

The Open Method of Coordination in the New Member States—the Perspectives for its Use as a Tool of Soft Law

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Abstract: The open method of coordination (OMC) has introduced a shift with the traditional legal instruments set up by the Treaty. Its introduction was initially supposed to favour more ‘flexibility’ and ‘openness’ in the community legal order. After a presentation of the OMC, this article intends to provide an assessment of the OMC’s implementation in the ten new Member States. It displays that the OMC is sometimes far from his initial purposes, and in consequence needs to a certain extend, to adapt some of the guidelines and to clarify its legal bases. It concludes with a critical appraisal of the use of the OMC as itself, which should be imbricated in the community method.

I Introduction

Debates surrounding the different alternatives for integration within the European construction can no longer ignore the increasing momentum of a new convergence instrument referred to as the Open Method of Coordination (OMC), especially in relation to social affairs. Although it was introduced in 1997 in relation to the model of the European Employment Strategy at the Luxembourg Summit, the OMC was not formalised until the Lisbon Council of 2000. This Council departed from the style of the previous ones, as it set itself an overall macro-economic objective that realisation would be primarily based on OMC. Indeed, it was the Portuguese Presidency that laid down the goal of transforming the European Union into a ‘knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion’,¹ and by doing so, it introduced this new instrument, aiming to ‘organise a learning process about how to cope with the common challenges of the global economy in a co-ordinated way while also respecting national diversity’.² The intro-

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¹ Lisbon European Council, Presidency Conclusions, 23–24 March 2000, pt. 5.

² Council of the EU, Note on the ongoing experience of the Open Method of Coordination, Portuguese Presidency Note, 9088/00, 14/06/00, p. 4.

duction of OMC was linked to the diffusion of a semantic field centred on theory of the firm and management issues, as well as laying down procedures (and not rules) so that experiences gained can be shared. This is in fact the model known as *knowledge organisation*, and it lies at the heart of the method chosen in contrast to a logic of binding regulation.

The OMC can be broken down into four phases: definition of guidelines associated with timetables, establishment of quantitative and qualitative indicators in order to analyse the best practices, translation of guidelines into national and regional policies, and setting-up of monitoring and evaluation that are organised through peer review.³

'Neither the terms "open" or "coordination" are left to chance'.⁴ The coordinating dimension of this tool reveals its intention to distinguish it from traditional harmonisation techniques, which take place primarily through the adoption of directives. As such, coordination is by no means a novelty in European law: in fact, this concept is laid down by the Treaty within the context of Broad Economic Policy Guidelines (BEPG), which consist in providing a period definition of macro-economic objectives, the realisation and evaluation of which take place through peer review.⁵ In other areas, such as social protection, coordination has been established through regulations in order to favour the free movement of migrant workers.⁶ The OMC presents similarities with so-called '*soft*' economic policy coordination, as is exemplified by the Cardiff process on structural reforms, or the Cologne process relating to macro-economic dialogue.⁷ It can nevertheless be distinguished from those processes by its institutionalised dimension and the increasing relevance and scope of application. Moreover, its participatory dimension is supposed to be one of its most salient characteristics. The OMC was conceived and presented as an instrument by which Member States, European institutions, social partners and social NGOs would be able to influence the method's functioning jointly, given that they are associated with both the definition and implementation of the objectives. As it involves many different actors both at Community, national and infra-national levels, the OMC has often been perceived as a multi-level form of governance.

Several observations need to be made in relation to these introductory remarks. What is the scope of the OMC? Given that its structure tends to be conceived as an instrument of *soft law*, how should it be construed in relation to the Community method?

³ A precise description of the OMC is given in the Lisbon European Council Conclusions, at point 37, which lists the stages involved: 'fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long terms; 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 practice; 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 organised as mutual learning processes'.

⁴ M. Telo, 'La gouvernance économique et sociale et la réforme des traités—La méthode ouverte de coordination', *Mélanges Jean Victor Louis* (Éditions de l'ULB, 2003), pp. 479–497, esp. p. 482.

⁵ In fact, within the framework of BEPGs, there are retroactive circles: recommendations are developed by the Commission and presented to the Ecofin Council, the adoption by the latter of broad guidelines, the continuous monitoring mechanism granted to the Council, which may also make recommendations.

⁶ Council Regulation 1408/71, 14th June 1971.

⁷ D. Hodson and I. Maher, 'The Open Method as a new mode of Governance: the case of soft economic policy co-ordination', (2001) 39 *JCMS* 4, pp. 719–746.

What are the new forms of institutional equilibrium that may emerge as a result of its implementation?

The OMC is far from being a uniform instrument. It seems more relevant to use it in the plural—open methods of coordination—or, as the European Parliament refers to it, several processes of open coordination, ‘more or less developed’,⁸ that have a direct or indirect connection with the Lisbon strategy. The areas in which the OMC is applied are increasing, but they are nonetheless subject to a differentiated form of application. In this context, it has been demonstrated that there is ‘a wide variety of opportunities for the application of the OMC’.⁹ In its current form, the OMC is applied in its entirety within the framework of the European Employment Strategy (EES), social inclusion¹⁰ and pension reform,¹¹ sectors in which the OMC processes satisfy the criteria of the definition ascribed to it during the Lisbon Council.¹² A soft OMC process has also been recently launched in the area of health.¹³ Lastly, quite distinct areas such as education,¹⁴ research,¹⁵ immigration¹⁶ or even enterprise policy¹⁷ have been subject to incomplete OMC processes, which are restricted to, more or less, institutionalised *benchmarking* procedures.

Undoubtedly, the OMC introduces and reveals new normative approaches in Community law. By focusing on ‘exhortations to virtue’¹⁸ and the absence of any formal constraints, the OMC belongs to the category of *soft law* instruments.

As it departs from the framework used for the community method,¹⁹ the OMC is generally advocated as a new mode of governance, although it is clear that there is a

⁸ European Parliament, Report on analysis of the open coordination procedure in the field of employment and social affairs and perspectives for the future, 30 April 2003, PE 316.405.

⁹ Telo, *op. cit.* note 4 *supra*, esp. p. 482.

¹⁰ Launched at the Treaty of Nice, following the adoption of the common objectives. The fight against poverty and social exclusion, definition of appropriate objectives, Employment and Social Affairs Council, 12189/00 SOC 33.

¹¹ COM (2001) 362 final, 3 July 2001, Supporting national strategies for safe and sustainable pensions through an integrated approach, 3 July 2001. The first National Strategy Reports on pensions have been presented in 2003 and synthesised in the Joint Commission-Council report on adequate and sustainable pensions. Adoption of indicators is nevertheless still in progress.

¹² Pt. 37 Lisbon European Council Conclusions, *op. cit.* note 1 *supra*.

¹³ COM (2004) 304 final, 20 April 2004, ‘Modernising social protection for the development of high-quality accessible and suitable health care and long-term care: support for the national strategies using the “open method of coordination”’.

¹⁴ Report from the Education Council to the European Council, *The concrete future objectives of education and the training system*, 14 February 2001, 5680/01 EDUC 18.

¹⁵ Resolution of the Council of 22 September 2003 on investing in research for European growth and competitiveness, OJ C 250/02 18/10/2003. In particular, the Council calls on Member States to set up OMC that focuses on the objective of dedicating 3% of GDP to research.

¹⁶ COM (2001) 387 final, 11 July 2001, ‘Communication from the Commission on an open method of coordination for the Community immigration policy’.

¹⁷ Decision of the Council of 20 December 2000, on a multi-annual programme for enterprise and entrepreneurship, and in particular for small and medium-sized enterprises (SMEs) 2001–2005, OJ L 333/84 29/12/2000.

¹⁸ According to Dehousse’s well-coined expression, R. Dehousse, ‘Du bon usage de la méthode ouverte de coordination’ in R. Dehousse (ed.) *L’Europe sans Bruxelles? Une analyse de la méthode ouverte de coordination*. (L’harmattan, 2004) pp. 157–180.

