

# **How to be fundamental with soft procedures? The Open Method of Coordination and Fundamental Social Rights**

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## **1. Introduction**

Soft law is certainly not a new invention in European policy-making. Yet, the use of non-binding instruments to provide policy guidance in European governance has increased particularly over the last decade. A central role in this evolution is played by the Open Method of Coordination (OMC), a cyclical benchmarking procedure coordinating national policies by providing guidance and assessment at the European level. OMC-procedures have been introduced for such different areas as macro-economic policy, employment policy, social inclusion and enterprise policy, and the Lisbon Summit of the European Council in 2000 placed the OMCs within a broader strategy aiming at providing a framework for competitiveness and social cohesion. These coordination procedures of national policies are called ‘open’ both because of their assumed openness to the participation of stakeholders, and because of their openness in terms of objectives and instruments, which can more easily be adjusted to changing needs than traditional regulatory policy based on legislative standards.

Yet, while the participatory nature of the OMC is contested,<sup>1</sup> also its openness in terms of capability to adjust to changing needs has raised criticism. In contrast to common legislative standards, the flexible benchmarks set by the OMC could arguably lead to regulatory competition resulting in a race to the bottom in terms of social standards. However, given the lack of legislative competence and/or political will, the adoption of social standards through European regulation is not a realistic alternative, and might - given the diversity of welfare systems - not even be desirable. Therefore, recourse to fundamental social rights may appear as an attractive solution, in the sense that in the absence of social legislation at European level, fundamental social rights may appear as a hard standard which OMC processes would have to respect, thereby avoiding deregulatory tendencies.

However, the relation between the ‘soft’ OMC procedure and the (assumed) ‘hard’ fundamental social rights may be more complex than appears at first sight. To assess this relationship, the second section of this paper will briefly clarify the nature of both the OMC and fundamental social rights. It recalls that on the one hand, the OMC – while being a soft law procedure – may have ‘hard effects’, and that, on the other hand, fundamental social rights are less ‘hard’ than their fundamental nature may lead us to expect. The relation between OMC and fundamental social rights is thus not an automatic one in which the soft OMC procedure would be backed by the hard guarantees of fundamental social rights.

There is, though, a common ground where the OMC and fundamental social rights may meet. The third section of this chapter will analyse this meeting place, using the example of the European Employment Strategy (EES). The role of fundamental social rights in terms of justiciable rights *ex post* is likely to remain very limited in the context of the OMC

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<sup>1</sup> K. Jacobsson and A. Vifell (2002), *Integration by deliberation? Dynamics of Soft Regulation in the Case of EU Employment Policy*, Paper presented at the ECPR Conference, 26-28 September 2002, Bordeaux; C. Barbier, C. de la Porte and P. Pochet, *European Briefing, Journal of European Social Policy*, Vol. 12 (2002), No. 3, p. 242; S. Smismans, ‘EU Employment Policy: Decentralisation or Centralisation through the Open Method of Coordination?’, in R. Toniatti, F. Palermo and M. Dani (eds), *An Ever More Complex Union. The Regional Variable as Missing Link in the EU Constitution* (2004) (also at <http://www.iue.it/PUB/law04-1.pdf>); P. Nanz and C. de la Porte (2004), ‘OMC – An important tool to improve transparency and democratic participation? The case of pension reform from the perspective of deliberative democracy’, *Journal of European Public Policy*.

on employment, but fundamental rights may play a programmatic role *ex ante* in the EES. In addition, the technique of the OMC could be used in developing a real European fundamental rights policy. However, I will argue in the last section of this chapter that in order for this fundamental rights policy to be effective, it should be based on a participatory process and be linked with other OMC procedures.

## 2. The hard effects of soft law and the softness of fundamental social rights

### A. *The hard effects of the OMC*

It may be useful to recall here the basic features of the OMC. According to the Conclusions of the Lisbon Summit, the OMC is characterised by the following elements: the fixing of European guidelines; the establishment of quantitative and qualitative indicators and benchmarks; the translation of these guidelines in national and regional policies; and a periodic monitoring, evaluation and peer review.<sup>2</sup> Yet, there are important differences among the various OMC procedures. The periodicity of guidelines differs, as well as the specificity of the quantitative and qualitative targets. Some OMC procedures are described or referred to in the Treaty, whereas others have been established without any Treaty reference. Moreover, while none of the OMC procedures can lead to binding European norms, the potential ‘threat of sanction’ differs, with some OMC procedures having, for instance, the option to adopt specific recommendations, putting Member States under pressure to follow the guidelines.<sup>3</sup>

This paper focuses on the OMC in the field of employment, which has served largely as a reference point for the development of this method in other sectors. Enshrined in the EC Treaty, the OMC in employment constitutes the backbone of the European Employment Strategy (EES).<sup>4</sup> It is a cyclical process structured around the yearly issuing of European Employment Guidelines, prepared by the Commission and adopted by the Council, after consultation of the European Parliament, the Economic and Social Committee, the Committee of the Regions and the Employment Committee. The Member States ‘shall take into account’ these guidelines in the development and implementation of their national employment policies. Each Member State is to make an annual report (the National Action Plan, NAP) on ‘the principal measures to implement its employment policy in the light of the guidelines for employment’, outlining how it plans to respond to the guidelines and what progress has been made. The NAPs are sent to the Commission and the Council which prepare on this basis a joint report to the Spring European Council. On the basis of this analysis, and at the initiative of the Commission, new guidelines will be drafted<sup>5</sup> and the Council may make (non-binding) recommendations to Member States concerning their employment policies.<sup>6</sup>

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<sup>2</sup> European Council Presidency Conclusions, 23/24 March 2000.

<sup>3</sup> For an overview, see Susana Borrás and Kerstin Jacobsson (2004), ‘The open method of co-ordination and new governance patterns in the EU’, *Journal of European Public Policy*, Vol.11, No.2, p.185-208.

<sup>4</sup> For an overview of the literature, see Caroline de la Porte, and Philippe Pochet, “The European Employment Strategy: Existing research and remaining questions”, *Journal of European Social Policy*, Vol.14, No.1, February 2004, pp.71-79

<sup>5</sup> Since 2003 the implementation of the guidelines has been prioritised rather than spending resources on the drafting of new ones. The OMC in employment is still based on an annual cycle, but the guidelines will be revised profoundly only every three years. In 2004, for instance, the Council simply confirmed the 2003 guidelines, while issuing general and individual recommendations.

<sup>6</sup> For a more detailed description of the procedure and relation with other OMC procedures, see Stijn Smismans (2005), ‘Reflexive law in support of directly deliberative polyarchy: Reflexive-deliberative polyarchy as a normative frame for the OMC’, in Olivier De Schutter and Simon Deakin (eds), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?*, Brussels: Bruylant.

