

# Alternative Regulations or Complementary Methods? Evolving Options in European Governance



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## Summary

Long gone are the days when the only choice for pursuing a Community objective was law, and law was adopted according to one main procedure. In many areas EU policy is formulated and implemented through a mixture of methods both legal and non-legal, European and national, public and private. After a flashback to recall some the main reasons why all these new methods have emerged, this article outlines the main features of two areas in which “self-regulation” and “co-regulation” are significant: environmental agreements and the social dialogue. It then gives an overview of the very different ways in which the “open method of coordination” is in fact being pursued. The final section then addresses some of the main issues which have been raised regarding the effectiveness and legitimacy of these new methods, and looks to the future.

## Introduction

Many people feel that the European Union is unreasonably and even undemocratically complicated. It is, after all, an elementary feature of democracy that those who are subject to the law should know where it comes from. EU rules, however, seem to emanate mysteriously from cloud-covered “Brussels”. The European Convention promises to clarify the reasons and the authors of European laws – for that is what they are, and may now at last come to be called. Yet, even as people may feel they are on the verge of understanding European law, they are told that there are other European processes which shape their lives but which are not laws and are not in the hands only of the EU institutions. It is not necessarily reassuring.

To promise too much simplicity, however, will not help either. Even if a new constitutional treaty provides a simpler framework, European governance is going to remain a complex matter. We are not going to establish a clear “delimitation” between EU and national competences. We will continue to have a system in which there is cooperation rather than separation between levels, and the division of responsibilities is made more by function than by sector. And to make things even more difficult, there will be grey areas in which the Member States retain legislative competence but where the Community can act – including by legal instruments – but only to provide supporting measures excluding harmonisation. Nor is there going to be a simple opposition between a “Community method” and “intergovernmentalism”. To be sure, there is a “pure” Community method by which the Commission has the exclusive right of initiative, the Council decides (preferably by qualified majority) with the participation of Parliament (ideally codecision) and the whole thing is subject to the jurisdiction of the Court. Yet even within the Community there are major differences in

how things are done, and in many areas policy is formulated and implemented through a mixture of methods both legal and non-legal, European and national, public and private.

A difficult series of balances must be struck – and explained – if we are going to respond appropriately to this challenge. This tension is well reflected in the European Commission’s December 2002 Report on European Governance. On the one hand, the Commission urges “more focused European institutions with clearer responsibilities” supported by improved “bottom-up involvement in EU policy shaping and implementation”. Yet it also argues in favour of “widening the choice of instruments to respond to new governance challenges”.<sup>1</sup> The Commission’s June 2002 Action Plan on Simplifying and Improving the Regulatory Environment thus talks of establishing mechanisms which will make it easier

“to choose the most appropriate instrument or combination of instruments (of both a legislative and non-legislative nature) from the wide range of options available (regulation, directive, recommendation, co-regulation, self-regulation, voluntary sectoral agreements, open coordination method, financial assistance, information campaign)”.<sup>2</sup>

The main aim of this article is to explain roughly what is involved in these different ways of doing things. After a flashback to recall some the main reasons why all these new methods have emerged, it outlines the main features of two areas in which self- and co-regulation are significant: environmental agreements and the social dialogue. It then gives an overview of the very different ways in which the “open method of coordination” is in fact being pursued. The final section then addresses some of the main issues which have been raised regarding

the effectiveness and legitimacy of these new methods, and looks to the future.

### 1. A Brief Look Back

Long gone indeed are the days when the only choice for pursuing a Community objective was law, and law was adopted according to one main procedure. There has been a constant but uneven strengthening of “supranational” processes, notably the extension of qualified majority voting (QMV) in the Council and the strengthening of the European Parliament’s role in decision-making, first with the “cooperation procedure” and then through the creation at Maastricht and subsequent extensions of “codecision”. In parallel, there have been a series of tendencies leading away from simple reliance on the law.

Completion of the internal market itself was made possible not only by QMV but also by the move away from detailed European harmonisation through adoption of mutual recognition and the *New Approach*, by which legislation was limited to defining “essential requirements” of health and safety while leaving the detailed technical specifications to standardisation bodies. In other words, progress was achieved by a combination of more efficient legislation (both in process and content) with decentralisation and voluntary standards.

As the single market programme was implemented, political consensus was more or less reached on the twin principles of *subsidiarity* – the Community should only act where this is necessary or more effective than action at the level of the Member States (or regions) by virtue of the nature of the objective to be achieved; and *proportionality* – Community action should be as limited as possible and leave as much flexibility as possible while ensuring fulfilment of the objectives. In other words, only as much law should be adopted as was strictly necessary.

The process of Economic and Monetary Union then served as an example of convergence and multilateral surveillance, prompting new forms of non-binding *policy coordination* in other areas, a process strongly influenced also by the spread into public administration and policies in the 1990s of the ideas of management by objectives and benchmarking. At the same time, effective implementation of major Community policies was seen to demand new forms of *participation*. In the structural funds, the doubling of resources was accompanied by new forms of partnership with sub-state and private actors, while environmental policy gave increasing weight to the involvement of stakeholders. Finally, Community policy has had to come to terms with increasing *diversity*. Integration has increasingly touched on sensitive issues such as social policy, where there are strong differences in national structures and legal harmonisation has been considered both unnecessary and unacceptable.

The various “new methods” which have emerged from all this are often lumped together in a rather indiscriminate way. A basic distinction can be made, however, according to the nature of the main actors who

are involved in each case:

- forms of interaction between Community processes and *private actors*, which are generally referred to as “self-regulation” and “co-regulation”; and
- forms of non-binding policy coordination which take place mainly between *national governments and administrations*, with some role for the EU institutions, which are widely referred to as constituting an “open method of coordination”.

