

Legitimising European Governance: Taking Subsidiarity Seriously within the Open Method of Coordination

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I Introduction

The familiar story about the challenge - for some, the crisis - facing the European Union goes something like this. Economic integration has been achieved. The internal market is complete, and the Euro has already become - as all currencies become, at least for those with means - a humdrum reality. In the efficiency-generating, politically-neutral years of (largely) negative integration, redistributive policy had been left to the Member States. This option is no longer open. In today's brave new world, characterised by ever-increasing interdependence between economic actors, in part forged internally (ironically perhaps, the product of the completion of the internal market and EMU), and in part thrust upon Europe as a result of the external pressures of globalisation, Member States are, progressively, being rendered impotent. There is a perceived need for common responses. The challenge is to articulate these responses in a way which does not offend the widely-held popular belief that policy, especially redistributive policy, made at the European level is somehow 'less legitimate' than policy made at national level.

Academics and politicians have formulated a range of cures for Europe's 'legitimacy deficit', each stemming from a particular theoretical diagnosis. The debate is, in the main, vibrant and imaginative. Participants share a similar objective. They are striving to develop an institutional or constitutional structure which will legitimise European level decision making and make Europe's citizens better able to thrive and prosper in today's globalised world.

This paper aims to illustrate that legitimising *European level* decision making is no more (and no less) than part of the solution. It is recognised that in today's interdependent world, the range of (especially redistributive) policy outcomes which either cannot, or will not, be achieved by Member States acting alone is increasing. However, it is argued that within a multi-level governance system policy should be made at various levels. Policy makers at the international, regional, local and, of course, national levels can

do more than merely play their part in the making of policy at the European level, or worse, merely play their part in the implementation of decisions made at European level. Crucially, they should also be afforded the space to make certain decisions of their own. What is needed within the constitutional architecture of the EU is a principle which directs attention to the level, or levels, at which certain policy objectives can best be formulated and realised. Such a principle is, I acknowledge, difficult to operationalise. Nevertheless, it exists, it is called subsidiarity, and it should (still) be taken seriously.¹

This paper considers the various dimensions of the legitimacy and subsidiarity debates. It welcomes the fact that the two principles seem to be playing a full part within the debate on the future of Europe. Its focus is on the open method of coordination (OMC), a much heralded new governance strategy, said to be capable of contributing to Europe's legitimacy, and to be in conformity with the dictates of the subsidiarity principle. The aim of this paper is to examine the operation of the open method in the employment and social sphere. It draws attention to the extent to which the OMCs in each field constrain local autonomy, and endeavours to illustrate the ways in which the OMC process is capable of adding legitimacy to the EU polity.

II Legitimacy

Legitimacy is, to be sure, a difficult concept. It is 'one of the most frequently used and misused concepts in political science' ranking 'up there with "power" in terms of how much it is needed, how difficult it is to define and how impossible it is to measure'.²

In this paper, I am not so rash as to attempt a definition. Following the approach of Neil Walker, I identify three interrelated strands; performance, regime and polity legitimacy, each of which contributes to the social and

¹ Bermann, G., 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', 94 *Columbia Law Review* (1994) 331.

² Schmitter, P., 'What is There to Legitimise in the European Union... And How Might This Be Accomplished?', in Joerges, C., Meny, Y. and Weiler, J. (eds), *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, Jean Monnet Working Paper No. 6/01, RSC, 2001, p.79. See also De Búrca, G., 'The Quest for Legitimacy in the EU', 59 *MLR* (1996) 349; and Bogdansky, D., 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law', 93 *AJIL* (1999) 596.

normative acceptability of particular governmental structures.³ These three strands relate to each other in complex ways, and moreover, are internally contested. However, they are useful for these purposes in that they provide an indication of the dimensions of the legitimacy challenge facing Europe.

Performance legitimacy relates to the ability of any political entity to deliver policy goals. Attention is devoted both to the choice of policy priorities and to their realisation. Utilitarian and efficiency-based arguments are decisive in the performance legitimacy calculus. Regime legitimacy refers to the nature of the institutional structure. It is concerned with the pattern of political organisation, the representative quality of the governing institutions and the relationship between them. Democratic arguments, of various types, dominate here. The third and final strand, polity legitimacy, is rather more abstract and intangible. It is said to be an ‘umbrella term’, which relates to the extent to which entities meet ‘certain minimal conditions of political community’.⁴ ‘A polity enjoys legitimacy *qua* polity to the extent that its putative members treat it as a significant point of reference within their political identity’.⁵ In the EU context, much of the literature on constitutionalism, constitutional discourse, and beyond,⁶ seeks to contribute in some way here.

Endeavouring to assess the legitimacy of the EU, which is a ‘polity in formation’, ‘ever at the experimental limits of governance’,⁷ is of course, even more difficult than assessing the legitimacy of well-established national polities. Nevertheless, the language of legitimacy has claimed its (legitimate) place in the discourse on the future of Europe. In the Laeken Declaration, the European Council called for more democracy, transparency and efficiency as

³ Walker, N., ‘The White Paper in Constitutional Context’, in Joerges *et al* (eds) (2001), n.2 above, p.33.

⁴ *Ibid*, p.36.

⁵ *Ibid*, p.37.

⁶ Ward, I., ‘Beyond Constitutionalism: The Search for a European Political Imagination’, 7 *ELJ* (2001) 24.

⁷ Everson, M., ‘Administering Europe?’, 36 *JCMS* (1998) 195, p.201. On governance, see Jachtenfuchs M., ‘The Governance Approach to European Integration’, 39 *JCMS* (2001) 245; Della Salla, V., ‘Constitutionalising Governance: Democratic Dead End or Dead On Democracy?’, *Con WEB* No. 6/2001, at <http://les1.man.ac.uk/conweb/>; Shapiro, M., ‘Administrative Law Unbounded: Reflections on Government and Governance’, 8 *Indiana Journal of Global Legal Studies* (2001) 369; and Zurn, M., ‘Governance Beyond the Nation State: The EU and Other International Institutions’ 6 *EJIL* (2000) 183. On the US experience, see Freeman, J., ‘The Private Role in Public Governance’, 75 *NYULR* (2000) 543.

the means to increase the Union's legitimacy.⁸ The Commission in its White Paper on European Governance preferred to focus not on legitimacy, but on 'five principles of good governance': openness, participation, accountability, effectiveness and coherence. Nevertheless, it added that the Union's 'legitimacy today depends on involvement and participation'.⁹

II 1 Diagnoses and cures for the 'legitimacy deficit'

In the days in which there was a clear political mandate to pursue the goal of market integration at the European level, and in which it was (surprisingly successfully) maintained that the market integration project did not raise redistributive concerns other than those which could be dealt with at the national level, it was possible for the European Community to sidestep any complex legitimacy enquiry.¹⁰ The Community was evaluated overwhelmingly in performance legitimacy terms, according to technical, efficiency-based standards. The key question was how it contributed to the goal of market integration.¹¹ It scored highly. It was able to deliver the internal market. Insofar as market creating policies were the sole object, any democratic, or regime, legitimation which it was felt might be necessary, was provided through intergovernmental channels. Its lack of a direct democratic

⁸ Laeken European Council, 14 and 15 December 2001, Presidency Conclusions, Annex I, Section II.

⁹ Commission, 'European Governance: A White Paper', COM(2001)428, p.10-11.

¹⁰ 'The founders of the European Community wanted to keep all these questions of regime, philosophy of the State, political culture, and the like within the national framework of each Member State and did not seek to transfer them to the EU'. Elazar, D., 'The United States and the European Union: Models for Their Epochs', in Nicolaidis, K. and Howse, R. (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP, 2001), Chapter 1, p.40.

¹¹ Scharpf puts the matter like this: 'Once the basic political commitments to market integration had been adopted in the Treaty of Rome and, again, in the Single European Act, it was for the Commission and the Court, acting as "guardians of the Treaty", to define and implement the common project; and it was plausible for the Commission to see itself as the taskmaster whose job it was to cajole, blackmail or compel recalcitrant or protectionist Member States to accept the concrete implications of what they had already agreed to in the abstract'; Scharpf, F., 'European Governance: Common Concerns vs. The Challenge of Diversity', in Joerges *et al* (eds) (2001), n.2 above, p.8. See also Majone, G., 'The European Community Between Social Policy and Regulation', 31 *JCMS* (1993) 153; and Majone, G., *Regulating Europe* (Routledge, London, 1996).

mandate could even be presented as a strength - it lent energy and credibility to the integration process.¹²

Today's Union does not have such luxury. It 'will no longer be judged solely by its ability to remove barriers to trade or complete an internal market'.¹³ Market integration is recognised for what it is, and always was; a normatively, politically and philosophically contested enterprise.¹⁴ Uncertainty affects not only the manner in which enduring redistributive concerns might be integrated within market management, but also the character of the parties to be included within the regulatory debate, be they supranational institutions, Member States or private interests.¹⁵ This realisation that market-making within Europe is a social and political, as well as an economic enterprise, coupled with the evolution of competences in policy areas distant from the internal market core, has meant that Europe can no longer shield from the legitimacy gaze. However, given the complexity and contestability of any legitimacy enquiry, developing legitimacy diagnoses, and matching them with the necessary cures, is no easy task.

A small minority of commentators conclude that the disease is insurmountable. The patient is in fatal danger; according to the least attractive variant of this position, it is only through the death of the European patient that the national souls within will find redemption. Redistributive policies require thick commitment from the people; Europe has no *volk*, no demos, no polity, and no way of inspiring such commitment.¹⁶ Legitimacy is unattainable. European institutions have had their time. That time is now past.

¹² Majone, G., 'Europe's "Democratic Deficit": The Question of Standards', 4 ELJ (1998) 5; and Majone, G., 'The Credibility Crisis of Community Regulation', 38 JCMS (2000) 273.

¹³ Commission (2001), n.9 above, p.11.

¹⁴ See Maduro, M., *We, The Court: The European Court of Justice and the European Economic Constitution* (Hart, Oxford, 1998); and Joerges, C., 'The Market without the State? The "Economic Constitution" of the European Community and the Rebirth of Regulatory Politics', EIoP Vol. 1 (1997) No. 19, at <http://eiop.or.at/eiop/texte/1997-019a.htm>.

¹⁵ Everson, M., 'Adjudicating the Market', 8 ELJ (2002) 152.

¹⁶ Surely, however, 'there is no reason to presume that civic solidarity will find its limits at the borders of the Nation State'; Habermas, J., 'So, Why Does Europe Need a Constitution?' EUI, 2001, p.18. See further Weiler, J., 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision', 1 ELJ (1995) 219; and Craig, P., 'Constitutions, Constitutionalism, and the European Union', 7 ELJ (2001) 125, p.136-139.

Most of us are less fatalistic. We argue that the European Union can, indeed that it must, survive. We, to varying degrees, accept that the patient is ill, that she needs to adapt to the changed world in which she now lives, but insist that a cure exists. However, beyond what is in reality a less-than-inspiring, skin-deep, optimistic consensus, opinions are divided. What should one make of the institutional trinity at the heart of the Community method? What of the Court of Justice and its relationship with national courts?¹⁷ How about the more recent intrusion of the European Council, the European Central Bank, comitology, agencies, the social partners and civil society? And, most pertinent for this paper, what of the open method of coordination?

II 1 A Substantive and procedural solutions

There are of course no easy answers. Some advocate what may be termed substantive solutions, which focus on the performance dimension of legitimacy. It is useful, for the purposes of the arguments below, to dwell on two of the difficulties they encounter.

The first, is the lack of guidance in the Treaties. Beyond the commitment to an ever closer union among the peoples of Europe, the Treaty ‘merrily’ proclaims little more than ‘essentially economic aspirations’.¹⁸ The story of European integration can be presented as the story of the triumph of economic means over social, political and human ends.¹⁹ In the 1950s, agreement was reached on the creation of a common market,²⁰ in the 1980s, on the completion of the internal market, and in the 1990s, thanks again in

¹⁷ This aspect is not considered in this paper. On the nature of legal authority within the EU, see Weiler, J., *The Constitution of Europe: “Do the New Clothes Have an Emperor” and other essays on European integration* (CUP, 1999), chapter 9; Walker, N., ‘Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe’, in De Búrca, G. and Scott, J. (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (Hart, Oxford, 2000), p.9; and Sciarra, S. (ed.), *Labour Law in the Courts: National Judges and the European Court of Justice* (Hart, Oxford, 2001). On the application of subsidiarity to the decisions of the Court of Justice, see De Búrca, G., ‘The Principle of Subsidiarity and the Court of Justice as an Institutional Actor’, 36 *JCMS* (1998) 217, and Swaine, E., ‘Subsidiarity and Self-Interest: Federalism at the European Court of Justice’, 41 *Harvard International Law Journal* (2000) 1.

¹⁸ Ward (2001), n.6 above, p.25. See e.g. Article 2 EC.

¹⁹ ‘Europe would, however, be better served if the current debate about its future addressed not only means but ends too’, Weiler (1999), n.17 above, p.262.

²⁰ ‘The union of the states of the Community was based on the union of specific economic functions rather than a general act of confederation establishing an overarching general government’; Elazar (2001), n.10 above, p.37.

large part to the deliberate exclusion of matters ‘political’,²¹ on economic and monetary union. The result is that the EU has an, albeit contested, economic constitution.²² However, as Maduro graphically puts it, it has no soul.²³

The second point is that this should come as no surprise. The ‘true nature of the European project’ remains a ‘vexed and vexing question’,²⁴ which many are reluctant to bring to the forefront. There has only ever been a consensus about the substantive objectives of the European Union on the most abstract and general, perhaps banal, level. It is one thing to say that Europe should be furnished with a soul, or, in more prosaic language ‘constitutionalised’, but quite another to develop the substantive content of any such Constitution.²⁵

One of the central concerns of this paper is the March 2000 decision, at the Lisbon European Council, to set a new strategic goal for the Union: ‘to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion’.²⁶ Is this something more than the general commitments found in the Treaty? To the extent that it is, is it legitimate, and if so on what grounds?

Habermas is among those who argue that unless the European project is politicised, ‘the hearts of an overwhelmingly negative, or, at the very least,

²¹ See Dyson, K. and Featherstone, K., *The Road to Maastricht: Negotiating Economic and Monetary Union* (OUP, Oxford, 1999).

²² See Snyder, F. (ed.), *Constitutional Dimensions of European Economic Integration* (Kluwer, 1996).

²³ Maduro, M., ‘Europe and the Constitution: *What if this is As Good As It Gets*’, Con WEB No. 5/2000, at <http://les1.man.ac.uk/conweb/>, p.3. See also Maduro, M., ‘Europe’s Social Self: “The Sickness Unto Death”’, in Shaw, J. (ed.), *Social Law and Policy in an Evolving European Union* (Hart, Oxford, 2000), p.325. In this area, the literature is eminently quotable. For Ward, ‘Europe needs to awaken its political imagination. For it is only by exercising its imagination, by indulging in a little “romance” that it can conceptualise what a European public philosophy might actually be’; Ward (2001), n.6 above, p.40.

²⁴ Lebessis, N. and Paterson, J., ‘Developing new modes of governance’, in De Schutter, O., Lebessis, N. and Paterson, J. (eds), *Governance in the European Union* (OOPEC, Luxembourg, 2001), p.264-265. ‘The core of the problem is that there is no agreed narrative about what Europe is for and how it should get there’; Hutton, W., *The World We’re In* (Little, Brown, London, 2002), p.303.

²⁵ For a careful analysis of the difficulties, see Craig (2001), n.16 above, p.139-147. See also Walker (2001), n.3 above, p.39-44.

²⁶ Lisbon European Council, Presidency Conclusions, 23 and 24 March 2000, para.5.

cautious population' will not be won.²⁷ How though can one clarify the political project? It is recognised that inspirational leadership must play a part.²⁸ More important, for Habermas, are 'the empirical preconditions that must be met if an improbable extension of identity-formation beyond national borders is to be achieved: (a) the imperative of a citizenship-based, European civil society; (b) the construction of a Europe-wide public sphere of public communication; and (c) the creation of a political culture that can be shared by all EU citizens'.²⁹ Ultimately it is the legitimacy of the process or regime, in which 'Europe must reflexively re-apply to itself the logic of the circular process that witnessed the mutual reinforcement of the democratic state and the nation',³⁰ which is of decisive importance for the legitimacy of the polity.

