

# **The Open Method of Co-ordination and Fundamental Rights: A Critical Appraisal**

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## **Introduction**

The open method of co-operation (OMC) refers to a mode of EU governance intended to stimulate Member States to reflect upon their domestic policies in light of common EU objectives and indicators and to open up domestic policy performance to processes of review by EU institutions (the Commission and the Council); by other Member States; and potentially by civil society actors more generally. This process may or may not be accompanied by EU level targets or benchmarks whose function is to set a level of policy performance to which individual states, or the states collectively, should aspire. Key to the OMC is the absence of a transfer of policy competence to the EU: rather, policy-making remains with the Member States albeit within a framework of European co-ordination. EU-wide co-ordination in the realms of economic and employment policies is given specific expression in the EC Treaty. However, following the Lisbon European Council meeting, OMC emerged as a generaliseable technique of governance capable of being applied to take forward

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commitments and tasks contained within the Treaties and more especially where the scope for the adoption of binding harmonised rules was either legally limited or inappropriate. OMC has been applied to the co-ordination of social inclusion, pensions, education, research, enterprise and innovation policies. The aim of this paper is to consider the possibilities for, and limitations of, using OMC to advance fundamental rights in the European Union.

Using OMC as a means of positively enhancing fundamental rights protection combines a ‘new governance’ instrument with more traditional lawyerly concerns with the protection of rights. It holds open the promise of moving beyond the idea that fundamental rights are limited to the domain of courts and to the agency of rights-holders in vindicating those rights. Instead it suggests possibilities for stimulating governmental actors to reflect upon and to develop the protection of fundamental rights in policy-making while also holding states to account for their performance through systematic and periodic analysis and review. The dichotomy between hard law (rights) and soft governance (monitoring and evaluation) appears to be transgressed (in the sense that – within the sphere of law – different modes of governance may be combined in new ‘hybrid’ forms) and a new frontier in fundamental rights protection opened-up.

While there is nothing inappropriate about using new governance techniques to take forwards fundamental rights commitments (see especially de Búrca, 2005), it does not follow that new techniques such as OMC are necessarily appropriate. Or to put it another way, there may be limitations, risks and tensions in the applications of new techniques. Therefore, I want to explore a number of critical questions that arise when thinking about OMC and fundamental rights. We can consider four lines of enquiry:

- Do we need an OMC process when we already have alternatives?
- Why the desire to talk in terms of OMC?
- If we think of an OMC for fundamental rights in the EU, what is the rationale for co-ordination?
- What scope is there for using open methods even in the absence of a stand-alone OMC for fundamental rights.

### **What is the Need for an OMC?**

The argument in favour of the application of new modes of governance to the development of fundamental rights is that they are intended to supplement rather than replace either existing means for rights-vindication or campaigns to enhance the enforcement of rights. New governance is, if you will, simply another front in the human rights campaign. While this line of thought suggests that a fundamental rights OMC could be pursued alongside a justiciable Charter of Fundamental Rights (see de Schutter, 2005), what it does not tell us is why introduce OMC when there are, or could be, other mechanisms for monitoring and reviewing Member States' policies and their impact on fundamental rights concerns.

Within the EU, the Network of Independent Experts already prepares annual reports on the protection of human rights (based on the Charter of Fundamental Rights) within the EU and Member States on the basis of reports compiled by its individual national experts. Opinions can be addressed to the European Commission. So is there really a need for an OMC when elements of that methodology are already present within this system, and when the Network approach (whether alone or in

combination with the idea of the Fundamental Rights Agency) may have certain advantages over OMC?

The first advantage of the current system is that it is an evaluation based on reports prepared by experts. OMC is a more political evaluation based on reports prepared by national administrations. Expertise and independence – even in the absence of the cloaking of an independent agency – lends credibility to the evaluation process in a way that may be absent from OMC. The independence of the Network and of any future independent ‘Fundamental Rights Agency’ provides the opportunity for a certain level of leadership in the field (either by the experts themselves or in support of others, whether Commission or EP) that the OMC model – based on an accommodation by the Commission and Council articulated through committees composed of high-level civil servants – often tends to lack.