### 2. Self-regulation and Co-regulation

A common language is only now beginning to be developed regarding self-regulation and co-regulation in the EU context. The common feature is the existence of some form of relationship between binding legislation and voluntary agreements in a particular area, but many different concepts and modalities can be observed.

A loose distinction is frequently made between more “top-down” and more “bottom-up” approaches. “Bottom-up” approaches consist of self-regulation which is initiated by stakeholders themselves (perhaps with a bit of prompting by the Commission) but which still takes place under the shadow of the law. The relationship can be simply one of Euro-acknowledgement of autonomous self-regulation in a particular sector or profession. So long as the resulting agreements do not conflict with European law or other policies, it may not seem necessary for anything at all to be done by the EU institutions, or indeed by national authorities. In other cases it is more a case of the institutions and governments not being able to regulate alone, as in the case of consumer protection in electronic commerce, where self-regulation is understood more in terms of Codes of Conduct for Online Businesses, Trustmarks and Alternative Dispute Resolution (ADR) mechanisms.

More “top-down” approaches include the use of standards – that is, voluntary measures which are adopted within the framework of legislative acts, in the spirit of the New Approach – and the implementation of Directives by voluntary agreements. The Commission’s June 2002 Action Plan on Simplifying and Improving the Regulatory Environment is quite clear that what the Commission, at least, understands as “co-regulation” is essentially a means of implementation. This mechanism can offer advantages. It may “be appropriate in cases where flexible and/or urgent measures are necessary, provided that they do not require a uniform application in the Community and that they do not affect the conditions for competition”; and it can draw on the field experience of the parties concerned. However, it should only be used on the basis of a legislative act, and can be replaced by further legislation if necessary.<sup>3</sup> This is not a view which is shared by everyone, and a lively debate can be expected.

The following sections aim to give an idea of the present state of play concerning these kind of procedures by looking briefly at two cases in which self- and co-regulation already have a significant European experience: environmental agreements and the Social Dialogue.

### *Environmental Agreements*

Voluntary agreements have long been explored at national level in the environmental area. European policy has also tried to incorporate such agreements, as part of an overall strategy in which stakeholder involvement and behaviour change are seen as essential elements. The 5th Environmental Action Programme of 1992 thus proposed a “reinforcement of the dialogue with industry and the encouragement, in appropriate circumstances, of voluntary agreements”. The Council, ratifying this programme, noted that “... the involvement of all levels of society in a spirit of shared responsibility requires a deepening and broadening of the range of instruments to complement normative legislation including, where appropriate, market-based and other economic instruments, research and development, information, education and training, financial support mechanisms, voluntary schemes”.<sup>4</sup> Ten years later, a similar “strategic integrated approach” is being pursued under the 6th Action Programme.<sup>5</sup>

General voluntary agreements at European level have been few: the eco-label award scheme (1992 - revised 2000) and voluntary participation by organisations in a Community eco-management and audit scheme (EMAS) (1993 - revised 2001). There have been various efforts, however, to establish mixes of legislation and voluntary measures in specific cases. An early example was *detergents*, where the goals are not only a decrease in poorly biodegradable organic ingredients, which depends on change in manufacturing, but also reductions in energy use and in consumption per capita of detergents and packaging. These require changes in consumer behaviour which can be assisted through labelling, information and educational programmes. Community legislation to this effect existed, but in the mid-1990s, the European association AISE adopted a Code of Good Environmental Practice, leading to a 1998 Commission Recommendation<sup>6</sup> intended “to enhance the effectiveness and to guarantee the transparency and credibility of this industry commitment”, which specifies targets for each of the main objectives and committed all parties to monitor and report.

An illustrative case of the perceived interplay between negotiation and legislation is that of *energy efficiency*. After the 1996 “Refrigerator Directive”, negotiated agreements became more accepted, and the Commission had by 2000 negotiated two agreements with manufacturers (of TV and video recorders, and washing machines). According to its 2000 Action Plan, a large number of appliances would be subject to such agreements, but a framework directive was still desirable.<sup>7</sup> The Commission’s 2002 argument is a perfect summary of this approach:

“Negotiated agreements can present some advantages compared to regulation fixing mandatory standards. They can provide for quick progress due to rapid and cost-effective implementation. They allow for flexible and adjusted adaptation to technological options and market conditions... The

adoption of a legislative framework on energy efficiency requirements would reinforce the potential impact of negotiated agreements by the industry. Being aware that the Community disposes of an efficient tool to set rapidly energy efficiency requirements through the adoption of implementing directives, the industry could either conclude satisfactory self-commitments or support compulsory requirements where it is clear that too many ‘free riders’ would not sign for the agreed targets and so doing would undermine the competitiveness of the manufacturers volunteering to comply.”<sup>8</sup>

Perhaps the best known case is the European strategy to reduce *CO<sub>2</sub> emissions* from passenger cars, with its three pillars of fuel economy labelling of cars; the promotion of fuel efficiency by fiscal measures; and commitments of the automobile industry on fuel economy improvements. The first is addressed primarily by law: the 1999 “labelling” Directive on the availability of consumer information on fuel economy and CO<sub>2</sub> emissions.<sup>9</sup> The second requires agreement by the Member States to introduce differentiated taxation systems. The third is being pursued by negotiated agreements which were reached in 1999 and 2000 with European, Korean and Japanese Manufacturers Associations, which give recognition to the commitment given to the Commission by those bodies to achieve specified emission targets.

