Open Method of Coordination: 
A New Stepping Stone in the Legal Order of International and European Relations

Beryl Ter Haar

Abstract. The Open Method of Coordination (OMC) is characterised by the combined use of modes of governance and soft law instruments. A combination that is uncommon, since they usually are sequential related to each other: governance leads to soft law. The focus of this paper is therefore on the meaning of this combined use for the position of the OMC in the legal order of international and European relations. To determine the OMC’s position, the paper first substantiates the soft law aspects of the ideal-type OMC, based on international relations concept of legalisation, an ideal-type European Community law, and the terminology of the gap-thesis. Furthermore, the paper examines the internal and external functioning of the OMC, the latter in particular its relations with Community hard law. The paper concludes with showing that the OMC adds in two ways a new stepping stone into the legal order of international and European relations.

Keywords: open method of coordination; soft law; new governance; gap-thesis; theory of hybrid structures between soft law and hard law.

1. Introduction

Since the establishment of the European Economic Community in 1957, the variety of legal instruments used to govern European integration and cooperation has increased. The two most influential reasons for the introduction of new instruments to govern European integration and cooperation are the enlargement of the European Union and the expansion of subjects governed on European level. They influenced the evolvement of European law, because they caused an increase of diverse and sometimes opposite interests of the Member States. As a result of those divergent interests, it became harder, if not impossible, to address the common objectives through the traditional Community Method, i.e. European integration through harmonization of national laws and policies. In order to cope with those common objectives, while respecting the diversities, Europe employed different governance strategies under the umbrella of ‘new governance’. Archetypical for these new strategies is the open method of coordination (OMC).

* PhD-candidate at the Leiden University, Faculty of law. The PhD-thesis is conducted as part of the project ‘Social Security Reform’, and has as subject the meaning of the open method of coordination for the development of a Social Europe’. This paper is presented at the Conference New International Law, 15-18 March 2007 Oslo, Norway.


3 De Bürc a and Scott, supra note 2, p. 3.
The OMC is a practical instrument, which *raison d’etre* is to offer a process of mutual, cross-national learning in a setting of multi-level participation. At the same time, the OMC is a steering instrument with normative effect, since the aim of the learning process is to achieve common objectives. The progress of the achievement of those objectives is measured by indicators and governed by recommendations. As such, the OMC is characterized by a combined use of modes of governance and legal instruments, albeit of soft law. This combined use is awkward in the legal order of international and European cooperation (further referred to as: legal order), since they are usually sequential related to each other: governance leads to the adoption of a legal instrument. What this combined use means for the position of the OMC in this legal order, is therefore the focus of this paper.

To find out what this combined use of governance and soft law means for the position of the OMC in the legal order, the following steps will be taken. First is a sketch will be drawn of the position of governance and soft law instruments as they are commonly positioned in the legal order. This sketch is based on the concept of legalization used to define hard law as well as soft law and on the traditional concept of the regulation of international relations (§2). Although the OMC is presumed to use soft law instruments, this is hardly substantiated. Therefore, the second step is an analysis of the OMC’s legal aspects, in particular of the basic agreement to apply the OMC, and its material content (§3). The third step regards the internal and external functioning of the OMC. It addresses the question how the OMC’s modes of governance and soft law instruments are related to each other, and it explores the possible relationships of the OMC with the other instruments in the legal order (§4). The final step is the actual positioning of the OMC in the legal order. This will show that the OMC, as a result of its combined use of governance and soft legal instruments, adds a new stepping stone into the legal order (§5).

2. Position Governance and Soft Law in the Legal Order

In this paragraph I will sketch the legal order based on the traditional concept of the regulation of international relations. The main focus in this sketch is on the position of governance as process to adopt soft law as instrument to govern those international relations. Because the concept of soft law is disputed, I first introduce a working definition of soft law, based on the concept of legalization. The paragraph closes with a sketch of the international legal order.

2.1 The concept of soft law

The concept of soft law is still disputed. A minority of scholars does not accept the concept of soft law, as they, very roughly and superficial, argue that law is either hard or no law at all. And those scholars that do accept the concept of soft law, dispute its definition. The concept of soft law used in this paper carries on the concept of legalization as developed by Abbott *et al.*

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5 See more elaborate in the second paragraph of this paper.

