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CONSTITUTIONALISING THE OPEN METHOD OF COORDINATION

WHAT SHOULD THE CONVENTION PROPOSE?

BY

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Within the Convention process, the final reports of no less than four separate working groups – those on Simplification, Complementary Competences, Economic Governance and Social Europe – have come out in favour of including the ‘Open Method of Coordination’ (OMC) within the Constitutional Treaty. The relevant sections of these reports are attached in an annex.

The reasons for this relatively broad agreement, as expressed in the various reports, stem from widespread recognition of the usefulness, efficiency and flexibility of this new form of national policy coordination for dealing jointly with issues of common interest to the member states. Several of the reports point out that in addition to the two treaty-based coordination mechanisms in employment and economic policy launched during the 1990s, the Lisbon European Council authorised the extension of this method to a broad range of other policy domains, such as information society, enterprise policy, research and development, education and training, combating social exclusion and modernising social protection. Since then, significant OMC processes have been developed in a number of these fields, especially social protection (inclusion, pensions, health care), while new ones have begun to emerge in other areas such as immigration and asylum, as well as industrial policy, youth policy and disability policy.

Some of the Working Group reports argue that the open method has proved a useful policy instrument where ‘no stronger coordination mechanisms exist’, (Economic Governance WG, para 3), and even advocate its confinement to such circumstances (Social Europe WG, paras 41, 43). But in reality, as the Convention Secretariat among others points out in its paper on coordination of national policies (WG VI, WD 015, 26 September 2002), OMC-type mechanisms have also been used as a complement to Union directives in order to elaborate and update legal standards (e.g. industrial waste, occupational health and safety), or as a possible route forward where “Member States do not yet want common legislation in a given sphere but nevertheless have the political will to make progress together” (as in immigration and asylum policy). This fluid reality is recognised to a greater extent in the final report of the WG on Complementary Competences (para 5, p. 7) which noted that the Lisbon summit had applied the OMC “to areas of Union competence, of supporting measures, as well as areas of Member States’ competence”.

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The value of the OMC, in our view, lies not simply in its general usefulness, efficiency, and flexibility as an instrument of EU policy-making. Because the OMC encourages convergence of national objectives, performance and policy approaches rather than specific institutions, rules and programmes, this mechanism is particularly well suited to identifying and advancing the common concerns and interests of the Member States while simultaneously respecting their autonomy and diversity. It is neither strictly a supranational nor an intergovernmental method of governance, but one that is genuinely joint and multi-level in its operation. By committing the member states to share information, compare themselves to one another and reassess current policies against their relative performance, the OMC is also proving to be a valuable tool for promoting deliberative problem-solving and cross-national learning across the EU. It is for precisely these reasons, we believe, that the OMC has so rapidly become a virtual template for Community policy-making in complex, domestically sensitive areas where diversity among the member states precludes harmonisation but inaction is politically unacceptable, and where widespread strategic uncertainty recommends mutual learning at the national as well as the European level.

Despite the reasonably broad consensus on including the OMC in the constitutional treaty, however, at least two concerns about so doing have also been raised in the various WG reports and associated plenary debates. The first, and most general of these, is that constitutionalisation of the OMC could lead to rigidification of the procedure, thereby undermining the flexibility that is widely agreed to be one of its main advantages. The second and more specific concern is that the OMC could be (mis)used as a substitute for existing harder or more powerful legal instruments, thereby weakening the member states' and the EU's commitment to the standards or values that would otherwise be contained in the latter. This is a version of the concern that is sometimes expressed to the effect that the spread of soft law might undermine the use of hard law, thus not only undermining the specific commitment to particular objectives (such as, for example, in the field of social policy) but also more generally undermining the wider European integration project that has relied so much over the years on the compelling normative force of law.

These concerns are important and should be addressed in any provision to constitutionalise the OMC. However, we believe that they would be better addressed by a provision that articulates those concerns more directly, rather than by the cruder and practically unworkable mechanism of excluding the use of the OMC in any field where the EU possesses legislative competence (as proposed by the Social Europe WG, paras 41, 43). The latter mechanism would undermine the possibility of using the OMC, as has already been done in a number of contexts, in a complementary manner to flesh out and adapt the content of existing binding legislative standards. Secondly, it would exclude the important possibility of using the OMC as a first venture into a policy field in which it proves initially impossible to reach political agreement on the use of binding legislation, and where an OMC could over time be used to build up consensus amongst the states to such an extent that the articulation of stronger legal commitments would later become possible. What we advocate, therefore, is some kind of '*chapeau*' phrase in the generic provision anchoring the OMC in the Constitutional Treaty, which specifies that it should not be used in a way that would undermine or weaken the existing EU *acquis*, nor as a permanent substitute for Union legislative action permissible under the Constitutional Treaty.