The effects of this soft coordination mechanism remain difficult to ascertain. The difficult empirical assessment has just begun<sup>7</sup> and the Commission's evaluation of five years of OMC-employment<sup>8</sup> certainly does not present an uncontested success story. However, while the precise impact of the 'soft' OMC procedure remains unclear, the first years of experience show at least its important potential in the diffusion of a cognitive framework defining in which terms and with which priorities debates on certain policies, such as employment, should take place in the Member States.<sup>9</sup> This framework defines the conceptual borders beyond which any alternative becomes increasingly more difficult to defend and even to imagine.<sup>10</sup> Analysing the EES, Jacobsson reminds us of Gramsci arguing that 'the most effective form of political control is to make one's conception of the world hegemonic, to set the political agenda in such a way that ideology becomes conceived of as natural or normal.'<sup>11</sup> Thus, while not binding and not immediately discernable as having direct effects, soft procedures such as the OMC may have a very important impact in the longer run. Armstrong, for instance, argues that the policy space which Member States occupy in the field of social inclusion, coordinated within an OMC, is more institutionally shaped by other OMC processes and the values they incorporate than by the direct pressures of directly effective EU economic law.<sup>12</sup> Moreover, the impact of the introduction of the OMC should not only be measured by the way it influences national policies. The OMC in employment, for instance, has strongly reconceptualised the role of EC labour law. The 'expanding nature' of the EES on the European social dimension<sup>13</sup> has been described as a shift from social policy to employment policy.<sup>14</sup> EC labour law is increasingly thought of as a tool for European employment policy, and one can see 'a re-orientation from an approach to labour market regulation which had as its core a strong concept of employment protection and high labour standards, to an approach which prioritises employment creation, and minimises the role of social policy, since social policy is seen as potentially increasing the regulatory burden.'<sup>15</sup> This has been particularly clear for what has long been the core of European social intervention, namely occupational health and safety policy (OH&S). Under pressure of the priority given to employment, OH&S policy had by the end of the 1980s been deprived of

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<sup>7</sup> See, for instance, Kerstin Jacobsson and Herman Schmid (2002), 'Real Integration of just Formal Adaptation? – On the Implementation of the National Action Plans for Employment', in Caroling de la Porte and Philippe Pochet (eds), *Building Social Europe through the Open Method of Co-ordination*, Brussels: Peter Lang, p.60-95.

<sup>8</sup> Taking stock of five years of the European Employment Strategy, COM (2002) 416 final, 17 July 2002.

<sup>9</sup> E. Szyszczak, 'The Evolving European Employment Strategy', in J. Shaw (ed), *Social Law and Policy in an Evolving European Union*, Hart, 2000, p.211; E. Léonard, 'Industrial Relations and the Regulation of Employment in Europe', *European Journal of Industrial Relations*, Vol.7 (2001), No.1, p.34.; P. Syrpis (2002), 'Legitimising European Governance: Taking Subsidiarity Seriously within the Open Method of Coordination', EUI Working Paper, p.40; Kerstin Jacobsson (2004), 'Soft regulation and the subtle transformation of states: the case of EU employment policy', *Journal of European Public Policy*, Vol. 14, No.4, p.361.

<sup>10</sup> Barbier applies to the EES the concept of 'référentiel' borrowed from Jobert and Muller. See J.C. Barbier (2002), 'Une "Europe sociale" normative et procédurale: le cas de la stratégie coordonnée pour l'emploi', *Sociétés contemporaines*, No.47 ; and B. Jobert and P. Muller (1987), *L'Etat en action, politiques publiques et corporatismes*, Paris : PUF.

<sup>11</sup> Kerstin Jacobsson (2004), 'Soft regulation and the subtle transformation of states: the case of EU employment policy', *Journal of European Public Policy*, Vol. 14, No.4, p.366.

<sup>12</sup> Kenneth Armstrong (2003), 'Tackling Social Exclusion Through OMC: Reshaping the Boundaries of EU Governance' in T. Börzel and R. Cichowski (eds) *The State of the Union: Law, Politics and Society* (Vol. 6), Oxford: Oxford University Press, p.180.

<sup>13</sup> N. Bruun, 'The European Employment Strategy and the "Acquis Communautaire" of Labour Law', *The International Journal of Comparative Labour Law and Industrial Relations* (2001), Vol.17, No.3, p.309.

<sup>14</sup> D. Ashiagbor, EMU and the Shift in the European Labour Law Agenda: From 'Social Policy' to 'Employment Policy', in: *European Law Journal* (2001), Vol.7, No.3.

<sup>15</sup> *Ibid.*, p.311.

many of the resources it could build on, and its strongly regulatory approach has to a great extent been replaced by a soft persuasive policy whose effectiveness can be questioned.<sup>16</sup> Finally, the impact of the OMC on the European social dimension can only be understood by taking into account how the different OMC procedures relate to one another. As shown by the example of social inclusion given by Armstrong, referred to above, the OMC in this field is strongly constrained by the framework set by the OMC on employment, which in its turn is shaped by the cognitive framework of the Broad Economic Policy Guidelines (BEPG). It has been argued that the OMC, as a strategy for reincarnation of the European welfare State, is subservient to the ideologies, path-dependencies and structures of Economic and Monetary Union, as institutionalized in the BEPGs.<sup>17</sup> The Lisbon process, centred around a discourse of economic growth and competitiveness rather than around social citizenship, and the encouragement of co-ordination of social and economic policies has resulted not so much in economic policy being sensitive to social concerns, but to a colonization of the Welfare State by the economic policy-making process.<sup>18</sup>

Therefore, seen from the perspective of the protection of social rights, the OMC may, at the same time, be too soft and too hard. Too soft because, while not being able to set binding social standards at European level it neither guarantees that it would lead to the protection of social rights at national level given its language of quantitative objectives<sup>19</sup> and the predominance of the economic framework.

Too hard, because despite its non-binding nature, it may impose a cognitive framework, outside of which it may prove increasingly difficult to take policy initiatives. This cognitive framework is likely to shape 'the European social dimension' both in influencing national policies and conceptualising the nature of European intervention.

One should thus be cautious about presenting the OMC by definition as 'a step forward' for Europe's social dimension. The introduction of the OMC has often been presented in this way since it allows the EU to intervene in social policy issues for which it had previously no competence. However, European engagement of this kind does not necessarily guarantee a high or higher protection of social standards. This does not imply that the operation of the OMC will necessarily be to the detriment of social standards, nor does it argue that the EU member states would be better off without any coordination. Yet, one should acknowledge that it is in the nature of the OMC as an 'open' process which can go in different directions, that it does not offer any guarantee for the protection of social rights. Therefore, and given that the adoption of a strong regulatory social framework at EU level may be neither feasible nor desirable, it would be entirely justified to ask whether

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<sup>16</sup> For more detail, see Stijn Smismans (2004), *Law, Legitimacy and European Governance. Functional Participation in Social Regulation*, Oxford University Press, chapter 2. In addition to the priority given to employment, the bad implementation record of the occupational health and safety (OH&S) regulatory framework has been another reason for the shift to 'persuasive policy-making'. Yet, bad implementation does not explain the low policy priority given to OH&S.

<sup>17</sup> D. Chalmers and M. Lodge (2003), 'The Open Method of Coordination and the European Welfare State', Discussion Paper ESRC Centre for Analysis of Risk and Regulation, No.11, June 2003, p. 2.

<sup>18</sup> Ibid, p. 10. This economic bias obviously relates to the deep structure of the EC's economic constitution; G. de Búrca (2003), 'The constitutional challenge of new governance in the European Union', *European Law Review*, 28.