6 Those scholars that examine the legal aspects of the OMC do this either based on a theoretical perspective or based on case-studies of the practice. See for two major works in this field: C. Joerges, I-J. Sand, and G. Teubner, *Transnational Governance and Constitutionalism*, (Hart Publishing, Oxford, 2004); and De Búrca and Scott, supra note 2.


is based on the presumption that international law is not a binary system of either hard law or political agreement, but that international law is actually a legal continuum with a wide variety of legal instruments with different legal status.\(^9\) The top of this legal continuum is an ideal-type of international hard law, which can be defined as: an international agreement in which states acknowledge their promises as binding commitments with full international legal status, which defines unambiguous the conduct it requires, authorizes or prescribes and grants third parties authority to implement, interpret and apply the rules, to resolve disputes and (possibly) to make further rules.\(^10\) The bottom of this continuum is formed by the political agreement. All instruments in between are called ‘soft law’.\(^11\) In this continuum, the question is not whether an instrument is hard law or soft law, but rather, is it law or a political agreement. Therefore, the literature about soft law focuses on arguments showing that soft law does not exceed the legal continuum\(^12\) and define the concept of soft law in relation to hard law,\(^13\) as will this paper.

Based on the above given definition of the ideal-type of international hard law, Abbott et al. deduce three common characteristics of international law: obligation, precision and delegation of competence and dispute settlement.\(^14\) When an international agreement falls short on one or more of these characteristics, it is called soft law. When one or more of the characteristics are missing, the agreement exceeds the legal continuum into the political. Regarding the characteristics the follow general remarks can be made. Soft law falls short on obligation because it does not create legally binding rights and obligations.\(^15\) Nonetheless, it does not fall short on obligation in the sense of compliance, while it possesses shared expectations of future behaviour which is in practice treated similar as legally binding obligations.\(^16\) Soft law can fall short on the ideal-type of international hard law, because it creates vague and imprecise rights and obligations, such as principles and objectives.\(^17\) In respect of the delegation of competence, soft law can fall short, because it is presumed not to create the legal ground for it.\(^18\) To what extent soft law falls short on the second aspect of delegation, dispute settlement or third party interpretation, is measured by the sort of methods used and institutions involved, varying from courts with full jurisdiction to pure political bargaining. The less compelling the method, the softer the agreement is considered


\(^11\) See more elaborate Abbott et al., supra note 8, pp. 404-408.


\(^13\) E.g. Abbott et al., supra note 8.

\(^14\) This can also be deduced from the above given definition of the ideal-type of international hard law. Just like Abbott et al., I choose not to introduce the possibility of enforcement by sanctions as common characteristic, since there is, in relation to international law, no general agreement about its necessity in order to create hard law.


\(^18\) See Abbott et al., supra note 8, p. 416-418, which is repeated by Schäfer, supra note 15, p. 195.
to be. Based on these remarks, soft law can be described as: an international agreement that lacks legally-binding force, is often imprecise, does not delegate competence and cannot be the basis for dispute settlement or third party interpretation, but does possess legal scope, since it creates common expectations about future behaviour and compliance, as a result of which it has legal and practical effects.

2.2 Position of Governance and Soft Law in the International Legal Order: A Sketch

The international legal order is dominated by two kinds of international relations between states: (1) coexistent relations, e.g. to regulate diplomatic relations; and (2) cooperative relations, e.g. to increase welfare by coordinating economic policies. The coexistent relations are regulated by traditional authority, which is characterized by the domination of hierarchy and monopoly for rule setters (mostly state and public actors) and systems of hard law. The cooperative relations can be regulated by traditional authority, but is mostly regulated by governance. Governance deals with processes and systems by which an organisation or society operates and is characterized by the multiplicity of authorities (public as well as private) and systems of soft law. The regulation of cooperative relations is often delegated to an international organisation, such as the United Nations or the European Union. Both relations make use of political agreements. Taken all together, the legal order to regulate international and European relations can be sketched as shown in figure 1.

Figure 1 Sketch of the legal order to regulate international and European relations.

This sketch visualises the sequential relation between governance and soft law. But, as the OMC is characterized by the combined use of governance and soft law, what does this mean for the position of the OMC in this legal order?