To address the more general of the two concerns outlined above, i.e. that constitutionalising the OMC runs the risk of rigidifying its procedures and thereby restricting the flexibility of its application to different policy fields, we support the proposal of the Social Europe WG Report

(para 42) to define only the fundamental characteristics of this method (its aims and basic elements) in a generic provision of the Constitutional Treaty. The precise nature of OMC procedures could then, as the Working Group Report suggests, be worked out experimentally to suit the different issue areas concerned, rather than being specified in detail in the Constitutional Treaty, with the exception of the existing treaty-based coordination processes in economic and employment policy, which would be embodied in subsequent articles. To preserve the “soft” *acquis* established by the ongoing OMC processes in social inclusion and social protection, while leaving ample flexibility for future developments, we also support the proposal to include a specific constitutional provision on the application of the method in the social policy field, along the lines suggested by Dr. Frank Vandenbroucke, the Belgian Minister of Social Affairs and Pensions, to an expert hearing of the Social Europe Working Group on 21 January 2003 (see annex) and endorsed by members of the Group in its final report (para. 47).

A generic provision for incorporating the OMC into the Constitutional Treaty might draw on the definition of the method proposed by Louis Michel, the Belgian Foreign Minister, and incorporated with some modifications into the Report of the Social Europe Working Group (para. 37), as a form of policy coordination “consisting for Member States, at their own initiative or at the initiative of the Commission, with due respect for national and regional diversity, in setting joint objectives and indicators on a given topic, and, on the basis of national reports, enabling these states to improve their knowledge, develop exchanges of information, experience and practice, and, in accordance with the objectives set, to promote innovative approaches likely to result where appropriate in guidelines, recommendations or other forms of European legislation” (WG XI, WD 30). Such a generic provision might also, as the Social Europe Working Group Report suggests (para 42), properly make reference to the importance within the OMC of establishing a timetable for action in advancing common objectives and assessing the ability of national actions to achieve those objectives against appropriate outcome indicators.

In the spirit of flexibility advanced above, however, a generic provision for constitutionalising the OMC should not seek to prescribe in detail the respective roles of particular actors in its procedures. Hence, it would be inappropriate, for example, to specify that whenever the OMC is used, “the Commission would have the power to make recommendations to Member States’ governments and to inform national parliaments directly of their opinions” (Social Europe WG Report, para 45), especially since the Social Protection Committee has not so far agreed to empower the Commission to issue such recommendations within the social inclusion and pension reform processes. But it would be important for the generic constitutional provision on the OMC to ensure a clear consultative role for the European Parliament. Such consultation is already mandated within one of the existing treaty-based policy coordination processes (the European Employment Strategy), although not the other (the Broad Economic Policy Guidelines). There have been repeated and legitimate calls in recent years for a more generalised consultative role for the Parliament, as the EU’s broadly democratically representative organ, within the various OMC processes, and a new generic provision should reflect this, without being excessively prescriptive.

A better way of ensuring the “transparency and democratic character” of the OMC, which the Report of the Social Europe WG (para 44) rightly deems necessary, would be to include within the generic provision of the Constitutional Treaty explicit *requirements* for transparency and broad participation in all OMC processes (including those specified in greater detail in subsequent articles). The requirements which should be added are firstly, an obligation to ensure

that the OMC is conducted as openly as possible in accordance with the principle of transparency; and secondly an obligation to ensure the fullest possible participation of all relevant bodies and stakeholders, including social partners, civil society organisations, national parliaments and local/regional authorities, in accordance with national laws and practices. These twin requirements of transparency and broad participation are crucial to both the democratic legitimacy and practical effectiveness of the OMC, which is why we strongly recommend their inclusion as constitutional obligations (albeit recognising the variety of national laws and practices through which such obligations will be given effect), rather than as permissive provisions for consultation of various types of actors during the implementation process (as proposed by the Social Europe WG Report, para 45; cf. also the recommendation for “widespread consultation” in the Economic Governance WG Report, para IV, 3). In particular, we believe that participation by the widest possible range of actors in OMC processes at all levels, which depends in turn on openness and transparency, is essential in order to ensure the representation of diverse perspectives, tap the benefits of local knowledge, and hold public officials accountable for carrying out agreed commitments in meeting common Union objectives. Such requirements for transparency and broad participation in OMC processes would be in accordance with the constitutional views expressed by the Economic and Social Committee (WG XI, WD 40), the Committee of the Regions, the European Trade Union Confederation, the Platform of Social NGOs (which includes the European Anti-Poverty Network and the European Women’s Lobby), and the European Public Social Platform (which includes the Assembly of European Regions, the Council of European Municipalities and Regions, and EUROCITIES). They are also consistent with the revised common objectives for the social inclusion process adopted by the Council in December 2002, with the Commission’s recent Communication on the Future of the European Employment Strategy, and with numerous resolutions of the European Parliament.