<sup>19</sup> S. Ball (2001), 'The European Employment Strategy: The Will but Not the Way?', 30 *Industrial Law Journal*, 353. On the role of Eurostatistics in the EES, see Kerstin Jacobsson (2004), 'Soft regulation and the subtle transformation of states: the case of EU employment policy', *Journal of European Public Policy*, Vol. 14, No.4, p. 361-363. Given the importance of statistical indicators in the EES, Antoine Lyon-Caen and Joëlle Affichard argue that in order for the OMC to be 'open', reflexivity should extend to the presentation and use of the indicators, opening-up statistical expertise to constructive criticism, in particular from other fields of expertise. See Antoine Lyon-Caen and Joëlle Affichard (2005), 'From Legal Norms to Statistical Norms: Employment policies put to the test of coordination', in Olivier De Schutter and Simon Deakin (eds), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?*, Brussels: Bruylant.

fundamental social rights can offer such a guarantee within the context of the coordination of national policies. Yet, this attractive line of reasoning may soon meet with disappointment when confronted with the soft nature of fundamental social rights.

### *B. The softness of fundamental social rights*

Whereas the ‘soft OMC’ may have hard effects, fundamental social rights may be softer than the term ‘rights’ seems to suggest. While human rights may be ‘fundamental’, they are not necessarily ‘hard’ in terms of their justiciability or the existence of sanctions for their breach. The discourse of fundamental human rights has been strongly framed by international law and the international documents codifying these rights. It is influenced by the ‘softness’ of these international instruments which are characterised by weak sanction mechanisms and broadly defined principles. In particular fundamental social rights – together with economic and cultural rights – are often said to be ‘soft’ in that they are not readily justiciable and may even be merely manifestations of a political or social programme, in contrast to civil and political rights which can be invoked in court against State action which fails to respect them. This difference is often justified by the fact that the latter are more easy to ensure since they are largely ‘negative rights’, i.e. they offer protection against State action, whereas the former are generally ‘positive rights’ that require positive action from the State and therefore strongly depend on the available socio-economic resources of a country, which implies limits to the possibility of claiming relief.

Increasingly however it is argued that the opposition between ‘negative’ civil and political rights on the one hand, and ‘positive’ social rights on the other, is artificial since the former may also entail positive duties on the State, whereas the latter may also imply obligation for the State not to intervene.<sup>20</sup> Yet, while arguments to place social rights on the same ground as other fundamental rights are increasingly to be found, international documents most often still deal with them separately and provide for different enforcement mechanisms.

Within the context of the EU, the difficult trajectory of social rights seeking to find their place in a process that has been primarily concerned with the building of a common market should also be recalled. Although social considerations have been taken into account in the interpretation and design of internal market rules, these have mainly been conceptualised as derogations from (economic) rights, and were thus to be interpreted narrowly according to the case law of the Court.<sup>21</sup> ‘EU social rights are not conceived as rights corresponding to social entitlements that EU citizens can claim with regard to the European polity. They are conceived, instead, either as an instrument of undistorted competition or as a guarantee that

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<sup>20</sup> E.g. Tadeusz Jasudowicz (1994), ‘The legal character of social rights from the perspective of international law as a whole’, in Krzysztof Drzewcki, Catarina Krause and Allan Rosas (eds), *Social Rights as Human Rights. A European Challenge*, Finland: Åbo Akademi Tryckeri, p. 23.; Veli-Pekka Viljanen (1994), ‘Abstention or Involvement? The Nature of State Obligations under Different Categories of Rights’, in *ibid*, p.43. Cécile Fabre, while recognising the difference between negative and positive rights, argues that the distinction is irrelevant to arguments for or against constitutional social rights. See Cécile Fabre (2000), *Social Rights under the Constitution*, Oxford: Clarendon Press, p.65.

<sup>21</sup> Nicholas Bernard (2003), ‘A New Governance’ Approach to Economic, Social and Cultural Rights in the EU’, in Tamara Hervey and Jef Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Oxford: Hart, p.253.

such competition will not affect the level of social protection afforded by the Member States'.<sup>22</sup>

In the fundamental rights regime of the EU, social rights have occupied a secondary position, contrary to the values of economic freedom that are promoted by market integration.<sup>23</sup> Although the Court has recognised fundamental social rights as part of the general principles of Community law, they have rarely found their way into the case-law, and there is no case in which the Court has required the Member States or the EU to take 'positive action' in order to respect an (unwritten) fundamental social right.<sup>24</sup>

The adoption of the Charter of Fundamental Rights of the European Union (CFREU) in 2000, now agreed to be included into the Constitutional Treaty, opened the way to a strengthened position for fundamental social rights. Not only does it provide a written catalogue of fundamental rights with binding and 'constitutional' value – if the Constitutional Treaty is ratified – but it also appears, at first sight, to place social rights at the same level as economic, civil and political rights by merging them into a single text without a clear distinction. However, as has already been extensively debated in the literature,<sup>25</sup> the potential impact of the Charter is strongly shaded by its 'horizontal clauses' aiming at protecting the sovereignty of the Member States. The negotiation on the introduction of the Charter into the Constitutional Treaty further stressed these limits, in particular by introducing a distinction between rights and principles.<sup>26</sup> The latter are 'judicially cognisable only in the interpretation of' legislative and executive acts implementing them. Although the Charter does not indicate which provisions are rights and which principles, (most of) the social provisions are likely to be considered principles rather than rights, given their vague formulation and the legacy of the past.

### 3. Where OMC and fundamental social rights may meet

#### A. *The European Employment Strategy and fundamental social rights*

Theoretically one can broadly distinguish between two ways in which fundamental social rights can relate to the EES. On the one hand, they can provide a standard to be respected by the EES, and which is *ex post* justiciable. On the other hand, they can have a programmatic *ex ante* function in guiding European employment policy.

#### 1. *Fundamental social rights as an ex post justiciable standard*

##### (a) Guidelines and fundamental social rights

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<sup>22</sup> Miguel Poiaras Maduro (2003), 'The Double Constitutional Life of the Charter of Fundamental Rights of the European Union', in Tamara Hervey and Jef Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Oxford: Hart, p.285.

<sup>23</sup> *Ibid.*, p.284.

<sup>24</sup> See Bruno de Witte in this volume.

<sup>25</sup> See, for instance, Tamara Hervey and Jef Kenner (eds) (2003), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Oxford: Hart; and G. de Búrca (2005), 'Beyond the Charter: How Enlargement has enlarged the Human Rights Policy of the EU', in Olivier De Schutter and Simon Deakin (eds), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?*, Brussels: Bruylant.

<sup>26</sup> See B. Bercusson in this volume.

The EES has been built on several so-called pillars, among which are the importance of 'entrepreneurship' and the encouragement of 'adaptability'.<sup>27</sup> The entrepreneurship pillar combines a 'classical' industrial relations policy based on the idea that entrepreneurial activity will create employment in terms of dependent work, with a more innovative idea of an employment policy that would encourage the autonomy and initiative of individuals, and would thus identify in independent work and entrepreneurship a valid alternative to dependent work.<sup>28</sup> While the first dimension does not necessarily include employment protection in terms of qualitative standards and rights, the second increases further the risk of a non-protected workforce since independent workers have traditionally lacked many of the protective measures from which dependent workers could profit. Encouraging entrepreneurship as a core dimension of employment policy might increase the use and abuse of the status of 'independent worker' for functions which would otherwise be ensured by 'dependent contracts'. Could fundamental social rights provide a justiciable basis for sanctioning such an abuse?

