Chapter 9

The Open Method of Coordination in the Area of Social Policy and the Legality Principle

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1. INTRODUCTION

The Open Method of Coordination (OMC) was developed in the 1990s in the area of employment policy. Later it was also applied in other areas: social inclusion; pensions; immigration; education and culture; and asylum. More recently its use has been suggested for other areas as well, including health care, environmental affairs and the promotion of mobility of researchers. In short, the OMC is an instrument meant to meet certain objectives defined by the Council of Ministers. It requires Member States to submit reports on the national state of affairs in the policy area concerned, and on the basis of discussions within the Council on these reports, Member States are given guidelines which require them to take measures to reach the set objectives. Subsequently the Member States have to report the results of their policies. In section 2.2 the OMC procedure will be described in more detail.

The OMC is used in particular in areas where the Treaty does not give powers to make binding rules. It enables the European institutions thus to overcome the problem of the lack of competence to make rules, while at the same time allowing them to ask Member States to undertake policy measures in such areas. Sometimes

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the Treaty sets particular policy aims without giving the corresponding powers to make binding rules. Article 3 Treaty on the Functioning of the European Union is an example of such a Treaty provision that mentions several social policy aims, but gives no powers to the Council to make Regulations or Directives to realize these aims. The OMC is a useful instrument, as we will see below, to fill the gap: it leaves the room and also the responsibility to the Member States to develop their own policies where they are encouraged to take action. The obligation to report on the results of the actions taken and the recommendations following these reports make the OMC instrument far from optional.

For this reason, it is appropriate to consider the OMC in light of the functions that are traditionally attributed to the legality principle (see Chapter 1 of this book). The legality principle has to ensure that the elements of a democratic legal order are observed. We have to acknowledge, however, that these elements are not automatically guaranteed if a particular public authority is regulated by an Act. Therefore we do not only have to analyse whether authority is exercised on the basis of an Act, but we also have to consider the functions related to the principle, and whether and how they are realized.

Secondly, we have to acknowledge that the legality principle within the Nation-state may have a different meaning and function from that in the context of a multilevel legal order. The traditional meaning of the legality principle is that public authority can only be exercised on the basis of, and in accordance with, enacted laws. In the case of a multilevel order – the European Union in particular – the requirement of a legal basis for exercising authority has a reason, which is, for an important part, different from the reason why this requirement exists in national law. In the EU it serves to define the position of the stakeholders within the EU, in particular the relation between the Member States and the institutions of the Union.

The functions which have been connected to the legality principle within the nation-state context are, however, also relevant to the multilevel legal order. Therefore we will address these functions in order to see how they are satisfied in relation to the OMC. The first function of the legality principle is the attribution of public authority. Thus, we have to consider how public authority is attributed in respect of the OMC. This raises questions such as what is the legal basis for the OMC concerned, how is it drafted and does the OMC affect provisions of the Treaty where the powers to make instruments are exclusively reserved for the Member States? From the attribution function, it also follows that procedures must hold the government and administrative authorities to account for the way in which they exercise their powers. Since the OMC is applied in a multilevel legal order – that is, in the relation between the EU and the Member States – special attention is to be paid to the effects of this instrument on the various levels.

The second function of the legality principle is legitimation of public authority. This function means that democracy has to be realized through formal procedures and institutions involved in the legislative process. Alternative forms of democracy through semi-public devolution of legislative powers to functional bodies or stakeholders in sectors of society or the economy can also be required. The objective of democratic legitimacy of exercising public powers is served by

the requirement of legality, if legality (in view of its function) is understood as implying a procedure that involves representative institutions, rendering the outcome of the procedure 'democratic'.

The third function of the legality principle is the regulation of the manner in which public authority is to be exercised. This implies that certain substantive standards should be satisfied. This regulation is central for the attainment of the following objectives: prevention of arbitrariness and other forms of abuse of power; legal certainty; accessibility and foreseeability. It follows from this function that rights and obligations are to be clearly and precisely identified when they affect the legal position of citizens.

I will first describe the OMC instrument in the area of employment policies (section 2). Section 3 will deal with the OMC in other areas of social policy. Section 4 will give some examples of the guidelines and recommendations following from the OMC in employment. Section 5 will analyse the OMCs in terms of the functions connected with the OMCs.