¹⁹ Defined somewhat belatedly by the White Paper on Governance. COM (2001) 428 final, European Governance—A White Paper, p. 10.

continuance between OMC and the community method.²⁰ At its inception, it was perceived as a relatively innovative form of coordination on account of its malleability, flexibility and openness, which meant that it would be able to respect the need for 'legitimate diversity' thus overcoming the unstable oscillation between 'consensus and uniformity'.²¹ In fact, Scharpf pointed out that the construction of social Europe creates a dichotomy.²² Research on the effectiveness of its objectives relating to social protection or social inclusion supposes the existence of robust textual bases that allow Community programmes to be set up or a general framework to be defined for the harmonisation of national systems. But the diversity of models hampers agreement over common European solutions.²³ This existing Gordian knot could well be superseded by the open method, according to the preparatory work of the White Paper on European governance: 'The OMC is a flexible instrument, leaving it to the Member States to implement coordination defined at European level and so respecting the diversity of national systems while introducing some degree of continuity between Community and national arrangements'.²⁴

Undoubtedly, the OMC has developed into a vehicle for—and indeed extends the scope of—a strong movement towards decentralisation and informal frameworks. This movement has already witnessed the proliferation of European agencies, rather than an extension of the Commission's role in relation to the emergence of a new functional need. This evolution is also taking place from a normative perspective. Thus, 'the wave of harmonisation that marked the completion of the internal market has been followed by a phase that is characterised by softer approach, which is welcomed by national political leaders: benchmarking, peer review and reciprocal monitoring'.²⁵ The flexibility of this tool is generally considered as a legitimisation factor and it is supposed to favour the intervention of actors pursuing less distinct, and what would otherwise be antagonistic, objectives.²⁶ '*La crise de la standardisation*' (the standardisation crisis)²⁷ currently affecting many areas of national legislations thus enters into the fray of Community legislation.

As such, the OMC cannot be simply perceived as a traditional *soft law* instrument within the Community legal order. Professor Snyder has defined it as 'rules of conduct which, in principle, have no legally binding force but which nevertheless may have

²⁰ On this topic, see the stimulating presentation of T. Georgopoulos, *La méthode ouverte de coordination, en attendant Godot*, Note de recherche 1/05, Université de Montréal, Institut d'études européennes. Available at <<http://www.iee.umontreal.ca/publicationsfr.html>>.

²¹ F. W. Scharpf, 'La diversité légitime: un nouveau défi de l'intégration européenne', (2002) 52 *Revue Française de Science Politique* 5–6, pp. 609–639.

²² F. W. Scharpf, 'The European social model: coping with the challenges of diversity', in J. H. H. Weiller, I. Begg and J. Peterson (eds), *Integration in an expanding European Union, Re-assessing the fundamentals* (Blackwell Publishing, 2003), pp. 109–133.

²³ *Ibid.*

²⁴ Preparatory work for the White Paper, Work Area no. 4—Coherence and cooperation in a networked Europe, Report by Working Group 4a, 'Involving experts in the process of national policy convergence', (2002) OPOCE, pp. 222–270, esp. pp. 233–234.

²⁵ R. Dehousse, 'La méthode communautaire a-t-elle encore un avenir?', *Mélanges Jean Victor Louis* (Éditions de l'ULB, 2003), pp. 95–107, esp. p. 101.

²⁶ S. Regent, 'The Open Method of Coordination: a new supranational form of governance?', (2003) 9 *ELJ* 2, pp. 190–214.

²⁷ J. De Munck, 'Normes et procédures: les coordonnées d'un débat', in J. de Munck and M. Verhoeven (eds), *Les mutations du rapports à la norme, un changement dans la modernité?* (De Boeck Université, 1997) pp. 25–58.

practical effects',²⁸ and *soft law* instruments have always existed in the Community legal order,²⁹ especially within the framework of inter-institutional relations. The growth areas that mobilise the activities of Community institutions nevertheless signify a more marked trend towards the use of *soft law* instruments, although their forms differ from those formerly adopted. The OMC is certainly a tangible expression of this evolution. In fact, it has been presented as an instrument that could express a kind of third way. It is considered as a third way because of the method itself, which is often presented as a mid-way solution between pure integration and the simple logic of cooperation.³⁰ Accordingly, the OMC ought to be a suitable instrument for 'integration by cooperation', which is sometimes portrayed as a new paradigm in European construction.³¹ Furthermore, it is considered a third way given that the political choices that underpin the determination of objectives in employment or social inclusion are seen in a context of embodying the spirit of renewing the mission of the States of the origin in relation to the global economy. Concepts such as the activation of employment policies or 'flexicurity'³² at work are presented as a possible solution for policies against unemployment.

Applied to the fifteen Member States, the OMC raised several further issues. Whilst it has redefined, albeit to a still somewhat uncertain extent, the institutional equilibrium associated with the traditional Community method,³³ it has left a number of questions unanswered, relating to the reality of the convergence that it purported to bring about, whether or not there was effective participation of the social and civil partners, and more generally speaking, the relevance and place of the increasing number of *soft law* tools in Community law.

The participation of new States in the OMC procedure has been foreseen. As soon as the European Social Agenda was adopted, actions were planned targeting the development of and cohesive review of employment policies leading to joint evaluations and, further still, the preparation of the future Member States for the joint evaluation of social protection policies.³⁴ By furthering awareness of the OMC mechanisms, the Commission successfully set up a preparatory process in the field of employment (the Joint Assessment Papers of employment policies priorities, or JAP), social inclusion (the Joint Inclusion Memorandum, or JIM), and collaterally, within the context of pension reforms. The significance of these exchanges was acknowledged by the scoreboard on

²⁸ F. Snyder, 'Soft law and institutional practice in the European Community', in S. Martin (ed.), *The Construction of Europe—Essays in honor of Emile Noel* (Kluwer Academic Publishers, 1994), pp. 197–225.

²⁹ K. C. Wellens and G. M. Borchardt, 'Soft law in European Community law', (1989) 14 ELR 5, pp. 267–321.

³⁰ Portuguese Presidency Note, *op. cit.* note 2 *supra*, p. 6: 'The open method of coordination is to be combined with the other available methods depending on the problem to be addressed. These methods can range from integration and harmonisation, to co-operation. The open method of coordination itself takes an intermediate position in this range in this range of different methods'.

³¹ P. Magnette, 'L'intégration par la coopération, Un nouveau modèle de construction européenne?', in P. Magnette and E. Remacle (eds), *Le nouveau modèle européen* vol. 1 (éd de l'ULB, 2000), pp. 25–29.

³² On this topic, see T. Wiltshagen and F. Tros, 'Flexicurity: conceptual issues and political implementation in Europe', (2004) 2 *Transfer*.

³³ Authors who support the OMC willingly assert the value of this convergence instrument against the one that has been to some extent critically labelled as '*classique*' (traditional). In this sense, see J. Scott and D. M. Trubeck; 'Mind the Gap: law and the new approaches to governance in the European Union', (2002) 8 ELJ 1, pp. 1–18.

³⁴ COM (2000) 379 final, 'Social Policy Agenda', p. 27.

implementing the social political agenda,³⁵ which identifies, amongst the actions to be taken to strengthen the social aspect of enlargement, the preparation of a report on the state of development of joint evaluation documents in relation to employment policies, the drawing-up of joint memoranda on social inclusion and the commencement of cooperation in relation to pensions.

This preparation was certainly necessary. First, it was necessary to assist the new accession states in learning about the machinery of the OMC, although, in this respect, the original 15 Member States can hardly be considered as experts themselves. Second, it was necessary to favour a convergence of national policies in sensitive areas and where national choices are characterised by their considerable diversity from one another. This relates to the need to find a basis on which to establish coherence, especially as regards national social policies. Nevertheless, the participation of the ten new Member States in the OMC raises a number of issues, certain of which came to light as a result of the preparatory works. First and foremost, the question of adapting certain objectives in relation to employment and social inclusion to the macro-economic situation of the new states. The priorities retained by the fifteen Member States, particularly in relation to employment, are at times divergent. This is particularly the case as regards the implementation of employment policies. Moreover, the participation of actors that are in theory mobilised by the OMC remains weak. We are moving towards an OMC that is genuinely spearheaded by the Commission, and therefore moving away from its objective—which is already somewhat remote within the first fifteen Member States—of achieving a method that allows the ‘Union, the Member States, regional and local authorities, as well as social and private partners’,³⁶ to meet on an equal footing, which produces a rather unexpected institutional equilibrium within the instrument itself, especially as it is supposed to have been developed on the basis of the network logic. Lastly, its intelligibility also needs to be called into question. Since its legal basis is poorly identified—and insufficiently clarified by the draft constitutional treaty—the application of the OMC in its entirety to the new Member States runs the risk of generating a sense of disorder, which might obfuscate the priorities themselves.

