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What are the Implications of OMC for the EU’s Evolving Political Structure?

I. Where Does OMC Fit in the EU’s Evolving Political Structure?

A. The OMC as a Governance Instrument of Choice for EU Policymaking

1. The first point I would like to emphasize is the growing centrality of OMC to EU policymaking. Because the OMC encourages convergence of national objectives, performance and policy approaches rather than specific institutions, rules and programs, this method is particularly well suited to identifying and advancing the common concerns and interests of the Member States while simultaneously respecting their autonomy and diversity. By committing the Member States to share information, compare themselves to one another, and reassess current policies against their relative performance, the OMC is also proving to be a valuable tool for promoting deliberative problem solving and experimental learning across the EU. Hence this method has rapidly become the governance instrument of choice for EU policymaking 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. This can be seen in the rapid spread of OMC (in a variety of different procedural forms) across a wide range of policy domains since the 2000 Lisbon Summit (as discussed in previous sessions). Even when the EU has not explicitly created new OMC processes, it continues to reach instinctively for key elements of the OMC like benchmarking,

comparison of national systems, mutual surveillance, peer review, and exchange of good practices to tackle pressing common challenges. Examples of this tendency can be found in recent developments in policy domains as different from one another as health care and the fight against terrorism.

B. OMC as a Component of an Emergent Experimental Governance System

1. A second point that I would like to emphasize is the complementary rather than competitive relationship between the OMC and the classical Community Method of EU decision making. In more and more policy areas, such as hazardous waste or occupational health and safety, hard-law directives increasingly tend to incorporate provisions for completion and periodic revision of standard-setting through soft-law OMC-type procedures. In other cases, such as the regulation of “atypical” forms of employment, there is, as Claire Kilpatrick and others have observed, an “integral continuity” between the legally binding norms embodied in EU framework directives (sometimes themselves the product of social dialogue agreements) and the “soft” commitments of the EES guidelines. In most OMC processes, finally, 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 programs and practices pursued by the Member States on the other.
2. Hence, as Chuck Sabel and I argue in our paper, the OMC can be seen as one element in a larger emergent system of experimental governance within the EU (including framework directives, comitology, networked agencies, and procedural guarantees of transparency), which blurs the distinction between hard and soft law. At a deeper level still, the Community Method can be itself interpreted along the lines suggested by Paul Magnette and others as a deliberative agenda-setting mechanism

through which the EU, despite its diversity, provides for public- or other-regarding decisions, thereby inducing Member States to relax their sovereign veto powers. Interpreted in this way, we further argue, the EU's emergent system of experimental governance, with the OMC at its center, amounts to a re-elaboration and renewal rather than a replacement of the Community Method.

C. Why Is the OMC So Controversial?

1. If all this is true, or even plausibly so, then why is the OMC so controversial? I want to leave aside for the moment criticisms of the lack of openness and broad participation in OMC processes. Not because these considerations are unimportant – on the contrary, they are crucial to both the legitimacy and the effectiveness of the OMC, as my co-authors and I contend in the background papers circulated for this workshop. But rather because OMC procedures for ensuring full and open participation can be reformed – and to a considerable extent are being so reformed in the case of the EES – by applying to them the same techniques of benchmarking and peer review that inform substantive policy judgements.
2. More fundamental in arousing controversy, as Gráinne de Búrca argues in her paper on “The Constitutional Challenge of the New Governance” presented here a couple of months ago, is the way OMC cuts across deeply entrenched conceptions of the EU's constitutional order, based on a clear distinction between intergovernmentalism and supranationalism, on legally binding divisions of competences and powers between the EU and the Member States, and on an insistence on representative government institutions as the key to legitimacy. Like the opposition between hard and soft law discussed earlier, the OMC blurs these canonical distinctions by integrating a wider array of stakeholders into what Gráinne calls “a highly reflexive and pragmatic form of governance entailing the expansion of EU activity into virtually all

policy fields, [and] a profound degree of mixity in terms of the sharing of competence between levels and sites of decision-making....”

3. Not only does the OMC thus call into question powerful received views of EU constitutionalism (even if the classic Community Method itself is often described as a form of “mixed government”), but it also challenges each of the major actors to redefine their role within the Union’s decision-making process. Thus the Commission is pushed to rely less on its exclusive right of legislative initiative and to develop new agenda-setting capabilities based on its key position in orchestrating and supporting OMC processes (as DG EMPL has done very successfully). OMC likewise trenches on the European Parliament’s aspirations to operate as a fully sovereign co-legislator, while (potentially) opening up new deliberative and monitoring roles in EU governance (which have already begun to emerge in the case EES, where the Treaty gives the EP a right to be consulted). Through OMC, Member State governments gain the assistance of their peers in dealing with their most intractable problems, but only at the cost of exposing sensitive domestic policy fields to European scrutiny and potential criticism. By integrating policymaking across different domains and levels of governance, the OMC likewise upsets constitutionally established divisions of competence between national governments and regional authorities like the German Länder, while at the same time creating new opportunities for mutual learning about the latter’s core tasks such as social inclusion or education. Even in the case of European trade unions, OMC presses them to develop unfamiliar roles beyond conventional collective bargaining and political lobbying in agreeing joint objectives with employers and following up their implementation at national and local levels (as is already occurring in areas like teleworking and lifelong learning).