2. THE OMC FOR EMPLOYMENT POLICIES

2.1. The Legal Basis for the OMC in Employment

The Open Coordination Method was developed for the first time in relation to employment policy.[1] Employment policy is an important policy area for the EU, since it is part of the European Employment Strategy (EES). The EES, which was initiated in the 1990s, was initially solely part of the instruments of the European Monetarian Union. It made use of mid-term objectives, indicators and convergence aims. In 1997 the EES was made part of the Treaty of Amsterdam (Article 125 EC, now Article 145 TFEU).

A major aim of this employment strategy was to increase the employment rate in the Member States and to improve the overall economic situation. The EU was not, however, given the competence to make binding rules on the employment policies of the Member States. The OMC can be seen then as an instrument for realizing the objectives of the employment strategy, thus compensating for the lack of EU competence in this area. Article 145 TFEU does not give the powers to EU institutions to make rules which bind the Member States. Instead, according to this Article, Member States and the Community shall, in accordance with this title of the Treaty, work towards developing a coordinated strategy for employment. This strategy must be particularly aimed at promoting a skilled, trained and adaptable

1. See, on the Open Coordination Method, B. Schulte, 'The new European ''Buzzword'': Open Method of Co-ordination', *European Journal of Social Security* 4 (2002): 343 ff.; J. Berghman and K. Okma, 'The Method of Open coordination: Open procedures or closed circuit? Social policy making between science and politics', *European Journal of Social Security* 4 (2002): 331 ff.

workforce, and labour markets responsive to economic change, with a view to achieving the objectives defined in Article 3 TFEU.

Article 146 mentions obligations for the Member States: Member States, through their employment policies, shall contribute to the achievement of the objectives referred to in Article 145 in a way consistent with the broad guidelines of the economic policies of the Member States and of the Community adopted pursuant to Article 121(2). In addition, the Member States, having regard to national practices related to the responsibilities of management and labour, have to regard promoting employment as a matter of common concern, and shall coordinate their action in this respect within the Council.

These provisions, together with Article 147, constitute the legal basis for the OMC in employment policy. In Article 148 the procedure is described in more detail. Note that the Treaty does not use the term 'Open Method of Coordination' to describe the procedure.

2.2. The Procedure for the OMC in Employment

The OMC procedure as described in Article 148 TFEU is as follows. First, each year the European Council has to consider the employment situation in the Community. On the basis of a joint annual report by the Council and the Commission, the Council adopts conclusions on this employment situation. On the basis of these conclusions, the Council, acting by a qualified majority on, *inter alia*, a proposal from the Commission, has, each year, to draw up guidelines which the Member States have to take into account in their employment policies. Subsequently, each Member State has to write an annual report on the principal measures taken to implement its employment policy in the light of these guidelines; these reports are sent to the Council and the Commission. The Council examines these reports – that is, on the employment policies of the Member States – in the light of the employment guidelines.

The Council can, if it considers it appropriate in the light of that examination, make recommendations to Member States on a proposal from the Commission. Finally, on the basis of the results of the reports, the Council and the Commission have to make a joint annual report to the European Council on the employment situation in the Community and on the implementation of the guidelines for employment.

Thus, the OMC is a cycle of guidelines, recommendations and reports:

- a report and conclusions are made by the Council on the employment situation; these set objectives, and in order to be able to measure the extent to which these are reached, common indicators are used (e.g., reaching an employment level of 70%);
- guidelines are made by the Council for Member States;
- annual reports of the Member States on the measures they have taken in light of guidelines with action plans;

– an examination by the Council of the reports (peer reviewing);
– recommendations by Council to Member States; and
– an annual report by Council and Commission on the employment situation.

2.3. The OMC as An Instrument of Soft Law

Initially, it was feared that the OMC would not have much effect. However, the Council issued detailed and specific recommendations of which I will give examples in section 4. These recommendations are to be taken into account for the next reports Member States have to write. Thus, Member States have to consider these recommendations when developing their policies, making them quite influential.