The notion of 'adaptability' in the EES apparently aims at modernising work organisation in order to increase employment, while reconciling more flexibility with security and high occupational status. While adaptability may offer the benefit of reconciling work with family life, the framework of competitiveness and employment provided by the EES may also lead to the kind of flexibilisation that puts at risk social rights. The serial use of short time contracts, for instance, frequently leads to workers not being able to take an annual period of (paid) leave. This contrasts with the fundamental social right to an annual period of paid leave, as recognised in Article 31 (2) of the CFREU. Could this provision be relied upon to contest the (assumed) effects of the EES?

The scope for justiciability of fundamental rights in the context of the EES appears strongly limited. This limitation results from the 'soft character' of both the OMC and of fundamental social rights.

The OMC, as a soft procedure of coordination of national policies does not lead to the adoption of European legislation, but only provides guidance and assessment. Are these guidelines justiciable? Could one directly challenge the guidelines for failing to respect fundamental rights? The action for annulment under Article 230 EC explicitly excludes recommendations and opinions as acts that could be reviewed. The case law confirms that only binding measures come within the scope of the action for annulment,<sup>29</sup> which seems to preclude any possibility of bringing aspects of the soft OMC procedure before the Court of Justice on this basis. Moreover, contesting via the preliminary ruling procedure (Article 234 EC) the validity of EES guidelines or recommendations for not respecting fundamental social rights appears equally unlikely. As Bernard rightly argues, although the Court has referred to the difference of wording between Articles 230 and 234 to establish its jurisdiction in the context of the preliminary ruling procedure to *interpret* non-binding acts adopted by the institutions, it would be difficult to understand why the *validity* of a category of act would be open to challenge under Article 234 EC but not under Article 230 EC.<sup>30</sup>

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<sup>27</sup> Until 2002, the EES was explicitly built on four 'pillars', namely employability, entrepreneurship, adaptability and equal opportunities. While this four pillar structure formally disappeared in the 2003 guidelines, these ideas remained central features of the EES.

<sup>28</sup> Marco Dani, *Lo sviluppo dell'imprenditorialità nello spazio costituzionale europeo: le politiche pubbliche tra sostegno ed emancipazione*, p.3.

<sup>29</sup> Nicholas Bernard (2003), 'A New Governance' Approach to Economic, Social and Cultural Rights in the EU', in Tamara Hervey and Jef Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Oxford: Hart, p.256.

<sup>30</sup> *Ibid.*, p.257.

While it appears impossible to contest directly the validity of soft measures as guidelines and recommendations for violation of fundamental social rights, it should be acknowledged that the OMC is not entirely detached from hard law. There are two ways in which OMC procedures can relate to hard law. First, the guidance provided by OMC procedures is intended to be translated into national policies, which may include the adoption of national legislation. While being a soft procedure, the OMC will thus at a certain stage (also) result in hard law. Second, while the OMC procedure as such does not lead to European legislation, the cognitive framework provided by OMC procedures may, nevertheless, influence European regulation in those areas where the EU does have legislative competence. It is in this double interaction between OMC and hard law that one may imagine fundamental social rights entering judicial procedures. Yet, even in this case, account should be taken of the limits imposed by the ‘soft’ nature of fundamental social rights.

#### (b) National legislation implementing OMC guidelines

Can fundamental social rights provide a threshold for national legislation which is framed in the context of an OMC? Could a judicial challenge be mounted to national legislation implementing an OMC guideline, on the ground of infringement of fundamental social rights?

It should be recalled that in relation to the action of the Member States, the EUCFR only applies ‘when they are implementing Union law’ (Article 51(1) EUCFR). Does national legislation adopted within the framework provided by an OMC fall under this definition? The concept of ‘Union law’ need not be reduced to European legislation, European binding acts of a general nature, but it should be seen also as including European binding acts of an individual nature, and also non-binding acts. Union law can be defined as the broad category of all European acts and their interpretation over which the Court of Justice has jurisdiction. The ECJ has clearly confirmed that the preliminary ruling procedure of Article 234 EC confers on the Court jurisdiction to rule on the validity and interpretation of *all acts* of the institutions of the Community without exception (emphasis added).<sup>31</sup> In the case at hand, the Court confirmed its jurisdiction to interpret via a preliminary ruling a Recommendation, despite its non-binding character. The ECJ further specified that ‘the national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on *the interpretation of national measures adopted in order to implement them* or where they are designed to supplement binding Community provisions (emphasis added)’.<sup>32</sup>

The ‘implementation of Union law’ is thus not limited to binding European acts, but can also refer to the implementation of non-binding European acts. The adoption of a national measure to implement a Recommendation issued in the context of an OMC procedure would thus fall under the definition ‘implementation of Union law’. Some authors, however, have argued that this would be more difficult to sustain in relation to the broader policy guidelines that are issued within OMC procedures.<sup>33</sup> This reasoning is defensible in so far as it might be difficult to identify whether a national measure constitutes the implementation of such a broadly defined guideline. However, one could argue that where NAPs explicitly identify national legislation as the implementing measure of European

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<sup>31</sup> Case C-322/88, *Salvatore Grimaldi v. Fonds des maladies professionnelles*, [1989] ECR I-4419, indent 8.

<sup>32</sup> *Grimaldi*, I-4421, indent 18.

<sup>33</sup> Nicholas Bernard (2003), ‘A New Governance’ Approach to Economic, Social and Cultural Rights in the EU’, in Tamara Hervey and Jef Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Oxford: Hart, p.258.

policy guidelines, they provide us with a clear indication that we are dealing here with the ‘implementation of Union law’.

However, even if it is accepted that national legislation implementing an OMC guideline/recommendation can be defined as ‘implementation of Union law’, and therefore that the CFREU applies, it is still necessary to take into account the limits imposed by the Charter’s distinction between rights and provisions.

The possibility to use a fundamental social right as a justiciable provision to challenge national legislation based on the EES seems extremely limited given that the Court will most likely remain very reluctant to recognise the social provisions of the Charter in terms of subjective rights providing direct entitlements. There might be some very rare exceptions to this: it would be very strange, for instance, for Article 23 CFREU on sex equality not to be justiciable, given that this principle has always been a justiciable and directly effective right in Community law. Thus, for instance, if a national law intended to implement the EES guideline to encourage lifelong learning excluded women from such programs, this law could be challenged with reference to the fundamental social right recognised in the Charter. Yet, beyond sex equality – for which the Treaty already provided a solid basis to challenge national legislation – it remains to be seen whether the Court will recognise other social provisions of the Charter as justiciable rights. The Court is even reluctant to recognise fundamental social rights in the interpretation of European legislation (see below). The situation in which the legality of a national law implementing the EES could directly be challenged on the basis of an ‘unwritten’ fundamental social right and independently of any European regulatory framework<sup>34</sup> seems extremely unlikely.

Therefore, the role of fundamental social rights in relation to national legislation implementing the EES may be less in the provision of a justiciable basis to challenge such legislation, but rather in the support for such national legislation where it contributes to the realisation of social rights – in potential conflict with economic freedoms. As argued above, the EES is built on a permanent tension between ensuring competitiveness and social cohesion. Adaptability, for instance, need not lead to the downgrading of social standards by introducing flexible contracts. Adaptability can also lead to the creation of new social rights aiming at reconciling work with family life. National legislation implementing OMC guidelines in this sense may find support in this interpretation by reference to the fundamental social rights of the Charter.

