

Experimental Governance: The Open Method of Coordination

*Erika Szyszczak**

Abstract: *The open method of coordination (OMC) has increased the competence of the European Union to regulate areas where the traditional Community legislative processes are weak, or where new areas require coordination of Member State policy, either as part of the spillover of the integration project as a result of economic and monetary union, or as a result of the case law of the European Court of Justice. The OMC is viewed as an aspect of new, experimental governance, which is part of the response by the EU to regulatory shortcomings. This article explores the normative aspects of the OMC using case studies. The article examines the conditions in which the OMC emerges, the conditions upon which it thrives, and the claims that are made for its effectiveness as a new form of governance.*

I The Historical Context

The term ‘open method of co-ordination’ (OMC) was coined at the Lisbon Summit of March 2000. However, a legal base for what is now generically identified as the OMC, is seen in the use of new methods of coordinating policy in the arena of economic and monetary union (the Broad Economic Policy Guidelines) introduced in the Maastricht Treaty 1991, and now found in Article 98 EC, and later, in the arena of employment policy, the European Employment Strategy, introduced in the Amsterdam Treaty 1997 in Articles 125–130 EC. It is arguable that the advent of the OMC in EU policy making and governance models is not so novel, or so recent, but merely builds upon the long tradition of soft law processes used in policy making¹ and the experimentation with new forms of governance,² drawing upon the success of Commission monitoring of traditional hard law directives and the peer review, name and shame mechanisms utilised in

* Jean Monnet Professor of European Law *ad personam*, Professor of European Competition and Labour Law and Director of the Centre for European Law and Integration, University of Leicester, UK. I am grateful to Brabara Bogusz, Adam Cygan, Arabella Stewart, and participants at the Harvard Seminar for useful comments on a first draft of this article.

¹ K. Wellens and G. Borchardt, ‘Soft Law in European Community Law’, (1989) 14 *European Law Review* 267; L. Senden, *Soft Law in European Community Law* (Hart, 2004).

² For example, the commitment to procedural safeguards such as proportionality and subsidiarity, the use of comitology, framework legislation, networked administrative agencies. See also: K. Jacobsson, ‘Between Deliberation and Discipline: Soft Governance in EU Employment Policy’, in U. Morth (ed.) *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* (Edward Elgar, 2006).

the implementation and monitoring of the Internal Market programme and extended into other areas such as competition policy.³

The OMC can be viewed as yet another aspect of experimental governance without entailing a systemic change to the underlying constitutional settlement of 1957.⁴ In this respect firm boundaries seem to be drawn between 'old' governance, or the Community method, and 'new' governance, which may exist outside the legal constitutional structures of the EU.

The OMC may also be characterised as part of an inherent logic within the EU; of political actors switching from traditional to better or more efficient regulation in areas where some level of EU regulation is necessary but where it has been difficult to reach consensus on *what* level and *how* this should be achieved. All are part of the inherent ability of the EU integration process to constantly reinvent itself as part of an evolutionary process of political and economic survival.

A unifying characteristic of new governance⁵ is that it is seen as an experimental form of governance and decision-making:⁶ a response to the various regulatory shortcomings of the EU that were manifested in the latter part of the last century. Such shortcomings include: the limited decision-making capacity of the EU, buttressed by political concerns of the Member States to retain a residual sovereign capacity to direct, and implement, economic and social policies which are not seen as central to the integration project; the Court of Justice's continued role to set legal limits to the competence attributed to the integration project;⁷ and the various criticisms of the powers of the EU, questioning the legitimacy of the decision-making processes and the powers attributed to the EU.⁸

One normative analysis of the problem is provided by Scharpf.⁹ He argues that the EU is bedevilled by systematic limits, or black holes, of non-decision. Regulatory competition forces Member States into a downward spiral and European decision-making tends to end up lower than that of any single Member State. In his analysis, a solution to the problem emerges by estimating the degree to which decision-making should be decentralised. But *within* the EU, deadlock in decision-making is also reached because of institutional factors. It is accepted that the EU is a multilevel decision-making polity, with very few institutional mechanisms to achieve hierarchical cooperation, and this contributes to the decision-making deadlock. The situation is exacerbated by the creation of new Institutional models of decision making, giving bodies such as the European Parliament greater powers of co-decision and attaching importance to the views of other institutions such as the Economic and Social Committee, the Committee of the Regions, the Economic and Policy Committee, the Employment Committee, and the Social Protection Committee. Post-Maastricht, the emphasis upon

³ See E. Szyszczak, 'The Regulation of Competition', in N. Shuibhne (ed.), *The Regulation of the Internal Market* (Edward Elgar, 2006).

⁴ E. Szyszczak, 'Social Policy in the Post-Nice Era', in A. Arnull and D. Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press, 2003).

⁵ For a discussion of new governance techniques see the Special Issue on Law and New Approaches to Governance in Europe, (2002) *European Law Journal* Vol 8, Issue 1.

⁶ See J. Zeitlin, 'Social Europe and Experimentalist Governance', in G. de Búrca (ed.), *EU Law and the Welfare State* (Oxford University Press, 2005).

⁷ Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419. See the paper by Mattias Kumm in this issue.

⁸ P. Schmitter, 'How to Democratize the European Union . . . and Why Bother?' (Lanham, 2000).

⁹ F. W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999).

greater grass-roots input from de-centralised and non-institutionalised actors has exaggerated the problem. For Scharpf, a way out of this deadlock is to emphasise the horizontal and vertical *differentiation* of decision-making and to put in place mechanisms to determine the proper *choice* of decision-making arenas, or patterns of linkages between the arenas, to prevent decision-making breakdown.

A different approach to analysing the normative dimension is seen in the work of Joerges.¹⁰ He argues that the Member States, the political interests of the élites within, and across, the Member States, as well as stakeholders in the EU decision-making processes of the EU, can break the decision-making deadlock by *transforming* interests. This thesis argues that the Member States' preferences are influenced by continual discussion and exchange of arguments. An example of this is seen in the academic analysis of the use of comitology in the EU.¹¹ The outcome, it is claimed, is that expert deliberation in committees leads to Community-compatible interests.

