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THE OMC AND ITS PATCH IN THE EUROPEAN
REGULATORY AND CONSTITUTIONAL LANDSCAPE

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Abstract

Multi-level forms of governance, as representing a less top-down and more bottom-up approach, have been promoted with a view to enhancing not only the legitimacy of EU action but increasingly also its effectiveness. At the same time, however, their use raises effectiveness and legitimacy concerns of its own. This also goes for the open method of coordination, as one of the major manifestations of the Union's multi-level governance development. Much research on the OMC focuses on its use in particular policy areas and the effectiveness concerns that may arise in such areas. In this contribution the focus will be more generally on the legitimacy of the OMC as a regulatory device, in terms of its legal foundations. It asks how the use of the OMC fits in the European regulatory and legal-constitutional landscapes, in particular to what extent its current patch in these landscapes, in the light of the quest for more legitimacy of the EU, can be said to lead to a need for a) more conceptual clarity and b) a better constitutional embedment in the Treaties? After analysing the development of the OMC in the broader regulatory context of the EU, the relation between the OMC and the classic Community – now Union – method and the European legal framework within which the OMC is being resorted to, the focus is on whether this legal framework meets the requirements imposed by the principle of legitimacy; in particular, under what legal conditions would one be able to say that the OMC makes indeed a contribution to the legitimacy of the European Union? It is argued that some constitutional changes need consideration in this regard.

Keywords

EU-governance, legitimacy, OMC, legal foundations, constitutionalisation

1. Introduction*

Ever since the adoption of the Treaty of Maastricht in 1991, we have witnessed the gradual development of a European legislative and regulatory culture that is not only based on the ‘classic’ Community method, but also on the notions of flexibility, differentiation and ‘soft’ convergence. This takes place – naturally – within the boundaries that are set by the principle of conferral as the foundational principle that governs the existence of EU powers, but the EU-Treaty widened the door for this development in two ways. First of all, many new provisions that this Treaty entailed were characterized by their open wording, speaking often of ‘rules’, ‘measures’ and ‘provisions’, thus leaving the choice of instrument more open and creating scope for the use of alternative instruments. Secondly, the new European legislative culture has developed in particular under the influence of the two other foundational principles that the EU-Treaty established for the actual exercise of European power: subsidiarity and proportionality. In areas in which the EU does not enjoy exclusive competences, the application of the subsidiarity principle should contribute to a ‘restrained’ attitude of the European legislator, only acting if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States¹ and can rather be better achieved at Union level because of its scale or effects. The proportionality principle specifically requires that Union action does not exceed what is necessary to achieve the Treaty objectives.

The Treaty of Maastricht thus marked both political support and the creation of legal space for the development of what is now usually caught under the term of ‘multi-level governance’. In the post-Maastricht era multi-level governance within the framework of the EU has developed in many different directions, while the underlying political goals have broadened, in particular in the light of the aims of the Lisbon Strategy to make the EU the most competitive and innovative economy. Multi-level forms of governance, as representing a less top-down and more bottom-up approach, have thus not only been promoted with a view to enhancing the legitimacy of EU action but increasingly also its effectiveness. At the same time, however, their use raises effectiveness and legitimacy concerns of its own. This also goes for the open method of coordination (hereafter: OMC), as one of the major manifestations of the Union’s multi-level governance development. The OMC has been the subject of much research, but with a strong emphasis on its use in particular policy areas and the effectiveness concerns that may arise in such areas.

In this contribution, the focus will be on the legitimacy of the OMC as a regulatory device, in terms of its legal foundations. The core question to be dealt with is the following one: How does the use of the OMC fit in the European regulatory and legal-constitutional landscapes, in particular to what extent can its current patch in these landscapes, in the light of the quest for more legitimacy of the EU, be said to lead to a need for a) more conceptual clarity and b) a better constitutional embedment in the Treaties? In dealing with this question, we will first consider the development of the OMC in the broader regulatory context of the EU, looking in more detail at how the OMC fits in with EU regulatory policy as this has been getting shape over the last two decades and the strive for more legitimacy as a main underlying concern of this policy. We will then consider what this means for the relation between the OMC and the classic Community – now Union - method (hereafter: CUM). The focus will be on how the OMC can be said to alter the Union’s regulatory landscape and on the stronger connection we can see emerging between regulatory intensity and regulatory instruments

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¹ See the new Article 5 EU.

(section 2). The issue that needs addressing next, is what the findings in section 2 entail for the European legal framework within which the OMC is being resorted to. What is this legal framework and can we say that it meets the requirements imposed by the principle of legitimacy; in particular, under what legal conditions would one be able to say that the OMC makes a contribution to the legitimacy of the European Union and what changes would need consideration in this regard (section 3)? The contribution will wind up with some concluding remarks (section 4).

2. The OMC in the European regulatory landscape

A. The broader regulatory governance context

In recent times, the regulatory role of the nation-state – to be exercised in a more or less independent way - has been declining as a result of a variety of factors. Suffice it to mention here that, inter alia because of globalization of the economy and life more generally, non-state, international and supranational actors have come to play an increasingly important role in regulatory governance, thereby fundamentally challenging traditional conceptions of the centrality of the national (welfare) state and affecting the nation-state's abilities to dominate key resources and to maintain the rule of law and democracy.² Speaking of regulatory governance in and of itself alludes already to an erosion of territorial, nation-state centered political government governance and constitutionalism.³ The latter can be said to be characterized by formality - formal institutions, hard legal instruments and a strong focus on democratically legitimate structures -, which are all features indicative of a top-down and hierarchical process with a strong reliance on public regulation to realize common goals and interests. By contrast, 'regulatory governance' is characterized by informality, because of its involvement and participation in regulation of stakeholders, civil society, etc., the use of soft law or private law instruments and its strong focus on efficiency.⁴ So, clearly, the actors involved and their means of action – legislation, but also agreements, contracts, codes of conduct, etc. – may be both of a public and/or private (hybrid) nature, features that are all indicative of a more bottom-up and co-operative approach. Because of these features, regulatory governance both within and beyond the nation-state has been said to have become highly fragmented,⁵ being described in terms of 'decentring' of regulatory governance⁶ and 'regulatory capitalism', the latter actually pointing at the simultaneous growth of both state regulation and non-state regulation.⁷

The development of the OMC as a new governance mode thus not only fits in with a European trend to follow a less top-down government approach, but also with a wider global governance trend. Within the specific context of the EU, the broadening of the regulatory governance spectrum has gained further emphasis with the Protocol on Subsidiarity and Proportionality, attached to the Treaty of Amsterdam. This Protocol specified that the measures of the EU need to be as simple as possible, that legislation should only be resorted to if and in so far as necessary and that EU measures should leave as much scope as possible for national decisions. If European measures are deemed necessary,

² C. Scott, Regulatory Governance and the Challenge of Constitutionalism, *EUI Working Paper RSCAS 2010/07*, p. 1. Available through www.eui.eu

³ Cf C. Joerges, The Law's Problems with the Governance of the European Market, in: C. Joerges and R. Dehousse, *Good Governance in Europe's Integrated Market*, OUP 2002, p. 4.

⁴ See Ch. Möllers, European Governance: Meaning and Value of a Concept, *Common Market Law Review*, (2006), 43: 313-336.

⁵ *O.c.* note 3, p. 6.

⁶ J. Black, Decentring Regulation: The Role of Regulation and Self-regulation in a 'Post-Regulatory' World, *Current legal problems*, (2001), pp. 103-146.

⁷ E.g. J. Braithwaite and D. Levi-Faur, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better*, Edward Elgar Publ., 2008.

non-binding instruments like recommendations should be given preference. This preference is not explicitly expressed anymore in the new version of this Protocol, as attached to the Treaty of Lisbon, but it confirms that decisions need to be taken as closely as possible to the citizens. Furthermore, the proportionality principle in the revised article 5 of the EU-Treaty now specifies that both contents and form of Union action should not go beyond what is necessary to realize the Treaty objectives.