*Packaging and packaging waste* constitute a special case. The 1994 Directive was the first effort to apply the New Approach to environmental issues. It sets the “essential requirements” which must be fulfilled, while the corresponding detailed technical specifications are to be drafted by standardisation bodies. Compliance with the essential requirements is presumed through compliance with harmonised standards or, in their absence, with relevant national standards.<sup>10</sup> This process has been somewhat controversial. The Commission issued a mandate to the European Committee for Standardisation (CEN), which in 2000 approved five standards. These, however, met with formal objections from Belgium and Denmark. Three were subsequently not published at all, and one only accompanied by a warning that it did not cover all the essential requirements. A new mandate has been given and CEN has drawn up new draft standards which were undergoing internal consultation in February 2003.<sup>11</sup>

In the context of the June 2002 Action Plan, and in the light of specific environmental concerns, the Commission has tried to clarify things. The July 2002 Communication on Environmental Agreements at Community Level<sup>12</sup> suggests three categories of agreement where Commission action may be necessary (as compared to spontaneous decisions of stakeholders in areas where the Commission has no intention of proposing legislation):

- self-regulation which is acknowledged at Community level by means of a Commission Recommendation of an exchange of letter;

- self-regulation which is acknowledged by a Commission Recommendation which is accompanied by a monitoring Decision;
- co-regulation, in the sense of environmental agreements which are concluded in the framework of a legislative act in order to implement its “essential aspects”.

It also puts forward both a number of basic legal conditions for environmental agreements and a set of “assessment criteria” applicable for both self- and co-regulation: cost-effectiveness of administration (that is, also taking into account the comparative administrative costs for the Community institutions!); representativeness of the parties concerned; quantified and staged objectives; involvement of civil society; monitoring and reporting; sustainability; and incentive compatibility (i.e. consistency with other policies in terms of signals given to participants in the agreement).

If these conditions are met, may we see more proposals providing for implementation by negotiated agreement? The first case was the 2000 End-of-life Vehicles Directive.<sup>13</sup> A nearly identical formula is used in the Directive on Waste Electrical and Electronic Equipment (WEEE) signed by the European Parliament and the Council on 27 January 2003:

“3. Provided that the objectives set out in this Directive are achieved, Member States may transpose the provisions set out in Articles 6(6), 10(1) and 11 by means of agreements between the competent authorities and the economic sectors concerned. Such agreements shall meet the following requirements:

- agreements shall be enforceable;
- agreements shall specify objectives with the corresponding deadlines;
- agreements shall be published in the national official journal or an official document equally accessible to the public and transmitted to the Commission;
- the results achieved shall be monitored regularly, reported to the competent authorities and the Commission and made available to the public under the conditions set out in the agreement;
- the competent authorities shall ensure that the progress reached under the agreement is examined;
- in case of non-compliance with the agreement Member States must implement the relevant provisions of this Directive by legislative, regulatory or administrative measures.”<sup>14</sup>

### *Social Dialogue*

The Social Dialogue is perhaps the classic case of interplay between European legislation and private negotiation. In this case the social partners, in addition to their own autonomous dialogue, not only must be consulted by the Commission on social-policy initiatives. They may end up agreeing between themselves a text which can be transformed, without

change – and without discussion by the European (or any other) Parliament – into European law.

This dates back to the mid-1980s, with the 1985 “Val Duchesse” initiative of Jacques Delors to promote industrial relations at the European level. The Single European Act introduced a new article stating that “The Commission shall endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement.” In 1991 an Agreement on Social Policy was concluded between 11 Member States (not the UK) and attached to the Maastricht Treaty. This was introduced into the body of the Treaty (new Articles 138 and 139) at Amsterdam in 1997. It states that “The Commission shall have the task of promoting the consultation of management and labour at Community level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.” Before submitting proposals in the social policy field, the Commission shall consult management and labour, first, on “the possible direction of Community action”, and then, if Community action is considered advisable, on “the content of the envisaged proposal”. On the occasion of such consultation, management and labour may inform the Commission that they wish to initiate a dialogue at Community level which “may lead to contractual relations, including agreement”. Those agreements can be implemented either by “procedures and practices specific to management and labour and the Member States” or by a Council Decision on a proposal from the Commission.

The main “cross-industry” or “interprofessional” bodies which meet in the Social Dialogue Committee are:

