

# The meaning of the open method of coordination for the development of a social Europe

a legal analysis

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*---- please do not quote; work in progress ----*

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## 1 Introduction

This paper is actually the first chapter of my thesis in which the subject is introduced, *i.e.* the open method of coordination and its meaning for the development of a social Europe. It starts with a short account of the development of European social policies with a focus on the problems in finding the most suited means to govern these complex and politically sensitive policies (§2). The last development in this process is the open method of coordination (OMC). In paragraph three the OMC is further introduced by a historical account of its development as regulatory instrument and the three main rationales for its development. Paragraph four contains a literature review about the research that has been done so far, in particular concerning the legal aspects of the OMC. Based on the literature review a thesis about the OMC is posed and research questions are formulated (§5). This is followed by a description of the methodology applied in this thesis regarding the research questions. At the same time the out-line of the thesis is given (§6).

## 2 The creation of a social Europe and the open method of coordination

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.<sup>1</sup>

Although the initial aim of the European integration process was that of the creation of an internal market, the current goals of the EU clearly includes the creation of a social Europe. The initial idea of Delors in the 1980s was the creation of a single European social model, yet there is no evidence of the creation of a European welfare state to replace the national welfare states.<sup>2</sup> A generally accepted reason for this absence is that the development of European social policies is constrained by ‘the diversity of national welfare states, differing not only in levels of economic development and their ability to pay for social transfers and services but, even more significantly, in their normative

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<sup>1</sup> Article 3(3) TEU.

<sup>2</sup> Cf. Barnard (2006), *EC Employment Law*. Oxford: Oxford University Press, p. 49. See also: Barnard (1999), ‘EC “Social” Policy’, in Craig, P. and De Búrca, G. (eds), *The Evolution of EU Law*. Oxford: Oxford University Press, p. 479-516, in particular p. 496-497; Majone, G. (1993), ‘The European Community: Between Social Policy and Regulation’, 31:2 *Journal of Common Market Studies*, p. 153-170; and Teague, P. (2001), ‘Deliberative Governance and EU Social Policy’, 7:1 *European Journal of Industrial Relations*, p. 7-26, in particular p. 21.

aspirations and institutional structures.<sup>3</sup> Due to this diversity, the member states have been reluctant to compromise their sovereignty over social policy issues and forced the EU to be creative and flexible in reshaping the balance of power. The complexity of the social issues enhanced the necessity to search for more flexible means and integration techniques.<sup>4</sup>

The means and techniques used to create the internal market, *i.e.* market-making by way of negative integration and efficiency enhancing regulation, are less suited for the regulation of social policies which are traditionally, at national level, viewed as serving social justice or a market-correcting function.<sup>5</sup> The result is that the development of a European social policy is characterised as a process of trial and error in search for the best suited means and techniques to regulate social issues. Each development period has a key issue and a dominant form of regulation.<sup>6</sup> For instance, the key issue in the first period is that of the free movement of worker governed by coordination regulations. The second period, also called “the golden age” of social policy, addresses three issues, namely equality between man and women, health and safety in the workplace and certain aspects of labour law (collective redundancy, transfer of undertakings, and insolvency of the employer), which are governed by directives aimed at harmonisation by minimum standards.<sup>7</sup>

The down turn of this development is twofolded. Firstly, the focus on key issues has resulted in a patchwork of rules rather than a fully fledged social policy with welfare institutions and cradle to grave protection.<sup>8</sup> Secondly, the search for the best suited form of regulation is characterised by a shift from “hard” to “soft” intervention that involves a minimum of compulsory modification of both market outcomes and national policy choices.<sup>9</sup> These interventions by soft law are met with scepticism and considered to be

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<sup>3</sup> Sharpf, F. (2002), ‘The European Social Model: Coping with the Challenges of Diversity’, 40:4 *Journal of Common Market Studies*, p. 645-670, citations on p. 666. See for similar conclusion also: Schmidt, V.A. (2002), *The Futures of European Capitalism*. Oxford: Oxford University Press.

<sup>4</sup> Streeck, W. (1995a), ‘Neo-Voluntarism: A New European Social Policy Regime?’, 1:1 *European Law Journal*, p. 31-59; Streeck, W. (1995b), ‘From Market Making to State Building? Reflections on the Political Economy of European Social Policy’, in S. Leibfried and P. Pierson (eds), *European Social Policy. Between fragmentation and Integration*. Washington: the Brookings Institution, p. 389-431 (especially, p. 424). See also Trubek, D.M. and Mosher, J.S. (2003), ‘New Governance, Employment Policy, and the European Social Model’, in J. Zeitlin and D.M. Trubek (eds.), *Governing Work and Welfare in a New Economy*. Oxford: Oxford University Press, p. 33-58, in particular p.36.

<sup>5</sup> Barnard 2006, p. 51; Streeck 1995b, p. 339.

<sup>6</sup> This is clearly argued by Pochet, Ph. (2005), ‘The OMC and the Construction of Social Europe’, in Zeitlin, J. and Pochet, Ph., with Magnussen, L. (eds), *The Open Method of Co-ordination in Action*. Brussels: P.I.E.-Peter Lang S.A, p.37-82, in particular p. 38-39. See indirectly also the historical accounts of Heerma van Voss, G.J.J. 2003; and Barnard 2006

<sup>7</sup> See Pochet 2005, p. 40-41; Heerma van Voss, G.J.J. (2003), *Regelgeving Europees Sociaal Recht*. Den Haag: Sdu-uitgevers, p. 14-16.

<sup>8</sup> Barnard 2006, p. 49.

<sup>9</sup> Streeck, W. (1995a), ‘Neo-Voluntarism: A New European Social Policy Regime?’, 1:1 *European Law Journal*, p. 31-59; Streeck, W. (1995b), ‘From Market Making to State Building? Reflections on the Political Economy of European Social Policy’, in S. Leibfried and P. Pierson (eds), *European Social Policy. Between fragmentation and Integration*. Washington: the Brookings Institution, p. 389-431 (especially, p. 424).

inferior to interventions by hard law because they are presumed to create more rhetoric than normative effect.<sup>10</sup> Therefore developments within the social policy-field are regarded as symbolic, thereby preventing the formation of hard law and any genuine attempt to construct a coherent EU social policy.<sup>11</sup> In this context, it does not come as a surprise that the OMC, as the latest introduced new regulatory instrument to govern subjects like employment, social exclusion, and social protection, is controversially perceived.

In short, the OMC can be described as a soft law mechanism that supports the Member States in developing their own policies in order to achieve common objectives regarding a subject of common concern. Therefore, the OMC creates an iterative process in which it fosters mutual learning by the exchange of good practices and innovative approaches. Progress in achieving the common objectives is monitored via national action plans which are assessed in accordance with common criteria (indicators) which are defined on European level and priorities or targets which are defined by the Member States themselves. Compliance is ensured by peer pressure and the force of public opinion. As such, the OMC steers the policies of the Member States in the sense of outcomes (common objectives) and policy ideas (mutual learning), while respecting national diversities.<sup>12</sup>

For some scholars the OMC is an innovative breakthrough with superior capacity to solve the problems the EU faces in the field of social policy.<sup>13</sup> For others the OMC is a development which threatens European social policy. Accordingly, the move towards the OMC is at best a waste of time and at worst a smokescreen behind which the welfare state might be dismantled. Furthermore, it is argued that the move away from efforts to construct uniform social and employment standards across the EU will contribute to the gradual erosion of the programs and policies that constitute a social Europe.<sup>14,15</sup>

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<sup>10</sup> Borrás, S. and Greve, B. (2004), 'Concluding remarks: New method or just cheap talk?', 11:2 *Journal of European Policy*, p. 329-336; and Schäfer, A., 'A Critical Assessment of the Open Method of Coordination', unpublished manuscript – Max-Planck-Institute für Gesellschaftsforschung.

<sup>11</sup> Cf. Hatzopoulos, V. (2007), 'Why the Open Method of Coordination Is Bad For you: A Letter To the EU', 13:3 *European Law Journal*, p. 309-342; Trubek, D.M. and Trubek, L. (2005), 'The Open Method of Co-ordination and the Debate over "Hard" and "Soft" Law', in Zeitlin, J. and Pochet, Ph., with Magnussen, L., *The Open Method of Co-ordination in Action*. Brussels: P.I.E.-Peter Lang S.A., p. 83-103; and Kleinman, M. (2002), *A European Welfare State? European Union Welfare Policy in Context*. Basingstoke: Palgrave.

<sup>12</sup> See for a more elaborate description of the OMC §1.2. See among many others, also: Pochet 2005, p. 41; Sakellariopoulos, Th. (2004), 'The Open Method of Coordination: A Sound Instrument for the Modernization of the European Social Model', in Th. Sakellariopoulos and J. Berghman (eds.), *Connecting Welfare Diversity within the European Social Model*. Antwerpen: Intersentia, p. 55-92, in particular p. 56; and Vandenbroucke, F. (2002a), 'The EU and Social Protection: What Should the European Convention Propose?', *MPIFG Working Paper 02/6*, p. 9-10.

<sup>13</sup> E.g. Gerstenberg, O. and Sabel, C.F. (2000), 'Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?', in C. Joerges and R. Dehousse (eds.), *Good governance in Europe's Integrated Market*. Oxford: Oxford University Press, p. 289-341; and Vandenbroucke, F. (2002a), 'The EU and Social Protection: What Should the European Convention Propose?', *MPIFG Working Paper 02/6*, p. 10.

<sup>14</sup> Trubek, D.M., and Mosher, J.S. (2003), 'New Governance, Employment Policy, and the European Social Model', in J. Zeitlin and D.M. Trubek (eds.), *Governing Work and Welfare in a New Economy*. Oxford: Oxford University Press, p. 33-58, in particular p.33-34; Zeitlin, J. (2005a), 'Introduction', in Zeitlin, J. and

Despite the controversies, the OMC became in a relatively short period one of the most, if not the most important, instrument to govern social issues, in particular employment, social exclusion and social protection. The controversies surrounding the OMC and its rapid upsurge in governing social issues, made the OMC a much debated subject in social, political and legal science. Most of the early research is theoretical of nature and aims in getting a better understanding about what the OMC is or should be about and what can be expected from it. Most research of later date focuses on the actual practice of the OMC, in particular whether or not the OMC can live up to the expectations that are created in the early theoretical accounts about the OMC.

Because there is already a lot of research done about the OMC, this introduction continues with a review of this research (§3).

### **3 The open method of coordination**

The first part of this paragraph holds a historical account of the development of open coordination as a means explicitly defined by the Treaty to govern a specific subject to a general instrument to govern EU policies (§3.1). In the second part describes the rationales for the development of open coordination in general and the expectations this has laid upon the OMC accordingly (§3.2).