Secondly, monitoring is intended to send signals not only to the Member States but also to the EU institutions as to the impact of policies on fundamental rights. OMC, while it may provide EU institutions with information, is not primarily intended as a tool to stimulate those institutions to act: rather it is intended to promote policy reflection by the Member States.

Thirdly, by using the Charter as the normative text, monitoring takes place against a relatively fixed matrix of norms and values. That is not to say that the meaning is fixed but rather that the mode of articulation of the norms and values has, at least for the moment, been settled. One of the problems of OMC may be that one of its supposed advantages – the revisability of objectives in light of changing situations – would be undesirable in the context of this relatively recent expression of fundamental rights concerns. This point, however, is far from clear-cut. The extent to which the objectives of co-ordination have proved to be revisable is open to debate

(and may differ across policy fields). But, maybe the point is more that the experience of the OMC to date has been one where the normative background (expressed as objectives or guidelines) has sometimes been open to quite significant shifts in ways which might appear troubling for those seeking to secure fundamental (albeit contested) rights. For example, if we think about the original Lisbon ‘triangle’ of economic, employment and social inclusion, these were presented as mutually reinforcing (could one even say ‘indivisible’?) properties of the European economic and social model (at the level of values). Yet five years later, the Commission re-presents Lisbon as a strategy in which social policy is the product of economic growth and jobs, with the downplaying of the mutual and interdependent nature of economic and social integration. Consequently, the economic and employment co-ordination processes were integrated, with the social inclusion OMC process pushed out of the Lisbon core. Would those proposing an OMC for the Charter not worry that OMC might represent a threat to the indivisibility of the package of rights?

In addition to these potential advantages of ‘monitoring’ over ‘open co-ordination’ we also need to recognise that there are other monitoring mechanisms out there beyond the realm of European Union law e.g. the monitoring mechanism under the Council of Europe Social Charter (which in addition to its monitoring function also has a quasi-judicial complaints mechanism). So if there are other means out there which can or could perform a monitoring function, what is the need for OMC?

One argument is the flip-side of the first argument in favour of expert monitoring, namely, that the virtue of OMC is that it is a political process intended to shift political expectations and institutional cultures and, therefore, to open the way to mainstream fundamental rights into domestic policies. In this way, expert evaluation might fall between two stools: on the one hand, it is perceived by political actors as

too esoteric, lawyerly and independent of political realities of practical problem-solving in the face of new threats, and on the other, it is insufficiently legal in the sense that it lacks the punch of a court ruling condemning a state for its actions. The value of OMC may well be that it allows fundamental rights to stimulate policy reflection as part of concrete processes of problem-solving. An example might be the use of fundamental rights to social assistance to raise questions as to eligibility for and/or the levels of payment made under, minimum income support schemes, when these are reviewed in light of the OMC on social inclusion and social protection.

A second potential advantage of OMC might be the idea of a ‘Fundamental Rights National Action Plan’ (‘FunNAP’). While oftentimes the OMC NAPs have been less like plans and more like reports, nonetheless, the ambition of OMC has been to push Member States to develop NAPs which set out an agenda for the future rather than simply reporting on the past. While we tend to focus attention on the top-down aspects of the OMC methodology – the objectives, indicators, targets and review mechanisms – one of the potentials of OMC is the somewhat random factor of what states make of the NAP-building process. There is at least some evidence from the OMC on social inclusion that the mere fact of the existence of the process has created new opportunities for domestic actors (governmental and non-governmental) to develop new ways of working and new ways of engaging with one another. This potential for the NAP to open out to civil society and to develop forward-looking relationships may help monitoring and evaluation move outside the realm of the human rights expert (usually a lawyer) to embrace alternative sources of expertise and knowledge.

These arguments do not, however, necessarily push in favour of a free-standing OMC on fundamental rights. They may instead be used to justify

modifications to existing monitoring arrangements or as ways of supplementing existing OMC processes in particular policy domains.