Procedural accounts of law are very much in vogue.³¹ In the face of reasonable pluralism, asserting the normative superiority of particular substantive outcomes is inherently problematic. Instead, one looks for policy outcomes which emerge from particular procedures. In legitimacy terms, the focus shifts away from performance towards regime. Regime legitimacy is usually perceived in democratic terms. The search is on for ways of involving people more intimately in the making of the decisions which affect their lives. The fact that the Commission has joined academics in referring to governance rather than government, and that innovative Conventions were established both in relation to the Charter of Fundamental Rights,³² and the Future of the Union,³³ can all be seen as partial responses to the democratic challenge.

²⁷ Habermas (2001), n.16 above, p.24. Note however the doubts expressed by Ward that 'political affinity is not something that can be defined in a legal statute'; Ward (2001), n.6 above, p.28; and, even more fundamentally, by Elazar, who argues that 'the EU is more likely to succeed because it has more limited ends'; Elazar (2001), n.10 above, p.49.

²⁸ Habermas (2001), n.16 above, p.24, approving the contribution of Lionel Jospin to the debate precipitated by Joschka Fischer's May 2000 Humboldt speech. See further Joerges, C., Meny, Y. and Weiler, J. (eds), *What Kind of Future for What Kind of Polity? Responses to Joschka Fischer* (Robert Schuman Centre, Florence, 2000).

²⁹ Habermas (2001), n.16 above, p.18.

³⁰ *Ibid.*

³¹ See De Schutter, Lebeccis and Paterson (eds) (2001), n.24 above; Maduro (1998), n.14 above; and Black, J., 'Proceduralizing Regulation', 20 OJLS (2000) 597.

³² De Búrca, G., 'The Drafting of the European Charter of Fundamental Rights' 26 ELRev (2001) 126.

³³ See http://www.europa.eu.int/futurum/index_en.htm.

This growing emphasis on democracy and regime legitimacy challenges international organisations.³⁴ In this context, size matters, and biggest is not best. The ‘democratic deficit’ (perhaps a ‘deficit of mutual awareness between civil society and public authorities’)³⁵ cannot be ignored. But once again, agreement as to the nature of the disease, and therefore as to the possible range of cures, is elusive. Two strategies are possible; and this paper contends that both are necessary. The first involves reducing the democratic deficit in relation to decision making at the European level. The second involves a closer examination of the need for certain decisions to be taken at the European level.

In relation to European level decision making, the malaise is almost self-evident.³⁶ The cure, however, is not. What is the kind of democracy which would best suit the EU?³⁷ Indirect democratic legitimation through Member State channels, a model in which the importance of the Council of Ministers would be stressed, ‘belongs to a model of international treaty-based intergovernmental government that was appropriate only to the extent that market-creating policies were the sole object pursued’.³⁸ Representative democracy, a model which would favour an increase in the powers of the European Parliament, seems not to be a defensible paradigm of democratic empowerment in a political community as vast as the European Union.³⁹

³⁴ Stein, E., ‘International Integration and Democracy: No Love at First Sight’, 95 AJIL (2001) 489.

³⁵ Lebeccis and Paterson (2001), n.24 above, p.280.

³⁶ ‘All in all, who can disagree that the present mechanisms and institutions do not guarantee the kind of democracy many would like to see in the European Union and that there is vast room for improvement’; Weiler, J., ‘Europe: The Case Against the Case for Statehood’, 4 ELJ (1998) 43, p.53.

³⁷ See e.g. Dahl, R., *On Democracy* (1998), and Held, D., *Models of Democracy* (Polity, Cambridge, 1996). Vignon, J., ‘Governance and Collective Adventure’, in De Schutter, Lebeccis and Paterson (eds) (2001), n.24 above, p.3, refers to a ‘profound mutation of democracy in the nations of Europe and elsewhere’. See further Burchill, R., ‘The Developing Law of International Democracy’ 64 MLR (2001) 123, and Lord, C., ‘Assessing Democracy in a Contested Polity’, 39 JCMS (2001) 641.

³⁸ Habermas (2001), n.16 above, p.15. See also Mancini, G., ‘Europe: The Case for Statehood’, 4 ELJ (1998) 29.

³⁹ See Weiler (1999), n.17 above, chapter 8. Note however, that the European Council shows sensitivity to the democratic legitimacy which the European Parliament and national parliaments have provided, and can still provide, for the European project; see Laeken Conclusions (2001), Annex I.

As a result of the deficiencies of the more traditional models, attention has moved onto direct, participatory forms of democracy.⁴⁰ Under what is often termed a ‘deliberative democratic’ model, the role of government is to provide a space which allows people (or citizens or civil society) to be involved in decision making. Within this space, there is no hierarchy. The participants, each seeking not to further their own selfish interest, but to foster the public interest or the common good, indulge in reasoned argumentation.⁴¹ The emphasis is placed on the discursive process, and ‘the need to facilitate the continuous generation of new knowledge(s)’.⁴² Within such a postnational dialogic space,⁴³ it becomes possible to transcend the constraints inherent in national value-relationships.

The theory is attractive. There are signs that it is increasing influential within the EU. The decision making of the Court of Justice,⁴⁴ comitology,⁴⁵ and agencies,⁴⁶ have each been presented as exemplars of this deliberative approach. So too, but, as is discussed in detail below, rather less credibly, is the open method of coordination. The Commission’s White Paper on Governance and the European Council’s Laeken Declaration also appear to

⁴⁰ Again, the literature is vast. See Habermas, J., *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (MIT, 1996); and Nino, C., *The Constitution of Deliberative Democracy* (New Haven, 1996). In the EU context, see Curtin, D., *Postnational Democracy: The European Union in Search of a Political Philosophy* (Kluwer, 1997); Wallace, H. and Young, A. (eds), *Participation and Policy-Making in the EU* (Clarendon, Oxford, 1997); Gersternberg, O. and Sabel, C., ‘Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?’, in Joerges, C. and Dehousse, R. (eds), *Good Governance in Europe’s Integrated Market* (OUP, 2002); and De Schutter, Lebossis and Paterson (eds) (2001), n.24 above.

⁴¹ The deliberative model is thus contrasted with corporatist and pluralist conceptions of democracy. See further Bernard, N., ‘Legitimising EU Law: Is the Social Dialogue the Way Forward? Some Reflections Around the UEAPME Case’, in Shaw (ed.) (2000), n.23 above, p.279.

⁴² Scott, J. and Trubek, D., ‘Mind The Gap: Law and New Approaches to Governance in the European Union’, 8 *ELJ* (2002) 1.

⁴³ See Shaw, J., ‘Postnational Constitutionalism in the European Union’, 6 *JEPP* (1999) 579.

⁴⁴ See Everson (2002), n.15 above; and Gersternberg, O., ‘Expanding the Constitution Beyond the Court: The Case of Euro-Constitutionalism’ 8 *ELJ* (2002) 172.

⁴⁵ Joerges, C. and Neyer, J., ‘From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology’, 3 *ELJ* (1997) 273; Joerges, C., ‘“Deliberative Supranationalism” - Two Defences’, 8 *ELJ* (2002) 133.

⁴⁶ Everson, M., ‘Independent Agencies: Hierarchy Beaters?’, 1 *ELJ* (1995) 180; Ladeur, K.-H., ‘Towards a Legal Theory of Supranationality: The Viability of the Network Concept’, 3 *ELJ* (1997) 33.

demonstrate a growing institutional sensitivity towards the values which deliberation promotes.

This is not the place for a detailed discussion of deliberative democracy.⁴⁷ I will, however, allow myself to make two critical observations, which are of relevance to the discussions below relating to subsidiarity and the open method of coordination. First and most important, I am not aware of arguments which make a general case for the centre of deliberation to be specifically at the European level. What are the reasons for suggesting that a deliberative polyarchy should be pan-European, but not, for example, global, or national, regional or local? Might not the answer as to the most appropriate level depend on the nature of the issue under deliberation? Second, the deliberative democratic model asks a lot of the citizen. It will not work unless enough of us participate, and indeed, unless we participate in the right way. It is easy to imagine that a deliberative space could be dominated by powerful interests using the opportunity afforded to them by government to pursue sectional interests. Issues of power, or in the language of economists, rent seeking, may easily re-emerge in this new context; and the various theories do not seem to take these aspects sufficiently into account.⁴⁸ Can it be enough that we all had the opportunity to participate?

III Subsidiarity in a multi-level governance system

Although enhancing performance and regime legitimacy and improving governance at the European Union are urgent matters, efforts should also be directed elsewhere. The main focus of this paper is on what is often, somewhat misleadingly,⁴⁹ termed the vertical dimension of the legitimacy challenge; on the ways in which competence can and should be shared between the European level and other levels of governance. This is

⁴⁷ Some claim that the theory is, in some respects, anti-democratic. Although it 'maximises the access of "outside" interest groups to the government decision-making process', it may also undermine democracy (conceived in individual, popular or majoritarian terms), quite simply because when 'public policy decisionmaking is diffused among various government and nongovernment actors in an amorphous, non-rule-defined manner, democratic accountability is destroyed'; Shapiro (2001), n.7 above, p.372.

⁴⁸ See the concerns in Lebossis and Paterson (2001), n.24 above, p.275; and in Weiler, J., 'The Commission as Euro-Sceptic: A Task Oriented Commission for a Project-Based Union', in Joerges *et al* (eds) (2001), n.2 above, p.211.

⁴⁹ In so far as the term vertical has hierarchical connotations, it should be rejected. It is better to see federal organisation in terms of a matrix or mosaic with larger and smaller arenas, not higher and lower; see Elazar (2001), n.10 above, p.42-44.

subsidiarity's domain.⁵⁰ Bermann argues that by performing a confidence-building function (by reassuring the constituent states that their distinctiveness will be respected at the European level), subsidiarity may contribute to the legitimacy of the European Union.⁵¹ This paper contends that its role may be still more important. If the principle is used so as to allocate competences in various policy fields to the most appropriate levels of governance, perhaps so as to best allow the identity claims of the Union to nest with the identity claims of the States within the political consciousness of its, and their, citizens,⁵² it will contribute directly to the legitimacy, in particular the polity legitimacy, of the European Union.

Like legitimacy, subsidiarity is complex. As it is understood in this paper, it is a principle which directs attention to the level, or levels, at which certain policy objectives can best be formulated and realised. It forms 'part of a language which attempts to articulate and mediate... some of the fundamental questions of political authority, government and governance which arise in an increasingly interlocking and interdependent world'.⁵³ This broad principle does not only address the political allocation of power in areas in which it is constitutionally shared;⁵⁴ but also endeavours to influence the constitutional debate relating to the proper allocation of competences. It is not only of utility in relation to European versus national levels of governance; but also encompasses global, regional and local dimensions. It deals not only with whether action should be taken at one level or another, but also speaks to the identity of policy makers at the various levels, and the nature of their interventions.

Although it is multi-faceted,⁵⁵ the principle has a core. It affirms the value of a Union in which decisions are taken 'as closely as possible to the citizen', and 'systematically places the burden of proof on the proponents of

⁵⁰ Much of the inspiration for this section is taken by following articles: Bermann (1994), n.1 above; and De Búrca, G., 'Reappraising Subsidiarity's Significance After Amsterdam', Harvard Jean Monnet Working Paper 7/99. I do not feel that it is useful to analyse Article 5 EC in detail in this paper. It suffices to refer the reader to the above articles.

⁵¹ Bermann (1994), n.1 above, p.367.

⁵² Walker (2001), n.3 above, p.39.

⁵³ De Búrca (1999), n.50 above, p.3.

⁵⁴ This is the specific function of Article 5(2) EC. See Bermann (1994), n.1 above, p.423.

⁵⁵ Endo has traced its historical and philosophical roots; Endo, K., 'Subsidiarity and its Enemies: To what extent is Sovereignty Contested in the Mixed Commonwealth of Europe?', EUI Working Paper, RSC No. 2001/24, p.9-30.

Community action'.⁵⁶ Unless there are clear legitimacy benefits associated with action (of whatever kind) at the Community level,⁵⁷ subsidiarity asks that the autonomy of smaller levels of governance be, as far as possible, respected. In this section I aim to demonstrate the enduring relevance of the principle of subsidiarity, to analyse the benefits of decentralised decision making within the EU, and lastly, to consider the benefits of European level action.

III 1 The political salience of subsidiarity

Ever since its inception at Maastricht,⁵⁸ and subsequent constitutionalisation at Amsterdam via the Protocol on the application of the principles of subsidiarity and proportionality,⁵⁹ the principle of subsidiarity has been a fixture in the political and constitutional debate. The principle can serve a variety of different, even contradictory, ends. This section provides an indication of the ways in which the principle is being used and abused.

The European Council is alert to the broad set of questions which underlies subsidiarity. At Laeken, it stated that it would be important 'to clarify, simplify and adjust the division of competence between the Union and the Member States in the light of the new challenges facing the Union', and concluded that this process could 'lead both to restoring tasks to the Member States and to assigning new missions to the Union'.⁶⁰ Laeken tantalised, providing evidence that the Heads of State or Government are asking themselves some of the right questions, but ultimately frustrated, in that the by now eager reader was not furnished with anything so tangible as answers.

One series of questions asked at Laeken concerns the ways of making the division of competence more transparent. Can we, it is asked, 'make a clearer distinction between three types of competence: the exclusive competence of the Union, the competence of the Member States and the shared competence of the Union and the Member States?'⁶¹ How are we to ensure that 'a redefined division of competence does not lead to a creeping

⁵⁶ Bermann (1994), n.1 above, p.453.

⁵⁷ While Article 5 suggests that these benefits should be assessed in comparative efficiency (i.e. performance legitimacy) terms, this paper argues that all dimensions of the legitimacy equation should be taken into account.

⁵⁸ In Article 5 TEC, and in the Preamble and Article 1 TEU.

⁵⁹ De Búrca (1999), n.50 above, p.26.

⁶⁰ Laeken Conclusions (2001), Annex I, Section II.

⁶¹ *Ibid.*

expansion of the competence of the Union or to encroachment upon the exclusive areas of competence of the Member States and... regions?’⁶² Another series of questions relates to the ‘reorganisation of competence’. Almost all policy areas are mentioned. Coherence, the adoption of an integrated approach, stepped up coordination, and intensified cooperation are alluded to as possible goals. The European Council, however, also indicates that some tasks might be better left to the Member States, which might be provided with guarantees that their ‘spheres of competence’ will not be affected. In particular, it suggests that ‘the day-to-day administration and implementation of the Union’s policy’ should perhaps be left ‘more emphatically’ to the Member States.⁶³

While welcoming the fact that the Heads of State or Government are showing their willingness to tackle competence questions, and apply the principle of subsidiarity in this context,⁶⁴ this paper suggests that there are certain flaws which are visible even at this preliminary agenda-setting stage.⁶⁵ The blatant attempt to pander to the desires, wishes, expectations, feelings, understandings and fears of citizens can be ignored as a mere rhetorical flourish on the part of the European Council, neither adding nor subtracting from the substance of the discussion. Of more concern are the following two points.

First, to the extent that the European Council is wedded to the identification of spheres of exclusive competence for both the Community and the States, it is pursuing the wrong course.⁶⁶ The reality is that competence is shared. As the Commission states, ‘in a multi-level system the real challenge is establishing clear rules for how competence is shared - not separated’.⁶⁷ Principles for the sharing of competence may not yield the clarity at least superficially associated with principles relating to its division; but, in this case, the best solution is not the clearest. Actors at various levels are, and

⁶² *Ibid.* See also Pollack, M., ‘The End of Creeping Competence? EU Policy-Making Since Maastricht’, 38 *JCMS* (2000) 519.

⁶³ *Ibid.*

⁶⁴ Laeken also considered institutional aspects, making the innovative suggestion that, in the context of an increase in the democratic legitimacy of the Union, national parliaments might focus on the division of competence between the Union and the Member States, for example through preliminary checking of compliance with the principle of subsidiarity. These institutional aspects are beyond the scope of this paper.

⁶⁵ For progress, see: <http://european-convention.eu.int/default.asp?lang=EN>.

⁶⁶ See, De Búrca (1999), n.50 above, p.5-6 and 16-24; and Lebesis and Paterson (2001), n.24 above, p.292.

⁶⁷ Commission (2001), n.9 above, p.35.

should be, involved in the planning, execution and/or implementation of all decisions. Nevertheless, the fact that competence is shared does not mean that subsidiarity is redundant. Far from it. It can be used as a guiding principle in order to help fashion what will inevitably be a complex relationship between actors at various levels, and to delineate their respective roles within an essentially cooperative process.