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19 See among others Bothe, supra note 15, p. 87; and Abbott et al., ibid.
20 See Friedmann, supra note 1, chapters 1 and 6, and pp. 365-368.
22 Mört, ibid. See also B. Rosamond, Theories of European Integration (Palgrave, London, 2000).
3. Open Method of Coordination

In the foregoing paragraph, soft law is defined and the legal order is sketched, including a visualisation of the sequential relation of governance and soft law. This paragraph continues with an analysis of the legal aspects of the OMC, in particular the decisive agreement to apply the OMC, and its material content. Because OMCs come in many different forms, this analysis is based on an ideal-type OMC, defined on the OMCs used in the realm of the European Community (EC). This ideal-type OMC is based on five key-elements, and can be described as:

OMC development 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. (emphasis added)

Other instruments that can be used are considered as derivatives of the key elements. For instance, guidelines are derived from objectives and benchmarking from peer reviewing.

3.1 Analysis of the Legal Status of the Agreement to Apply the OMC

States are principally sovereign to govern every subject as they like. This sovereignty is limited as soon as the subject is (also) governed on international level. To what extent the sovereignty is limited depends on the status, i.e. hard law, soft law or political, of the agreement in which it is decided to govern a subject on international level. Furthermore, the legal bases, i.e. the agreement, is also a first indication of the legal status of the instrument itself. Therefore, the substantiation of the OMC as soft law instrument starts with the analysis of the agreement to apply an OMC.

The OMC-s applied in the EC have two legal bases. Two OMCs, the Broad Economic Policy Guidelines (BEPG) and the European Employment Strategy (EES), have their legal base in the EC-Treaty. The legal status of the EC-Treaty is hard law. The other OMCs, such as those for social inclusion, pensions, healthcare and education, have their legal base in the Presidential Conclusions of the European Council. The legal status of those Conclusions is not undisputed. On the one hand, the European Council is an organ of the European Union and therefore is its decision-making power bound to the conferred powers by the EU- and EC-Treaty. The EC-Treaty confers no such powers to the European Council, whereas the EU-Treaty attributes a political task, i.e. to give the necessary impetus for its development and to define the general political guidelines. On the other hand, the European Council consists of ‘the Heads of State or Government of the Member States’, and is as such an intergovernmental

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24 The OMC is more widely used, but is best developed and structured in the EC.
27 Resp. article 99 and 128 EC-Treaty.
30 Based on article 5 EC-Treaty.
organisation. As intergovernmental organisation, the European Council is free to adopt whatever agreement they want.\textsuperscript{31}

Unfortunately, the European Council has never expressed itself about the legal status of its Presidential Conclusions. Generally those Conclusions are considered as political agreements. In respect of those parts of the Conclusions concerned with the application of OMCs, it is nonetheless arguable to accept them as intergovernmental soft law agreements. When arguing along the line of the concept of legalization and its characteristics obligation, precision and delegation, the following can be remarked. To start with the presence of the characteristic obligation. It can first be noticed, that the role of the European Council in respect of those OMCs that have no legal base in the EC-Treaty, is similar to the two OMCs that have a legal base in the EC-Treaty: a guiding and coordinating role, and a function to define the relevant mandates.\textsuperscript{32} In practice, this role of the European Council is accepted by the institutions of the EC and the Member States, without any distinction of the legal base.\textsuperscript{33} In respect of the characteristic precision, it is well arguable to consider these Conclusions as soft law, based on the tenor of the used phrases in respect of the application of the OMCs. For instance, the phrase that ‘the Union has set itself a new strategic goal’, whilst the European Council normally uses a phrase like ‘achieved political agreement on…’. Or, the phrase ‘implementing this strategy will be achieved by’ instead of ‘should be achieved by’. As for the characteristic delegation it must be noted that on the one hand the European Council itself adopts the common objectives and/or guidelines, instead of delegating it to the Council or Commission (or both), whereas, on the other hand it also delegates further rule-making to the Council and/or Commission, e.g. the adoption of the indicators.\textsuperscript{34} Moreover, the European Council is part of the monitoring process to ensure compliance with the OMC.\textsuperscript{35}

Based on this analysis I conclude the following. Two OMCs, BEPG and EES, have a legal base in the EC-Treaty, which has the status of hard law. The other OMCs have a legal base in the Presidential Conclusions of the European Council. Those parts of the Presidential Conclusions concerned with the application of the OMCs can be considered as intergovernmental soft law agreements, since all three characteristics of the concept of legalization, obligation, precision and delegation, are present, albeit barely.