Moreover if such national legislation derogates at the same time from EU law, such as the free movement rules, it should be possible to use the fundamental social rights of the Charter in defence of such national derogations. The Court has already allowed fundamental rights to be invoked where Member States derogate from EU law,<sup>35</sup> and it would therefore be logical to accept such reasoning where similar derogations take place in the context of an OMC, given that in that case the Member States are ‘implementing Union law’ and should thus not only ‘respect the rights’ and ‘observe the principles’ of the Charter, but should also ‘promote the application thereof’ (Article 51 CFREU).

Fundamental social rights can thus be used in the interpretation of national legislation implementing the EES, both to support the social rights dimension *within* the EES in contrast to the economic and competitiveness dimension of the strategy, and *outside* the EES to support derogations from the economic constitution of the EU.<sup>36</sup>

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<sup>34</sup> For the possibilities when European regulation does exist, see below.

<sup>35</sup> Case 5/88 *Wachauf* [1989] ECR 2609; and Case C-260/89 *Elliniki Radiophonia Tileorassi AE v. Domitiki Etairia Pliroforissis and Sotiris Kouvelas* [1991] ECR I-2925.

<sup>36</sup> If one accepts that national legislation in the context of an OMC is ‘implementing Union law’, this use of fundamental social rights would respect the requirements of Article 52 (5) CFREU regarding ‘principles’.

(c) European legislation related to the cognitive framework of the OMC

In addition to the relation between the OMC and national legislation framed in that context, the OMC in question may also be related to legislation adopted at the European level. It is clear that the OMC has generally been developed for certain policy areas in which the EU has no legislative competence, and in some cases precisely because the transfer of such competence to the European level has been considered undesirable. However, this does not imply that the OMC takes place in a vacuum, entirely separated from regulatory initiatives for issues on which the EU does have competence to adopt hard law. In fact, while aiming at coordinating national policies, the OMC might also influence the cognitive framework within which European legislation is adopted. This is, for instance, the case with the EES. As argued above, EU labour law has increasingly been influenced by the broad cognitive framework for employment provided by the OMC.

While the EES encourages ‘adaptability’, including flexible solutions in regulating working time, Directive 2003/88/EC, replacing Directive 93/104/EC, lays down minimal requirements for the protection of health and safety of workers in organising working time. Although defining ‘minimal requirements’, this regulation is characterised by strong flexibility allowing for a large number of derogations. While adaptability in working time may be won at the benefit of reconciling work with family life, the framework of competitiveness and employment provided by the EES may also lead to a further interpretation of the Working Time Directive in the direction of flexibilisation according to sectors and local needs and at the cost of social rights.<sup>37</sup> Therefore, the recognition of the fundamental right of every worker to a limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave, as provided in Article 31 (2) CFREU, may serve as a counterbalance in the judicial interpretation of the Directive and of the EES.

Two remarks should be made here. First, even in the interpretation of European legislation, the Court has been reluctant to recognise fundamental social rights. In *BECTU*,<sup>38</sup> for instance, the Court agreed that the UK did not respect the provisions on annual leave provided by the Working Time Directive, but it shied away from the language of fundamental rights, preferring instead to characterise the right to paid annual leave as ‘a particularly important principle of Community law’, albeit one ‘from which there can be no derogations’.<sup>39</sup> The CFREU, whose possible inclusion in the Constitutional treaty was being debated at that time,<sup>40</sup> had not been referred to by the Court, which only mentioned the Community Social Charter which was cited in the Working Time Directive’s preamble.

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‘The provisions of this Charter which contain principles *may be implemented* by legislative and executive acts taken by Institutions and bodies of the Union, and *by acts of Member States when they are implementing Union law*, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality (stress added).’

<sup>37</sup> Analysing the implementation of the Working Time Directive in the UK, Barnard, Deakin and Hobbs argue that ‘the Directive is at risk of degenerating into a weak and partial mechanism for the realization of social rights’; Catherine Barnard, Simon Deakin and Richard Hobbs (2005), ‘Reflexive Law, Corporate Social Responsibility and the Evolution of Labour Standards: the Case of Working Time’, in Olivier De Schutter and Simon Deakin (eds), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?*, Brussels: Bruylant.

<sup>38</sup> Case C-173/99 R v. Secretary of Trade for Industry, ex parte BECTU [2001] ECR I-4881.

<sup>39</sup> Compare with Case C-133/00 Bowden and others v. Tuffnells Parcels Express Ltd [2001] ECR I-7031; see Jo Hunt (2003), ‘Fair and Just Working Conditions’, in Tamara Hervey and Jef Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Oxford: Hart, p.60-63.

<sup>40</sup> This may also explain the Court’s reluctance to intervene in the political debate.

Second, although fundamental social rights might be invoked in this way, and they could *de facto* constitute a threshold against a race-to-the-bottom effect of the EES on European legislation, in terms of judicial proceedings the issue will most likely be argued in terms of the relationship between the Directive in question and fundamental rights, without any reference to the OMC.

However, the EES and European social regulation are not necessarily moving in the same direction. For instance, analysing policy towards older workers, Paul Skidmore<sup>41</sup> has revealed the tension between the EES and European social policy based on the EU's legislative competences. Encouraging measures to tackle the unemployment of younger and older workers, the EES may lead to national labour law provisions favouring particular age groups in the workforce, which may result in a contrast with the Framework Directive 2000/78/EC<sup>42</sup> on equal treatment in employment and occupation. The Framework Directive, adopted on the basis of the anti-discrimination clause of Article 13 EC, prohibits age discrimination, but also states that 'differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary' (Article 6(1)). Courts may thus be faced with the task of deciding whether a national measure adopted in the context of the EES does constitute 'legitimate employment policy' and where this is the case whether the measure is then proportionate. In general the ECJ's case law on discrimination has demonstrated the Court's strict adherence to a principle of formal equality with only narrow derogations.<sup>43</sup> This is likely to be followed also in relation to age discrimination, even if 'justified' by the employment policy of the EES. Can fundamental social rights play a role in deciding on this tension between EES and European social regulation? In the case at hand, the old worker 'privileged' by national measures would most likely have little to win from a reference to fundamental rights. Whereas article 21 CFREU clearly prohibits discrimination on grounds of age, the Charter does not provide clear entitlements to which one could refer in order to justify such privileged treatment. In particular, the Charter does not include the right to work.<sup>44</sup>

The potential tension between Directives based on the anti-discrimination clause of Article 13 EC and the OMC is also noted in the field of social inclusion. According to Kenneth Armstrong, OMC and anti-discrimination Directives may be complementary policy instruments to combat social exclusion, but they create, nevertheless, 'a tension between a conception of social inclusion premised on pathways out of exclusion and policy diversity between states on the one hand, and an ideal of civil and political inclusion premised on equality guarantees and uniform EU entitlements'.<sup>45</sup> If this tension were to enter the sphere of judicial scrutiny, the use of fundamental rights would favour the second pathway since they identify general entitlements. Yet, in the absence of strong uniform EU social entitlements, in terms of legislation or fundamental rights as defined in the CFREU,

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<sup>41</sup> Paul Skidmore (2004), 'The European Employment Strategy and labour law: a German case-study', 29 *European Law Review* 1, p.52-73.