These developments have shifted the focus of academic study away from the substantive issues of European integration towards a greater emphasis upon inquiry as to *how* the EU is emerging as a system of governance.

II A Normative Analysis of the OMC

What is distinctive about the OMC as a new form of economic governance is the acceptance of a generic name for the processes and the attempt to create a core of common features with a systematic attempt to formally, and proactively, use the OMC in defined policy arenas. From the Lisbon Summit of March 2000 onwards, the OMC has been introduced, or recommended, in a number of arenas where the modern demands of European integration require policy coordination, but where Community competence in the field is weak, non-existent, or quite blatantly outlawed.

In these areas the OMC has been packaged and sold as a *complementary* form of governance, not a substitute for the traditional Community method. It has been described as a 'third way' of governance and is deployed when 'harmonisation is unworkable but mutual recognition and the resulting regulatory competition may be too risky'.¹² Radaelli describes its use as 'a transfer platform rather than a law-making system'.¹³

The OMC is a uniquely different form of economic governance. It seeks to establish a set of autonomous national decision-making arenas, coordinated by jointly produced best practice models. It attempts the best of all worlds: combining decentralisation of policy formulation and decision-making with re-integration at the EU level. As such it would seem to attempt the aggregation of preferences approach of Scharpf, but also has appeal to those of the Joerges' school of thought who like preference transformation.

There are arguments that the OMC goes further; it is part of a process of introducing and institutionalising new forms of economic governance, creating a regulatory climate

¹⁰ C. Joerges, 'Bureaucratic Nightmare, Technocratic Regime and the Dream of Good Transnational Governance', in C. Joerges and E. Vos, (eds), *EU Committees: Social Regulation, Law and Politics* (Hart, 1999).

¹¹ See C. Joerges and E. Vos, (eds), *EU Committees: Social Regulation, Law and Politics* (Hart, 1999).

¹² D. Trubeck and J. S. Mosher, 'New Governance, EU Employment Policy, and the European Social Model', in J. Zetlin and D. M. Trubeck (eds), *Governing Work and Welfare in a New Economy: European and American Experiments* (Oxford University Press, 2003) at 21.

¹³ C. Radaelli, 'The Code of Conduct Against Harmful Tax Competition: Open Method of Co-ordination in Disguise?', (2003) 81 *Public Administration* 513.

for convergence of different Member State policies and, in some cases leading to policy transfer. This in turn may lead to the eventual central, EU coordination of fully integrated, or differentiated common policies. This process can take place at least at two levels: the OMC can contribute to a common discourse, a common language and a common identification of a particular problem and the diffusion of shared beliefs, the acceptance of common problems and shared beliefs as to what is 'good policy' and what is 'bad policy'.¹⁴ At another level it can lead to the convergence of policies and policy transfer by identifying and praising 'good performance' and criticising and condemning 'bad performance'.¹⁵ This technique was used in the early days of the EES when the EC Commission was critical of certain employment policies of poorly performing Member States and lavished praise on other Member States. The Commission went as far as creating league tables to establish the best and worst performing Member States. Biagi¹⁶ argued that this practice was *ultra vires* the remit of the Commission, and now there is a tendency for the Commission to avoid criticism of a particular Member State, with reviews often merely repeating the self-reporting of the Member State.¹⁷

This approach has allowed the EU to expand its decision-making capacity and has allowed the EU to enter into in a number of new policy fields.¹⁸ This encroachment is different from the traditional model of the EU as a regulatory state. New forms of economic governance are based primarily upon *voluntary* performance standards. Law sometimes plays a role in providing a procedural framework, but is rarely used as a policy instrument or as an enforcement or sanction tool.

III Why Use Policy Coordination and Policy Transfer in the EU?

A Competence Creep

At the heart of the role of the OMC in European integration processes is the issue of competence. The EC must respect the powers conferred upon it by the primary Treaty. The EC does not enjoy unlimited competence and must use only powers attributed to it.¹⁹ The EC is even more circumscribed in the use of its attributed powers since any exercise of power is subject to the restraints of the principle of subsidiarity²⁰ and

¹⁴ An example of this would be the unacknowledged use of the OMC in tax policy discussed by Radaelli, *op. cit.* note 13 *supra*.

¹⁵ See E. Szyszczak, 'The Evolving European Employment Strategy' in J. Shaw (ed.), *Social Law and Policy in an Evolving European Union* (Hart, 2000).

¹⁶ M. Biagi, 'The Impact of the European Employment Strategy on the Role of Labour Law and Industrial Relations' (2000) 16:2 *IJCLLR* 155.

¹⁷ C. de la Porte, 'Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?', (2002) 8 *European Law Journal* 38.

¹⁸ V. Eichener, 'Effective European Problem Solving: Lessons from the Regulation of Occupational Health and Safety and Environmental Protection', (1997) 4: 4 *Journal of European Public Policy* 591; A. Hértier, *Policy-Making in Europe: Escape from Deadlock* (Cambridge University Press, 1999); A. Hértier *et al.*, *Ringling the Changes in Europe. Regulatory Competition and the Transformation of the State: Britain, France and Germany* (de Gruyter, 1996).

¹⁹ Art 5(1) EC.

²⁰ Art 5(2) EC.

proportionality.²¹ Notwithstanding such constraints, the EC has been exposed to what is termed 'competence creep'.²²

Where there is the common political will, Article 95 EC and Article 308 EC offer a broad legal base to transfer political will into EC policy and normative standards. Both Articles are reigned in: Article 95 EC is restricted to a trigger justification of market integration, and Article 308 EC is triggered by EC objectives. The latter still requires unanimity voting in the Council. Despite these curbs, both legal bases have been used successfully to create new policy arenas in the areas of social policy, consumer policy, environmental policy, and healthcare policy. But the Court of Justice has imposed limits on this practice, for example in Opinion 2/92²³ and *Germany v Parliament and Council (Tobacco Advertising)*.²⁴ 'Competence' became a central concern in the reform process which emerged from Treaty of Nice's Declaration on the Future of the European Union and the Laeken Declaration, and resulted in the reorganisation and monitoring of Union competences in the Constitutional Treaty. In contrast, the issue of whether to constitutionalise the OMC was avoided.²⁵ The OMC is thus given the freedom to evolve and continues to supply a safety net for the creation of policy objectives and their normative development.