As these issues are complex and somewhat dishevelled, they need to be examined jointly. First, an inquiry will be conducted into the processes used to prepare the new Members for the open method. Second, we will attempt to elucidate the specific problems that arise or may arise in connection with the implementation of the OMC in the new Member States. In this respect, we will subsequently attempt to identify the possible changes that can be made to this instrument within the context of an enlarged Europe.

II A Progressive Apprenticeship of the Functioning of the OMC by the New Member States

In 1999, the ten future Member States were invited by the Commission to develop an action plan for employment policy, and later, social inclusion. Under this procedure, the future Member States were able to familiarise themselves with the functioning of

³⁵ COM (2004) 137 final, 1 March 2004, ‘Scoreboard on implementing the social policy agenda’.

³⁶ M. J. Rodrigues, ‘For a European strategy at the turn of the century’, in M. J. Rodrigues (ed.) *The New Knowledge economy in Europe, A Strategy for international competitiveness and social cohesion* (Edward Elgar, 2002).

the OMC. A more informal type of cooperation was also set up for pensions.³⁷ This type of cooperation was applied in particular to Estonia.³⁸ An assessment is currently under way, whilst awaiting the possibility setting up a more specific OMC on pensions with the new members, which would allow national pension plans to be presented from 2005 onwards.³⁹ Preparations for this were led by the Commission, which means that the initial conception of how the OMC will be networked amongst the different subjects is strongly influenced by it.

A Setting Up a Preparatory Framework for the Participation of the new Member States in the OMC

An original formula has been developed for the establishment of a framework for the coordination of employment policies and coordination of social inclusion policies.

a) The Preparation for the Employment OMC through the Production of JAP (Joint Assessment Papers) of Employment Policies Priorities

Employment policy embodies both the most specific and oldest forms of the OMC. Acting on the suggestions of the Luxembourg Council, the Amsterdam Treaty in fact introduced Title VIII on employment, under which it laid down a general framework for a coordinated strategy for employment. Achieving a high level of employment is advocated as a Community priority, and employment is promoted through the organisation of an annual multilateral monitoring procedure set forth in Article 128. Until the recent reform of the EES,⁴⁰ the latter was based on four pillars: employability, adaptability, entrepreneurship and equal opportunities. This structure prevailed from 1997 to 2003, although certain areas of intervention were subsequently added, particularly as regards the quality of work and lifelong learning.⁴¹ Since July 2003, EES has had three basic aims—full employment, the improvement of quality of work and strengthening social cohesion—which are implemented through ten specific guidelines. Their extension had in fact made them less coherent, and this gives cause for the development of a tighter framework for the EES.

The Commission's aim was to guarantee that the candidate countries would be able to define employment policies in anticipation of their accession to the European Union, as well as progressively adapt their institutions and policies so that they would be in a position to actively participate in the EES. In fact, the new members presented their first employment NAPs, as well as the existing Member States, in October 2004. To this

³⁷ The objectives of the OMC as regards pensions are set forth in a joint report by the Employment Committee and the Committee for Social Protection, presented to the Laeken Council in December 2001. Eleven objectives have been identified, covering three principal areas: an adequate level of pensions, financial viability, and the modernisation of the pensions system.

³⁸ 'La méthode ouverte de coordination dans une Europe élargie: identification des enjeux', Seminar, 21 March 2003, Organised by the Observatoire social européen pour le Service Public Fédéral Sécurité Sociale.

³⁹ For a presentation of the setting up of the future stages of the OMC in relation to pensions, see D. Natali, 'La OMC Pensions: un résumé historique', Working Paper, Observatoire social européen, 2004, available at <<http://www.ose.be>>.

⁴⁰ Council Decision of 22 July 2003 on guidelines for the employment policies of the Member States, OJ L 197/13 5/8/2003.

⁴¹ P. Pochet and C. Degryse, 'La nouvelle stratégie européenne pour l'emploi', (2003) 3 *Revue Belge de Sécurité Sociale* pp. 583–601.

end, in 1999 the Commission launched a cooperation procedure on employment policy with these countries, to promote an exchange of knowledge about the EES processes and to ensure that the setting-up of the European Social Fund would focus on the policy priorities identified in the employment area.

Initially, the candidate countries and the Commission analysed the principal challenges facing them as regards employment policy, the results of which took the form of Joint Assessment Papers (JAP). The first JAPs were signed by the Czech Republic, Slovenia, Poland and Estonia in 2000, followed by Malta, Hungary, Slovakia, Cyprus and Lithuania at the beginning of 2001, then Romania and Bulgaria in Autumn 2002.⁴² The last JAP was signed by Latvia at the beginning of 2003. At the end of Spring 2002, the candidate countries prepared interim reports that were examined by the Commission and representatives of the candidate countries within the framework of technical workshops.⁴³ This provided an overview of developments relating to the rate of unemployment, structural difficulties connected with the labour market, as well as illustrating the reforms made. Nonetheless, these documents expose a degree of bias, which is universally present, in relation to the OMC, insofar as this is a European dimension that is very peripheral to them. It takes place somewhat artificially to legitimate the reforms that are already being made. In this respect, the preparatory documents add to the shortcomings already observed in relation to the National Action Plans of the fifteen Member States, which are often perceived as 'simply extracts from national policies cobbled together to be presented in a European context'.⁴⁴ JAPs are sometimes thought of as a purely administrative exercise that systematically fails to create any genuine commitments.⁴⁵

b) Preparation for the Social Inclusion OMC through the Production of JIM (Joint Inclusion Memoranda)

The principle of an OMC was advocated by the Lisbon Council in the context of combating poverty and social exclusion. Accordingly, global objectives were adopted by the European Council in Nice—promoting access to employment and resources, preventing risks, acting to protect the most vulnerable, as well as mobilising all actors—and monitoring indicators were agreed upon at the Laeken Council at the instigation of the Belgian Presidency.⁴⁶ These indicators have been divided into three categories: primary indicators are restricted, and cover the main areas considered to be the principal factors of social exclusion; secondary indicators are jointly adopted by the States and institutions (Commission, Council and opinions of the Social Protection Committee), which contain comments in particular on income distribution and types of unemployment; finally, there are tertiary indicators adopted solely by the states in order to illustrate the specificity of particular areas. The first National Action Plans, which are not the same

⁴² Cooperation with the candidate countries on employment and social policy, conference organised by the Employment and Social Affairs DG, 4 December 2002, summary available at <http://europa.eu.int/comm/employment_social/employment_analysis/>.

⁴³ COM (2003) 37 final, 30 January 2003, Progress on the implementation of the Joint Assessment Policies on employment policies of candidate countries.

⁴⁴ Report of the European Parliament, PE 316.405, 24 April 2003, 'Analysis and open method of coordination in the fields of employment and social matters', OJ C 68, 18/03/2004.

⁴⁵ M. Celin, 'European employment strategy: the right answer for candidate countries', (2003) 1 *Transfer*, pp. 88–100.

⁴⁶ T. Atkinson, B. Cantillon and E. Marlier, *Social Indicators—The EU and Social Inclusion* (Oxford University Press, 2002).

as those presented within the framework of employment policy given their much broader and unstructured scope of application relating to specific guidelines, were submitted in June 2001.

Preparing the new Member States in the processes adopted for the OMC on the subject of social inclusion has led to the drawing-up and signature of Joint Memoranda on Social Inclusion or Joint Inclusion Memoranda—JIM). This process was launched through the Conclusions of the European Council in Göteborg, which invited the Commission and candidate countries to start up a cooperation procedure aimed at promoting their full participation in the policies of the Union. In order to make the new member countries participate in the social inclusion OMC, the Commission established a cooperation process with each of these countries, which, through the organisation of workshops, allowed them to draw attention to a certain number of common issues, such as the need to create an integrated approach for social inclusion policies, and the priority of obtaining better social statistics to facilitate comparative techniques. This cooperation led to the signature of a number of Joint Memoranda on Social Inclusion or JIM⁴⁷ at the end of 2003, which has foreshadowed the NAPs that were submitted at the beginning of 2005.⁴⁸

The joint preparation of JIMs is seen by the Commission as a process that favours a joint apprenticeship between the Brussels' institution, on the one hand, and the new Member States, on the other. This work inevitably supposes the development of administrative capabilities on both sides, as well as the mobilisation of local authorities, academic institutions, NGOs and social partners. These JIMs are presented in a standardised manner. In particular, they include an analysis of social situations based essentially on national indicators, which are supposed to be comparable with EU indicators: identifying the major challenges ahead; evaluating local situations in view of the Nice objectives; reviewing the manner in which the problems of gender are rationalised in policies.