These principles are operationalised foremost within the context of the Union's Better Regulation (BR) Strategy which it has been developing over the past decade, building on documents such as the Commission's White Paper on European Governance (2001),⁸ the Commission's Communication on general principles and minimum standards for consultation of interested parties (2002),⁹ the Interinstitutional Agreement on Better Lawmaking (2003),¹⁰ the Commission's Strategy for Growth and Jobs (2005)¹¹ and its Impact Assessment Guidelines (revised in 2009).¹² The impact assessment tool, geared towards the ex ante examination and evaluation of Commission initiatives, is increasingly being developed as an instrument or tool to ensure the aims of the BR-strategy and the use of alternative instruments is also being pledged in this context.¹³ Even if not all of these documents put (equal) emphasis on the OMC, we can say that it is within this context of the BR-Strategy that the OMC has been developing; it fits in with the underlying concerns of upholding the subsidiarity and proportionality of the Union's actions and the strive for deregulation in the EU in connection with the promotion of the goals of the Lisbon strategy, so with a view to enhancing both the Union's democratic legitimacy and effectiveness. Yet, this is not to say that both aims are given the same weight.

B. Enhancing legitimacy and effectiveness

Taking a closer look at the notions of (democratic) legitimacy and effectiveness and the way in which these have been substantiated in the wide range of the Commission's BR-policy documents, there is much ground for arguing that the Commission is mostly concerned with enhancing effectiveness and as such in fact with merely one particular aspect of legitimacy. To explain, legitimacy, as Verhoeven has described it, "lies mostly in the recognizability and identifiability of a political system as inherently and naturally bound up with its citizens,"¹⁴ in its turn depending on three elements which are mutually reinforcing and influencing each other. The first element concerns formal recognition and identification, implying understandable constitutional foundations of the political system at issue, which must also be clearly recognizable as channels of civil involvement. The second element concerns participation, entailing active citizenship and active participation of the citizen in the political debate and the third one is substantive acceptance, meaning that the political policy must be an adequate response to the actual needs of all citizens.¹⁵ The notion of input legitimacy can be said to

⁸ COM(2001)428 final.

⁹ COM(2002)704 final.

¹⁰ OJ 2003, C 321/1.

¹¹ COM(2005)330 final.

¹² To be found on: http://ec.europa.eu/governance/impact/commission_guidelines/commission_guidelines_en.htm

¹³ Further on this A. Meuwese and L.A.J. Senden, European Impact Assessment and the Choice for Alternative Regulatory Instruments, in: J. Verschuuren (ed.), *The impact of legislation. A Critical Analysis of Ex Ante Evaluation*, Martinus Nijhoff Publishers, Leiden, Boston, 2009, pp. 137-174.

¹⁴ A. Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory*, The Hague, Kluwer Law International, 2002.

¹⁵ A. Verhoeven, 'Democratic Life in the European Union, According to its Constitution', in: D. M. Curtin and R.A. Wessel (eds.), *Good Governance and the European Union. Reflections on Concepts, Institutions and Substance*, Intersentia, 2005, p. 157.

align with the first two elements and the notion of output legitimacy with the latter one.¹⁶ ‘Full’ legitimacy cannot be achieved if not all three elements are given the attention and weight they require. Or, realising full legitimacy presupposes an adequate balancing of all three elements. This perspective on legitimacy sees thus not only democratic legitimacy and effectiveness as strongly connected notions, but also those of democracy, legitimacy and constitutionalism,¹⁷ especially when understanding constitutionalism as “a term which seeks to capture the idea that public power is or should be limited and subject to some higher form of control by reference to the law”.¹⁸

Analysing the Commission’s policy (documents) from this perspective, we can witness that there is a strong emphasis on enhancing output legitimacy or substantive acceptance of Union action and (far) less on input legitimacy and thus the democratic and constitutional legitimacy of Union action for that matter.¹⁹ When it comes to the OMC in particular, the Commission’s approach as set out in its White Paper on European Governance supports this conclusion, as the Commission fits the use of the OMC in this document in the specific context of realizing better policies and regulation. It states that “effective decision-making also requires the combination of different policy instruments [...] to meet Treaty objectives” and that improvements regarding better and faster regulation should be realized amongst other by complementing or reinforcing Community action through the use of the OMC.²⁰ That is not to say that the Commission does not consider at all the input-legitimacy dimension of the OMC; it does indicate some boundaries to the use of the OMC, and most importantly observes that it should not be used when legislative action under the Community method is possible, but these boundaries have not been further substantiated nor did the Commission propose any formal or constitutional boundaries to be set to its use. This reinforces the idea that the Commission wishes the OMC to be a flexible instrument that can indeed be used on a case-by-case basis, as it expressly indicates, as long as this does not affect its own right of legislative initiative under the CUM. We will see that the emphasis on effectiveness in the regulatory policy approach is also corroborated by the legal framework of the OMC (section 3.1).

C. The OMC as a new governance method

Looking more closely now at the OMC itself, there is no need to dwell here on the origins of the OMC in the European employment strategy, nor to present a detailed analysis of its different steps or stages.²¹ Yet, it seems that the OMC has become a very popular label for different and in fact differing developments, in view of which it can be considered relevant to dissect the OMC somewhat closer in its three essential component elements and their respective meaning, and to do so with a focus on its relation with the CUM.

C.1 The essential components of the OMC

The first element to highlight is that the OMC concerns a *mode* of governance. Whilst the OMC is often recognized indeed as ‘a new mode of multi-level governance’ in the literature, it is also quite

¹⁶ F. Scharpf, *Governing in Europe: effective and democratic*, OUP, 1999.

¹⁷ Cf also the observation of A. Verhoeven 2005, *o.c.* note 15, p. 158 (under reference to J. Habermas, *Between facts and norms*, MIT Press, 1997), that if democracy is to reinforce itself rather than to abolish itself, a number of basic principles have to be complied with and that in that sense democracy and constitutionalism go hand in hand.

¹⁸ Scott 2010, *o.c.* note 2, p. 1.

¹⁹ One may also note in this regard that the words ‘effective(ly)’ and ‘effectiveness’ are used 49 times in the Commission’s White Paper on European Governance, whereas one comes across ‘democracy’ and ‘democratic’ and ‘legitimacy’ only 12 times.

²⁰ *O.c.* note 8, pp. 18-22.

²¹ See other contributions in this volume.

often (in the same breath) equalled to a soft law instrument. From a conceptual point of view, this does not seem right to me; methods or modes of governance are indicative of certain procedural or decision-making processes to realize certain goals, whereas instruments are just one element in such a process, i.e. the tools to be used or resorted to. As such, these can also be said to relate more to the output of the process. To explain this conceptual point further, when reference is being made to the CUM, this is taken to refer in the first place to the decision-making process in which the Commission, the Council and the European Parliament each play a proper and distinctive role; with the co-decision procedure having become the ordinary legislative procedure, it can be taken to refer foremost to the Commission holding the (exclusive) right of legislative initiative and the Council and European Parliament co-deciding upon that basis. The CUM is fundamentally geared towards the adoption of legislation, – usually a regulation or directive –, hard law being traditionally considered an important integrative force.