Second, to the extent that the European Council is suggesting that guaranteeing Member State autonomy in relation to the day-to-day administration and implementation of policy made at the Union level is a sufficient response to subsidiarity, it is not doing justice to the principle. The Commission is also guilty here. Notwithstanding some encouraging signs,⁶⁸ it also has a tendency to undervalue the principle. Subsidiarity is admittedly, in part, about ensuring that there is ‘flexibility’ as regards ‘the way in which rules are implemented on the ground’.⁶⁹ But it is also about the levels at which certain policy goals should be formulated.

III 2 The benefits of decentralisation within the EU

As stated above, subsidiarity imposes a certain ‘onus of justification’ on the various EU institutions when they act.⁷⁰ Unless this onus can be discharged, subsidiarity asks that Community level institutions defer to those at more local levels.

Law and economics analyses have examined the division of powers between central and lower levels of government in federal systems. On such a basis, Van den Bergh concluded that ‘the best choice is a mixed system, which leaves competences at the Member State level if the benefits of diversity

⁶⁸ The Commission not only makes the connection between its five chosen principles of good governance and the older principles of proportionality and subsidiarity, but also goes on to state that ‘from the conception of policy to its implementation, the choice of the level at which action is taken (from EU to local) and the selection of instruments used must be in proportion to the objectives pursued. This means that before launching an initiative, it is essential to check systematically (a) if public action really is necessary, (b) if the European level is the most appropriate one, and (c) if the measures chosen are proportionate to those objectives.’ Commission (2001), n.9 above, p.10-11. See also the Report of the Working Group ‘Better Regulation’ (Group 2c), May 2001, p.6: ‘Regulation will always be necessary and indeed desirable. But regulation at EU level should be limited to those areas and cases where it is really necessary to achieve public policy goals established in the Treaty’.

⁶⁹ Commission (2001), n.9 above, p.5.

⁷⁰ De Búrca (1999), n.50 above, p.8.

[between national legal regimes] outweigh the costs of externalities and opportunistic manipulation'.⁷¹ In this paper, I make use of the insights derived from law and economics, but also seek to move beyond them. Law and economics approaches answer questions relating to the ways in which competence should be divided and shared between decision makers at various levels by employing only criteria of economic efficiency.⁷² To put this another way, they tend to be concerned only with the performance strand of legitimacy. This paper contends that, especially given the indeterminacy of substantive policy goals in today's EU, the regime and polity dimensions are also critical, and it endeavours to take these fully into account in assessing the benefits of decentralised decision making within the EU.⁷³

With this in mind, it is possible to examine the strength of four arguments in favour of decentralisation within the particular context of today's EU. The first two relate to the enduring performance and regime legitimacy of the States (and regions and localities). The final two relate to the benefits associated with diversity and the fragmentation of political authority.

III 2 A The satisfaction of local preferences

The first argument, which relates principally to performance legitimacy, is based on the satisfaction of local preferences and the preservation of local identity. This is said to be more easily achieved under a local, or decentralised, governance regime. Bermann's comparison between federalism in the US and subsidiarity within the EU is useful as an introduction to the issues at stake here. He argues that subsidiarity is 'a compelling response to the federalism patterns that have developed in the

⁷¹ Van den Bergh, R., 'The Subsidiarity Principle in European Community Law: Some Insights from Law and Economics', 1 *Maastricht Journal of European and Comparative Law* (1994) 337, p.354.

⁷² Public choice analyses and political distortions are condemned because they lead to inefficiencies, not because of concerns premised on (for example) regime and polity legitimacy; see e.g. Van den Bergh, R., 'Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law', 5 *Maastricht Journal of European and Comparative Law* (1998) 129, p.148-151.

⁷³ See in this vein, De Búrca (1999), n.50 above, p.3-4, 21, and Howse, R., 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence', in XXX, p.768-769: 'The particular competence of an institution... need not be (technocratic/scientific) expertise based - true to the conception of what is required for legitimacy when competing values are being adjudicated, it may just as likely be based on the institution's particular responsibility to or claim to representivity of stakeholders or constituents whose values and interests are at issue in the dispute (social/political/cultural knowledge)'.

Community’, and states that the Community does not have the same ‘luxury of indifference towards subsidiarity’ as does the United States.⁷⁴ His argument is largely based on the heterogeneity of Europe. ‘In Europe, geography still brings along with it differences in culture, language, and social and political values that are far more pronounced than the prevailing differences in the United States’.⁷⁵ ‘Subsidiarity is a particularly apt instrument for a polity determined not merely to maintain a decent equilibrium in power between the federal government and the states, but to minimize the loss of political autonomy at the more local levels’.⁷⁶

Europe is, as we all know, a heterogeneous continent. Within Europe it is likely that Member State laws, rather than laws formulated at the EU level, will better satisfy local preferences. This is quite simply because there are a whole host of historical, institutional, cultural, geographic, linguistic, social and economic reasons why preferences are more homogeneous within each Member State than they are within Europe as a whole.⁷⁷ Moreover, whatever the degree of pluralism, it is easier to satisfy the preferences of a small population than those of a large one. And, it can be argued that distance from specific practical situations tends to reduce the capacity to make wise regulatory decisions.⁷⁸ These points can be expressed in the language of legitimacy. Member States have acquired performance legitimacy by satisfying the (relatively homogenous) needs of their populations. This demands respect at the European level.

However, it is important not to push the argument too far. Reasonable pluralism, so clearly a feature of European life,⁷⁹ does not disappear at the boundaries of individual states or regions or even localities. Conflict between

⁷⁴ Bermann (1994), n.1 above, p.335 and 449.

⁷⁵ *Ibid.*, p.450.

⁷⁶ *Ibid.* See also Elazar (2001), n.10 above.

⁷⁷ ‘No matter how close the Union, it is to remain a union among distinct peoples, distinct political identities, distinct political communities’ Weiler, J., ‘Federalism Without Constitutionalism: Europe’s *Sonderweg*’, in Nicolaidis and Howse (eds) (2001), n.10 above, p.67. The preexisting differences between these peoples will, of course, only be exacerbated after enlargement.

⁷⁸ Simitis, S. and Lyon-Caen, A, ‘Community Labour Law: A Critical Introduction to its History’, in Davies, P. et al. (eds), *European Community Labour Law: Principles and Perspectives: Liber Amicorum Lord Wedderburn* (Clarendon, Oxford, 1996), Chapter 1, p.10. Note that there are contrary arguments here. Certain fundamental problems may best be solved within a supranational framework, detached from ‘immediate national constraints and political contingencies’; see Goetschy, J., ‘The European Employment Strategy: Genesis and Development’, 5 *EJIR* (1999) 117, p.132.

⁷⁹ Everson (2002), n.15 above, (2).

rich and poor and left and right continues, with refreshing regularity, to occur. Also, the impact of globalisation is important. It not only exposes the growing artificiality of constructs such as local identity, but also reduces States' capacity to maintain the policies, especially the redistributive policies, which their local population might hold dear. If, for whatever reason, States are unable to satisfy the preferences of their (increasingly heterogeneous) populations, their performance legitimacy will progressively be undermined. In such circumstances, any loss of political autonomy on their part will, most likely, not be mourned.

III 2 B Representation, participation and accountability

The second argument in favour of decentralisation is essentially democratic. Other things being equal, individuals are more likely to be better represented, to have greater opportunities for participation, and to be better able to hold policy makers to account in smaller than in larger political communities. In legitimacy terms, the argument is simply to the effect that smaller political entities (such as Member States and the regions) are more likely than larger political entities (such as the EU) to possess regime legitimacy. The argument is compelling, and leads one towards a preference for, or presumption in favour of, national and sub-national decision making.⁸⁰

However, it is again important not to push the argument too far. One must be aware of the democratic innovations at European level, discussed above, and, in the specific context of the open method of coordination, below. Similarly, one must not ignore the democratic limitations of national polities. In the face of growing economic and social interdependence, national polities are no longer able to control all the decision making procedures which impact upon the lives of those on their territory. More important for these purposes, they can no longer make provision for the participation and representation of all those who are affected by their decisions.⁸¹ International organisations may, in certain circumstances, outperform Member States in terms of regime, as well as performance, legitimacy.⁸²

⁸⁰ Stein argues that in relation to all international organisations seeking 'to meet the democracy - legitimacy requirement... dispersion of the organization's central power should be sought through reliance on regional and local authorities, and the principle of subsidiarity should be honored'; Stein (2001), n.34 above, p.532-533.

⁸¹ Maduro (2000), n.23 above, p.9.

⁸² See Fox, G., and Roth, B. (eds), *Democratic Governance and International Law* (CUP, 2000); and Held, D., *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity, Cambridge, 1995).

III 2 C Diversity

Europe's diversity is an asset often valued in and of itself. At Laeken, the European Council referred to Europe as the continent of 'liberty, solidarity and above all diversity, meaning respect for others' languages, cultures and traditions'.⁸³ Beyond this, there is also an instrumental reason for the appeal of diversity. First, as stated above, 'divergent legal rules are better able to satisfy heterogeneous preferences of a large population and may thus contribute to increased welfare in the European internal market'.⁸⁴ Second, regulatory competition, which presupposes diversity, may be thought of as an effective discovery procedure which leads to the finding of better ways for the pursuit of human aims.⁸⁵ One should, however, be alert to the potentially negative consequences of diversity and, in particular, regulatory competition.⁸⁶

III 2 D The fragmentation of power

Finally, it is said that decentralisation is able to promote individual freedom, by fragmenting power among different centres of governance.⁸⁷ This - more an argument for the diffusion of power than for its decentralisation - clearly cuts both ways in the EU context. Indeed, it has much greater force in relation to the concentration of decision making authority at nation state level, than it does in relation to the gradual accretion of power at the European level.⁸⁸ It is more realistic to depict the philosophical and the

⁸³ Laeken Conclusions (2001), Annex I, Section I.

⁸⁴ Van den Bergh (1998), n.72 above, p.130.

⁸⁵ Streit, M. and Mussler, W., 'The Economic Constitution of the European Community - "From Rome to Maastricht"', in Snyder, F. (ed.), *Constitutional Dimensions of European Economic Integration* (Kluwer, 1996).

⁸⁶ The effects of regulatory competition within the EU are largely beyond the scope of this paper. See further Van den Bergh (1998), n.72 above; Esty, D. and Geradin, D. (eds), *Regulatory Competition and Economic Integration: Comparative Perspectives* (OUP, Oxford, 2001); and Deakin, S. and Barnard, C., 'Market Access and Regulatory Competition', Harvard Jean Monnet Working Paper 9/01.

⁸⁷ The strength of the principle of subsidiarity 'lies in the ability to moderate and contain the absolutism of any level in a multi-level and co-operative governance' structure; Endo (2001), n.55 above, p.6.

⁸⁸ The impact of European integration on governance within (especially federal) nation states is difficult to gauge. Both Carter, C., 'Democratic Governance Beyond the Nation State: Third Level Assemblies and Scrutiny of European Legislation', 6 *EPL* (2000) 429; and, more generally, Schmidt, V., 'Federalism and State Governance in the European Union and the United States: An Institutional Perspective', in Nicolaidis and Howse (eds)

political hegemony of the sovereign state as a barrier to the historical quest for human self-fulfilment,⁸⁹ than it is to level any equivalent charge at the European Union.⁹⁰

These four arguments combine to make the case for subsidiarity. The principle imposes a burden on proponents of Community level intervention to justify the need for action at that level. My claim is that given the current levels of legitimacy of the various levels of governance within the EU, the imposition of such a burden is warranted. The claim is not that the burden will never be, or even that it is only in extreme circumstances that it will be, displaced. ‘So far as the concept of subsidiarity, not of sovereignty, is in use as the principle governing Community or Union, it presupposes the just and necessary interference from Brussels’.⁹¹ However, it remains appropriate to insist that proponents of Community level action are able to explain the reasons for any shift of the locus of decision making to the EU level, and to demonstrate the advantages (in legitimacy terms) which EU level solutions provide. The next subsection examines the nature of the arguments which may be made.

III 3 The benefits of European level intervention

European governments and citizens are, or at least should be, ‘less preoccupied with sovereignty than they are interested in deriving benefits from international collaboration’.⁹² The difficulty is that these benefits are often not easy to identify. International collaboration may involve many different actors and may take many different forms. It is only possible to identify whether there is a case for European level intervention on the basis of a complex analysis of the strengths and weaknesses (from performance,

(2001), n.10 above; suggest that the EU is not sensitive to the divisions of power within States. This contrasts with Elazar’s view, that the EU is designed, in part, ‘to empower ethnic groupings previously submerged by the statism of the nation state’; Elazar (2001), n.10 above, p.48.

⁸⁹ Jackson, R., ‘Introduction: Sovereignty at the Millennium’, 47 *Political Studies* (1999) 423, p.427. In a similar vein, see Ward (2001), n.6 above; and Ladeur (1997), n.46 above.

⁹⁰ The fragmentation argument provides strong support for Weiler’s vision of Europe as a Community of States, rather than a Unity; see Weiler (1999), n.17 above, p.90-96.

⁹¹ Endo (2001), n.55 above, p.25.

⁹² Puchala, D., ‘Institutionalism, Intergovernmentalism and European Integration: A Review Article’, 37 *JCMS* (1999) 317, p.323. Although ‘few States are looking to subordinate themselves to a large comprehensive framework’, almost all recognize the need to join ‘inter-state and multi-state networks for functional reasons’, ‘provided they have a share in their governance’; Elazar (2001), n.10 above, p.48.

regime and polity legitimacy perspectives) of a variety of possible actions by various combinations of actors at different levels. In this subsection, three arguments are tentatively presented.

III 3 A Furthering the interests of each individual State

The first is, in principle at least, is entirely uncontroversial. It appeals to nothing more noble than national self-interest,⁹³ and grows from the acknowledgment that, in certain circumstances, national and sub-national solutions may be sub-optimal. International collaboration within the EU is justified to the extent that it remedies specific legitimacy failings in policy making processes within individual States.⁹⁴ To make a convincing case for European level intervention under this head, it is necessary only to demonstrate the benefits for each individual State of supranational intervention of various kinds.

Failings at the national and sub-national levels may manifest themselves in many different ways. States may lack the experience, expertise or know-how necessary to deal with particular challenges. Within the European and the broader international context, it is possible to envisage that dialogue, learning and cooperation, not only between States, but also between States, European institutions and a variety of other actors at global, regional and local levels (such as, in relation to social matters, the International Labour Organisation, the representatives of the social partners and civil society) might, in various ways, lead to enhanced legitimacy. It may also be the case that States lack the resources to deal with particular problems. In this case, the European Union emerges as a potential source of funding; though budgetary constraints limit its potential here.⁹⁵ In these ways, it may be possible for European intervention to improve the policies of each State without intruding onto local autonomy.

Secondly, again with the sole aim of furthering the interests of each individual State, specific action at European level, may, in a range of ways,

⁹³ The view that Europe's legitimacy is judged solely on whether or not it serves the national interest 'is the hallmark of classical Euro-Scepticism', Weiler (2001), n.48 above, p.209-210.

⁹⁴ The nature of the parties who would be involved, and of the decision-making process which would take place if action were adopted (i) at Community level and (ii) at national (or sub-national) level are key considerations. See De Búrca (1999), n.50 above, p.32.

⁹⁵ See however, Schmitter, P. and Bauer, M., 'A (modest) proposal for expanding social citizenship in the European Union', 11 JESP (2001) 55.

complement, boost the effectiveness of, or may even, in the most clear cut cases, take the place of action taken at State level. In relation to policies of transnational scope (for example the regulation of transnational enterprises), European level decision-making seems to be better able than national to ensure the participation and representation of those affected, and may also offer performance legitimacy advantages as regards the making and implementation of policy.⁹⁶ In determining the need for and intensity of European intervention it is, however, necessary to take into account the potentially negative effects of European intervention on local standards and cultures.⁹⁷ The more European intervention intrudes onto local autonomy, the more urgent the need for it to be convincingly justified on legitimacy grounds.

The remaining arguments for European action rely on making the case that actors at national and subnational levels should consider more than their own individual interest. They therefore require more careful justification.⁹⁸ Scharpf's 'federal comity' model is of great assistance here. Scharpf argues that European level policy makers 'must respect the need for autonomous solutions at the national level that reflect idiosyncratic preferences, perceptions, policy traditions and institutions. At the same time, however, national actors must respect the fact that they are members of a community of nation states that must take each others' interests and the commitment to a common venture into account when arriving at their autonomous solutions'.⁹⁹ In similar vein, it is said that the EU has a role to play in 'making sure that Member States' own policy decisions do not seriously harm other Member States or jeopardise the achievement of other European goals'.¹⁰⁰ Two distinct arguments can be derived from this.