One explanation, and a good reason, for leaving the OMC outside of the (re)organisation of competences in the Constitutional Treaty is the flexibility inherent in the OMC process. The resort to the OMC is explained by the global context of economic cooperation. The globalisation of economic activity has increased the opportunities of states and policy makers, as well as other stakeholders in the political policy-making processes, to 'learn' from the experience of policy interventions elsewhere. Many international agencies²⁶ have actively encouraged and facilitated policy transfer across a wide range of domains, using evidence-based policy. Technological developments enable policy experimentation to be easily communicated in the international arena.²⁷ These factors are enhanced when states belong to regional economic and political groupings, such as the EU. The development of regional *identities*, for example, the ideas of the 'European Social Model', or creating an 'Area of Freedom, Security and Justice', as well as the declarations of European identity (a Citizenship, a Constitution, a flag, an anthem) and European values²⁸ in the Constitutional Treaty for the EU has stimulated a more active dialogue on comparative policy. In a mature and sophisticated arrangement, such as the EU, the institutional structure and mechanisms to enhance this dialogue are in place. These institutions can actively encourage, facilitate, and implement policy coordination and transfer.

²¹ Art 5(3) EC.

²² J. Weiler, 'The Transformation of Europe', (1991) 100 *Yale Law Journal* 2403; M. Pollack, 'Creeping Competence: The Expanding Agenda of the European Community', (1994) 14 *Journal of Public Policy* 95; S. Weatherill, 'Competence Creep and Competence Control', (2004) 23 *Yearbook of European Law* 1. Cf. G. Majone, *Dilemmas of European Integration. The Ambiguities & Pitfalls of Integration by Stealth* (Oxford University Press, 2005).

²³ Opinion 2/92 [1996] ECR I-1759.

²⁴ Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419.

²⁵ See J. Zeitlin, 'Social Europe and Experimentalist Governance: Towards a New Constitutional Compromise', in G. de Búrca (ed.), *EU Law and the Welfare State* (Oxford University Press, 2005) 213, at 238–241.

²⁶ For example, the IMF, OECD, the World Bank, WTO.

²⁷ D. Stone, 'Non-governmental Policy Transfer: the Strategies of Independent Policy Institutes', (2000) 13 *Governance*, 45.

²⁸ S. Millns and M. Aziz (eds), *Values in the Constitution of Europe* (Ashgate, 2005).

A template has emerged that begins to institutionalise the role of the OMC to enable it to explore even more sensitive areas of European Union policy where the Member States have sought to retain national competence but the logic of European integration demands at least *convergence* of policy, or to place this in negative terms, to halt a drift or slide towards divergent policies resulting in huge differentiation from the core of policies.

B Coordination of Policies in New Areas Affected by Community Law Competence

The OMC is being used, at the instigation of the Commission, to encourage the Member States to coordinate sensitive policy areas that are being eroded by the rulings of the Court of Justice. A clear example of this is the encouragement of the use of the OMC in health care, which springs as a response to EU consumer-citizen demands and an ever-increasing and expansive case law of the Court of Justice that threatens the Member States' sovereignty in this area.²⁹ Health care is an area where Community competence is clearly limited in the EC Treaty by Article 150 EC.³⁰ The Court of Justice has argued, repeatedly, that the Member States remain competent to organise their own systems of social protection.³¹ Nevertheless, recent years have seen a number of inroads into the Member States' sovereignty by the same kind of opportunistic litigation that was seen in the 1970s and 1980s in relation to the free movement of goods: nationals of a Member State using the free-movement provisions of the Internal Market *against their own Member State* in order to seek more effective, superior, faster medical treatment, or medical treatment that is not available in the home state, in another Member State.³²

The immediate response of the Member States to this case law was to initiate a High-Level Process of Reflection, which in turn has led to hard law,³³ and proposals for hard law. This is the traditional way of handling a sensitive problem at a diplomatic level. The Commission was involved by supplementing the Reflection Group's work with its own report.³⁴ The responsibility for setting up the OMC, establishing indicators has been given to the Social Protection Committee, and health-care issues have been

²⁹ See V. Hatzopoulos, 'Health Law and Policy: The Impact of the EU', in G. de Búrca (ed.), *EU Law and the Welfare State* (Oxford University Press, 2005) 111.

³⁰ See V. Hatzopoulos, 'Health Law and Policy: The Impact of the EU', in G. de Búrca (ed.), *EU Law and the Welfare State. In Search of Solidarity* (Oxford University Press, 2005).

³¹ Case 238/82 *Duphar* [1984] ECR 523, para 16.

³² See, *inter alia*, Case C-158/96 *Kohll* [1998] ECR I-1931; Case C-157/99 *Smits and Peerboom* [2001] ECR I-5473; Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509; Case C-372/04 *Watts v Bedford PCT and the Department of Health* Opinion of AG Geelhoed 15 December 2005.

³³ Regulation 1408/71/EEC was updated and there is a proposal for a Directive on services in the Internal Market which, controversially, includes a definition of hospital services, COM (2004) 44 final. This proposal was watered down at the European Council Meeting, 22–23 March 2005, available at <http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/84335.pdf>. States such as France, have argued that health care should be seen as a service of general (economic) interest and should be excluded from the Directive.

³⁴ *Report on the application of internal market rules in the field of health care services and implementation by the Member States of the Court's jurisprudence*, SEC (2003) 900. This was followed by a Report on the High Level Reflection Process, published on 9 December 2003 (Reference: HLPR/2003/16 and a Communication, *Follow Up to the High Level Reflection Process* COM (2004) 301.

subsumed under the general agenda of modernising social protection.³⁵ Alongside these processes a parallel process has emerged of what is termed 'informal coordination' of health policy. This appears to take place outside of the 'formal' OMC process, under the auspices of the High Level Group on Health Services and Medical Care. This new process focuses upon micro-economic issues, whereas the formal OMC process is limited to the macro-economic goals of coordination of access, quality, and financial sustainability. The High Level Group has been invited to input into the work of the formal OMC.³⁶

C *Supplementing Existing Competence*

The OMC is also being used to supplement existing areas of competence. Thus the OMC has been categorised as a pre-legal step in governance processes.³⁷ The Complementary Competencies Working Group of the Convention also recognised this role for the OMC. Other commentators see the OMC as an attempt to revitalise old styles of governance.³⁸ Other commentators have questioned whether the OMC can really be categorised as a process, arguing that the OMC merely feeds into established law-making processes.³⁹ This wide use of the OMC, to revitalise or supplement or feed into old-style regulation, is seen by the suggestions that the OMC could be used in the area of the environment.