#### **3.1 Development of open coordination as general means of EU governance**

Although the European Council of March 2000 introduced the OMC as a new instrument, its origins date back to the realisation of the EMU in 1992. In the realm of the EMU the Stability and Growth Pact (SGP) was adopted in order to “safeguard sound public finances as a means to strengthen the conditions behind price stability oriented monetary policies.”<sup>16</sup> The SGP consists of three basic tools, also called competences: 1) hard measures regarding the Excessive Deficit Procedure, i.e. mechanisms, procedures and specific rules concerning excessive budget deficit and specific, legally binding, sanctioning processes to be followed if deficits become excessive; 2) broad economic policy guidelines (BEPGs) through which the Council coordinates the national economic policies of the member states, in particular of those participating the Euro; and 3) multilateral surveillance.<sup>17</sup> The use of soft, non-binding guidelines in combination with multilateral surveillance is actually the first form of open coordination.

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Pochet, Ph., with Magnussen, L., *The Open Method of Co-ordination in Action*. Brussels: P.I.E.-Peter Lang S.A., p. 19-33, in particular p. 23; and Goetschy, J. (2003), ‘the European Employment Strategy, Multi-level Governance, and Policy Coordination: Past, Present and Future’, in J. Zeitlin and D.M. Trubek (eds.), *Governing Work and Welfare in a New Economy*. Oxford: Oxford University Press, p. 59-87.

<sup>15</sup> See for a more elaborate description of the controversies: Kröger, S. (2008), *Soft Governance in Hard Politics. European Coordination of Anti-Poverty Policies in France and Germany*. Wiesbaden: VS Verlag für Sozialwissenschaften, p. 42-44.

<sup>16</sup> Th. Sakellariopoulos, ‘Chapter II. The Open Method of Coordination: A Sound Instrument for the Modernization of the European Social Model’, in Th. Sakellariopoulos and J. Berghman (eds.), *Connecting Welfare Diversity within the European Social Model* (2004), pp.55-92 (p.67).

<sup>17</sup> Article 121 TFEU (ex article 99 TEC). See for the explicit measures on:

This form of open coordination is further developed in the context of European social policies. Despite all the difference between the Member States, they also recognised that they share some social values, structural problems and macroeconomic difficulties. For instance, the then fifteen Member States were all confronted with persistent high levels of unemployment rates during the 1980s and 1990s, which emerged the aspiration and need for a coordinated response at European level. Through a slow process of agenda-setting and several European Council summits,<sup>18</sup> the European Employment Strategy (EES) gained its currently familiar shape as codified in article 148 TFEU (ex article 128 TEC). With its combination of modes of governance and legally non-binding integration instruments, the EES is generally considered to be the predecessor of the OMC as introduced in the Lisbon Strategy.<sup>19</sup> Moreover, the OMC as introduced in the Lisbon Strategy is a blue print of the EES.

The introduction of the OMC by the European Council of March 2000, was thus not the introduction of a new instrument, rather it was an exercise of giving a general name to an instrument that was already used to govern two specific by the Treaty defined policies. Since it is only from this moment on that this form of open coordination got a general name and became known as a general instrument to govern European policies, it could be considered as the birth of the OMC.

In the Lisbon Strategy the OMC is described as ‘the means of spreading best practice and achieving greater convergences towards the main EU goals’.<sup>20</sup> It is designed as a decentralised approach to help the member states to develop their own policies<sup>21</sup> and therefore involves:

- fixed guidelines with specific timetables for achieving the goals;
- establishing, where appropriate, quantitative and qualitative indicators and benchmarks;
- translation of the European guidelines into national and regional policies by setting specific targets and adopting measures; and
- periodic monitoring, evaluation and peer review organised as mutual learning.

These elements of soft law and governance tools are not just isolated elements, yet, ideally, they are sequential related to each other. Thus, open coordination

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[http://ec.europa.eu/economy\\_finance/about/activities/sgp/sgp\\_en.htm](http://ec.europa.eu/economy_finance/about/activities/sgp/sgp_en.htm). See also B. van Riel and A. Metten, *De keuzes van Maastricht. De hobbelige weg naar de EMU*, Assen: Van Gorcum (2000), pp.56-58; and D.M. Trubek, P. Cotrell & M. Nance, “Soft Law”, “Hard Law”, and European Integration: Toward a theory of Hybridity’, 02/05 *Jean Monnet Working Paper* (2005), pp.21-26.

<sup>18</sup> Of which the most important summits in Edinburgh in 1992, Essen in 1994, and in 1997 resp. Amsterdam and Luxembourg.

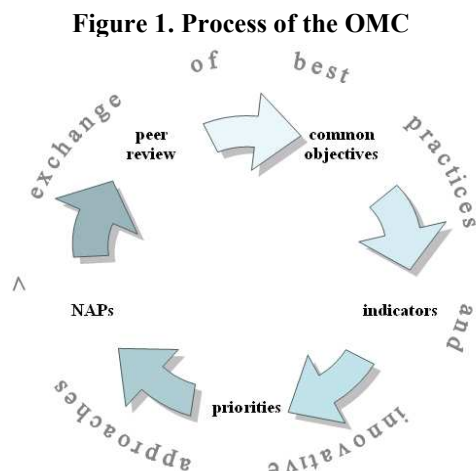
<sup>19</sup> See among many other texts: Commission Green (COM (93) 551) and White (COM (94) 333) papers on Social Policy; [http://ec.europa.eu/employment\\_social/employment\\_strategy/develop\\_en.htm](http://ec.europa.eu/employment_social/employment_strategy/develop_en.htm); Van Riel & Metten (2000), pp. 125-139; Szyszczak (2001), pp. 1125-1144; Pochet (2005), in general; Trubek & Trubek (2005a), pp. 347-351; and Schäfer (2006), pp. 204-206.

<sup>20</sup> European Council of Lisbon, Presidency Conclusions of March 2000, par. 37 (Lisbon Strategy) available on: [http://europa.eu/european-council/index\\_en.htm](http://europa.eu/european-council/index_en.htm).

<sup>21</sup> Par. 38 Lisbon Strategy.

proceeds from common objectives establishing a field of common concern. Progress towards objectives can be measured once common indicators are established. Indicators allow comparison of performance of member states that is, in turn, used to set targets. Once targets are set member states or the EU draw up action plans to meet the objectives. Peer reviewing allows badly performing member states to draw lessons from best practice.<sup>22</sup>

This is illustrated in figure 1.



The OMC as general instrument to govern European policies differs from its predecessors in two ways. Firstly, before its introduction, open coordination was only applied when it was explicitly defined in the Treaty, which is the case with BEPGs and EES. By giving a general name to this method of open coordination, this means of governance became available as a general means to govern subjects on European level. In particular for those subjects that are part of the Lisbon Strategy, among which social issues such as social inclusion, social protection and education.

Secondly, the form of open coordination of the economic policies and employment is explicitly defined in the Treaty. The form of open coordination by the Lisbon Strategy is “open” since it only defines the “ingredients” of open coordination, yet the “recipe” differs depending on the needs of the subject that will be governed by the means of open coordination.<sup>23</sup> For instance, the OMC that is used to govern the combat against social exclusion uses a far more richer recipe, than the OMC used to govern the social protection issues pensions and healthcare.<sup>24</sup> Moreover, some “ingredients” have different flavours. For instance, peer review meetings organised in the context of the EES are hosted by a Member States that presents a good practices to its peers, while peer review

<sup>22</sup> Laffan and Shaw 2005, p. 15.

<sup>23</sup> Cf Vandenbroucke 2001; Radaelli 2003.

<sup>24</sup> See: Lafan, B. and Shaw, C. (2005), ‘Classifying and Mapping OMC in different policy areas’, 02/D09 NEWGOV-New Modes of Governance Project 2: Capacity Building through the Open Method of Co-ordination, p. 14.

meetings organised in the context of social inclusion are hosted by a Member State that wants to learn from good practices of its peers.<sup>25</sup> Consequently, in practice there is not one general OMC, yet there are as many OMCs as there are subjects governed by the means of open coordination.

### **3.2 Rationales for and expectation of the open method of coordination**

The completion of the EMU in 1992 is not only taken as the starting point for the development of the OMC as method, it is also the moment in which the first rationale for the development of the OMC has its roots. After all, with the completion of the single market, the integration of the EU did not stop, yet it expanded into other areas. This is particularly the case in the economic policy areas and the field of social policy, which includes employment, social inclusion, pensions, healthcare and education. As such, the European integration process touched upon the policy fields that belong to the core areas of the welfare state. Each member state has its own ideal of what sort of welfare state it would like to be. Although, the member states welfare ideals can be grouped by similarities or family resemblance and they are faced with common problems, such as high levels of unemployment, there is also lot of difference on how these policies are shaped and how those problems are governed within the member states.<sup>26</sup> These differences call for more flexibility in EU policies, in the sense that the aim of the EU policies is convergence, while allowing differences, such as the different welfare ideals. Moreover, the preservation of their differences made the member states reluctant to compromise their sovereignty over these policy areas. A reluctance that is even enhanced by the member states' lack of confidence in the capacity of the EU institutions to self-restrain their delegated competence.<sup>27</sup>

Diversity and flexibility are important aspects of the second rationale for the development of the OMC. After the end of the Cold War in 1989, the outlook of the enlargement of EU-15 with 12 eastern- and central European countries included the prospect of increased intra-EU diversity.<sup>28</sup> In order to cope with this increased diversity, many institutional reforms enshrined in the Treaties of Amsterdam, Nice and Lisbon are concerned with reshaping the balance of power. For instance, enhanced cooperation, the possibility to opt-out, and the use of qualified majority voting in the council instead of unanimity. However, none of these institutional reforms form 'a feasible balance between the need to respect diversity among member states, and the unity – and meaning – of common flexibility'.<sup>29</sup>

The double challenge of the legitimacy of EU activities is the third rationale for the emergence of the OMC. The first challenge follows from the member states' acknowledgement that they are faced with the same problems regarding which they are convinced that the EU is the most appropriate level to discuss and resolve these problems.

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<sup>25</sup> See also: Radaelli 2003, p. 31-38.

<sup>26</sup> Cf. Kleinman 2002, p. 28-58 (which covers chapter 2); Mosher and Trubek 2003, p. 66; and Schäfer 2004, p. 14.

<sup>27</sup> Cf. Majone 2005, p. 70-71 and Streeck 1995.

<sup>28</sup> Cf. Borrás and Jacobsson 2004, p. 185.