The analysis of the reports, the comparison of the results reached in the Member States, and the description of best practices of other Member States, constitute pressure on the Member States to continue to aim for the formulated objectives. We can conclude that, while having formally kept the freedom to choose the national instruments to meet the objectives of the employment strategy, Member States have to take the recommendations into account, in any case if they do not succeed in meeting the objectives of the employment strategy with their own instruments.

The OMC is a way to set Member States in motion without hard law at the EU level. It is an instrument which leaves the powers to develop a policy basically at the national level, but still has serious effects on national employment policy. In other words, the OMC is an instrument which deals in a very specific way with the subsidiarity principle.

As, from this point of view the OMC in employment was seen as successful, the Method was introduced in other areas as well.[2]

3. THE OPEN METHOD OF COORDINATION IN SOCIAL POLICY AREAS (OMC LIGHT)

3.1. Introduction

The first 'new' area where the OMC was introduced was social inclusion. Social inclusion – or 'combating social exclusion' – is important from a political point of view, as the EU is often criticized for being an economic organization only, which aims at promoting and enforcing more competition and demands the abolition of social protection rules if these impede competition. In order to mitigate these effects, the EU has to take action in the area of social policy.

The Treaty gives, in Article 3 TFEU, the obligation to the Community to promote, *inter alia*, a high level of employment and of social protection, a high level of protection and improvement of the quality of the environment, the raising

2. E. Szyszczak, 'Experimental Governance: the Open Method of Coordination', *European Law Journal* (2004): 489 ff.

of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States. This Article shows that social objectives constitute a very important part of the obligations of the EU, but EU institutions have very few powers to realize these objectives.

First I will describe the competences of the Union in the area of social policy (section 3.2) and then the OMC will be discussed (section 3.3).

3.2. The Competences of the EU in the Area of Social Policy

Article 151 TFEU gives the main rules on the obligations and powers of EU in the area of social policy. According to this article, the Union and the Member States must have as their objectives the promotion of employment and improved living and working conditions so as to make possible their harmonization while the improvement is being maintained. They must also promote proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment, and the combating of exclusion.

To this end, Article 151 continues, the Community and the Member States have to implement measures that take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Community economy. They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonization of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.

Article 153 gives the powers to make instruments to realize these objectives. The Council may adopt measures designed to encourage cooperation between Member States, through initiatives aimed at improving knowledge, developing exchanges of information and best practice, promoting innovative approaches, and evaluating experiences, excluding any harmonization of the laws and regulations of the Member States.

In addition, Directives with minimum provisions can be made for this purpose, but only in a set of limited areas mentioned in the Article concerned: improvement of the working environment, working conditions, social security and social protection of workers, protection of workers where their employment contract is terminated, information and consultation of workers, representation and collective defence of interests of workers, conditions of employment for third country nationals, integration of persons excluded form the labour market, and equality of men and women. In the area of combating social exclusion and the modernization of social protection other than that of employees (mentioned in Article 153(1)), no such minimum requirements can be made. In the case of social security, the protection of workers where their employment contract is terminated, and conditions for third country nationals, unanimity in voting is required. In the area of pay, the right of association, and the right to strike, there are explicitly no powers for Union institutions to make rules.

Article 154 provides that the Commission has the task of promoting the consultation of management and labour at Community level, and has to take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties. To this end, before submitting proposals in the social policy field, the Commission has to consult management and labour on the possible direction of Community action. If, after such consultation, the Commission considers Community action advisable, it has to consult management and labour on the content of the envisaged proposal. Management and labour have to forward to the Commission an opinion or, where appropriate, a recommendation. On the occasion of such consultation, management and labour may inform the Commission of their wish to initiate the process provided for in Article 155. The duration of the procedure must not exceed nine months unless the management and labour concerned and the Commission decide jointly to extend it. Article 155 provides that should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.

Thus, management and labour – often called the social partners at EU level – play a role in the development of social policies, both at the level of consultation, and legislature in lieu of the Council, although subsequently the Council has to make a Directive to give the agreement legal force in the EU and to ensure its implementation.[3]

3.3. Combating Social Exclusion

Combating social exclusion is a main objective of European social policy.[4] However, the term 'social inclusion' is far from clear.[5]

The European Commission mentioned the following objectives for combating social exclusion:

- the promotion of participation in work and the promotion of access to all sources, rights, goods and services;
- measures to prevent the risk of social exclusion;
- measures to help the most vulnerable groups to re-integrate into society ('social inclusion');
- mobilization of all the bodies concerned to combat social exclusion.