The EU has had a policy on the environment since the SEA 1986.⁴⁰ In new areas, particularly sustainable development and Environmental Policy Integration (EPI), these competences are weak.⁴¹ The EU environmental policy also has problems with the implementation gap. Environmental policy is on the Lisbon agenda, but the use of the OMC is very under-developed. The Gothenberg Council added the environmental dimension to the balancing of economic and social aims of the Lisbon strategy. The Commission's Environmental Review⁴² argued that the OMC could be used to better articulate the EU policy on sustainable development, and the OMC has been suggested for certain policy areas of the Environmental Technologies Plan.⁴³ But the Competitiveness Council's preparation for the 2004 Spring European Council viewed several of the commitments to environmental policy as a *challenge* to competitiveness.

The EU Sustainable Development Strategy provides general environmental guidelines, and these are reviewed on an annual basis by the European Council. But more

³⁵ For a review of the preliminary national policy statements, published on 30 November 2005 see: <http://europa.eu.int/comm/employment_social/social_protection/docs/spc_ltc_2005_en.pdf>. There is an interesting section on the role of the OMC at 28.

³⁶ My thanks to Arabella Stewart for discussing this point with me.

³⁷ See E. Szyzszak, 'Social Policy in the Post-Nice Era', in A. Arnall and D. Wincott, (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press, 2003).

³⁸ Scharpf *op. cit.* note 9 *supra*; A. Hértier, 'The White Paper on European Governance: A Response to Shifting Weights in Interinstitutional Decision-Making', in C Joerges, Larisa Dragomir, Karl-Heinz Ladeur, Jacques Ziller, (eds), *Symposium: Responses to the European Commission's White Paper on Governance* (EUI, Robert Schumann Centre for Advanced Studies, 2001).

³⁹ C. De La Porte, 'The Soft Method of Co-ordination in Social Protection', *European Trade Union Yearbook 2002* (Brussels, 2003).

⁴⁰ See J. Scott, *EC Environmental Law* (Longman, 1998).

⁴¹ A. Lenschow, 'New Regulatory Approaches in "Greening" EU Policies', (2002) 8:1 *European Law Journal* 19.

⁴² COM (2003) 745, 6.

⁴³ COM (2004) 38.

detailed scrutiny of the Member States' implementation of policy is lacking. The Commission presented its first environmental policy review in December 2003, and in 2004 the Commission presented a review of the integration of environmental policy into the Cardiff Process. The general perception is that the environment remains a peripheral concern of the EU, with economic and employment policies continuing to dominate the Lisbon Strategy. An Environmental Policy Committee could be one way of involving a wider range of civil society in the policy-making process, as well as reconciling the role of the environment through mainstreaming process, especially within the Lisbon and Cardiff Processes.

The way forward is presented involving the Commission pushing for greater integration of environmental concerns within the existing BEPG and EES OMC or to develop the embryonic coordination of the Member States' national sustainability strategies. This would include establishing an institutional framework, a focus upon learning, exchange of best practice, a formal review of Member State policies. The Commission has planted the seeds for the development of the OMC:

... there are *common challenges* confronting each country. We are at an early stage in a learning process for the establishment and implementation of NSDS. The analysis therefore illustrates the *opportunities for joint action* between the Member States and the Commission, notably for identifying good practices, pooling knowledge and exchanging experience. (emphasis added).

Thus there are arguments to be made that, despite being viewed as an aspect of subsidiarity: the OMC penetrates into national systems changing internal policy, re-configuring political institutional frameworks.⁴⁴

III The Features of the Open Method of Coordination

A common core to the most advanced forms of the OMC was identified at the Lisbon Council⁴⁵ comprising:

- drawing up common guidelines at the EU level
- setting goals/timetables
- setting benchmarks
- setting common indicators
- Member States create national action plans involving multi-level actors drawn from stakeholders and civil society
- Member States exchange experience of best practice
- Action Plans are monitored
- Action Plans evaluated by the Commission and peer review
- EU Guidelines are reviewed
- results assessed.

A number of open methods of coordination are emerging that display some, but not all, of these common core features.⁴⁶ The spectrum of domains in which OMC is being

⁴⁴ Szyszczak, *op. cit.* note 37 *supra*.

⁴⁵ Lisbon European Council, Presidency Conclusions, 23–24 March 2000, Pt 37.

⁴⁶ The European Parliament has described these various forms of OMC as several processes of coordination, more or less developed which have some connection with the Lisbon Process: European Parliament, *Report on analysis of the open method of coordination procedure in the field of employment and social affairs and perspectives for the future*, 30 April 2003, PE 316, 405.

used, or considered, continues to grow: nascent areas are being subsumed under the broad modernisation of social protection and EES strategies as they gain acceptance. A brief typology could be drawn up as follows:

Developed Areas	Adjunct Areas	Nascent Areas	Unacknowledged
Broad economic policy guidelines	Modernisation of social protection	Innovation and research and development	Tax
European employment strategy	Social inclusion	Education	
	Pensions Healthcare	Information society Environment Immigration Enterprise policy	

Developed areas of the OMC are distinguishable: they have an EC Treaty base. Both the BEPG and the EES have processes that are clearly established, and in the case of the EES, undergone appraisal and refinement. Both processes have been streamlined to coincide with the Spring Economic Council and are viewed as the basic economic constitutional documents of the EU and as new forms of economic governance.⁴⁷ Adjunct areas have grown as *supplements* to the EES as the Lisbon Strategy has expanded.