Thus, JIMs lay down the principal challenges to be faced by each new Member State as regards poverty and social exclusion, and describe the principal measures adopted to transpose the joint objectives of the EU on poverty into national policies. The inspiration for such documents was to enable administrative bodies in the new Member States to acquire a knowledge of the structure of the social inclusion OMC, especially the different types of indicators involved. In fact, these memoranda contain, with the exception of Slovakia, which is in the process of setting-up a body for statistics, annexes that present an inventory of the different measures on poverty, in accordance with the primary and secondary indicators. The involvement of new Member States in the production of JIMs augurs well for their participation in the OMC in the field of social inclusion.⁴⁹

Whether it is a question of setting-up processes for employment policy or social inclusion, the Commission seems to be omnipresent. This comment is intended to challenge the logic of the system that was supposed to be developed under the OMC, i.e. a network of different actors.

⁴⁷ These JIMs are available at

<http://europa.eu.int/comm/employment_social/soc-prot/soc-incl/jim_fr.html>.

⁴⁸ DG Employment, Social Affairs and Equal Opportunities, *Report on social inclusion in the 10 new Member States*, European Commission, OPOCE, February 2005, p. 193.

⁴⁹ Although 'the transition from the JIM Memoranda to the NAPs/inclusion has proved difficult for most of the 10 Member States', DG Employment, Social Affairs and Equal Opportunities, *op. cit* note 47 *supra*, p. 5.

B An Institutionalised Preparation, Which Confirms that the Initial Reticular Logic of the OMC is Weakening

a) A New Form of Institutional Equilibrium Theoretically Introduced by the OMC

In comparison with the Community method, the OMC introduces a new form of institutional equilibrium. The European Council appears as the central forum for decision-making in the establishment of the OMC, whilst the European Parliament seems to have been removed, or is even inexistent,⁵⁰ and the Commission plays a somewhat catalytic role acting more as 'a supporting agency than an institution which has a monopoly over the power of initiative'.⁵¹ Within the initial framework of the OMC, the European Council was indisputably conceived as the main institution as far as setting up the OMC were concerned. Moreover, this mission has been institutionalised since the Göteborg Council, which invested it with the task of checking up on the progress made in relation to the Union's economic and social modernisation strategy during the Council scheduled in Spring. Furthermore, this Spring Summit is preceded by the tripartite social summit,⁵² the purpose of which is to facilitate the rationalisation in relation to the participation of the social partners by associating them to the development of the employment policy and the BEPGs. Hence the European Council's role in relation to the OMC reveals clearly his increasing role within the institutional framework. In fact, 'Ever since the European Council has been invested with the powers to provide the necessary impetus for the development of the Union—and therefore the Community—the scope and significance of the Commission's power of initiative can no longer be appreciated in the same terms as it was under the original system'.⁵³ Given that it acts as a 'supreme organ of political cooperation',⁵⁴ the European Council appears initially to be well suited to the role of '*chef d'orchestre*' of the OMC.⁵⁵

b) A Progressive Return a More Dominant Role of the Commission

Within the framework of the OMC, the Commission is supposed to participate in the presentation and also in the elaboration of guidelines, as well as the organisation of exchanges of information about best practices, proposals for indicators, management and monitoring and peer review. Nevertheless, the preparation of the new Member States for the procedures of the OMC is a slow but quite clear process that tends to distort the institutional equilibrium underlying this method. Admittedly, the European Council was behind the launching of preparatory procedures, particularly in Göteborg

⁵⁰ Despite repeated requests for the conclusion of an institutional agreement that would allow for it to be associated with the OMC, see in particular, European Parliament Report on analysis of the open coordination procedure in the field of employment and social affairs and perspectives for the future, 30 April 2003, *op. cit.* PE 316.405.

⁵¹ P. Pochet, 'Subsidiarité, gouvernance et politique sociale', (2001) 1 *Revue belge de sécurité sociale*, pp. 125–140.

⁵² The formation of which was called upon by the social partners at the Laeken Summit, as well as by the Commission. See COM (2002) 341 final, 26 June 2002, 'The European Social Dialogue—a force for innovation and change'.

⁵³ P. Manin, 'La "méthode communautaire": changement et permanence', in V. Georges (ed.), *Mélanges en hommage à Guy Isaac* (Presses de l'Université des Sciences sociales de Toulouse, 2004), pp. 213–237, esp. pp. 222–225.

⁵⁴ D. Simon, *Le système juridique communautaire*, 3rd ed. (PUF, 2001), p. 217.

⁵⁵ S. Cafaro, 'La méthode ouverte de coordination, l'action communautaire et le rôle politique du Conseil européen', *Mélanges en hommage à Jean-Victor Louis*, vol. II (Éditions de l'ULB, 2003).

for social inclusion. Nonetheless, monitoring and implementation of the OMC is carried out by the Commission, which, in addition to acting as a coordination structure, appears to have become the guardian of OMC's ambition. As regards employment policy, the Commission was genuinely behind initiating cooperation in 1999, by defining the structure for JAPs, and to some extent, anticipating the conclusions of the Göteborg Council. As such, candidate countries were invited, taking into account particular situation, 'to translate the Union's economic and social and environmental objectives into their national policies'.⁵⁶ In October 2002, the Commission instigated bilateral action for the production of joint memoranda on social inclusion (JIM). The Commission still takes the initiative for cooperation with the new Member States as regards participation in OMC pensions.⁵⁷ The drawing-up of social inclusion memoranda by the Commission belongs to a logic of recommendations, as at times they contains proposals for specific reforms—as opposed to the spirit of coordination and setting-up different networked national policies. The decisive role played by the Commission in relation to the preparation of future members for the OMC also has to take account of developments in the OMC itself, as expressed in the White Paper on governance: this clearly shows an intent to limit the scope of application of the OMC by avoiding any diluting of the Community method; the Commission takes an active part in coordination, particularly as regards the dissemination of the information it produces.⁵⁸ The power that the Commission has created for itself is thus quite similar to its power of initiative under the Community method.

At this stage, two movements can be identified. The first relates to the effectiveness of the network logic within the context of the OMC. Although it was supposed to represent a form of 'network governance',⁵⁹ managing the OMC appears to come within a more institutional logic than a network one. This evolution seems logical given the increasing technicality of the method itself. The Commission's increasing role appears as a consequential development. It is linked with the role allocated for committees—the Employment Committee and the Social Protection Committee⁶⁰—which are associated in the preparation of joint reports and the definition of indicators. The current evolution tends to reinforce this, if, as the Commission desires; committees are set up to associate the social partners so that 'each area under the method of open coordination should form the subject of organised dialogue'.⁶¹ Once the institutional dimension—linked to the setting-up of monitoring structures, coupled at times to a recommendatory logic had been spread, the initial conception of an OMC that consists in organising a network to promote the development of common policies tends to be gradually eroded.

⁵⁶ Göteborg European Council, Presidency Conclusions, 15–16 June 2001, pt. 11.

⁵⁷ 'La méthode ouverte de coordination dans une Europe élargie: identification des enjeux', Seminar, *loc. cit.* note 37 *supra*.

⁵⁸ COM (2001) 428 final, European Governance—A White Paper, p. 26.

⁵⁹ C. de la Porte and P. Pochet, 'Supple Coordination at EU Level and the key actor's Involvement', in C. de la Porte, P. Pochet and Peter Lang (eds) *Building Social Europe through the Open Method of Coordination* (PIE Peter Lang, 2002) 27–68.

⁶⁰ On this topic, see J-Y. Hocquet, 'Le Comité de la protection sociale (CPS): une instance communautaire pour quoi faire?', (2005) 1 *Droit social* 91–96.

⁶¹ COM (2002) 341 final, *op. cit.* note 51 *supra*, p. 14.

III The Limits of a Mimetic Application of the OMC to the New Member States

The preparatory work revealed a certain number of specific elements both in relation to employment policy and social inclusion, which make difficult to merely transpose the current OMC framework to the new Member States. The question of participation has turned out to be a sensitive issue and the solution to it will have to be found in the long term.

A Identifying the Specific Challenges for the New Member States

Whereas the question of employment is indeed a complex issue for the fifteen Member States, increasing the rate of employment in particular is a pivotal issue for the new members. Moreover, it leads to the overlapping of two of the principal open methods, EES and social inclusion.

a) New Member States, New Labour Markets, New Challenges for the EES

The preparatory stage has allowed for actions to be identified that need to be activated to increase the rate of employment. However, it has also raised the issue of the inadequacies of the new Member States in transposing the new employment strategy.