<sup>42</sup> OJ [2000] L303/16.

<sup>43</sup> *Ibid.*, p.60.

<sup>44</sup> A remarkable absence in the CFREU, in contrast for instance to the European Social Charter. See Diamond Ashiagbor in this volume.

<sup>45</sup> Kenneth Armstrong (2003), 'Tackling Social Exclusion Through OMC: Reshaping the Boundaries of EU Governance' in T. Börzel and R. Cichowski (eds) *The State of the Union: Law, Politics and Society* (Vol. 6), Oxford: Oxford University Press, p.177.

reference to fundamental rights would mostly end up in ensuring formal equality, which may precisely put at risk national social entitlements.

To summarize, the possibility of reference to fundamental social rights in a judicial context in order to limit, interpret or steer the effects of an OMC is not entirely to be ruled out. However, as a justiciable threshold against a potential race to the bottom effect of the OMC, fundamental social rights may not offer very much. Guidelines and Recommendations as such cannot be directly challenged. It is also very unlikely that a national law implementing the EES could be challenged by reference to a fundamental social right as enshrined in the CFREU. Instead, fundamental social rights might enter into the judicial debate in relation to the *interpretation* of national or European legislation influenced by the EES. Thus it could strengthen a social rights interpretation of national law implementing the EES – rather than a race-to-the-bottom interpretation of the Strategy – and strengthen the position of such national legislation against the EU’s economic constitutional framework. It could equally strengthen the social rights interpretation of European legislation in the context of the cognitive framework provided by the EES, or help to address the tension between the former and the latter.

It is undoubtedly the case that a judicial interpretation of the EES in terms of respecting and even promoting social rights will have more chance the more the EES takes up *ex ante* the language of social rights in terms of its policy objectives.

## 2. *Fundamental social rights as ex ante inspiration of the EES*

While fundamental social rights demonstrate serious limits in terms of justiciability, in particular if they are expected to provide a threshold against a race to the bottom interpretation of the OMC, they may play an important role *ex ante* in defining the policy objectives of the EES. The *ex ante* role of fundamental social rights as a normative discourse that can guide policy has been illustrated by the way in which the 1989 Community Charter of the Fundamental Social Rights of Workers inspired European social policy, and in particular the adoption of Directives.<sup>46</sup>

However, fundamental social rights need not necessarily serve as a basis for a legislative policy agenda at the European level, they can also serve as normative objectives and as an inspiration for the programmatic steering of national policies through the OMC.

Fundamental social rights are realised through the development of social policies, which remain largely in the hands of the Member States. However, OMC procedures, such as those in the field of employment, social inclusion and pensions, aim to set the cognitive framework for these policies. If this cognitive framework is defined in terms of economic and statistical targets without the language of fundamental rights this may undermine at national level the direct link between fundamental social rights and the policy instruments needed to realise them. It is therefore desirable that these OMCs take up the language of fundamental social rights.

Would this however conflict with the CFREU’s emphasis on the importance of respect for the division of powers between the EU and its Member States in order to protect their national sovereignty? By adopting the language of fundamental social rights in the OMC, the EU would not exercise any additional competence. It would fit precisely with the idea that fundamental social rights do not necessarily require ( ) the creation of common legislative standards at the European level, but can be realised even while taking into account national diversity. EU Institutions and Member States would simply ‘respect the

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<sup>46</sup> B. Wendon (1998), ‘The Commission as image-venue entrepreneur in EU social policy’, 5 *Journal of European Public Policy*, p.344.. Since 2001 a comparable evolution can be noticed in relation to the CFREU, see Bruno de Witte in this volume.

[Charter's] rights, observe the principles and promote the application thereof in accordance with their respective powers...' (Article 51 (1)). *Vice versa*, if OMC procedures as the EES do not take up the language of fundamental rights they are likely to fall short of the requirement to respecting and promote the application of the Charter's rights and principles given their power to influence the cognitive framework for policy instruments which help to realise such rights.

In order to integrate the language of fundamental social rights into the EES it would be advisable to include in the Employment Title of the EC Treaty a reference to fundamental social rights and the CFREU as explicit principles and objectives of this policy.

However, the main challenge is to integrate the language of fundamental social rights into the content of the EES, via the guidelines and recommendations. Some of the benchmarks set in the EES could be framed with reference to the realisation of specific fundamental social rights. Such language strengthens the cognitive framework in which national policies and legislation could then take rights seriously. Moreover, it would broaden the space to provide an *ex post* 'social rights interpretation' of the OMC by the judiciary, as indicated above.

### *B. The OMC at the service of a fundamental rights policy*

Using the example of the EES, I have argued that fundamental social rights may function both as an *ex post* (interpretative rather than entitling) justiciable threshold and an *ex ante* programmatic inspiration for the OMC. Several authors have identified an additional relation between fundamental social rights and the OMC, namely that the OMC could be used as a technique to give concrete contextual substance to these abstract rights.<sup>47</sup>

This fits with the programmatic use of fundamental social rights as a source of inspiration for policy making, but strengthens this use in a double way. First, the introduction of an OMC specifically on fundamental rights, for instance via an annual cycle of national reports to be assessed at the European level, would contribute to defining and interpreting fundamental rights in concrete contexts and on the basis of concrete experiences, in relation to Europe's economic constitution, and would allow for the exchange of best practices. Second, such a cyclical assessment combined with the possibility of addressing recommendations to particular states would create political peer pressure for changes in policy.

This double advantage is illustrated by the experience of the review procedure of the European Social Charter of the Council of Europe which may be of inspiration here.<sup>48</sup>

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<sup>47</sup> G. de Búrca (2003), 'The constitutional challenge of new governance in the European Union', *European Law Review*, 28 ; G. de Búrca (2005), 'Beyond the Charter: How Enlargement has enlarged the Human Rights Policy of the EU', in Olivier De Schutter and Simon Deakin (eds), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?*, Brussels: Bruylant; Nicholas Bernard (2003), 'A New Governance' Approach to Economic, Social and Cultural Rights in the EU', in Tamara Hervey and Jef Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Oxford: Hart, p.247; Kenneth Armstrong (2003), 'Tackling Social Exclusion Through OMC: Reshaping the Boundaries of EU Governance' in T. Börzel and R. Cichowski (eds) *The State of the Union: Law, Politics and Society* (Vol. 6), Oxford: Oxford University Press, p.180; Olivier De Schutter (2005), 'The Implementation of Fundamental Rights through the Open Method of Coordination', in Olivier De Schutter and Simon Deakin (eds), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?*, Brussels: Bruylant.

<sup>48</sup> See Niamh Casey (2000), 'The European Social Charter and Revised European Social Charter', in Cathryn Costello (ed), *Fundamental Social Rights. Current European Legal Protection and the Challenge of the EU Charter on Fundamental Rights*, EU Official Publications, p.55-74; and Régis Brillat in this volume.

Governments are required to provide reports on their implementation of the Charter, which are then assessed by the European Committee of Social Rights, composed of independent experts. This Committee determines for each provision whether or not the national situation is consistent with the Charter. This review process requires the experts to interpret the Charter and it has contributed significantly in providing doctrinal substance to what are often very generally framed provisions.<sup>49</sup> The European Committee of Social Rights subsequently addresses a report to the Governmental Committee that prepares the decisions of the Committee of Ministers. The latter adopts a resolution for the supervision cycle as a whole and can adopt recommendations addressed at individual countries.