The Lisbon Process is the overarching policy goal that legitimises the expansion of OMC into new areas, but the EES tends to dominate OMC processes. The development of offspring created a perceived risk that these OMC processes could develop in ways that would conflict with the overarching EES. But, to date the processes have been slow to mature. In the policy documents created in the extension of the OMC to new areas, we see the Commission throwing in a number of aims and goals for the OMC. An example of this is seen in the recent Communications on health care where the OMC is designed to implement the Lisbon objectives *and* to handle to erosion of the Member States' sovereignty in the area of providing medical services as a result of the increasing opportunistic litigation before the Court of Justice.⁴⁸

A question emerges as to whether, in the light of the questioning of the efficacy of the Lisbon Process to achieve its own ambitious goals, these areas will continue as mere adjuncts or whether the seeds will germinate to create self-sustaining policy areas. From the early 1990s the Commission attempted to persuade the Member States that a number of aspects of social protection were of common concern.⁴⁹ The issues of modernising social protection, social cohesion, and (un)employment were raised, but the Member States resisted inroads into their sovereign territory. Following the introduction of the Lisbon Process, issues of demographic aging, social inclusion, and

⁴⁷ E. Szyszczak, 'Social Policy', (2003) 52 ICLQ 1013.
⁴⁸ Communication from the Commission to the Council, The European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Modernising social protection for the development of high-quality, accessible and sustainable health care and long-term care: support for the national strategies using the 'open method of co-ordination'*, COM(2004) 304 final.
⁴⁹ E. Szyszczak, 'The New Paradigm for Social Policy: A Virtuous Circle?', (2001) 35 CMLR 1125.

high-quality health care were portrayed as issues for the 'dynamic working population agenda', which will deliver the goals of the Lisbon process. Thus, such issues could appear comfortably on the political agenda and were identified as areas suitable for the OMC. Initially the modernisation of social protection was seen as a supplementary policy to the EES, but there is evidence that the Commission would like to take both the Modernisation of Social Protection (especially in relation to pension policy)⁵⁰ and the Modernisation of Health Care⁵¹ forward, as distinct policies.

IV The Distinctive Features of OMC as a New Form of Governance

The most developed form of the OMC displays a number of characteristics that justify the label of a new form of governance: the use of soft law rather than the traditional institutional mechanisms to create hard law, and the fact that there is no clear demarcation between rule-making and rule-implementation. There is no role for the courts to legitimise the process. What seems to be a simple, but sensitive, solution to the problem created by the spillover of economic and monetary union has created controversy. First, the OMC runs counter to the traditional Community method of policymaking at the EU level. The OMC is atypical to the traditional Community method of the first pillar involving regulatory/redistributive principles and atypical to the traditional diplomatic approach, which has evolved using international cooperation under the second and third pillars. Second, the approach of the OMC runs counter to the principles of good governance that have emerged (transparency, accountability, democratic input) as well as the fundamental principle that the Community is governed by the rule of law.⁵² The lack of transparency and the failure to engage with the (more) democratic institutions of the EU such as the European Parliament, the ESC, and the Committee of the Regions as well as a *broad* participation of civil society, have questioned the role of the OMCc in the new constitutional agenda of the EU.

Of significance is the inability of national parliaments to find a foothold in the OMC processes.⁵³ This, in part, is just another aspect of the de-parliamentarisation process of European integration, whereby the centralisation of government and legislative processes has diluted the role of national political actors.⁵⁴ During the Convention on the Future of Europe, a group of national MPs argued that national parliaments should be addressed in the OMC. To date, the input from national parliaments to the OMC processes has been marginal, partly because of the procedural ambiguity of *how* to process the OMC at the EU level and partly because of the perceived lack of concrete

⁵⁰ The modernisation of pensions is a relatively recent development and the nature of the OMC in pensions is qualitatively different. For example, the use of National Strategy Reports rather than NAPs; the fact that there are no quantitative indicators in the NSRs, but EES indicators are deployed. The use of Recommendations is absent in pensions OMC. The absence of civil society input is noticeable; there are no mandatory consultative participants, the social partners do not have a formal role.

⁵¹ Communication from the Commission to the Council, The European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Modernising social protection for the development of high-quality, accessible and sustainable health care and long-term care: support for the national strategies using the 'open method of co-ordination'*, COM(2004) 304 final.

⁵² Case 294/83 *Parti Ecologiste 'Les Verts' v Parliament* [1986] ECR 1339 and Case T- 135/96 *UEAPME v Council and Commission* [1998] ECR II-2335.

⁵³ See F. Duina and M. Oliver, 'National Parliaments in the European Union: Are There Any Benefits to Integration?', (2005) 11 *European Law Journal* 173.

⁵⁴ K. Auel and A. Benz, 'The Politics of Adaptation: The Europeanisation of National Parliamentary Systems', (2005) 11 *Journal of Legislative Studies* 372.

outcomes from the OMC.⁵⁵ Similarly, national parliaments have not engaged in the scrutiny of the OMC processes.⁵⁶ As Raunio explains: 'As a result, MPs have not found it worthwhile to spend their precious time on scrutinising such processes'.⁵⁷

Yet one of the features of Europeanisation is the way in which it alters existing political structures, creating new opportunities, as well as new points of access to decision-making. Thus the OMC has the potential to offer national parliaments a new site of political access outside of the conventional EU institutional structures. The OMC is hailed by the Commission as a new approach to problem-solving embracing iteration, mutual cooperation, standard setting, mutual learning to engender policy learning. This is fed by the symbiotic coordination of top-down and bottom-up learning processes, the use of networks rather than hierarchies, the involvement of new actors, and the participation by civil society.

The inability of the OMC to address the democratic deficit in EU decision-making may detract from its value in supplying a new normative solution to efficient and effective regulation in the EU.

Despite the claims that the OMC can lead to 'better regulation' and 'more effective' regulation there has been very little empirical work carried out on the real effects of the OMC.⁵⁸ Criticisms of the policy transfer literature reveal that there is often a tendency to use selective case studies on successful policy transfer, alongside a failure to analyse or differentiate whether policy really has been transferred or whether it is indigenous. Analysis of the NAPs in the EES has often shown that similar policies appear on national agendas, and the EES process is used as a persuasive (or coercive) vehicle to implement changes in policy where there is a lack of consensus (or opposition) at the national level.⁵⁹ One area where empirical work has been carried out, perhaps because the effects of policy coordination are tangible, is the BEPG.⁶⁰

Many of the claims for the effectiveness of the OMC as a new form of governance come from within, especially from the Commission, where claims of the usefulness and the effectiveness of the OMC are seen in Communications, Recommendations, Joint Reports. In the Commission's review of the OMC in 2002 it argued that:

There have been significant changes in national employment policies, with a clear convergence towards the common EU objectives set out in the EES policy guidelines.⁶¹

In contrast, Zeitlin makes the point that within the OMC there are practical, as well as institutional, constraints which make the processes of policy transfer difficult to pursue and assess.⁶² This lack of analysis relates to the actual operation of the OMC as well as

⁵⁵ See J. Zeitlin, P. Pochet and L. Magnussen (eds) *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies* (Peter Lang, 2005).