The specific factors of the labour markets of the new members

These specific issues have come to light as a result of the assessment carried out by the Commission. Once the JAPs were handed in, the Commission presented the cooperation developed thus far in the area of employment, as a supporting document that summarised the changes made in each country.⁶² This initial analysis allowed for a number of workshops to be organised with a view to examining the state of development of employment policies, institutional frameworks and the administrative structures dedicated to the employment policies and the activities of the European Social Fund (ESF). These workshops gave rise to a further implementation⁶³ of the initial evaluation made at the beginning of 2003. As it related to the implementation of an employment strategy for the new Member States, four major targets were identified by the Commission: to increase the availability of manpower, to increase the rate of employment, to monitor the functions of the labour market and ensure that it supported the restructuring of the economy that was already under way, and to improve and adapt the qualifications of manpower in the context of restructuring the future pressures linked to the single market.

Several obstacles nevertheless stood in its way. First and foremost, the weakness of the 'active labour market policies' and 'preventive approaches'. According to the Commission, 'these elements play a critical role in supporting people's adjustment to structural changes'.⁶⁴ The policy of labour market activation, which is central to EES, does not seem always relevant in the new Member States, as we will see later. Moreover, the exclusion of ethnic minorities and handicapped person from the labour market has also

⁶² COM(2003) 37 final, 30 January 2003, 'Progress in implementing the Joint Assessment Papers on employment policies in candidate countries'.

⁶³ COM(2003) 663 final, 6 November 2003, 'Progress in implementing Joint Assessment Papers on employment policies in acceding countries'.

⁶⁴ *Ibid.*, p. 8.

been singled out by the Commission on several occasions. Lastly, questions relating to the promotion of equality of women and men, and the fight against informal work are still inadequately dealt with.⁶⁵ These difficulties have been taken into consideration in the proposals for recommendations transmitted by the Commission to the Council.⁶⁶ Indeed, mention should be made of the fact that the employment OMC differs from the other open coordination processes in that the Council has a legal competence⁶⁷ to address recommendations to each Member State in order to address specific indications for the reform of its employment policies. The Council recommendations, which belong to the normative typology of Article 249 EC are an ‘instrument that lays down rules inviting its addressees adopt or to follow a certain line of conduct, or proposing that they undertake certain action’.⁶⁸ In this sense, the employment OMC is subject to a higher degree of constraint as regards the political input of these recommendations. This logic of official indications has clearly found expression in recent proposals. In fact, it would seem that the setting up of an EES in a larger Europe will happen through the adoption of ‘strong’ recommendations—albeit they are from a normative point a view non-binding acts—thus moving further away from the simple introduction of better practices to the network. Recent proposals have confirmed this tendency: ‘most new Member States, together with the social partners, *need to* further develop their efforts to modernise their employment policies’, or ‘more efforts are needed to integrate the most vulnerable groups’ or again ‘serious efforts are *needed to* develop lifelong learning, and in particular to modernise education’.⁶⁹

Nevertheless, achieving the Lisbon objective as regards the rate of employment, which sets a target of 70% employment between now and 2010 (with the rate of female employment exceeding 60%) is remote. At the end of 2002, the rate of employment in the ten new Member States stood at 55.9%, with female employment standing at 50.2%. For the first fifteen Member States of the EU, current figures are already far behind the Lisbon objective, with the employment rate standing at 64.3%.⁷⁰ Such disparity between current figures and the target aimed for could have the effect of transforming the Lisbon objective into a pious vow, and as such jeopardise its credibility. From this perspective, a ‘vision renouvelée’ should perhaps be defined;⁷¹ the report of the high-level working group, which will be submitted in Spring 2005, will provide an answer to this if indeed it proves necessary.⁷²

Search for a better governance of the EES?

The question of governance of the EES is also being asked with acuteness. Assessments made by the Commission can surprise regarding the contrasts between the evaluations

⁶⁵ *Ibid.*, p. 7.

⁶⁶ COM (2004) 239 final, 7 April 2004, ‘Communication from the 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 of the Council on the implementation of the Member States’ employment policies’.

⁶⁷ Art 128(4) EC.

⁶⁸ L. Senden, *Soft Law in European Community Law* (Hart Publishing, 2004), p. 173.

⁶⁹ COM (2004) 239 final, *loc. cit.* note 65 *supra*, Annexe III, Priorities for the new Member States, pp. 28–36.

⁷⁰ *La situation sociale dans l’Union européenne en 2004*, European Commission, DG Employment, Social affairs and Equal Opportunities, OPOCE, 2004, p. 30.

⁷¹ According to the expression of the Economic and Social Committee, See Opinion of the Economic and Social Committee on ‘Lisbon—Renewing the Vision’, OJ C 61/24 14/3/2003.

⁷² The group has a website at: <http://www.europa.eu.int/comm/lisbon_strategy/group/index_fr.html>.

made, which do not produce an intelligible interpretation of the policies carried out. Through its numerous references to the amplitude of the administrative reforms taken, the Commission nonetheless emphasises the vagueness of the strategies presented by the new members:

Countries' employment objectives often lack precise and realistic objectives and targets, which have been recognised in the evaluation of EES as a crucial element in stimulating reforms . . . A Policy evaluation culture is still at its beginning and capacities need to be enhanced for this purpose both in the PES and the Ministries.⁷³

Good governance of the EES in the new Member States—but also in the first fifteen states—will lead to reforms. This will take place initially through the restructuring of employment services, which have been entrusted with an obligation to carry out active policies and agree on offer and demand in the labour market. In this respect, the establishment of the EES will lead indirectly to the diffusion of the principles set up by the Court of Justice in *Höfner*,⁷⁴ where the Court introduced a logic of efficiency in the functioning of employment services, as a criterion for the implementation of terms of Article 86(2) relating to services of general interest. Moreover, dynamics have to be developed, particularly between the central and regional authorities in relation to setting up the local dimension of the European employment strategy, which requires the involvement of local authorities in the development of national action plans.⁷⁵ Henceforth, given that they are already faced with diversified mobilisation and, to some extent, unequal levels of autonomy in relation to employment policies, the local dimension of the EES still has to be developed for the new Member States.

b) The Relative Autonomy of the Social Inclusion OMC

There is clearly some overlapping between the employment strategy and the fight against social exclusion. The two open methods are closely linked, and this is increasingly so in the new Member States. This consubstantial link is clearly evidenced in the social inclusion memoranda, or JIMs, which identify elements relating principally to the labour market amongst the causes of poverty. The poor employment rate, combined with long-term unemployment, or even further, the exclusion of certain groups from the labour market such as ethnic minorities or handicapped persons, are among the principal factors of social exclusion in the new Member States. Poverty flows principally from high rates of unemployment, and does not appear to be directly linked to the lack of professional training, or for that matter, the increasing numbers of single parent families.⁷⁶ Participation in the labour market has thus come to be regarded as a 'key challenge' for the majority of the Member States.⁷⁷ The Commission's observation is valid for most of them: Poland, Slovakia, Lithuania, Latvia, Hungary, Estonia and the Czech Republic. Only Cyprus, Slovenia and Malta are targeted by more specific measures for social inclusion measures, such as creating more social housing, modernising social protection policies and vocational training for under qualified workers.

Moreover, in the absence of any powers of recommendation, as in the ESS, recognised to the Council, the social inclusion OMC may appear as accessory. The global

⁷³ COM (2003) 663 final, *op. cit.* note 62 *supra*, p. 10.

⁷⁴ Case C-41/90 *Höfner et Elser* [1991] ECR I-1979.

⁷⁵ M. Jouen, 'La stratégie européenne pour l'emploi local' in Dehouse, *op. cit.* note 18 *supra*, pp. 75–97.

⁷⁶ Seminar, *loc. cit.* note 37 *supra*, at 16.