Such a political reporting mechanism on fundamental rights has also advantages over *ex post* judicial sanctioning mechanisms. An OMC can provide both *ex post* assessment and *ex ante* guidance for a real fundamental rights policy. Neither does it depend on the initiative of an individual complainant. Moreover, those most in need of fundamental social rights protection, often lack the knowledge and resources to go to court. Finally, although it appears difficult to maintain a rigid distinction between political and civil rights on the one hand, and economic and social rights on the other, one cannot ignore the fact that the recognition of a fundamental social right very often implies a difficult assessment of costs and available resources. A participatory political procedure may often be a better forum than judicial proceedings to make such an assessment.<sup>50</sup>

#### **4. The language of rights: a minority language? The need for participatory procedures.**

As noted by Olivier De Schutter, the current political setting is a favourable one for thinking about a fundamental rights policy in the EU in which an OMC may find a place.<sup>51</sup> Not only has the CFREU and its inclusion into the Constitutional Treaty placed fundamental rights at the centre of the European constitutional debate, but the European Council in Brussels in December 2003 also decided to convert the European Monitoring Centre on Racism and Xenophobia into a Fundamental Rights Agency. The Monitoring Centre, which has as its main task the collection of data, would extend its remit to the field of fundamental rights. The Commission established a consultation process late in 2004 to prepare a proposal in this direction.<sup>52</sup> Even while awaiting further institutional initiatives for what might become an EU fundamental rights policy, several lessons can be drawn from existing institutions.

It has been argued for instance that existing European information agencies are too detached from policy making, and that they fail to trigger policy initiatives or to influence

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<sup>49</sup> See Régis Brillat and Jean-François Akandji-Kombé in this volume.

<sup>50</sup> Roman Wieruszski (1994), 'Some Comments Concerning the Concept of Economic and Social Rights', in Krzysztof Drzewcki, Catarina Krause and Allan Rosas (eds), *Social Rights as Human Rights. A European Challenge*, Finland: Åbo Akademi Tryckeri, p.69; Matthew Craven (2000), 'A View From Elsewhere: Social Rights, International Covenant and the EU Charter of Fundamental Rights', in Cathryn Costello (ed), *Fundamental Social Rights. Current European Legal Protection and the Challenge of the EU Charter on Fundamental Rights*, EU Official Publications, p.86; Nicholas Bernard (2003), 'A New Governance' Approach to Economic, Social and Cultural Rights in the EU', in Tamara Hervey and Jef Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Oxford: Hart, p.266.

<sup>51</sup> Olivier De Schutter (2005), 'The Implementation of Fundamental Rights through the Open Method of Coordination', in Olivier De Schutter and Simon Deakin (eds), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?*, Brussels: Bruylant

<sup>52</sup> Communication from the Commission; The Fundamental Rights Agency. Public consultation document. COM (2004) 693 final; 25/10/2004.

the implementation of policy. The 2002 assessment made of the Monitoring Centre, for instance, was very critical and suggested, among other things, that the Centre should strengthen its links with the Member States.<sup>53</sup> Comparable comments have been made regarding the European Agency for Safety and Health Protection at Work.<sup>54</sup>

If hopes are built primarily on an agency which gathers information, fundamental rights may remain a minority language that has no real influence on policies. The same risk is present in the functioning of the Network of Independent Experts set up in 2002 by the European Commission at the recommendation of the European Parliament.<sup>55</sup> The Network, composed of one expert per Member State, provides an annual report, addressed to the Commission, assessing the application of the CFREU, and may be called to deliver an opinion on specific questions raised by the Commission. Yet, while providing valuable reports it risks remaining an exercise confined to a small group of experts without actually triggering any political consequences.

It has been argued that the novelty of the OMC resides precisely in the fact that, compared to previous forms of soft law, data collection and reporting mechanisms in the EU, it provides for a 'high level political participation' through the Council and the European Council, in contrast to monitoring procedures which are typically managed at the administrative level.<sup>56</sup> The OMC thus has greater potential to generate political engagement than other forms of soft law and monitoring.

However, creating an OMC process on fundamental rights provides no guarantee that fundamental rights protection will be a strong feature of European policy making. Two potential weaknesses of the OMC which emerge from the experience with existing OMC procedures should be considered. First, despite 'high level' political involvement through the Council and European Council, the practice of OMC procedures has often been described as technocratic, centred around a limited group of representatives from national administrations, and – despite rhetorical promises – weak in including stakeholders or ensuring bottom up involvement.<sup>57</sup> While this puts into doubt the democratic quality of the OMC, the lack of involvement may equally impede its effectiveness by not reaching those who implement policies in practice. In the field of fundamental rights, the importance of involving civil society actors in a reporting system such as the OMC is illustrated by the experience of the European Social Charter. Until 1998, civil society actors were only involved in the annual review procedure through their participation as observers of representatives of the European social partners' organisations in the meetings of the Governmental Committee. Although Article 27 ESC provided the Governmental Committee with the opportunity also to consult other civil society organisations, this has never been done in practice.<sup>58</sup> As argued by the former head of the ESC Section at the Council of Europe, the limited role assigned to employers' and workers' organizations in the old ESC system and the total exclusion of the NGOs had reduced their interest in the

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<sup>53</sup> Commission européenne, Evaluation de l'Observatoire européen des phénomènes racistes et xénophobes, May 2002, at : [http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/pdf/origin/eumc\\_eval2002\\_fr.pdf](http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/origin/eumc_eval2002_fr.pdf)

<sup>54</sup> Stijn Smismans (2004), *Law, Legitimacy and European Governance. Functional Participation in Social Regulation*, Oxford: Oxford University Press, p.294.

<sup>55</sup> [http://europa.eu.int/comm/justice\\_home/cfr\\_cdf/index\\_en.htm](http://europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm)

<sup>56</sup> Susana Borrás and Kerstin Jacobsson (2004), 'The open method of co-ordination and new governance patterns in the EU', *Journal of European Public Policy*, Vol.11, No.2, p.189.

<sup>57</sup> See footnote 1.

<sup>58</sup> Klaus Fuchs (1994), 'The European Social Charter: Its Role in Present-Day Europe and Its Reform', in Krzysztof Drzewcki, Catarina Krause and Allan Rosas (eds), *Social Rights as Human Rights. A European Challenge*, Finland: Åbo Akademi Tryckeri, p. 158.

Charter and was, therefore, one of the main effectiveness problems of the ESC, given their important influence on national policies in this area.<sup>59</sup>

Second, the experience with existing OMCs has raised awareness of the need to 'streamline' or coordinate the various coordination methods. Initially, OMC procedures – despite often dealing with interrelated policy issues – proceeded with their own policy cycles and involving different actors, ignoring what happened in the parallel procedures. Yet, the OMC has more recently demonstrated the potential for 'reflexivity', by taking into account what is happening beyond that particular coordination mechanism.<sup>60</sup> More than for any other policy sector, an OMC on fundamental rights should avoid enclosing itself within its own cyclical process. Fundamental rights should inspire all policy areas. Put differently, the language of rights should not confine itself to a ghetto with only fundamental rights experts being involved in an OMC on fundamental rights, but instead should be able to influence other OMCs. The prospect of having an OMC-dealing with fundamental rights on the one hand and, an OMC dealing with employment on the other, each functioning entirely independently should be avoided. Instead the language of fundamental rights, although developed and fine-tuned within an OMC dealing specifically with fundamental rights should then be able to influence the EES and to provide a counterbalance to the competitiveness discourse in this Strategy.