When speaking about the OMC as a regulatory mode, it thus makes sense to consider first the institutional organization and functioning of this process. Without elaborating in detail on this here, different accounts are given of this in the literature, some arguing that it is the Commission that takes the lead in OMC-processes,²² while others put far more emphasis on the role of the Member States, the European Council, and of the Council merely in extension of that.²³ Some take the view that all institutions lose in the OMC, except for the European Council.²⁴ Given that the OMC is not regulated in a general way in the Treaties,²⁵ unlike the CUM in mainly Article 294 TFEU, the role to be played by the various institutions in the OMC is in fact a rather diffuse one and rather dependent on the area at issue, so it seems, especially when it comes to the position of the Commission and the European Parliament. To illustrate, in the two areas in which the Treaty can be said to provide rather explicitly for the use of the OMC, the formal institutional modalities differ. In the framework of Article 121 TFEU (ex Art. 99 EC), the Council thus acts upon the basis of a Commission recommendation with a view to establishing a recommendation for the broad economic guidelines of the Member States and of the Union, the European Parliament only being informed of this recommendation. According to Article 153(2)a TFEU, it is the European Parliament and the Council that may adopt measures to encourage cooperation between Member States with regard to different aspects of employment policy. This provision does not in fact envisage a role for the European Commission in this process.²⁶ Interestingly, one must note also that under the old text of this provision (Art. 137(2)a EC), the European Parliament was not assigned any role at all.

The second element – *open* – entails a further qualification of the nature of the OMC as a governance process. Where the CUM has been and still is perceived by many as an ‘old’ government, top-down and exclusive process²⁷ within which only formal public institutions are in charge,²⁸ the

²² E.g. C. de la Porte and P. Pochet, *Supple Coordination at EU Level and the Key Actor’s Involvement*, in: C. de la Porte, P. Pochet and P. Lang (eds.), *Building Social Europe through the Open Method of Coordination*, PIE Peter Lang, 2002, pp. 27-68.

²³ Cf D. Wincott, *Beyond Social Regulation? New Instruments and/or a New Agenda for Social Policy at Lisbon?*, *Public Administration*, 2003, pp. 533 ff.

²⁴ Cf V. Hatzopoulos, *Why the Open Method of Coordination is Bad For You: A Letter to the EU*, *ELJ*, vol. 13, no. 3, May 2007, pp. 320-322.

²⁵ Further on this section 3.

²⁶ The text of the Treaty is not very clear on this point, as one might conclude on the basis of a reading of the whole second paragraph of Art. 153, that such cooperation measures would have to be adopted pursuant to the ordinary legislative procedure. Yet, such a conclusion would contradict the new hierarchy of norms contained in Arts. 288-289 TFEU, which link form and procedure; acts adopted pursuant to the ordinary legislative procedure are legislative acts and (must) take the form of regulations, directives and decisions. These instruments are all legally binding instruments, leading to unification or harmonization of laws of the Member States. Article 153(2)a explicitly excludes the latter. The applicability of the ordinary legislative procedure can thus logically only relate to Art. 153(2)b.

²⁷ Instead of *Classic*, one could thus also read ‘*Closed*’ Union Method.

OMC claims to be inclusive and participatory by its very nature, alluding to the involvement of other actors than those usually involved in the exercise of public power, such as relevant stakeholders, NGOs, social partners, civil society and regional and local authorities. Depending on the area, such actors may be more or less involved at the different stages of the OMC process: 1) the definition of joint, European goals and guidelines in connection with time schedules; 2) the establishment of quantitative and qualitative indicators and benchmarks for the identification and comparison of best practices; 3) the translation of the guidelines into national and regional action plans that take account of national and regional differences; and 4) periodic monitoring, evaluation and peer review, with a view to the reinforcement of the mutual learning process.²⁹ It is because of its (proclaimed) openness that the OMC is denoted as a form of multi-level governance or network governance.³⁰ Given however the uncertainties and doubts surrounding the actual materialization of this element of the OMC,³¹ it has earned itself also qualifications such as experimental governance³² and democratic experimentalism.³³

The third element – *coordination* - refers to the aims that are being pursued when the OMC is being resorted to, which is to be understood as policy coordination and not as legal approximation of any kind. This can already be inferred from the different steps of the OMC as described above. More in specific, it is geared towards policy coordination on two levels: idealistic or cognitive convergence,³⁴ meaning that a joint understanding is created of the relevant policy objectives on national and European level and how these can be best achieved, and actual policy convergence, by improving knowledge, exchanging information and establishing and praising best practices and identifying and criticizing and changing bad practices through peer review and peer pressure (see also Art. 153(2)a TFEU for these elements).³⁵ While OMC processes may differ from one policy area to another as to their level of sophistication,³⁶ they share these essential aims³⁷ and also their set of tools for realising them; mainly non-binding recommendations, guidelines and codes of conduct. Given that it is not approximation of the legal systems of the Member States that the use of the OMC is striving after, the

(Contd.) _____

²⁸ Even if there are claims of participatory democracy being made by the EU, in particular the Commission, in the framework of its Union method, one can question the actual degree of participation. The new Article 11 EU can also not be understood to create any participation rights.

²⁹ Steps according to the European Council Conclusions of Lisbon, 23-24 March 2000 (http://europa.eu/european_council/conclusions/index_en.htm) in which the OMC was for the first time described as a self-standing European policy coordination method.

³⁰ E.g. De la Porte and Pochet 2002, *o.c.* note 22.

³¹ The limited amount of empirical studies carried out so far show a not too optimistic picture, see Hatzopoulos 2007, *o.c.* note 24, pp. 325-326 on this. An under-researched question in this regard is also what level and standards of participation are actually to be set.

³² E.g. E. Szyszczak, Experimental Governance: The Open Method of Coordination, *ELJ*, vol. 12, no. 4, July 2006, p. 486.

³³ E.g. B. Eberlein and D. Kerwer, New Governance in the European Union: A Theoretical Perspective, *JCMS* 2004 (vol. 42-I), p. 133.

³⁴ C. M. Radaelli, *The Open Method of Coordination: A New Governance Architecture for the European Union?*, Swedish Institute for Economic Policy Studies (SIEPS) report, 2003, p. 9.

³⁵ Szyszczak 2006, *o.c.* note 32, p. 489 and A. Schäfer, Beyond the Community Method: Why the Open Method of Coordination was Introduced to EU Policy-making, *EIoP*, vol. 8(2004), no. 13, p. 10.

³⁶ Szyszczak 2006, *ibid.*, p. 494, for instance distinguishes between 1) developed areas of the OMC (the employment strategy and the broad economic guidelines); 2) adjunct areas (social protection, social inclusion, pensions and health care); 3) nascent areas (innovation and R&D, education, information society, environment, migration and enterprise policy); and 4) unacknowledged areas (taxation).

³⁷ Which is not to say at the same time that these materialize. Radaelli 2003, *o.c.* note 34, p. 9, thus speaks in respect of the code of conduct concerning bad tax competition, of an embryonic, fragile cognitive convergence, while actual policy convergence in the sense of converging decisions and policy implementation on the national level is still lacking. Hatzopoulos 2007, *o.c.* note 24, pp. 311-316, concludes on the basis of a number of empirical studies that the OMC on the short term does not show visible immediate results and that on the longer term there is only question of indirect effects on national policy processes.

recourse to these softer instruments is understandable. As such, we may conclude that OMC processes are geared towards soft policy convergence, on both a cognitive and practical output level. Since both policy coordination and soft law instruments have been part of the EU integration process from the very beginning, the ‘newness’ of the OMC relates foremost to its combining these two features while adding to this the element of openness, blending these into a self-standing European governance mode.

C.2 The OMC in relation to the CUM

In line with Curtin’s observations, the OMC can be said to fit in with the development of the EU as a policy-making entity, alongside its nature as a law-making entity, but as such it still relies on or specializes more in regulatory than in (re-)distributive policies. Taking a broad view on ‘regulation’ in this respect, it refers not only to the implementation and enforcement of both formal and informal rules adopted within various institutional configurations, because much regulation can be said to be accomplished without recourse to rules of any kind.³⁸ Regulation, it is contended, can be “secured by organizing economic incentives to steer business behavior, by moral suasion, by shaming, and even by architecture. On this broadest view, regulation means influencing the flow of events.”³⁹

Starting from this broad view on regulation, we can identify in the light of the above discussion at least three different levels of regulatory intensity in the context of the EU, each level pursuing its own aim and deploying its own instruments.⁴⁰ The use of the CUM is thus geared towards either the unification of law – often leading up to the adoption of regulations in the sense of Article 288 of the TFEU – or the harmonization of national laws – leading up primarily to the adoption of directives as provided for by the same article. Where the regulation by its very nature is ‘binding in its entirety’ and as such the most intrusive instrument, only leaving room to the Member States for adopting executive or implementing measures if so required by the regulation, the directive (at least in theory) leaves more (procedural) discretion to the Member States as it is binding ‘as to the result to be achieved’ only, leaving the choice of ways and means for doing so to the Member States. In the case of minimum harmonization, Member States will also be left a certain level of substantive discretion.