⁷⁷ SEC (2004) 848, Commission Staff Working Paper, 'Social Inclusion in the New Member States—a synthesis of the Joint Memoranda on Social Inclusion', p. 47.

objectives are wide-ranging and priority is given to the promotion of participation in employment and accession to resources (Objective 1). One part of the social inclusion OMC may thus be treated by the EES prism, as this overlapping also appears unequivocally in the Commission's evaluation document.⁷⁸ The style adopted by the preparatory documents in this respect is quite revelatory. It distances itself from the imperative style within the report on employment policies, and therefore its social inclusion assessment focuses more on a description of causes of poverty in the new Member States and identifying the key issues.⁷⁹ Although it currently focuses on peer reviews that identify the best social inclusion policies in the first fifteen Member States, this logic runs the risk of maintaining disparity with a more 'binding' logic as in the EES. As previously, the possibility of making recommendations through the Council could be envisaged. However, the procedural processes that characterise the OMC are gradually being disseminated in the new Member States at an administrative level. But, the question of the participation of private and social partners remains open.

B Is OMC so Open in the New Member States?

a) The OMC, an Instrument that is Theoretically Based on the Participation of the Social and Civil Partners

The OMC is generally presented as a participatory instrument⁸⁰ that allows the main actors to be associated with one another: these may be domestic authorities for the local aspect of employment policy, social partners and NGOs involved in the fight against poverty.⁸¹ According to certain observers, this participation should favour the renewal of a less hierarchical form of governance within the EU, which would validate several theories relating to democratic experimentalism.⁸² Prior to the enlargement of the Community, this participatory aspect was already considered to be weak. In a 2002 Communication calling for greater participation, the Commission emphasised that

the social partners are called upon to adjust their various practices—concertation, independent social dialogue, their involvement in the different processes of the open coordination method (employment, inclusion, social protection)—and to improve the implementation and monitoring of their results with the aim of improving the efficiency and raising the profile of their contribution to the Lisbon strategy.⁸³

Whilst it was problematic for the 15 Member States, the participation of the new Members has continued to remain the weak point in NAPs and JIMs, with the exception of Hungary and Slovenia.⁸⁴

⁷⁸ *Ibid.*, esp. 16 to 21.

⁷⁹ There are eight of them: increasing labour market participation, improving education and lifelong learning, reforming social protection systems, access to health and social services, decent housing, promotion and integration of ethnic minorities, family support and mobilising all actors.

⁸⁰ C. de la Porte and P. Nanz, 'The OMC—a deliberative democratic mode of governance? The cases of employment and pensions', (2004) 11 *Journal of European Public Policy* 2, pp. 267–288; in this stimulating contribution the authors put in relief the distance between the reality of the participation, i.e. the reality of the so-called 'open' dimension of the OMC and the initial discourses and theoretical background that considered that OMC was too often a form of 'democratic experimentalism'.

⁸¹ Structured around the *European Anti Poverty Network*, see <<http://www.eapn.org>>.

⁸² The starting point for the so-called democratic experimentalism is that, from a multi-governance perspective, the authority departs from a hierarchical use of power by relying on the network concept and discussion that focuses on collective learning.

⁸³ COM (2002), 341 final, 26 June 2002, 'The European social dialogue, a force for innovation and change'.

⁸⁴ SEC (2003) 848, p. 39.

However, calls for participation and involvement of the social partners from the new States do not miss. They relate unequivocally to assessments made concerning the implementation of the employment strategy: 'Social partners have a key role to play in ensuring good governance and are explicitly invited to play their part in the effective implementation of the new EGLs'.⁸⁵ Yet the Commission itself acknowledges that these exhortations, as such, are in stark contrast with actual participation, which remains very weak:

While governments are generally favourable to a stronger involvement of the social partners, it is not certain that the latter always grasp their role and responsibilities for employment policies to the fullest extent possible. While progress is being made in strengthening social partners' capacities there is still a long way to go until social dialogue becomes a reality at all levels.⁸⁶

b) A Weak Participation of the Social Partners in the New Member States

Given that from the outset participation was perceived as an objective that would be difficult to attain, this seems to have further contributed to the risk of its becoming so. A certain number of structural difficulties have stood in the way of participation. Whereas the legitimacy of the trade unions in the new Member States is sometimes weak, numerous investigations concur and emphasise that few employers' federations exist and in any case they are rarely institutionalised.⁸⁷ This inadequacy is also illustrated by the recent Report on the future of social policy in an enlarged Europe.⁸⁸ Moreover, the proportion of workers covered by collective agreements is very low because more often than not sector agreements quite simply do not exist. Lastly, the place set aside for sectoral social dialogue is particularly minimal.⁸⁹

Developments towards a greater structuring of social dialogue in the new Member States seem to have been more a result of the transposition of social directives rather than the participation in the preparatory stages for the OMC.⁹⁰ For instance, the transposition of the Directive on European Works Council⁹¹ allowed for the bases of social dialogue to be strengthened in large corporations. The establishment of such Councils allows employees of multinationals in the new Member States to be involved in organisational changes affecting their undertakings. In future, they will also allow for the

⁸⁵ COM (2003) 663 final, Progress in implementing the Joint Assessment Papers on employment policies in acceding countries, p. 9. Moreover, the reality of participation contrasts with the Commission's aim of extending the scope of application of the sectors mobilising the intervention of the social partners. In its Communication on the future of the European employment strategy (COM (2003) 6 final, 14 January 2003), the Commission invited the social partners to intervene in quite varied areas such as restructuring, active ageing, human resources, education and lifelong learning, the organisation of work and the balance between flexibility and security, the reduction of disparities amongst salaries, and the fight against forms of discrimination.

⁸⁶ COM (2003) 663 final, p. 11.

⁸⁷ M. Celin, 'European employment strategy: the right answer for candidate countries?', (2003) 9 *Transfer* 1 pp. 88–100.

⁸⁸ Report of the High Level Group on the future of social policy in an enlarged European Union, Report for the Employment and Social Affairs DG, May 2004, p. 15.

⁸⁹ M. Lado and D. Vaughan-Whitehead, 'Social dialogue in candidate countries: what for?' (2003) 9 *Transfer* 1, pp. 64–87.

⁹⁰ H. Kohl and H. W. Platzer, 'Labor relations in central and eastern Europe and the European social model', (2003) 9 *Transfer* 1, pp. 11–30, esp. p. 26.

⁹¹ Directive 94/45 of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 254 30/9/1994.

creation of places used for promotion of corporate social responsibility. Moreover, a broad interpretation of the obligation to exchange information under the auspices of the Works Council⁹² will have the effect of setting up a framework for dialogue in companies that belong to multinational groups implanted in the new Member States, despite the fact that its head office is situated outside the EU itself. Coupled with the initial text of the directive, this far-reaching case-law development will thus favour the emergence of social dialogue, at least in large corporations. A further contribution introduced by another binding text establishing a general framework for informing and consulting employees, constitute the actual reforms introduced to the new Member States, by imposing a binding obligation on each Member State to create a general framework for the exchange of information and a proper, effective and permanent consultation procedure for employees.⁹³ From a long-term perspective, these texts will contribute to the growth of social dialogue—particularly in companies and on a sectoral basis—in the new Member States. In this way, the establishment of a culture of institutionalised social dialogue will perhaps lead to an increase in participation in the OMC process, which is currently lacking. *Hard law*, which is too often dismissed, would entail more concrete results in this respect than a process that brings about little mobilisation, despite the fact that its purpose is to favour the participation of its main actors.

IV Some Prospects for the OMC in an Enlarged Europe

Whereas the overall structure of the OMC seems to be adapted to the arrival of the ten new Member States given its flexibility, certain aspects of it, even some of the most important ones, could benefit from minor changes. A degree of clarification is required both in relation to the objectives of the different forms of OMC and the participation of private and social partners. The classification of different OMCs should give more space to the actual contexts of the new members. Moreover, current uncertainty relating to the legal bases of the OMC jeopardise its true significance in the context of an enlarged Europe, particularly in the absence of any simplification of its terms in the draft Constitution.

A Effectiveness Subordinated to the Need for Clarification

The effective implementation of the OMC in an enlarged Europe presupposes, in the light of the considerations made during the preparations for the new Member States, the adaptation of its objectives and its indicators, whilst at the same time ensuring a great degree of appropriation of its method.

a) Adaptation of Objectives and Indicators

Within the framework of the EES, certain elements concerning the labour market in the new Member States do not fall within the remit of its guidelines. In fact, the markets of the new members are far more flexible than those of the first fifteen states. The models calculated on the basis of the rate of employment protection, which include elements such as social legislation, protection against dismissal, the place of precari-

⁹² Case C-440/00 *Kühne & Nagel* [2004] OJ C 47 21/02/04, p. 1.

