

AQ: Please check the footnote cue asterisks "\*" in chapter title to be deleted or to be retained or whether we should retain in footnote below.

## **Social Europe and Experimentalist Governance: Towards a New Constitutional Compromise?\***

JONATHAN ZEITLIN

The European Union (EU) is once again at a crossroads, hesitating over the terms of a new constitutional compromise. To build an integrated continental market the Member States sacrificed some of their power to veto Union regulation. In return they got assurance that the regulatory choices submitted for their final approval would be shaped by a public-regarding process that filtered out proposals chiefly motivated by narrow self-interest. The 'classic' Community Method of EU policy-making, based on the agenda-setting role of the Commission and its exclusive powers of legislative initiative, provided that assurance. This compromise transformed the EU from an association of states into a single legal community whose integrity was ensured by the European Court of Justice (ECJ). Until now this community has worked well enough to assuage many of the most pressing concerns about its democratic legitimacy.

The potential new compromise regards 'Social Europe'. Faced with the urgent, politically imperative task of reconstructing, separately but harmoniously, their welfare states, the Member States would relax the power accorded them by the treaties and the Community Method to block EU intrusion into national systems of social protection. Again they would insist on institutionalization of a public-regarding process of agenda setting. This time that process would be embodied in new forms of experimentalist governance, epitomized by but not confined to the Open Method

This chapter draws on a joint paper with Charles Sabel of Columbia University Law School, 'Active Welfare, Experimental Governance, Pragmatic Constitutionalism: The New Transformation of Europe', available online at <http://www2.law.columbia.edu/sable/papers.htm>, as well as on my introduction and conclusion to J. Zeitlin and P. Pochet, with L. Magnusson (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (2005). An earlier version was presented to an international conference organized by the Hellenic Presidency of the European Union on 'The Modernization of the European Social Model and EU Policies and Instruments', Ioannina, Greece, May 21–22 2003. I am grateful to Natalie Oldani for invaluable assistance in preparing the references.

of Coordination (OMC).<sup>1</sup> These permit exploratory learning within and among Member States by contrasting different problem-solving strategies, each informed by a particular idea of the good, with the aim of both improving local performance and creating frameworks for joint action at the Union level. Through the ramifications of experimental governance, this compromise could transform EU policy-making again, integrating it more fully into civil society. At the limit the compromise would help establish the EU as a new form of pragmatist democracy that sees problem solving and agonistic deliberation over ideals of the good as so indissolubly connected that effective learning becomes institutionalized in the continuing exploration of deep values.

The roots of this potential compromise are political and intellectual as well as administrative. Foremost among these has been the progressive shift in both national and EU debates away from the goal of a single Social Europe as a regulatory counterbalance to the single market in favour of an alternative approach based on connecting welfare diversity within the European Social Model through policy coordination and mutual learning.<sup>2</sup> This shift in the debate reflects in turn a number of surprising empirical findings and novel conceptual developments. One is the limited incidence of social dumping or regulatory races to the bottom, coupled with evidence of races to the top in some well-documented cases, which has made the EU appear less constitutionally hostile to market-correcting regulation than originally feared.<sup>3</sup> A second is the discovery that there is not one welfare state in Europe, but several welfare-state families: what Anton Hemerijck and Jos Berghman, following Fritz Scharpf, term 'legitimate diversity'.<sup>4</sup> Whatever their

<sup>1</sup> Other components of the new experimentalist governance in the EU include: the commitment to proportionality or framework legislation, comitology, networked administrative agencies, and transparency as a procedural safeguard. For a fuller discussion, see C. F. Sabel and J. Zeitlin, 'Active Welfare, Experimental Governance, Pragmatic Constitutionalism: The New Transformation of Europe', unpublished paper presented to the International Conference of the Hellenic Presidency of the European Union, 'The Modernization of the European Social Model and EU Policies and Instruments', Ioannina, Greece, May 21–22 2003.

<sup>2</sup> For a synthetic presentation of this shift, see T. Sakellariopolous and J. Berghman (eds.), *Connecting Welfare Diversity within the European Social Model* (2004).

<sup>3</sup> For the absence of 'social dumping' in the EU, see Guillén and Matsaganis, 'Testing the "Social Dumping" Hypothesis in Southern Europe: Welfare Policies in Greece and Spain during the Last 20 Years', 10 *JESP* (2000) 2. For 'races to the top' in occupational safety and environmental protection, see Eichner, 'Effective European Problem-Solving: Lessons from the Regulation of Occupational Safety and Environmental Protection' 4 *JEPP* (1997) 4; A. Héritier, *Policy-Making and Diversity in Europe: Escape from Deadlock* (1999), at ch. 5. For a summary of the 'achievements of Social Europe' in creating a binding set of rights through legislation and social dialogue agreements, see M. Ferrera, A. Hemerijck and M. Rhodes, *The Future of Social Europe: Recasting Work and Welfare in the New Economy*, (2000), at 73–76.

<sup>4</sup> Hemerijck and Berghman, 'The European Social Patrimony: Deepening Social Europe through Legitimate Diversity', in T. Sakellariopolous and J. Berghman (eds.), *Connecting Welfare Diversity within the European Social Model* (2004) 9; Scharpf, 'Legitimate Diversity: The New Challenge of European Integration', in T. Börzel and R. Chichowski (eds.), *The State of the European Union*, vol. 6, *Law, Politics, and Society* (2003) 79. This discovery originated with the seminal work of Gosta

differences, moreover, members of each of these families have been struggling with similar challenges of adapting inherited institutions and programmes to changing employment patterns, household and family structures, demographic trends, and distributions of social risk—some countries more successfully than others. These same developments suggest that Europe might serve in a new way to enhance social protection in a period of increasing uncertainty by creating a forum for the discussing and generalizing the results of the different national strategies of adjustment.<sup>5</sup>

### 1. THE OPEN METHOD OF COORDINATION: THEORETICAL PROMISE OF A NEW MODE OF EU GOVERNANCE

This is where the new governance comes in, above all the Open Method of Coordination. The OMC may be defined as an experimentalist approach to EU governance based on iterative benchmarking of national progress towards common European objectives and organized mutual learning.<sup>6</sup> Since its announcement as a new and broadly applicable governance instrument at the extraordinary Lisbon European socio-economic summit in March 2000, which drew on experience with the coordination of national economic and especially employment policies over the preceding decade, the OMC has been extended to cover an enormous range of policy fields. Beyond the Broad Economic Policy Guidelines (BEPG) introduced by the Treaty of Maastricht (1992), and the European Employment Strategy (EES) inaugurated by the Treaty of Amsterdam (1997), the OMC has become the central tool of EU social policy-making in the new millennium, with formal coordination processes launched for social inclusion and pensions over the period 2001 to 2003,

Esping-Andersen: G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (1990); G. Esping-Andersen (ed.), *Welfare States in Transition: National Adaptations in Global Economies* (1996); G. Esping-Andersen, *Social Foundations of Post-Industrial Economies* (1999) on the 'three worlds of welfare capitalism', even if subsequent analyses (e.g. Ferrera, 'The Four "Social Europes": Between Universalism and Selectivity', in M. Rhodes and Y. Mény (eds.), *The Future of European Welfare: A New Social Contract?* (1998) 79), have modified and extended his typology.

<sup>5</sup> See Ferrera and Hemerijck, 'Recalibrating Europe's Welfare Regimes', in J. Zeitlin and D. M. Trubek (eds.), *Governing Work and Welfare in a New Economy: European and American Experiments* (2003) 88; Hemerijck, 'The Self-Transformation of the European Social Model(s)', in G. Esping-Andersen, with D. Gallie, A. Hemerijck, and J. Myles (eds.), *Why We Need a New Welfare State* (2002) 173; Ferrera, Hemerijck, and Rhodes, *supra* n. 3; Zeitlin, 'Introduction: Governing Work and Welfare in a New Economy: European and American Experiments', in J. Zeitlin and D. M. Trubek (eds.), *Governing Work and Welfare in a New Economy: European and American Experiments* (2003) 1.

<sup>6</sup> Cf. the definition advanced by one of the OMC's founding fathers in the social policy field: 'Open coordination is a mutual feedback process of planning, examination, comparison and adjustment of the social policies of Member States, all of this on the basis of common objectives', Vandembroucke, 'Foreword: Sustainable Social Justice and "Open Co-ordination" in Europe', in G. Esping-Andersen, with D. Gallie, A. Hemerijck, and J. Myles (eds.), *Why We Need a New Welfare State* (2002) viii.

and further proposals pending from the Commission and the Parliament for the application of this method to health and long-term care. As part of the 'Lisbon Strategy' aimed at turning the EU by 2010 into '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', the March 2000 European Council authorized the extension of the OMC to a host of other policy areas, such as research/innovation, information society/eEurope, enterprise promotion, structural economic reform, and education and training. Since then, 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, as well as in areas like youth policy where the Union has few if any legal powers.<sup>7</sup> In addition, following recommendations from the Commission's High Level Group on Industrial Relations, the European social partner organizations have drawn inspiration from the OMC for the monitoring and follow-up of

<sup>7</sup> For overviews of the scope and applications of the OMC across different policy areas, see Borrás and Jacobsson, 'The Open Method of Co-Ordination and New Governance Patterns in the EU', 11 *JEPP* (2004) 185; C. Radaelli, *The Open Method of Coordination: A New Governance Architecture for the European Union?* Sieps Report No. 1 (2003); de Búrca, 'The Constitutional Challenge of New Governance in the European Union', 28 *ELR* (2003) 814; European Convention Secretariat, *The Coordination of National Policies: The Open Method of Coordination. Note to the Members of Working Group on Economic Governance*, CONV WG VI WD 015, (2002); C. Romano, *La Méthode ouverte de coordination: Un nouveau mode de gouvernance?* (2002). On the OMC in research/innovation, immigration/asylum, and occupational health and safety respectively, see Kaiser and Prange, 'Managing Diversity in a System of Multi-Level Governance: The Open Method of Co-Ordination in Innovation Policy', 11 *JEPP* (2004) 249; Caviedes, 'The Open Method of Co-Ordination in Immigration Policy: A Tool for Prying Open Fortress Europe?', 11 *JEPP* (2004) 289; Smismans, 'Towards a New Community Strategy on Health and Safety at Work? Caught in the Institutional Web of Soft Procedures', 19 *International Journal of Comparative Labour Law and Industrial Relations* (2003) 1. For proposals that the OMC be used as a vehicle for the implementation of fundamental rights, see EU Network of Independent Experts in Fundamental Rights, *Report on the Situation of Fundamental Rights in the European Union and Its Members States in 2002* (2002); de Búrca, 'The Constitutional Challenge of New Governance in the European Union', 28 *ELR* (2003) 814; Bernard, 'A New Governance Approach to Economic, Social and Cultural Rights in the EU', in T. K. Hervey and J. Kenner (eds.), *Economic and Social Rights under the Charter of Fundamental Rights of the European Union* (2003) 247; de Schutter, 'The Implementation of Fundamental Rights through the Open Method of Coordination', in O. de Schutter and S. Deakin (eds.), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (forthcoming). A number of pre-existing European policy coordination processes have also been retrospectively interpreted as full or partial examples of the OMC *avant la lettre*, including the Cardiff Process for structural economic reforms, the Bologna Process for cooperation in European higher education, and the code of conduct against harmful tax competition: on these, in addition to the surveys cited above, see D. Foden and L. Magnusson (eds.), *Trade Unions and the Cardiff Process: Economic Reform in Europe* (2002); A. Hingel, *Education Policies and European Governance: Contribution to the Interservice Groups on European Governance* (2001); and Radaelli, 'The Code of Conduct against Harmful Tax Competition: Open Method of Coordination in Disguise?', 81 *Public Administration* (2003) 3, respectively.