Clearly, the OMC is striving after a yet lower level of regulatory intensity, as regards the actual steering pressure it exercises on Member States and on those ultimately concerned by the policy coordination initiatives. As seen, OMC-processes and the soft guidelines and recommendations established in the framework of that are as such less geared towards rule-setting and more towards establishing objectives and indicators and benchmarks, for the identification and comparison of what ways may lead best to realizing those objectives. Much leeway and discretion is thus left to the Member States for deciding how to proceed. The role of legal rules as steering means in the framework of the OMC is thus a very limited one, leaving it very much up to the Member States themselves to decide whether implementation of the recommendations can come about best by way of establishing national policy and/or legislation.⁴¹

From both a conceptual and analytical point of view, one can thus already conclude that the CUM and the OMC and the three concomitant regulatory levels must be seen as complementary to and not as replacing one another, each fulfilling a proper and self-standing role in the integration process in its own right. This conclusion is also borne out by the new competences catalogue, established in Articles 2 to 6 TFEU. While we are certainly not talking here about one-on-one relationships in the Union’s actual legislative and policy-making practice, analytically we can identify first of all a strong

³⁸ D.M. Curtin, *European Legal Integration: Paradise Lost?*, in: D.M. Curtin, J.M. Smits, A. Klip and A. McCahery, *European Integration and Law*, Intersentia, 2006, pp. 20-21.

³⁹ C. Parker and J. Braithwaite, ‘Regulation’, in: P. Cane and M. Tushnet (eds.), *The Oxford Handbook of Legal Studies*, Oxford, OUP, 2003, p. 119, as cited by Curtin 2006, *ibid.*, p. 21.

⁴⁰ Co-regulatory and self-regulatory devices might possibly be identified as representing a fourth level.

⁴¹ Cf Radaelli 2003, *o.c.* note 34, p. 15.

connection between the establishment of common policy in areas of exclusive EU competence, by way of regulations (e.g. customs union, common commercial policy). A similar link can be established between the approximation or harmonisation of laws in areas of shared competence of the EU with the Member States, by way of directives (e.g. internal market). The same goes for policy coordination in areas of supporting, coordinating or supplementing competences in which the Member States retain their legislative competence, by way of recommendations, guidelines and codes of conduct (e.g. health, education, culture).

Looking at practice, empirical sector-specific studies also indicate that, depending on the area and the objectives the EU is pursuing in that respect, there may be question of a mix of the different levels, methods and instruments (e.g. employment policy),⁴² while in others policy coordination may be all that the Union is striving after (e.g. education) or there may be a strong drive for unification (e.g. agriculture). A regulatory mix may come about intentionally, in the sense that deliberate political choices are made about the level of interference, but also unintentionally, as a result of developments on different – legislative, administrative, policy or judicial – levels.⁴³ Resorting to the use of the OMC is sometimes also considered a necessity, because the Union legislator does not manage to adopt legislation or only to a (too) limited extent as a result of the applicability of the unanimity requirement and national sovereignty objections (e.g. taxation). In view of these structural features and difficulties of the European decision-making process, the OMC can indeed be considered ‘part of an inherent logic within the EU,’⁴⁴ as in such cases the OMC may prove to be the only way forward with a view to realizing certain transnational socio-economic goals that otherwise cannot be addressed.

Having said that, from a strictly legal point of view, we cannot ignore that the issue of how the OMC relates to the CUM and of what the actual scope is for intentional choices being made regarding their respective use, is also strongly linked to the competences that have been conferred upon the EU. Given the principle of conferral, there is no completely free choice for the European legislator to act and the legal basis in the Treaties may be pushing already in the one or the other direction. This issue will be further explored in section 3.2.

In conclusion here, when talking about the patch of the OMC in the European regulatory landscape, we can say that it occupies a space in its own right, planting its own particular seeds for furthering the European integration process. As such, it is not a matter about shifting from one governance mode to another and of substituting the CUM with the OMC, the institutional reform brought by the Treaty of Lisbon making it also very clear that the CUM remains the foundation for decision-making in the EU in many areas and considering the OMC more as a complementary one. By this broadening of the regulatory spectrum, the challenge has now become to find the right regulatory mix with a view to realizing the aims strived after in a particular area, and this in accordance with the powers that have been conferred upon the EU. Theoretical accounts of new governance support such an understanding, in particular the different accounts of the ‘hybridity’ thesis that perceive the relationship between law and new governance as one of co-existence, mutual interdependence, engagement, interaction and mutually sustaining or support.⁴⁵

⁴² See C. Kilpatrick, *New EU Employment Governance and Constitutionalism*, in: G. de Burca and J. Scott, *Law and New Governance in the EU and the US*, Hart Publishing Oxford, 2006, pp. 121-151.

⁴³ The area of health care provides an interesting example in this context, the level of regulatory intensity or interference on the basis of the Treaty provisions being in principle limited to policy coordination, but at the same time there being secondary legislation adopted in other fields (such as the services directive) that may affect the organization of national health care systems and there also being case law limiting the member states’ discretion in this area. See on this T. Hervey, *The European Union and the Governance of Health Care*, in: De Burca and Scott 2006, *ibid.*, pp. 179-210.

⁴⁴ In this sense, Szyszczak 2006, *o.c.* note 32, p. 487.

⁴⁵ G. de Burca and J. Scott, *Introduction: New Governance, Law and Constitutionalism*, in: De Burca and Scott, *o.c.* note 42, 2006, p. 6.

3. The OMC in the European legal landscape

A. An effectiveness-based approach

Some scholarly contributions on the OMC focus foremost on the effectiveness of the OMC and soft policy tools,⁴⁶ while others may be merely concerned with the democratic legitimacy problems new governance generates more generally.⁴⁷ To some extent different disciplinary backgrounds and approaches can explain this different focus; political scientists are more geared towards researching issues of effectiveness (or substantive/output-legitimacy), whereas lawyers tend to be more concerned with the analysis of constitutional issues and with the democratic legitimacy and accountability of the exercise of public power (or formal/input-legitimacy).⁴⁸ In the light of the broad view adopted above in section 2.B.1 on the notion of legitimacy, both aspects clearly need addressing and balancing vis-à-vis each other. Or, a political and regulatory system that is built on democracy and the rule of law, as the EU claims to be at numerous instances in the Treaties,⁴⁹ and that is increasingly made up of different governance modes, can only be legitimate if it is functioning both effectively and in a democratically and constitutionally acceptable way. Recognizing the potential usefulness and effectiveness of new and hybrid governance approaches in a broad variety of areas,⁵⁰ in case of the OMC, may not lead us to neglect the question as to what role law plays or better, should play in shaping such new governance modes.⁵¹ However, overall, scholarly concern about the legal and constitutional aspects of the OMC has been rather limited and has certainly not been put centre-stage of the debate.⁵² Sometimes, there is also a too readily accepted presumption that governance modes like the OMC that do not entail much or any parliamentary involvement, provide themselves for a certain ‘constitutional compensation’ through the bottom-up involvement and participation of stakeholders, citizens, civil society, etc. For the time being, however, there is too little empirical evidence of their de facto participation, at least within the framework of the OMC, that would support such a presumption of network-democracy. This state of affairs gives additional weight to the question of what the role of the law is – and of constitutionalism in extension of that – is in framing the OMC. There is clearly also a paradox in this; while new governance (modes) are in and of themselves very much connected with features of informality and efficiency, as such putting constraints on their formalization and constitutionalisation, these features at the same time raise legitimacy concerns that beg the question as to how to deal with them in law.