⁹³ Directive 2002/14/EC, establishing a general framework for informing and consulting employees in the European Community, OJ L 80 23/11/2002.

ous contracts in the overall employment offer, indicate that protection may move from simple to multiple forms.⁹⁴ On the other hand, labour mobility is still considerably less. There are therefore a number of specific characteristics compared with the labour markets of the first fifteen states: rather low rates of employment (between 40 and 50%), greater variation in rates of unemployment (5–20%), higher rates of long-term unemployment (particularly in the case of ethnic minorities), more place for an informal economy and more flexible labour market.

As such, taking account of the specific characteristics and the inadequacies singled out by the Commission's assessment reports, there is cause for questioning the very validity of certain objectives.⁹⁵ Admittedly, the question of increasing the rate of employment, which is at the heart of the EES, remains an imperative for the new Member States. However, this has to be coupled with objectives that relate, for example, to increasing remuneration at work. On the contrary, research into the dissemination of activation policies for the labour market, which genuinely create paradigms in the EES, and are therefore more questionable. The so-called active employment policies afford a privileged status to instruments that favour a return to the labour market (particularly by offering employment grants), and they are therefore opposed to the so-called passive policies that are based on the logic of providing indemnities to the unemployed. Under the combined effects of a growing suspicion vis-à-vis welfare states and the increase of unemployment despite indemnity policies, these active policies are now regarded as the '*deus ex machina that will provide the solution to the unemployment problem*'.⁹⁶ Nevertheless, there is nothing to indicate that those policies are relevant in the new Member States. In fact, the low rates of unemployment benefit—which in many cases remain lower than the subsistence level and are paid on a very short-term basis—minimise the existence of inactivity traps. The setting-up of activation mechanisms is important for labour markets that are characterised by a degree of institutional rigidity—poorly functioning employment services, a level of unemployment benefits that is almost equal to remuneration at work and rigidity relating to information. Activation policies can only be efficient if coupled to forms of positive assistance, and this approach should be promoted in the new Member States.

In relation to the social inclusion OMC, several questions also have to be raised concerning the adaptation of indicators and certain objectives. During the workshops involving the accession states and the Commission, the states emphasised the fact that several objectives were not very feasible. This was particularly the case in relation to ensuring that decent lodgings would be granted to everyone by 2010.⁹⁷ More appropriate indicators also need to be adopted. The measures adopted in Laeken do not seem suited to taking account of conditions of extreme poverty as they only consider the relative risk of poverty, which is defined in relation to the general level of prosperity of each country and expressed using a centralised value for income distribution. On a more general level, and insofar as there is scope for the development of social

⁹⁴ R. Eamets, E. Kallaste, J. Masso and M. Room, 'How flexible are labour markets in the CEECs? A macro level approach', (2003) 9 *Transfer* pp. 101–121.

⁹⁵ B. Galgoczi, 'The implementation of the EES in the context of accession and candidate countries', in B. Galgoczi, C. Lafoucriere and L. Magnusson, (eds) *The enlargement of social Europe—The role of social partners in the European Employment Strategy* (European Trade Union Institute, 2004), pp. 77–94, esp. pp. 80–91.

⁹⁶ L. Calmfors, *Active labour market policy and unemployment: a framework for the analysis of crucial design features*, OECD Labour market and social policy occasional paper (OECD, 1994), p. 2.

⁹⁷ Seminar *loc. cit.* note 37 *supra*, p. 17.

inclusion OMCs, from 2006, through proposals for a framework for the integration of pensions and healthcare, a certain number of specific indicators will be envisaged. Research into the convergence of these areas, where the national policies of the 25 Member States are characterised by their extreme diversity from one another, reveals that there will undoubtedly be difficulties in achieving consensus on these indicators.

b) A Gentle Appropriation of the OMC Mechanism

Although it may allow for the establishment of a centralised framework, the Commission's predominant role in preparing the new Member States for the OMC rather tends to distort the ambitions nurtured by the founders of this instrument. Whereas the national actions plans are supposed to represent a skilful way of presenting the specific characteristics of national policies—in relation to employment or the fight against social exclusion—and the way they are developed at present or in future in the light of European objectives, the participation of new states in the current processes runs the risk of simply importing existing models to their respective systems. As the Commission has conceded in a somewhat guarded manner, and a number of commentators have commented more openly, the drafting of Memoranda by the new Member States relating to employment policy and also social inclusion, present the image of a skilful reporting exercise for different national policies by trying to agency them into becoming a presentation that fits the scheme of things defined by the guidelines.⁹⁸ This often falls short of the initial objective ascribed to the action plans that would have allowed for the identification of national policy choices, and which would have thus contained an added value.⁹⁹ The issue of importing models in order to reform employment policy needs to be debated openly. In fact, the objectives, particularly those contained in the employment OMC, are not at all neutral. Hence, the objectives laid down by the employment guidelines—full employment, improving the quality of work and productivity, strengthening social cohesion and insertion—are the vehicles of a benevolent neutrality thanks to their rather orthodox character. The guidelines on employment reflect the political options of the New Labour;¹⁰⁰ they were born in a specific context, and as such, they are not necessarily adapted to the macro-economic reality of the new accession countries.

B The Imperfect Legal Bases Leading to a Defective Readability of the Method in an Enlarged Europe

Whilst it is true to say that the OMC's effectiveness in the new countries continues to be conditioned by the need to clarify a certain number of points relating to its objectives, its legal bases also need to be determined in a precise manner. The incomplete explanation provided by the constitutional treaty will not favour its readability of the increasing recourse to this *soft law* tool.

⁹⁸ B. Galgoczi, 'The implementation of the EES in the context of accession and candidate countries', *op. cit.* note 94 *supra*.

⁹⁹ Report of the High Level Group on the future of social policy in an enlarged European Union, Report for the Employment and Social Affairs DG; May 2004, p. 86.

¹⁰⁰ J. Kenner, 'The EC employment title and the Third Way: Making Soft Law work', (1999) 15 *The International Journal of Comparative Labour Law and Industrial Relations* 1, pp. 33–60.

a) *The Incomplete Explanation of the OMC's Legal Bases*

At present, the OMC relies on an incomplete legal basis contained in the treaties. Title VIII describes the employment strategy, without actually using the term OMC, and within the framework of social policy, Article 137 foresees that the Council may adopt measures to encourage cooperation between States within the context of exchanging good practices; again without making any specific reference to the OMC. Neither the scope nor the mode of application of the mechanism has been clearly stated in the treaty. More specifically, there is no clear legal basis for the establishment of a broad social protection OMC, comprising social inclusion, pensions and healthcare, which, according to the Commission, will take effect from 2006.¹⁰¹ The work of the Convention put in relief several options aiming at constitutionalising the OMC. The Working Group on Social Europe asked for a horizontal provision to be inserted into the constitutional treaty defining the OMC and its procedure, and proposing its scope of application *a contrario*: accordingly, the OMC would neither apply in areas where sectoral coordination already exists (such as in the area of economic or employment policy) nor in areas in which the Union already has legislative powers.¹⁰² Consensus for this proposal has nevertheless been difficult to obtain, which also explains why it has not been very innovative.¹⁰³ However, neither this provision nor other work aiming at constitutionalising the OMC¹⁰⁴ has been successfully brought about its inclusion in the draft constitutional treaty. The inadequacies of this text are twofold. First, its formulation remains imprecise. The provision contains a standard formula:

The Commission may, in close contact with the Member States, take any useful initiative to provide such coordination, in particular initiative aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.¹⁰⁵

which, despite the fact that it refers clearly to the different procedural stages for the OMC, fails to name it as such. This formula is excluded from the framework intended for employment policy, which, as in the case of the current treaty, has a specific section dedicated to it.¹⁰⁶ Moreover, the precise scope of application of the OMC is still unclear. It is envisaged both for social policy¹⁰⁷ and research,¹⁰⁸ which are areas in which competence are shared, but also in cases where the EU has a complementary or supporting competence. Hence, the text departs from the solemn terms couched by the White Paper, which exclude recourse to the OMC whenever the Community method can be

¹⁰¹ COM (2003) 261 final, 27 May 2003, 'Strengthening the social dimension of the Lisbon strategy: Streamlining open coordination in the field of social protection'.

¹⁰² Final Report of Working Group XI 'Social Europe', pp. 17–20.

¹⁰³ S. Sciarra, 'La constitutionalisation de l'Europe sociale, entre droits sociaux fondamentaux et *soft law*', in O. de Schutter and P. Nihoul (eds), *Une Constitution pour l'Europe: Réflexions sur les transformations du droit de l'Union européenne* (Larcier, 2004), pp. 171–94, esp. pp. 180–194.