### 3.2 Analysis of the Material Content of the OMC

#### 3.2.1 Preparation of the Analysis

The forgoing analysis shows that OMCs have their legal base in both, a hard law agreement (EC-Treaty) and a soft law agreement (Presidential Conclusion). However, the OMCs based on the EC-Treaty do not have to be as hard as their legal base, since they may be softened for several

\textsuperscript{31} Cf. Senden, \textit{supra} note 29, pp.190-193.


\textsuperscript{33} A conclusion I deduce from the subsequent actions from the European institutions involved and the Member States. For an impression of the action undertaken based on the mandating European Council Presidential Conclusions concerning non-treaty based OMC-s, see the websites of the Social Protection Committee concerning the OMC Pensions \textless ec.europa.eu/employment_social/social_protection/pensions_en.htm\textgreater and OMC Social Inclusion \textless ec.europa.eu/employment_social/social_inclusion/index_en.htm\textgreater, both visited on 3 October 2007.

\textsuperscript{34} E.g. European Council, \textit{Presidency Conclusions} (Stockholm 23-24 March 2001) paras. 27 and 29.

\textsuperscript{35} The Joint or Syntheses Reports of the Council and Commission are submitted to the annually Spring Council, which on its turn uses them for new impetus. \textit{See for instance} European Council, \textit{Presidency Conclusions}, 7775/1/06 (Brussels, 18 May 2006) par. 19.
reasons. And oppositely, the OMCs adopted in the Presidential Conclusions do not have to be as soft as their legal base suggests. What the legal status of the OMC actually is, depends on its material content.\footnote{See also Baxter, supra note 9, pp. 564-565.} Thus, an analysis of the material content is needed.

This analysis of the material content of the OMC is based on the concept of legalization as described in paragraph 2: international law as a continuum of varying legal instruments, which legal status is assessed by several aspects of the three main characteristics of legalization: obligation (legally binding, and compliance), precision (flexibility, method, and result), and delegation (of further rule-making, and of enforcement). Thus, the OMC is assessed by the three main characteristics of the ideal-type international law. To perform this normative analysis, the following three ‘ingredients’ are used. As argued above, OMCs come in many different forms, so, in order to assess the legal status of the OMC in general, the first ingredient is the description of the ideal-type OMC. Because the OMC is assessed in relation to the ideal-type hard law, the second ingredient is the following description of the ideal-type EC law: legislation Member States have to comply with, since it is legally binding in its entirety, because it is clear, precise, and unconditional enough to be invoked and relied on by individuals before a court of law.\footnote{This definition is based on the doctrines of supremacy and direct effect of EC law. See more elaborate about this P. Craig and G. De Bürca, \textit{EU law: text, cases and materials} (Oxford University Press, Oxford, 2003) chapters 5 and 7, pp. 178-229 and 275-316 respectively.} The third ingredient regards the interpretation of these ideal-types in the terminology of the several aspects of the three characteristics: the terminology of the gap-thesis. The gap-thesis emphasizes the differences between EC law and the OMC, in order to explain why the OMC emerged as new method to govern Europeanization.\footnote{See more elaborate about the gap-thesis and its terminology Scott & Trubek, supra note 2, p. 8; S. Borrás and K. Jacobsson, ‘The open method of co-ordination and new governance patterns in the EU’, 11:2 \textit{Journal of European Public Policy} (2004) pp. 187-189; and De Bürca and Scott, supra note 2, pp. 5-6.} These three ‘ingredients’, the ideal-types OMC and EC law and the terminology of the gap-thesis, have I ordered by the three characteristics of the concept of legalization, as shown in table 1. This table is the input for the actual analysis of the legal aspects of the OMC’s material content.