### **Why Use the Language of OMC?**

One cannot help having the sense, however, that part of the appeal of OMC is the hope that a new governance frontier has been opened up, a new show is in town, that will allow for new sources of influence on Member States. Starting with the Treaty-based co-ordination mechanisms and then spreading in the aftermath of the Lisbon Council, OMC emerged as a legitimating discourse for the construction of problems within a European framework while appearing to respect the division of competences between the EU and Member States. But we live now in different times. The superficial Lisbon consensus on the twin goals of competitiveness and social cohesion has given way to a central and contested focus on 'growth and jobs'. To the extent that OMC was envisaged as a key technique for taking forward the Lisbon consensus, its utility and future is now shrouded in doubt. The mid-term review of the Lisbon Strategy following on from the Kok Report signalled that the added-value of 'satellite' OMC processes (beyond the Treaty-based economic and employment co-ordination processes) would need greater justification, with 'streamlining' emerging as the discourse designed to halt the diffusion of new OMC processes and to re-articulate the relationship between economic and social integration. Or to put it more succinctly, the future of OMC is at stake, making it a less than opportune time to think about applying OMC to the protection of fundamental rights. If the argument in favour of an OMC on fundamental rights is intended to pick up some of the momentum of the post-Lisbon bandwagon, we need to be aware that the wheels may

be coming off that bandwagon (or at least that the coaches appear to be heading off in somewhat different directions) and that this may not be the time to make the leap on-board.

### **What is OMC For?**

Even if we accept the idea of developing an OMC for fundamental rights, we need to consider more carefully what OMC is for. This question is not as easy to answer as it might seem. There is a lot of loose talk of ‘co-ordination’ and ‘convergence’ in OMC debates. Part of the problem is the failure to recognise that not all existing co-ordination processes have the same function. Instead we need to think about OMC processes operating along a scale.

At one end of the scale the function of OMC is to achieve more or less what the Community Method often seeks to achieve: that is to say convergence of national policies around a common set of norms or paradigms as a means of dealing with problems which, if left to Member States alone, could create externalities for other Member States (often in the form of barriers to free movement or distortions to competition). The aim of co-ordination, then, is to arrive at more or less similar results for states but without a transfer of legislative competence to the EU to achieve that result (either because legislative intervention would be inappropriate or because Member States are reluctant to cede competence in the area). The problem with this sort of co-ordination is that it is continually begging the questions: why co-ordinate rather than legislate; why stimulate decentralised policymaking rather than centralise policymaking; why meddle in the margins rather than concede competence?

Nonetheless, even if unilateral action by Member States would not create externalities, there is still an argument for co-ordination based on the premise that all states are facing common problems. While each state may find its own solution there is the danger that one or more states will produce a sub-optimal solution. Better then, so the argument goes, for states to seek to produce a common solution within a European framework to tackle their common concerns. In subsidiarity terms this form of co-ordination is justified on the basis that action by the Member States alone would be sub-optimal and co-operation would produce a better outcome. The difficulty here is in identifying problems that are sufficiently shared and sufficiently susceptible to a solution that is based on shared understandings of how best to tackle the problem. Moreover, there will be issues about the extent of co-ordination beyond areas or levels of common agreement: these issues are again familiar in the more traditional legislative sphere.

At the other end of the spectrum, co-ordination becomes more open. States may not face common problems at all, but rather different states (or different groups of states) may face some problems but not others, or may face some similar problems of policy performance but with very different causal factors. The aim of co-ordination here is much more open. In part it is about simply trying to identify why policies produce the results they do. In part it is about seeking to match policy solutions to policy problems. But unlike the two other examples of co-ordination there is less of a steer towards identifying common solutions which states should then adopt. Rather, this is co-ordination *à la carte* and variable. Much more space is left to states to choose how to engage with the co-ordination process. The difficulty then becomes one of justifying co-ordination within a European framework in terms other than those we traditionally associate with EU action i.e. the removal of externalities or solving

common problems through common solutions. Or to put it another way, meeting the subsidiarity test is harder. The justification for European action may be much more abstract: e.g. that there are common values shared by Member States even though their interpretation of those values in policy terms may differ and/or that the mere fact of EU membership entails a commitment to co-operation amongst states (even if that co-operation is not mandated or could be achieved outside the EU framework).