non-binding framework agreements and guidelines at both cross-industry and sectoral levels.<sup>8</sup>

The OMC was defined by the Portuguese Presidency at Lisbon and afterwards in terms closely modeled on the EES as involving a specific ensemble of elements:

- ‘Fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long term;
- establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practices;
- translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences;
- periodic monitoring, evaluation and peer review organized as mutual learning processes.’<sup>9</sup>

But actual OMC processes as they have evolved since Lisbon vary considerably in their modalities and procedures, depending on the specific characteristics of the policy field in question, the Treaty basis of EU competence, and the willingness of the Member States to take joint action. Thus, for example, the Commission and the Council are empowered to issue joint recommendations to Member States on the implementation of the EES and the BEPG, but not on that of other OMC processes, while consultation of the European Parliament is formally required only in the case of the EES. Although most OMC processes are based on common European objectives, only the EES and BEPG involve detailed guidelines for their realization by Member States. Common European statistical indicators or benchmarks have been established for economic policy, structural reforms, employment, social inclusion, and education, but not yet for pensions or healthcare. The BEPG, backed by the Stability and Growth Pact, notoriously impose national ceilings on government deficits and public debt as a proportion of GDP; the EES has fixed European employment rate targets, disaggregated by age and gender, which some countries have translated into nationally specific objectives; and the Social Inclusion OMC calls upon Member States to set national targets for the reduction of relative income poverty.<sup>10</sup> Member States prepare National Action Plans (NAPs) for

<sup>8</sup> European Commission DG EMPL, *Report of the High Level Group on Industrial Relations and Change in the European Union* (2002). Agreements concluded so far have focused on the issues of teleworking and lifelong learning. For an overview of current developments, see European Commission DG EMPL, *Industrial Relations in Europe 2004* (2004).

<sup>9</sup> European Council, *Lisbon European Council Presidency Conclusions*, 23–24 March 2000, para. 37.

<sup>10</sup> The Barcelona European Council of 15–16 March 2002 also fixed national childcare and R&D investment/GDP targets for Member States as part of the EES and innovation policy OMC respectively, see European Council, *Barcelona European Council Presidency Conclusions*, 15–16 March 2002. The new employment guidelines, adopted in July 2003, include additional quantitative targets at national level for combating early school leaving and promoting participation in lifelong learning, see Council of the European Union, ‘Council Decision of 22 July 2003 on Guidelines for the Employment Policies of the Member States’, OJ L 197/13 5.8.2003.

employment and social inclusion, and National Progress Reports on structural economic reforms, but so far only more limited National Strategy Reports on pensions.<sup>11</sup> These national plans and reports are subjected to mutual surveillance and peer review by Member State representatives in the Employment Committee (EMCO), Social Protection Committee (SPC), and Economic Policy Committee (EPC) respectively, while active programmes for mutual learning through exchange of good practices (also confusingly termed 'peer review') have been organized within the framework of the EES and the Social Inclusion process. Other so-called OMC processes are more loosely structured, involving only selective elements of the broader method, such as scoreboards, peer evaluation, and exchange of good practices.<sup>12</sup> Hence as former Belgian Minister Frank Vandenbroucke, who played a key part in launching the social inclusion and pensions processes during his country's 2001 EU Presidency, has rightly observed: 'Open coordination is not some kind of fixed recipe that can applied to whichever issue,' but instead 'a kind of cookbook that contains various recipes, lighter and heavier ones.'<sup>13</sup>

Abstracting from such procedural variations, the OMC has been widely acclaimed as a theoretically promising governance instrument for EU policy-making in a number of crucial respects. As many commentators have emphasized, the OMC appears well suited for pursuing common European concerns while respecting legitimate national diversity because it commits Member States to work together in reaching joint goals and performance targets without seeking to homogenize their inherited policy regimes and institutional arrangements. Such capacity for

<sup>11</sup> Initially, these OMC processes also followed different timetables, with an annual cycle for the BEPG and EES, a biennial cycle for social inclusion, and a triennial cycle for pensions. But the EES and the BEPG have now been 'streamlined' and synchronized with one another on a triennial cycle, with guidelines fixed in the first year, followed by annual updates and implementation reports in years two and three. OMC processes in social inclusion and social protection (likely to include health and long-term care as well as pensions) are to be synchronized with this cycle of economic and employment policy coordination in 2006; see European Commission, *Communication from the Commission on Streamlining the Annual Economic and Employment Policy Co-ordination Cycles*, CPM (2002) 487 final, *Strengthening the Social Dimension of the Lisbon Strategy: Streamlining Open Coordination in the Field of Social Protection*, COM (2003) 61 final, *Modernising Social Protection for the Development of High-Quality, Accessible and Sustainable Health Care and Long-Term Care: Support for the National Strategies Using the 'Open Method of Coordination'*, COM (2004) 304 final; Social Protection Committee of the European Union, *Opinion of the Social Protection Committee on the Commission's Communication, Strengthening the Social Dimension of the Lisbon Strategy: Streamlining Open Coordination in the Field of Social Protection*, Council of the European Union 12909/03 (2003).

<sup>12</sup> These techniques are also used in policy coordination processes not formally designated as OMCs such as the code of conduct against harmful tax competition, or the peer evaluation mechanism for national arrangements in the fight against terrorism. On these, see respectively Radaelli, *supra* n. 7; Council of the European Union, 'Council Decision of 28 November Establishing a Mechanism in Evaluating the Legal Systems and their Implementation in the Fight Against Terrorism (2002/996/JHA)' OJ L 349/1-3 24.12.2002.

<sup>13</sup> Vandenbroucke, 'Open Co-Ordination on Pensions and the Future of Europe's Social Model', closing address to the conference 'Towards a New Architecture for Social Protection in Europe?' (Brussels, 19–20 October 2001); Vandenbroucke, *supra* n. 6.

reconciling European action with national diversity has become more vital than ever with the recent enlargement of the EU to include ten new Member States, which differ widely both from one another and from the original fifteen in their labour market institutions and social welfare regimes, as well as in their levels of economic development and rates of employment, unemployment, and income poverty.<sup>14</sup> In social policy more specifically, some leading proponents of the OMC have also hailed its potential as a cognitive and normative tool for defining and building consensus around a distinctive 'European' (or perhaps more accurately 'EU') 'Social Model' and policy paradigm based on shared values and objectives.<sup>15</sup> Insofar as the OMC systematically and continuously obliges Member States to pool information, compare themselves to one another, and reassess current policies and programmes in light of their relative performance, it likewise appears to be a promising mechanism for promoting experimental learning and deliberative problem solving across the EU. Diversity within Europe, on this view, should be regarded 'not as an obstacle to integration but rather as an asset [. . .] a natural laboratory for policy experimentation', which enhances opportunities for cross-national learning through comparison of different approaches to similar or related problems.<sup>16</sup> For each of these reasons, this method has rapidly become the governance instrument of choice for EU policy-making in complex, domestically sensitive areas where diversity among the Member States precludes harmonization but inaction is politically unacceptable, and where widespread strategic uncertainty recommends mutual learning at the national as well as the European level.

## 2. IS THE OMC LEGITIMATE? THREE CRITICAL QUESTIONS

Despite these theoretically promising features, however, a series of critical questions have been raised about the OMC's legitimacy as a new mode or instrument of EU governance.

### A. Subsidiarity

One frequently raised concern about the OMC is that it violates the principle of subsidiarity by allowing the EU to encroach illegitimately into policy domains reserved by the Treaties to the Member States through the adoption of common European objectives and performance indicators, backed up by peer pressure.

<sup>14</sup> Hemerijck and Berghman, *supra* n. 4; B. Galgóczi, C. Lafoucrière, and L. Magnusson (eds.), *The Enlargement of Social Europe: The Role of the Social Partners in the European Employment Strategy* (2004).

<sup>15</sup> Vandenbroucke, *supra* n. 6; Ferrera, Matsaganis, and Sacchi, 'Open Coordination against Poverty: The New EU "Social Inclusion Process"', 12 *JESP* (2002) 226.

<sup>16</sup> European Commission, *supra* n. 8, at 37; Cohen and Sabel, 'Sovereignty and Solidarity: EU and US', in J. Zeitlin and D. M. Trubek (eds.), *Governing Work and Welfare in a New Economy: European and American Experiments* (2003), at 368.