⁵⁶ COSAC, *Third Bi-annual Report: Developments in the European Union, Procedures and Practices, Relevant to Parliamentary Scrutiny*, Brussels, 2005. Available at: <<http://www.cosac.org>>.

⁵⁷ T. Raunio, 'Does the OMC Really Benefit National Parliaments?', (2006) 12 ELJ 130, 131.

⁵⁸ D. Hodson, 'Macroeconomic co-ordination in the euro area: the scope and limits of the open method', (2004) 11:2 *Journal of European Public Policy* 231.

⁵⁹ Szyszczak *op. cit.* note 47 *supra*.

⁶⁰ This has also led to analysis of the transfer of policies that appear *not* to work. A good example of this in the UK is the work carried out analysing the attempts to bring US-style reforms of welfare benefits to the UK: D. P. Dolowitz, 'The British Child Support Agency: did American origins bring failure?', (2001) 19 *C Environment and Planning* 373.

⁶¹ European Commission, *Taking Stock of Five Years of the European Employment Strategy*, COM (2002) 416 final.

⁶² Zeitlin *op. cit.* note 25 *supra*, at 235.

an analysis of the outcomes. A further difficulty in analysing *outcomes* is the lack of any rigorous assessment as to how far policy coordination and policy transfer can be attributed to OMC processes, and how far it can be attributed to other externalities. An example of this can be seen in the area of immigration.

Immigration is one of the most sensitive areas where Member States have long been reluctant to relinquish sovereignty, not only on *who* they should admit to their national territory, but also *how* foreigners should be treated when in their territory. The rules of the Internal Market, the citizenship, and non-discrimination on grounds of nationality provisions within the EC Treaty as well as the application of the ECHR have made substantial inroads into Member State sovereignty in respect of nationals of one of the Member States, third-country national members of the family of an EU national exercising economic rights to migration, and certain privileged third-country and long-resident third-country nationals. But even today, Community competence in the field of immigration policy is inchoate.

The Commission has long argued that the need for an EU immigration policy is a 'common concern'. Unlike the area of free movement of goods, where there has long been an outer EU border, it has not been possible to fully liberalise the free movement of people within the EU by policing a common outer border to the EU. The use of third-country nationals in the labour market of one Member State may create imbalances in competition between the Member States.⁶³ Straubhaar⁶⁴ argues that it is not feasible to continue with independent national migration policies in economies that have been opened up for international transactions in goods services, and financial markets.

Recent political events in Europe have also exposed the vulnerability of certain EU states to mass influxes of political refugees and asylum-seekers. Alleged differences in social welfare benefits, as well as poor enforcement of labour standards, create magnets for economic refugees. Even more recently, the perceived, and actual, post-September 11th terrorist threat, alongside links made between immigration issues and organised crime, has heightened the *need* for closer cooperation over security and the control of foreign nationals. These problems, which are individual, and common, to the Member States, are portrayed by the Commission as a 'common concern' for *all* of the Member States, since a policy in one Member State has spillover effects for other states. Paradoxically, rather than share competence between the Member States for managing this 'common problem', the Member States have also chosen to delegate and divest some of the *national* management of the immigration problem to private actors within the Member States, for example, employers, transport carriers, and local government.⁶⁵

⁶³ S. Borrás and K. Jacobson, 'The open method of co-ordination and new governance patterns in the EU', (2004) 11:2 *Journal of European Public Policy* 185; B. Bogusz, 'Modes of Governance For An EU Immigration Policy—What Role for the Open Method of Co-ordination?', in B. Bogusz, A. Cygan, R. Cholewinski and E. Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Brill/Martinus Nijhoff, 2004).

⁶⁴ T. Straubhaar, *New Migration Needs a NEMP (A New Migration Policy)*, HWWA Discussion Paper No 95 Hamburg: Hamburgisches Welt-Wirtschafts-Archiv, 2000

⁶⁵ D. Bigo, 'Criminalisation of "Migrants": The Side Effect of the Will to Control the Frontiers and Sovereign Illusion', in B. Bogusz *et al.* (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Brill/Martinus Nijhoff, 2004); G. Lahav, 'Immigration and the state: the devolution and privatisation of immigration control in the EU', (1998) 24:4, *Journal of Ethnic and Migration Studies* 675; V. Guiraudon and G. Lahav, 'A reappraisal of the state sovereignty debate: the case of immigration control', (2000) 33 *Comparative Political Studies* 163; P. Minderhoud, 'Coping With

The turning point for re-invigorating a Community approach to immigration is the Treaty of Amsterdam 1997. In response to the Tampere Conclusions,⁶⁶ the Commission adopted the *Communication on a Community Immigration Policy*.⁶⁷ This Communication sets out a number of policy goals. These have been followed by a number of hard and soft law measures, and the suggestion that the OMC should be used for asylum policy and general immigration policy for an initial six-year period.

The Commission established six Guidelines, which are much looser than the Guidelines seen in the Employment Policy. What is interesting in these Guidelines is the re-working of many old concerns in making the case for a common policy. Member States are asked to prepare NAPs. These are evaluated, but, unlike the tougher name-and-shame policy of the EES, the focus in immigration policy appears to be closer to the Internal Market Score Board, where the emphasis is upon the Member States' implementation of EU legislation already adopted. The Commission hopes that policy experimentation will occur through the diffusion of information and practices among Member States. Asylum policy focuses more upon harmonisation of Member State policies.⁶⁸ This separation out of the two strands of migration issues has allowed for a degree of flexibility. This in turn may explain why there has been consensus on the hard law measures in this area. We also see the fragmentation of immigration issues by filtering immigration through other policy areas such as the EES, security, citizenship, and human rights.