Our recommendations, therefore, drawing on the suggestions made in the four Working Group final reports, but with a number of modifications and additional suggestions, are:

- (1) The OMC should be included in the Constitutional Treaty. The two existing coordination processes in employment and economic policy should be retained; a third specific OMC provision should be included to cover the social policy field so as to preserve the distinctive and valuable OMC *acquis* that has already developed in social inclusion and social protection, along the lines proposed by the Social Europe WG in para 47 of its final report; and a flexible generic enabling OMC provision should be introduced for areas other than these three, along the lines proposed by the Social Europe WG in section IV of its final report, but subject to the further recommendations that we make below regarding transparency and participation.
- (2) The generic provision should not restrict the availability of the OMC to areas where the EU does not possess legislative competence; nor to areas where the Union has only minimum harmonising powers. It should specify in general terms, however, that the OMC should not be used in a way that would undermine or weaken the existing EU *acquis*, nor as a permanent substitute for Union legislative action permissible under the Constitutional Treaty.
- (3) The generic provision should include an obligation to ensure that all OMC processes are conducted as openly as possible in accordance with the principle of transparency; and an

obligation to ensure the fullest possible participation of all of the relevant bodies and stakeholders, including social partners, civil society organisations, national parliaments, and local/regional authorities, in accordance with national laws and practices.

ANNEX

EXTRACTS ON THE OMC FROM THE WORKING GROUP FINAL REPORTS AND EXPERT PROPOSAL FROM DR. FRANK VANDENBROUCKE

1. Views/Recommendations of the Social Policy Working Group Final Report (CONV 516/1/03)

37. The open method of coordination was established by the European Council held in Lisbon on 23 and 24 March 2000. It is a new form of coordination of national policies consisting of the Member States, at their own initiative or at the initiative of the Commission, defining collectively, within the respect of national and regional diversities, objectives and indicators in a specific area, and allowing those Member States, on the basis of national reports, to improve their knowledge, to develop exchanges of information, views, expertise and practices, and to promote, further to agreed objectives, innovative approaches which could possibly lead to guidelines or recommendations.

38. In Lisbon, the European Council extended the method incorporated in the Title on Employment of the TEC to other areas, such as the information society and research policy, enterprise policy, education and vocational training policy, combating social exclusion and social protection.

39. An empirical approach has been used to develop and adapt this method to the specific characteristics of each field of action. The method is therefore applied in different ways to different areas, with an ad hoc procedure being worked out each time. That is why we sometimes speak of open methods of coordination, in the plural.

40. The Group welcomed the usefulness and efficiency of the method, which enables Member States to create synergies within the Union in order to deal with matters of common interest together.

41. Although some members expressed doubts, most members requested the insertion into the Treaty of a horizontal provision defining the open method of coordination and its procedure, and specifying that the method can be applied only where no Union legislative competence is enshrined in the Treaty and in areas other than those where the coordination of national policies is governed by a special provision of the Treaty defining such coordination (in economic matters (Article 99) and in the area of employment (Article 128), in particular). Indeed, unlike the open method of coordination, the coordination procedures enshrined in the Treaty are compulsory and enable the Union institutions to make recommendations to Member States and even to impose sanctions on Member States which do not respect the line jointly adopted. The open method of coordination could nevertheless be applied to areas where coordination of national policies is provided for in the Treaty, but where the detailed arrangements are not laid down, such as trans-European networks (Article 155 TEC), enterprise policy (Article 157 TEC) and research and technological development (Article 165 TEC).

42. The Treaty provision on the open method of coordination should be embodied in the Constitutional Treaty, within the Chapter on Union instruments which constitute non-legislative measures. This provision should define the aims of the open method of coordination and the basic elements to be applied. These would include the identification of common objectives, establishing a timetable for action as well as, where appropriate, outcome indicators making it possible to assess whether national actions are able to achieve the objectives, and facilitating exchanges of experience between Member States. The precise nature of any Open Method of Coordination procedure would be guided by the nature of the issue involved, rather than be specified in detail in the Treaty.