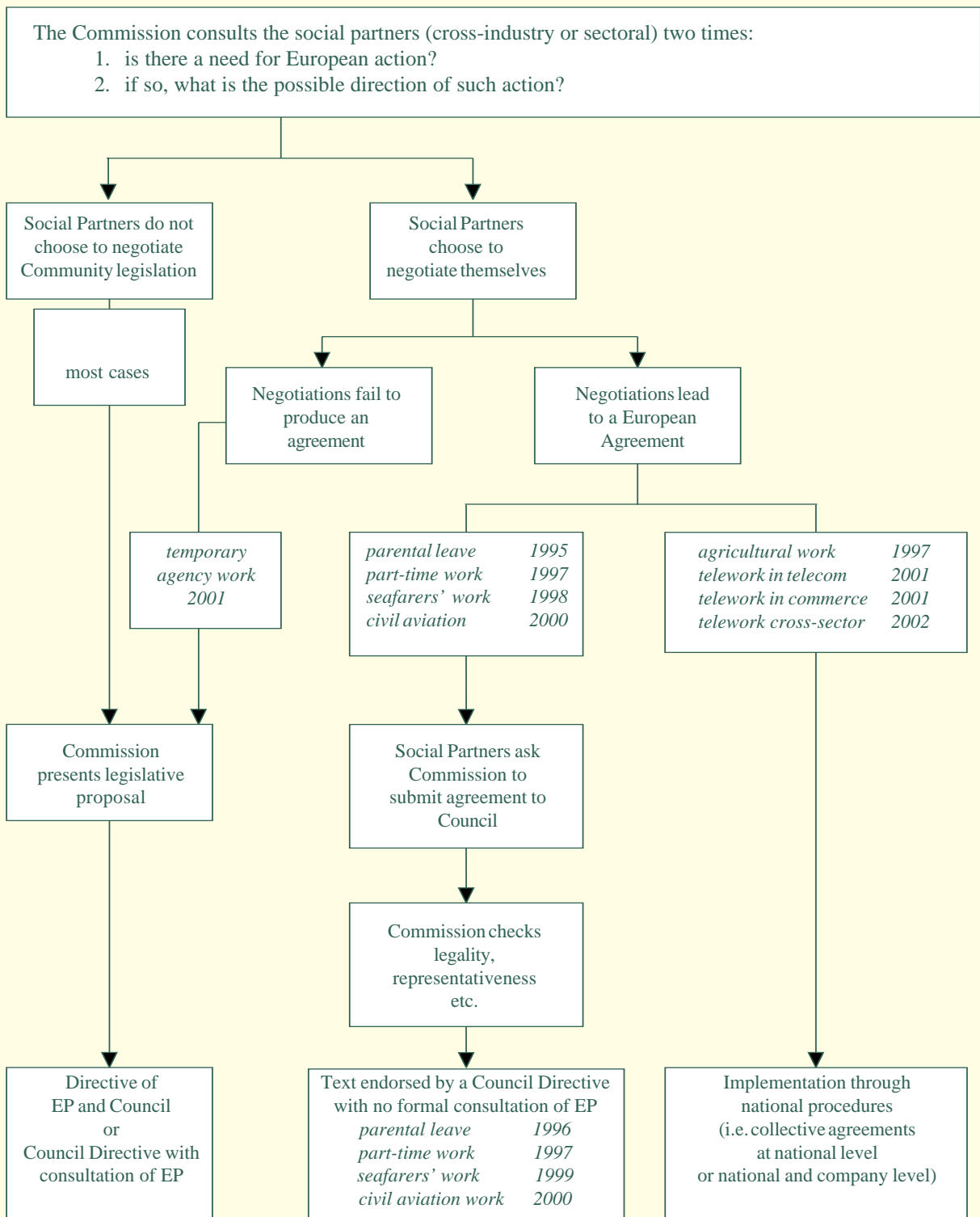
- the Union of Industrial and Employers’ Confederations of Europe (UNICE), which now has a cooperation agreement for this purpose with the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME);
- the European Centre of Enterprises with Public Participation (CEEP); and
- the European Trade Union Confederation (ETUC).

There are also now 27 Sectoral Social Dialogue Committees bringing together workers and employers in particular areas.<sup>15</sup>

Figure 1 shows the steps and options involved in the process foreseen by Articles 138 and 139 as well as the results to date under this procedure.<sup>16</sup>

The results are not impressive, at least in quantitative terms: three cross-industry agreements and two sectoral agreements which have been implemented through Council Directives; and three sectoral agreements which have been implemented through collective agreements. Significantly, the Social Partners chose, for the first time in the case of a cross-sectoral agreement, to implement the 2002 Framework Agreement on telework by the “voluntary route”, rather than a Council Directive. The Work Programme of the European Social Partners for

Figure 1 – the European Social Dialogue



2003-2005 which was presented in November 2002 their intention to develop a work programme for “a more autonomous social dialogue”<sup>17</sup>, which does seem to involve a desire to come out from under the shadow of the law. A recent exchange may be symptomatic. The Commission in December 2002 sent to the Social Partners a consultation document concerning stress at work. The latter responded with a joint letter in January 2003 indicating that such a consultation was inappropriate

since, as stated in the joint work programme, they planned to reach a voluntary agreement themselves. The Social Partners are not asking for any change in the formal arrangements – indeed they have proposed to the Convention that the text of Articles 138 and 139 should be incorporated, as they stand, into the new Treaty.<sup>18</sup> However, this may largely be out of fear of finding something worse at the next IGC if they don’t hold on tight to what they have.



## 2. The Open Method(s) of Coordination

Various forms of non-binding policy coordination are usually, and rather misleadingly, lumped together as “the open method of coordination”. To be sure, there are common features. There is a desire to do something at European level, but harmonisation is considered both politically unacceptable and unnecessary; the process is one of convergence of national policies towards common objectives following common guidelines, rather than the establishment of a common policy; and the emphasis is more on policy learning than on legal enforcement. However, there are important differences.

The starting point was the Maastricht Treaty’s provisions for achieving Economic and Monetary Union. Economic policy coordination has remained largely non-binding, with the central instrument being the *Broad Economic Policy Guidelines (BEPGs)* and the system of multilateral surveillance. The procedure follows an annual cycle. The Commission draws up recommendations each year which are submitted to the ECOFIN Council. ECOFIN presents a draft to the European Council, which adopts conclusions, and the BEPGs are then formally adopted by the ECOFIN Council in the form of a recommendation following the June European Council. Country-specific recommendations may be made by the Council on a recommendation from the Commission where it is considered that a Member State’s policies “risk jeopardising the proper functioning of economic and monetary union”.