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3. See, for an extensive discussion of the relationship between this social dialogue and the legality principle, the contribution by Albertine Veldman to this volume.
4. See, on this topic, D.G. Mayes, J. Berghman & R. Salais, *Social Exclusion and European Policy* (Cheltenham/Northampton: Edward Elgar Publishing, 2001); E. Aposapori & J. Millar, *The Dynamics of Social Exclusion in Europe* (Cheltenham and Northampton: Edward Elgar Publishing, 2003).
5. See, for a thorough analysis, K. Vlemminckx & J. Berghman, 'Social Exclusion and the Welfare State', in D.G. Mayes, J. Berghman & R. Salais (eds.), *supra* n. 4, 34 ff; P. Schoukens, 'How the European Union Keeps the Social Welfare Debate on Track: 'A Lawyer's View on the EU Instruments Aimed at Combating Social Exclusion', *EJSS* (2002) 117 ff.

For our purpose it suffices that social exclusion is more than poverty, since poverty does not necessarily mean that one cannot or does not participate in social activities or benefit from these. Also, persons with an income above subsistence level can sometimes be excluded from particular activities or benefits.

3.4. The OMC in Social Inclusion

The OMC inclusion was elaborated by a request to each Member State in 2001 to benchmark the state of social inclusion in its country by producing a two-year national action plan. Member States also had to present national level strategies for improving the situation. In 2003 the European Commission published a joint report on social inclusion in which the approaches of the Member States were compared and contrasted and recommendations were given.

In order to win the fight against social exclusion, the national measures and results were compared on the basis of so-called social inclusion indicators. These indicators are still subject to further development, but already show what results have been achieved in the Member States. The idea behind these indicators is that social exclusion is a relative concept: relevant is whether citizens have access to, among other things, work, housing and health care. The indicators have to show whether national measures are effective in ensuring access to these elements.

The OMC in social inclusion has no basis in the Treaty, as is the case with OMC in employment. Instead, the procedure can be based on Article 153(2)(a) TFEU, which provides that the Council can take measures in order to encourage Member States to cooperate by means of initiatives which increase knowledge, exchange information, and give information on examples of good results ('best practice'). Since this procedure does not provide for the power or the obligation to give recommendations and guidelines, as is the case with the OMC in employment, the OMC in social inclusion (and other OMCs in areas other than employment) are sometimes called OMC light.

4. EXAMPLES OF THE GUIDELINES AND RECOMMENDATIONS GIVEN AS PART OF THE OMC EMPLOYMENT

In order to give a picture of the guidelines which have been issued so far and to be able to provide more material for the analysis of the OMCs *vis-á-vis* the functions of the legality principle, it is useful to mention some examples of the guidelines and recommendations which have been made in recent years. These examples are derived from the Employment policy guidelines (2005–2008).

General recommendations made by the Commission include recommendations, *inter alia,* to improve the adaptability of workers and enterprises and the flexibility of labour markets by promoting adaptation of employment legislation, and reviewing, where necessary, the different contractual and working time

arrangements. Another recommendation is to ensure employment-friendly labour cost developments and wage-setting mechanisms by reviewing the impact on employment of non-wage labour costs and, where appropriate, adjusting their structure and level, especially to reduce the tax burden on the low-paid.

In addition to these general recommendations individual recommendations were made – that is, guidelines addressed to individual Member States.[6] These individual guidelines give more specific requirements.

One example of an individual recommendation is one recommending that a Member State reduce non-wage labour costs, in particular for the low-paid, while safeguarding budgetary consolidation efforts and removing unemployment traps by reviewing the conditionality of benefits. The Member State addressed has to implement this recommendation and it has several options in doing so. It can be easily understood that the requirements are of a highly sensitive nature, since they may involve the lowering of benefits in order to avoid employment traps, or the tightening of sanctions in the case of claimants refusing work.