<sup>29</sup> Borrás and Jacobsson, p.186; Scharpf 2001; and Sakellariopoulos 2004, p.64.

Nonetheless, they are reluctant to provide the EU with the necessary competence to govern these problems, which is in particular the case with social policy.<sup>30</sup> Consequently, the legitimacy of EU initiatives is challenged by a weak or sometimes even a lack of competence.<sup>31</sup> The second challenge derives from the legitimacy crisis of the 1990s and early years of 2000, also known as the democratic deficit. This crisis was not only a matter of representation and the role of the European parliament, it was also a matter of efficiency, transparency and accountability.<sup>32</sup>

Since these are rationales for the development of the OMC, the OMC is obviously supposed to meet all the requirements to deal with the obstacles addressed by the rationales. To be more explicit, the expectation of the OMC is that it can deal with the political sensitivity of social issues, the diversity between the Member States and the double challenge of legitimacy, *i.e.* weak competence to govern social issues on European level and democratic deficit.

In theory the OMC should be able to meet these expectations, since ‘it does not seek to establish a single common framework’, instead it puts ‘the EU Member States on a path towards achieving common objectives, while respecting different underlying values and arrangements’.<sup>33</sup> Or, as described by Zeitlin, the OMC addresses ‘common European values while respecting national diversity because it encourages convergence of objectives, performance, and broad policy approaches, but not of specific programmes, rules, or institutions’.<sup>34</sup> Consequently, the OMC needs no strong competence to regulate the laws and policies of the Member States. As such it should be able to meet the first challenge of legitimacy. With its decentralised approach and the inclusion of stakeholders, it should also be able to deal with the second challenge of legitimacy, *i.e.* the democratic deficit.

In theory, the OMC is thus hailed as a promising instrument to deal with the obstacles in European social policies. This might also explain the rapid upsurge of the OMC in the field of social policy. However, the theoretical successfulness of the OMC is based on the full application of the OMC as defined in the Lisbon Strategy. Thus, involving all the “ingredients”, a full decentralised approach including active participation of all stakeholders and the creation of an epistemic community in which experimental mutual learning takes place. In practice, though this can be completely different, for example because each OMC is designed accordingly to the needs of the subject it governs. Therefore, it is doubtful whether the OMC can actually live up to its expectations.

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<sup>30</sup> Streeck 1995.

<sup>31</sup> Scott and Trubek 2002, p. 7; Mosher and Trubek 2003, p. 66; and Szyszczak 2006, p. 489-491.

<sup>32</sup> See also Borrás and Jacobsson 2004, p. 187; Sakellaropoulos 2004, p. 56-57; and European Commission COM(2001) 428 final.

<sup>33</sup> De la Porte 2002, p. 39. See about this also: Mosher 2000, p. 7-8; Scott and Trubek 2002, p. 5; and Szyszczak 2006, p. 501.

<sup>34</sup> Zeitlin 2005, p. 448. (boek met Pochet)

## 4 Review research about the OMC

Since the interest of this thesis is for the legal aspects of the OMC, the literature review is confined to the literature in legal and political science. The research in that literature can be divided in research that is concerned with its historical development as a general governance instrument (§4.1), the conceptualisation of the OMC (§4.2) and in the context of European integration in general (§4.3).

### 4.1 Genesis and development of the OMC

As being a new method with a distinctive approach compared to the Community Method (first way)<sup>35</sup> and the Social Dialogue (second way)<sup>36</sup>, much explanation needed to be done about this third way approach.<sup>37</sup> Much early research is therefore devoted to the genesis and development of the OMC. Generally, these historical accounts trace the steps of the idea of open coordination in economic policy, via the employment strategy to its introduction in the Lisbon Strategy as fully developed general method.<sup>38</sup> A large part of the historical accounts also includes the rationales for the development of the OMC. Some literature include different rationales,<sup>39</sup> however, in most of the literature the focus is on a (part of a) rationale that serves the purpose of the research best.<sup>40</sup> For instance, Ashiagbor focuses on the flexibility of the OMC regarding diversity of policy outcomes when she examines compliance with the employment strategy.<sup>41</sup> Scott and Trubek, to give another example, find a strong basis in the legitimacy crisis in their explanation of the emergence of the OMC as a typical instrument of new governance. In this way, the historical account of the rationale for the development of the idea of open coordination sets the context for the respective research.

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<sup>35</sup> Community Method is characterised by the relationship of the institutional actors: the Commission as initiator of legislation; the European parliament jointly with the Council as legislator; and the European Court of Justice to ensure compliance.

<sup>36</sup> Social Dialogue is characterised by the involvement of social partners who negotiate agreements that are initiated by the Commission and can get *erga omnes* effect by a decision of the Council. See also articles 154 and 155 TFEU.

<sup>37</sup> See for these three approaches, albeit in different terms, also: Szyszczak 2001, p. 1127-1128; and Senden, L.A.J. with Tahtah, A. (2008), 'Reguleringsintensiteit en regelgevingsinstrumentarium in het Europees Gemeenschapsrecht. Over de relatie tussen wetgeving, soft law en de open methode van coördinatie', *Sociaal Economische Wetgeving*, nr. 2, p.43-57. See for a description of alternative approaches compared to the Community Method: Scott and Trubek 2002, p.2-5.

<sup>38</sup> Like in § 2.1. See: Goetschy 1999; van Riel and Metten 2000; Szyszczak 2001, p. 1132-1139; Hodson and Maher 2001; Sakellariopoulos 2005, p.10; and Hatzopoulos 2007, p. 311. Schäfer (2004, p. 4-7) even traces the development of the idea of open coordination outside the context of the EU, namely the multilateral surveillance procedures of the IMF and OECD.

<sup>39</sup> E.g. Borrás and Jacobson 2004, p. 185-187.

<sup>40</sup> E.g. Heerma van Voss 2004, p. 280-281 (focus on sensitivity and diversity); Kaiser and Prange 2004, p. 250 (focus on legitimacy); Pochet 2005, p. 52 (focus on diversity and flexibility); De Búrca and Scott 2006, p. 4-6 (focus on diversity and flexibility).

<sup>41</sup> Ashiagbor 2004, p. 35-37.

## 4.2 Conceptualisation of the OMC

In addition to the historical accounts of the development of the OMC as a general instrument of European integration, the OMC is conceptualised. A rather straight forward and superficial, yet often utilized, way of conceptualising the OMC, is by defining it by its features as introduced in the Lisbon Strategy.<sup>42</sup> Although pragmatic, in the sense that it gives a quick understanding about what the features of the OMC are, it does not tell much about what the OMC is about. Therefore, a more substantial conceptualisation is needed. This is often done based on the ontology of the OMC and, in addition, by its (legal) nature.

Based on the ontology of the OMC, there are many ways the OMC can be conceptualised,<sup>43</sup> however, since the OMC is commonly considered as archetypal of new governance, a common way of conceptualising the OMC is by defining the concept of “new governance”. The concept “new governance” is not a settled one, yet, generally it is defined by contrasting it with the traditional mode of governance used in the context of the EU, *i.e.* the Community Method (CM). Trubek and Mosher, for instance, define new governance as a move from top-down government with uniform and legally binding rules, towards more flexible and participatory approaches of governance.<sup>44</sup> De Búrca and Scott have formulated a more pragmatic concept of “new governance”, entirely defined by its characteristics:

New governance is an approach that ‘places considerable emphasis upon the accommodation and promotion of diversity, on the importance of provisionality and revisability’, and ‘on the goal of policy learning’. Furthermore, new governance is an approach that ‘generally encourages or involves the participation of affected actors (stakeholders)’, emphasises transparency, ongoing evaluation and review, and voluntary or legally non-binding norms. New governance is also an approach that operates through a network of which its centre facilitates an infrastructure for coordination or exchange between the constituent parts.<sup>45</sup>

Although, the OMC itself, as archetypal of “new governance”, is hardly defined in this manner, the “new governance” characteristics of the OMC do play an important role in the research about the OMC.<sup>46</sup> For instance, all the contributions in the book edited by Zeitlin and Pochet, with Magnussen,<sup>47</sup> not only try to find out whether the OMC is of influence on the national policies, but also whether it actually causes changes in governance and policy making and in participation.

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<sup>42</sup> *E.g.* Vandenbroucke 2002, p. 9-11; Laffan and Shaw 2005, p. 15; Hatzopoulos 2007, p. 312.

<sup>43</sup> *See* Laffan and Shaw 2005, p. 4-7.

<sup>44</sup> *Cf.* Trubek and Mosher 2003, p. 33; and De Búrca and Scott 2006, p. 2-4, who call this “definition by contrast”.

<sup>45</sup> De Búrca and Scott 2006, p. 3. *See* for a similar approach also: C. Joerges, I-J Sand and G. Teubner (2004), *Transnational Governance and Constitutionalism*. Oxford: Hart Publishing.

<sup>46</sup> *E.g.* Hatzopoulos (2007, p. 312) recognizes the OMC as multi-level process of governance.

<sup>47</sup> (2005) *The Open Method of Co-ordination in Action*. Brussels: P.I.E.-Peter Lang S.A. *See* in particular the Conclusion written by Zeitlin, p. 447-503.

In addition to conceptualisation by its ontology, the OMC is also conceptualised by its (legal) nature. It is generally accepted that the OMC is voluntary and legally nonbinding. Nonetheless, it is argued, or at least suggested, that the OMC is part of the legal ambit, since it is ‘a potentially important normative system’.<sup>48</sup> In general there are many (philosophical) theories about what law is and does and when a rule ceases to be law. Although, in theory it would be possible to create as many clarifications as there are legal theories,<sup>49</sup> in practice there are two legal theories that dominate the doctrinal debate: the theory of reflexive law<sup>50</sup> and a pragmatic approach of soft law in international law.<sup>51</sup>

It is not surprisingly that the theory of reflexive law is one of the two most dominant theories about law that dominate in the conceptualisation of the OMC, since it is closely linked to theories about new governance.<sup>52</sup> The essence of reflexive law is “the acknowledgement that regulatory interventions are most likely to be successful when they seek to achieve their ends not by direct prescription, but by inducing ‘second order effects’ on the part of the social actors.”<sup>53</sup> Such indirect legal regulation is more likely to lead to flexible solutions. Furthermore, it provides a framework, a set of background rules, leaving actors to operate, deliberate or bargain ‘in the shadow of the law’.<sup>54</sup>

The pragmatic approach of soft law in international law is not so much used to conceptualise the OMC,<sup>55</sup> rather it is used as an argument in the more general debate about “hard” versus “soft” law.<sup>56</sup> This is in particular the case in the context of the shift of hard intervention towards soft interventions in European social policies.