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>Aspects</th>
<th>Community hard law</th>
<th>Ideal-type OMC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Obligation</td>
<td>Binding</td>
<td>operates mainly in weakly constitutionalised areas of Community competence, integrates multiple policy area’s.</td>
<td>operates in strongly constitutionalised areas of Community competence, fragmented treatment of policy area’s.</td>
</tr>
<tr>
<td></td>
<td>compliance</td>
<td>legally binding obligations with no possibility to opt-out (or slow down) in case of unexpected real shocks</td>
<td>voluntary and self-regulative, leaving the possibility to opt-out (or slow down) in case of unexpected real shocks</td>
</tr>
<tr>
<td></td>
<td>flexibility</td>
<td>predicated upon existing knowledge, is static and substantive</td>
<td>places emphasis upon the need to facilitate the continuous generation of new knowledge, is iterative and flexible in the face of different conditions across space and time</td>
</tr>
<tr>
<td>Precision</td>
<td></td>
<td>appears to rest upon a clear distinction between rule making and application must break</td>
<td>accepts that the distinction between rule making and application must break</td>
</tr>
</tbody>
</table>

Table 1: Interpretation of the ideal-type OMC and the ideal-type Community hard law in the terminology of the concept of legalization.
method on the one hand, and rule application and implementation on the other
down as indeterminate and flexible rules are adapted to meet new challenges and resolve unexpected problems

| Result | aims at harmonization of national policies, scarcely taking into account the national and regional diversity | aims at convergence while allowing diversity |

Delegation

rule-making and implementation

looks for a unitary source of ultimate authority; centralised

predicated upon a dispersal and fragmentation of authority, and rests upon fluid systems of power sharing; decentralised

accountability

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

3.2.2 The Analysis

The first aspects to be analysed are those of the characteristic obligation. In respect of the aspect ‘legally binding’, the OMC is assessed as soft, because it is mainly applied in policy-areas where the EC has weak competence. The exercise of these competences is diluted on several ways. Firstly, it is restrained by the principle of subsidiarity. Secondly, it is often limited to specifically defined subjects. And lastly, it is often diluted by the prohibition to harmonise the laws and regulations of the Member States. When the second aspect of obligation, compliance, is assessed a different picture arises. To start with, the principle of subsidiarity does not apply, since the decision to adopt the OMC is taken by the Member States themselves as they meet in the European Council. Further, the adoption of the OMC is not bound by specific defined subjects, the description of a general formulated Community objective is sufficient enough. And finally, the OMC aims at convergence, while allowing diversity, and not at harmonisation. Thus, although the competence to create Community hard law is diluted, the competence to create an OMC is sufficient. Consequently, Member States are expected ‘to ensure fulfilment of the obligations arising’ from a specific OMC.

The OMC is the mostly used to govern sensitive and complex policies, with a high ‘degree of uncertainty as to which solution will achieve the desired results’. Therefore, the OMC allows ‘a range of possibilities for interpretation and trial and error without the constraints of uniform rules’. These qualifications give the impression that the content of the OMC cannot be precise.

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40 Art. 5, par. 2, EC-Treaty. Cf. also Szyszczak, ibid.
41 E.g. art. 137, par. 1, sub a EC-Treaty (SI and Pensions); art. 149, par. 4 EC-Treaty (Youth); and art. 152, par.4, sub c EC-Treaty (Health).
42 E.g. art. 137, par. 2, sub. a EC-Treaty.
43 As argued in paragraph 3.1 of this paper.
44 For instance the OMC Health is based on art. 2 j° art. 137, par. 1, sub. (k) EC-Treaty (social protection).
45 See table 1, characteristic ‘precision’, aspect ‘result’.
47 Trubek et al., supra note 2, p. 16.
48 Ibid.
However, the contrary is true, if its iterative nature is taken into account. The ideal-type OMC proceeds from generally phrased common objectives which are further defined by more concrete quantitative and qualitative indicators. Based on those indicators, performance reports are drawn up, that form the input for country-specific and more detailed recommendations. Thus, when the complete iterative process is taken into account, the OMC is actually quite precise.\textsuperscript{49} It is quite precise, because part of the OMC’s nature is that there will always be a margin of discretion left for the Member States. After all, the OMC only provides common goals and the means to learn from each other how to achieve those goals (convergence, while allowing divergence), it doesn’t set fixed rules to be implemented (harmonisation).\textsuperscript{50}