III 2 B Ensuring that proper account is taken of the interests of other states

⁹⁶ Note, however, that in relation to many transnational challenges, a global approach would offer still greater promise.

⁹⁷ De Búrca (1999), n.50 above, p.27.

⁹⁸ 'When the existence or serious interest of a nation becomes threatened', there are fears that a re-awakened Schmittian Sovereignty might displace the civilities inherent in multi-level governance. See Endo (2001), n.55 above, p.31.

⁹⁹ Scharpf, F., 'Balancing Positive and Negative Integration: The Regulatory Options for Europe', RSC Policy Papers 97/4, p.13.

¹⁰⁰ Report by Working Group 4a, Involving Experts in the Process of National Policy Convergence, June 2001, p.6.

European level action may be necessary so as to ensure that States take the interests of (nationals of) other States into account when making policy decisions.¹⁰¹ For Weiler, Europe is a process-oriented ‘Community of Values, the principal one of which is a historical commitment to a different, more civil process of inter-statal intercourse’.¹⁰² Notably, this commitment extends only to relations within the EU. Notwithstanding this limitation, acceptance of this commitment justifies a significant role for the European Union. The impact which one State’s policies might have on other States has undoubtedly increased with economic and social interdependence; and this has adverse consequences for both the performance and the regime legitimacy of States.¹⁰³ In today’s world, it is inevitable that many national policy choices will have extra-territorial effects, some of which may be attributed to the competition between regimes within Europe, others of which may be unintended. Supranational intervention may be necessary in order to ensure that the negative externalities of States’ policies are minimised, and that States take proper account of the external, as well as the internal effects of their policies.¹⁰⁴ Proponents of legitimate European intervention under this head must (and this is not as straightforward a task as many appear to assume) demonstrate both that negative externalities exist,¹⁰⁵ and that European level action assists in their elimination.¹⁰⁶

III 2 C Advancing ‘the common venture’

¹⁰¹ It is possible to see this argument in terms of national self-interest; as it can be argued that a reciprocal commitment to respect others brings mutual advantage. My conception does not rely on such a utilitarian calculation. This makes it broader, but also more vulnerable.

¹⁰² Weiler (2001), n.48 above, p.210.

¹⁰³ See Maduro (2000), n.23 above.

¹⁰⁴ The calculation here has both performance and regime dimensions. One should examine both the extra-territorial effects of certain policies, and their democratic legitimation.

¹⁰⁵ In the social field, the empirical evidence in relation to so-called social dumping and the race to the bottom is inconclusive. See Barnard, C., ‘Social Dumping and Race to the Bottom: Some Lessons for the EU from Delaware?’, 25 *ELRev* (2000) 57; and Barnard, C., ‘Regulating Competitive Federalism in the European Union? The Case of EU Social Policy’, in Shaw (ed.) (2000), n.23 above, Chapter 3.

¹⁰⁶ See Van den Bergh (1994), n.71 above, p.348; and Van den Bergh (1998), n.72 above, p.140-142. For an indication of the range of approaches adopted by the European institutions in the context of the elimination of ‘distortions of competition’, see Syrpis, P., ‘The Integrationist Rationale for European Social Policy’, in Shaw (ed.) (2000), n.23 above, p.23-30.

The key question here is whether the common venture is itself legitimate. We are confronted directly by the relative legitimacy of decision making at the European as against the national or sub-national level. It is suggested that European level decision making is most likely to have legitimacy benefits where it is concerned with policies of transnational scope (section III 2 A above) or with policies which have significant cross-border effects (section III 2 B above), though these may also exist in other areas in which it is possible to demonstrate legitimacy advantages associated with European intervention of various types. It is interesting to note, in relation to the completion of the internal market (the core substantive policy objective of the EU), that traditional performance legitimacy arguments for European intervention are often considered to be insufficient; performance arguments are often accompanied by arguments based on regime.¹⁰⁷ Additionally, there is great sensitivity to the preservation of local autonomy within the context of the completion of the internal market.¹⁰⁸ The same attention to the various dimensions of legitimacy and subsidiarity should also be evident in other areas in which the citizens and States of the EU choose to make common cause.

This paper goes on to consider European interventions via the open method of coordination in the employment and social fields. It will be seen that, in these fields, common objectives have been formulated with varying degrees of specificity within the OMC context. My aim is to assess the legitimacy of European level intervention.

One view has it that European intervention via the OMC does not intrude upon local autonomy. On this view, the OMC is consistent with the principle of subsidiarity, and can only add to the overall polity legitimacy of the European Union. It operates so as to strengthen, rather than to undermine, 'the political legitimacy, institutional integrity and problem-solving capacity of its Member States'.¹⁰⁹ The analysis below indicates that although this view may (still) be tenable in relation to the nascent OMCs in the social

¹⁰⁷ See Everson (2002), n.15 above; and Gersternberg (2002), n.44 above.

¹⁰⁸ See Deakin and Barnard (2001), n.86 above; Syrpis, P., 'Smoke Without Fire: The Social Policy Agenda and the Internal Market', 30 ILJ (2001) 271; and Dougan, M., 'Minimum Harmonization and the Internal Market', 37 CMLRev (2000) 853; and, more broadly, De Búrca and Scott (eds) (2000), n.17 above. To the extent that the common venture is compatible with local autonomy, the subsidiarity-related objections tend to recede.

¹⁰⁹ Scharpf, F., 'European Governance: Common Concerns vs. The Challenge of Diversity', in Joerges *et al* (eds) (2001), n.2 above, p.8.

field, it can no longer be supported in relation to the European Employment Strategy.

Of course, even if the OMC conflicts with local autonomy, it may still be able to lend legitimacy to the European polity. Arguments based on both performance and regime legitimacy may be deployed, and to the extent that there are benefits to be derived from European intervention, the principle of subsidiarity does not present an obstacle. In relation to performance, it may for example be argued that the problems at issue (e.g. unemployment and welfare state reform) cannot be solved by States acting alone; that the policies of any one State are capable of harming others; that common policies are necessary adjuncts to the internal market and EMU; and/or that common policies are necessary in the context of the Lisbon European Council's new, and (it is contended) legitimate, strategic goal. In relation to regime, the processes through which common objectives are formulated, implemented and re-evaluated within the OMC, as well as the scope for flexibility which is retained by actors at the national and subnational levels, have been widely praised. This paper offers a critical assessment of the purported benefits.

IV The Open Method of Coordination

Among the raft of 'new governance strategies' with which the EU seems to be experimenting,¹¹⁰ the open method of coordination (or OMC) is the most prominent. It is being used in an ever increasing range of policy areas, from economic, structural and employment policy, to social inclusion, social protection, structural policy, enterprise policy, research, education and even enlargement.¹¹¹

It is widely recognised that effective decision-making requires 'the combination of different policy instruments'.¹¹² Nevertheless, there are substantial disagreements as to the circumstances in which the OMC can and should be used. The Commission appears to suggest that the OMC should

¹¹⁰ Scott and Trubek (2002), n.42 above.

¹¹¹ In the context of enlargement, the Lisbon Strategy is seen 'as an incentive for candidate countries to adopt and implement key economic, social and environmental objectives and as a two-way learning process'; Barcelona European Council 15 and 16 March 2002, Presidency Conclusions, para.2.

¹¹² Commission (2001), n.9 above, p.20.

not replace primary legislation,¹¹³ and that it should also not be used in those areas in which the Community lacks the competence to act.¹¹⁴ ‘Just as coordination should not be a way to escape the application of the classic Community method,¹¹⁵ nor should it be a way to impose norms and obligations where the Treaty does not provide the necessary legal base’.¹¹⁶ Others, however, suggest that the open method can and should complement other forms of Community action.¹¹⁷ I share the latter view. Like all the other available strategies, the OMC should be used to the extent that it yields legitimacy benefits. Where an OMC enables the participation of a greater range of stakeholders or the solution of complex transnational problems, it should be used alongside, or in preference to, the classic Community method. Similarly, where an OMC does not impinge on local autonomy, and instead provides a forum in which the Member States and other relevant actors are able to share experience, expertise and know-how, there should be no objection to its operation even in areas in which the Community does not have the competence to act.

The OMC owes its name to the Lisbon European Council. ‘The innovation of Lisbon was simply to give a name to the method enshrined in the EC Treaty’s Title on employment, with the avowed aim of extending it - gradually and in ways tailored to individual sectors - to other fields, such as the information society and research, enterprise policy, education and social inclusion’.¹¹⁸ At Lisbon, the Union set itself a new strategic goal: to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion. The implementation of the ‘Lisbon strategy’ was said to depend not only on improving existing processes, but also on the introduction of a ‘new open method of coordination’.¹¹⁹

¹¹³ The OMC should not be used ‘when legislative action under the Community method is possible’; nor should it ‘dilute the achievement of common objectives in the Treaty or the political responsibility of the Institutions’; Commission (2001), n.9 above, p.22.

¹¹⁴ A Commission Working Group suggested that ‘it can only be used if it supports a defined Community objective or helps the Union to fulfil its task in an existing area of competence’; Working Group 4a Report (2001), n.100 above, Executive Summary, point 6; and p.30.

¹¹⁵ For a definition, see Working Group 4a Report (2001), n.100 above, p.8, fn. 10.

¹¹⁶ *Ibid*, p.33.

¹¹⁷ Scharpf (2001), n.109 above, p.9-11. The White Paper itself states that the OMC may ‘sit alongside the programme-based and legislative approach’; Commission (2001), n.9 above, p.22.

¹¹⁸ Working Group 4a Report (2001), n.100 above, p.11-12.

¹¹⁹ Lisbon Conclusions (2000), para.7.

The OMC, a method ‘designed to help Member States to progressively develop their own policies’, is described as ‘the means of spreading best practice and achieving greater convergence towards the main EU goals’.¹²⁰ It is said to involve:

- fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long terms;
- establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice;¹²¹
- translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences;
- periodic monitoring, evaluation and peer review organised as mutual learning processes.¹²²

In keeping with the dictates of multi-level governance, there are responsibilities for actors at all levels. The European Council has a strong ‘guiding and coordinating role’ ‘to ensure more coherent strategic direction and effective monitoring of progress’.¹²³ It is also said that a ‘fully decentralised approach will be applied in line with the principle of subsidiarity in which the Union, the Member States, the regional and local levels, as well as the social partners and civil society, will be actively involved, using variable forms of partnership’.¹²⁴ And, ‘achieving the new strategic goal will rely primarily on the private sector, as well as on public-private partnerships’.¹²⁵

Notwithstanding some ambiguities, which are perhaps inevitable in a document dealing with policy at such a level of generality, the method is tolerably well defined.¹²⁶ It has generated an avalanche of academic

¹²⁰ *Ibid*, para.37.

¹²¹ Benchmarking methods are ‘devised by the Commission, networking with different providers and users, namely the social partners, companies and NGOs’; *Ibid*, para.37.

¹²² *Ibid*, para.37.

¹²³ *Ibid*, para.7.

¹²⁴ *Ibid*, para.38.

¹²⁵ *Ibid*, para.41.

¹²⁶ The Commission describes the OMC as ‘a way of encouraging co-operation, the exchange of best practice and agreeing common targets and guidelines for Member States, sometimes backed by national action plans as in the case of employment and social

comment. Most of this has been favourable. There are many reasons to welcome the OMC. It seems to answer many of the concerns raised in the first half of this paper. It is, for example, said to go ‘some way towards resolving the intractable problem of the legitimacy of policy-making in the EU’,¹²⁷ and it is also claimed that it ‘radicalizes subsidiarity’.¹²⁸ In the light of the above, invoking legitimacy and subsidiarity in the context of a critical examination of the OMC may appear somewhat perverse or contrary. However, I contend that the OMC deserves particularly close scrutiny not only because it is new and important, but also because it is so regularly held up as an answer, even the answer, to Europe’s governance conundrum.

For the purposes of my analysis, it is instructive to isolate three distinct stages in the development of any OMC. Stage one (which corresponds to the second of the four elements identified at Lisbon) involves the identification of an area in which there are problems to be solved, challenges to met or opportunities to be grasped. The relevant stakeholders at all levels are invited to debate the issues and to develop their understandings.¹²⁹ Indicators and benchmarks are developed and, with reference to these, best practice may be identified. At this stage, regime considerations are paramount. Interest is focused on the way in which the problem is conceptualised,¹³⁰ on the identity of those involved,¹³¹ on the way in which their discussions are structured,

exclusion. It relies on regular monitoring or progress to meet those targets, allowing Member States to compare their efforts and learn from the experience of others.’ Commission (2001), n.9 above, p.21. For Scott and Trubek, it ‘aims to co-ordinate the actions of the several Member States in a given policy domain and to create conditions for mutual learning that hopefully will induce some degree of voluntary policy convergence’; Scott and Trubek (2002), n.42 above, (p.4).

¹²⁷ Hodson, D. and Maher, I., ‘The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination’, 39 *JCMS* (2001) 719, p.722.

¹²⁸ *Ibid*, p.728. See further Calame, P., ‘Active Subsidiarity: reconciling unity and diversity’, in De Schutter, Lebessis and Paterson (eds) (2001), n.24 above.

¹²⁹ ‘The development of organized and reciprocal learning processes to cope with a rapidly changing world is at the heart of the method’. De La Porte, C., Pochet, P. and Room, G., ‘Social Benchmarking, policy making and new governance in the EU’, 11 *JESP* (2001) 291, p.293.

¹³⁰ It is said that problems should be framed in such a way as to reduce negative externalities and to exploit synergistic opportunities, and that sectoral and national boundaries should be destabilised; Lebessis and Paterson (2001), n.24 above.

¹³¹ The precise nature of the relationship between the European Council, the Council and its various Committees, and the Commission; and between actors at European, Member State, regional and local levels, was left ambiguous at Lisbon. The involvement of stakeholders, for example, can be seen as a ‘vital precondition’ not only for (regime) ‘legitimacy’, but also for ‘effectiveness’ (i.e. performance legitimacy); see Working Group 4a Report (2001), n.100 above, p.23.

and on how each participant learns from the others.¹³² Stage two involves reaching mutual agreement, fixing common objectives and developing guidelines at the European, national and sub-national levels (the first and third elements identified at Lisbon).¹³³ While it is important that policy objectives are ‘democratically legitimised’,¹³⁴ attention here shifts towards the performance dimension of legitimacy.¹³⁵ One becomes anxious about the clarity of the objectives, about how they might best be implemented,¹³⁶ and about the proper scope of national and regional autonomy. As has always been the case in relation to European social policy,¹³⁷ critical attention is paid to the possible subordination of the social to the economic. Finally, stage three (the fourth element at Lisbon) ensures that the objectives set in stage two remain subject to refinement. The method is circular. A range of stakeholders is involved in monitoring progress. This aspect makes it ‘easier to revise strategies and standards in light of evolving knowledge’.¹³⁸ The criteria according to which performance is assessed, are developed and redeveloped via a democratic regime.¹³⁹

Stage one of any OMC, with its focus on dialogue, learning, exchange of information and experience, offers at least the prospect of enhanced (performance and regime) legitimacy without any loss of local autonomy. This is not true of stage two. The more precisely and immutably objectives

¹³² Lebessis and Paterson (2001), n.24 above, p.276.

¹³³ ‘While the OMC has recourse to benchmarking, it goes beyond this by defining European-level guidelines and identifying common challenges, even if the formulation of the response to the challenges remains the responsibility of member states’; De La Porte, Pochet and Room (2001), n.129 above, p.293.

¹³⁴ Working Group 2c Report (2001), n.68 above, p.14.

¹³⁵ *Ibid.* Although the Group accepts that the invitation to participate in the supporting self-regulatory process must be ‘open, transparent and neutral’, and although ‘the legislator must avoid the temptation to try to “micro-manage” self-regulation’ (which ‘must remain voluntary and stakeholder-led and should be judged on its results and outcomes’), ‘strong and specific policy guidelines are a necessary framework without which “co-regulation” will not achieve maximum efficiency’.

¹³⁶ The Barcelona European Council has stated that, in relation to the Lisbon Strategy, the focus ‘must be on action for implementation, rather than on the annual elaboration of the guidelines’; Barcelona Conclusions (2002), para.49.

¹³⁷ See e.g. Shaw, J., ‘Twin-Track Social Europe - The Inside Track’, in O’Keeffe, D. and Twomey, P. (eds), *Legal Issues of the Maastricht Treaty* (Wiley, Chichester, 1994) and Lord Wedderburn, *Labour Law and Freedom: Further Essays in Labour Law* (Lawrence and Wishart, London, 1995), e.g. at p.391.