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<sup>48</sup> Trubek and Trubek 2005, p.83.

<sup>49</sup> See in general about this Kelly 1992 and in respect of legal theories on international law Koskeniemi 2005.

<sup>50</sup> Ashiagbor 2005, p. 217-226; R. Rogowski (2006), ‘Reflexive Coordination’, *Emile Noel Forum Paper*; O. De Schutter and S. Deakin (2005), *Social Rights and Market Forces: is the Open Coordination of Employment and Social policies the Future of Social Europe?* Bruxelles: Bruylant; J. Lenoble and M. Maesschalck (2003), *Toward a Theory of Governance: The Action of Norms*. The Hague: Kluwer Law International;

<sup>51</sup> With the exception of Senden, L. (2004), *Soft Law in European Community Law*. Oxford: Hart Publishing, soft law as concept is hardly debated within the European context (*cf* De La Rosa 2007, p. ), however, it is in the context of international law. Since the EU is a regional international organisation, it is not uncommon to apply the international debate about soft law also to the EU. *E.g.* Wellens and Borchardt 1989; and Trubek, Cotrell and Nance 2005.

<sup>52</sup> See for this linkage in particular: Joerges, Sand and Teubner 2004; and J. Lenoble 200, p. 25.

<sup>53</sup> C. Barnard and S. Deakin (2000), ‘In search of Coherence: social policy, the single market and fundamental rights’, 31:4 *Industrial Relations Journal*, p. 341.

<sup>54</sup> G. Teubner (1987), as cited in Ashiagbor 2005, p. 217, *ft nt.* 128.

<sup>55</sup> *E.g.* De la Rosa, S. (2007), *La méthode ouverte de coordination dans le système juridique communautaire*. Bruxelles: Bruylant, in particular p. 251-327 (chapitre 2 La dimension normative de la méthode ouverte de coordination); Trubek, D.M., Cotrell, P. and Nance, M. (2006), “‘Soft Law’, ‘Hard Law’ and European Integration: Toward a Theory of Hybridity”, in G. de Búrca and J. Scott (eds.), *Law and New Governance in the EU and the US*. Oxford: Hart Publishing, p. 65-94.

<sup>56</sup> *E.g.* Trubek, D.M. and Trubek, L. (2005), ‘The OMC and the Debate over “Hard” and “Soft” Law’, in J. Zeitlin and Ph. Pochet, with L. Magnussen (eds.), *The Open Method of Co-ordination in Action*. Brussels: P.I.E.-Peter Lang S.A, p.83-103.

### 4.3 OMC and the process of European integration

Since the OMC is one of the instruments used in the European integration process, most research is undertaken within the context of that process. This research is done from two angles: the first angle is referred to as institution or capacity building (§4.3.1) and the second one is referred to as “Europeanization” (§4.3.2).

#### 4.3.1 Capacity building

European integration research concerned with capacity building tries to clarify our understanding of the OMC by mapping what powers and means the European actors can use to integrate the policies and laws of the member states.<sup>57</sup> In other words, capacity building is about the bottom-up process of institution building and political integration at the European level.<sup>58</sup> More specifically, capacity building from a mainly legal perspective is concerned with two issues. Firstly, it is concerned with the issue of competence of the European Union to further European integration regarding a certain subject. Second, following the competence, capacity building is concerned with either, the introduction of new executive, legislative and judicial powers and the creation of new institutions, committees or agents, or the adjustment of the powers and tasks of the established European actors.<sup>59</sup>

The issue of competence in the doctrinal debate is dictated by the fact that the OMC is often applied to govern subjects regarding which the EU has weak or no competence. This issue is divided in two kinds of research. The first derives from the sociological and political doctrine and is concerned with clarifying why a certain subject is governed on EU-level. It is this kind of research that addresses the rationales for the introduction and the upsurge of the OMC in certain policy areas, among which employment and social protection. As such this research includes considerations about legitimacy, in the sense of the democratic deficit regarding the involvement of the EU, and the subsidiarity principle.<sup>60</sup> In line with these considerations, it is further explored whether or not the OMC is the most appropriate instrument to be applied.<sup>61</sup> The combination of these clarifications provides the EU the political competence for the use of the OMC regarding the respective subjects. In other words, it provides the arguments why the EU could and/or should govern the respective subject, and, more particular, why it could and/or should be governed by means of the OMC.

The second kind of research deals with competence in the legal sense, *i.e.* the legal base to govern a certain subject by the OMC. The core issue in this research is whether or not the OMC could and should be applied to govern subjects regarding which the Treaty provides a weak or no legal base at all. Goetschy, for instance, argues that the OMC

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<sup>57</sup> Cf. M. O’Neil, *The politics of European Integration. A Reader* (Routledge, 1996), p. 81. See also Nugent 2003, p.487; and Bulmer 2007, p.48.

<sup>58</sup> *Idem.*

<sup>59</sup> Cf. Kaeding 2007, p. 24, who describes this in somewhat similar words regarding European integration.

<sup>60</sup> *E.g.* Vandenbrouck 2002, p. 3-7; Moreno and Palier 2004; Hatzopoulos 2007, 318-319.

<sup>61</sup> *E.g.* De la Porte (2002), ‘Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?’, 8:1 *European Law Journal*, p. 38-58.

could be used in cases where the EU has weak or no competence.<sup>62</sup> Szyszczak on her turn argues that this should not be done since it results in a competence creep which is a doubtful development.<sup>63</sup>

The second sort of research concerned with capacity building – institutions and regulatory systems – examines the OMC in contrast or comparison with the traditional Community Method (CM). In this research the newness of the OMC is stressed and explained. Typical for this kind of research is the development of theories to clarify the functioning of the integration instrument. Regarding the OMC there are two dominant theories: the ‘gap-thesis’ and the ‘hybridity-thesis’.

De Búrca and Scott describe that the gap-thesis

‘attests to the imperviousness of law in the face of new governance, and to the existence of a gap between formal law and the practice of new governance. According to this thesis, formal law, including constitutional law, is largely blind to new governance.’<sup>64</sup>

Further they explain that the gap-thesis stands for the idea that

‘law either has not ‘caught up with’ developments in governance, or it ignores developments which do not conform to its presuppositions, structures and requirements.’<sup>65</sup>

Consequently, so they argue, the gap-thesis represents two related strands:

- 1) law resists the new governance phenomenon, meaning that law not only ignores the existence of experimental forms of governance, but through its blindness and non-recognition it may even operate to curtail and inhibit such experimentation; and
- 2) law is confronted with a reduction of its capacity, which is mainly used to express concerns that new governance may evade traditional legal mechanisms for securing accountability, or that it may circumvent important political and constitutional constraints and commitments.<sup>66</sup>

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<sup>62</sup> Goetschy, J. (2003), ‘The European Employment Strategy, Multi-level Governance, and Policy Coordination: Past, Present and Future’, in Zeitlin, J. and Trubek, D.M. (eds.), *Governing Work and Welfare in a New Economy. European and American Experiments*. Oxford: Oxford University Press, p. 59-87, in particular, p. 83.

<sup>63</sup> Szyszczak, E. (2006), ‘Experimental Governance: the Open Method of Coordination’, 12:4 *European Law Journal*, p. 486-502, in particular p. 489-491 and 501.

<sup>64</sup> De Búrca and Scott 2006, p. 4. See about the gap-thesis also: Scott, J. and Trubek, D.M. (2002), ‘Mind the Gap: Law and New Approaches to Governance in the European Union’, 8:1 *European Law Journal*, p. 1-18.

<sup>65</sup> *Idem*.

<sup>66</sup> *Idem*, p. 5-6.

To make the gap between the premises and values of traditional EU law and those of new governance more explicit, Scott and Trubek have contrasted them, which is cited in table 1.<sup>67</sup>

**Table 1 traditional conception of EU law contrasted with new governance**

EU law	New governance
Looks for a unitary source of ultimate authority	Predicated upon a dispersal and fragmentation of authority, and rests upon fluid systems of power sharing
Posits hierarchies, and places courts at the centre of systems of accountability	Posits heterarchy, and often looks outside of the courts in seeking to secure real accountability
Appears to rest upon a clear distinction between rule making on the one hand, and rule application and implementation on the other	Accepts that the distinction in rule-making and rule application and implementation must break down as indeterminate and flexible rules are adapted to meet new challenges and resolve unexpected problems
Might see itself as predicated upon existing knowledge	Places emphasis upon the need to facilitate the continuous generation of new knowledge(s)

Such a “gap” is also acknowledged between the OMC and the traditional EU soft law. Borrás and Jacobsson have contrasted this as cited in table 2.<sup>68</sup>

**Table 2 traditional EU soft law contrasted with the open method of coordination**

Traditional EU soft law	Open method of coordination
Supranational approach: the Commission and the Court of Justice have a dominant role	Intergovernmental approach: the Council and the Commission have a dominant role
Administrative monitoring	Political monitoring at the highest level
Weak and ad hoc procedures	Clear procedures and iterative process
No explicit linking of policy areas	Systematic linking across policy areas
No explicit linking of EU/national levels	Interlinking EU and national public action
Does not explicitly seek participation	Seeks the participation of social actors
No explicit goal of enhancing learning is stated	Aims at enhancing learning processes

The second dominant theory, the hybridity-thesis, is concerned with the relationship between law and new governance, since it acknowledges the co-existence and engagement of law and new governance, it explores the different ways of securing their fruitful interaction and positions law and governance as mutually interdependent and mutually sustaining. Hybridity is conceived primarily in terms of the interaction of hard and soft law in which they potentially play off each others strengths and mitigate one another’s weakness.<sup>69</sup> Trubek and Trubek, in a more narrow approach, discern three varieties of coexistence of new governance (soft law) and traditional regulation (hard law) operating in the same policy domain (table 3).<sup>70</sup>

<sup>67</sup> Scott and Trubek 2002, p. 8.

<sup>68</sup> Borrás, S. and Jacobsson, K. (2004), ‘The open method of co-ordination and new governance patterns in the EU’, 11:2 *Journal of European Public Policy*, p. 185-208 (citation p. 188).

<sup>69</sup> De Búrca and Scott 2006, p. 6. See in particular the contribution of Trubek, D.M., Cotrell, P. and Nance, M., ‘Soft Law’, ‘Hard law’ and EU Integration’, p. 65-94.