Placing different OMC processes on this scale is not without its difficulties not least because the processes have changed over time. Crudely, though, the economic policy co-ordination process comes closest to the former (externality-oriented) end of the spectrum while social inclusion co-ordination fits more closely to the latter end of the spectrum. Employment co-ordination has shifted somewhat from a common problem-common solution paradigm to a more common problem-different (find-your-own) solution approach.

So how then should we rationalise any prospective free-standing OMC for fundamental rights. Clearly one way of thinking about it is to use the approach of considering differences between Member States (in terms of their level of protection of fundamental rights) as creating potential cross-border problems (in terms of barriers to free movement or distortions to competition). Thus Olivier de Schutter argues that one of the functions of an OMC on fundamental rights would be in terms of the identification of potential problems posed by Member States' lowering their levels of rights-protection.

There are three sets of difficulties with this idea. The first is the construction of human rights issues within the language of barriers to free movement and the tackling of externalities. While this brings the rationale for action firmly within the conceptual repertoire of the EU and appears to give a solid basis for co-ordination,

nonetheless, it tends to point to the need for EU action rather than stimulating the Member States themselves to act. Secondly, if OMC is simply used to signal to EU institutions a potential barrier to free movement or distortion to competition, then what competence does the EU have to act on it? In this way, we don't get round the limits on competence in the sphere of human rights and the space is created, as in *Tobacco Advertising*, for litigation around the creative use of a legal basis such as Article 95 or 308 EC. As for the use of less binding legal instruments such as recommendations, the experience of the OMC on social inclusion tells us that unless this is provided for in the Treaty, Member States are unlikely to simply volunteer to permit recommendations to be made. And even when the Treaty provides for them, the experience of economic policy co-ordination is that states are unwilling to invoke recommendations against states.

The third difficulty is why use OMC to identify such problems rather than other instruments like notification requirements which perform this function? In other words, if OMC is mainly about putting EU institutions in the position of having knowledge about a potential barrier to trade or distortion to competition arising from differences in rights protection across states, why not use a technique that is more like Decision 3052/95 or Directive 98/34 which provide for exchanges of information and co-ordination to prevent barriers to trade arising. It might seem more consistent with the logic of identifying differences in levels of rights-protection as potential barriers to free movement to use this sort of notification technique rather than OMC. The aim of OMC, while to some extent to inform EU institutions in order to help develop the cognitive map of the problem-space with a view to facilitating problem-solving, is more about stimulating Member States to act than it is about equipping EU institutions with a basis for further action (although there might be an analogy with

the SGP and EDP in economic policy coordination where there is a mechanism for the Commission and Council to take action against a state that reports excessive budgetary deficits).

The paradox, then, is that while the justification for introducing co-ordination may be premised on the desire to deal with externalities, the sorts of problems which OMC may be good at identifying may be such that co-ordination alone may be poor at solving. If OMC is used simply to identify rather than resolve the externality, then this throws us back to existing powers within the EU to seek to tackle the problem e.g. through harmonisation. Which leads us back into a discussion of the attribution and exercise of EU competence. That may be no bad thing, but it does mean that OMC is being used to beg constitutional questions rather than as a means of getting round them.

What then of a model of OMC based on common problem-solving? In order for this sort of co-ordination to work Member States have to have a consensus that they are facing a similar threat or common challenges (e.g. competition as a result of globalisation or strains on public finances in response to joblessness, demographic change and pensions commitments). They have to more or less agree on the paradigm through which to seek to meet that threat or challenge. In one sense, it is possible to see the protection of fundamental rights as common challenges for states to which – in line with the commitment to these rights as European values – some sort of concerted response is required. Nonetheless, this construction lacks the same sort of impetus as the identification of a current and urgent ‘problem’ to which states should turn their attention. To put it crudely, it is one thing to ask ‘how can we all do better?’ and another to ask ‘how do we fix this problem facing us’? The notion of an OMC premised on finding common solutions to common problems is more about finding an

answer to the latter sort of question than it is the former. That said, it is evident that European states have had to face common challenges and threats – the response to terrorist attacks in Madrid and London – which do suggest a need for concerted action. But again, does this argue for co-ordination or for the centralisation of decision-making?