II. OMC, Social Europe, and the Convention

A. OMC and the Stalemate over Social Europe

1. Discussion of constitutionalizing the OMC has been closely bound up with the broader debate on Social Europe at the Convention. This debate quickly stalemated in a way that reflected the limits of the traditional agendas of right and left at European level. The right tried to prevent the Convention from discussing Social Europe altogether, while resisting any increase in the Union's competences and powers in the social field. 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 QMV to all areas of social and employment policy. Neither side could achieve its goals. The right could not prevent the creation of a Social Europe Working Group in response to insistence by a broad front of Socialists and Christian Democrats in the Convention plenary that Europe must be more than a market, and that the draft constitutional treaty must therefore make explicit reference to the EU's social dimension.
2. But the Working Group's deliberations quickly revealed the lack of broad support even within its own ranks for the left's historic program. Thus Nordic Social Democrats and British New Labourites joined hands with conservative liberals and Christian Democrats to oppose granting new competences or stronger legislative powers to the EU in sensitive policy areas like social security bearing directly on the core functions of national welfare states.

B. New Compromise or Anti-Climax?

1. So what next? There are two major possibilities. The first and most likely is 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 be to constitutionalize the emergent system of experimental governance in a way that redefines the Community Method's compromise between

deliberative decision making and relaxation of veto powers. This new compromise would have two elements. The first would be a substantial strengthening within the draft constitutional treaty of references to the Union's social values and objectives, which would place them on an equal footing with its economic goals. The second would be 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 objectives.

2. The Convention has already made significant progress towards the first element of this compromise, even if it not yet clear precisely what form this strengthening of the EU's social objectives will take. 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 Treaty. Many of its members also supported the inclusion of a broad 'horizontal' or 'mainstreaming' clause, which would oblige the Union to integrate the promotion of these social values and objectives into all its activities. The Presidium, by contrast, proposed a much shorter and less expansive list of social values and objectives, in line with its general strategy of keeping the opening "constitutional" section of the revised Treaty to the barest essentials. But even the Presidium's draft, which is likely to be heavily amended, would go a long way towards achieving a new parity between the EU's social and economic goals. And this probable strengthening of the Union's social values and objectives will be further reinforced by the almost certain incorporation into the draft constitutional treaty of the Charter of Fundamental Rights.
3. The other key element of the emergent compromise would be the anchoring in the draft constitutional treaty of the OMC as an instrument for enabling the Union and its Member States to take effective joint action in advancing their common social values and objectives. Yet here

the outcome appears much less certain. The Social Europe Working Group endorsed the inclusion of the OMC in the draft constitutional treaty (as did three other Groups which considered the question), provided that, as one summary 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”. These provisos reflected in turn symmetrical fears among 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 certain members of the Group and of the Convention more broadly (including government representatives from some key Member States) remained skeptical about the incorporation of the OMC into the draft constitutional treaty. The majority of the Group insisted on specifying the scope and limits of the method, as well as the roles of different actors in the procedure, in ways that might threaten its practical viability if enacted.

4. Here too, however, the contours of a potential solution are not difficult to imagine. The Social Europe Working Group itself proposed to define only the fundamental aims and basic elements of the OMC in a generic provision of the Constitutional Treaty. The precise nature of its procedures could then be worked out experimentally to suit the different issue areas concerned, rather than being specified in detail in the Constitutional Treaty (apart from the existing treaty-based coordination processes in economic and employment policy). In the spirit of flexibility, however, such a generic provision for constitutionalizing the OMC would not seek to prescribe in detail the respective roles of particular actors in its procedures. A better way of ensuring the “transparency and democratic character” of the OMC, which the Social Europe Group rightly deemed necessary, as Gráinne de Búrca and I argue in our CEPS Policy Brief, would be to include within the generic

provision of the Constitutional Treaty explicit requirements for transparency and broad participation in all OMC processes.

5. For the moment, however, it remains unclear whether the OMC will be incorporated into the draft constitutional treaty at all, or whether it will instead be blocked by an unholy alliance within the Convention between defenders of the Member States' prerogatives against further intrusions by the EU on the one hand and those who fear dilution of the "hard" *acquis communautaire* by soft law processes on the other. What difference, if any, would non-inclusion make to the future of the OMC? The answer is surprisingly hard to determine. 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 Broad Economic Policy Guidelines. 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 even where Member States remain reluctant to acknowledge the Europeanization of sensitive domestic policy areas by creating formal new OMC processes, they increasingly make use of closely related procedures in addressing urgent common problems, as in the cases of health care and the fight against terrorism mentioned earlier. The apparently staid Community Method has almost always run ahead not just of constitution making but also of constitutional theory in the EU. Whatever the Convention may ultimately decide, there is little reason to think that the future will be different from the past in this regard.