Understood properly, however, the OMC does not involve the subordination of one level of government to another, but rather a collaborative mode of governance in which each level contributes its distinctive expertise and resources to tackling common problems cutting across jurisdictions. In this sense, OMC should be seen as extending rather than infringing the principle of subsidiarity in EU policy-making. Such a view depends in turn on what one might call an 'experimentalist' interpretation of subsidiarity, advanced by Gráinne de Búrca and others, based on the theoretical incoherence and practical impossibility of reserving specific policy areas either to the Union or the Member States, as for example in the idea of a 'competence catalogue' demanded by the German Länder. The true meaning of subsidiarity, on this interpretation, is that the effectiveness of public action within the EU at different levels of governance and through different methods (including shared decision-making or application of a particular procedure such as the OMC) should itself be evaluated empirically in the light of practical experience in tackling the problem at hand.<sup>17</sup>

### B. The 'Community Method'

A second widely voiced criticism is that the OMC's 'soft law' procedures represent a potential threat to the 'classic' Community Method of EU policy-making, based on binding legislation initiated by the Commission, enacted by the Council and the Parliament, and enforced by the Court of Justice. It has equally been considered a threat to the alternative method of EU social legislation, introduced by the Treaty of Maastricht, whereby European social partners negotiate framework agreements on issues proposed by the Commission, which are then approved as legally binding Council Directives, and implemented by the Member States either through transposition into domestic legislation or (more rarely) through encompassing collective agreements at national level. The assumption here is that the OMC's availability as a 'soft law' option may displace the use of 'hard law' instruments even where the EU already possesses legislative powers. Such concerns have led to demands by the Commission and others that the OMC should not be used when legislative action under the Community Method is possible.<sup>18</sup>

<sup>17</sup> For this 'experimentalist' interpretation of subsidiarity, see de Búrca, 'Reappraising Subsidiarity's Significance after Amsterdam', *Harvard Jean Monnet Working Paper* 7/99 (1999); de Búrca, *supra* n. 7; de Búrca and de Witte, 'The Delimitation of Powers between the EU and Its Member States', in A. Arnall and D. Wincott (eds.), *Accountability and Legitimacy in the European Union* (2002) 201.

<sup>18</sup> See for example, European Commission, *European Governance: A White Paper*, COM (2001) 428; Goetschy, 'The European Employment Strategy, Multi-Level Governance, and Policy Coordination', in J. Zeitlin and D. M. Trubek (eds.), *Governing Work and Welfare in a New Economy: European and American Experiments* (2003) 59; European Convention, *Final Report of Working Group XI on Social Europe*, CONV 516/1/03 REV 1 WG XI 9. As a number of authors have pointed out, the Community Method itself has evolved and diversified during the 1980s and 1990s in ways that do not fit well with the 'classic' model defended by the Commission's *White Paper on Governance*: see for example Scott and Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union', 8 *ELJ* (2002) 1. Helen Wallace

But this objection seems both empirically and conceptually misplaced. Empirically, OMC processes have mainly been introduced or proposed in policy fields where EU Treaty powers are limited; where there is insufficient consensus among Member States to enact legally binding directives (e.g. immigration); or where there is too much national diversity for harmonization at European level to be a credible option (e.g. employment, social protection). Hence in these areas OMC processes cannot plausibly be regarded as a substitute for binding legislation through the 'classic' Community Method, but should be seen instead as an alternative to inaction.<sup>19</sup> Across an increasing range of policy fields, moreover, 'hard law' Directives themselves increasingly tend to incorporate provisions for completion and periodic revision of standard-setting through 'soft law' OMC procedures, as in the regulation of industrial waste or occupational health and safety. Often, too, there is an integral continuity between the legally binding norms embodied in EU framework directives (whether enacted through the 'classic' Community Method of legislation or through the social dialogue procedure) and the 'soft' commitments of the EES guidelines, as in the regulation of part-time work or private pensions.<sup>20</sup> Hence the OMC can be seen as one element in a larger emergent system of experimental governance within the EU that blurs the distinction between 'hard' and 'soft' law, including growing reliance on framework directives, comitology, networked administrative agencies, and a commitment to transparency as a procedural safeguard.<sup>21</sup>

Within OMC processes, the common objectives play a pivotal role in linking EU policy-making upwards to the core values and goals of the Union (as set out in the Treaties and the Charter of Fundamental Rights) on the one hand, and downwards to more specific policy approaches and programmes pursued by the Member States

distinguishes five different modes of policy-making in the EU, among which the 'Community Method' is dominant only in certain sectors of activity: see Wallace, 'Analyzing and Explaining Policies', in H. Wallace and W. Wallace (eds.), *Policy-Making in the European Union* (2000) 65.

<sup>19</sup> For a development of this view in relation to European social policy, see Daly, 'The Possibility of an EU Social Policy: Lisbon and After', unpublished paper presented to the lecture series on 'Europeanization and Reform of National Welfare States', University of Wisconsin-Madison, 14 October 2004.

<sup>20</sup> For the example of industrial waste, see European Convention Secretariat, *The Coordination of National Policies*, *supra* n. 7; for occupational health and safety, see European Commission, *Adapting to Change in Work and Society: A New Community Strategy on Health and Safety at Work 2002-2006*, COM (2002) 0118 final. On the regulation of atypical forms of employment, see Davies and Freedland, 'The Role of EU Employment Law and Policy in the De-Marginalization of Part-Time Work: A Study in the Interaction between EU Regulation and Member State Regulation', in S. Sciarra, P. Davies, and M. Freedland (eds.), *Employment Policy and the Regulation of Part-Time Work in the European Union* (2004) 63; and Kilpatrick, 'Hard and Soft Law in EU Employment Regulation', paper presented to the European Union Studies Association Eighth Biennial International Conference, Nashville, 27-29 March 2003. On pensions, see Pochet, 'Pensions: The European Debate', in G. L. Clark and N. Whiteside (eds.), *Pension Security in the 21st Century* (2003) 44. For a general discussion of the hard law-soft law debate, see Trubek and Trubek, 'The Open Method of Coordination and the Debate over "Hard" and "Soft" Law', in J. Zeitlin and P. Pochet with L. Magnusson (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (2005) 83.

<sup>21</sup> For an elaboration of this argument, see Sabel and Zeitlin, *supra* n. 1.

on the other. Thus, for example, the annual employment guidelines begin by invoking the objective of 'promoting economic and social progress and a high level of employment' defined in Article 2 of the Treaty on European Union.<sup>22</sup> In defining accessibility along with quality and financial viability as long-term objectives of EU policy coordination in healthcare, the Commission and the Council likewise referred explicitly to the 'right of access to preventative health care and [...] medical treatment' proclaimed by the Charter of Fundamental Rights (Article 33).<sup>23</sup> In establishing an action programme to support the Social Inclusion OMC, similarly, the Council and the Parliament highlighted the right to protection against poverty and social exclusion enunciated by the Charter of Fundamental Rights and the European Social Charter.<sup>24</sup>

At a deeper level, the Community Method itself can be interpreted along the lines suggested by Paul Magette and others as a deliberative agenda-setting mechanism through which the EU, despite its diversity, provides for public- or other-regarding decisions, where such regard means sufficiently responsive to the demands of Member States (and eventually citizens) to be accepted by them as legitimate. In Magette's view, the Community Method embodies a constitutional requirement that EU institutions and Member States 'integrate *a priori* the *desiderata* of the others and take account of them in the formulation of their own preferences'.<sup>25</sup> One interpretation of the Community Method, favoured by the Commission, is that due regard for the interests of the others produces agreement on something approaching the Rousseauian general interest.<sup>26</sup> But on another reading, preferred by Magette, the Community Method (or what he terms the 'Community Model') is a form of political cooperation characterized by a mixture rather than a separation of powers among EU institutions and the Member States, in which due regard for the others produces a permanent deliberative disequilibrium. This deliberative disequilibrium excludes selfish outcomes without necessarily producing outcomes that are transcendently public-regarding.<sup>27</sup> On both interpretations, however, deliberative agenda setting sufficiently reassures the Member States, and less immediately

<sup>22</sup> European Commission, *Strengthening the Implementation of the European Employment Strategy: Proposal for a Council Decision on Guidelines for the Employment Policies of the Member States: Recommendation for a Council Recommendation on the Implementation of Member State's Employment Policies*, COM (2004) 239 final.

<sup>23</sup> European Commission, *The Future of Health Care and Care for the Elderly: Guaranteeing Accessibility, Quality, and Financial Viability*, COM (2004) 304; and European Commission, *Modernising . . .*, *supra* n. 11, at 9.

<sup>24</sup> De Búrca, *supra* n. 7.

<sup>25</sup> P. Magette, *L'Europe, l'État et la démocratie* (2000), at 251 (my translation).

<sup>26</sup> European Commission, *supra* n. 18, at 8.

<sup>27</sup> Magette, *supra* n. 25, at 43–69, 75, 139–69, 203, 250–3. Magette's colleague and collaborator Mario Telò, drawing on the work of Norberto Bobbio, has characterized the EU more generally as an instance of 'mixed government', which is currently being renewed through the OMC and the guiding role of the European Council within the Lisbon Strategy: see Telò, 'Introduction', in M. Telò (ed.), *Norberto Bobbio: L'État et la démocratie internationale: De l'histoire des idées à la science politique* (2001),

the citizens, that narrowly self-interested proposals will not be advanced for legislative approval. This reassurance in turn induces the Member States to relax veto powers whose exercise would paralyse decision-making in the EU. The Community Method can thus be seen as the constitutional precondition for the EU as a functioning polity.

Viewed in this way, the EU's emergent system of experimentalist governance, with the OMC at its centre, amounts to a renewal rather than a replacement of the Community Method. And the iterative, reciprocal exploration of the relationship between the Union's objectives and Member State policies through the OMC can be further understood as a new form of pragmatic constitutionalism, in which the meaning of common values (ends) is continuously redefined in light of collective experience with alternative means of pursuing them.<sup>28</sup>

### C. Democracy

A third critical question about the OMC concerns its democratic character. Is the OMC part of the solution to the EU's democratic deficit or instead part of the problem? OMC processes, objectives, guidelines, and recommendations are formally authorized by Member State governments in the European Council and the sectoral formations of the Council of Ministers, and might thus be considered democratically legitimate from a narrowly intergovernmentalist perspective.<sup>29</sup> But most of the actual work of running OMC processes is done by unelected committees of national civil servants and Commission officials, whose decisions are rarely overturned or even discussed in the Council. The European Parliament has no direct decision-making or oversight role in OMC processes (though it does have a right to be consulted about the employment guidelines), while national parliaments are hardly involved in the preparation of National Action Plans even if they are formally consulted or informed in some Member States.<sup>30</sup>

Many proposals for increasing the OMC's legitimacy have focused on enhancing the role of the European and national parliaments in the process. But greater parliamentary involvement *per se* can hardly be regarded as a panacea, since there is already a substantial democratic deficit in this regard at the national

at 43–45; Telò, 'Il metodo aperto di coordinamento: Dal Consiglio europeo di Lisbona al testo costituzionale', *Quaderni di rassegna sindacale* (2004) 1; cf. also J. L. Quermonne, *L'Europe en quête de légitimité* (2001), at ch. 4 on 'L'invention de la méthode communautaire'.

<sup>28</sup> For further development of this argument, see Sabel and Zeitlin, *supra* n. 1.