This then leaves us with the most open of co-ordination processes. The underlying assumption is not that states are necessarily facing the same problems but, nonetheless, that problems are to be addressed within a common framework of fundamental European values. The aim of this sort of OMC would be to stimulate states to identify the problems they face and to consider how best to address them (using the experiences of other Member States). The advantage of this sort of OMC would be that it could help identify common problems while not being limited to doing so in that its concern is to stimulate each state to reflect on its own policy frameworks in order to seek to mainstream fundamental rights into its policies. The disadvantage, of course, is that once we move away from externalities and common challenges it becomes much harder to justify EU attempts to stimulate domestic policy reflection on subsidiarity grounds. That is to say, it is not enough to treat OMC as meeting the test of subsidiarity merely because it does not seek to harmonise. If post-Tobacco Advertising we have had to ask – why harmonise? – we equally need to ask, why co-ordinate? This may be more particularly so when there are other mechanisms (especially existing monitoring mechanisms) which might do the job. In other words, even a very open free-standing OMC on fundamental rights, justified on the basis of the common commitment to a set of European rights and values, will encounter resistance on subsidiarity grounds. To be clear, the subsidiarity argument is not premised on the formal wording of Article 5 EC, but more generally in terms of

justifying any form of EU action (when compared to action by the Member States acting wholly alone).

Even if we could agree on the type of OMC for fundamental rights, how would it be brought into being? We know that Treaty change is not essential to bring an OMC into being: but we also know that this renders the technique vulnerable to changes in political winds. In the wake of the 'No' votes to the Constitutional Treaty, the suggestion of any type of Treaty change is simply not on the political agenda (and rightly so). However, I do think it would be possible, in specifying the role and function of the Fundamental Rights Agency, to use the Regulation (based on Article 308) to articulate the contours of a fundamental rights OMC (including how the information collected by the Agency and the monitoring by the Network would feed into the process). This suggestion, given the current wording of Article 308 EC would push the OMC away from the more 'open' variant of OMC and closer to one which conceptualises fundamental rights issues within the language and logic of the economic constitution. There may well be a place for that, but there is a danger that what appears like a free-standing fundamental rights OMC ends up actually more connected to the economic core than some might wish.

### **Beyond the Idea of a Free Standing OMC**

There is another way of conceiving of the relationship between OMC and fundamental rights (one which need not be an alternative but indeed an additional approach). For many observers of existing OMC processes in the social sphere, the weakness of these processes can be attributed, in part, to the lack of political commitment accompanying their development. The Lisbon Summit, on this view, was

the highpoint of a commitment to an idea of social policy as a productive factor, with the Kok report and the mid-term review of the Lisbon Strategy as evidencing a shift in the political winds and a retreat from any real commitment to an active European social policy. The argument then goes that the way to solidify political commitments is in some way to put the commitment beyond politics through their linkage to substantive fundamental rights. The idea is not then to set up an OMC for fundamental rights *per se*, but rather to take existing OMC processes in areas like social inclusion and social protection, but institutionalise and deepen commitments by linking the objectives of co-ordination to specific fundamental rights or to specific fundamental rights instruments. In this way OMC bridges the relationship between law (which institutionalise fundamental rights and takes commitments outside of politics) and politics (which then implements those commitments in the Member States) by stimulating Member States to reflect upon their policies in light of fundamental rights and by creating a process for evaluating the effectiveness of those policies in a comparative perspective.