<sup>70</sup> Trubek, D.M. and Trubek, L. (2006), ‘New Governance and Legal Regulation: Complementarity, Rivalry or Transformation’, *paper presented at the conference on “Law in New Governance”*. University College, London, p. 4 and footnote 4 on page 6 where they note that, compared to the definition of De Búrca and

**Table 3 varieties of coexistence of new governance and traditional regulation**

Complementarity	Two systems working for common goals
Rivalry	Two systems competing for dominance
Transformation (hybridity)	Systems merge into new hybrid process

Each variety of coexistence has several constellations. An example of complementarity can be seen in the efforts of the EU to combat discrimination against women in the workplace which is governed by a mutually interdependent recourse to hard and soft law. In this example directives establish legal rights while the OMC employs guidelines to foster national policies that will discourage gender discrimination and increase female labour market participation, and thirdly the social fund complements both as it provides funding for projects that further the general goal of equal access to work for women.<sup>71</sup> Rivalry is for instance the case if new governance is a substitute for legal regulation, for example because the function of the legal rule is unsatisfactory.<sup>72</sup> Transformational constellation occurs for instance when new governance is used to interpret or specify legal rules<sup>73</sup> or when (hard) law creates minimal standards that function as ‘default penalty’ to be complied with in case of failure to conform to demands of new governance.<sup>74</sup>

Coexistence can occur by design, which is the case when a new mode of governance is introduced with the intent of displacing older forms, a new governance process is established as a prerequisite of legislation, or when it is allowed as an opt-out from legal regulation on certain conditions.<sup>75</sup> But it can also occur unintentionally, for instance when the creation of a newer mode makes it hard to deploy traditional modes that wither away,<sup>76</sup> or it evolves as need is perceived and new processes are crafted.<sup>77</sup>

Both these theories give the impression that the OMC has really something to offer in addition to the other integration instruments, in particular the legally binding regulations and directives. At least that is when it comes to European institution-building, whether this is also the case on the national level is a question that is examined from the second angle of European integration research: Europeanization.

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Scott 2006, p. 6, they have narrowed the term hybridity to hybrids as instances of transformation. The latter is for De Búrca and Scott a separate, third thesis concerned with new governance (p. 9-10).

<sup>71</sup> Kilpatrick, C. (2006), ‘New EU Employment Governance and Constitutionalism’, in G. de Búrca and J. Scott (eds.), *Law and New Governance in the EU and the US*. Oxford: Hart Publishing, p. 121-152. See with particular reference to complementarity: De Búrca and Scott 2006, p. 6; and Trubek and Trubek 2006, p. 6-7.

<sup>72</sup> Trubek and Trubek 2006, p. 6.

<sup>73</sup> Trubek and Trubek 2006, p. 10; De Búrca and Scott 2006, p. 8 call this instrumental or developmental hybridity.

<sup>74</sup> Trubek and Trubek 2006, p. 11; De Búrca and Scott 2006, p. 9 call this ‘default hybridity’.

<sup>75</sup> Trubek and Trubek 2006, p.11; they call this form of coexistence ‘integration planned *ex ante*’.

<sup>76</sup> Trubek and Trubek 2006, p. 4-5.

<sup>77</sup> Trubek and Trubek 2006, p. 12-14; they call this form of coexistence ‘*ex post* integration’.

### 4.3.2 Europeanization

When the European capacity building is in place its activities have to feed back into the national systems.<sup>78</sup> After all, ‘European integration remains an incomplete project as long as European rules are not implemented according to their attentions’.<sup>79</sup> This already gives a hint what ‘Europeanization’ is about: the impact of EU activities on the Member States.<sup>80</sup> More specific, it is about the top-down relation between the European institutions and regulatory systems and those of the Member States.<sup>81</sup> As such, it connects national policies and legislation with European policies and legislative activities.

To figure out how the OMC “feeds back” into the national level much use is made from country case-studies. Given the high expectations laid upon the OMC much attention is paid to the question ‘whether it can deliver measurable performance improvements in relation to agreed objectives and metrics’.<sup>82</sup> In particular it is searched for causal relationships between the OMC and domestic changes in policy and legalisation. Issues that are addressed in this kind of research are for instance: substantive policy change (including broad shifts in policy thinking); procedural shifts in governance and policy making (including administrative reorganisation and institutional capacity building; participation and transparency; and mutual learning.<sup>83</sup>

--- This part is still in progress ---

## 5 Thesis and research questions

The main question of this thesis is about the meaning of the OMC for the development of a social Europe. This question is very broad and general and needs to be defined more precisely. First I will pose a hypothesis regarding the main question in order to give it a direction (§5.1). This hypothesis is based on a general impression that can be deduced from the literature review. Secondly, I will define research questions that address legal aspects about the OMC that I think need further examination, either because they are not sufficiently enough examined or because they are scarcely addressed or not at all (§5.2). Finally I will describe the methods used to examine the research questions (§5.3).

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<sup>78</sup> Cf. Vink, M. and Graziano, P. (2007), ‘Introduction’, in P. Graziano and M. Vink (eds.), *Europeanization. New Research agendas*. New York: Palgrave Macmillan, p. 8.

<sup>79</sup> *Idem*, Vink and Graziano p. 4.

<sup>80</sup> For completeness sake it should be noted that Europeanization is a contested concept that is not one thing and varies across countries, sectors and regions. See: Kaeding, M. (2007), *Better regulation in the European Union: Lost in translation or Full Steam Ahead?*, Leiden: Leiden University Press, p. 25.

<sup>81</sup> Cf. M. O’Neil, *The politics of European Integration. A Reader* (Routledge, 1996), p. 81. See also Nugent, N. (2003), *The Government and Politics of the European Union*, New York: Palgrave Macmillan, p.487; and Bulmer, S. (2007), ‘Theorizing Europeanization’, in P. Graziano and M. Vink (eds.), *Europeanization. New Research agendas*. New York: Palgrave Macmillan, p.48; and Kaeding, M. (2007), *Better regulation in the European Union: Lost in translation or Full Steam Ahead?*, Leiden: Leiden University Press, p. 25.

<sup>82</sup> Zeitlin, J. (2005b), ‘Conclusion’, in Zeitlin, J. and Pochet, Ph., with Magnussen, L., *The Open Method of Co-ordination in Action*. Brussels: P.I.E.-Peter Lang S.A., p. 447-503 (citation on p. 449).

<sup>83</sup> *Idem*, p. 450.

## 5.1 Thesis

The rationales for the development of the OMC as a typical instrument of new governance lay high expectations on it. Since one of the expectations is that the OMC is able to deal with politically sensitive and complex policies, these are in particularly high in the case of European social policies. Whether the OMC can live up to these expectations is controversially perceived. Some scholars are pessimistic because in general they regard the shift from hard interventions in social policies towards soft interventions as a bad development. For them, the OMC is just another step towards an undesired direction. In their research they emphasise on short comings concerning the regulatory and judicial capabilities of soft law compared to those of hard law. Moreover, they argue that the use of soft law itself frustrates serious attempts to regulate European social policies by hard law.

Other scholars are rather optimistic about whether the OMC can live up to its expectations. For them the OMC is an innovative approach that can do what hard law cannot deliver. This is for instance emphasised by the gap-thesis. With the hybridity-thesis, they argue that the choice for hard or soft intervention is not a rivalry choice of either the one or the other, yet, these interventions are complementary. In that sense the OMC is not a new, alternative approach, hence, it is a new, complementary approach. However, these researchers are hardly able to find evidence that the OMC indeed delivers what it is expected to deliver. It is easy to show that the OMC is utilised to govern social subjects such as employment, social inclusion, social protection and education, however, for several reasons it is hard to prove whether the OMC actually influences the laws and policies of the Member States. This is partly due to one of its rationales, namely that it aims for convergence, while it also allows the Member States to maintain their diversities. Furthermore, the causal relationship between the OMC and changes in national legislation and policies is hard to establish. In the case studies that have been conducted in this respect, scholars found just few evidence of such a causal relationship, hence, they found many more and often much more stronger causal relations that resulted in the change of the legislation or policy.

Overall there arises an impression that the OMC is not really living up to its expectations. For as far as the OMC does live up to its expectations this can hardly be substantiated. Therefore, my thesis is that:

the meaning of the OMC for the development of a social Europe is significant in theory, yet nihil in practice.

## 5.2 Research questions

To test this hypothesis, the main question needs to be further defined. Since the interest of this thesis is with the legal aspects of the OMC, this further definition is confined to those aspects.

### 5.2.1 Question 1: What is the legal status of the OMC?

What springs out in the OMC literature is the fact that the OMC is called ‘soft law’, however, this is not substantiated. This is problematic because as being a new instrument that applies a new, third, way of regulating national legislation and policies, it is just the question whether it belongs in the legal realm. Trubek, Cotrell and Nance have realised that in their contribution<sup>84</sup> since they spend more than half of their paper to describe what can be understood by the term ‘soft law’ and what soft law can do. Yet, that is where they stop, they do not describe how they, themselves, define soft law nor do they analyse whether the OMC could be considered as soft law based on what can be understood by soft law. In other words, they do give an impression of what can be understood by soft law, but they leave it up to the reader to conclude that the OMC is therefore soft law.

Another example that deals with the legal status of the OMC is a book edited by Joerges, Sand and Teubner. In this book they address legal issues that derive from legal structures or less formal arrangements, like the OMC. Their starting point is the premises that arrangements like the OMC challenge the type of governance traditionally allocated to constitutional states. In order to deal with these kind of legal structures or less formal arrangements, they focus on fundamental legal questions that might be either problematic or form a challenge within the legal realm. These are questions such as “who bears responsibility for governance without a government” and “can accountability be ensured”.<sup>85</sup> What their research comes down to is that instead of substantiating whether or not these kind of legal structures or less formal arrangements belong within the legal realm, they deal with the problems and challenges they may cause in it.

In opposite of the fundamental approach of Joerges c.s. are contributions that address just a few legal issues rather briefly, like those of Goetschy<sup>86</sup> and Szyszczak<sup>87</sup> who both mainly address the issue of competence in the sense whether or not a legal base in the European Treaty is needed to apply the OMC.

There are some legal scholars that address the question of the legal status of the OMC directly.<sup>88</sup> The most extensive and thorough contribution is the dissertation of Stéphane de la Rosa.<sup>89</sup> De la Rosa pays quite a lot of attention to the notion ‘soft law’, which includes the description of several understandings of the concept<sup>90</sup> and several functions

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<sup>84</sup> “Soft Law”, “Hard Law” and European Integration: Toward a Theory of Hybridity, 2005, p. 1-20.

<sup>85</sup> Joerges, Sand, Teubner (2004), *Transnational Governance and Constitutionalism*, p. ix-x.

<sup>86</sup> Goetschy (2003), ‘The European Employment Strategy, Multi-level Governance, and Policy Coordination: Past, Present and Future’, in Zeitlin and Trubek (eds), *governing Work and Welfare in a New Economy. European and American Experiments*, Oxford: Oxford University Press, p.59-87.