The obvious starting point for considering the position of the OMC in the law, is to look at the way in which the TEU and TFEU deal with the OMC. In doing so, it is helpful to consider first the ‘gap thesis’ that De Burca and Scott have put forward in the context of the legal consideration of new governance more generally. In its descriptive form, this thesis attests to the imperviousness of law in the face of new governance and to the existence of a gap between the practice of governance and formal law. Formal law, including constitutional law, is considered to be ‘largely blind to new governance.’ In their view, reading of the legal texts conceals rather than reveals the presence and

⁴⁶ D. Trubek, P. Cottrell and M. Nance, ‘Soft Law’, ‘Hard Law’, and EU Integration, in: De Burca and Scott 2006, *ibid.*, pp. 65-94.

⁴⁷ E.g. Many of the contributions in De Burca and Scott 2006, *o.c.* note 42.

⁴⁸ Cf Verhoeven 2002, *o.c.* note 14 and Curtin 2006, *o.c.* note 38.

⁴⁹ See inter alia the preamble of the EU-Treaty and its Arts. 2, 3, 6 and 21.

⁵⁰ E.g. on the basis of a constructivist account of soft law as done by Trubek, Cottrell and Nance 2006, *o.c.* note 46.

⁵¹ Cf in this sense Hervey 2006, *o.c.* note 43.

⁵² The main exceptions being G. de Burca and J. Zeitlin, *Constitutionalising the Open Method of Coordination. What Should the Convention Propose?*, CEPS Policy Brief, no. 31, March 2003, www.ceps.be. In some more recent literature, more emphasis is also being placed on a clearer legal foundation. See e.g. S. de la Rosa, *The Open Method of Coordination in the New Member States – the Perspectives for its Use as a Tool of Soft Law*, *ELJ*, vol. 11, no. 5, September 2005, pp. 632-634.

prevalence of new governance forms. In its explanatory form, the gap thesis claims that law has either not caught up with developments in governance or that it ignores these. In its normative dimension then, two distinct but related strands are identified in this thesis, the first arguing that law resists the new governance phenomenon – presenting law as an actual impediment or obstacle to new governance - and the second one arguing that law is confronted with a reduction in its capacity - putting emphasis on the fact that the law's capacity to steer normative directions of policy and to secure accountability of governance is endangered.⁵³ I think there is much truth to this thesis, but it may not tell the full story. In particular, it does not seem to be fully explanatory when one looks in more detail at the legal framework as this now applies pursuant to the entry into force of the Treaty of Lisbon.

Such a closer reading of the amended Treaties reveals indeed a certain blindness of the Treaties of the OMC and of other elements of new governance. But in explaining this silence, it seems that there are yet other factors at play than those identified above. A third explanation can thus be found in the creation of a deliberate or intentional imperviousness of the Treaties, with a view to maintaining maximum flexibility for the use of new governance modes, including the OMC, and as such for maximizing their effectiveness without being hampered by legal-constitutional constraints. This would also add in fact a third normative strand to the gap thesis, arguing that the law actually wants to leave a certain leeway to the development of new governance where this is perceived as making a contribution to the effectiveness of the Union's actions and institutions.

Ground for the above argument can be found in the preparatory work of the European Convention for the Constitutional Treaty. The question of the constitutionalisation of the OMC gained specific attention in three of its working groups, the working group on social policy proposing to establish the aims of the OMC and the conditions for its application in the new provisions regarding the Union's instruments. The working group on simplification was asked to take the OMC on board in its considerations as one of the Union's soft instruments. That working group however did not manage to come up with a concrete proposal, but observed merely that:

“Constitutional status should be assigned to the open method of coordination, which involves concerted action by the Member States outside the competences attributed to the Union by the treaties. It should be emphasized that this should not be confused with the coordination competences conferred upon the Union by various legal bases, notably in the economic and employment fields.”⁵⁴

While this statement raises some question marks of its own (to be further discussed under section 3.B.2), it contained a clear recommendation in favour of constitutionalisation. Yet, despite this and despite the observation of the President of the European Convention, Valéry Giscard d'Estaing, in his report to the European Council of December 2002 that the OMC should be codified, this did not materialize. The Praesidium of the Convention ultimately decided against it, because of reasons of lack of political agreement on this issue and of maintaining the informal and flexible nature of the OMC. So clearly effectiveness concerns outweighed formal legitimacy concerns in the political debate and the non-constitutionalisation of the OMC can be seen as the reflection of that. This means that the Treaties do not elaborate in a general way on the aims of the OMC and the circumstances and conditions for its use.

Also when it comes to the issue of participation, the Treaties testify of an effectiveness-based approach. This can be said to go both for the way in which the EU is seeking to enhance participation and involvement in the framework of the preparation of legislative proposals under the CUM and of policy coordination under the OMC. For neither of them do the Treaties provide a strong legal framework with a view to actually ensuring such participation and involvement of third actors, not

⁵³ De Burca and Scott 2006, *o.c.* note 42, pp. 4-5.

⁵⁴ Final report of Working group IX 'Simplification', Brussels, 29 November 2002, CONV 424/02, p. 7, still to be consulted on <http://register.consilium.europa.eu/pdf/en/02/cv00/cv00424.en02.pdf>

stipulating any clear rules as to who is when to be consulted and under what conditions. The new provisions on Democratic Principles in the EU-Treaty do contain some elements of participatory democracy (in particular Article 11, paras. 1 to 3), but these are framed in a very open-ended way and are far from creating any participation rights.⁵⁵ They do also refrain from establishing a link with the governance modes that are recognised – explicitly or implicitly – elsewhere in the Treaties and that expressly build upon the involvement of third actors such as civil society and the social partners. Apart from the OMC, this also concerns the European Social Dialogue (Arts. 154-155 TFEU). We may thus say that, despite its appearance and the heading under which it has been brought in the Treaty, Article 11 also reflects more a concern of enhancing the Union’s and the institutions’ effectiveness and less of enhancing democratic legitimacy.⁵⁶ This approach also fits in with the soft legal framework the Commission has established for its consultation and dialogue practices, in its Communication on general principles and minimum standards for consultation of interested parties.⁵⁷ Whilst this is not to say that a strong legal framework in itself ensures the legitimacy of the CUM and the OMC, it flows from the above understanding of legitimacy that it does require that some solid conditions and guarantees be put in place. This seems all the more fundamental for a governance mode that upholds participation as one of its essential elements.

B. Legal foundations and limits of the OMC

Given that the Treaty of Lisbon failed to regulate the OMC in a general way, we need to explore the legal foundations of and the boundaries to the use of the OMC on the basis of a reading of the Treaties in the light of relevant general principles of law and legal doctrines. The following institutional positions underline the relevance of such an analysis.

B.1 The institutions’ views

In the White Paper on European Governance, the Commission briefly discussed the circumstances under which the OMC may be used in its view. In extension of what has been observed already in section 2 on this, the Commission can be said to be foremost concerned with the protection of its own role in the European decision-making process, and also of that of the EP. This is apparent from its emphasis on the use of the OMC as a complement rather than a replacement for Community action and that it should not be used when legislative action under the Community method is possible. It also stresses that the OMC may not upset the institutional balance nor dilute the achievement of common objectives in the Treaty or the political responsibility of the institutions. It feels therefore that it should be closely involved and play a co-ordinating role and that regular reporting mechanisms to the European Parliament should be established.⁵⁸ The Inter-Institutional Agreement on Better Law-making subsequently concluded between the Commission, the Council and the European Parliament was explicitly supportive of the use of alternative instruments, while also setting certain conditions for their use.⁵⁹ Interestingly, however, it did so only regarding co-regulatory and self-regulatory devices, abstaining from making any mention whatsoever of the OMC. This supports the view that the institutions and the Member States have aimed at keeping the use of the OMC as flexible as possible.