There are a number of advantages to this approach. It builds on existing commitments by the Union and Member States to co-operate in order to produce better outcomes than might be achieved by Member States acting alone. Even in areas where the co-ordination is very 'open' in the sense that Member States are not facing an obvious or immediate common problem, it does provide a common reference point and value system for committing states individually and collectively to raise their aspirations to improve the lives of their own citizens and ensuring proper protection for non-nationals. It provides a means of giving concrete expression to a set of European values which would otherwise have little scope for policy purchase. To that extent it may help existing OMC processes meet the subsidiarity test in that the

European dimension of the issue is clearly specified (the domain of European values) while the actual focus of activity, in terms of domestic policy reflection, is clearly located within the Member States in accordance with the division of competences applicable in the specific area as set out in the Treaty.

Another advantage is that insofar as OMC processes have successfully spread out to engage a wider set of stakeholders, connecting the specific OMC process to a set of relevant fundamental rights creates a new set of resources for the monitoring and review of policy by these actors. It gives expression to the desire to spread fundamental rights discourse out from the realms of lawyers and courts to engage the experience of a wider set of social actors.

Thinking back to the earlier discussion of the relationship between OMC and fundamental rights monitoring, one advantage of connecting fundamental rights concerns to OMC may be the hope of getting the best of both worlds. If the downside of OMC at the moment is often the inability of the process to arrive at clear messages for states (as the Commission and Council bargain out the content and tone of Joint Reports), feeding in the reports and opinions of a Fundamental Rights Agency and the Network might help enhance deliberations and focus messages. For example, if we look at the social inclusion OMC (as it currently stands) there is an objective to facilitate access to rights as well as an objective to prevent the risks of poverty and social exclusion. Expert reports (which are currently commissioned through the related Community Action Programme to evaluate the NAPs on inclusion) could be used to comment on what Member States report (as regards access to rights) as well as to identify key fundamental rights risks for that state which should be addressed in future plans. We would have a mix of governance techniques deployed to enhance fundamental rights protection. The analogy is perhaps this: if one of the functions of

the new Food Safety Agency is to compile information and identify risks, but with decision-making reverting back to some form of comitology, then the role of the Fundamental Rights Agency (and the Network) might similarly be to compile information, monitor rights protection and identify risks, but with OMC being used as the technique to stimulate states to reflect on this information and to develop domestic policies accordingly (either individually or, within the scope of EU competence, collectively).

The limitations of moving from a ‘free-standing’ fundamental rights OMC approach are also obvious. First, it is dependent on their being an active OMC in an area or a prospect of one being established. Necessarily this means a linkage between a selective use of OMC and a selective set of fundamental rights, rather than a free-standing use of OMC for a general set of fundamental rights. Second, the very idea that fundamental rights may be called in aid to support an OMC may simply end up compounding a lack of political commitment rather than shoring up those commitments. We may end up simply ratcheting up the symbolism rather than adding new impetus to domestic policy development. Thirdly, even if the substantive aims of policy are better articulated through the lens of fundamental rights, there is no guarantee that the OMC process attached to it will necessarily succeed in institutionalising commitments to learn lessons and to act on the information generated by the process. In other words, the introduction of a fundamental rights dimension to policy co-ordination, of itself may add little when faced with other limitations and impediments that inhere either to the policy domain itself or to the architecture of the specific OMC process (although as suggested above, it could be the opportunity to redefine the architecture to seek the best of all worlds).

## **Conclusions**

The paper has very deliberately adopted a rather critical and negative stance towards the OMC. This should not be interpreted as a device to fall back on more traditional modes of governance. Rather this scepticism emerges within a framework of arguing for new and innovative techniques of governance. But it is motivated by the desire to be clear about the problems and limitations of OMC. It is tempting to read into the newness of new modes of governance a kind of positive teleology in which 'new' means 'good' and in which that which is new replaces all that has gone before. Rather the challenge for fundamental rights may be to seek to learn the lessons of recent experiments in EU governance (especially the experience of comitology, agencies, and OMC) in order to fashion governance techniques that are clear as to their purpose and as to their place in an overall governance architecture.

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