The first “spillover” of this approach was the *Luxembourg Process*, which bears that name due to the Extraordinary European Council on Employment held in Luxembourg in November 1997 to push ahead with the provisions introduced into the Treaty at Amsterdam earlier that year. Guidelines and targets were agreed for each of the four “pillars” of employability, entrepreneurship, adaptability and equal opportunities. These have been modified every year since and at Lisbon in March 2000, in addition to the “vertical” objectives, the Member States agreed on quantifiable “horizontal” objectives for the overall employment rate. The annual cycle has been as follows. The Commission proposes *Employment Guidelines*. The Council adopts the Guidelines after the December European Council. In the spring of each year, Member States incorporate the guidelines into *National Action Plans (NAPs)* stating how they will transpose the guidelines into national measures, which are forwarded to the Commission and to the Council together with an implementation report. The Council and the Commission present to the following December European Council a *Joint Employment Report*. The Commission also presents a new proposal for revised Guidelines for the following year which are formally approved by the Council on the basis of the conclusions of the European Council. The Council may also address country-specific *recommendations* to individual Member States. The objective of policy learning is also supported by a *peer review* programme between Member States, organised with the support of the Commission.

The *Cardiff Process* was established soon after, in June 1998, to improve the functioning of product and capital markets through peer pressure and benchmarking. By the end of November each year, the Member States submit national reports. The Commission produces by the end of each year a “Cardiff report” which is transmitted to the Council. The Economic Policy Committee carries out a country examination and produces its Annual report on structural reform in March. In parallel, the Commission produces “country fiches” which are used as input for the structural part of the Commission’s report on the implementation of the BEPGs. All of this, together with the Council’s conclusions concerning the internal market aspects of the reform process, goes through ECOFIN to the Spring European Council and then it is back to the Commission, as it makes recommendations concerning the next BEPGs.

The next step, the *Cologne Process* created in June 1999, provides for macroeconomic dialogue at European level. The meetings take place at technical and political level, and bring together the Council, the Commission, the European Central Bank and a representative of the monetary authorities outside the euro zone, and the social partners.

The *Lisbon* European Council of March 2000 was to go furthest of all, with its definition of a “a new strategic goal for the Union in order to strengthen employment, economic reform and social cohesion as part of a knowledge-based economy” and a new approach to achieve this goal, explicitly building on the BEPGs, the Luxembourg, Cardiff and Cologne Processes:

- “a new open method of coordination as the means of spreading best practice and achieving greater convergence towards the main EU goals. This method, which is designed to help Member States to progressively develop their own policies, involves:
- fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long terms;
  - establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice;
  - translating these European guidelines into national and regional policies by setting specific targets and adopting measures...;
  - periodic monitoring, evaluation and peer review organised as mutual learning processes.”<sup>19</sup>

The open method of coordination (OMC) was specifically invoked at Lisbon for information society, research policy, enterprise policy, and the various areas involved in “modernising the European social model by investing in people and building an active welfare state” (education and training, employment policy, modernising social protection, promoting social inclusion). The result has been a rapid spread of this new method in these, and other, areas.

OMC has in fact coincided with a gradual process of

“convergence of objectives” in *social protection*. The Council in mid-1992 adopted two Recommendations on “common criteria” concerning resources and “the convergence of social protection objectives and policies”,<sup>20</sup> which was indeed “a premature version” of OMC.<sup>21</sup> Amsterdam introduced a clause in the Treaty permitting “measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences in order to combat social exclusion.”<sup>22</sup> The Council created a Social Protection Committee in June 2000, which was then given a legal basis in the EC Treaty as new Article 144 at Nice. This Committee elaborated a series of common objectives which were approved at Nice in December 2000 (and revised in December 2002). Member States were invited to submit “a national action plan covering a two-year period and to define indicators and monitoring mechanisms capable of measuring progress.”<sup>23</sup> The first set of these “national action plans for inclusion” (“NAPinc”) was presented in June 2001, and an initial set of indicators was approved in December 2001. At the same time a Decision was adopted setting up a programme of Community action to support transnational cooperation and mutual learning.<sup>24</sup>

Lisbon’s call for a study on the sustainability of *pensions* and Stockholm’s specific reference to OMC led to a Commission Communication in July 2001 outlining an “integrated approach” combining existing policy processes with the open method of coordination which would, it was argued, help Member States focus on necessary reforms and make pensions policy more transparent, contribute to consensus, foster mutual learning and help measure progress on the basis of commonly agreed indicators. Common objectives and working methods should be agreed by the end of 2001 and national strategy reports presented in 2002.<sup>25</sup> Eleven common objectives were agreed at Laeken. National Strategy Reports were submitted in September 2002 and a first peer review took place on the basis of these reports in October 2002. A Joint Commission and Council Report is to be presented to the 2003 Spring European Council.

OMC has been pursued enthusiastically in the area of *education*. The Stockholm European Council approved a report identifying three strategic and 13 associated objectives, and requested a work programme, which was presented at Barcelona.<sup>26</sup> Likewise the Council has supported a Commission White Paper on *youth* which proposes to use OMC to improve participation, information, voluntary service and research into youth-related activities.<sup>27</sup>

In the area of *research*, Lisbon prompted new initiatives both to improve national policies through benchmarking, and to promote even more transnational networking and cooperation. A Council Resolution of June 2000 invited the Commission to draw up a

methodology for benchmarking national research policies and a list of indicators covering human resources, public and private investment, scientific and technological productivity, and the impact of RTD on economic competitiveness and employment. A first set of indicators was produced by the Commission in July 2001 and a European Innovation Scoreboard was developed. Benchmarking has also been applied to *enterprise policy*, together with an Enterprise Policy Scoreboard and a set of quantitative targets was presented in November 2002.<sup>28</sup> With regard to *information society*, a first *eEurope* Action Plan was rapidly presented and approved in June at the Feira European Council as the “*eEurope* 2002 Action Plan, which set 64 targets in 11 action areas to be achieved by the end of 2002. A second plan “*eEurope* 2005: An information society for all” was approved at Seville in June 2002.