⁵⁵ Cf V. Cuesta, *The Lisbon Treaty’s Provisions on Democratic Principles: A Legal Framework for Participatory Democracy*, *European Public Law*, 2010, pp. 123-138.

⁵⁶ In the same sense, C. Closa, *European Citizenship and New Forms of Democracy*, in: G. Amato, H. Bribosia and B. de Witte (eds), *Genèse et destinée de la Communauté Européenne: commentaire du Traité établissant une Constitution pour l’Europe à la lumière des travaux préparatoires et perspectives d’avenir*, Brussels, Bruylant, p. 1050.

⁵⁷ O.c. note 9.

⁵⁸ COM(2001)428 final.

⁵⁹ See sections 18-23 of the IIA, o.c. note 10.

A resolution of the EP on institutional and legal implications of the use of “soft law” instruments, adopted in 2007, shows an increasingly reticent approach on the part of this institution towards the use of soft law and the OMC.⁶⁰ Regarding the latter, it observes the following:

“P.whereas the open method of coordination can be of service in promoting the achievement of the internal market but it is regrettable that the involvement of Parliament and the Court of Justice therein is very weak; whereas, because of this democratic deficit in the so-called open method of coordination, it should not be misused to replace the Community's lack of legislative competence and in this way to impose de facto obligations on the Member States that are tantamount to legislation but arise outside the legislative procedures laid down in the Treaty,

4. [The EP] Considers the open method of coordination to be legally dubious, as it operates without sufficient parliamentary participation and judicial review; believes that it should therefore be employed only in exceptional cases and that it would be desirable to consider how Parliament might become involved in the procedure;”

These institutional positions point to the relevance of the issue of competence to use the OMC and of principles such as institutional balance, democracy and judicial review. These issues will be considered in turn.

B.2 Competence

The view is often defended that the principle of conferred powers only applies to legally binding acts of the European Union and that there is thus an unlimited competence for the EU to adopt non legally binding or soft law acts.⁶¹ This view needs to be rejected for a number of reasons. To begin with, given the foundation of the EU on the principle of conferral, it has not been the intention of the Treaty drafters to endow the EU with a general competence to act; to a larger or lesser extent, the separate provisions of the Treaty thus specify in what areas the EU may act, what the scope of such action may be, who is to act, under what procedure and with what instruments. In some cases, such provisions concern exclusively the adoption of non-binding instruments.⁶² It is also clear that despite their formally non-binding status, the ECJ has recognised certain legal effects of soft law instruments.⁶³ Already in view of this, one is to understand that also the use of soft law, and of the OMC in connection with that, does require some accounting for in terms of competence and that its use may be limited in certain cases, as a result of Treaty themselves or as a result of general principles of law.⁶⁴

Moreover, one must note that the principle of conferral is not to be understood in a narrow sense, equalling it merely to a principle of legality. The principle of conferral also fulfils a number of other functions, namely ensuring legal protection, protecting the inter-institutional division of powers and the vertical division of powers between the EU and its Member States, and democracy more generally. While the principle of conferral can thus not be said to apply to soft law acts in the sense that they would require the identification of a legal basis in the Treaties with a view to ensuring their legality, the principle does require accounting for their adoption with a view to protecting the other functions it fulfils. Or, the use of soft law and the OMC may not detract from the principle of conferral as regards the other functions it serves.

⁶⁰ Resolution of 7 September 2007, A6-0259/2007.

⁶¹ E.g. Ch.-A. Morand, *Les recommandations, les résolutions et les avis du droit communautaire*, *Cahiers de droit européen*, vol. 6(1970), no. 2, p. 623 and R. van Ooik, *De keuze der rechtsgrondslag voor besluiten van de Europese Unie*, Kluwer, Deventer, 1999, p. 34.

⁶² The ECJ has also deemed it necessary to clarify the power to adopt soft law instruments, where such a general allocation of power in the Treaties was lacking. Further on this, L.A.J. Senden, *Soft Law in European Community Law*, Hart Legal Publishing, Oxford, 2004.

⁶³ Case C-322/88 *Grimaldi* [1989] ECR 4407.

⁶⁴ Cf also A. von Bogdandy and J. Bast, *The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform*, *CMLRev.*(2002), vol. 39, p. 233.

From what has been observed under section 2.C, it can be inferred already that the OMC is being used in areas in which the EU lacks legislative powers (e.g. employment, social exclusion, innovation and R&D) or in which stagnation has occurred in the legislative process (e.g. taxation). On the one hand, one can thus witness reluctance on the part of the Member States to either empower the Union to adopt legislation in certain areas or to make actual use of conferred legislative powers. On the other hand, the use of the OMC in these areas shows recognition on their part of the necessity to act on the European level to tackle a certain issue or problem. The OMC may as such prove to be the only escape out of political deadlock. Against this background, the Treaties appear to provide for a legal foundation of the use of the OMC in at least three ways.

First of all, the TFEU contains a number of provisions that explicitly provide a legal foundation for the OMC as a process of coordination or convergence of national policies. This goes for the areas of economic policy and employment policy. Because of the existence of such explicit Treaty legal bases, Szyszczak has qualified these as developed OMC areas.⁶⁵ Given these Treaty bases and the historic roots of the OMC in the employment strategy, one has a very hard time understanding the aforementioned finding of the Convention working group that the OMC “should not be confused with the coordination competences conferred upon the Union by various legal bases, notably in the economic and employment fields.” This viewpoint testifies of the conceptual confusion surrounding the OMC, and in particular its relation to the numerous references to ‘coordination’ in the Treaties.

This also brings me to the second foundation of the OMC in the Treaties; it is clearly being resorted to in other areas in which a legislative competence is lacking, but in respect of which the Treaty merely provides for coordinating or supporting competences on the part of the EU. Such Treaty articles provide for a foundation of the OMC from the perspective of the substantive objectives and regulatory intensity they are striving after (often excluding the harmonisation of laws), but they are not (fully) described in OMC-procedural terms.⁶⁶ Such coordination competences have been introduced pursuant to the various Treaty amendments, which brought ‘flanking policies’ of the internal market, such as research and development, education and health, within the scope of the European integration process. As a result of this development, the notion of coordination has gained in fact an increasingly soft connotation, drifting away from the notion of harmonisation and being used mostly now in contexts that have nothing to do with the legal approximation of rules but foremost with national policy coordination.⁶⁷ The introduction of the competences catalogue by the Treaty of Lisbon can be seen as a next step in this development, where it provides specifically for coordination, supporting and supplementing competences. From the point of view of conceptual clarity and transparency, it is a missed opportunity that the Treaty of Lisbon has not carried through this distinction between the different categories of competences in a consistent way in the separate Treaty provisions, by using the term coordination in some provisions still also in relation to harmonisation and the adoption of directives (e.g. art. 52 TFEU).

The third legal foundation for the OMC is found in Treaty provisions conferring a legislative power upon the EU, regarding for instance taxation, migration and environmental policy. The Commission’s view that the OMC should not be used in cases when legislative action is possible under the CUM has been heavily criticised, mainly because this would allude to a perception of the use of the OMC as an alternative to harder forms of governance.⁶⁸ While the Commission’s view is indeed to be rejected

⁶⁵ Szyszczak 2006, *o.c.* note 32.

⁶⁶ E.g. Articles 166-168 and 180-181 TFEU.

⁶⁷ Curtin 2006, *o.c.* note 38 also proceeds in fact from such a conceptual division of these notions, where she links harmonisation to law, legislation and the hard model of integration and coordination to convergence, governance and the soft model of integration. Quite noteworthy, in 1987 two eminent EU law scholars still observed that there is not a true difference between the notions of coordination, approximation and harmonization. See R. Lauwaars and J. Maarleveld, *Harmonisatie van wetgeving in Europese organisaties*, Europese Monografieën 33, Kluwer, Deventer, 1987.