<sup>29</sup> See for example Scharpf, 'Notes toward a Theory of Multilevel Governing in Europe', 21 *Scandinavian Political Studies* (2001) 1; Scharpf, 'The European Social Model: Coping with the Challenge of Diversity', 40 *JCMS* (2002) 4; Scharpf, *supra* n. 4.

<sup>30</sup> For critiques of this type, see Okma and Berghman, 'Coördination ouverte: entre science et politique?', 44 *Revue belge de sécurité sociale* (2002) 547; S. Smismans, 'EU Employment Policy: Decentralization or Centralization through the Open Method of Coordination?', *EUI Working Paper Law 2004/01* (2004); de la Porte and Nanz, 'The OMC: A Deliberative–Democratic Mode of Governance? The Case of Employment and Pensions', 11 *JEPP* (2004) 2.

level, where legislatures have long experienced grave difficulties in exercising detailed control over policy-making and administration in complex, specialized fields such as employment and social protection.<sup>31</sup> Hence the OMC's democratic legitimacy must rest on an alternative basis: openness, transparency, and broad participation in public problem-solving activities, aimed at promoting mutual learning through coordinated monitoring of decentralized experimentation in pursuit of common goals. Of crucial importance here is broad participation in all phases of OMC processes not only by national administrations and the traditional social partner organizations representing business and labour, but also by other non-state and subnational actors with relevant interests and expertise, notably non-governmental organizations (NGOs) civil society organizations and local/regional authorities. Not only the legitimacy but also the effectiveness of OMC processes, on this view, depend on the participation of the widest possible range of stakeholders in policy formulation, implementation, monitoring, and evaluation at all levels (EU, national, subnational) in order to ensure the representation of diverse perspectives, tap the benefits of local knowledge, and hold public officials accountable for carrying out mutually agreed commitments. Transparency is no less vital, both as a procedural safeguard for European citizens' right to know the reasons behind public decision-making, and as a source of reliable information on which actors at different levels can draw to drive the policy coordination process forward.

Pushed to their logical conclusion, the application of these principles could transform the EU into a new form of pragmatist democracy, in which by directly engaging local administrative units and civil society actors as well as Member States in joint problem-solving through routine comparison of different practices, the Union deliberately raises and helps address doubts about apparently common-sense solutions and the meaning of fundamental values.<sup>32</sup> Both the European and national parliaments, on this view, could valuably participate in framing and debating OMC objectives and procedures, monitoring progress toward agreed goals, and revising the process in light of the results achieved. But this would involve a transformation of the conventional conception of parliaments' role in democratic polities as authoritative principals delegating detailed implementation of legislation to administrative agents, whose behaviour they seek to control through a combination of *ex ante* incentives and *ex post* sanctions. Effective participation by parliaments in OMC processes (as in the working of pragmatist or experimentalist democracies more generally) would require them to develop new roles in passing framework legislation embodying commitments to broad goals (like OMC objectives); establishing administrative infrastructures to stimulate decentralized experimentation about how best to achieve these goals, monitor the efforts of local units to improve their

<sup>31</sup> For recent reviews of this classic problem, see Dorf and Sabel, 'A Constitution of Democratic Experimentalism', 98 *Columbia Law Review* (1998) 2; Stewart, 'Administrative Law in the 21st Century', 78 *New York University Law Review* (2003) 437.

<sup>32</sup> For a fuller elaboration of this argument, see Sabel and Zeitlin, *supra* n. 1; Cohen and Sabel, *supra* n. 16.

performance against them, pool the resulting information, and set provisional standards in light of what they have learned; reviewing the results and revising the framework objectives and administrative procedures accordingly.<sup>33</sup>

As presently constituted, existing OMC processes in social and employment policy fall short of these ideals of transparency and broad participation. The deliberations of the EU Employment, Social Protection, and Economic Policy Committees take place behind closed doors and their internal debates are not open to public scrutiny, though all three committees have established open websites on which they post their formal opinions and reports.<sup>34</sup> At national level, too, NAP preparation has typically been dominated by bureaucratic insiders with close ties to European institutions, although a clear trend towards greater 'domestication' of the process has become visible over time in many countries. In most Member States, both media coverage and public awareness of OMC processes remain low, and have tended if anything to decline over time. Behind each of these limitations lies the fact that with few exceptions, NAPs are presented domestically as backward-looking activity reports to the EU and government documents 'owned' by the relevant ministries rather than as forward-looking action plans or strategic programming instruments subject to normal public scrutiny and debate by all stakeholders.<sup>35</sup>

But there are also encouraging signs of new participatory dynamics triggered by the OMC, especially in the Social Inclusion process, where 'mobilizing all the relevant bodies' in the fight against poverty and exclusion figures among its four core objectives. Thus in many EU Member States, as recent empirical research shows, the Social Inclusion process has stimulated the widespread development of new consultative bodies and structures to facilitate input from anti-poverty NGOs and local/regional authorities into the preparation and in some cases also the monitoring of their NAPs. At a European level, networks of social NGOs and local/regional authorities have likewise been extremely active in drawing domestic information upwards from their national affiliates, commenting critically on the NAPs and Joint Inclusion Reports, mobilizing pressure on EU institutions, diffusing

<sup>33</sup> For this view of the transformed roles of the legislature and administration in experimentalist democracies, see Sabel, 'Beyond Principal-Agent Governance: Experimentalist Organizations, Learning and Accountability', in E. Engelen and M. Sie Dhian Ho (eds.), *De Staat van de Democratie: Democratie voorbij de Staat* (2005) forthcoming.

<sup>34</sup> For a careful, well-informed, and balanced analysis of the operation of these committees, see Jacobsson and Vifell, 'Towards Deliberative Supranationalism? Analysing the Role of Committees in Soft Co-ordination', in I. Linsenmann, C. O. Meyer, and W. Wessels (eds.), *Economic Governance in the EU*, (2005) forthcoming.

<sup>35</sup> In addition to the chapters in J. Zeitlin, P. Pochet and L. Magnusson (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (2005), see also Meyer, 'Towards a Grand Débat Européen? Exploring the Europeanization of Socio-Economic Discourses in Selected Member State', in I. Linsenmann, C. O. Meyer, and W. Wessels (eds.), *EU Economic Governance: The Balance Sheet of Economic Policy Coordination* (2005) forthcoming; European Commission and Council of the European Union, *Joint Employment Report 2003–2004*, 7069/04, at 18.

European information downwards to their affiliates, and linking them together horizontally through conferences and round tables, often supported financially by the Commission and the Parliament. Even in the EES, where Member State governments have been more reluctant to open up the process to groups beyond the traditional social partners (whose cooperation is considered necessary for progress on labour market reforms in areas subject to collective bargaining), social NGOs and local/regional authorities have vigorously campaigned for the right to participate at both European and national levels, achieving significant advances in a number of countries. The Commission and the Parliament have actively supported these demands, especially those of the local and regional authorities, by pressing for changes to the Employment Guidelines and sponsoring innovative projects such as Local and Regional Action Plans (LAPs and RAPS), the development of territorially disaggregated indicators, and the creation of a European local development network and forum for information-sharing and exchange of good practices.<sup>36</sup>

A theoretically promising response to the limitations on transparency and participation in existing OMC processes would be to apply to their own procedures the key elements of the method itself: benchmarking, peer review, monitoring, evaluation, and iterative redesign. Thus for example Member States could be required to benchmark openness and participation within all OMC processes according to national laws, traditions, and practices, with due respect for the principle of subsidiarity.<sup>37</sup> The relative success of the Social Inclusion process in 'mobilizing all relevant bodies' testifies to the practical validity of this approach. So too do the Commission's proposals in the 2003 Employment Guidelines for 'the mobilization of all relevant actors [ . . . ] and main stakeholders', including civil society and local and regional authorities, along with the social partners and national parliaments.<sup>38</sup> In the event, these proposals were watered down by resistance from Member State representatives in the Employment Committee.<sup>39</sup> But enhancing participation of non-state and subnational actors in OMC processes remains a live and politically contested issue on the EU employment policy agenda, as for example through the recommendations of the 2003 Task Force chaired by Wim Kok, which called for consultation of civil society as well as the social partners in the preparation of the

<sup>36</sup> For a fuller analysis and supporting evidence, see Zeitlin, 'The Open Method of Coordination in Action: Theoretical Promise, Empirical Realities, Reform Strategy', in J. Zeitlin and P. Pochet with L. Magnusson (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (2005), § II.C.

<sup>37</sup> For elaboration of this approach, see *ibid.*, § III.C.

<sup>38</sup> European Commission, *Proposal for a Council Decision on Employment Policies of the Member States*, COM (2003) 176 final; cf. European Commission, *The Future of the European Employment Strategy (EES): A Strategy for Full Employment and Better Jobs for All*, COM (2003) 6 final.

<sup>39</sup> Member States insisted on deleting any reference to civil society, acknowledging only that: '1) Good governance and partnership are important issues for the implementation of the European Employment Strategy, while fully respecting national traditions and practices. 2) In accordance with national traditions, relevant parliamentary bodies as well as relevant actors in the field of employment at national and regional level have important contributions to make'; Council of the European Union, *supra* n. 10.

NAPs/empl and the creation of 'reform partnerships' involving local authorities alongside social partners and public agencies.<sup>40</sup> 'Ensuring effective implementation of reforms through better governance' was included at the Commission's insistence as one of four common recommendations to all Member States in the 2004 Joint Employment Package, and EMCO is developing indicators for benchmarking governance in the NAPs/empl.<sup>41</sup> More generally, the Commission has proposed that the emphasis on openness and the involvement of a wide range of actors (including NGOs and subnational authorities as well as social partners) in the Social Inclusion process 'could usefully be applied to the entire range of the future social protection process' under the new streamlined arrangements to be introduced in 2006, and this participatory approach is fully incorporated into its proposals for a new OMC process in health and elder care.<sup>42</sup>

### 3. IS OMC EFFECTIVE? AMBIGUITIES AND EMPIRICAL ASSESSMENT

Perhaps the most widespread criticism of the OMC concerns not its weak democratic legitimacy or potentially pernicious effects, but rather its alleged lack of substantive impact on the Member States. According to this view, the OMC in its present form amounts to little more than the European emperor's newest clothes, an exercise in symbolic politics where national governments repackage existing policies to demonstrate their apparent compliance with EU objectives.<sup>43</sup>

Despite the high political stakes involved, the debate surrounding the OMC is widely agreed to suffer from an empirical deficit. Many assessments of the OMC, including some that claim to conduct an 'in context' rather than 'in vitro' analysis of the method,<sup>44</sup> rely in practice on a very limited range of often outdated evidence, onto which they project their own theoretical and normative assumptions. Empirical analysis of the OMC is extremely challenging, for a series of interrelated reasons:

- The variety of distinct processes subsumed under the OMC rubric.
- The relative newness of most OMC processes.