¹³⁸ Scott and Trubek (2002), n.42 above.

¹³⁹ Lebessis and Paterson (2001), n.24 above, p.277-278.

are fixed,¹⁴⁰ the more local autonomy may be compromised. In these circumstances, subsidiarity asks that policy makers indicate that the benefits (in performance or regime legitimacy terms) which accrue from the setting of guidelines at European level outweigh the costs of lost local autonomy. The precise question which participants within OMCs in the employment and social policy fields are invited to ask themselves is whether the fixing of specific guidelines at the European level contributes to, or detracts from, the legitimacy of the policy response to problems such as unemployment and pensions reform.

My criticism of the operation of the OMC has two limbs. First, to the extent that there are benefits, in terms of either the performance or the regime, accruing from European intervention, they tend not to be articulated clearly enough. In large part as a result of this, insufficient attention tends to be devoted to ensuring that these benefits are realised. Second, participants within the various OMC processes appear determined to set more and more specific objectives at the European level, even in absence of evidence of benefit. This overlooks the possibility that in many policy areas, what may be termed ‘non-teleological’ OMCs, in which there are no (specific) guidelines at the European level, and no threat to local autonomy, may represent the most legitimate strategy.¹⁴¹

IV 1 OMCs in the Employment and Social Fields: The Treaty Context

Employment and social policies now finds themselves in the mainstream of constitutional debate.¹⁴² In performance legitimacy terms, the focus has shifted away from the completion of the internal market, towards the redistributive consequences of European integration and their resolution.¹⁴³ Also, at Laeken, the European Council stated that citizens ‘want results in the fields of employment and combating poverty and social exclusion’.¹⁴⁴ In regime legitimacy terms, the involvement of the social partners in the legislative process, via Articles 138 and 139 EC was an important innovation.¹⁴⁵ The development of the OMC is, of course, another.

¹⁴⁰ On the specificity of objectives, see De Búrca (1999), n.50 above, p.24-25.

¹⁴¹ See De La Porte, Pochet and Room (2001), n.129 above.

¹⁴² Szyszczak, E., ‘The New Paradigm for Social Policy: A Virtuous Circle?’, 38 CMLRev (2001) 1125.

¹⁴³ See e.g. Lisbon Conclusions (2000).

¹⁴⁴ Laeken Conclusions (2001), Annex I, Section I.

¹⁴⁵ See Lo Faro, A., *Regulating Social Europe: Reality and Myth of Collective Bargaining in the EC Legal Order* (Hart, Oxford, 2000), and Barnard, C., ‘The Social Partners and the Governance Agenda’, 8 ELJ (2002) 80.

The social field forms a particularly appropriate focus for my enquiry into legitimacy and subsidiarity within the context of the OMC. The debate on the extent to which the Community institutions have, and should have, competence in the social field provides a rich context.¹⁴⁶ The relationships between on the one hand social policy, and on the other employment policy,¹⁴⁷ economic policy,¹⁴⁸ the completion of the internal market,¹⁴⁹ and economic and monetary union,¹⁵⁰ are complex and contestable. The Treaties have, gradually, afforded the Community institutions a role, but there has always been great sensitivity to the autonomy of the Member States.

The Treaty context which the OMCs under discussion inhabit deserves close attention. Article 2 EC refers to the promotion of ‘a high level of employment and social protection’. In Article 3 EC, the distinctions between employment and other social policies begin to become apparent. The activities of the Community include ‘the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a co-ordinated strategy for employment’; but nothing more than ‘a policy in the social sphere’.¹⁵¹

In the Employment Title (Articles 125-130 EC), introduced in December 1997 at Amsterdam, it is made clear that the Member States and the Community should ‘work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable

¹⁴⁶ See the Ohlin Report, *Social Aspects of European Economic Cooperation: Report of a Group of ILO Experts*, 74 *International Labour Review* (1956) 99; Davies, P., ‘The Emergence of European Labour Law’, in Lord McCarthy, (ed.), *Legal Intervention in Industrial Relations: Gains and Losses* (Blackwell, Oxford, 1992); Syrpis, P., *The Rationales for European Community Social Policy: An Analysis of European Community Worker Participation Law* (D Phil thesis, Oxford, 2000).

¹⁴⁷ See Freedland, M., ‘Employment Policy’, in Davies *et al* (eds) (1996), n.78 above, Chapter 13.

¹⁴⁸ See Deakin, S. and Reed, H., ‘The Contested Meaning of Labour Market Flexibility: Economic Theory and the Discourse of European Integration’, in Shaw (ed.) (2000), n.23 above, Chapter 4; Deakin, S., ‘Labour Law as Market Regulation: the Economic Foundations of European Social Policy’, in Davies *et al* (eds) (1996), n.78 above, Chapter 4; and Ball, S., ‘The European Employment Strategy: The Will but not the Way?’, 30 *ILJ* (2001) 353.

¹⁴⁹ See Syrpis (2000), n.106 above.

¹⁵⁰ See Ashiagbor, D., ‘EMU and the Shift in the European Labour Law Agenda: from Social Policy to Employment Policy’, 7 *ELJ* (2001) 311; and Pochet, P. (ed.), *Monetary Union and Collective Bargaining in Europe* (PIE-Peter Lang, Brussels, 1999).

¹⁵¹ Articles 3(i) and (j) EC.

workforce and labour markets responsive to economic change'.¹⁵² Member States are to contribute to these objectives 'in a way consistent with the broad guidelines of the economic policies of the Member States and of the Community adopted pursuant to Article 99(2)';¹⁵³ a clause which has been thought to render employment policy logically subservient to economic policy.¹⁵⁴ They are also to regard 'promoting employment as a matter of common concern'.¹⁵⁵ For its part, the Community is to encourage cooperation between Member States, and to support, and if necessary, complement, their action. All the while, it is to respect the competences of the Member States.¹⁵⁶ Article 128 EC details the OMC procedure, outlining the respective roles of the European Council, the Council, the Commission, the European Parliament, the Economic and Social Committee, the Committee of the Regions, the Employment Committee, and the Member States. In the course of its annual 'examination of the implementation of the employment policies of the Member States in the light of the guidelines for employment', the Council may 'make recommendations to Member States'.¹⁵⁷

In relation to social protection and social inclusion, the objectives of the Community and the Member States are said, in Article 136 EC (as amended at Amsterdam in 1997) to include 'proper social protection' and the 'combating of exclusion'. Article 137 EC states that the Community shall support and complement the activities of the Member States in a range of fields. Only in December 2000 at Nice, via a Treaty which is, of course, yet to come into force, were 'the combating of social exclusion' and 'the modernisation of social protection systems' added to the list. And, although the Council was, at Nice, authorised to 'adopt measures designed to encourage cooperation between Member States' in relation to social protection and social inclusion, it was specifically excluded from enacting directives in these fields.¹⁵⁸ Moreover, a provision was added to the effect

¹⁵² Article 125 EC.

¹⁵³ Article 126(1) EC.

¹⁵⁴ Ball (2001), n.148 above, p.360.

¹⁵⁵ Article 126(2) EC.

¹⁵⁶ Article 127 EC. Article 129 EC authorises the Council to 'adopt incentive measures designed to encourage cooperation between Member States and to support their action in the field of employment' in a variety of ways, not including the harmonisation of the laws of the Member States.

¹⁵⁷ Article 128(4) EC.

¹⁵⁸ Article 137(1) and (2) EC as amended at Nice. Note, however, that since the Maastricht Treaty, via the Agreement on Social Policy, the Community has had the competence to adopt directives, by unanimity, in the 'social security and social protection

that provisions adopted pursuant to Article 137 EC, ‘shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof’.¹⁵⁹

It is not unreasonable to expect that these differences in Treaty context should result in differences in the respective OMC processes. A ‘decision of the states to specify expressly in the Treaty that they retain national competence over a closely related or overlapping policy area’,¹⁶⁰ may be taken as an indication that the Community should defer to the autonomy of the States. As the Commission’s Working Group 4a stated, ‘while the Luxembourg process, in particular because it is enshrined in the Treaty, confers a strong mandate on the European institutions for defining guidelines and recommendations at European level, other forms of “open coordination” are less binding’.¹⁶¹

In the subsections below, I aim to illustrate that different OMCs operate in the employment and the social protection fields (social inclusion and pensions). The OMC in the employment field appears to be premised on the need, in particular circumstances, to override local autonomy, apparently so as to enhance the effectiveness of national policies.¹⁶² The OMCs dealing with social inclusion and pensions, notwithstanding the ambitions of some of the leading players, remain, at least for now, more sensitive to local autonomy. The extent to which these different OMCs contribute to the legitimacy of the European polity is the principal focus on this section.

IV 2 The European Employment Strategy (EES)

As has been well documented,¹⁶³ the EES has a relatively long history, which can be traced back at least as far as the Commission’s 1993 Growth,

of workers’ field. In several other areas of social policy, it has the competence to adopt directives in accordance with the co-decision procedure outlined in Article 251 EC.

¹⁵⁹ Article 137(4) EC as amended at Nice.

¹⁶⁰ De Búrca (1999), n.50 above, p.32.

¹⁶¹ Working Group 4a Report (2001), n.100 above, fn 21, p.12. Social inclusion is, in fact, the OMC identified as less binding.

¹⁶² See Article 3(i) EC.

¹⁶³ See e.g. Biagi, M., ‘The Implementation of the Amsterdam Treaty with regard to Employment: Coordination or Convergence?’, 14 *IJCLLIR* (1998) 325; Goetschy (1999), n.78 above; Kenner, J., ‘The EC Employment Title and the “Third Way”: Making Soft Law Work?’, 15 *IJCLLIR* (1999) 33; Szczyrak, E., ‘The Evolving European Employment Strategy’, in Shaw (ed.) (2000), n.23 above, Chapter 10; Sciarra, S.,

Competitiveness and Employment White Paper,¹⁶⁴ and the European Council's 1994 Essen Conclusions.¹⁶⁵ In November 1997, the European Council 'decided that the relevant provisions of the new Title on employment in the Treaty of Amsterdam are to be put into effect immediately',¹⁶⁶ thereby preempting the ratification process.

As the workings of the EES will be familiar to most, this section includes only a brief summary. The coordination of employment policies is 'based on common lines of approach for both objectives and means', and draws directly on the experience built up in the multilateral surveillance of economic policies.¹⁶⁷ At Luxembourg it was said that the idea was to create for employment, as for economic policy, a 'resolve to converge towards jointly set, verifiable, regularly updated targets'.¹⁶⁸ Thus, the employment strategy 'consists of establishing Union-wide "employment guidelines", based on a common analysis of the situation and of the broad lines of policy to be followed in order to turn back the tide of unemployment on a lasting basis. On the basis of that analysis, the "guidelines" set specific targets, achievement of which is regularly monitored under a common procedure for assessing results'.¹⁶⁹ The guidelines are then incorporated into national

'Integration Through Coordination: The Employment Title in the Amsterdam Treaty', 6 *Columbia Journal of European Law* (2000) 209; Ashiagbor (2001), n.150 above; Ball (2001), n.148 above; Trubek, D. and Mosher, J., 'New Governance, EU Employment Policy and the European Social Model', in Joerges *et al* (eds) (2001), n.2 above, p.95; and Ashiagbor, D., *Soft Harmonisation: Labour Law, Economic Theory and the European Employment Strategy*, PhD thesis, EUI, Florence, 2002.

¹⁶⁴ Commission White Paper, 'Growth, Competitiveness, Employment', COM(1993)700. See Barnard, C. and Deakin, S., 'Social Policy in Search of a Role: Integration, Cohesion and Citizenship', in Caiger, A. and Floudas, D. (eds), 1992 *Onwards: Lowering the Barriers Further* (Wiley, Chichester, 1996), Chapter 10.

¹⁶⁵ Essen European Council, Presidency Conclusions, 9 and 10 December 1994. At Essen, the Council merely recommended that Member States invest in vocational training, increase employment intensive growth, reduce non-wage labour costs, increase active labour market policies, and fight youth and long-term unemployment. Member States were instructed to incorporate these recommendations into multi-year programmes that would be monitored at EU level. This did not delegate much power to the EU, but did contribute to the increase in discussion of the employment crisis at the EU level; see Trubek and Mosher (2001), n.163 above, p.99-100.

¹⁶⁶ Luxembourg European Council, Presidency Conclusions, 20 and 21 November 1997, para.3.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*, para.13. At Luxembourg, as today, the guidelines were structured around four pillars; improving employability, developing entrepreneurship, encouraging adaptability in businesses and their employees, and strengthening the policies for equal opportunities.

employment action plans drawn up by the Member States. It is through the national plans that the guidelines ‘will be given practical effect, in the form of national objectives which are quantified wherever possible and appropriate’.¹⁷⁰

Over time, the objectives of the EES have been further clarified. The most significant changes occurred at Lisbon, where the European Council stated that the overall aim should be, ‘on the basis of the available statistics, to raise the employment rate from an average of 61% today to as close as possible to 70% in 2010 and to increase the number of women in employment from an average of 51% today to more than 60% by 2010’.¹⁷¹ At Stockholm, in March 2001, the European Council ‘set intermediate targets for employment rates across the Union as a whole for January 2005 of 67% overall and 57% for women’ It also ‘set an EU target for increasing the average EU employment rate among older women and men (55-64) to 50% by 2010’.¹⁷²

At Barcelona in March 2002, the European Council called for the Employment Strategy to ‘be simplified, in particular by a reduced number of guidelines, without undermining their effectiveness’.¹⁷³ It was said that the focus of the Employment Strategy should be on ‘raising the employment rate by promoting employability and by removing obstacles and disincentives to take up or remain in a job, while preserving high protection standards of the European social model’.¹⁷⁴ I quote at length from the Presidency Conclusions, in order to illustrate the specific nature of the guidance now being afforded to Member States. Where Member States pursue tax cuts, ‘priority should be given to reducing the tax burden on low-wage earners’; ‘tax and benefit systems should be adapted to make work pay and encourage the search for jobs’; national labour institutions and collective bargaining systems should ‘take into account the relationship between wage developments and labour market conditions, thereby allowing the evolution of wages according to productivity developments and skills differentials’; ‘in order to strike a proper balance between flexibility and security’, Member

Emphasis was placed on ‘preventive measures to reverse the trend of youth unemployment and long-term unemployment’, and on ‘active employability measures rather than passive support measures’; para.23. Detailed consideration of the policy prescriptions is beyond the scope of this paper.

¹⁷⁰ *Ibid*, para.15.

¹⁷¹ Lisbon Conclusions (2000), para.30.

¹⁷² Stockholm European Council, Presidency Conclusions, 23 and 24 March 2001, para.9.

¹⁷³ Barcelona Conclusions (2002), para.30. This reiterates the view of the Employment and Social Policy Council of 7 March 2002.

¹⁷⁴ *Ibid*, para.31.

States are ‘invited to review employment contract regulations, and where appropriate costs, with a view to promoting more jobs’; Member States should remove disincentives for female labour force participation and should strive ‘to provide childcare by 2010 to at least 90% of children between 3 years old and the mandatory school age and at least 33% of children under 3 years of age’; and they should reduce early retirement incentives, and step up efforts to increase the opportunities for older workers to remain in the labour market, aiming towards a progressive increase of about 5 years in the effective average age at which people stop working in the European Union by 2010.¹⁷⁵ It has become clear that the realisation of the Lisbon objectives has profound implications for the content of Member States’ employment policies.

IV 2 A Is local autonomy compromised?

Much of the rhetoric associated with the open method of coordination is sensitive both to adherence to the principle of subsidiarity, and to the maintenance of local autonomy. However, as the above extracts from the Barcelona Summit make clear, it is impossible to deny that the Employment Guidelines seek to exercise a direct influence the content of Member States’ employment policies. As Erika Szyszczak has said, ‘States are no longer free to determine national policy but must work within officially recognised Community Guidelines which have taken on a normative status’.¹⁷⁶

It is useful to distinguish between cooperation and coordination. Silvana Sciarra makes clear that although they can be thought of as ‘parallel paths leading in the same direction’, the two are ‘separate legal instrumentalities’.¹⁷⁷ Cooperation involves the encouragement and support of national actions, and the giving of precedence to national competencies. With coordination however, and the lead comes from the Community.¹⁷⁸ With this distinction in mind, Sally Ball commented that in the employment context, ‘it is possible to see the relationship between member states and the

¹⁷⁵ *Ibid.*, para.32. See also ECOFIN Council Key Issues Paper on the 2002 BEPG, 5 March 2002, para.26.

