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EU law 'transformed'? Evaluating accountability and subsidiarity in the 'streamlined' OMC for Social Inclusion and Social Protection*

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Abstract: From initially defining new governance processes as external to "traditional" forms of EU law, a number of academic scholars have begun to argue that methods like the OMC can be seen as indicative of a broader "transformation" of European law-making. The transformation thesis relies on seeing the OMC as an evolving legal mechanism, in which features such as peer review, and the participation of 'new' constitutional actors, can take the place of traditional forms of legal accountability and participation.
At the same time, the transformation thesis remains empirically under-developed. Taking the new streamlined OMC process in social inclusion and social protection as its starting point, this paper will seek to remedy that gap. The paper evaluates the transformation thesis using interview data gained from the recent Commission evaluation of the OMC SPSI (conducted from 2005-2006). While the OMC SPSI displays evidence for a number of its features – it also displays some of the limits of the 'transformation' idea.
While the OMC as it stands indicates elements of a more 'dynamic' form of accountability and subsidiarity in the EU order, its lack of critical review and transparency, and failure to include local or regional actors casts doubt on its suitability as a replacement for traditional legal accountability mechanisms. As much as 'transformation' may offer an attractive future for EU law, its dynamic vision for open coordination remains largely unrealised.

Keywords: accountability; European law; governance; legitimacy; open coordination; rule of law; social policy; subsidiarity; political science

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1. Introduction

While political scientists have divided their attention to the Open Method of Coordination (OMC) between issues of legitimacy on the one hand and effectiveness on the other, lawyers have tended to approach the question of the OMC from the first legitimacy-based perspective.

Given the extensive challenges the method poses to "traditional" forms of EU law (to be spelled-out in this paper), is the move to open coordination in employment, social inclusion and other fields a legitimate one? It is easy to answer this question in the negative. Lacking proper mechanisms of judicial review, and severing the links between publicly-elected Parliaments and the execution of public policy (at EU *and* national levels), the OMC can easily be conceptualised as a threat to the legitimacy and place of EU law-making (Joerges 2007; Hatzopoulos 2007). The method seems to represent a trade-off between legitimacy and effectiveness; a means of driving the integration process forward in the social field, precisely through leaving traditional legal safeguards – "the rule of law" in Europe – behind.

At the same time, recent years have seen the development of an alternative body of literature (Gerstenberg and Sabel 2002; Sabel and Simon; 2006; Scott and Sturm 2007; Sabel and Zeitlin 2008). This literature posits methods like the OMC not as a second-best alternative to more robust forms of law-making, but as part of a "transformative moment" in our very understanding of European law. Under the transformative view, the method's seeming sacrifice of values of uniformity and stability in law-making is not seen as imperilling a European understanding of legality, but instead as representing a renewal of two features – accountability and subsidiarity – central to the legitimacy of all forms of European law-making. In promoting a more dynamic and de-centralised form of rule, methods like the OMC may not only contest concepts like legality and legitimacy, but also point towards a significant re-formulation of their meaning.

While this literature may offer an exhilarating glance towards the future of EU law in a broader sense, it also leaves significant questions unanswered. The most significant – to be addressed in this paper – is the lack of examples indicating a genuine effort to apply the core tenets of "transformation" to the practice of EU governance. This paper will attempt to carry-out this task through an assessment of the everyday operation of a particular OMC process – the OMC in Social Protection and Social Inclusion (OMC SPSI). This process was created in 2006 through the "streamlining" of a more long-standing process for the coordination of social inclusion policies (operating from 2000), and two separate open coordination strands – for pension (from 2001) and for health and long-term care (from 2004)) (Commission 2005).

