



ARTICLES

SPECIAL SECTION – POLICY COORDINATION IN THE EU: TAKING STOCK OF THE OPEN METHOD OF COORDINATION

THE PLACE OF THE OMC IN THE SYSTEM OF EU COMPETENCES AND SOURCES OF LAW

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ABSTRACT: It is often said that the Open Method of Coordination (OMC) is a form of soft law and that it takes place outside the competences of the EU. This *Article* critically examines both these statements. It argues that OMC processes must, under the principle of conferral, be within the limits of the competences attributed to the EU by the Treaties, and that this is also the case in practice. It further argues that, whereas the OMC does produce soft law instruments in the field of employment, most of the other OMC processes produce neither hard nor soft law but policy documents which may or may not be taken into account by the Member States in the respective policy domains. The *Article* concludes that the OMC is a form of EU-level cooperation that operates within a legal framework defined by EU competences and the EU institutional balance, but that mostly does not use legal tools, either of the hard or soft variety, in its policy output.

KEYWORDS: competences of the EU – principle of conferral – soft law – recommendations – employment guidelines – coordination of national policies.

I. THE PLACE OF THE OMC IN PRIMARY EU LAW

When the term Open Method of Coordination (OMC) was adopted by the Lisbon European Council of 2000, it did not figure in the text of the Treaty establishing the European Community (the EC Treaty). Soon after, though, the Convention on the Future of Europe, when preparing the text of the Constitutional Treaty for Europe, discussed whether the term should be included in the EU's constitutional document. One of the Convention's

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preparatory bodies, the Working Group on Simplification, recommended in 2002 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”.¹ This sentence expresses a curious conception of the OMC (as being *outside* rather than *inside* the EU’s competences) that has often been repeated and that is discussed below. In the end, and despite calls from some academics, the Convention decided not to grant constitutional status to the OMC as such.² Rather, by way of compromise, a description of a method of action which corresponds to the OMC – but without using the term itself – was included in the Treaty articles dealing with the policy areas of public health, industry and research. In addition, the existing references to policy coordination for the areas of economic governance and employment policy were kept as they had been previously formulated under the EC Treaty since Maastricht and Amsterdam respectively. This fragmented piecemeal approach was maintained in the Lisbon Treaty, so that the following question arises: given that the Lisbon Treaty formally recognises the use of the method in certain areas, does this mean that it may not be used in other policy areas where it is currently used (such as education and culture) or where it might have been used (such as immigration)?³

Today, the OMC is still situated in a constitutional no man’s land. In the text of the EU Treaties, those four words do not appear anywhere together, although the word “coordination” appears in many places of the text. A glance at the website of the European Commission (Commission), one of the central actors of the OMC, does not clarify much. Some of the policy-specific webpages mention the use of the OMC in their policy domain, but not the ones one would expect: the social protection, culture and education webpages mention the OMC although the respective Treaty articles do not; conversely, the webpages on research policy, industrial policy and health do not mention the OMC although the Treaty articles dealing with those policies are the ones that allude most clearly to the OMC process! Whenever the OMC is mentioned on the Commission’s website, one finds a hyperlink to the very same page of the Eur-Lex “Glossary of summaries”, where a short description of the OMC is given. That quasi-official description on EUR-Lex contains two problematic legal statements, namely: (1) “the open method of coordination (OMC) in the European Union may be described as a form of ‘soft law’”; and (2) “the OMC takes place in areas which fall within the competence of EU countries” (a formulation echoing the statement of the Convention working group mentioned above). Both statements are less than self-evident, and will be discussed in this *Article*. First Section II discusses the startling statement that the OMC “takes place” in areas of Member State competence;

¹ Convention on the Future of the Union, Final report of Working Group IX on Simplification of 29 November 2002, CONV 42/02, 7.

² See G. DE BÚRCA, J. ZEITLIN, *Constitutionalising the Open Method of Coordination: A Note for the Convention*, in *CEPS Policy Brief*, no. 31, March 2003.

³ The three identically phrased references to the method, in relation to public health, industry and research, can be found in Art. 168, 173 and 179 TFEU.

how can this be reconciled with the principle of conferral? Then, Section III discusses the statement that the OMC is a form of soft law; this does not seem to square with most of the OMC's policy output which is neither hard nor soft law. The common theme of these two discussions is a reflection on the place of the OMC in the EU legal order. Assuming that the EU legal order is based on a rule of recognition, which determines whether a norm is part of EU law or not, is the OMC inside or outside that legal order? An answer to that question will be given in the concluding Section IV.