43. At the same time, the scope and limits of the method would need to be specified by indicating that the open method of coordination is an instrument for achieving the Union's objectives; that the instrument can be implemented only where the Union does not have legislative competence, and where Union competence in the area of sectoral coordination is not enshrined in the Treaty (Articles 99, 104 and 128) or where the Union has competence only for defining minimum rules, in order to go beyond these rules. The open method of coordination constitutes an instrument which supplements legislative action by the Union, but which can under no circumstances replace it. It enables the Union to support and supplement Member States' actions.

44. While allowing for the flexibility of the instrument to be retained, incorporation of the open method of coordination in the Treaty would improve its transparency and democratic character, and clarify its procedure by designating the actors and their respective roles.

45. The method would in principle be implemented each time by a decision of the Member States meeting within the Council on the basis of the Conclusions of the European Council on the initiative of the European Commission, with notification of the European Parliament. National parliaments and regional or local authorities could be consulted during implementation, as could the social partners when the open method of coordination is applied to the social field. Civil society could possibly be consulted when the matter under coordination lends itself to that. The Commission would be responsible for analysing and evaluating the action plans. The outcome of the Commission's analysis could be discussed within the European Parliament and national parliaments. The Commission would have the power to make recommendations to Member States' governments and to inform national parliaments directly of their opinions in order to trigger a "peer review" procedure and to a national debate, the aim being to allow Member States, within the Union framework, to set themselves common objectives while retaining national flexibility in their implementation.

46. Although some members of the Working Group wished to include into the Constitutional Treaty not only the method, but also the list of subjects to which the open method of coordination could be applied, a consensus emerged against such a list.

47. Some areas to which the method could be applied were mentioned in the Group, such as education, tax harmonisation and the establishment of minimum social standards. Members of the Group thought social protection and inclusion was particularly well suited to this approach, and considered that a specific reference as to how the open method could be applied in this case could be inserted into the Constitution, building on the description of the role and functioning of the Social Protection Committee (as established under article 144 of the Nice Treaty).

2. Views expressed in the Final Report of the Working Group on Complementary Competences (CONV 375/1/02)

Some members of the working group requested that the Open Method of Coordination be codified in the Treaty as an additional instrument for the Union. They defined the method as “a mutual feedback process of planning, examination, comparison and adjustment of the (social) policies of (EU) Member States, all of this on the basis of common objectives”. The working group noted that the Open Method of Coordination, as instituted by the European Council in Lisbon, March 2000, applies to areas of Union competence, of supporting measures as well as areas of Member States’ competence. Broad agreement was found in the group to ask the working group on simplification (WG IX) to include the instrument of Open Method of Coordination in its work as a “soft” instrument or method.

3. Views expressed in the Final Report of the Working Group on Economic Governance (CONV 357/02)

The Working Group considers that the open method of coordination has proved to be a useful instrument in policy areas where no stronger coordination instruments exist. There is a large measure of support within the Group for including, for the sake of clarity, the basic objectives, procedures and limits of the open coordination method, where the European Parliament and the European Commission should also have a role to play, in the Constitutional Treaty, but in a manner which does not undermine the flexibility of the method (which is one of its main advantages) and which does not have the effect of replacing or circumventing 'Community' procedures or policies. It is recommended that it should include a provision allowing for a wide-ranging consultation process, in particular with the social partners. However some members of the Group consider that the informal character of the open coordination method should be better preserved by keeping it outside the Treaty.

4. Views expressed in the Final Report of the Working Group on Simplification (CONV 424/02)

Constitutional status should be assigned to the open method of coordination, which involves concerted action by the Member States outside the competences attributed to the Union by the treaties. It should be emphasised that this should not be confused with the coordination competences conferred upon the Union by various legal bases, notably in the economic and employment fields.

5. Proposal by Dr. Frank Vandenbroucke, Belgian Minister of Social Affairs and Pensions, for anchoring the open method of coordination with regard to social protection and inclusion to the Treaty

In the fields referred to in Articles 137, paragraph 1, (j) and (k), (*)

the Council,

on the basis of the conclusions of the European Council,

pursuant to a consensus between the Member States, on a proposal from the Commission, which takes into account the opinion of the Social Protection Committee, and after consulting the European Parliament, management and labour, and the Social Protection Committee,

shall

- adopt a set of commonly agreed objectives and commonly agreed indicators,
- if appropriate, draw up guidelines which the Member States shall take into account in their policy,
- adopt reports on the implementation of this co-operation process.

The result of this process shall be incorporated into the Broad Economic Policy Guidelines.

(* Reference is to the Treaty establishing the European Community as amended by the Treaty of Nice).