¹⁷⁶ Szyszczak (2000), n.163 above, p.211.

¹⁷⁷ Sciarra (2000), n.163 above, p.218.

¹⁷⁸ *Ibid.* Note however that (per Sciarra at p.223) ‘the concept of integration through coordination focuses its integrational impulse at the periphery of the European legal system, rather than attempting to impose integration from the centre’.

EC as moving beyond one of mere cooperation, to one of coordination, with the EC firmly taking the lead'.¹⁷⁹

Both the guidelines themselves, and the recommendations issued to the Member States support this conclusion. The last three sets of Guidelines, those adopted in 2000, 2001 and 2002, have taken the form of a Decision which certainly reads as if intended to have normative effect. Each year, the sole article has stated that Member States 'shall' take the guidelines into account in their employment policies.¹⁸⁰ However, some deference is shown to the different starting points of the different Member States,¹⁸¹ and to particular national and regional circumstances.¹⁸² Each year it is said that 'the implementation of the guidelines may vary according to their nature, the parties to whom they are addressed and the different situations in the Member States. They should respect the principle of subsidiarity and Member States' responsibilities with regard to employment'.¹⁸³ Nevertheless, the scope for diversity at the implementation stage only exists within the normative framework established at the European level.

Recommendations have been issued to individual States in 2000, 2001 and 2002. Each time, the Council has indicated that 'recommendations should be used sparingly, should concentrate on priority issues and should be based on sound and accurate analysis'.¹⁸⁴ Each time, it has stated that the 'competences' (in 2002, the 'powers') of the Member States 'should be respected', and, perhaps in the same spirit, has acknowledged the 'significant

¹⁷⁹ Ball (2001), n.148 above, p.357.

¹⁸⁰ See Council Decision 2000/208 EC of 13 March 2000 on Guidelines for Member States' employment policies for the year 2000, OJ L 72/15 [2000], Council Decision 2001/63/EC of 19 January 2001 on Guidelines for Member States' employment policies for the year 2001, OJ L 22/18 [2001], and Council Decision 2002/177/EC of 18 February 2002 on Guidelines for Member States' employment policies for the year 2002, OJ L 60/60 [2002].

¹⁸¹ Lisbon Conclusions (2000), para.30.

¹⁸² Stockholm Conclusions (2001), para.9.

¹⁸³ Employment Guidelines 2002, n.180 above, recital 17. There are similar paragraphs in previous Guidelines; see e.g. Luxembourg Conclusions (1997), para.14; and Council Resolution of 22 February 1999 on the 1999 Employment Guidelines, OJ C 69/2 [1999], recital 7.

¹⁸⁴ Council Recommendation of 14 February 2000 on the implementation of Member States' employment policies (2000/164/EC), OJ L 52/32 [2000], Council Recommendation of 19 January 2001 on the implementation of Member States' employment policies (2001/64/EC), OJ L 22/27 [2001], and Council Recommendation of 18 February 2002 on the implementation of Member States' employment policies (2002/178/EC), OJ L 60/70 [2000].

efforts already undertaken by the Member States'. Each time, it has then proceeded to indicate the 'challenges', 'issues', 'structural deficiencies', 'structural problems' or even 'structural challenges' faced by each State in turn; and to specify between two and six policy areas which 'should' receive priority attention. The recommendations 'unavoidably give the impression of dictating what the content of Member States' employment policies should be'.¹⁸⁵

IV 2 B Does the EES enhance legitimacy?

It is permissible and proper for the EU to constrain local autonomy, but only to the extent that it is possible to point to legitimacy benefits which derive from European level intervention. One important criticism of the EES, and indeed of European integration as a whole, is that the benefits tend not to be articulated clearly enough. More or often than not, the benefits of European intervention are left unsaid, perhaps because they are (wrongly) assumed to be self-evident. The key question in relation to the EES is how the evolving Lisbon strategy contributes, or perhaps detracts from, the legitimacy of the European polity. Can the intrusion onto local autonomy described above be justified in performance and/or regime legitimacy terms?

It should first be noted that the external effects of any one State's employment policies are unlikely to be substantial. The Commission has stated that there are 'externalities between Member States' *economic* policies and between those policies and the single monetary policy', and thus, a 'major need for co-ordination'.¹⁸⁶ However, there is no similar language used in relation to *employment* policy. If, for example, the Netherlands adopts passive rather than active employment policies, or resiles from its commitment to life-long learning, it will not steal a competitive march on the rest of Europe, or destabilise the euro.

The case for European intervention in the employment sphere therefore rests principally on the ability of the Lisbon strategy to improve each State's employment statistics. The 2001 Employment Guidelines explain that the Lisbon European Council 'embraced full employment as an overarching objective of the EU's employment and social policy', because, despite the careful build-up of a macroeconomic framework for stability and growth,

¹⁸⁵ Ashiagbor (2002), n.163 above, p.163.

¹⁸⁶ Commission Communication on strengthening economic policy coordination within the euro area, COM(2001)82, p.4.

and the favourable economic outlook, further progress 'is not automatic: it requires leadership, commitment and concerted action'.¹⁸⁷

In relation to performance legitimacy, which encompasses both the choice of policy priorities and the mechanisms for their realisation, significant criticisms may be made. First, although the commitment to promoting employment, whether it is 'high' or 'full' employment, is universally welcomed, the more detailed policy prescriptions are much more controversial.¹⁸⁸ There are tensions between the employment guidelines and the broad economic policy guidelines and the stability and growth pact;¹⁸⁹ and also tensions within the employment guidelines themselves. 'As long as the priorities of EMU remain as they are... there is a danger that the potential of the employment strategy will remain unfulfilled'.¹⁹⁰ And, notwithstanding the fact that increasing attention is now beginning to be paid to better jobs as well as to more jobs,¹⁹¹ the guidelines remain dominated by 'the business-friendly commitment to competitiveness, flexible labour markets and reductions in the tax burden - the policies advocated by the corporate "choir" of lobbyists in Brussels'.¹⁹²

Second, it is difficult to assess whether the OMC mechanism has been successful in directing States towards the stated objectives or in any way enhancing the effectiveness of national policies. In the first set of guidelines,

¹⁸⁷ Employment Guidelines 2001, n.180 above. The achievement of the Lisbon objectives is said to require efforts by the Community and the Member States, and 'a continued implementation of an effective and well-balanced and mutually supportive policy mix, based on macroeconomic policy, structural reforms promoting adaptable and flexible labour markets, innovation and competitiveness, and an active welfare state promoting human resources development, participation, inclusion and solidarity'.

¹⁸⁸ See the trenchant criticisms in Ashiagbor (2002), n.163 above.

¹⁸⁹ Per Deakin and Reed, at p.90-91, 'Article 99 and the Stability and Growth Pact together constitute an attempt to lock Member States into a path of economic development based on economic convergence around tight budgetary controls and the maintenance of price stability'; Deakin and Reed (2000), n.148 above.

¹⁹⁰ Deakin and Reed (2000), n.148 above, p.99. 'The risk remains that active labour market policies will slide down the agenda if and when the economic climate looks more unstable'; Ball (2001), n.148 above, p.360.

¹⁹¹ Employment Guidelines 2002, n.180 above, Horizontal Objective B. 'Quality of employment' was referred to at the Nice European Council, Presidency Conclusions, 7, 8 and 9 December 2000, para.18. See further the European Foundation for the Improvement of Living and Working Conditions Foundation Paper, Quality of work and employment in Europe: Issues and Challenges (OOPEC, Luxembourg, 2002).

¹⁹² Hutton (2002), n.24 above, p.305. The commitments 'come straight from the canons of American conservatism and the Washington consensus'.

it was said that ‘it is crucial for the coherence and effectiveness of the approach as a whole that all Member States make use of the “guidelines” in analysing their own situation and framing their policy and that they establish their attitude to each of them in their national employment action plan’.¹⁹³ In the Joint Employment Report for 2001, the overall assessment of the National Action Plans (NAPs) was guardedly optimistic. ‘Performances are improving in terms of both employment and unemployment. Policies are broadly developing in support of the Employment Guidelines and Recommendations, although not always with the systematic approach that would be required’.¹⁹⁴ My assessment is less positive. The Joint Employment Report makes startling reading. Eight of the fifteen Member States do not even include national targets for the overall employment rate within their NAP, and twelve do not include national targets for the employment rate for women.¹⁹⁵ There are indeed concerns, such as those expressed in the 2001 Employment Guidelines, about the ‘efficiency’ of the Luxembourg process.¹⁹⁶ The Recommendations issued to States are remarkably similar from year to year. There has been very little change in the relative performance of States, and while there has been slow progress in almost all States, it is not at all clear that this can or should be attributed to ‘leadership, commitment and concerted action’ at the European level.

The difficulties inherent in demonstrating the legitimacy of the OMC in performance terms should not come as a surprise. Within a pluralist society, it is to be expected that there should be rich debate about the priorities needed in order to enable the realisation of the Lisbon objectives. Moreover, it is clear that within a multi-level governance system, the centre cannot easily impose its own preferred solutions on national and subnational units; whether it acts via the open or indeed the classic Community method.

If it is to be argued that the OMC contributes to the legitimacy of the European polity, performance arguments (based on the effectiveness of the OMC process) must be successfully combined with those which focus on the regime. It is necessary to construct a case in favour of a regime in which

¹⁹³ Luxembourg Conclusions (1997), para.15.

¹⁹⁴ Commission and Council Joint Employment Report for 2001, p.84. For example, at p.15, it is said that the issue of quality of employment is ‘not developed in detail’ in many NAPs.

¹⁹⁵ *Ibid*, p.14.

¹⁹⁶ Employment Guidelines 2001, n.180 above, recitals 11 and 15. It is suggested that ‘national reports should, where appropriate, include budget information in order to permit an effective assessment of the progress achieved by each Member State in implementing the guidelines, taking into account their impact and cost effectiveness’.

objectives are set via an OMC process at European level, and are then implemented somewhat unevenly at national, regional and local levels. Clearly, this is no easy task. Even if one leaves the uneven implementation to one side, it is, I would argue, difficult to make the case that the content of employment policies should be formulated at the European level through an OMC, rather than at the national or subnational level. The assertion that unemployment is a common problem does not, without more, lead to the conclusion that it demands a common response.¹⁹⁷ The hope that policy makers at the European rather than the national level may be better able to withstand the pressures of globalisation and fulfill a redistributive function also appears to be a forlorn one. Whilst there is little doubt that globalisation operates so as to limit the policy options of the Member States, the constraints of globalisation, and indeed of EMU and economic policy coordination, apply in much the same way to policy made at European level via the EES, as they do to national employment policies; it has been noted that the strategy falls ‘far short of a real social redistribution function’.¹⁹⁸ An alternative approach suggests that the EES represents a way to ‘depoliticise’ the unemployment problem and to address it in a longer-term perspective. ‘Implicit in this orientation (as with EMU and its convergence criteria) is the belief that politicians need to be detached from their immediate national constraints and political contingencies. On the basis of common objectives set within a supranational framework they are most likely to develop a capacity to solve fundamental problems such as unemployment’.¹⁹⁹ This account is also vulnerable. First, on a normative level, the desirability of this ‘depoliticisation’ may be questioned, in much the same way as it is possible to question Giandomenico Majone’s arguments in favour of the ‘de-democratisation’ of the internal market.²⁰⁰ Second, on the descriptive level, the extent to which the OMC in the employment sphere does in fact free politicians from national constraints and political contingencies may also be doubted.

The regime advantages associated with the OMC in the employment field are contingent on there being a case, which I would suggest is unproven, for European intervention accompanied by structured diversity at the national level. Given this limitation, certain advantages do emerge.

¹⁹⁷ Cf. Trubek and Mosher (2001), n.163 above, p.96.

¹⁹⁸ Goetschy (1999), n.78 above, p.134.

¹⁹⁹ *Ibid*, p.132.

²⁰⁰ See notes 11 and 12 above and the accompanying text.

The OMC does enable ‘the harnessing in a more systematic, more deliberate way than hitherto of all Community policies in support of employment’.²⁰¹ It also enables a more integrated approach to be adopted to economic, employment and social policies.²⁰² Additionally, the OMC regime allows for the voices of a range of actors to be heard in the context of the policy making and policy reviewing processes. One should, however, be wary of overstating the nature of the change heralded by the OMC. As is the case with the classic Community method, within the context of the OMC, the Commission is the ‘driving force and catalyst’.²⁰³ It ‘structures the framework in which the different players interact’, and it ‘contributes to the structuring of the discourse through the documents it prepares, notably the guidelines and the analyses of performance of the Member States’.²⁰⁴ The European Council and various Council formations also have key roles, as do their committees, notably in relation to the EES, the Economic Policy Committee (EPC) and the Employment Committee (EMCO).²⁰⁵ Though great attention has been devoted to the role of the social partners, their involvement ‘is envisaged within parameters already set by the EES’s agenda, rather than them being given a wider role in setting the guidelines of the EES themselves’.²⁰⁶ According to the 2002 guidelines, ‘the social partners are invited to develop, in accordance with national traditions and practices, their own process of implementing the guidelines for which they have the key responsibility, identify the issues upon which they will negotiate and report regularly on progress, in the context of national action plans if desired, as well as the impact of their actions on employment and labour market functioning’; but all ‘within the overall framework and

²⁰¹ Luxembourg Conclusions (1997), para.6.

²⁰² For concerns about the subordination of the social to the economic within the EES, see Ball (2001), n.148 above; Deakin and Reed (2000), n.148 above, p.71; and Ashiagbor (2002), n.163 above.

²⁰³ Working Group 4a Report (2001), n.100 above, p.25.

²⁰⁴ De La Porte, C., ‘Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?’, 8 *ELJ* (2002) 38.

²⁰⁵ This advisory committee is to promote coordination between Member States on employment and labour market policies; see Article 130 EC. The Committee, which replaced the Employment and Labour Market Committee set up by Decision 97/16/EC, was established in January 2000; see Council Decision of 24 January 2000 establishing the Employment Committee, OJ L 29/21 [2000]. It is to collaborate closely with the social partners, in particular with those represented in the Standing Committee on Employment provided for by Council Decision 1999/207/EC. It has been said that its members (each Member State and the Commission appoint two) ‘do not have strong legitimacy to intervene and point out the defects of the procedures’; Sciarra (2000), n.163 above, p.228.

²⁰⁶ Ball (2001), n.148 above, p.369.

objectives set by these guidelines'.²⁰⁷ There have also been some modest efforts directed towards the greater involvement of regional and local actors. In 1999, it was said that 'the role and responsibility of partners at the regional and local levels in job creation and in ensuring supportive conditions and structures needs to be more fully recognised and supported'.²⁰⁸ By 2001, there was 'a growing awareness that the objectives that the Union has set itself to improve performance in the area of employment cannot be achieved without greater participation of the regional and local levels'.²⁰⁹ There is much further work that needs to be done before it can be maintained that all the relevant stakeholders are able to have their say.

Finally, this time in contrast to the classic Community method, the OMC appears to allow for the gradual evolution of policy at the European level. However, it is argued the advantages here, which are centred on the facilitation of learning and the evolution of new knowledges, may be diminished, rather than enhanced, by the tendency for specific objectives and guidelines to be promulgated at the European level. The result is that the paradigms within which learning can take place are relatively fixed, and that there is little or no encouragement for them to be transcended.²¹⁰ The four pillar structure of the guidelines is a given, as is the stable macro-economic background, and there is reluctance on the Commission's part to change the guidelines 'for fear of creating confusion'.²¹¹ The worry is that thinking might tend to ossify, rather than to evolve. The operation of the peer review programme, in which participants reflect on and assess different practices in labour market policy in various States, is of interest here. It is doubtless well-intentioned. Its website refers to Karl Popper's claim that 'a policy is a hypothesis which has to be tested against reality and corrected in the light of

²⁰⁷ Employment Guidelines 2002, n.180 above, Horizontal Objective D.

²⁰⁸ Employment Guidelines 1999, n.183 above, recital 12.

²⁰⁹ Commission Communication, 'Strengthening the local dimension of the European Employment Strategy', COM(2001)629, p.4-5. See also Commission Communication, 'Acting Locally for Employment - A local dimension for the European Employment Strategy', COM(2000)196.

²¹⁰ 'The policy "experimentation" which is the hallmark of the open method of coordination in fact permits experimentation only within a framework firmly wedded to sound public finances, comprehensive economic reform and restructuring of welfare states and the labour market, thus limiting the extent to which Member States can depart from the Employment Strategy without also breaching the Broad Economic Policy Guidelines and the Stability and Growth Pact'; Ashiagbor (2002), n.163 above, p.270.