⁶⁸ Kilpatrick 2006, *o.c.* note 42 and Trubek, Cottrell and Nance 2006, *o.c.* note 46, p. 82.

because of its too broad formulation (see *infra*), there are good reasons for arguing that in the EU the choice of the governance mode and its concomitant instruments is not a totally free one and that whoever is allowed to do more, may not always confine himself to doing less. The desired level of regulatory interference and intensity at EU-level may thus be quite defined already by the Treaty drafters. In this regard we must distinguish between three different types of legal bases in the Treaties.

At one end of the spectrum one finds the ‘prohibiting’ legal bases, ruling out legislative harmonisation.⁶⁹ At the other end of the spectrum, we find the ‘obliging’ legal bases, stipulating for instance that “The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure [...] issue directives or make regulations setting out the measures required to bring about freedom of movement of workers [...]” (art. 46 TFEU). Such a provision imposes not only a clear obligation to act, but also to do that in a particular – legislative – way. As such, the Treaty drafters have recognised the necessity of legally binding action to effectively realise the Treaty goals, in case of the free movement of workers. Taking less action in situations like these – for instance the adoption of soft law within the framework of an OMC-like process – should then not be considered sufficient, but merely as a springboard to legislation or as supporting or complementing a legislative framework. If we were to read the above observation of the Commission as meaning that one should be careful with proceeding to the use of the OMC whenever the Treaty *requires* legislative action, then that would in fact be to the point. Yet, the situation is different for situations in which legislative action is merely made *possible* under the Treaty provisions.

That brings us to the third and intermediate category of legal bases; those that can be termed as ‘enabling’ ones, which actually vary as to the degree of discretion they leave to the Union legislator. Article 67, par. 3 TFEU provides an example of this, stipulating that “The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.” Clearly, this provision imposes some obligation on the EU to act, but leaves a lot of leeway for deciding how to do that and in what (legal) form. Such a provision obviously allows also for a certain ‘regulatory mix’ or hybridity, combining possibly a legislative approach under the CUM with a soft convergence approach under the OMC. Yet, the ECJ has identified an important limit to this discretion, ruling that the institutions are obliged to choose the instrument that is most appropriate for realising the aims of the measure in question and the Treaty provisions that lie at its foundation. Where the Treaty aims at realising a common transport policy with a view to a good functioning of the internal market, it is thus quite obvious that this cannot be realised with an exclusive reliance on soft law measures.⁷⁰ So, the choice of the mode of governance and instruments must be in line with the Treaty objectives that are being strived after. To a certain extent at least, the use of notions like ‘common policy’, ‘harmonisation’ or ‘approximation’ and (policy) ‘coordination’ or ‘cooperation’ can be taken as indicators for this.

B.3 Weighing of general principles of law

The principle of conferral, and the resulting specification of Union powers in the separate Treaty provisions, concerns thus the first important legal determinant when it comes to the choice of regulatory method and instrument. As seen, this choice is not unlimited and may be quite defined already in the prohibiting and obliging types of legal basis. Such limitation can be explained in part by the desire to retain as much national powers as possible, but also by the recognition that an effective EU policy requires a certain type of action. As such, these types of legal bases leave rather limited scope for the application of the two other important legal determinants for Union action: the

⁶⁹ E.g. Article 168(5) TFEU.

⁷⁰ Case 13/83, *Parliament v. Council*, [1985] ECR 1513.

subsidiarity and proportionality principles. Such application would be confined foremost to defining the substantive scope and contents of the act to be adopted, the decision as to the appropriate level of decision-making and the level of regulatory intensity being largely decided in fact already by the Treaty drafters.

As regards the enabling legal bases, the Court's 'appropriate means-end' approach implies in fact that the subsidiarity and proportionality principles have to be balanced with the principle of effectiveness. A tension may arise in this regard; whereas subsidiarity and proportionality may pull foremost in the direction of the use of the OMC and soft law, the latter principle may be pulling foremost in the direction of the use of the CUM and hard law. In fact, under the old Protocol on Subsidiarity and Proportionality, the principle of effectiveness and also the principles of institutional balance and sincere cooperation were formulated as a counterweight to the subsidiarity and proportionality principles. Even more so, one could argue that it contained a certain hierarchy of principles, by stipulating that the application of the subsidiarity and proportionality principles have to stand the test of those other principles.⁷¹ Apart from that, the principles of transparency and legal certainty must also be understood to impose certain legal limits to regulatory choice; where for instance the adoption of a soft law act creates uncertainty about the rights and obligations it entails or where such act seeks in fact to bring about new legally binding rules, these principles may be infringed as well as the principles of conferral and institutional balance.⁷²

Quite remarkably, the new Protocol on Subsidiarity and Proportionality, attached to the Treaty of Lisbon, does not refer anymore to other legal principles as against which the subsidiarity and proportionality principles need to be weighed. Yet, one may not draw the conclusion from this that they have become irrelevant and are not to be taken account of anymore when deciding on the appropriate choice and means of regulation.

First of all, Article 296 TFEU now contains some guidance as to how the institutions have to deal with the discretion enabling Treaty provisions leave. It reads that:

“Where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality. [...] When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.”

The first sentence of this provision could raise the impression that in the case of enabling Treaty articles, the choice of the level of regulatory interference and instrument is to be decided foremost on the basis of the proportionality principle, it being quite unclear what 'applicable procedures' this provision is actually referring to. The second sentence, however, can be read as an implicit reference to – and concretization of – the principles of institutional balance and legal certainty; when for instance the Council (with or without the EP)⁷³ would decide to start an OMC-like process and/or adopt recommendations, this would interfere with the Commission's right of legislative initiative when a

⁷¹ It read in particular: “(2) The application of the principles of subsidiarity and proportionality shall respect the general provisions and the objectives of the Treaty, particularly as regards the maintaining in full of the *acquis communautaire* and the institutional balance; it shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law, and it should take into account Article F(4) of the Treaty on European Union, according to which ‘the Union shall provide itself with the means necessary to attain its objectives and carry through its policies’; [...] (8) Where the application of the principle of subsidiarity leads to no action being taken by the Community, Member States are required in their action to comply with the general rules laid down in Article 5 of the Treaty, by taking all appropriate measures to ensure fulfilment of their obligations under the Treaty and by abstaining from any measure which could jeopardise the attainment of the objectives of the Treaty.”

⁷² For a more detailed analysis of this, see Senden 2004, *o.c.* note 62.

⁷³ The reference to the EP in this context is somewhat odd, since usually the EP will not be involved in the adoption of atypical acts that might detract from the Commission's right of initiative.

Treaty provision allows for or commands the adoption of legislation and the Commission has started developing proposals already. When covering the same ground, such a simultaneous two-track approach may not only be ineffective and affect the Commission's position, but also create confusion for those that will be affected by the rules or policies thus established.

Secondly, it must be noted that no matter what is explicitly stipulated in the Treaties, all institutions are under a general duty to comply with *all* (also unwritten) general principles of law that apply within the EU law context. Not doing so, may lead for instance to the annulment of a legally binding Union act under Article 263 TFEU or to a procedure for failure to act on behalf of the EU institutions under Article 265 TFEU.⁷⁴ This entails in itself already a duty to weigh the different legal principles at stake in the regulatory process.