The main source of information in its assessment will be the evaluation of the OMC carried-out by the Commission from 2005 to 2006 (Commission 2006). The evaluation consisted of an extensive questionnaire sent by the Commission's DG for Employment and Social Affairs to the labour and social affairs ministries of the participating national governments, as well as selected trans-national NGO's, Social Partners and Local Authorities (with a track record of involvement in the OMC SPSI through its supporting "Community Action Programme" – PROGRESS). The questionnaire asked its respondents, through a series of closed questions, as well as an open one, to give their opinions about two processes – the OMC processes in social inclusion, and in pensions. Responses were received from all 25 of the governments then participating in the OMC, as well as 11 European "umbrella" organizations of social NGOs, 4 social partner organizations, and 3 organizations representing regional and local authorities. These responses, while not exhaustive, offer a series of insights into the views of the method's most influential policy actors.

The responses will be evaluated in three steps.

- While the paper's second part (s2) will outline the transformation thesis,
- the third part (s3) will evaluate the claim that the OMC is forging a "dynamic" vision of accountability in the EU.
- Finally, the paper's fourth part (s4) will ask whether the OMC SPSI as it stands is capable of respecting, or even radicalising, the principles of "subsidiarity" in the EU order.

The limits and promise of the transformation view will be assessed in the paper's conclusion (s5).

As this analysis will show, while "transformation" may remain a fascinating account of the legal implications of the rise of "new governance" in the EU, there are significant gaps between its vision of a bottom-up and de-centered form of law-making and the realities of the OMC SPSI. As much as the OMC – in its abstract design – may offer an attractive future for those seeking an alternative to hierarchical legal programmes, it has not yet succeeded in re-creating the mechanisms of political accountability and local involvement to which "transformation" literature aspires.

2. The Transformation Thesis

The transformation thesis shares much in common with a number of other normative accounts of EU governance. It significantly relies, for example, on a deliberative conception of the EU polity; one in which the processes of new governance have the potential to significantly alter the perceptions of state and non-state actors (Joerges and Neyer 1997; Eriksen and Fossum 2002). It also shares something in common with Fritz Scharpf's conception of "input" legitimacy i.e. that decisions can be considered legitimate "if and because they reflect 'the will of the people' – that is, they can be derived from the authentic preferences of a political community" (Scharpf 1999: 6). It is therefore not completely alien to existing governance literature in the social sciences.

There are two distinct elements, however, that *are* different. Firstly, the transformation thesis carries a different object of analysis – the fate and development of EU law. Secondly, it emerges from a different theoretical background – the debate, in the US, over experimentalist or pragmatist approaches to law (Dorf and Sabel 1998; Simon 2004). While there is little space here to describe these differences in any depth, they constitute the distinct contribution of "transformation" literature to the debate over new governance in the EU.

Experimentalist theory approaches methods like the OMC by highlighting a basic dissatisfaction with existing attempts to conceptualise the relationship between "new governance" and traditional forms of EU law. Perhaps the most popular view of that relation is the idea that the OMC should be seen as an "extra-legal" process (Scott and Trubek 2002; de Burca 2003). This external view of the law-governance relationship suggests that both the strengths and limits of the method rest upon its distance from law traditionally understood. In terms of strengths, this means that the OMC can be a useful instrument in filling legislative "gaps" closed-off by the strict decision-making hurdles of the EC Treaty (Scharpf 2003: 654; Zeitlin 2005). In terms of limits, it suggests that the OMC is a "second-best solution"; comparatively "weak" when contrasted with the EU's normal legislative instruments (Scharpf 2003: 655; Commission 2001: 22). In both cases, the OMC should be understood as something working at the periphery of legal integration (as either a supplement or threat to ordinary legal methods).

The transformation thesis approaches the law-governance relationship from precisely the opposite direction. Rather than see the relationship between law and governance as antithetical, the transformation thesis argues that processes like the OMC stand as a window onto the future of EU law (Sabel and Zeitlin 2008: 323-327). The development of new governance – so these theorists argue – does not exist as a parallel process of "political" integration (and hence as a transient and less important stage of the integration process), but precisely provides evidence that EU law has reached a new turning point.