<sup>40</sup> Employment Taskforce, *Jobs, Jobs, Jobs: Creating More Employment in Europe: Report of the Employment Taskforce Chaired by Wim Kok* (2003), at 56–58.

<sup>41</sup> European Commission, *supra* n. 22; EMCO Indicators Group, *Indicators Group Report to EMCO on Progress Made in the Field of Indicators to Monitor the Employment Guidelines*, EMCO/22/130704/EN (2004).

<sup>42</sup> European Commission, *Strengthening . . .*, *supra* n. 11; European Commission, *Modernising . . .*, *supra* n. 11.

<sup>43</sup> Chalmers and Lodge, 'The Open Method of Co-Ordination and the European Welfare State', *ESRC Centre for Analysis of Risk and Regulation Discussion Papers* 11 (London School of Economics, 2003); Radaelli, *supra* n. 7; Scharpf, *supra* n. 21; Scharpf, *supra* n. 4.

<sup>44</sup> E.g. Radaelli, *supra* n. 7, at 10, 50, 56; Chalmers and Lodge, *supra* n. 43.

- The horizontal and vertical complexity of OMC processes, which typically integrate multiple policy domains, and involve multiple levels of governance (EU, national, subnational) across fifteen (and now twenty-five) Member States.

The methodological difficulties of assessing the causal impact of an iterative policy-making process based on collaboration between EU institutions and Member State governments without legally binding sanctions. Since Member State representatives continuously participate in the definition of objectives, guidelines, and indicators for OMC processes, which do not necessarily result in new legislation or justiciable obligations, standard approaches to assessing the domestic effects of 'Europeanization' based on 'goodness of fit', adaptational pressures, and compliance with EU law<sup>45</sup> cannot be directly applied. Member State governments may also have political reasons of their own for playing up or down the domestic influence of OMC processes in NAP and evaluation reports. Hence statements about the sources of policy change in such official documents cannot be taken at face value but must be carefully contextualized and triangulated with other evidence.<sup>46</sup>

Despite these practical and methodological problems, there is now a very large body of material available on the empirical operation of OMC processes, particularly in the fields of employment and social policy. Such material includes not only numerous official reviews and reports,<sup>47</sup> but also a wide range of studies and assessments produced by European social partner organizations, NGOs, local and regional authority networks, EU agencies, think-tanks, academic research projects, and individual scholars.<sup>48</sup> The remainder of this section summarizes the conclusions

<sup>45</sup> E.g. M. G. Cowles, J. Caporaso, and T. Risse (eds.), *Transforming Europe: Europeanization and Domestic Change* (2001); K. Featherstone and C. Radaelli (eds.), *The Politics of Europeanization* (2003).

<sup>46</sup> For discussions of these methodological problems, see Zeitlin, Pochet, and Magnusson, *supra* n. 35; Büchs, 'Methodological and Conceptual Issues in Researching the Open Method of Coordination', in L. Hantrais (ed.), *Researching the European Social Model from a Comparative Perspective* (2003) 31; Barbier, 'Research on "Open Methods of Coordination" and National Social Policies: What Sociological Theories and Methods?', unpublished paper presented to the RC 19 International Conference, Paris, 2004; J. C. Barbier, *La Stratégie européenne pour l'emploi: genèse, coordination communautaire et diversité nationale*, report for the DARES, Ministère du travail, January 2004; López-Santana, '“Unpacking” the Policy-Making Process: The European Employment Strategy and Europeanization', unpublished paper presented to the 14th International Conference of Europeanists, Chicago, 11–13 March 2004; Borrás and Greve, 'Concluding Remarks to Special Issue on "The Open Method of Co-ordination in the European Union": New Method or Just Cheap Talk?', 11 *JEPP* (2004) 329.

<sup>47</sup> The most significant of these are: the National Action Plans, Strategy Reports, and Joint Reviews for employment (1997–2003), social inclusion (2001, 2003), and pensions (2003); the national reports (often supported by independent research papers) and Commission transversal studies produced for the five-year impact assessment of the EES (2002); and the ongoing reports of the Commission's expert groups on Gender and Employment (EGGE) and Social Inclusion, all available on the DG EMPL website, [http://europa.eu.int/comm/employment\\_social/index\\_en.html](http://europa.eu.int/comm/employment_social/index_en.html).

<sup>48</sup> A select bibliography of more than 140 books, papers, and reports, including links to relevant websites, is available at the University of Wisconsin–Madison's Online Research Forum on the Open Method of Coordination, <http://eucenter.wisc.edu/OMC/index.htm>.

of a comparative research project on the European Employment and Social Inclusion Strategies conducted by an international team of scholars, which focuses particularly on their operation and influence at national and subnational levels.<sup>49</sup>

### A. Substantive Policy Change

Among the most widely attested findings of recent empirical work on the European Employment and Social Inclusion Strategies, both within and beyond our project, is that these OMC processes have raised the political salience and ambitions of employment and social inclusion policies at the national as well as the EU level. A second broadly supported finding is that these OMC processes have contributed to broad shifts in national policy orientation and thinking, involving the incorporation of EU concepts and categories into domestic debates. The most obvious examples of this cognitive influence of OMC on domestic policy orientations concern the shift of emphasis from reducing unemployment to raising employment rates as a core objective, from passive income support to activation services, and from a curative to a preventative approach to fighting unemployment. But many other key concepts associated with the EES and the Social Inclusion process have also entered or gained new prominence on the policy agendas of EU Member States, notably active ageing/avoiding early retirement, lifelong learning, gender mainstreaming, flexicurity (balancing flexibility with security), reconciling work and family life, an inclusive labour market, social exclusion as a multi-dimensional phenomenon beyond income poverty, and an integrated partnership approach to promoting employment, inclusion, and local development.<sup>50</sup>

Beyond these broad shifts in national policy thinking, there is also some evidence that these OMC processes have contributed to specific changes in individual Member States' policies. Such evidence is most abundant for the EES, which has been running considerably longer (seven rounds of NAPs and Joint Reports as against two for the Social Inclusion process), and has been subjected to more extensive research and evaluation. The most salient areas of influence on national policies concern the adoption of individual activation plans and a preventative approach to fighting unemployment, measures to close off pathways to early retirement and encourage lifelong learning, and the promotion of equal gender opportunities and

<sup>49</sup> Zeitlin, Pochet, and Magnusson, *supra* n. 35.

<sup>50</sup> In addition to *ibid.* on the EES see Jacobsson, 'Soft Regulation and the Subtle Transformation of States: The Case of EU Employment Policy', Stockholm, SCORE Stockholm Center for Organizational Research, 2002; Jacobsson, 'Between Deliberation and Discipline: Soft Governance in EU Employment Policy', in U. Mörth (ed.), *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* (2005); European Commission, *Impact Evaluation of the European Employment Strategy: Technical Analysis Supporting (Taking Stock of Five Years of the EES)*, COM (2002) 416 final, at ch. 1; European Commission, *Taking Stock of Five Years of the European Employment Strategy*, COM (2002) 416 final, at 9–15. On the Social Inclusion process see Ferrera, Matsaganis, and Sacchi, *supra* n. 15; European Commission and Council of the European Union, *Joint Report by the Commission and the Council on Social Inclusion*, 7101/04, at 36–42.

gender mainstreaming, including efforts to reduce occupational segregation and pay gaps between men and women.<sup>51</sup>

Both in the case of broad cognitive shifts and of specific programmatic changes, however, identifying the precise causal impact of the EES and the Social Inclusion process on national policy-making raises difficult problems of interpretation. Thus changes in Member States' policy orientations, including enhanced attention to employment promotion and social inclusion, often preceded the launch of these OMC processes. In important respects, moreover, these OMC processes cannot be considered truly external to national policy-making, since Member States actively supported their initiation and continuously participate in the definition of objectives, guidelines, and indicators, into which they often seek to 'upload' their own domestic priorities and preferences. Not only have EU Member States actively participated in defining OMC goals and metrics, but they have also exercised considerable selectivity (both conscious and unconscious) in 'downloading' and inflecting European concepts and policy approaches in the fields of employment and social inclusion, as for example in the case of activation.<sup>52</sup>

Interpretation of the OMC's substantive policy impact is further complicated by the strategic behaviour of national governments in communicating with domestic publics on the one hand and EU institutions on the other.<sup>53</sup> Thus governments often use references to OMC processes as a source of legitimation and blame-sharing in order to advance their own domestic agenda, sometimes irrespective of their real influence on policy decisions. Conversely, governments may also consciously play down the influence of OMC processes in communicating with domestic audiences, especially in Member States or policy areas where the legitimacy of EU intervention is weak. Governments may likewise deliberately over- or understate the influence of OMC processes on domestic policy in reporting to the EU, depending on whether they want to burnish their credentials as 'good Europeans' by demonstrating consummate compliance with guidelines and recommendations, or instead to present themselves as defenders of subsidiarity and the national interest against Brussels.

<sup>51</sup> For a detailed presentation of the evidence, see Zeitlin, *supra* n. 36, § II.A. On gender equality and gender mainstreaming, see especially Rubery, 'Gender Mainstreaming and the OMC: Is the Open Method Too Open for Gender Equality Policy?', in J. Zeitlin and P. Pochet with L. Magnusson (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (2005) 391.

<sup>52</sup> On 'uploading' and 'downloading' between Member States and the EU, see Börzel, 'Pace-Setting, Foot-Dragging, and Fence-Sitting: Member State Responses to Europeanization', 40 *JCMS* (2002) 2. On the differential inflection of activation policies, see Barbier, 'The European Employment Strategy: A Channel for Activating Social Protection?', in J. Zeitlin and P. Pochet with L. Magnusson (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (2005) 417.

<sup>53</sup> For a subtle and insightful analysis of the Swedish case, see Vifell, 'Speaking with Forked Tongue—Swedish Employment Policy and European Guidelines: A Case of Europeanization through Soft Co-Ordination', paper presented to the Conference of Europeanists, Chicago, 11–13 March, 2004.