<sup>87</sup> Szyszczak (2001), ‘The new paradigm for social policy: a virtuous cycle?’, *Common Market Law Review* 38: 1128-1170. Szyszczak (2006), ‘Experimental Governance: The Open Method of Coordination’, *European Law Journal* 12:4, p. 486-502.

<sup>88</sup> Armstrong ....; Ashiagbor 2005 ....

<sup>89</sup> S. de la Rosa (2007), *La méthode ouverte de coordination dans le système juridique communautaire*. Bruxelles: Bruyant, in particular p. 251-327 (chapitre 2 La dimension normative de la méthode ouverte de coordination).

<sup>90</sup> De La Rosa 2007, p. 269-273.

of soft law in the legal order of the EU<sup>91</sup>. Based on these descriptions his first conclusion is that although the OMC holds mainly a political commitment and not a legal one, it does not exclude the fact that the OMC may have a normative dimension. In order to determine whether the OMC has a normative dimension, De la Rosa examines the normativity of the individual normative elements of the OMC.<sup>92</sup> The normative elements he identifies are communications of the Commission, recommendations of the Council, guidelines, and action programmes<sup>93</sup>.<sup>94</sup> His conclusion of this part of his analysis is that:

[L]a méthode ouverte présente assurément une dimension normative mais n'est pas en tant que telle une norme. Elle est un instrument de *soft law*, comme il en existe d'autres dans le système juridique communautaire, mais elle est censée produire des effets du fait même de cette qualité.<sup>95</sup>

De la Rosa's examinations of these instruments are quite thorough and done in a very classical way, which means that it is descriptive and based on what is generally understood and accepted about the normativity of these instruments in the legal doctrine about European law. Nonetheless, these analyses are unsatisfactory for two reasons.

The first reason that De la Rosa's analysis falls short, is because he does not use his knowledge about soft law to substantiate the legal status (or normativity) of the normative elements he identified. Instead he relies on general understandings about these elements as they can be found in the doctrine. Moreover, what stands out in the research about the legal status of the OMC in general is that they are all very descriptive, there is no analytical systematic approach. An approach that is more scientifically objective and takes into account all aspects of a legal instrument, *i.e.* lawfulness, substance and compliance structure.

The second reason which for me makes the analysis of De la Rosa unsatisfactory, is the fact that it does not include the two characteristics of the OMC: the fact that the normative elements as well as non-normative elements are sequentially related to each other (see figure 1, above) and the fact that the OMC is an iterative process. It are exactly these characteristics by which the OMC distinguishes itself from the other instruments the EU has used to govern social policies. Moreover, in my opinion, both these

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<sup>91</sup> De La Rosa 2007, p. 273-280.

<sup>92</sup> De La Rosa 2007, p. 287. His exact conclusion is: Malgré toutes les nouveautés liées à la MOC, il s'agit toujours d'un engagement politique et, en tant que tel, non juridique. L'innovation de la MOC est surtout la mise en avant d'un cadre relativement flexible, propice à ce que soient associés des impératifs à la fois économiques et sociaux. Cette conclusion provisoire doit toutefois être complétée par une étude de la dimension normative de la méthode ouverte. Il faut, à cette fin, s'interroger sur la normativité qui se dégage de ses différentes composantes.

<sup>93</sup> In my opinion action programmes are not part of the OMC, they can be supportive to the OMC though. Such is the case with the OMC Social inclusion and the European employment strategy which are both supported by the European social fund. This support means that member states can receive funding for certain projects if they are aimed at achieving (part of) a common objective of one of these OMC's. **See about this also: ...**

<sup>94</sup> De La Rosa 2007, p. 292.

<sup>95</sup> De la Rosa 2007, p. 326.

characteristics are of significant relevance for the legal status of the OMC as a whole. Not taking them into account in such an analysis is selling the OMC short.

To make a simplified comparison: the way De la Rosa, but also others like Ashiagbor<sup>96</sup>, analyses the legal status of the OMC based on the individual status of the normative elements of the OMC is like analysing a football team based on the quality of the individual players without looking at how they are playing together in the actual game. Although this is simplified comparison, the essence is that the different elements within the OMC form the “team” OMC and the legal status of the “team” OMC depends on the legal status of all of those elements together. This is in particular the case when it comes to the normativity of the OMC. When the elements function well together they may strengthen each other, which includes the normative quality of the element itself as well as that of the OMC as a whole. Vice versa, the elements can weaken each other when they do not go well together. Furthermore, the iterative nature of the OMC may result in the fact that the elements become better attuned in the course of time; just like football players become a better team each time they play with each other. Therefore, not taking into account the fact that the elements of the OMC are not independently functioning yet inextricable bound up with each other in an iterative sequential relation, is as good as doing no analysis at all of the legal status of the OMC.

Given the fact that the indication of the OMC as being soft law is hardly substantiated and for as far efforts are undertaken these are unsatisfactory, the first research question is:

1. What is the legal status of the OMC?

#### 5.2.2 Question 2: What is the integration capacity of the OMC assessed by its legal dynamics?

Knowing the legal status of a legal instrument gives an impression of the normative effect that instrument may generate, however, the probability that the instrument will have normative effect depends also on the role the instrument plays in the European integration process. Knowing what the probability is that an instrument will have normative effect is interesting since the aim of the instruments is to further the European integration process, in this thesis, that of social policies in particular. After all, as Curtin argues

‘The ultimate goal of the EU may always have been political (ever closing union among the peoples), its immediate objectives economic and social, but the means and techniques used to achieve it have traditionally been ‘legal’: the application and progressive development of common rules and enforcement procedures.’<sup>97</sup>

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<sup>96</sup> Ashiagbor (2004), ‘The European Employment Strategy and the regulation of part-time work’, In S. Sciarra, P. Davies and M. Freedland (eds), *Employment Policy and the regulation of Part-time work in the European Union. A Comparative Analysis*. Cambridge: Cambridge University Press, p. 35-62.

<sup>97</sup> Curtin 2006, p. 1.

With the search for ever more flexible means to govern European social policies the EU has developed a complex and highly sophisticated system of legal instruments.<sup>98</sup> This system of legal instruments include formal EU integration instruments like the directive and recommendation (art. 228 TFEU; ex art. 249 TEC). It also includes some specific instruments to be used regarding a specific policy field, such as the collective agreement (art. 155 TFEU; ex art. 139 TEC) and the European employment strategy (art. 148 TFEU; ex art. 128 TEC). Furthermore, the EU uses instruments that have no specific legal base in the treaty at all, most of those instruments are called decision *sui generis*, among which action programmes. The open method of coordination as general integration instrument is another example of an instrument that has as no legal basis in the Treaty.

All these instruments create their own specific legal dynamics in the process of European integration. The legal dynamics of European integration can be understood as the legal and institutional elements that condition both the magnitude and spatial scope of integration.<sup>99</sup> In other words, whether the political or economic dynamics can be executed depends on the magnitude and spatial scope provided by the dynamics of the legal and institutional elements involved with the integration process. Legal dynamics of European integration are for instance the sort of competence attributed to the EU to govern a subject, the effect of the instrument on the national legal order and the compliance structure provided by or inherent to the instrument.<sup>100</sup>

In the handbooks about European labour law or employment law,<sup>101</sup> generally only the legal dynamics of the formal legally binding instruments, in particular directives and collective agreements, are described.<sup>102</sup> Those of the legally non-binding instruments, neither the formal instruments, *i.e.* the recommendation, nor the informal instruments, *i.e.* resolutions and action programmes, are not. At the most they are mentioned as being instruments that are more and more relied on in respect of social policies.<sup>103</sup> This is somewhat remarkable because European social policies are mainly governed by soft

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<sup>98</sup> Cf. ....The Convention Working Group IX on Simplification noted in her final report that the European Union has 15 different legal instruments, which includes binding as well as non-binding instruments.

<sup>99</sup> Dehousse, R. and J.H.H. Weiler (1990), 'The Legal Dimension of Integration', in W. Wallace (ed.), *The Dynamics of European Integration*, London: The Royal Institute of International Affairs, 242-260, in particular p. 243.

<sup>100</sup> Dehousse and Weiler 1990, p. 249-251.

<sup>101</sup> Among others: Szyszczak, E. (2000), *EC Labour Law*. Harlow: Longman; Nielsen, R. (2000), *European Labour Law*. Copenhagen: DJØF Publishing; Barnard, C. (2006), *European Employment Law*. Oxford: Oxford University Press (3<sup>rd</sup> ed.); and Blanpain, R. (2008), *European Labour Law*. The Hague: Kluwer Law International (11<sup>th</sup> ed.).

<sup>102</sup> E.g. Szyszczak 2000, p. 2-5 (legal base) and p. 171-173 (compliance upheld by European Court of Justice); Nielsen 2000, p. 56-67 (chapter II.6, which includes subjects such as direct effect and supremacy of EU law); Barnard 2006, p. 62-104 (chapter 2, which includes competence, decision-making and the legislative process); Blanpain 2008, p. 104-110 (legislative process and decision-making), p. 151-160 (competence).

<sup>103</sup> E.g. Nielsen 2000, p. 52-53 and Barnard 2006, p. 80-81; Blanpain 2008, p. 107-108.

law.<sup>104</sup> The same is true for the OMC, if it is already mentioned, it is not described by its legal dynamics, yet its structure and content are described.<sup>105</sup>

Legal dynamics are also addressed in the theories about European capacity building, in particular by the gap-thesis. However, the gap-thesis is of a very abstract and general level in this respect. Rather than with the OMC on the one hand and directives on the other, the gap-thesis is more concerned with new governance and EU hard law respectively.<sup>106</sup> The comparison of Borrás and Jacobsson is also on a rather general level since it compares the OMC in an ideal-type form with EU soft law in general.<sup>107</sup> However, there is not one OMC but as many as there are subjects that are governed by it and there is also not one type of EU soft law yet there are several and moreover, the same soft law instrument can serve different functions in the European integration process.<sup>108</sup> Consequently, the legal dynamics of these instruments are likely to differ as well.

However, when it comes to answering the main question, it would be interesting to compare the legal dynamics of the OMC with those of the other instruments commonly used for European social policies. That is with EU hard law on the one hand, thus the directives and collective agreements and with EU soft law on the other hand, among which recommendations, resolutions and action programmes. Therefore, the second research question is:

2. What is the integration capacity of the OMC assessed by its legal dynamics?

5.2.3 Question 3. Which instruments are actually involved with the development of a social Europe and how are they related?