OMC has also been pursued in areas *outside the Lisbon strategy*, notably in asylum and immigration. The Commission has presented a series of Communications suggesting that the Council should approve multi-annual guidelines accompanied by timetables, which should be implemented through national action plans in the “classic” spirit of OMC.<sup>29</sup>

### 3. Issues and Prospects

Different issues are posed by self- and co-regulation, on the one hand, and the areas involving some form of OMC on the other. However, there are some common challenges and themes. For present purposes, they can be divided into two groups relating respectively to issues of effectiveness and questions of democratic legitimacy.

#### *Effectiveness*

It is hard, as well as beyond the scope of this article, to give an evaluation of results in the areas under consideration. One should also exercise some care as regards how the question is formulated. What do we actually mean when asking whether things “work”?

In many cases there are quantitative targets and, so long as adequate monitoring has been carried out, some judgements can of course be made. In the case of voluntary environmental agreements, for example, one can measure progress. To look back to the cases cited earlier, the Commission’s report on the intermediate results (for the period 1996-2000) indicates that the reduction of consumption of detergents and packaging is still less than half way towards the target.<sup>30</sup> The main findings presented by the Commission in December 2002 concerning the reduction in CO<sub>2</sub> emissions are also mixed with regard to the response of manufacturers. However, they are also pretty damning regarding the performance of Member States in complying with the law, five of them having recently been taken to Court!<sup>31</sup> It is not always easy to tell which element has had most real impact.

Turning to OMC, it is likewise difficult to tell what share in the measurable results in employment figures,

## What do we actually mean when asking whether things “work”?

for example, is due to the Luxembourg process itself, what is caused by other measures and what are matters which public policies of any sort cannot really influence in any predictable or measurable way.

While multilateral surveillance, peer review and so on are undisputedly valuable, the application of *benchmarking* to public policies raises important issues of both measurement and transferability. How should one compare “performance” – in terms of the efforts made or the results achieved? Are the indicators appropriate to the sector and valid across all the countries? By way of illustration, a Commission paper of January 2002 on the first results of attempts to benchmark national research strategies rightly stresses that “best practice is always context-specific and path-dependent. There is no universal set of best practices. Moreover, the complexity of RTD and innovation systems is such that individual policy instruments, applied in isolation, are unlikely to have a substantial impact on overall performance.”<sup>32</sup> Taken out of context, imitation of particular policy measures can even have negative effects. It is worth stressing that this danger may also exist when it comes to methods of cooperation in the EU. It may be inappropriate to apply techniques which work in one sector to another. Consumer and environmental organisations, for example, argue that models developed for product safety (i.e. the New Approach) may not be appropriate elsewhere: “In the field of consumer safety there is a strong incentive for manufacturers to maintain a certain level of protection as a result of product liability legislation. This holds true at least in cases where a clear and direct relation between a faulty product, an accident and an injury exists. There is nothing comparable in the environmental field.”<sup>33</sup>

What can one say, for example, about the Luxembourg process after five years? A review was conducted in 2002 on the basis of national evaluations,<sup>34</sup> but clear conclusions are not easy to reach. The process is certainly established procedurally: It works in the sense that it takes place regularly and has been accepted. It is still too early to evaluate real impact on employment and, as noted, it is difficult to evaluate what has been the specific contribution, if any, of the Luxembourg process itself. The process seems to have contributed to an increase in policy coherence at the national level, as well as in policy prominence and the spread of “new policy paradigms”. Has there been “policy learning”? Yes, there have been some shifts in policy in some countries, but much of what has happened is better characterised as fairly marginal policy learning in Member States which were doing these things anyway.

Finally, there are several dangers, not only that the whole thing could become a ritualised, empty process, but also that it could contribute to avoiding some of the tough decisions (labour market, investment etc.) which must be taken if there is to be real change on the ground.

#### ***Democracy, Participation and Accountability***

There are also serious concerns for legitimacy. If it is difficult for citizens to understand European law, it is virtually impossible to see what is going on in most of these new methods.

The problem is most acute with regard to *OMC*. The procedures to be used concerning economic coordination and employment are stated in the Treaty itself. In other cases, procedures are to a greater or lesser extent ad hoc and unclear. As a Working Document of the Convention’s Working Group on Economic Governance has put it, “there is the difficulty of identifying the players involved in the method, the procedure being in practice essentially in the hands of high-level committees devoid of democratic legitimacy which formulate almost the entire content of the guidelines to be adopted by the European Council.”<sup>35</sup>

There seems to be a large measure of consensus in the European Convention that some “horizontal” definition of *OMC* should be introduced into the Treaty. It remains to be seen how its nature and scope of application will be defined. Should it be a procedure which applies only in some areas? - for example, only in those areas in which it will be specified that the Union

only has competence to adopt “supporting measures”. Or should it be seen as a method which could be chosen as a more flexible option, on a case-by-case basis, even in areas where the Union does not have legislative competence? The conclusions of the Working Group on Social Europe generally coincide with the view of the Working Group on Simplification, to the effect that *OMC* should be given constitutional status as a means of “concerted action by the Member States outside the competences attributed to the Union” but that it “should not be confused with the coordination competences conferred upon the Union by various legal bases, notably in the economic and employment fields.”<sup>36</sup> In other words, the future chapter on non-legislative measures should specify its aims and basic elements, and it should be used only where there is no Union legislative competence, coordination is not already enshrined in the Treaty “or where the Union has competence only for defining minimum rules, in order to go beyond these rules”.<sup>37</sup>