Another example of a guideline with of a sensitive nature is the recommendation to remove incentives for early retirement and to review the financing of social protection systems to reduce non-wage labour costs. The recommendation to encourage the social partners to take responsibility in wage setting, putting pressure on Member States to ask social partners to reduce their wage claims in collective bargaining can be also seen as an example of a sensitive recommendation. A fourth example is the recommendation to develop temporary work agencies to increase the diversity of work arrangements. A final example is the recommendation to roll out privatization programmes. These examples will be discussed in the following section.

5. THE FUNCTIONS OF THE LEGALITY PRINCIPLE *VIS-À-VIS* THE OMC EMPLOYMENT

5.1. Introduction

The OMCs discussed so far are, on the one hand, a way for Member States and the European Commission to exchange information. They also promote the exchange of information between the Member States themselves, and can constitute best practice and benchmarks. However, the OMC is not simply a communication instrument, it is also a steering instrument to help reach certain objectives.[7] This double role raises the question of how the functions connected with the legality principle are respected in the OMC approach.

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6. Decision (EC) 2004/740 of the Council of 4 October on guidelines for the employment policies of the Member States, OJ 2004, L 326/45.
7. B. ter Haar, 'Open Method of Coordination: A New Stepping Stone in the Legal Order of International and European Relations', *Nordic Journal of International Law* 77 (2008): 236.

Although a Member State is officially not obliged to follow a recommendation, if it does not achieve the objectives that are set, it will be confronted with the question of why it failed to do so. Moreover, there may be indirect sanctions if the recommendation is not followed. If, for instance, a Member State does not fulfil the criteria set for the employment policies in the light of EMU,[8] sanctions can be imposed on this Member State and stringent requirements can be imposed. If it is claimed that a Member State has 'even been given actual support' by the recommendation and it still does not achieve the objective, this may be an important argument for imposing sanctions. Thus, the recommendations are far from a free option for Member States.

As was already mentioned in section 1, the traditional legality principle was primarily developed in order to protect citizens against the State. In the discussion on the legality principle within the EU framework, the multilevel legal order has to be kept in mind, meaning that several addressees can be distinguished apart from the individual citizens: Member States, social partners, the Council, the Commission and the European Parliament are all stakeholders.

I will discuss the functions of the traditional legality principle according to the order mentioned in the first section of this contribution. First the OMC in employment, and in section 6 the OMC light is discussed.

5.2. Attribution of Public Authority

As we have seen in section 2.2, Article 148 TFEU gives both the legal basis for the OMC in employment and the rules for its implementation. Thus, the obligations of the Member States and the recommendations made by the Council are based on a Treaty provision. Consequently, the formal requirement that the authority is based on a statutory provision is satisfied. Still, while the Treaty regulates the method of OMC, it is silent on its contents. In section 3.2 we saw that, in respect of social policy, the Treaty provides sharp rules in several areas, whether rules with minimum requirements can be made or not (Article 153(2) TFEU). In respect of social security, for instance, such a Directive has to be adopted unanimously. In the area of combating social exclusion and the modernization of social protection systems, no minimum requirements can be made, according to Article 153(2). Some areas are explicitly excluded from making rules with minimum requirements, such as pay and the right of association.

The OMC recommendations do not take such distinctions and exclusions into account. In section 4 we saw that one of the OMC employment recommendations was to review the conditionality of benefits in order to remove unemployment traps. Although the recommendation to review the conditionality of benefits is not a minimum requirement in the sense of Article 153, there is some overlap between such a requirement and this recommendation. After all, it may mean that a Member State feels indeed obliged to change its benefit system. If the reviewing of the

8. Article 128 refers to these criteria, which themselves are laid down in Art. 99(2).

conditionality of benefits is seen as a modernization of social protection systems in the sense of Article 153, we reach an area where no powers are given for minimum requirements, but the OMC applies in this area without problems.

The recommendation to encourage social partners to take responsibility in wage setting may influence collective bargaining processes, whereas Article 153(5) provides that the provisions of this Article shall not apply to pay and the right to association (which is commonly also considered as the right to collective bargaining). There is also a discrepancy with Article 153(4) TFEU: the provisions made on the basis of Article 153 do not prevent Member States from taking or maintaining measures with a higher level of protection which is compatible with the Treaty. Although this provision concerns a Directive, it can be argued that it also applies to recommendations. After all, if a Member State yields to the pressure to lower its protection, such as lowering social benefits, we cannot say that it is not prevented from maintaining a higher level.