4. In conclusion: what need for further constitutionalisation?

To what answer then, do the findings in the above sections lead us of the main question formulated in the introduction, in particular regarding the need for a better constitutional embedment of the OMC? As seen, the main substantive reason for not giving the OMC constitutional status in the Treaties has been the desire to uphold the flexible and informal nature of the OMC with a view to ensuring its effectiveness. Yet, if we understand the EU in terms of a constitutional system that regulates the exercise of public power within its framework for the sake of upholding certain fundamental values upon which it is built, such as the rule of law and democracy, it seems only logical that the use of the OMC - as a governance mode that involves the exercise of public power - also needs certain regulation. While acknowledging the need for taking a broader perspective on this issue than that of 'traditional constitutionalism' and that one may find and enhance (democratic) legitimacy of the OMC by developing alternative and complementary approaches, for instance on the basis of institutionalised networks,⁷⁵ we should not ignore the relevance of the traditional constitutional perspective. In view of this, one can identify quite a number of compelling arguments that plead in favour of some level of constitutionalisation. This would not necessarily go against the effectiveness of the OMC, but may actually contribute to this.

To begin with, the discussion has shown that it is not always clear as to what processes in what areas can actually be denoted as OMC-type processes, the Convention working group adding considerably to this conceptual confusion by stating that it concerns a mode of governance that is being used in areas in which the Union has no competences⁷⁶ and that it does not bear any relation to the areas of employment and economic policy. The current legal approach to the OMC may thus be too flexible and too much geared towards effectiveness, in that it leads to confusion as to what the nature, goals and scope are of certain Union, OMC-type actions. Some more conceptual clarity would add to the transparency of Union action and enhance the understanding of the position of the OMC vis-à-vis the CUM.

In extension of that, institutional balance is a second argument that pleads for clarification of the position of the OMC vis-à-vis the CUM, in particular of when the OMC may be resorted to under the Treaty provisions.⁷⁷ The case of enabling legal bases seems particularly problematic in this respect; when would there be room to resort to the OMC under such bases, without this affecting the enhanced

⁷⁴ Cf the Common Transport Policy case, discussed above. O.c. note 70.

⁷⁵ Cf Scott 2010, o.c. note 2.

⁷⁶ This statement is particularly hard to understand in the light of its further observation that it needs to be constitutionalised; why constitutionalise a method that is understood to relate to areas in which the Union does not have any powers? One can only understand this if one is to read its reference to competences as to mean 'legislative competences.'

⁷⁷ The earlier discussed Article 296 TFEU can only be seen as a first step in such clarification.

role of the EP in the decision-making process as a result of the broader applicability of the co-decision procedure, now the ordinary legislative procedure? Provision would at least need to be made for the Parliament's involvement in the decision as to what would be the best way to proceed in a certain area (especially when a legal basis provides for the possibility of the adoption of legislation under the ordinary legislative procedure) and, when it is opted for an OMC-type process, the (timely) involvement of the EP in it should also be ensured. Quite noteworthy, the Treaty of Lisbon has provided for a better position and involvement of the EP in the case of delegation of powers to the Commission, also within the framework of the comitology process, especially where such delegation would affect the Parliament's decision-making rights under the ordinary legislative procedure.⁷⁸

A third argument relates to the issue of openness and participation of the OMC. Where participation is considered to be a constitutive element of the OMC and where it has been seen to be an essential component of the notion of legitimacy itself, there is nothing in the current legal framework of the OMC that can be said to constitute a duty of involvement or right of participation of relevant stakeholders, etc. It is as such also far from clear towards what level of participation the OMC is actually geared. The legal framework for participation is thus in rather stark contrast with the high claims the OMC makes of being an open, bottom-up process. While more empirical research needs to be done on this, it is suggested that the legal permissiveness of the OMC in this regard bears some relevance to the limited involvement of certain parties in OMC-processes. If the OMC is to truly enhance democratic legitimacy, then putting into place certain procedural guarantees should be considered, addressing issues such as the identification of relevant stakeholders and concerned parties, their representativeness and timely information. Ensuring adequate involvement of all relevant actors is also highly important from the point of view of ensuring the effectiveness of OMC-processes, as realising policy coordination will in the end depend very much on their support. One must observe here also that the expectations regarding Article 11 EU should not be set to high; while this provision concerns the issues of involvement, participation and dialogue in a more general way, as such probably covering both CUM and OMC-processes, it is framed very much as a one-way process leaving the institutions a lot of leeway as to how to proceed. At the very best, one might be able to deduce a consultation duty for the Commission, yet the scope of that duty being rather diffuse.

A fourth argument concerns judicial review of OMC-processes and the adoption of recommendations and other soft devices in that context. While under the (now) Article 263 TFEU-procedure for annulment of Union acts, the ECJ has admitted the judicial review of all acts that, regardless of their soft denomination, seek to produce some legal effect, true soft law acts fall short of that possibility. As such, they will escape any judicial review.⁷⁹ Already for this reason, parties (including the EP) that feel sidestepped in an OMC-process for not having been properly involved will not be able to challenge the soft outcome of that process in court. Furthermore, most natural or legal persons (including citizens, NGOs etc) will not have *locus standi* under the fourth paragraph of this procedure, given the harsh conditions that it entails for them to start annulment proceedings.⁸⁰ A third hurdle occurring in this regard concerns the fact that, as seen, participation is not formulated in the Treaties as a right, raising the question to what extent participation could be judicially enforceable at all in the current stage of the law. Clearly, the judicial framework in the Treaties still turns a blind eye to new governance developments, not only in relation to the OMC but also regarding other developments that have become part and parcel of the CUM in the framework of the Commission's Better Regulation strategy, such as consultation and impact assessments.⁸¹ The more these are

⁷⁸ See Articles 290-291 TFEU.

⁷⁹ Further on this, Senden 2004, o.c. note 62.

⁸⁰ See on this problem, A. Cygan, Protecting the Interests of Civil Society in Community Decision-making – The Limits of Article 230 EC, *ICLQ* vol. 52, October 2003, pp. 995-1012.

⁸¹ See on this, A. Alemanno, The Better Regulation Initiative at the Judicial Gate. A Trojan Horse within the Commission's Walls or the Way Forward?, *ELJ*, vol. 15, issue 3, May 2009, pp. 382-400.

developing as better regulation or good governance standards, the more pressing the question becomes as to how to ensure their compliance and enforcement, also at the judicial level. Or, developments at the legislative and policymaking levels should be adequately mirrored on the judicial level.

In connection with that last observation, a fifth argument relates to the consistency of the Union's approach. The Treaty of Lisbon has sought to clarify and enhance a number of institutional features of the Union, by introducing not only a catalogue of competences as already seen, but also a hierarchy of norms entailing a rationalization of the Union's instruments (arts. 288-291 TFEU), a section on 'procedures for the adoption of acts and other provisions' which introduces a new distinction between the ordinary legislative procedure and special legislative procedures (arts. 293-299 TFEU) and a title on democratic provisions confirming representative democracy as the foundation of the Union but alluding at the same time to participatory democracy to complement this. Given the specific aims underlying the institutional reform under the Lisbon Treaty to enhance the transparency and legitimacy of the EU, next to effectiveness, one might have expected that the OMC and policy coordination would have been recognised as a feature that has now acquired a permanent patch in the Union's institutional and regulatory landscape, and that it would have clarified the conditions for its use. This would have been all the more appropriate, given the emphasis the Treaties now put in numerous provisions on the Union's values and democratic foundations. It does so not only when it comes to the internal functioning of the EU, but also regarding its external relations, promoting democracy as a kind of universal good governance principle and thereby feeding people's democratic expectations.

In conclusion, if the OMC is to come to full fruition in the European integration process and to live up not only to its expectations in terms of effectiveness but also of legitimacy, further steps in its constitutionalisation are strongly advised. While amendment of the Treaties in the short term is not to be expected, the best way to move forward for now would be to flesh out and agree upon at least some of the procedural modalities for the use of the OMC in an interinstitutional agreement between the Commission, the European Parliament and the Council.⁸²

⁸² The EP has also made such a proposition in the aforementioned resolution on the use of soft law, *o.c.* note 60. Article 295 TFEU explicitly provides for the conclusion of such agreements "which may be of a binding nature."

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