Regarding delegation it is evident that OMCs fall short on the delegation of authority to implement rules, since they are meant ‘to help the member states to progressively develop their own policies’.\textsuperscript{51} On the other hand, the delegation of authority for further rule-making is inherent to the OMC. This follows from the OMC’s iterative nature, which results in the sequential relationship of the different OMC-instruments. Thus, the adoption of one instrument leads to the adoption of the next instrument. This means, that when the adoption of common objectives is considered as the first step of the application of the OMC, all the subsequent instruments are to be considered as ‘further rule-making’. This is moreover the case, when it is taken into account that with the adoption of each subsequent instrument, more precise obligations and expectations are created (as argued above). Besides the OMC’s iterative nature, its open nature also implies the delegation of authority for further rule-making. Although, the open nature of the OMC sees primarily on the domestic measures adopted by the Member States in order to achieve the common objectives, it also opens the possibility for the adoption of a Community measure to achieve a common objective.\textsuperscript{52} Albeit, that the actual adoption of such a measure must have a legal base in the EC-Treaty.\textsuperscript{53} Overall, it is arguable that the delegation of authority for further rule-making is either inherent to or implied by the nature of the OMC. Nonetheless, this aspect of the international law characteristic is rather weak, since the subsequent OMC-instruments themselves are of soft law.\textsuperscript{54}

In respect of the second aspect of delegation, accountability, the following can be analysed. It is clear that the OMC doesn’t offer accountability through legal systems, like the European Court of Justice.\textsuperscript{55} Instead, it offers a political monitoring system, e.g. syntheses reports, country-specific recommendations and peer reviews. As such, this system functions as peer pressure: it distinguishes bad performing member states (shaming) from best performing member states (naming).\textsuperscript{56} This leaves the OMC not completely unarmed when it comes to accountability, however, the teeth to bite with are not very sharp.

\textbf{3.3 Conclusion of the Analyses}


\textsuperscript{50} See also Scott and Trubek, \textit{supra} note 2, p. 5.


\textsuperscript{52} See more elaborate the next paragraph of this paper.

\textsuperscript{53} This follows from the principle of attributed competence as stipulated by article 5 EC-treaty.

\textsuperscript{54} See Abbott \textit{et al.}, \textit{supra} note 8, p. 416, table 4b.

\textsuperscript{55} \textit{Ibid}, p. 416, table 4a.

The analysis of the legal status of the agreement in which is decided to apply the OMC, showed that the OMC in the realm of Europe has two legal bases. The first legal base is directly in the EC-Treaty (BEPG and EES), which has the status of hard law. The second legal base are the Presidential Conclusions of the European Council, which have, in respect of the OMC, the status of intergovernmental soft law agreements. The analysis of the material content of the OMC shows that the OMC doesn’t exceed the legal continuum. As such the analysis substantiates the OMC as soft law instrument. Moreover, the analysis shows that the soft law aspects of the OMC cannot be assessed without taking into account its governance aspects, especially its iterative and open nature. The relation between the modes of governance and soft law instruments will be examined in further detail in the next paragraph, when a closer look is taken at the internal and external functioning of the OMC.

4. The Internal and External Functioning of the OMC

This paragraph explores the internal and external functioning of the OMC. The internal functioning of the OMC is determinant for the position of the OMC in the legal order, since it shows in what way the OMC adds a new stepping stone to the legal order. The external functioning of the OMC is determinant for its position in the legal order in respect of the ideal-type of Community hard law.

4.1 Internal Functioning of the OMC

As argued in the introduction, the OMC is characterized by the combined use of modes of governance and soft law instruments. The foregoing analysis of the material content of the ideal-type OMC, lifts already a corner of the veil of how the modes of governance and soft law instruments are related to each other. Central to this relation is the iterative nature of the OMC, which is the result of the OMC’s raison d’etre: multi-level, cross national learning. This multi-level, cross national learning involves modes of governance, such as targets, deadlines, benchmarking, peer reviewing and evaluation.57 These modes of governance result in the adoption or adjustment of legal instruments, like Council recommendations and common objectives.58 As such, the OMC is a multi-step iterative procedure that ‘systematically and continuously [obliges] the Member States to pool information, compare themselves to one another, and reassess current policies in the light of their relative performance’.59 Thus, similar to the legal order to regulate international and European relations, modes of governance and soft law instruments within the OMC process, are also sequential related to each other: the modes of governance lead to the adoption or adjustment of soft law instruments.