Hence both on substantive and methodological grounds, the relationship between OMC processes and Member State policies should be analysed as a two-way interaction rather than a one-way causal impact. The EES and the Social Inclusion process often operate as catalysts or 'selective amplifiers'<sup>54</sup> for national reform strategies, increasing the salience and urgency of particular issues and policy approaches, which may already have been familiar domestically, at least in certain quarters. But there is also hard evidence of the OMC's ability to challenge and expand the terms of national policy debate, especially in fields like gender equality and social inclusion.<sup>55</sup> Yet given the ongoing variations in national interpretation and implementation of European concepts and policy approaches, OMC processes in employment and social inclusion should be viewed less as mechanisms for producing 'cognitive harmonization'<sup>56</sup> than as means for the creation of a common language and categorical framework to discuss and evaluate different solutions to similar problems.

## B. Procedural Shifts in Governance and Policy-Making Arrangements

More profound and more easily traceable than the OMC's influence on substantive policy changes within EU Member States has been its contribution to shifts in governance and policy-making arrangements, including administrative reorganization and institutional capacity-building, though here too there are many other causal factors. Nearly all accounts of OMC processes in action at a national level report that they have stimulated improvements in horizontal or cross-sectoral integration across formally separate but practically interdependent policy fields: labour market policy, unemployment benefits, social assistance, pensions, taxation, education/training, and local development in the case of the EES; housing, healthcare, justice, sport/leisure, and transport as well as the above in the case of social inclusion. A second major effect of the OMC has been to stimulate improvements in national statistical and steering capacities. Thus participation in the EES and the Social Inclusion process has pushed Member States to upgrade their policy monitoring and evaluation capabilities, as well as to harmonize national and European statistics. A third important influence of the EES and the Social Inclusion process has been to encourage the reinforcement of arrangements for vertical coordination among levels of governance. Such coordination has become both increasingly necessary and increasingly challenging as a result of the widespread decentralization of the

<sup>54</sup> Visser, 'The Open Method of Coordination as Selective Amplifier for National Reform Strategies: What the Netherlands Wants to Learn from Europe', in J. Zeitlin and P. Pochet with L. Magnusson (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (2005) 173.

<sup>55</sup> See also Jacobsson and Vifell, 'New Governance Structures in Employment Policy-Making? Taking Stock of the European Employment Strategy', in I. Linsenmann, C. Meyer, and W. Wessels (eds.), *Economic Governance in the EU* (2005) forthcoming.

<sup>56</sup> Palier, 'The Europeanisation of Welfare Reforms', unpublished paper presented to the Cost A15 Conference, Nantes, 20–22 May 2004.

public employment services and the devolution of welfare and employment policies in federal or federalizing polities. Sometimes this vertical coordination occurs through well-established institutional channels, while in others the NAP preparation process has led to the creation of new formal or informal mechanisms for cooperation and consultation between federal, regional, and in certain cases also local governments.<sup>57</sup>

### C. Mutual Learning

Perhaps the most critical claim for the novelty of the OMC concerns its capacity to promote mutual learning among EU Member States. As in the case of substantive policy change, the strongest impact of the European Employment and Social Inclusion Strategies in this area has come through a series of indirect or higher-order effects, which are not always recognized as 'learning'. Thus both OMC processes, as Ferrera and Sacchi suggest, have stimulated cross-national learning through heuristic, capacity-building, and maieutic effects.<sup>58</sup>

In heuristic terms, as we have already seen, the EES and the Social Inclusion process have been rather successful in identifying common European challenges and promising policy approaches, which have in turn contributed to broad shifts in national policy thinking. Both OMC processes have likewise enhanced mutual awareness of policies, practices, and problems in other Member States, even if such knowledge has largely been concentrated in EU committees and the higher echelons of national administrations. Beyond the formal framework of the OMC itself, moreover, EU Member States show increasing interest in learning from one another in preparing their own domestic policy reforms.<sup>59</sup>

In terms of capacity-building, both the EES and the Social Inclusion process have given rise to the development of common European indicators and the creation of new data sources, such as the EU Statistics on Income and Living Conditions (EU-SILC). Despite continuing data limitations, moreover, they have also contributed to revisions and improvements in national social and employment statistics. In so doing, these OMC processes have stimulated cross-national debate and deliberation about the comparability, appropriateness, and significance of these indicators and the statistical data on which they are based, even if such discussions are largely confined to technical experts within the Employment and Social Protection Committees along with their academic interlocutors.<sup>60</sup>

<sup>57</sup> For details, see Zeitlin, *supra* n. 36, § II.B.

<sup>58</sup> Ferrera and Sacchi, 'The Open Method of Coordination and National Institutional Capabilities: The Italian Case', in J. Zeitlin and P. Pochet with L. Magnusson (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (2005) 137; Ferrera, Matsaganis, and Sacchi, *supra* n. 15.

<sup>59</sup> For specific examples, see Zeitlin, *supra* n. 36, § II.D.

<sup>60</sup> On the social inclusion indicators, see T. Atkinson, B. Cantillon, E. Marlier, and B. Nolan (eds.), *Social Indicators: The EU and Social Inclusion* (2002); Atkinson, Marlier, and Nolan, 'Indicators and Targets for Social Inclusion the European Union', 42 *JCMS* (2004) 1. For a critical discussion of the employment indicators, see Salais, 'La Politique des indicateurs: Du taux de chômage au taux d'emploi

In maieutic or reflexive terms, the EES and the Social Inclusion process have pushed EU Member States to rethink established approaches and practices as a result of comparisons with other countries on the one hand and of the obligation to re-examine and re-evaluate their own policies and performance on the other. These OMC processes have undoubtedly 'destabilize[d] existing understandings' and 'pressured policy-makers to give a second thought to existing policy choices in the light of new ideas and the agreed common framework, and to accept being compared to better performers'.<sup>61</sup> In some cases, such reflexive learning has involved making new connections between hitherto separate policy issues, such as pensions and lifelong learning or women's employment and childcare provision. In others, it has entailed recognizing that policies which seemed beneficial from one perspective can be harmful from another, such as early retirement as a palliative for unemployment created by industrial restructuring or high female employment in public social services as a source of occupational segregation and gender pay gaps.

At the same time, however, there are relatively few concrete cases at national level of direct or first-order policy learning from abroad about what works and what does not. Most of the examples of such direct learning cited in interviews and evaluation reports tend to focus on gender mainstreaming, the provision of personalized activation services, and the shift from a curative to a preventative approach to fighting unemployment.<sup>62</sup> Other examples of national policy learning tend to involve more problem recognition than adoption of foreign 'best practice' solutions, as for example with lifelong learning, gender segregation, and labour market integration of immigrants and ethnic minorities. Even where national policy-makers refer explicitly to other countries' practices and the influence of OMC processes, they typically borrow selectively and adapt foreign programmes to the peculiarities of their own domestic social, institutional, and political contexts.

The limited incidence of direct policy transfer, as Visser points out, is a natural consequence of the OMC's 'contextualized benchmarking' approach, which unlike the 'decontextualized benchmarking' associated with the OECD Jobs Strategy, is more conducive to reflexive 'learning with others' than to 'adaptive mimicking' or what sociological institutionalists call 'mimetic isomorphism', which can easily

dans la stratégie européenne pour l'emploi (SEE)', in B. Zimmermann (ed.), *Action publique et sciences sociales* (2004) 287. Both the EMCO and SPC Indicators Groups regularly produce highly informative internal reports on their work. Those of the SPC are available on the Committee's website, [http://europa.eu.int/comm/employment\\_social/social\\_protection\\_committee/spc\\_indic\\_en.htm](http://europa.eu.int/comm/employment_social/social_protection_committee/spc_indic_en.htm), whereas those of EMCO are regrettably unavailable to the general public at the present time.

<sup>61</sup> Trubek and Mosher, 'New Governance, Employment Policy, and the European Social Model', in J. Zeitlin and D. Trubek (eds.), *Governing Work and Welfare in a New Economy: European and American Experiments* (2003) 46; Jacobsson and Vifell, *supra* n. 55.

<sup>62</sup> Some Member States such as France and Belgium with high levels of long-term unemployment still have significant reservations about the latter shift. See R. Salais, G. Raveaud and G. Mathieu, *L'Evaluation de l'impact de la Stratégie Européenne pour l'Emploi—Thème 10: Elaboration des politiques* (2002), at 13; DULBEA, *L'Evaluation d'impact de la stratégie européenne pour l'emploi en Belgique* (2002), at 6–7.

degenerate into uncritical trend following.<sup>63</sup> Such contextualized benchmarking as a mechanism for reflexive learning from others also fits well with the findings of comparative–historical research, which shows that foreign practices, whether in the economic or the political field, can rarely be successfully transferred from one social and institutional context to another without significant modification.<sup>64</sup> The need for such contextualization is explicitly recognized in OMC mutual learning programmes, which emphasize *in situ* explanation of ‘good practices’ by host country experts on the one hand and creative adaptation to different local conditions by visiting participants on the other.<sup>65</sup>

More problematic, however, is the limited evidence of reflexive learning from the results of OMC processes at EU level. According to the Commission’s own analysis of the national Impact Evaluation reports, the EES did not do an especially good job during its first five years in identifying which types of active labour market policies or tax-benefit reforms were most effective under what circumstances, and revising the guidelines accordingly, despite all the political attention devoted to these issues, although the exercise itself generated a great deal of empirical material which could be used for that purpose.<sup>66</sup> Nor does the new EES agreed in 2003 fully incorporate the empirical findings of the Impact Evaluation in this regard, even if they do respond to the widely expressed demands of Member State governments and other participating actors for fewer, simpler, and more outcome-oriented guidelines.<sup>67</sup>

Even more strikingly, the Member States do not seem to have made much tangible progress in drawing on cross-national learning at the level of local practice about how best to integrate labour market activation with social inclusion, balance flexibility with security, or extend the scope of lifelong learning to a wider section

<sup>63</sup> Visser, *supra* n. 54; see also Hemerjick and Visser, ‘Learning and Mimicking: How European Welfare States Reform’, unpublished paper, University of Leiden and University of Amsterdam, June 2001; Hemerjick and Visser, ‘Policy Learning in European Welfare States’, unpublished paper, University of Leiden and University of Amsterdam, October 2003; P. J. DiMaggio and W. W. Powell (eds.), *The New Institutionalism in Organizational Analysis* (1991)

<sup>64</sup> Zeitlin, ‘Introduction: Americanization and Its Limits: Reworking US Technology and Management in Post-War Europe and Japan’, in J. Zeitlin and G. Herrigel (eds.), *Americanization and Its Limits: Reworking US Technology and Management in Post-War Europe and Japan* (2000) 1; Zeitlin, *supra* n. 5; R. Boyer, E. Charron, U. Jürgens, and S. Tolliday (eds.), *Between Imitation and Innovation: Transfer and Hybridization of Productive Models in the International Automobile Industry* (1998).