Of course, the recommendations are of a different nature than the minimum requirements of Article 153. Member States can still decide not to follow them, they will not have direct effect in national procedures, and they are worded in such a way that there is still much discretion to develop them. Still, they touch on areas for which either no powers exist or where there are special conditions for making rules. Moreover, so far, no use of these provisions of Article 157 has been made, since there is very little support for EU law in these areas. This places the recommendations in a special light.

The question is, therefore, whether the fact that there is a legal provision dealing with the OMC is sufficient from the attribution point of view.

Therefore we will also discuss the aspects of the attribution function, mentioned in section 1. The question of whether the OMC affects provisions of the Treaty where the powers to make instruments are exclusively reserved for the Member States can be answered in the affirmative. If a Member State could completely neglect a recommendation, it could be said that there is no interference. However, the pressure can be quite high on a Member State to take action. There may, therefore, be a possible problem with the attribution of powers. After all, the unanimity rule and the involvement of the European Parliament constitute conditions for making the 'hard rules,' and some areas are excluded from being made subject to rules, whereas recommendations are made in these very areas.

From the attribution function it also follows that procedures must hold the government and administrative authorities to account for the way they exercise their powers. For this purpose, well defined functions and powers are needed. The powers in this area are not very well defined, as the Council enjoys a large discretion in making recommendations.

5.3. The Legitimation Function

The second function of the traditional legality principle is the legitimation of public authority. This function aims to realize democracy through formal procedures and

institutions involved in the legislative process. For this function a procedure is required which involves representative institutions.

In the OMC in employment the Member States, the Commission and the Council are the stakeholders. We have seen that the recommendations in the OMC and the minimum requirements which can be introduced on the basis of the Article 153 procedure overlap.

In section 1, I also mentioned that the legitimation function may require alternative forms of democracy through semi-public devolution of legislative powers to functional bodies or stakeholders in sectors of society or the economy. Article 154 and 155 TFEU can be seen as elaborating this requirement by allowing social partners to advise on proposed measures or to make agreements themselves, which can later be implemented. This involvement can be necessary in order to create a larger basis for these types of measures and to make use of the knowledge of the interests of the stakeholders involved and on the effects of the measures. By their consent, the legitimacy of the instrument is deemed to increase.

However, in respect of the OMC, the social partners are not involved in making these guidelines. Nor is the European Parliament consulted. As a result, the European Parliament plays no part in the OMC procedures and practice. Nor are commissions of Parliament and other advisory bodies involved. Thus, some stakeholders who are involved in the Article 153 procedure do not play a role in the OMC. These are, in particular, the social partners and European Parliament. Their absence in the process of making the recommendations and setting priorities within the OMC framework reduces their influence in this important area significantly.

Thus, there is a tension with the legitimation function, since the OMC is a procedure that bypasses the regular procedures, and is limited to the Council, European commission and Member State concerned, rather than involving all interested stakeholders.

5.4. The Regulatory Function

The third function of the legality principle is the regulation of the manner in which public authority is exercised. It is therefore important to consider whether there is sufficient legal certainty.

The regulatory function requires legal certainty and accessibility. There may be problems in this area when it comes to the OMC. It can happen, for instance, that a Member State takes measures in order to follow recommendations without mentioning that it is doing so. It can also say that 'we are obliged to do this by Brussels'. However, although this is a problem with transparency, the problem lies not in the fact that the recommendation has been made, but in the way Member States deal with the recommendations.

For example, a Member State introduces a higher tax rebate for persons in work in order to increase the desired difference between the net incomes for

persons in work and beneficiaries, thus making work more attractive. Suppose that the government claims that it has to do this in order to satisfy a recommendation of the EU. This makes it more difficult for the national parliament concerned, as it is not presented with alternative ways of satisfying the recommendation. It could also be that the Government does not explain that this measure is taken in order to satisfy a recommendation. In this case, the exercise of power lacks transparency and the democratic process is infringed. Although the problem lies at the national level, the effect is not irrelevant. A possible solution to counter this lack of transparency could be that Member States have to account for how they present the recommendations and their response to the national parliament and social partners.