¹⁰⁴ G. de Burca and J. Zeitlin, 'Constitutionalising the OMC—What should the Convention propose?', *CEPS Policy brief*, 31, March 2003, available at <<http://www.ceps.be>>.

¹⁰⁵ This formula was introduced in Article III-213.

¹⁰⁶ Art III-203 to III-208 relating to a coordinated employment strategy.

¹⁰⁷ Art III-213, refers to seven areas that could be subject to OMC: employment (which amounts to a repetition of the title on employment), labour law and working conditions, basic and advanced vocational training, social security, prevention of occupational accidents and illnesses, occupational hygiene, the right of association and collective bargaining between employers and workers. The OMC could apply 'in particular' to these areas, so it could be concluded that this is intended as an exhaustive list of areas which are or could be subject to OMC procedures.

¹⁰⁸ Art III-250.

relied on. Moreover, given that these are complementary competences, the criteria for recourse to the OMC have hardly been formulated with consummate clarity. Article I-17 refers to the possibility of carrying out coordination activities in the five areas relating to this category of competence,¹⁰⁹ but the standard formula mentioned above, which refers to the application of the OMC, only applies to two areas of competence, health¹¹⁰ and industrial policy.¹¹¹ Although the draft constitutional text timidly offers some clarification on this issue, a number of issues are still left open to conjecture. The text proposed only feebly echoes the proposals advanced by the European Parliament, which offered the most articulate clarification to date of the OMC, clearly dividing it into four stages: setting common objectives, guidelines and indicators, presenting a summary report and developing recommendations that also include a report by the Parliament.¹¹²

b) Soft Law and Hard Law: the Need for Complementariness between the OMC and the Community Method

The increasing dissemination of the OMC indicates that this instrument will indeed develop into a comprehensive form of governance, provided of course that the expression is accorded its true meaning. Its transitional character, which would have been relied upon at the time of its establishment, seems to be yielding ground to his insertion in the European legal system. Literature on the OMC generally wavers between excessive enthusiasm and doubts. Accordingly, most authors feel that it signifies the emergence of a new form of governance,¹¹³ certain even see it as ‘a new concept of deepening integration’¹¹⁴ in a number of areas, such as education, for example. As was emphasised at the start of this paper, the open method is encountering a period that is marked by the increasing use of *soft law* tools. As such, the direction taken is paradoxical. The legal basis of OMC in an enlarged Europe is considerably weaker, but the processes created by the method lead to constraints upon the states themselves: these may be procedural constraints—linked to the repetitive and reiterated system of peer review—political constraints that allow national governments to ‘to use European constraints as leverage with which to ensure that draft reforms are pushed through.’¹¹⁵ Moreover, within the framework of the employment OMC, recommendations addressed by the Council to the states go beyond the simple logic of procedural constraints. Even if those recommendations have no legal binding effect, they bring a moral obligation to be taken into account, in relation with Article 10 EC, which refers to the obligation for the Member States of an administrative cooperation; this article has been interpreted by the Court of Justice as creating officially a duty of loyal cooperation.

¹⁰⁹ These areas of supporting, coordinating or complementary action are: protection and improvement of human health; industry; culture; tourism; education, youth, sport and vocational training; civil protection; administrative cooperation.

¹¹⁰ Art III-278 §2, this unites the recently launched OMC with public health.

¹¹¹ Art III-279 §2, this unites and slightly strengthens the OMC’s position in relation to industrial policy, which at present is conceived as ‘soft’ benchmarking.

¹¹² PE 316.405, *op. cit.*, pp. 7 and 8.

¹¹³ Amongst the ample but somewhat repetitive literature, see B. Eberlein and D. Kerwer, ‘New governance in the European Union: a theoretical perspective’, (2004) 42 JCMS 1, 2004, pp. 121–142, esp. pp. 123–127.

¹¹⁴ R. Kaiser and H. Prange, ‘A new concept of deepening European integration? The European research area and the emerging role of policy coordination in a multi level governance system’, (2002) 6 *European integration online Papers* 18.

¹¹⁵ R. Dehousse, ‘Du bon usage de la méthode ouverte de coordination’, in Dehousse, *op. cit* note 18 *supra*.

Its actual effects may be brought about by the OMC, despite its theoretically non-binding character. As such, regardless of this observation, the appropriation of the method—in both the initial fifteen Member States and the accession States—remains weak; ‘The majority of OMC’s have to find their bearings, their internal coherency and their acceptance through national political channels’.¹¹⁶ Apart from the need for its appropriation, shaping the new Europe requires analysis into the degree of complementarity of the OMC with the Community method. Research into the convergence of national policies in sensitive areas has illustrated that rhetoric and exchanges of information about good practices will not be sufficient, especially in situations where there is little participation of the actors involved and, not to mention the slow apprenticeship in the mechanism of the OMC, whether this relates to the initial fifteen or twenty-five States. One solution, suggested by Scharpf, could be to combine framework directives with the OMC.¹¹⁷ This option would be based on the adoption of directives laying down general objectives, for example in social affairs, which would mean that a binding framework could be defined for the whole of the EU. Admittedly, taking account of the general nature of such objectives, the opportunities for calling for directives would be rather limited. The OMC, on the other hand, would allow for specific actions to be taken to transpose the framework directive for certain groups of states: hence, it would move towards a form of transposition that is capable of taking account of the specific contexts of a whole group of Member States. Bold as it may seem, this proposal may run the risk of being blocked by the Council given the sensitivity of the issue of adopting directives, even if they are general in nature, in a number of areas such as employment and social protection.¹¹⁸ Nonetheless, it is certainly worthwhile stimulating debate about this question. This is necessary if we are to develop a ‘renewed’ Community method using the open method subsequent to the White Paper, which, in the context of its increasing application, has to be adapted to the enlarged Europe. It remains to be seen however, how such an instrument would be developed—through a framework directive associated with a specific OMC—in relation to the provisions on strengthened cooperation that have been included in the draft constitutional treaty.¹¹⁹ In all probability, setting up instruments such as those suggested by Scharpf would strengthen original forms of cooperation if the OMCs associated with framework directives on social matters were also to contain certain specific elements linked to the levels defined for employment policies or social protection.

V Conclusion

The enlargement of the EU is a major challenge for the OMC. In fact, it will inevitably hinge on the current inadequacies of this instrument and defining the best way of adapting it to the new Member States. It goes without saying that debate surrounding the OMC—flexibility, its participatory dimension, and the adaptability of its

¹¹⁶ J. Goetschy, ‘L’apport de la méthode ouverte de coordination à l’intégration européenne—Des fondements au bilan’, in P. Magnetier (ed.), *La Grande Europe*, (ULB editions, 2004) pp. 141–166, esp. p. 164.

¹¹⁷ F. W. Scharpf, ‘The European Social Model: Coping with the challenges of diversity’, *op. cit.* note 22 *supra*.

¹¹⁸ M. Telo, ‘Strengths and deficits of the Open Method of Coordination: a Comment on Scharpf’, *Integration in an expanding European Union—Reassessing the fundamentals* (Blackwell Publishing, 2003), esp. pp. 135–139.

¹¹⁹ Art 43, Ch. III, Part I of the Draft Treaty establishing a Constitution for Europe.

processes—certainly reveals its limits. The independence of the OMC as a new and distinct form of regulation remains to be seen. The participation of the new accession states in its processes, which have been largely steered by the Commission, tends to suggest a somewhat institutional approach towards the method, which is far from the network logic presented as a consubstantial dimension of the OMC itself. The current shortcomings of the OMC therefore raise the question of how it will develop in relation to the Community method. In contrast to what has all too often been claimed by certain academic circles, the Community method still has a future; indeed, it is even a necessity for an enlarged Europe if we intend to construct a Europe where the European judge has a prominent role, given that the Community can chiefly use law to achieve, sometimes against Member States' willpower, a novel project of integration.¹²⁰ It is therefore a question of reflecting without dogmatism on the complementariness of the Community method with the instruments inspired by the doctrine of new governance, as for example, the OMC.

¹²⁰ R. Mehdi, 'La "double hiérarchie" normative à l'épreuve du projet de traité établissant une Constitution pour l'Europe', *Les dynamiques du droit européen en début de siècle, Mélanges en l'honneur de J. C. Gautron* (Pedone, 2004), pp. 443–462.

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