Having addressed the question of the legal status of the OMC and its integration capacity based on its legal dynamics, a next interesting thing is to examine how the OMC functions in relation to the other instruments that are used to govern European social policies. In the context of the hybridity-thesis this has been done for some subjects. Kilpatrick for instance has done this for employment regarding which she describes the activities undertaken by the EES, legislation and the European structural fund and how these activities relate to each other.<sup>109</sup> However, this kind of research is limited in two ways: firstly it is not often done and secondly it is only done in respect of the OMC and EU hard law, yet not with EU soft law.

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<sup>104</sup> Copeland, P. and Haar, B.P. ter (2010), 'What are the Future Prospects of the European Social Model? An Analysis of EU Equal Opportunities and Employment Policy', 16:3 *European Law Journal*.

<sup>105</sup> Szyzszak 2000, p. 20-24 (about the European employment strategy); Barnard 2006, p. 109-127 (about the European employment strategy) and p. 141-145 (about the OMC as introduced in the Lisbon Strategy); and Blanpain 2008, p. 238-254 (about the content of the employment guidelines).

<sup>106</sup> See above §4.3.1.

<sup>107</sup> See above §4.3.1.

<sup>108</sup> Cf. Senden 2004, p. 119-120.

<sup>109</sup> Kilpatrick 2006, p. 130-134.

Since this kind of research is not done often, there is room for more. Furthermore, the development of a social Europe is not furthered by the OMC and EU hard law only, hence, it is mainly furthered by the use of soft law. Therefore, it is interesting:

- a. to get a more comprehensive impression of which instruments actually are involved, EU hard law, soft law, as well as OMCs; and
- b. to examine how they are related, as rivals, complements or transformers.

Therefore the third research question is:

3. Which instruments are actually involved with the development of a social Europe and how are they related?

#### 5.2.4 Question 4. Creates the OMC “ripples” in the national legal order, and if yes, what kind of “ripples”?

The foregoing three questions all have to do with capacity building, however, as expressed in the Europeanization literature, the process of European integration is not finished if the European activities do not feed back into the national level. The literature review has shown though that it is hard to prove that there is a causal relation between the OMC and changes in policies and legislation on national level.<sup>110</sup> Furthermore, the effect soft law can have on the national level differs according to policy area, welfare regime, country and the position of the key-actors on national level.<sup>111</sup> Consequently, it is difficult to get a general impression of the normative effect of soft law, and the OMC in particular, on the national legal order.

However, one approach to get an impression of the national activities that are employed in the context of the OMC is not applied yet, *i.e.* a quantitative analysis of the sort of activities the Member States have undertaken. Although quantitative studies are distinctively lacking, in this case it gives a general impression about the normative effect of the OMC. In particular, when ‘normative effect’ is interpreted in the sense that the OMC contributes to “ripples” in the legal orders of the Member States. To be more precise, the OMC contributes to causing a “ripple” in the legal order when new legislation is introduced or existing rules are adjusted. There are two methods via which the OMC can cause a “ripple”:

- a. when change in a legal order is due to the operation of the soft law instrument through other legal mechanisms, in particular general principles of law and interpretation; or
- b. as a result of the voluntary compliance of the instrument.<sup>112</sup>

In the qualitative case-studies researchers have already proven that the OMC contributes to causing “ripples” in the legal orders of the Member States. Nonetheless, there is still need for a quantitative study, since these case-studies give no overall impression about

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<sup>110</sup> Zeitlin 2005, p. 453.

<sup>111</sup> De la Porte and Pochet 2002, p. 17 ; and Zeitlin 2005, p. 450-460.

<sup>112</sup> Senden 2004, p. 235-243.

the sorts of activities that are undertaken. The activities that are mapped by the case-studies are limited to the subject of the case-study and the Member States that are central to that study.

Another reason for the need of a quantitative study is the often heard argument that the shift from hard interventions towards soft interventions is bad for social policies, because the new Member States would be less sensitive to soft interventions in the sense of compliance. A quantitative study allows for a comparison of the activities of the old Member States with those of the new Member States.

Furthermore, the OMC not only requires all kinds of legislative activities, such as laws, collective agreements or policy rules, rather, it asks the Member States to take all kinds of activities that are needed to achieve the common objectives. This includes financial measures and incentives, and all kinds of policy initiatives such as dissemination of information or a programme to raise awareness.

The last question is therefore:

4. Creates the OMC “ripples” in the national legal order, and if so, what kind of “ripples”?

## **6 Methodology and outline of the thesis**

Since the methodology applied in this thesis falls as good as together with the outline of the thesis, these are described at once.

### **6.1 Analysis of the legal status of the OMC**

The first issue addressed in this thesis is the legal status of the OMC. It is generally accepted that the OMC is soft law, however, the concept soft law is ambiguous and needs further clarification. Therefore **chapter two** starts with a literature review about soft law. Since most of the research about soft law is done in the context of international law, this review is largely based on the literature about international soft law. The literature review is divided in four parts: the prove of the existence of soft law in state practice; the search for explanations for the use of soft law in state practice; conceptualisation of soft law; and comments on the theories about soft law.

It is one thing to know what soft law is, yet it is another to recognise it. In the course of time several methods have been developed as means to analyse international instruments of which the legal status is unclear. This approach will also be followed in this thesis. One of these methods, called “the concept of legalization” and introduced by Abbott *et al.*<sup>113</sup> is taken as the starting point to develop a more comprehensive analytical scheme.

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<sup>113</sup> Abbott, K.W. Keohane, R.O., Moravcsik, A., Slaughter, A-M, and Snidal, D. (2000), “Concept of Legalization”, 54:3 *International Organization*, p. 401-419.

This more comprehensive scheme further draws on the work of Gamble,<sup>114</sup> Senden,<sup>115</sup> Raustiala,<sup>116</sup> D'Aspremont,<sup>117</sup> and the case-law of the ECJ. The scheme is comprised by three features of international agreements and European integration instruments, *i.e.*: lawfulness; substance or *negotium*; and structure.<sup>118</sup> For analytical purposes, these three features are worked out in elements, such as competence, adopting procedure, precision of the obligation or right, used language and the form of dispute settlement. The representation of these elements form a sliding scale from typically hard law to no law at all. When all representations of all the elements of the three features together are taken into account, it is possible to conclude something about the legal status of the OMC.

In **chapter three** the legal status of the OMC will be analysed by the analytical scheme drawn in chapter two. Since the OMC has no fixed form, this analysis is done for three different OMCs. The first OMC is the ideal-type OMC as introduced in the Lisbon Strategy. However, this ideal-type OMC only gives an indication of its governance structure: common objectives; indicators; targets; action plans; and evaluation/peer review. For a full analysis by the analytical scheme, more information is needed though. For instance, which actors are involved and which procedures are followed for the adoption of the OMC, but also what sort of language is used to express the obligations created by the OMC. This information can be found in the OMCs that are actually applied. Given the context of this thesis, the development of a social Europe, in particular social protection, it is preferable to include an OMC that addresses these matters. This includes the OMC Social Inclusion and the European Employment Strategy. Since the EES has a governance structure that is fixed in the EC Treaty, the inclusion of this OMC makes it possible to address also the question whether the legal embedment of the OMC in the TFEU is of influence on its legal status?

Since one of my comments on former analysis of the legal status of the OMC is that these analysis to not take the characteristics of the OMC into account, the analysis is done for the OMC as a whole. That means that the normative elements as well as the mode of governance are included. Depending on the feature of the analysis some of the elements or modes of the OMC will be more relevant than the others.

Interpretations that are made in the analysis are either based on the findings about the OMC in the legal doctrine or on the general understanding of the feature and the specific interpretations of the elements of that feature. Although the analytical model seems to deliver an objective framework for the analysis of the legal status of the OMC, the interpretations are not always just as objective. Some of them are open for discussion and

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<sup>114</sup> Gamble, J.K. (1985), 'The 1982 United Nations Convention on the Law of the Sea as Soft Law', 8:37 *Houston Journal of International Law*, p. 37-47.

<sup>115</sup> Senden 2004, p. 235-290 (which covers chapter 6).

<sup>116</sup> Raustiala (2005), 'Form and Substance in International Agreements', 99:581 *The American Journal of International Law*, p. 581-614.

<sup>117</sup> D'Aspremont (2008), 'Softness in International Law: A Self-Serving Quest for New Legal Materials', 19:5 *European Journal of International Law*, p. 1075-1093.

<sup>118</sup> To divide an international agreement in these three features, albeit with different interpretations, is introduced by Raustiala 2005, who suggested this in an attempt to fathom the architecture of international agreements.

depend on the subjective valuation of the researcher in question. Where this is possible this is indicated.

## 6.2 Analysis of the integration capacity of the OMC based on its legal dynamics

To analyse the integration capacity of the OMC and to compare its integration capacity to that of the other instruments used to govern European social policies a second analytical model will be introduced in **chapter four**.

What is needed is an analytical model that makes it possible to conduct a systematic analysis of the integration capacity of all European integration instruments, hard law as well as soft law. Systematic in the sense that all the instruments are analysed for the same legal issues that together represent the legal and institutional elements that condition in particular the magnitude of European integration.

An initial idea for such an analytical model is suggested by Dehousse and Weiler. They introduce parameters which can be used to assess the magnitude of the integration process within the legal sphere.<sup>119</sup> The parameters they suggest are based on legal aspects that are described at length in the literature about European law, and are competence, decision making, effect on the national legal order and integration techniques. Each of these parameters have their own “dimension” since they represent various legal possibilities. For instance, the EU can be exclusively competent to govern a subject or has to share its competence with the Member States. With exclusive competence the EU has a stronger position to govern a subject than when it has to share its competence: its magnitude is wider. By putting the parameters and their respective elements together, Dehousse and Weiler are able to provide a comprehensive overview of the legal aspects concerned with the European integration process (figure 2).

**Figure 2 Legal parameters of integration by Dehousse and Weiler**

			Unified treatment
	Supranational bodies	Supremacy	Harmonized problem-solving
Exclusive	Intergovernmental bodies with supranational features	Direct effect	National law applicable
Concurrent	Intergovernmental bodies	Reception	Procedural obligations
Competences	Decision-making	Incidence on national legal order	Integration techniques

Source: Dehousse and Weiler 1990, p. 251.

<sup>119</sup> Dehousse and Weiler 1990, p. 249.

By structuring the legal aspects of European integration in this way, I see the possibility of assessing all European integration instruments in a systematic and comparable manner. Exactly what is needed firstly to analyse which legal dynamics the OMC has and to compare those with that of the other instruments. However, Dehousse and Weiler based their model on the legal aspects of 1990, in the meanwhile a lot has changed. Furthermore, their model is not exhaustive, it is a suggestion. Therefore, an update is needed and it needs to be worked out into a more comprehensive model. For completeness sake I have to note here that the interest lies only within the legal aspects of the European integration process, and not with the social, economic and political aspects.