II. THE OMC AND THE PRINCIPLE OF CONFERRAL

According to Art. 5, para. 2, TEU “under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.” Note that the Treaty does not state “the Union shall make law only...” but, much more broadly, “the Union shall act only...”. Within an OMC-type process, the Union is undoubtedly “acting”, and funds from the EU budget are spent to sustain the process, which implies that either the OMC process in general or every single OMC should be based on a competence attributed by the Treaties. We know that there is no overall authorization for launching and conducting OMCs, so what about the existence of specific bases for each of them? With regard to employment policy, the OMC process is clearly delineated (though without using the OMC phrase) in Art. 148 TFEU, but the other OMCs seem to be based on much more generic Treaty authorizations for the EU institutions to coordinate national policies. Thus, for example, the education Article, Art. 165, para. 4, TFEU, mentions two ways in which EU institutions can “contribute to the achievement of the objectives” mentioned in that Article, namely by the adoption of incentive measures and recommendations. Both these tools are used in practice, but not in the context of OMC-education, where one apparently finds a third form of action beyond those mentioned in Art. 165, para. 4.⁴ However, para. 1 of Art. 165 also states, in very general terms, that “the Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action”; now, if one considers that the incentive measures and recommendations mentioned in paragraph 4 are two ways for the EU to “support and supplement” member state policies, this would still leave open the alternative route of “encouraging cooperation”, which is the object of the OMC-Education. Similar reasoning can be applied to the similarly structured Art. 167 TFEU, on culture. The Social OMC also seems easily justifiable in terms of EU competence since it covers areas for which

⁴The prime example of an incentive measure in this field is Regulation (EU) 1288/2013 of the European Parliament and of the Council of 11 December 2013 establishing “Erasmus+”: the Union programme for education, training, youth and sport and repealing Decisions No 1719/2006/EC, No 1720/2006/EC and No 1298/2008/EC. An example of a recommendation is Council Recommendation 2012/C 398/01 of 20 December 2012 on the validation of non-formal and informal learning.

Art. 153, para. 2, TFEU allows the EU to “adopt measures designed to encourage cooperation between Member States”, but there is another problem with that legal basis, namely the fact that such measures must be adopted by the European Parliament and the Council in accordance with the ordinary legislative procedure. Yet, the Social OMC was launched without using the codecision procedure.

III. DOES THE OMC PRODUCE SOFT LAW?

Art. 288 TFEU mentions two types of instruments that are explicitly described as non-binding: recommendations and opinions. This Article is part of a section of the TFEU entitled “The legal acts of the Union”, which seems to indicate that legal acts should not necessarily be binding, thereby confirming the existence, within EU law, of the category of soft law.

Recommendations are the typical instruments of EU soft law. Although recommendations do not have binding force for the Member States to whom they are addressed, they nevertheless in certain circumstances may be an aid to the interpretation of EU and national provisions.⁵ Recommendations, when addressed to the Member States, act as a kind of surrogate directive: they often lay down very detailed standards and encourage the Member States to comply with them, but any “implementing” national legislation is adopted on a voluntary basis.⁶ In several places in the TFEU, EU institutions are specifically allowed, or even required, to adopt recommendations and sometimes rather elaborate decision-making rules are provided for that purpose. This is the case, for example, in the recommendations of the Council setting out the broad guidelines of economic policy⁷ for the Member States, the recommendations on employment policy, and, as mentioned before, the recommendations on education policy.⁸ Apart from the cases in which specific Treaty provisions allow for, or require, the adoption of recommendations, Art. 292 TFEU also seems to grant to both the Council and the Commission a general power to adopt recommendations, independently from a particular basis laid out in one of the policy chapters of the TFEU. The institutional practice confirms this, as we can observe that both institutions adopt recommendations for which the only legal basis, mentioned in their preamble, is Art. 292 TFEU.⁹

⁵ Court of Justice, judgment of 13 December 1989, case C-322/88, *Salvatore Grimaldi v. Fonds des maladies professionnelles*, para. 18.

⁶ See, for example, Recommendation 2006/952/EC of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry.

⁷ Art. 121, para. 2, TFEU.

⁸ Art. 148, para. 4, TFEU.

⁹ For example, Commission Recommendation (EU) 2015/914 of 8 June 2015 on a European resettlement scheme. This recommendation deals with the resettlement of asylum seekers, but its legal basis is Art. 292 TFEU rather than, as one would expect, one of the articles in the Treaty chapter on immigration and asylum.

Yet, here as well the principle of conferral applies: the EU institutions cannot make recommendations on any random subject; the content of the recommendation must, rather, relate to one of the policy competences as defined elsewhere in the Treaties.

In addition to the opinions and recommendations, there are other types of soft law in the legal practice of the Union. A well-known category consists of the *notices, communications and guidelines* of the Commission, in which this institution sets out the framework for dealing with individual cases, for example in the field of competition and State aid, or describes the kind of Member State measures or behaviour which it considers to be compatible with EU law in a given area (such as the internal market freedoms).¹⁰ Although these instruments do not have any intrinsic binding force with regard to private parties, and they cannot deviate from the Treaty or secondary law,¹¹ they can – in combination with the principle of legitimate expectations – impose a self-limitation on the Commission with regard to its individual decision-making in the area covered by the guideline or notice;¹² and these communications and guidelines themselves can also be challenged in cases of conflict with fundamental rights or general principles.¹³

Sometimes, in the literature, the term soft law is extended to an even broader category of documents published by the various EU institutions (strategies, agendas, high level reports, green and white papers, work programmes, and so on) that all share the characteristic of being policy documents rather than normative instruments seeking to guide behaviour. Using the term soft law for those documents would be a misnomer, as they do not display any legal characteristics, whether hard or soft. They often announce or foreshadow legal developments, but are not sources of law themselves.