4.2 External Functioning of the OMC

The function of the first two OMCs (the BEPG’s and the EES) was originally to prevent deadlocks regarding the development of the EMU, respectively the adoption of the employment

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58. Cf. Goetschy, ibid, pp. 59-87. This can even go so far as to the adjustment of the common objectives or guidelines, see for instance on <ec.europa.eu/employment_social/employment_strategy/eestm_en.htm>, visited on 27 August 2007.
chapter in the EC-Treaty. This original function got overlooked by the introduction of the OMC in the Lisbon Strategy as an instrument ‘designed to help Member States to progressively develop their own policies’. After this introduction the application of the OMC rapidly increased. To explain this rapid increase of the use of the OMC several theses have been introduced. Many of them are positioned in the context of the development of the European Social Model and an accordingly new social policy vision. This new social policy vision is more broadly examined by the notion ‘new governance’. New governance is described as a construction that is developed to explain a range of processes and practices that poses a normative dimension, in spite of the fact that they are not operated through the formal mechanism of traditional authority. The OMC is labelled as the archetypal of ‘new governance’. As argued in the foregoing paragraph, regarding the ideal-type Community hard law, the OMC is more flexible as result of its iterative and open nature, in particular regarding the results: convergence while allowing diversity. In this line of reasoning, the OMC foresees in a gap between formal law and the practice of governance, also called the gap-thesis. As such, the OMC functions as a substitute for the ideal-type Community hard law as means of regulating cooperation on European level.

In the doctrine of new governance, the discussion about the actual operational capacities of the OMC deviated the path of ‘hard law versus soft law’, and took a new direction into the path of interactions between these two regulative systems of cooperation. Proponents of this direction argue that in practice hard law and soft law are not rivalry alternatives, rather they are complementary. This is conceptualised in the theory of hybrid structures between hard and soft law. In this theory, ‘hybridity’ is understood as ‘the simultaneous presence of “hard” and “soft” measures in the same policy domain’. Hybridity can be the result of a conscious, complementary design or an unplanned complementarity, meaning that the same objective is pursued by both regulative systems, thus by hard law as well as soft law.

Based on the idea of hybrid structures, six possible complementary functions can be distinguished. In the first three possible functions, hard law and the OMC are complementary, because they meet each other somewhere in the process of legislation. These functions are: 1) OMC helps to overcome a deadlock regarding hard law; 2) OMC paves the path for the adoption of hard law; and 3) OMC concretises the general norms that are created by hard law. The other three functions have in common, that hard law and the OMC are simultaneously present and function inseparable bound up with each other. These functions are: 4) hard law creates (a new) OMC and mandates the OMC’s basic parameters; 5) hard law represents a ‘default penalty’, 6) OMC helps to overcome a deadlock regarding hard law; 7) OMC paves the path for the adoption of hard law; and 8) OMC concretises the general norms that are created by hard law.

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60 E.g. Schäfer, supra note 15.
63 De Búrca and Scott, supra note 2, p. 2.
64 Ibid, p. 3.
65 Ibid, pp. 4-6.
66 See the several contributions in De Búrca and Scott, supra note 2.
67 Cf. Trubek et al., supra note 2, p. 33; and De Búrca and Scott, supra note 2, pp.6-9.
69 Trubek and Trubek, supra note 58, pp. 6-7; and De Búrca and Scott, supra note 2, pp. 6-8. Note For the readability of this paper, I replace the words ‘New Governance’ with ‘OMC’.
70 Cf. De Búrca and Scott, supra note 2, pp. 8-9. An example of this is the EES: the iterative procedure and the institutional decision making environment are constituted in hard law, i.e. article 128 EC-Treaty, while the specific
which is applicable in the case of failure to conform to OMC demands;\textsuperscript{71} and 6) hard law and soft law are yoked in a multi-pronged strategy that deals with complex (social) problems that require a variety of different forms of intervention.\textsuperscript{72}

4.3 Conclusions about the Functioning of the OMC
The internal functioning of the OMC shows that the combined use of modes of governance and soft law instruments is no different from their common sequential relation in the legal order. Thus, the several modes of governance lead to the adoption of the several soft law instruments, as for instance the evaluation of a national action plan leads to the adoption of country specific recommendations. The external functioning of the OMC defines the relation of the OMC with Community hard law not only as two rivalry systems to regulate European cooperation, but also as a hybrid structure in which the two systems complement each other.