²¹¹ Trubek and Mosher (2001), n.163 above, p.111.

experience'.²¹² However, the analysis of particular national initiatives, such as the innovative French policy on the reorganisation and reduction of working time does little to inspire confidence.²¹³ The exchange of views is useful, as is the existence of a forum in which policy-makers from different Member States are able to meet and discuss policy. However, it is difficult to find evidence that the peer review process generates changes in thinking, or evolution of policy approaches. In the 2001 Recommendations, almost a year after the peer review of the French policy, France was told to 'pursue efforts to modernise work organisation and monitor closely the net effects of the implementation of the 35-hour working week legislation'.²¹⁴ By 2002, the instruction was to 'intensify efforts to modernise work organisation with a view to better combining security with greater adaptability to facilitate access to employment', and to 'closely monitor the net effects of the implementation of the 35 hour working week legislation, especially on small business'.²¹⁵ My intention here is not to take a view on the merits of the French policy. It is simply to examine the way in which the review feeds into the policy making process at the European level and to speculate that it might be that small business' appeals to adaptability and employability find it easier to be heard by the Council and the Employment Committee, which are, accordingly, deaf to the more social arguments which found favour with the French legislator.

The overall assessment of the legitimacy of the EES is therefore largely negative. The EES is a normative framework. There is political (even if not legal) pressure on States to comply with centrally designed policies which are designed on the basis of a particular (controversial) narrative of Europe's unemployment problem. There is all too little attention devoted to whether the objectives of employment policy are best set at the European level. There are, in fact, no obvious performance or regime legitimacy considerations militating in favour of European level decision making in this field; on the

²¹² <http://peerreview.almp.org/en/>. For a critique of Popper's account of evolution and progress, see Kuhn, T., *The Structure of Scientific Revolutions* (University of Chicago Press, 3rd ed. 1996). An evaluation of the peer review programme can be found at <http://peerreview.almp.org/pdf/evaluation-report-10-01.pdf>.

²¹³ The peer countries (Austria, Luxembourg, Greece, Italy and Spain) 'were impressed and interested by the French initiative'. 'However, doubts were expressed about the feasibility of introducing legislation along the lines of the Aubry laws in any of the participating countries, for a variety of reasons'; <http://peerreview.almp.org/pdf/ensumrep001.pdf>, p.12.

²¹⁴ Council Recommendations of 2001, n.184 above, p.32.

²¹⁵ Council Recommendations of 2002, n.184 above, p.75.

contrary, there are both performance and regime arguments which point towards the maintenance or enhancement of local autonomy.

IV 3 The OMCs in the social field

At Lisbon, there was a renewed emphasis placed on social policy, in part precipitated by the ‘quantum shift resulting from globalisation and the challenges of a new knowledge-driven economy’,²¹⁶ and in part the result of the ‘need to adapt to the changing world of work, new family structures and the dramatic demographic changes of the forthcoming decades’.²¹⁷ The two substantive subheadings in the Lisbon document are ‘preparing the transition to a competitive, dynamic and knowledge-based economy’, and ‘modernising the European social model by investing in people and building an active welfare state’. It was said that ‘people are Europe’s main asset and should be the focal point of the Union’s activities’.²¹⁸ Post-Lisbon, the European institutions have claimed that economic reform, employment and social policies form a “triangle” of mutually reinforcing policies’,²¹⁹ and that progress towards the Lisbon goals ‘can only be brought about by balanced efforts on both the economic and social fronts’.²²⁰ The rhetoric asserts that progress in the economic, employment and also the social arena, are all necessary for the achievement of the Lisbon goals.²²¹ But, does the reality match the rhetoric? And, more pertinent for this paper, does progress in the three fields demand action at the European level via equivalent mechanisms?

²¹⁶ Lisbon Conclusions (2000), para.1.

²¹⁷ Commission Communication, ‘A Concerted Strategy for Modernising Social Protection’, COM(99)347, p.3.

²¹⁸ Lisbon Conclusions (2000), para.24.

²¹⁹ Commission Communication, ‘Supporting national strategies for safe and sustainable pensions through an integrated approach’, COM(2001)362, p.9. See also Stockholm Conclusions (2001), para.2.

²²⁰ Barcelona Conclusions (2002), para.22.

²²¹ See also Langille, B., ‘Seeking Post-Seattle Clarity - and Inspiration’, in Conaghan, J., Fischl, R. and Klare, K. (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (OUP, 2002), Chapter 7, p.147-156. He argues that on a ‘pragmatic and strategic’ view, ‘the normative foundations of the economic and the social are different, and indeed contradictory, and the problem of governance is one of strategically managing these fundamental contradictions’. On a ‘deeper’ view, ‘there is an integration, not segregation of the economic and the social’. On this view ‘our normative architecture does not rest on two foundations but one’. The EU seems wedded to the first of these perspectives.

Within the context of the overall challenge of modernisation, the agenda for ‘deepened cooperation’ at the European level in the social field is based on four general objectives, which serve to identify the areas in which there are problems to be solved and challenges to met. They are (1) to make work pay and to provide secure income,²²² (2) to make pensions safe and sustainable, (3) to promote social inclusion, and (4) to ensure high quality and sustainable health care.²²³ This paper considers the legitimacy of the nascent OMCs in the pensions and social inclusion fields.²²⁴

The OMC dealing with safe and sustainable pensions, which is said not to ‘change the respective responsibilities of policy makers at European and national level’,²²⁵ was only authorised by the Stockholm European Council in March 2001.²²⁶ Securing sustainability was said to require meeting a triple challenge; safeguarding the capacity of pension systems to meet their social aims, maintaining the financial sustainability of pension systems, and enhancing the ability of pension systems to respond to the changing needs of society and individuals.²²⁷ These three principles were endorsed by the European Council in Goteborg.²²⁸ Building on the need to meet this challenge, a set of objectives were developed in 2001. In most places, these are vague in the extreme - reference is for example made to ‘a decent standard of living’, ‘effective incentives for the participation of older workers’, and ‘a fair balance between the active and the retired’.²²⁹

²²² The tension here is, sometimes, acknowledged. See Commission Report on Social Protection in Europe 1999, COM(2000)163, p.17; ‘the challenge facing Member States is to set benefit levels and the regulations governing entitlement to them so that these two objectives are achieved simultaneously’.

²²³ COM(99)347, p.12-15.

²²⁴ There has been slower progress in relation to health care. The Barcelona European Council was only able to take note of the initial Council report on health care for the elderly, and to invite the Commission and Council to examine more thoroughly the questions of accessibility, quality and sustainability in time for the Spring 2003 European Council; Barcelona Conclusions (2002), para.25.

²²⁵ COM(2001)362, p.4.

²²⁶ Stockholm Conclusions (2001), para.32. See also the report by the Social Protection Committee (SPC) on the future evolution of social protection, ‘Adequate and Sustainable Pensions’, June 2001, p.iv.

²²⁷ SPC Report, June 2001, n.226 above, p.i. See also Commission Communication, ‘The Future Evolution of Social Protection from a Long-Term Point of View: Safe and Sustainable Pensions’, COM(2000)622.

²²⁸ Goteborg European Council, Presidency Conclusions, 15 and 16 June 2001, para.43.

²²⁹ COM(2001)362, p.4-8; and Council Report on objectives and working methods in the area of pensions, 23 November 2001, p.5-7.

The OMC was said to have four advantages, which will be examined more closely below.

- The common objectives will help Member States focus on necessary reforms and make pensions policy more transparent, thus allowing citizens to adapt to foreseeable changes.
- They should also contribute to a consensus on necessary reforms, thereby strengthening public confidence in the future of pension systems.
- The exchange of experience, based on good practice and innovative approaches, will foster mutual learning and widen the range of policy options under consideration in each Member State.
- Finally, commonly agreed indicators will help to measure progress, in relation to the situation of other Member States and to the common objectives.²³⁰

In March 2002, the Barcelona European Council called for the reform of pensions systems to be accelerated to ensure that they are both financially sustainable and meet their social objectives, and stressed ‘the importance of the joint Commission and Council Report on Pensions to the Spring 2003 European Council, to be drawn up on the basis of the National Strategy Reports due in September 2002’.²³¹

The OMC dealing with social inclusion was authorised by the European Council at Lisbon in March 2000.²³² The OMC process is said to allow for ‘both coherence and diversity of action at national level’.²³³ The Member States are ‘invited to develop their priorities’ within the framework of four overall objectives: ‘to facilitate participation in employment and access by all to resources, rights, goods and services; to prevent the risks of exclusion; to help the most vulnerable; to mobilise all relevant bodies’.²³⁴ The Nice EC approved ‘the objectives of combating poverty and social exclusion adopted by the Council’ and invited Member States ‘to develop their priorities in relation to these objectives, to submit by June 2001 a national action plan covering a two-year period and to define indicators and monitoring

²³⁰ COM(2001)362, p.4.

²³¹ Barcelona Conclusions (2002), para.25.

²³² Lisbon Conclusions (2000), para.32.

²³³ Council, ‘Fight against poverty and social exclusion - Definition of appropriate objectives’, 17 October 2000, Annex, p.4.

²³⁴ *Ibid*, p.4-5.

mechanisms capable of measuring progress'.²³⁵ These first National Action Plans on inclusion (NAPs/incl) were evaluated by the Commission and Council at the end of 2001.²³⁶ The Joint Report 'examines Member States' NAPs/incl focussing on the quality of the analysis, the clarity of objectives, goals and targets and the extent to which there is a strategic and integrated approach'.²³⁷ At the Barcelona European Council in March 2002, in the aftermath of the first round of NAPs/incl, and based on the acceptance that 'the number of people experiencing high exclusion and poverty risk in society remains too high',²³⁸ Member States were invited to set targets, in the next National Action Plans, 'for significantly reducing the number of people at risk of poverty and social exclusion by 2010'.²³⁹

Because the intervention of the Community institutions in these field is so recent, it is difficult to assess. This section explains the evolution of policy in this area, focusing on the extent to which local autonomy has been affected, and on the ways and extent to which European intervention is able to add legitimacy.

IV 3 A Is local autonomy compromised?

The need for change in Member States' social protection systems has long been recognised. The initial aim at the Community level was to support the Member States in meeting the challenges.²⁴⁰ In 1997, for example, the 'common understandings' were these. First, the autonomy of the States was prioritised. It was said that 'each Member State is responsible for the

²³⁵ Nice Conclusions (2000), para.20. The annexed European Social Policy agenda makes it clear that this is within the context of an OMC.

²³⁶ Commission and Council Joint Report on Social Inclusion, 12 December 2001.

²³⁷ *Ibid*, p.5.

²³⁸ *Ibid*, p.7. In 1997, 18% of the EU population (more than 60 million people) were living in households where the income was below 60% of the national equivalised median income.

²³⁹ Barcelona Conclusions (2002), para.24.

²⁴⁰ The Commission took significant steps in 1995 and 1997, with its Communications 'The Future of Social Protection: A Framework for European Debate', COM(95)466, and 'Modernising and Improving Social Protection in the European Union', COM(97)102. See also Council Recommendation 92/441/EEC of 24 June 1992 on common criteria concerning sufficient resources and social assistance in social protection systems, OJ L 245/46 [1992], and Council Recommendation 92/442/EEC of 27 July 1992 on the convergence of social protection objectives and policies, OJ L 245/49 [1992].

organisation and funding of its own social protection system'.²⁴¹ Second, and notwithstanding the above, it was accepted that the EU might have a role in certain circumstances. It was said to be 'responsible for the co-ordination of national social security schemes in cases where citizens exercise their rights of free movement within the Union'. There has been significant progress here, primarily concerned with the elimination of barriers to the free movement of people and the freedom of establishment.²⁴² More generally, Europe's role was to serve 'as a forum for promoting better mutual understanding of long-term perspectives'.²⁴³

A shift in emphasis could be detected in 1999, when the Commission Communication (COM(99)347) referred to 'a concerted strategy' for modernising social protection. Much of the rhetoric still points towards intervention which is entirely consistent with the maintenance of local autonomy. The Communication itself 'sets out to continue and deepen a process of collective reflection on the state of social protection'.²⁴⁴ The pensions OMC is to play its part in helping the Member States to progressively develop their own policies.²⁴⁵ In relation to social inclusion, it is said that the setting of appropriate objectives should 'involve promoting a better understanding'.²⁴⁶ The programme of Community action to encourage cooperation between Member States to combat social exclusion, enables the Community and the Member States to enhance the effectiveness and efficiency of policies by 'improving the understanding of poverty and social exclusion and poverty', by 'organising exchanges on policies which are implemented and promoting mutual learning', and by 'developing the capacity of actors to address social exclusion and poverty effectively'.²⁴⁷

²⁴¹ This principle is, however, subject to the internal market case law of the Court. See Hervey, T., 'Social Solidarity: A Buttress Against Internal Market Law?', in Shaw (ed.) (2000), n.23 above, Chapter 2.

²⁴² These developments, not based on the OMC process, are beyond the scope of this paper. See further Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community, the Commission proposal for a Directive on the activities of institutions for occupational retirement provision (COM(2000)507), and the Commission Communication on the elimination of tax obstacles to the cross-border provision of occupational pensions (COM(2001)214).

²⁴³ COM(97)102, p.1.

²⁴⁴ COM(99)347, p.5.

²⁴⁵ SPC Report, June 2001, n.226 above, June 2001, p.34.

²⁴⁶ Council (2000), n.233 above, Annex, p.3.

²⁴⁷ Decision 50/2002/EC of the European Parliament and of the Council of 7 December 2001 establishing a programme of Community action to encourage cooperation between Member States to combat social exclusion, OJ L 10/1 [2002], Article 3.

Three action strands which may be implemented within a transnational framework are identified - improving understanding (analysis), promoting policy cooperation (exchanges of best practice) and promoting dialogue (participation and networking).²⁴⁸

However, there are also some indications that the concerted strategy may, at least to an extent, compromise, local autonomy. This is, it seems, largely because of the linkages which (are perceived to) exist between social policy and economic and employment policies. Both the ‘macro-economic disciplines required for stability and growth within Economic and Monetary Union’, and the ‘commitments to making social protection systems more employment-friendly under the European Employment Strategy’, are seen as potential justifications for the intrusions onto local autonomy.²⁴⁹ So too is the perceived ‘need to confirm the place of social protection within the common values of the Union in the context of enlargement’.²⁵⁰ It is said to be ‘vital’ that progress is made towards meeting the common objectives of pension reforms. ‘The assessment of such progress within the existing processes and within the framework of the open method of coordination should feed into the overall policy co-ordination process, and the results of this work should be integrated into the Broad Economic Policy Guidelines’.²⁵¹

The relationship between the social OMCs and the EES is relatively straightforward. Employment is ‘the best guarantee against social exclusion’,²⁵² and an important means to secure the future viability of social protection systems.²⁵³ Because of this, as made clear in the 2002 Employment Guidelines, ‘consistency and synergy between the employment and social inclusion process’ must be ensured.²⁵⁴ ‘Two way links have been established between the NAPs/incl and the NAPs/employment’;²⁵⁵ the challenge being to ensure that equal value is given to social policies alongside employment and economic policies.²⁵⁶ It is to be anticipated that,

²⁴⁸ *Ibid*, Annex.

²⁴⁹ COM(99)347, p.3.

²⁵⁰ *Ibid*, p.3; COM(2000)163, p.6.

²⁵¹ COM(2001)362, p.10.

²⁵² Barcelona Conclusions (2002), para.22.

²⁵³ The employment participation of those in the 55-64 age bracket was highlighted as crucial for the future of social protection, and has received increasing prominence in the employment guidelines. See also Commission Communication, ‘Towards a Europe for all Ages’, COM(99)221, and SPC Report, June 2001, n.226 above, p.ii.

²⁵⁴ Employment Guidelines 2002, n.180 above, recital 14.

²⁵⁵ Joint Report on Social Inclusion (2001), n.236 above, p.9.