Such an approach, strictly applied, would seem to imply limiting this newly-defined *OMC* to the other areas (if employment is dealt with separately) which are

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important issues of both  
measurement and transferability.**



being proposed as “areas for supporting action only” in draft Article 15(2) of the Constitutional Treaty, namely industry; education, vocational training and youth; culture; sport; and protection against disasters. “Industry” in this sense, however, presumably includes trans-European networks, enterprise policy and research and technological development, which, as the Working Group itself points out, have provisions for coordination in the Treaty but not detailed arrangements. Application of OMC in the social sphere other than employment could be covered by the paragraph in the Treaty which provides for cooperation to combat social exclusion.

The Working Group on Social Europe also makes a number of suggestions as to how the roles of all the EU institutions as well as the national governments and parliaments could be clarified, which will be an essential step in improving transparency and accountability.

*Self- and co-regulation* pose different questions. Political concerns are raised even where there is clarity of legal basis and procedure, as in the Social Dialogue. One issue is representativeness. The broader question is how far the procedure is acceptable at all in terms of democratic legitimacy, especially since the European Parliament plays no formal role. The Court of First Instance has argued that representative management and labour organisations can be a sufficient source of democratic legitimisation. Others believe that management and labour organisations, even if generally recognised as representative, cannot represent the peoples of Europe as a whole and therefore are unable to convey democratic legitimisation.<sup>38</sup>

Other important questions arise for implementing committees and agreements. Again, it is not just a matter of the representativeness of each organisation but also one of overall balance. Environmental and consumers organisations thus lament an “inherent imbalance between the resources and expertise that industry and societal groups like consumers are able to provide for any co-regulation exercise”.<sup>39</sup> But how far should European institutions go in trying to promote balanced public participation without endangering the autonomy of “civil society”?

It is hard to see where else the Treaty might define a role for private actors in decision-making as Articles 138 and 139 do for social policy. The Commission’s 2002 Action Plan and associated documents are helpful in identifying general parameters. These may serve as the basis for an eventual set of general EU guidelines, but specific issues will have to be addressed in the different areas in which self- and co-regulation are to be used.

#### ***A Concluding Remark***

European integration has come a long way since six countries sought to create a common market through law. After fifty years of exploration beyond the nation state, 15, soon to be 25, countries are now preparing a constitutional treaty which must lay down the ground rules for cooperating in everything from a single currency to culture diversity. It is probably a sign of health that the process has thrown up such a wide range of options for doing so.

Clarification of the rules is essential. Simplification too, but only up to a point. There is not going to be a simple match between competences and procedures – pure Community law for exclusive EU competences, at

one extreme, and non-binding coordination for pure national competences, at the other. It will help greatly, however, to have some more accessible set of principles by which people can understand and judge the mix of ways in which things are done. We have a rich set of options by which we can formulate the ways in which we wish

to cooperate. We need to think more, however, about where legal and non-legal instruments should be seen as *alternatives* and where (and how) they are *complements*.

International organisations, European institutions, the open method of coordination, are often dismissed as mere “talking-shops”. But talking, or deliberation, is not necessarily a bad thing. As clouds thicken in the debate over Iraq, one recalls Churchill’s comment that “jaw-jaw” is better than “war-war”. It may be that “jaw-jaw” and “law-law” are also more compatible than is often thought, at least with a view to the long term...

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#### **NOTES**

<sup>1</sup> Report from the Commission on European Governance, COM (2002) 705 final, 11 December 2002, pp.4-5.

<sup>2</sup> Communication from the Commission, *Action Plan “Simplifying and improving the regulatory environment”* COM (2002) 278 final, 5 June 2002, p.7.

<sup>3</sup> Commission, *Action Plan “Simplifying and improving the regulatory environment”*, p.13.

<sup>4</sup> Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council, of 1 February 1993 on a Community programme of policy and action in relation to the environment and sustainable development (OJ C 138 of 17 May 1993).

<sup>5</sup> *6th Environmental Action Programme 2002*. Decision 1600/2002/EC of the European Parliament and of the Council of