5. Position of the OMC in the Legal Order (Conclusions)
What does this mean for the position of the OMC in the legal order? To start with, the legal base of the OMC can be found in either the EC-Treaty (the BEPG’s and the EES) or in the Presidential Conclusions of the European Council. Regarding the latter, it is arguable to consider those parts of the Conclusions that are concerned with the OMC as intergovernmental soft law agreement. Thus an OMC is either created by traditional authority leading to the adoption of hard law, i.e. the EC-Treaty, or through governance resulting into the adoption of soft law, i.e. the Presidential Conclusions.

In spite of the legal base, there may be several reasons for the created OMC to be softer or harder as that legal base suggests. Therefore an analysis of the material content of the OMC was needed. Based on four ingredients, the concept of legalisation, the ideal-type OMC, the ideal-type Community hard law, and the terminology of the gap-thesis, the analysis of the material content shows that the OMC does not exceed the legal continuum. As such, the analysis substantiates the OMC as soft law instrument. Moreover, the analysis shows that the normative aspects of the OMC cannot be assessed without taking into account its iterative and open nature, which are the result of the OMC’s modes of governance.

A closer look at the internal relation between the modes of governance and soft law instruments within the OMC, reveals that this relation functions the same as their common sequential relation in the legal order: governance leads to the adoption of soft law. Different to the legal order, this process of governance leading to soft law is not once-only. Once it is decided to apply the OMC regarding an objective of common concern, a multi-step iterative process starts. Meaning that modes of governance lead to the adoption of a soft law instrument, which leads to the use of modes of governance, which leads to the adoption or adjustment of a soft law instrument, and so on, and so on. In other words, the process of governance leading to the adoption of soft law is repeated endlessly, like a \textit{perpetuum mobile}, within the OMC itself.

The external functioning of the OMC, finally, fine tunes the position of the OMC in the legal order to regulate international and European cooperation, in particular in relation with hard law. This external function defines the relation of the OMC with hard law not only as two rivalry systems to regulate international and European cooperation (expressed by arrows 1 in figure 2),

goals are defined in the OMC soft law instruments, i.e. the guidelines, indicators, and country-specific recommendations.

\textsuperscript{71} De Búrca and Scott, \textit{supra} note 2, p.9.
\textsuperscript{72} Trubek and Trubek, \textit{supra} note56, p. 7.
but also as a hybrid structure in which the two systems complement each other. The OMC and hard law complement each other in two ways: they meet each other somewhere along the process of legislation (expressed by arrow 2 in figure 2) or they are simultaneously present and function inseparable bound up with each other in the regulation of a specific policy objective (expressed by line 3 in figure 2).

When the foregoing is taken together, the position of the OMC in the legal order to regulate international and European relations can be visualised as shown in figure 2.

**Figure 2:** Position of the OMC in the legal order to regulate international and European relations

![Diagram of legal order]

Based on the foregoing and the visualisation of the position of the OMC in the legal order in figure two, I conclude that the OMC adds in two ways a new stepping stone into the legal order of the regulation of international and European relations. The first way is created by the iterative process of governance leading to soft law within the OMC itself. As such, the OMC repeats the process to regulate international and European cooperation, before it effects and influences national procedures and measures. The second way in which the OMC adds a new stepping stone to the legal order, is the result of its open nature and its function to resolve a deadlock, which may pave the path for the adoption of hard law. As arrow two shows, the relationship between the OMC and the EC-treaty works in two ways: the EC-treaty constitutes two OMC-s, whereas the OMC may lead to the adoption of Community hard law, based on the EC-treaty.

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73 For the readability of the figure, I have left out the international political order and the other soft law instruments.