Issues of immigration and labour markets are also considered within the more formal and advanced EES OMC. There appears to be little attempt to reconcile the two OMC processes. Similarly immigration concerns spill over into other Community policy-making processes, especially the citizenship and human rights agendas⁶⁹ and the discourse on third-country national rights created by the Court of Justice.

In evaluating the use of the OMC in immigration policy, the surprising outcome is the increased progress towards the adoption of hard law measures. This may be because the Community is starting from a low baseline. An alternative explanation is the usefulness of the OMC in identifying the core areas of common concern and using the process of open dialogue to turn, or soften-up the Member States into adopting EU legislation that is not seen as threatening the cherished individual sovereignty in this field.⁷⁰

V Efficiency and Effectiveness in Regulation

A number of claims are made as to why the OMC leads to better, in terms of 'efficiency' and 'effectiveness', regulation. The OMC is described as political decision-making based upon policy networks. A novel feature of the OMC is the use of a wider set of private actors in policy formulation, relying upon broad consultation and substantive

Irregular Migration: The Dutch Experience', in B. Bogusz *et al.* (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, (Brill/Martinus Nijhoff, 2004).

⁶⁶ *Bulletin of the EU* 10-99.

⁶⁷ COM (2000) 757.

⁶⁸ A. Caviades, 'The Open Method of Co-ordination in immigration policy: a tool for prying open Fortress Europe?', (2004) 11 *Journal of European Public Policy* 289.

⁶⁹ Case Joined Cases C413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091; Case C-200/02 *Chen* [2004] ECR I-9925; Case C-60/00 *Carpenter* [2002] ECR I-6279.

⁷⁰ See COM (2004) 811; COM (2005) 669.

input from what is termed generically as civil society.⁷¹ This can be seen as part of a new structural dynamic to decision-taking, seen in the use of Conventions for the adoption of the Charter of Fundamental Rights for the EU,⁷² the Constitutional Treaty, and as an attempt to address the democratic deficit problem of legitimacy in the EU. Commentators have used the term 'democratic experimentalism' to describe the involvement of a wider group of decision-makers, analysing whether this model can provide a model of democracy beyond the nation state.⁷³

Analysis of the various forms of the OMC reveal that, with the exception of the EES, the involvement of a wider range of stakeholders in the OMC has not materialised. Even within the EES, where the role of the social partners has been institutionalised, analysis has shown that the social partners have not been integrated fully into the decision-making processes. Extreme examples of the lack of involvement of a wider group of stakeholders is seen in the OMC in modernising social protection, where exchanges occur only at the formal level between civil servants and an institutionalised Social Protection Committee, given a Treaty status by the Treaty of Nice.

In the unacknowledged OMC related to tax Radaelli argues:

Turning to participatory governance, the business community and non-governmental actors have so far remained outsiders in the deliberations surrounding the code. Yet an increasing number of employers' federations, think tanks, and social movements have made proposals concerning business taxation . . .⁷⁴

In the embryonic immigration OMC non-state actors are involved but only in a technocratic manner to draw up statistics. The Commission has suggested the idea of creating a European Observatory. Civil society is represented in the form of the Economic and Social Committee, the Committee of the Regions, the European Parliament and the social partners are to be involved through the social dialogue process. The Commission envisages an active role for itself to facilitate exchange of information, best practices. Civil society has largely organised itself in the OMC process. This is an area with developed transnational networks and distinct interest groups that are willing to cooperate, share information, and feed into the process. Interestingly, the Commission and the Member States have not missed the opportunity to facilitate this input by funding research, conferences, public *fora*. This is a significant development, since the focus of Community/Member State immigration measures is at odds with the human rights/citizenship perspective advanced by these interest groups, and to some extent recognised by the Court of Justice. The management of this discourse appears to facilitate civil society involvement in an open forum without introducing formal processes for the input of civil society into the closely guarded formal OMC processes.

VI Sanctions, Enforcement, Outcomes

A weakness of the OMC is often seen in the lack of effect sanctions, either through private enforcement (direct effect) or public enforcement (Commission/Member State

⁷¹ K. Armstrong, 'Rediscovering Civil Society: The European Union and the White Paper on Governance', (2002) 8:1 *European Law Journal* 102.

⁷² G. De Búrca, 'The Drafting of the EU Charter of Fundamental Rights', (2001) 26 *European Law Review* 126.

⁷³ M. C. Dorf and C. F. Sable, 'A Constitution of Democratic Experimentalism', (1998) 98 *Columbia Law Review* 267. See also Special Issue, 'Deliberative Democracy', (2001) 29 *Politics and Society* 1.

⁷⁴ C. Radaelli, 'The Code of Conduct Against Harmful Tax Competition: Open Method of Co-ordination in Disguise?', (2003) 81 *Public Administration* 513, and 515.

intervention and litigation). It is argued that the use of monitoring by the Member States (peer group pressure: who wants to turn up at the various EU meetings with a poor scorecard?) and the Commission (name-and-shame) alongside social coercion by interest groups, the media, shapes the policy formulation in a coercive way at the national level.⁷⁵ In the EES the focus of the OMC has moved away from simply seeking optimal intervention in response to a given distortion by coordination of policies, to processes of policy transfer. The former can be defined as the process whereby independent nation states coordinate intervention in order to minimise negative spillover from uncoordinated actions; the latter is a process whereby policies developed in one domain are adopted in another. Dolowitz and Marsh define policy transfer as a process whereby knowledge about policies, administrative arrangements, and ideas in one political setting is used in the development of policies administrative arrangements, institutions, and ideas in another setting.⁷⁶

The concept of policy transfer is well-established in the political science literature.⁷⁷ This literature focuses upon institutional mechanisms and on the process of policy transfer.⁷⁸ Economists have also used the public choice view of policy formulation to determine how policy is determined, and arguments have been made that economics as a discipline has more to offer in evaluating policy from a theoretical and an empirical evaluation of evidence-based policy.⁷⁹

Lawyers have been slow to argue that the OMC is capable of offering a normative dimension to European integration processes.⁸⁰ It has been seen as a pre-legal process or an alternative, or as a complementary *political* process. Yet the role of the OMC should not be underestimated.⁸¹ The recent use of the OMC processes is seen in areas where the Member States have jealously guarded their residual competence, where the Community method has lacked flexibility to iron out the differences between the Member States, or in areas where this has been achieved has often resulted in weak compromise. The OMC is a subtle penetration into areas of competence *outside* of Community competence. The framing of a Community policy through Guidelines, indicators, and benchmarking is not a soft, or neutral process, but shapes the framework within which national policies, and actors must work. It is not only agenda-setting, but also sets the parameters as to *how* policies should operate. Thus in areas of employment policy, the modernisation of social protection, and immigration the EU has moved from coordination of national policies towards attempting a system of policy transfer.⁸²

⁷⁵ Szyszczak *op. cit.* note 49 *supra*.