<sup>65</sup> Thus as a preliminary evaluation of the EES peer review programme reported: ‘although Member States may not necessarily adopt the policies reviewed in an identical form, they are interested in adapting them to their own circumstances. In most cases, Member States have been inspired by their participation in the peer reviews to develop new initiatives or improve existing ones’ European Commission DG EMPL, *Employment Strategy: Peer Review Programme 2002–2003*, Employment Committee, Ad Hoc Working Group/007/190901/EN, (2001), at 3; ÖSB/INBAS, *Evaluation of Peer Review Programme on Active Labour Market Policy 2000–2001* (2001).

<sup>66</sup> European Commission, *Impact Evaluation . . .*, *supra* n. 50, at chs. 3–4; cf. also Visser, *supra* n. 54; O’Donnell and Moss, ‘Ireland: The Very Idea of an Open Method of Coordination’, in J. Zeitlin and P. Pochet with L. Magnusson (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (2005) 311.

<sup>67</sup> European Commission, *The Future . . .*, *supra* n. 38; Council of the European Union, *supra* n. 10.

of the population.<sup>68</sup> The potential for such ‘bottom-up’ and ‘horizontal’ learning from local and regional experimentation is amply illustrated by reports of European networking conferences and innovative local employment projects mentioned earlier.<sup>69</sup> By stimulating the mobilization of non-state and subnational actors, moreover, the EES, and still more the Social Inclusion process, appear to be creating the conditions for such ‘bottom-up’ learning in many EU Member States even where national governments do not formally acknowledge this in their NAPs or Impact Evaluation reports.

What accounts for these limitations on mutual learning within OMC processes? Part of the problem stems from the ambivalent commitment to this objective on the part of the key actors themselves. Thus the failure to capitalize at a European level on opportunities for reflexive learning from practical experience with the implementation of activation and prevention policies reflects the primary focus within the Commission and EMCO on ensuring national compliance with the action targets in the guidelines, rather than on reviewing the recommended measures in light of accumulated evidence about their effectiveness. And the failure to take full account of the empirical findings of the Five-Year Evaluation in the redesign of the EES likewise reflects the predominance of political bargaining over the new guidelines between the Commission and the Member States, even if the negotiations within EMCO also appear to have been subject to a certain deliberative discipline.<sup>70</sup>

Other limitations on mutual learning, however, stem from more readily corrigible defects in OMC procedures and instruments. Thus, for example, there is broad agreement that the increasingly full agendas of EMCO and the SPC on the one hand and the very tight timetable for peer review of the NAPs on the other have crowded out opportunities for mutual learning among the participants. Although the EES peer review programme for the exchange of good practices is generally considered to have been more satisfactory, widespread criticisms have also been raised about its ‘show and tell’ character, whereby Member States nominate ‘poster child’ programmes, which are then selected through a ‘beauty contest’ for presentation to a restricted audience of national officials and experts from those countries that choose to participate.<sup>71</sup> These criticisms have been taken to heart by the members of EMCO and the SPC themselves, who have redesigned their peer review procedures and introduced new programmes to strengthen mutual learning, such as

<sup>68</sup> European Commission, *Impact Evaluation . . .*, *supra* n. 50, at chs. 5, 6, 8, 10.

<sup>69</sup> See for example EAPN-EUROCITIES, *The EU Strategy for Social Inclusion: Making it Work at the Local Level*, Athens, 28 February–1 March 2003; European Commission DG EMPL, *Activity Report to EMCO Local Employment Development: 2001–2004* (2004), EMCO/14/220404/EN.

<sup>70</sup> Jobelius, ‘Who Formulates the European Employment Guidelines? The OMC Between Deliberation and Power Games’ paper presented to the Annual Conference of the ESPAnet, ‘Changing European Societies: The Role for Social Policy’, Copenhagen, 13–15 November 2003; Jacobsson and Vifell, *supra* n. 34; Vifell, *supra* n. 53.

<sup>71</sup> See for example C. de la Porte and P. Pochet, *The OMC Intertwined with the Debates on Governance, Democracy and Social Europe: Research on the Open Method of Co-Ordination and European Integration*, report prepared for Frank Vandembroucke, Belgian Minister for Social Affairs and Pensions (2003); Jacobsson and Vifell, *supra* n. 34.

thematic review seminars and national follow-up activities open to a broader group of stakeholders, including social partners, independent policy experts, and possibly also local authorities and NGOs.<sup>72</sup> Another set of procedural limitations concern the indicators which are supposed to serve as crucial performance metrics within OMC processes, though here too many of the problems are widely recognized by the EU committees responsible for their administration, and corrective measures are already under way.<sup>73</sup>

A final set of procedural limitations on mutual learning within OMC processes concerns the barriers to participation and integration into domestic policy-making discussed in the previous section. Thus the paucity of 'bottom-up' cross-national learning within the EES identified by both the Five-Year Evaluation and the contributors to our comparative study is closely linked to the limited opportunities for participation by non-state and subnational actors in the process at all stages, from the definition of objectives, guidelines, and indicators, through the preparation, monitoring, and evaluation of the NAPs to the peer reviews and exchange of good practices. And the limited integration of both OMC processes into domestic policy-making, as we have likewise seen, inhibits the broad participation and public debate that is a necessary condition for experimental learning from local practice. Hence the best way to overcome these limitations, as argued earlier, would be reflexively to apply to the OMC's own procedures key elements of the method itself, such as benchmarking, peer review, monitoring, evaluation, and iterative redesign. Thus Member States could be required to benchmark, monitor, and review not only openness and participation within OMC processes, but also their mainstreaming and integration into domestic policy-making according to national laws, traditions, and practices, with full respect for the principle of subsidiarity. And as in the case of participation, social inclusion offers a partial model for the mainstreaming of OMC processes into domestic policy-making, whose extension to the EES and social protection more generally remains a live and contested issue on the EU agenda.<sup>74</sup>

#### 4. THE CONVENTION AND SOCIAL EUROPE: NEW COMPROMISE OR ANTI-CLIMAX?

The Convention on the Future of Europe might have taken stock of the ongoing changes in the Community Method and incorporated the new compromise of experimentalist governance into the constitution of Europe. It might also have

<sup>72</sup> For the case of EMCO, see EMCO Ad Hoc Working Group, 'Future Focus and Format of the Cambridge Review Examination of the National Action Plans for Employment', EMCO/10/220404 (2004); European Commission DG EMPL, *Note to EMCO Ad Hoc Group Meeting 26.03.2004: Mutual Learning Programme on Employment Policies* (2004), EMCO/11/220404/EN. For a fuller discussion of ongoing and proposed reforms, see Zeitlin, *supra* n. 36, § III.D.

<sup>73</sup> For a full discussion and references, see *ibid.* §§ II.D, III.D.

<sup>74</sup> For an elaboration of this argument, see *ibid.*, § III.C.

helped to improve the legitimacy and effectiveness of experimentalist governance processes like the OMC by imposing procedural requirements for transparency and broad participation. In practice, it did neither. The achievement of the Convention was to have avoided any recourse to traditional forms of constitutionalism that might have fundamentally obstructed the innovations in EU governance. The Convention's failure was its inability to give due constitutional form to these innovations.

The debate over Social Europe at the Convention quickly stalemated in a way that reflected the limits of the traditional agendas of right and left in the EU. The right tried to keep Social Europe off the agenda altogether, while resisting any increase in the Union's social competences and powers. The left pressed for its historic goal of a single Social Europe, based on parity of the EU's social and economic objectives, together with extension of Union competences and qualified majority voting to all areas of social and employment policy. But the right could not prevent a broad front of Socialists and Christian Democrats from obtaining a Social Europe Working Group, while the group's internal deliberations quickly revealed the lack of broad support even within its own ranks for a single Social Europe. Nordic Social Democrats and British New Labourites joined with conservative liberals and Christian Democrats to oppose granting new competences or stronger powers for the EU in sensitive policy areas bearing directly on the core functions of national welfare states.<sup>75</sup>

This impasse could have been resolved in two distinct ways. One would have been for the Convention to do little or nothing, including little or no harm to innovative institutions, while simplifying the Treaties and tidying up constitutional loose ends. The alternative would have been formally to constitutionalize the new Community Method in a way that redefines the compromise between deliberative decision-making and relaxation of veto powers. Such a new compromise would involve two elements. The first is a substantial strengthening within the Constitutional Treaty of references to the EU's social values and objectives, which would place them on an equal footing with Union's economic goals. The second is the anchoring in the Treaty of new governance mechanisms such as the OMC, which enhance the Union's capacities to take effective action in pursuit of its social objectives.

The Convention and the Intergovernmental Conference (IGC) which followed made significant progress towards the first element of this new compromise. The Social Europe Working Group recommended adding a long list of items to the catalogue of values and objectives in Articles 2 and 3 of the draft Constitutional

<sup>75</sup> See European Convention, *Final Report of the Working Group VI on Economic Governance*, CONV 357/02 and European Convention, *supra* n. 18, along with the detailed working documents of both groups, available on the Convention website, [http://european-convention.eu.int/doc\\_wg.asp?lang=EN](http://european-convention.eu.int/doc_wg.asp?lang=EN). For useful commentary, see also the reports by Cécile Barbier of the Observatoire Social Européen in *Tomorrow Europe*, <http://www.ciginfo.net/demain/en/default.htm>, especially Nos. 11 ('Results of the First Working Groups', December 2002) and 12 ('European Convention: What About Social Europe?', February 2003).

Treaty. The Presidium, intent on keeping the opening 'constitutional' section of the revised Treaty to the barest essentials, proposed a much shorter and less expansive list of social values and objectives.<sup>76</sup> The final version included in the *Treaty Establishing a Constitution for Europe*, which incorporates numerous amendments, goes a long way towards achieving a new parity between the EU's social and economic goals. In particular, it declares that:

The Union shall work for the sustainable development of Europe based on balanced economic growth, a highly competitive social market economy aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment [. . .]. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States [. . .].<sup>77</sup>

This strengthening of the EU's social values and objectives will be further reinforced by the incorporation into the Constitutional Treaty of the Charter of Fundamental Rights, and by the addition of a new 'horizontal' clause committing the Union to 'take into account' in defining and implementing all its substantive policies and actions 'requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health'.<sup>78</sup>

The fate of the other key element of the emergent compromise—constitutional anchoring of the OMC—is more ambiguous. The Social Europe Working Group endorsed the inclusion of the OMC in the draft constitutional treaty (as did three other Working Groups that considered the question) provided that, as one summary of its conclusions put it, 'the provision would not replace existing normative procedures or make the open method of coordination rigid in cases where there is no specific legislative method of procedure'.<sup>79</sup> These provisos reflected fears among

<sup>76</sup> CONV 516/1/03 REV 1, paras. 6–22; CONV 528/03, Arts. I-2, I-3.