The update and further development of the model in a more comprehensive model will be based on the literature about European law in general. The determination of the parameters is based on handbooks and some specific contributions about legal aspects of the European integration process in general. The use of handbooks in this case is proper since the parameters have to represent the most general and abstract legal aspects concerned with the European integration process. The determination of the elements within the parameters is also based on handbooks as a start, yet for the further definition and interpretation of these elements I rely on more specific literature concerned with the parameter and the jurisprudence of the European Court of Justice (ECJ).

In **chapter five** the OMC will be analysed according this model. For the same reasons as in chapter three, this analysis is done for three different OMCs: the ideal-type OMC based on the description in the Lisbon Strategy, the EES and the OMC SI. For the analysis of the legal aspects of the OMC interpretations are needed. Since some of the legal aspects of the OMC are already extensively addressed in the doctrine about the OMC, part of the interpretations in the analysis are based on that literature. Those aspects that have barely or not at all been addressed are based on the definitions of the parameters and elements themselves.

Since the interest of this thesis is mainly in the legal dynamics and integration capacity of the OMC, this analysis is only extensively done for the OMC. However, since for the main question it is also interesting to know the legal dynamics and integration capacity of the other instruments, such analysis is briefly done for the instruments that are mostly used to govern issues of social protection. About the legal aspects of the hard law instruments, the directive and collective agreement, already a lot is known, therefore, the analysis of these instruments is based on the interpretations described in the handbooks about European law in general and that of social law in particular and the jurisprudence of the ECJ. Contrary hardly anything is known about the legal aspects of the soft law instruments, recommendations, resolutions and action programmes. The analysis of these instruments therefore relies on the scarcely available literature about this, a limited number of jurisprudence of the ECJ and my own interpretations based on the general definitions of the parameters and their elements.

It should be noted that the model seems to provide an objective way to analyse the legal dynamics of the OMC, however, like with everything in law, subjective interpretations have to be made. In most of the cases this is not a problem, because the interpretation

hardly gives rise to discussion. In some cases I might be more or less optimistic in the interpretation of the OMC compared to another scholar. Where possible this is indicated.

### **6.3 Instruments involved with the development of a social Europe and their relationship.**

The aim of **chapter six** is to examine the relation of the OMC with the other integration instruments that are used to govern social policies. Therefore it is necessary to know which instruments are involved. However, the EU has many different instruments at its disposal to govern its policies, therefore, it must first be determined which of these instruments are actually involved. Furthermore, it is not about just relations between instruments, hence it is about the relationship between instruments that are used to govern the same social policy.

Doing such an assessment for all European social policies is for practical reasons not an option: there are just too many. At its widest range European social policies not only cover employment policy of title IX TFEU and the core issues defined in title X of the TFEU, in particular article 153, but also the issues of title XII (education, vocational training, youth and sport), title XIII (Culture) and title XIV (Health). All in all it includes many different subjects, even when it is confined to the subjects of article 153 TFEU, which includes health and safety at work, working conditions, information and consultation of workers, social inclusions and social protection.

Therefore the first step is to define a subject for the analysis. Since the focus of the analysis is on the relationship of the OMC with other instruments, it has to be a subject to which at least the OMC is utilised. Furthermore, it is preferably a subject that is governed by both, hard law as well as soft law. Regarding the subjects of article 153 TFEU, there are two subjects governed by an OMC: (j) the combating of social exclusion (OMC SI) and (k) the modernisation of social protection systems (OMC Pensions). With exception of the coordination of social security by regulation 1448, there is no hard law (yet) governing the subject pensions. The subject of social exclusion offers more possibilities, since it includes different subjects among which active inclusion that involves the promotion of equal opportunities in respect of employment and active labour market policies.

The next step is to make an inventory of all the instruments that are adopted to govern these two issues. That is, all those instruments that, like the OMC, aim to influence, converge or harmonise the laws and policies of the Member States. So, the first line of selection is for those instruments that at least address the member states. This excludes for instance the Commission's Green and White Papers, and resolutions from the Parliament. The second line of selection concerns something that is specific for EU hard law: amendments and recasts. Should they be considered as new instruments or not? I decided to consider this ad hoc per instrument. If an amendment or recast only adjusts existing rights and obligations according to the case-law of the ECJ it is not considered as a new instrument, if it creates new obligations or rights it is.

Since the instruments that govern these subjects address them directly as well as indirectly, the third line of selection has to do with the content of the instruments. For instance, the 1974 social action programme<sup>120</sup> holds several provisions that directly govern the principle of equal opportunities. The Council's call 'to seek solutions to the employment problems confronting certain more vulnerable categories of persons (the young and the aged)' is just one example. The 1975 Directive on the principle of equal pay,<sup>121</sup> on the other hand, at first glance, has little to do with the principle of equal opportunities, other than that it is about equal treatment of men and women when it comes to the pay for the same or equal work. However, there are several instruments that claim that this Directive plays 'a dynamic role in improving the situation of women'.<sup>122</sup> These kind of equal treatment measures equalise the opportunities of women, since they do not directly affect the position of the men. They equalise the opportunities of women, because they 'counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures',<sup>123</sup> and 'the disadvantage faced by men with regard to participating in family life'.<sup>124 125</sup>

Since it would be interesting to have as much as different instruments as possible that govern the two selected subjects, both kind of instruments are selected: those that address them directly as well as those that do this indirectly. The more different instruments the more relationships to can be examined.

Furthermore, the selected instruments are grouped in ad randomly chosen, more or less equal time periods. Firstly just for practical reasons to order them. Secondly to get an impression of which kind of instruments are used in which periods and to see whether there are tendencies in the use of a specific kind of instrument. For instance whether the OMC really oppressed hard law.

Once the instruments are selected and ordered in time-periods, two tracks of research are followed. The first track is to compare the integration capacity of the OMC with that of the other instruments. Therefore the selected instruments are superficially assessed for their legal integration capacity. This assessment is done twice. First the most frequently used instruments are assessed based on their "ideal-types" and general understandings of the legal aspects of European integration. This makes it possible to compare the integration capacity of the ideal type OMC with the 'ideal-types' of the hard law and soft law instruments. Yet, like the OMC, the actual practice of the other integration instruments also differ from their theoretical definitions. Some of them are used for

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<sup>120</sup> Council resolution of 21 January 1974 concerning a social action programme, OJ [1974] C013/1.

<sup>121</sup> Council directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for man and women, OJ [1975] L045/19.

<sup>122</sup> E.g. Commission Communication, A New Community Action Programme on the promotion of equal opportunities 1982-85, COM(81) 758.

<sup>123</sup> 84/635/EEC: Council recommendation of 13 December 1984 on the promotion of positive action for women. OJ [1984] L331/34.

<sup>124</sup> Resolution of the Council and the Ministers for Employment and Social Policy meeting within the Council of 29 June 2000 on the balanced participation of women and men in family and working life. OJ [2000] C218/02.

<sup>125</sup> Similar arguments are made about the framework agreement on parental leave (OJ [1996] L145/4).

different reasons or its use has changed over time. Therefore a second brief assessment is done for all the selected instruments.

For these assessments, the analytical framework of the legal dynamics of European integration is extended with an indicator for the general integration capacity an instrument has. To be more specific, in their model (see figure 2) Dehousse and Weiler suggest that the elements of the parameters in the upper part of framework represent a stronger integration capacity than those in the lower part of the framework. This is expressed by the arrow on the left in the figure. This implicates that the more manifestations an instrument has on the elements of the parameter that are in the upper half of the framework, the stronger its legal integration capacity is. And *vice versa*, the more manifestations an instrument has on the elements of the parameter that are in the lower half of the framework, the weaker its legal integration capacity is.

The indicator that is added to the further developed framework is comprised by four levels, varying from level 1 representing the instruments that have most of their manifestations of the parameters on the strongest integration elements to level 4 representing the instruments that have most of their manifestation of the parameters on the weakest integration elements. For most of the instruments it is clear which level they represent, for those that the indication is disputable this is, where possible, indicated and the allocation of a certain level is explained.

Based on this assessment an impression is gained about the general integration capacity of the EU in governing social policies. More interestingly, it is possible to get an impression of the effect of the use of the OMC in terms of integration capacity. The presumption in this respect is that the introduction of the OMC has weakened the overall integration capacity of the EU, since it is said to oppress hard law instruments.

The second track of research is for the relationship between the OMC and the other instruments utilised to govern these two subjects. This research is descriptive of nature as it describes what kind of relations are present. Although the hybridity-thesis is the theoretical idea for this, the research is done with an open mind just to see what kind of relationships there are. The starting point is the OMC SI and its more specific objectives concerning active inclusion, in particular those of equal opportunities on the labour market and active labour market policies.

#### **6.4 Normative effect of the OMC on the legal orders of the Member States**

**Chapter seven** is concerned with a quantitative study about how the normative effect of the OMC on the legal orders of the Member States. More broadly, it is a study first to determine whether the Member States undertake legislative activities within the context of the OMC and secondly to analyse what kind of activities they undertake. The second part is not confined to only legislative activities, such as laws, collective agreements or policy guidelines, but also includes financial measures and incentives and all kinds of programmes and initiatives. The aim of the quantitative study is to give a general impression of what kind of activities the Member States undertake in the context of the

OMC. Furthermore it is to examine whether there is a difference in activities undertaken by the old and those undertaken by the new Member States.

Although it would be preferable to gather as much data as possible, for practical reasons (in particular time) the analysis is confined to ten randomly chosen member states, of which five are old member states (Austria, Germany, Greece, The Netherlands and the UK) and five are new member states (Czech republic, Hungary, Latvia, Poland and Slovak republic). Furthermore the time-period is limited to the period 2005 – 2010. Since it would be interesting to see whether the Member States act differently in regard of an OMC that has its legal basis in the Treaty compared to one that has not, the analysis is done for the EES and the OMC SI.

What kind of activities the Member States undertake can be derived from the national action plans they submit as part of the OMC. Since their activities vary widely, they are categorised in three typologies of activities: non-legislative programmes and initiatives; measures providing different forms of financial support or incentives; and legislative activities. The latter category is divided into: law, collective agreements and policy rules. Furthermore, these activities are categorised per year and per guideline.

## **6.5 Conclusion**

In the conclusion (**chapter 8**), the thesis will be tested by the conclusions and results of the four research questions. Therefore the conclusions and results of those questions will be summarised and interpreted in respect of the main question of this thesis: what is the meaning of the OMC for the development of a social Europe.