⁷⁶ D. Dolowitz and D. Marsh, 'The Role of Policy Transfer in Contemporary Policy-Making', (2000) 5 *Governance* 131.

⁷⁷ J. Banks, R. Disney, A. Duncan and J. Van Reenan, 'The Internationalisation of Public Welfare Policy', (2005) 115 *The Economic Journal* C62.

⁷⁸ D. Stone, 'Non-governmental Policy Transfer: the Strategies of Independent Policy Institutes', (2000) *Governance* 13, 45.

⁷⁹ See the literature cited in Banks *et al. op. cit.* note 77 *supra*.

⁸⁰ Cf., E. Szyszczak, 'The New Parameters of European Labour Law', in D. O'Keefe and P. Twomey (eds), *The Treaty of Amsterdam* (Chancery, London, 1999) 141, and *op. cit.* note 49.

⁸¹ E. Szyszczak, 'Social Policy in the Post-Nice Era', in A. Arnall and D. Wincott, (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press, 2003).

⁸² For a discussion of how this has been used in the enlargement process see: S. de la Rose, 'The Open Method of Coordination in the New Member States—the Perspectives for Its Use as a Tool of Soft Law', (2005) 11 *European Law Journal* 618.

VII Conclusions

This article places the OMC at centre stage in the experimental forms of new governance. The OMC has survived the re-organisation of the competence provisions in the Constitutional Treaty and has not been singled out as one of the reasons for the failure of the Lisbon Process to deliver its goals. Its immunity from criticism in the constitutionalisation processes of the EU relies upon its self-proclaimed emphasis upon democratic participation and its reliance upon grass-roots (subsidiarity) principles. Its appeal as a prime example of experimental governance lies in the fact that it appears to complement, but not replace, the traditional Community method. Yet, at the same time, the OMC is capable of reinforcing competence creep: the focus of the reform project in the governance agenda of the Constitutional Treaty.

A central explanation for the immunity of the OMC from interference by the constitutionalising agenda is its appeal to democratic participatory governance. Claims are made that the OMC relies on local deliberation, addresses the democratic deficit by not relying on centralised expert deliberation (as is the case with EU comitology) but with local stakeholders. The OMC offers a solution as to *how* transnational decision-making arenas and multilevel sites can be coordinated without exerting hierarchical control.⁸³ It is accepted that such networks need coordination of decision-making at the local, national, EU, and global level.

Another explanation for the survival of the OMC is the fact that it is described as experimental regulation. It does not adopt a regulatory standards approach but consists of performance standards: rules that identify the production processes best suited to achieving a regulatory goal: benchmark, rolling out best practice rules, etc. The OMC identifies weak performance and *offers solutions*. In this respect the OMC has much to offer in terms of open-ended solutions to regulatory problems; it is not worth ditching in the current stage of European integration.

Questions remain: can these solutions be converted into regulatory standards? If so, should they? It is often forgotten in drawing a dichotomy between hard law and soft law that the EC has used a combination of these measures in what might more realistically be called the traditional Community method, not only in social law, but also in areas such as competition policy.⁸⁴ This has been realised in part by the relaxation of the unanimity voting requirement, the availability of more flexible tools of governance, especially the introduction of hybrid measures such as Framework Agreements and the preparation of the ground for extending Community competence through soft law. The general modernisation of the EU post-Amsterdam has allowed many soft law initiatives to be converted into traditional Community hard law measures, including new standards based upon fundamental rights.

Initial analysis of the relationship between the Employment Chapter and the Social Policy Chapter after the Treaty of Amsterdam amendments saw this link between the coordination processes and hard law.⁸⁵ Post-Amsterdam it has been easier to reach political agreement in the form of hard law on a number of labour market flexibility

⁸³ D. Trubeck and J. S. Mosher 'New Governance, EU Employment Policy, and the European Social Model', in J. Zetlin and D. M. Trubeck (eds), *Governing Work and Welfare in a New Economy: European and American Experiments* (Oxford University Press, 2003).

⁸⁴ Cf. D. Trubeck and L. Trubeck, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination', (2005) 11 *European Law Journal* 343.

⁸⁵ Szyszczak *op. cit.* note 15 *supra*; D. Trubeck and L. Trubeck, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination', (2005) 11 *European Law Journal* 343.

measures that had been proposed as far back as the 1980s. The case study of immigration and the generic modernisation of social protection policy post-Amsterdam also show that a number of externalities are involved in drawing together the complementarity of the processes of new governance with the old Community method. Sometimes the OMC will be as good as it gets.

Then another question: do the outcomes of the OMC necessarily have to be converted into regulatory standards? In conclusion, and as an answer to these questions, if we judge governance processes by outcomes there are strong arguments that the open-textured nature of the OMC can stand alone and be effective. It is a tie that binds the Member States to the integration project. Not only does it halt continental drift; it prevents seismic rifts in the sensitive areas of the political economy of Europe. But Europe has set itself a demanding agenda: the Lisbon process of economic integration and the constitutional process of transparent and more effective governance. This agenda implies that there is a greater role for law to play, alongside other political processes, in coordinating the gains made through the OMC in creating and nurturing the underlying consensus-building so necessary in modern European integration processes. The OMC has the capacity to evolve, and mutate, while the Lisbon and the constitutionalising processes are struggling to survive.

First submitted September 2005
Final revision accepted December 2005