- 22 July 2002 (OJ L 242 of 10 September 2002).
- <sup>6</sup> Commission Recommendation 98/480/EC of 22 July 1998 concerning good environmental practice for household laundry detergents, (OJ L 215 of 1 August 1998).
- <sup>7</sup> Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, *Action Plan to Improve Energy Efficiency in the European Community*. COM (2002) 247 final, 26 April 2000, p.9.
- <sup>8</sup> Commission of the European Communities, *Background & Discussion Paper on a draft Proposal for a Framework Directive on Energy Efficiency Requirements for End-use Equipment*. 1 April 2002, par. 4.2.
- <sup>9</sup> Directive 1999/94/EC of the European Parliament and the Council of 13 December 1999 relating to the availability of consumer information on fuel economy and CO<sub>2</sub> emissions in respect of the marketing of new passenger cars. (OJ L 12 of 18 January 2000) Article 1.
- <sup>10</sup> European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste. (OJ L 365 of 31 December 1994).
- <sup>11</sup> See CEN/TC 216 Communication Paper, *Packaging and Packaging Waste*. January 2003.
- <sup>12</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Environmental Agreements at Community Level Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment*. COM (2002) 412 final, 17 July 2002.
- <sup>13</sup> Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of-life vehicles. (OJ L 269 of 21 October 2000) Article 10(3).
- <sup>14</sup> Directive 2002/96/EC of the European Parliament and of the Council on Waste Electrical and Electronic Equipment (WEEE) signed by EP and Council on 27 January 2003.
- <sup>15</sup> These 27 SSDC deal with agriculture, air transport, banking, cleaning, commerce, construction, culture, electricity, footwear, furniture, HORECA/Tourism, inland waterways, insurance, mining, personal services (hairdressing), postal services, private security, railways, road transport, sea fishing, sea transport, sugar, tanning/leather, telecommunications, temporary work, textiles/clothing, and wood. See European Commission, Directorate-General for Employment and Social Affairs, *Industrial Relations in Europe 2002*. May 2002.
- <sup>16</sup> See Communication from the Commission, *The European social dialogue, a force for innovation and change*. COM (2002) 342 final, 26 June 2002.
- <sup>17</sup> ETUC, UNICE/UEAPME and CEEP, *Work Programme of the European Social Partners 2003-2005*. 28 November 2002.
- <sup>18</sup> Joint contribution by the social partners' representatives in the Convention Working Group on Social Europe, 14 January 2003.
- <sup>19</sup> Presidency Conclusions, Lisbon European Council, par.37.
- <sup>20</sup> Council Recommendation 92/441 of 24 June 1992 on common criteria concerning sufficient resources and social assistance in social protection systems, and Council Recommendation 92/442 of 27 July 1992 on the convergence of social protection objectives and policies (OJ L 245 of 26 August 1992).
- <sup>21</sup> Caroline de la Porte, Philippe Pochet and Graham Room, 'Social benchmarking, policy making and new governance in the EU', *Journal of European Social Policy*, 11:4 (2001) pp.291-307.
- <sup>22</sup> Treaty establishing the European Community, Article 137(2) par.3.
- <sup>23</sup> Nice European Council, Presidency Conclusions, par. 18.
- <sup>24</sup> Decision No 50/2002 of the European Parliament and of the Council of 7 December 2001 establishing a programme of Community action to encourage cooperation between Member States to combat social exclusion (OJ L 10 of 12 January 2002).
- <sup>25</sup> Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, *Supporting national strategies for safe and sustainable pensions through an integrated approach*. COM (2001) 362 final, 3 July 2001.
- <sup>26</sup> Council, *Detailed work programme on the follow-up of education and training systems in Europe*. (OJ C 142 of 14 June 2002).
- <sup>27</sup> European Commission White Paper, *A new impetus for European youth*. COM (2001) 681 final, 21 November 2001.
- <sup>28</sup> Communication from the Commission to the Council and the European Parliament, *Better environment for enterprises*. COM (2002) 610 final, 7 November 2002.
- <sup>29</sup> Communication from the Commission to the Council and the European Parliament on an open method of coordination for the Community immigration policy. COM (2001) 387 final, 11 July 2001; Communication from the Commission to the Council and the European Parliament on the common asylum policy, introducing an open coordination method. First report by the Commission on the application of Communication COM (2000) 755 final of 22 November 2000.
- <sup>30</sup> Report from the Commission on the results reached for the period 1996-2000 by the implementation of Commission Recommendation 98/480/EC of 22 July 1998 concerning good environmental practice for household laundry detergents. COM (2002) 287 final, 10 June 2002.
- <sup>31</sup> Communication from the Commission to the Council and the European Parliament, *Implementing the Community Strategy to Reduce CO<sub>2</sub> Emissions from Cars: Third annual report on the effectiveness of the strategy (Reporting year 2001)*. COM (2002) 693 final, 9 December 2002. pp.4, 17.
- <sup>32</sup> Commission Staff Working Paper, *Benchmarking National RTD Policies: First Results*. SEC (2002) 129, 31 January 2002.
- <sup>33</sup> Common position of ANEC, BEUC and EEB on "Draft proposal for a Directive of the European Parliament and of the Council on the impact on the environment of electrical and electronic equipment (EEE)", May 2001.
- <sup>34</sup> The national evaluations as well as the Commission's analytical papers are available on the website of DG Employment and Social Affairs. For an overview see the Communications from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, *Taking Stock of Five Years of the European Employment Strategy*. COM (2002) 416 final, 17 July 2002; and *The Future of the European Employment Strategy (EES) "A strategy for full employment and better jobs for all"*. COM (2003) 6 final, 14 January 2003. See also Edward Best and Danielle Bossaert (eds.), *From Luxembourg to Lisbon and Beyond: Making the Employment Strategy Work*. (Maastricht: EIPA, 2002).
- <sup>35</sup> European Convention, Secretariat, *Coordination of national policies: the open method of coordination*. WG VI WD 015, 26 September 2002. p.17.
- <sup>36</sup> European Convention, Working Group IX on Simplification, Final Report, 29 November 2002. CONV 424/02. p.7.
- <sup>37</sup> European Convention, Working Group XI on Social Europe, Final Report, 4 February 2003. CONV 516/1/03. p.19.
- <sup>38</sup> Gabriele Britz and Marlene Schmidt, 'The Institutionalised Participation of Management and Labour in the Legislative Activities of the European Community: A Challenge to the Principle of Democracy under Community Law', *European Law Journal*, 6(1) 2000: 45-71.
- <sup>39</sup> ANEC comments on the European Commission's White Paper on Governance, March 2002. ANEC2002/GA/010. □