Thus, an OMC on fundamental rights could have an advantage over an information-based agency in that it could create a degree of high-level political involvement. But the language of fundamental rights should reach outside and beyond the OMC on that topic. In that sense, particular attention should be given to creating elements of reflexivity and interaction with other OMC procedures, for instance by streamlining their policy cycles, and to creating the widest possible participatory structures able to propagate the language of fundamental rights beyond a closed circle of experts.

The advantage of having an OMC does not imply that an information agency would not also have a role to play. One should rather look at how these policy instruments might be combined in order to compensate for one another's weaknesses.<sup>61</sup> Profiting from the reform of the Monitoring Centre on Racism, the future institutional setting for a European fundamental rights policy could be structured around the following three features: First, the Fundamental Rights Agency would focus on the collection of data AND providing an analysis of this data, which would be collected through a network involving national administrations, experts and civil society actors. In order to avoid information collection being merely a compilation of dispersed and non-comparable data (a criticism made both of the Monitoring Centre and the Bilbao Agency on occupational health and safety), it should also have a research function and should develop the capacity to analyse critically the received data. The competence to engage in research has, for instance, been a strong reason for satisfaction with the Dublin Foundation for Living and Working Conditions, in contrast to the criticism of the Bilbao Agency which lack such a competence.<sup>62</sup> The Network of Independent Experts could play a central role in providing

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<sup>59</sup> Ibid, p.159.

<sup>60</sup> See Stijn Smismans (2005), 'Reflexive law in support of directly deliberative polyarchy: Reflexive-deliberative polyarchy as a normative frame for the OMC', in Olivier De Schutter and Simon Deakin (eds), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?*, Brussels: Bruylant.

<sup>61</sup> I have argued in a comparable way in favour of an OMC in the field of occupational health and safety in combination with the role of the Bilbao Agency dealing with this field, in order to overcome the shortcomings of the latter. See Stijn Smismans (2004), *Law, Legitimacy and European Governance. Functional Participation in Social Regulation*, Oxford: Oxford University Press, p. 302-304.

<sup>62</sup> Ibid, p.301.

the capacity for critical analysis, for instance, by linking into the Agency structure as a scientific committee.<sup>63</sup>

This data collection would lead to annual reports on the state of fundamental rights in each Member State, and to reports on specific topics. National administrations currently play a role in information gathering, but they should not be monopoly players, since they are both party and judge in the implementation of fundamental rights. Experience with agencies, such as the Bilbao Agency, has shown the risk that a monopolising position of national administrations in the agency's network may negatively influence the quality of the information provided.<sup>64</sup> On the other hand, the experience of the European Committee of Social Rights in the context of the ESC, has shown the strong added value of reporting and of an assessment involving experts. Using the Fundamental Rights Agency for national reporting, with its resources in terms of having a fixed own secretariat, and building on expertise – provided by the Network of Independent Experts – and civil society involvement could offer an advantage over an OMC in which national administrations would be the central players.

Second, while using the Agency for national reporting, these reports should nevertheless be integrated in a cyclical OMC procedure creating a degree of political engagement; i.e. national reports should be taken up by the Commission in order to propose assessments and recommendations to the Council and European Council, to be streamlined with other OMC procedures. Again the ESC experience could be interesting here; one of the main reasons for the reforms of the 1990s has been the tension between the expert analysis of the European Committee of Social Rights (then Committee of Independent Experts) and the political assessment by the Governmental Committee; a tension which was resolved in favour of the expert judgement of the European Committee.<sup>65</sup>

Third, civil society actors should be involved in the reporting system. This should be done, above all, by involving them in the agency network in gathering information. However, their position could also be enhanced by introducing a collective complaints procedure such as has been done in the ESC (and which entered into force in 1998).<sup>66</sup> Such a collective complaint procedure could compensate for the significant shortcomings in the justiciability of fundamental rights, in particular social rights, not at least in the context of OMC procedures.

## Conclusion

The OMC can be seen both as a potential asset or as a threat for social standards. In the absence of (the political will to adopt) binding social norms at the European level, the OMC could steer national (social) policies in the same direction and, therefore, could reduce the risk of a race-to-the-bottom effect due to regulatory competition. Yet, if dominated by European's economic constitutional framework, statistical and quantitative

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<sup>63</sup> The assessment of the Monitoring Centre also called for a scientific committee, in order to leave the Management Board more space to deal with the real management issues. See Commission européenne, Evaluation de l'Observatoire européen des phénomènes racistes et xénophobes, May 2002, at :

[http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/pdf/origin/eumc\\_eval2002\\_fr.pdf](http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/origin/eumc_eval2002_fr.pdf)

<sup>64</sup> Smismans (2004), p.295-296.

<sup>65</sup> See also Régis Brillat in this volume.

<sup>66</sup> Niamh Casey (2000), 'The European Social Charter and Revised European Social Charter', in Cathryn Costello (ed), *Fundamental Social Rights. Current European Legal Protection and the Challenge of the EU Charter on Fundamental Rights*, EU Official Publications, p.68-75.

benchmarks, the OMC might also undermine the social-rights-oriented cognitive framework of national social policies.

Fundamental social rights could then appear as a threshold below which the OMC should not go. Yet, in terms of justiciability, fundamental social rights seem to offer little in relation to the OMC. One cannot directly challenge the validity of OMC guidelines or recommendations, and it is equally very unlikely that one could challenge a national law implementing an OMC guideline by reference only to fundamental social rights, independently of any European regulatory framework. Instead, fundamental social rights may help in the interpretation of national law implementing an OMC in relation to the EU's constitutional and regulatory framework, as well as in interpreting the latter where related to the cognitive framework provided by an OMC.

However, the most important use of fundamental social rights in relation to the OMC is likely to be in their programmatic nature, in giving definition to the direction and objectives of OMC procedures. Such a programmatic use would be strengthened by using the OMC as a technique for reporting on and guiding a fundamental rights policy in itself.<sup>67</sup> However, particular attention should be given to ensuring that such a fundamental rights OMC would be able to spread the language and orientation of fundamental social rights into other OMCs. The current proposal to transform the European Monitoring Centre on Racism and Xenophobia into a Fundamental Rights Agency provides a good occasion to think about the best institutional setting to realise this aim, which should be done by creating an appropriate balance between expert assessment, civil society involvement and political engagement.

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<sup>67</sup> The creation of an OMC fundamental rights in the EU may seem to duplicate already existing reporting mechanisms such as that of the ESC. Yet, its added value lies particularly in the fact that the EU is more politically salient, and that it would create better opportunities to link with EU policies, including OMCs. See also G. de Búrca (2005), 'Beyond the Charter: How Enlargement has enlarged the Human Rights Policy of the EU', in Olivier De Schutter and Simon Deakin (eds), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?*, Brussels: Bruylant.