<sup>77</sup> Intergovernmental Conference, *Treaty Establishing a Constitution for Europe* (2004), CIG 87/04, Art. I-3.

<sup>78</sup> *Ibid.*, Art. III-117. This latter clause, added by the Italian Presidency during the IGC negotiations, represents a partial response to demands by advocates of a stronger Social Europe for the inclusion of a 'horizontal clause on social values' in the first part of the Constitutional Treaty committing the Union 'to take into account in all the activities falling within its competence [. . .] the requirements related to achieving full employment and a high level of protection of human health, education and training, and to guaranteeing social protection and services of general interest which are accessible, financially viable, of high quality and organised on the basis of solidarity'. See Vandembroucke, 'Intervention', presented to the Expert Hearing of Working Group 11 'Social Europe', European Convention, 21 January 2003; Vandembroucke, 'The EU and Social Protection: What Should the Convention Propose?', *Max Planck Institute for the Study of Societies Working Paper 02/06* (2002); de Búrca, *supra* n. 7; Barbier, 'A Constitutional Treaty in Search of Its Authors', 23 *Tomorrow Europe* (2004) 8.

<sup>79</sup> Aoife Halligan, 'Convention Debates Social Europe', European Policy Center, <http://www.theepc.net/home.asp> (2003). For a comparison of the various Working Group recommendations, see de Búrca and Zeitlin, 'Constitutionalizing the Open Method of Coordination: What Should the Convention Propose?', *CEPS Policy Brief No. 31* (2003).

some members of the Working Group that constitutionalization of the OMC could undermine its flexibility and among others that it could subvert the use of the EU's existing Treaty powers to legislate in the social field. Hence a vocal minority within the Working Group and the wider Convention remained sceptical about the incorporation of the OMC into the draft constitutional treaty. The majority of the Social Europe Group insisted instead on specifying the scope and limits of the method, as well as the roles of different actors in the procedure, in ways that might have threatened its practical viability if enacted.<sup>80</sup>

These differences, as both political actors and academic commentators (including the present author) proposed at the time, could have been reconciled by a generic provision of the Constitutional Treaty defining only the fundamental aims and basic elements of the OMC; declaring that OMC processes be determined flexibly, subject to review by Parliament and other actors, unless specified otherwise by the Treaty; and disclaiming any intention to replace existing normative procedures by OMCs. To ensure the 'transparency and democratic character of the OMC', which the Social Europe Working Group likewise rightly deemed essential, this generic constitutional provision could also have included specific requirements for openness and broad participation of all relevant bodies and stakeholders (such as social partners, civil society organizations/NGOs, national parliaments, local and regional authorities) in accordance with national laws, traditions, and practices.<sup>81</sup>

In the event, however, the Convention Presidium itself deadlocked along similar lines to the Social Europe Working Group, reflecting a *de facto* alliance of opposites between defenders of the Member States' prerogatives against further intrusions by the EU on the one hand and those who feared dilution of the 'hard' *acquis communautaire* by soft law processes on the other. Hence the Presidium decided not to bring forward a proposal to incorporate the OMC into the Constitutional Treaty drafted by its Vice-President Giuliano Amato.<sup>82</sup> Instead, Article I-15 of the Constitutional Treaty gives the Union general powers to coordinate the economic,

<sup>80</sup> European Convention, *supra* n. 18, at paras. 37–45. See also the discussion of the Working Group debate in Trubek and Trubek, *supra* n. 20 and Tsakatika, 'The Open Method of Coordination in the European Convention: An Opportunity Lost?' in L. Dobson and A. Follesdal (eds.), *Political Theory and the European Constitution* (2004) 91.

<sup>81</sup> See de Búrca and Zeitlin, *supra* n. 79. For related proposals, see Vandenbroucke, 'Intervention', *supra* n. 78 and European Parliament 'Resolution on Analysis of the Open Coordination Procedure in the Field of Employment and Social Affairs, and Future Prospects', A5-0143/2003, 5 June 2003.

<sup>82</sup> Amato's proposal, reproduced in Telò, 'Il metodo aperto', *supra* n. 27, comprised the following three clauses that were to have been included in the first part of the draft Constitutional Treaty:

1. Where the Constitution excludes harmonization and does not specifically regulate coordination, the attainment of common European goals through national policies may be pursued by the open method of coordination, whenever the Member States so decide.
2. The open method of coordination shall be based on the definition of common guidelines or objectives with appropriate arrangements for periodic monitoring and evaluation. It may provide for timetables, indicators, benchmarking and exchange of best practices.

employment, and social policies of the Member States (with explicit reference to guidelines in the first two cases). In addition, Article I-17 allows the EU to take 'supporting, coordinating, or complementary action' in a series of other areas (industry; protection and improvement of human health; education, vocational training, youth, and sport; culture; civil protection) without harmonizing Member States' laws or regulations. Part III of the Constitutional Treaty then sets out specific procedures for the coordination of national policies in different areas, incorporating the existing Treaty provisions for the BEPG and the EES. But this part of the Constitutional Treaty also provides for the application of key features of the OMC in social policy, research and technological development, public health, and industry, without referring to it by name. In these areas, the Commission ('in close contact with the Member States') is charged with taking 'initiatives aimed at the establishment of guidelines and indicators, the organization and exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation', about which the European Parliament 'shall be kept fully informed' (Articles III-213, 250, 278, 279).<sup>83</sup>

Beyond the incongruity of referring covertly to what is supposed to be an *open* method of coordination, what difference, if any, will the failure to anchor it explicitly in the constitution make to the future of the OMC? There is no clear answer. Constitutional provisions undoubtedly matter in the EU, and the EES in particular has benefited from the added legitimacy conferred by its Treaty base in relation both to the Member States and to the BEPG. Explicit constitutional requirements

3. The European Council shall approve the definitions and adapt the method to match the specific needs of the particular policy area in which it wishes to promote coordination. At its request, the Commission shall support the process, by presenting proposals on guidelines and indicators, organizing the exchange of best practices and preparing the necessary elements for the periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

Compared to current EU practice, this proposal would have narrowed the scope of the OMC by confining it to areas where harmonization is constitutionally excluded and made it more intergovernmental by depriving the Commission of the right to propose new OMC processes as well as the Member States.

<sup>83</sup> These provisions, which incorporate language from the final clause of Amato's proposed article, were added to the draft Constitutional Treaty at the last minute as a result of an intensive lobbying campaign orchestrated by Maria João Rodrigues, coordinator of the Lisbon Summit for the Portuguese presidency and the 'mother of the OMC': see Barbier, 'Final Amendments to the Constitution', 17 *Tomorrow Europe* (2003), at 3. The European Parliament has passed two resolutions calling for the OMC to be incorporated into the Constitutional Treaty and for an inter-institutional agreement with the Council and the Commission, 'laying down rules for governing the selection of policies for open coordination', together with 'a procedure for developing the open method of coordination into the Community Method', which could be formalized by the Intergovernmental Conference. See European Parliament, *supra* n. 81 and 'Resolution on the Application of the Open Method of Coordination', B5-0282/2003 (5 June 2003); C. Barbier, *From the Convention to the Next IGC* (2003), at 11–12. But the IGC did not reopen the compromise reached by the Convention on this subject. For a detailed and insightful analysis of the Convention debate on the constitutional status of the OMC and its outcome, see also de Búrca, *supra* n. 7.

for transparency and broad participation in OMC processes might also have helped to prevent Member State representatives in EMCO from watering down proposals by the Commission and the Parliament to enhance the role of non-state and subnational actors in the new Employment Guidelines for 2003–6, as discussed earlier.<sup>84</sup>

But other OMC processes which have a weaker Treaty base such as social inclusion have also taken off quite rapidly, eliciting broader participation from civil society at both national and European level. And if Member State governments find the OMC hard to live with, they seem to find it even harder to live without it. Increasing interdependence, strategic uncertainty, and ongoing pressures to ‘do something’ about urgent policy issues at a European level continually push Member States to expand the scope of the OMC and/or to apply closely related approaches based on mutual surveillance, peer evaluation, and exchange of good practices to new issue areas. Thus for example, despite fears of ‘opening a box that can then never be closed’ again by allowing EU-level discussion of national healthcare policies, Member States now seem ready to accept a fully fledged OMC process for health and elder care,<sup>85</sup> as well as to extend mutual learning and exchange of good practices to other domestically sensitive issues such as the provision of social services.<sup>86</sup> In other thorny areas such as the fight against terrorism and regulation of genetically modified crops, the Council and the Commission have likewise reached for OMC-style mechanisms such as guidelines, peer evaluation, recommendations, and exchange of best practices in order to coordinate national policies.<sup>87</sup>

The apparently staid Community Method has almost always run ahead not just of constitution making but also of constitutional theory in the EU. The ungainly but workable compromise reached by the Convention, which neither advances nor obstructs the EU’s new experimentalist governance, offers little reason to think that the legal and constitutional hare will soon overtake the institutional tortoise.

<sup>84</sup> It may nonetheless be that European and national courts will use the strengthened commitments to transparency and participation in Art. I-47 and I-50 of the Constitutional Treaty as grounds for reviewing the procedural conformity of OMC processes with these principles. But that possibility remains at present entirely speculative.

<sup>85</sup> Baeten, ‘Health Care on the European Political Agenda’, in C. Degryse and P. Pochet (eds.), *Social Developments in the European Union 2002* (2003) 169; European Commission, *Modernising Social Protection*, *supra* n. 11.

<sup>86</sup> This latter proposal was supported close to unanimously by national ministers at the Maastricht Informal Council on Employment and Social Affairs, 8–10 July 2004, according to remarks by Belgian officials at the first workshop on ‘La Méthode Ouverte de Coordination (MOC) en matière des pensions et de l’intégration européenne’, Office Nationale des Pensions, Brussels, 14 July 2004.

<sup>87</sup> Council of the European Union, *supra* n. 12; European Commission, *Commission Recommendation of 23 July 2003 on Guidelines for the Development of National Strategies and Best Practices to Ensure the Coexistence of Genetically Modified Crops with Conventional and Organic Farming*, (2003). I am grateful to Gráinne de Búrca for these references.