A second aspect is whether stakeholders have access to Court if they disagree with the recommendation. At first sight, the discussion on whether cases can be brought before the Court of Justice may seem somewhat theoretical – why discuss starting court procedures if only a recommendation is involved? After all, recommendations seem only to be of soft law and there are no direct consequences if they are not followed. Indeed, there are no official sanctions for disobeying them, with the effectiveness of the OMC based more on 'peer pressure' by the other members of the Council.

However, suppose that a Member State is very much opposed to a particular recommendation, since it infringes on a particular fundamental characteristic of its system. An example could be that there is a recommendation to limit considerably employment protection laws or to lower or abolish minimum wages. If a Member State wants to go to Court in order to have the recommendation quashed, first of all, it has to be decided whether the Member State is admissible. To meet this requirement, a particular act or regulation must have legal effect. In the case of a recommendation it is not impossible for the Court to find that it can cause legal effect and that the Member State concerned is admissible, but this is far from certain. For others than Member States, direct access to the Court is not available since they are not addressed directly.

If the admissibility requirement is fulfilled, the next problem is that Article 148 TFEU does not give specific criteria for the possible contents of recommendations – in other words, it does not set limits of recommendations; Article 148(4) merely mentions that a guideline can be made by the Council 'if it considers it appropriate'. This gives a very broad discretionary power. Therefore the Court of Justice does not have much room to decide that a recommendation is contrary to this Provision. Of course, the Court could, in its considerations, also take other provisions or principles into account. An interesting source of such provisions could be the Charter of Fundamental Rights of the European Union (see also Article 6 TFEU), in which fundamental rights are laid down. However, the character and the broad wording of the recommendations would make such a test very difficult. Therefore, the protection by the Court against recommendations is very weak, event though they may exert a considerable influence.

6. THE FUNCTION OF THE LEGALITY PRINCIPLE *VIS-À-VIS* THE OMC LIGHT

As we saw in the previous section, the OMC in employment has a legal basis in Article 128. There is no such legal basis in the Treaty for the other OMCs. The OMC in social inclusion, the OMC pensions, the OMC in healthcare and the OMC in education have their legal basis in the so-called Presidential Conclusions of the European Council. The procedures and requirements are mentioned in the Presidency Conclusions of the Lisbon Summit of 23 March 2000.[9]

The status of these Conclusions is not undisputed, since the Treaty does not give explicit powers to the Council to take decisions on 'Presidential Conclusions'. On the website of the Council, maybe as a reaction to this discussion on the legal basis, the Presidential Conclusions are preceded by a reference to Article 4 TFEU: the European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof. However, general political guidelines for the development of the Union are not exactly the same as guidelines addressed at individual Member State level. This reference does not necessarily solve the dispute. Another argument is that the European Council does not need specific powers to adopt Conclusions; this does not seem too far-fetched.[10]

The OMCs in these areas (i.e., other than the OMCs in employment) are of a more limited character than the OMC in employment. On the one hand, a 'hard law' legal basis for these are missing, such as Article 148 for the OMC in employment, but on the other, these OMCs are limited to obtaining information from Member States, analysing this information, and benchmarking it. The role of the European Commission and Council in this procedure is therefore basically a monitoring one, since in these procedures no guidelines are given by the Council.

Consequently, with respect to the products of OMC light itself, no instruments are used which require a legal basis. Nor are specific guidelines or recommendations given to the Member States as a whole or to individual Member States. The legality principle is not infringed upon from a formal point of view – that is, that measures are taken for which the Treaty does not provide any powers. After all, it is a form of law that is even softer than the OMC in employment, as no guidelines and recommendations are given. However, while monitoring and discussing the benchmarks, the European Commission has ample opportunity to promote particular policies and to persuade reluctant Member States to implement agreed policies. As in the case of the OMC in employment, the European Parliament and the Court of Justice play a very small role or no role in this process. In this respect, the same problems with the regulatory and legitimation functions apply as with the OMC in employment, although the problems are less urgent since the instruments used in this OMC are weaker.