Now, if one examines the documentary output of the various OMC processes, it seems that very few of them can be considered as soft law. The one clear case of soft law can be found in the original domain of the OMC, namely employment policy, where the Council adopts annual guidelines addressed to the Member States and may also adopt recommendations as a follow-up measure if it considers that a Member State has not been sufficiently responsive to the guidelines.¹⁴ The EU institutions have, right from the

¹⁰ Examples of the former include: Commission Notice 2001/C 3/02, *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements*; Communication 2014/C 249/01 from the Commission, *Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty*; Communication 2012/C 8/03 from the Commission, *European Union framework for State aid in the form of public service compensation (2011)*. An example of the latter type is the Communication COM(2012) 261 of 8 June 2012 from the Commission on the implementation of the services directive.

¹¹ Court of Justice, judgment of 14 January 1997, case C-169/95, *Spain v. Commission*.

¹² See Court of Justice, judgment of 28 June 2005, joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and others v. Commission*, in relation to the Commission's fining policy in competition cases.

¹³ As for example in Court of Justice, judgment of 19 July 2016, case C-526/14, *Tadej Kotnik and others*.

¹⁴ See Art. 148 TFEU, respectively paras 2 and 4. For a discussion of the legal nature of the process, see D. ASHAGBOR, *The European Employment Strategy*, Oxford: OUP, 2005, chapter 5.

start, sought to enhance the normative force of these guidelines by adopting them in the form of a decision, which is an instrument of binding EU law.¹⁵ However, this “hard law” cover is deceptive, as the only thing imposed on the Member States by those decisions is that they shall “take into account” the guidelines set out in their annex.

Economic policy is, obviously, another domain where soft law is used frequently, although it does not go under the OMC flag but under that of the European Semester. The Social OMC, and its Social Protection Committee, contribute to the elaboration and subsequent monitoring of country-specific recommendations in social matters, but this, again, is not a product of the Social OMC itself but of the European Semester. For the rest, the Social Protection Committee is very actively engaged in data collection and reporting but it does not produce soft law measures of its own. In fact, it is very rare indeed to find soft law instruments being produced by OMC processes. If one looks, for example, at ET 2020 (which is the acronym adopted for the OMC Education and Training 2020), its principal output are the reports drawn up by its thematic working groups. These reports typically contain “guiding principles” which are submitted to the Member State governments, but it would go too far to call them soft law. For that term to be appropriate, the guidelines elaborated at working group level should be taken up in a formal instrument by one of the EU institutions, but this does not happen. The Commission occasionally publishes communications in the field of education, but these are policy documents and not soft instruments emanating from the OMC process as such.¹⁶ The Council and the Commission have summarized the state of play of the OMC process in a “Joint Report”, but this document is about organizing the OMC process and setting its priorities.¹⁷ It does not contain normative prescriptions; it is not soft law. The closest thing to a prescriptive norm are the education benchmarks which the Council adopted in 2009 when launching the ET 2020 process, but even there the Member States are merely “invited” to “consider, on the basis of national priorities” what they can do to help achieve those benchmarks.¹⁸

IV. CONCLUSION: IS THE OMC PART OF THE EU LEGAL ORDER?

The answer to the overall question of how, if at all, the OMC is part of the EU legal order is a complex one. First, in terms of EU competence, it seems clear that the OMC is not situated in a competence-free zone, and that the principle of conferral applies to the OMC as to any

¹⁵ For example, Council Decision (EU) 2015/1848 of 5 October 2015 on guidelines for the employment policies of the Member States for 2015.

¹⁶ The more recent such document is the Communication COM(2016) 941 of 7 December 2016 from the Commission, *Improving and modernising education*.

¹⁷ 2015 Joint Report 2015/C 417/04 of the Council and the Commission on the implementation of the strategic framework for European cooperation in education and training (ET 2020), *New priorities for European cooperation in education and training*.

¹⁸ Council conclusions of 12 May 2009 on a strategic framework for European cooperation in education and training (“ET 2020”). The benchmarks are listed in Annex I. The words quoted in the main text are on pp. 119/5 and 119/6 respectively.

other “action” of the EU. The OMC is not some kind of joker to be used by the EU institutions when the Treaty text has “forgotten” to confer competences on them. Yet, most of the actual OMCs are sufficiently embedded in the EU system of competences thanks to the fact that many TFEU articles generally state that the EU will encourage cooperation between the Member States. That generic language is broad enough to cover OMC processes.

In terms of the output of the OMC processes, the EUR-Lex webpage, cited in the introduction, is surely wrong to describe the OMC as a “form of soft law”. The OMC itself is neither an independent institution nor a legal instrument. It is an institutional *process* that produces policy that may or may not take a legal form: whereas some OMCs produce soft law, others do not produce any legal measures, whether hard or soft.

The general conclusion could thus be that the OMC is a form of EU-level cooperation that operates *within a legal framework*, defined by EU competences and the EU institutional balance, but that does not often use *legal tools*, either of the hard or soft variety, in its policy output.