²⁵⁶ *Ibid*, p.13.

in relation to employment-related social policy, Member State autonomy is to be constrained in much the same way as it is under the EES.²⁵⁷

The implications of economic policy coordination and EMU are much more difficult to tease out. On the one hand, it is said that ‘EMU does not of itself call into question the long recognised primary responsibility of each Member State for the organisation and financing of their own system’.²⁵⁸ And, although States ‘should be required to set out their strategies for ensuring the sustainability of adequate pension provision and modernising their pension systems in integrated national strategy reports’, ‘it will be for the Member States to decide which set of policies is most appropriate’.²⁵⁹ On the other hand, there is acknowledgement that as a result of the greater degree of interdependence brought about by EMU, ‘social protection systems becomes more and more a matter of common concern among Member States. Reforms in the social protection systems of one Member State are of interest to, and can potentially impact on, others’.²⁶⁰ The financial aspects of national social policy have come under the greatest pressure. The Stability and Growth Pact and the Broad Economic Policy Guidelines, ‘have increased the importance of securing financial stability and have, therefore, limited the scale of government borrowing and constrained the growth of public expenditure’.²⁶¹ By 2001, the Commission had gone so far as to propose an objective to the effect that ‘public spending on pensions is maintained at a level in terms of percent of GDP that is compatible with the Growth and Stability Pact’.²⁶² The position seems to be that, within an extremely broad guiding framework, Member States retain the freedom to set their own priorities in the social field, but that this freedom is constrained by the financial strictures deemed to be necessary in the context of the coordination of economic policy.

IV 3 B Do the OMC processes enhance legitimacy?

To the extent that there are no detailed objectives relating to the content of national social policies, the social OMCs fall to be assessed on different

²⁵⁷ It is almost impossible to draw a clear line between employment and social policy. If the logic of the EES is accepted and perceived to be successful, it may be anticipated that OMCs in the social field will increasingly follow the EES.

²⁵⁸ COM(99)347, p.8.

²⁵⁹ COM(2001)362, p.10. This was reiterated by the Council in November 2001; ‘it remains a matter for Member States to determine their own pensions policies’.

²⁶⁰ COM(99)347, p.8.

²⁶¹ COM(2000)163, p.8.

²⁶² COM(2001)362, p.6.

grounds to the EES. The emphasis should be on the extent to which the OMCs are capable of fostering mutual learning in each Member State.

The contention here is that within non-teleological OMCs, in which objectives are not set at the centre with any degree of specificity, the opportunities for learning, innovation and experimentation at national, regional and local levels is enhanced. In such a heterarchical setting, it is possible for each stakeholder, having studied the map created in the course of iterative interactions between relevant stakeholders at the various levels, to choose not only their preferred route towards a given destination, but also their own preferred destination.²⁶³ Under such an OMC regime, which should not be seen as transitional, underdeveloped or immature,²⁶⁴ it is possible for relevant actors to consider a wider range of policy options.

It may however be objected that the establishment of common objectives at the European level, via the OMC, may help Member States to ‘focus on necessary reforms’.²⁶⁵ On this account, common objectives might ‘act as guiding principles in the development of systems’,²⁶⁶ ‘give the process more visibility and political profile’,²⁶⁷ and/or create ‘EU-wide mobilisation’ towards social goals.²⁶⁸ There is a need for further research which attempts to discover the extent to which objectives should be articulated in order to maximise the learning potential of the OMC process. It is also important to consider whether or not certain policy options should be ruled out at the EU level, either because of their adverse effects on other states, or because of their adverse effects on (for example) fundamental rights.²⁶⁹ I can only emphasise here that it is not necessarily the case that advantages will accrue from greater precision. Indeed, deliberative democratic accounts, with their focus on open, heterarchical processes, would tend to support the

²⁶³ See Shaw, J., ‘Relating Constitutionalism and Flexibility in the European Union’, in De Búrca and Scott (eds) (2000), n.17 above, p.350.

²⁶⁴ Cf. The OMC ‘involves strategies aimed at medium-term results and *increasing in intensity* over time’; and, ‘the definition of *detailed* common objectives is a *necessary preliminary* step as soon as Member States decide that a certain field is a matter of common interest and one where they wish to coordinate their national policies’; Working Group 4a Report (2001), n.100 above, p.22, 23 (my italics).

²⁶⁵ COM(2001)362, p.4.

²⁶⁶ COM(99)347, p.5.

²⁶⁷ *Ibid*, p.3.

²⁶⁸ Joint Report on Social Inclusion (2001), n.236 above, p.11.

²⁶⁹ Where such a determination is made at the EU level, it seems doubtful in the extreme that the OMC can be the best mechanism for ensuring that national policy choices remain within permissible bounds.

establishment of non-teleological OMCs in which the capacity for national and subnational experimentation is not unduly bounded, and in which there is no ‘hegemonic imposition of a monolithic discipline’.²⁷⁰

The regime in the social OMCs appears well suited to the development of learning and new knowledge. The High Level Working Party on Social Protection, which was invited, by the Lisbon European Council to prepare ‘a study on the future evolution of social protection from a long-term point of view, giving particular attention to the sustainability of pensions systems in different time frameworks up to 2020 and beyond, where necessary’,²⁷¹ is able to play its part; as are not only the Member States and the Commission, but also the applicant countries, civil society and the social partners.²⁷² Within this context, NAPs can ‘provide a wealthy source of information from which the Commission and Member States can further develop a process of exchange and good practice conducive to more effective policies’.²⁷³ To date however, only a few NAPs ‘have moved beyond general aspirations and set specific and quantified targets which provide a basis for monitoring progress’.²⁷⁴ Within this context, it is of course necessary to examine the precise roles played by each of the actors and to ensure that there is real, rather than symbolic public scrutiny of the development of policy.²⁷⁵

It is also important that commonly agreed, unbiased and comparable indicators are in place, so as to help to measure progress. The Commission appears to appreciate that ‘a good understanding of what other Member States are doing... is extremely valuable for national policy makers even though successful policy measures in one country may not be directly transferable to another one’.²⁷⁶ There is a ‘need for improved and, above all, more timely data’,²⁷⁷ to ‘contribute to better evaluations of policies and a

²⁷⁰ De La Porte, Pochet and Room (2001), n.129 above, p.300.

²⁷¹ Lisbon Conclusions (2000), para.31. This High Level Working Party, was, via Council Decision 2000/436/EC of 29 June 2000 setting up a Social Protection Committee, replaced by the Social Protection Committee, see OJ L 172/26 [2000]. Article 144 EC (as amended at Nice), refers to the establishment of this Social Protection Committee, a committee ‘with advisory status to promote cooperation on social protection policies between Member States and with the Commission’.

²⁷² COM(99)347, p.15-16.

²⁷³ Joint Report on Social Inclusion (2001), n.236 above, p.6.

²⁷⁴ *Ibid*, p.8.

²⁷⁵ De La Porte, Pochet and Room (2001), n.129 above, p.303.

²⁷⁶ COM(2001)362, p.3.

²⁷⁷ COM(2000)163, p.3, 25.

clearer assessment of their effectiveness and value for money’, and to ‘lead to better policy making in Member States in the future’.²⁷⁸ In the social field, developing common indicators is not easy. The first Joint Report on social inclusion acknowledges that ‘we are still a long way from achieving a common approach to social indicators which will allow policy outcomes to be compared and which will contribute to the identification of good practice’.²⁷⁹ The Laeken European Council also stressed the need to reinforce the statistical machinery.²⁸⁰

Thus, OMC processes which defer to local autonomy have much to contribute in terms of performance and regime legitimacy, at least to the extent that they are able to foster mutual learning and improve policy outcomes in each State. Much is likely to depend on the way in which interactions between the OMC participants are structured, and on the ability to develop appropriate common indicators. What remains to be considered is whether this is sufficient. Might it be that more concertation is required in order to ensure that States do not adopt policies which are either such as to have adverse effect on others, or not consistent with the realisation of the Lisbon goals?

The Commission has recognised that one State’s social policies can have an (external) impact on other States.²⁸¹ Importantly however, it seems that the impact is caused not so much as a result of the choice of policy priorities, but rather, and especially within the Eurozone, as a result of the financial ramifications of these choices. States have a more direct interest in ensuring that other States’ pension and welfare systems are sustainable, than that they are safe. On that basis, it seems sensible that Member States are free to decide ‘what pensions system they want and what policy mix is required to maintain adequate incomes for older people’, but that they are cautioned that this should not jeopardise ‘the stability of public finances, undermining employment incentives or squeezing out other essential public expenditures’.²⁸²

²⁷⁸ Joint Report on Social Inclusion (2001), n.236 above, p.5.

²⁷⁹ *Ibid*, p.10.

²⁸⁰ Laeken Conclusions (2001), para.28.

²⁸¹ COM(99)347, p.8.

²⁸² SPC Report, June 2001, n.226 above, p.33-34. In relation to social inclusion, States are informed that ‘it is essential to be aware of financial constraints’; Joint Report on Social Inclusion (2001), n.236 above, p.13.

A rather different analysis is required in the context of a shift in the locus of decision making to the European level in order to facilitate the realisation of the Lisbon goals. As in relation to employment policy, both performance and regime legitimacy are considered. Arguments based on performance legitimacy encounter familiar difficulties, concerning both the choice of policy priorities and the capacity of the OMC to realise them. There are calls for the social OMCs to be developed, and for a common European strategy on social protection ‘where explicit, clear and mutually agreed objectives are defined’,²⁸³ to emerge. The Commission has also hinted at the formulation of ‘a *common political vision* of Social Protection in the European Union’.²⁸⁴ The approach adopted in this paper suggests that such policy-oriented initiatives, however well-intentioned, might prove to be counter-productive. It is accepted that social progress reinforces economic progress. As there is European level economic (and monetary) policy, symmetry would appear to dictate that there should also be a European level social policy. Such a simplistic rationale should be resisted. Actors at all levels should do what they can to strengthen and boost the effectiveness of, and increase the popular appeal of, economic and social policies. However, the Commission should not feel the need to act against poverty and social exclusion by seeking to have a direct influence on the content of national policies, particularly by seeking to steer them towards convergence. The ‘deep embeddedness of social policy in unique national institutions’, certainly exposes the inherent difficulty of imposing common policies;²⁸⁵ it may also indicate the folly of attempting to do so, given the likely durability of, and differences between, the various national models.²⁸⁶ There is little doubt that Member States’ freedom of manoeuvre in the social field is limited both by the pressures of globalisation and by the constraints of EMU. However, there is no reason to expect an improvement at the European level. Indeed there is a risk that ‘common social objectives which override national political choices’ might be imposed as ‘ostensible technical necessities’; and that the terms on which this is done will ‘privilege fiscal discipline over social needs and social cohesion’, and will ‘obscure the social and political choices at stake’.²⁸⁷ Given EMU, there is a need for some sort of fiscal framework;²⁸⁸

²⁸³ Vandebroucke, F., ‘European social policy: Is co-operation a better route than regulation?’, 8 *New Economy* (2001) 30, p.31.

²⁸⁴ COM(99)347, p.12, italics in the original.

²⁸⁵ Trubek and Mosher (2001), n.163 above, p.98.

²⁸⁶ ‘According to the current state of analysis, no type of pension scheme (pay-as-you-go vs. funded, private vs. public, defined benefit vs. defined contribution) can be regarded as inherently superior to another’; SPC Report, June 2001, n.226 above, p.iii.

²⁸⁷ De La Porte, Pochet and Room (2001), n.129 above, p.299.

but within that framework Member States should be free to develop their own priorities. In relation to regime, the arguments have been explored above, in the context of the facilitation of learning and the development of policy at the national level. There are also benefits which accrue from ‘the better integration of social objectives in the already existing processes’.²⁸⁹

Thus, the conclusion in relation to the legitimacy of the OMCs in the social field is more positive. There is greater deference to local autonomy, perhaps because there is less confidence in European level solutions. This helps to create certain regime advantages, which are premised on the capacity of the OMC process to generate learning and new, innovative policy approaches. This deference towards national level solutions is, however, subject to some limits. First, there is a close relationship between national policies relating to pensions and inclusion and the European Employment Strategy. Second, and perhaps even more important, national social policies, in particular in their financial aspects, may impact on economic policy coordination, the stability of the euro, and on the interests of other States. To this extent, there is some, legitimate, concertation.

V Conclusions

This paper is concerned with how decision making should be structured in today’s European Union. When examining the optimal allocation of competence, or the proper operation of the subsidiarity principle, it is easy to become despondent. Howse and Nicolaidis warn that ‘all efforts to generate an ideal allocation of competences end up plagued by radical indeterminacy. Whether in the case of social welfare, economic development, or culture, there are good arguments that can be made for centralization, and good ones for decentralization too’. They claim that it is necessary to situate the debate in context. In their edited collection on legitimacy and levels of governance in the United States and the European Union, they opt for the broad theoretical context ‘provided through the optic of legitimacy’.²⁹⁰ This paper adopts the same approach.

²⁸⁸ In this paper, it is accepted that certain constraints are imposed by the internal market and by EMU. The extent to which these economic common ventures can and should constrain national social (and employment) policies is normatively and economically controversial. That debate, however, is beyond the scope of this paper.

²⁸⁹ Joint Report on Social Inclusion (2001), n.236 above, p.6.

²⁹⁰ Howse, R. and Nicolaidis, K., ‘Introduction’, in Nicolaidis and Howse (eds) (2001), n.10 above, p.3.

It identifies the legitimacy challenges facing the European Union, and examines the range of suggested cures. In the light of the legitimacy challenges, it explores the operation of the principle of subsidiarity. It suggests that there should be a presumption in favour of decision making at national and subnational levels, and that there should be an onus on proponents of EU level action to demonstrate the benefits associated with such action. It, however, accepts that States also face legitimacy challenges, that these are growing in today's interdependent world, that there is a need to rectify the failings of the States, and that the EU should and must play its part.

Its particular focus is the open method of coordination in the employment and social fields. The OMC is often held up as the answer to the governance conundrum in today's multi-level European Union. It is said that the OMC enables policy to be directed at the European level, without any adverse effects on local autonomy. A close examination of the OMCs in the employment and social fields confirms the suspicion that this cannot be the case. In fact, different trade-offs can be and are made between central steering and local autonomy. These different trade-offs reflect different views as to the extent to which locally or centrally made policy is able to realise legitimacy benefits.

The key conclusion is that, in both the employment and social fields, there is a strong case for the maintenance of local autonomy. Non-teleological OMCs, in which the participants retain their autonomy, and in which the Commission and Council provide a comparative analysis of the effectiveness of policy, offer substantial benefits. On the other hand, shifting the locus of decision making to the European level does not, except for in relation to a particular set of largely transnational and financial issues, appear to add either performance or regime legitimacy. It certainly cannot be relied upon to facilitate a more redistributive policy. On the contrary, European level economic and monetary policy (which is driven by the need to protect the stability of the European economy and currency in the global economy) contributes to the foreclosing of redistributive options at both national and European levels.

The above has important implications for the future development of the open method of coordination. Since Lisbon, the European Council has adopted an ever more integrated approach to economic and social policy making. OMCs and other similar processes premised on the need for deeper cooperation,

coordination, or convergence, are appearing in a range of policy areas. Local autonomy is, as in the case of social inclusion, beginning to be circumscribed. What is worrying is the absence of a conspicuous enquiry into the need for central intervention.²⁹¹ In these circumstances, the impositions of solutions from the European level ‘could bring the EU institutions into disrepute with the populations of the various member states, resentful of European discipline whose rationale they doubt’.²⁹² This is especially so given that the Treaty does not, in many of these areas, unambiguously give the Community the competence to act.²⁹³

Ultimately, the question is what Europe (and in particular European level action) is for. The European level of governance, just like the national and subnational, is there to enable citizens to thrive. It and they are assessed in terms of performance and regime legitimacy. Each unit should contribute to the extent that it can. There is little doubt that ‘an effective Europe, delivering at European level what nation-states cannot perform at national level, through political processes there were accountable and transparent, would help to re-legitimise politics and democracy alike’.²⁹⁴ Conversely, an ill Europe, suffering from a significant legitimacy deficit, attempting either to replicate tasks that smaller units are capable of performing, or tasks with which it too is poorly-equipped to deal, would have the opposite effect.

The OMC might just provide a way for Europe to begin to acquire polity legitimacy. It offers the prospect of a Europe-wide public sphere of public communication and of a revitalisation of the current, ailing pattern of political organisation. This potential will be lost if the (understandable) eagerness of the centre to be prescriptive is not resisted.

²⁹¹ Bermann (1994), n.1 above, p.416.

²⁹² De La Porte, Pochet and Room (2001), n.129 above, p.302.

²⁹³ Given the concerns expressed about the legitimacy of EU level action, the fact that the Community dynamic ‘not only manifests itself in the ways foreseen by the Treaties but often grows out of practices applied in “grey areas” (and later formally incorporated in revisions of the Treaties)’ (Working Group 4a Report (2001), n.100 above, p.2) gives great cause for concern.

²⁹⁴ Hutton (2002), n.24 above, p.311.