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9. <http://europa.eu/european-council/index_en.htm> contains the Presidency Conclusions; para. 37 of the summit of March 2000 gives the requirements mentioned in the main text.
10. L. Senden, *Soft Law in European Community Law* (Oxford: Hart Publishing, 2004) 190 ff.

7. CONCLUSIONS: THE OPEN METHOD OF COORDINATION, THE FUNCTIONS OF LEGALITY AND THE MULTIPLE LEGAL ORDER

In this contribution I discussed the OMCs in relation to the functions of the legality principle. Are these functions still guaranteed, if not by legality itself, then by other, compensating rules? In the nation-state context the legality principle means that public authority is to be exercised on the basis of an Act. The use of an Act serves several functions, discussed in section 1, which are mainly meant to protect citizens.

In the EU context the legality principle mainly means that the Member States are protected against an excessive exercise of powers by EU institutions. Indirectly, legality here is also meant to protect citizens, to the extent that EU institutions cannot deprive Member States of their rights to protect citizens.

The national and EU legal orders are multiple legal orders. They are distinct, *inter alia*, to the extent that national orders have their exclusive domains, that some powers are attributed to EU institutions and others to national institutions, and that there are also separate spheres for courts and social partners to function.

Although the requirement of a legal basis for EU instruments is thus an important element of the EU legal order and is meant to provide protection to Member States and citizens, the lack of powers at the EU level to achieve some of the objectives mentioned in the Treaty is also a serious problem. This problem has to do with the fact that although Member States wished include these objectives in the Treaty, they did and do not wish to share any of their powers in such areas. Since the objectives are mentioned in the Treaty, the European Commission can feel obliged to take measures in these areas.

In view of this division of tasks between the Member States and the EU institutions, and in view of the need to take measures in order to meet objectives for which there is no competence, the OMC is an interesting instrument: it allows measures to be taken even if there is no legal power for such actions. At first sight a confrontation with the legality principle seems a fatal one, but in view of the way the OMC is elaborated – a recommendation is made and the Member State decides on its response to the recommendation – it can be seen as a way to reconcile the lack of powers with the need to take action.

So, within the framework of the multiple legal order, bearing in mind that actions have to be taken in order to meet particular objectives of the Treaty for which insufficient powers were given, the OMC has an important function, which is also in the interest of the citizens, since they aim to meet social objectives set by the Treaty.

Given the important role of the legal basis for the division of powers within the EU framework, and since all stakeholders are very well aware of the need of such a legal basis, it is not surprising that from a formal point of view the legality principle is not infringed upon by the OMCs. There is a legal basis for the employment OMC, and in the case of the light OMCs, where such a legal basis does not exist, the actions taken do not extend to the information and consultation phase.

The next question is whether there are sufficient checks and balances in the OMC procedures. The analysis of the OMC in light of the functions of the legality principle and the comparison with the safeguards given in provisions on 'hard' rules on social policy issues showed that clarity and protection are lacking. For this reason, the study of the function of legality principle is a very useful approach, also for multilevel legal orders.

The deficiencies of the OMC are the following. First, the stakeholders who have to be involved in consultation and legislative procedures on issues of social policy (Article 153 TFEU) do not have a role in the OMC process. Second, OMC recommendations can exert considerable pressure on the Member States in areas where they have exclusive rights. Setting more precise limits to the recommendations which could be issued and legal protection is therefore desirable.

Thus, the OMC has some problematic elements, because of the lack of checks and balances that exist in the hard law procedures. The stakeholders which play a role in hard law procedures on social policy should also be given a formal place in the OMC procedure.

To conclude, in a multiple order, the OMC is a useful instrument to reconcile the gap between objectives mentioned in the Treaty and the lack of sufficient competences where Member States wish to remain (exclusively) competent. The analysis from the point of view of the legality principle also shows the weak elements of the OMC. Insufficient checks and balances are guaranteed in the procedure, in any case in respect of the OMC in employment, since not all stakeholders are involved. If these stakeholders were involved, the at times far-reaching recommendations that touch on the limits set by the Treaty would sit better in the multi-level legal order.