Rather than act as a series of static, uniform and hierarchical rules, underlined by a clear distinction between different levels of governance, the transformation literature argues that the EU is developing as an "experimentalist" legal regime, in which legislative power is pooled and shared between legal actors (Sabel & Zeitlin 2008, Gerstenberg & Sabel 2002). Through its emphasis on procedural frameworks, and broad goals to be applied flexibly in different state contexts, the field of new governance is changing our *very understanding* of law and its most basic processes, institutions and values, just as law itself is conditioning how processes like the OMC operate. As de Burca and Scott have put it, "law, as a social phenomena is necessarily

shaped and informed by the practices of new governance, and new governance both generates and operates within the context of a normative order of law" (de Burca & Scott 2006: 16).

The reasons underlying this change concern the evolving nature of the EU's primary regulatory challenges. Not only is the EU buffeted by forces of globalization and exchange that have made the transfer of people, capital and technology more rapid than ever, but it is also territorially and horizontally divided – in the first case, into a multitude of national legal orders, and in the second, into a series of specialist discourses (in competition policy, energy, telecommunications, fiscal reform, and a host of other areas) (Scheuerman 2001).

This division makes the guiding ideal of EU law – to produce uniform and stable rules, establishing a common regulatory framework across the EU polity in particular areas – difficult, if not impossible, to achieve. To take social policy – as the most relevant example – while a model of common law-making may be the most simple solution to problems of "regulatory competition" between states, any attempt to establish minimum common social standards across the EU faces the hurdle of on the one hand, significant diversity between European welfare regimes, and on the other, frequent changes in national social preferences (Scharpf 2003: 649-652). Given this diversity, achieving agreement on "foundational" norms (often under conditions of unanimity) is likely to prove difficult. There is simply no uniform and stable basis in the field of social policy on which to construct common, balanced or fixed rules.

One response to this new environment is to pre-suppose that it erodes the very basis of the "rule of law" or "proper" law-making. The shift to methods like the OMC challenges a traditional (or "thin") definition of legality (Möllers 2006: 316-317). In promoting flexible and evolving "standards", subject to constant review and revision, the OMC undermines the commitment of the EU to prospective legal *rules*, that are to apply equally to all European citizens (regardless of their country of origin). Furthermore, in excluding the supervision by the ECJ, and the input of the European Parliament, the method potentially runs foul of "thicker" definitions of legality too; those that see a role for law in connecting executive conduct to popular decision-making or control (Scheuerman 2004: 110-114, Duina & Raunio 2007). The severing of traditional links of political and legal accountability could thus be seen as a threat to the nature of the EU as a 'law-bound' polity (Joerges 2007).

At the same time, one can see the method, and other new governance processes, as re-evaluating the very concepts (of legality and the rule of law) that "new governance" has been said to be making redundant. This applies to two features in particular. The first of these is *accountability*. While traditional, hierarchical forms of accountability are challenged through the method, the transformation thesis argues that new horizontal or "dynamic" forms are emerging in their place. Under the OMC, the iterative nature of structures of national reporting and peer review make holding actors to an *a priori* defined legislative mandate impossible. The very purpose of a reporting cycle is to use "local" practice as an opportunity to re-frame "central" goals and norms. Actors are thus being held accountable for standards that are constantly evolving (e.g. as political preferences, and the coalition of relevant actors involved, change).

At the same time, the nature of peer review holds out the possibility of establishing new accountability relationships. Here, actors are accountable on a "dynamic" basis, to standards and expectations that evolve as national preferences, and social structures, change. Under this model, we are not accountable upwards to an original purposive "mission", or to an ultimate legislative superior (of which, in the EU, there is none), but accountable side-ways, to other state and non-state actors, who share a mutual interest in ensuring that *all* policy actors takes common procedural and political commitments seriously (Sabel and Simon 2006: 400; Sabel and Zeitlin 2008: 276-277).

This suggests that the OMC SPSI contains a robust and transparent peer review structure. In terms of robustness, it implies that national administrators do not simply use peer review committees or other bodies to "exchange opinions" (although this may in itself be an important

function) but also see these structures as an opportunity to both justify their policy decisions and either contest or demand explanations from others. In terms of transparency, it implies that peer review is not a closed circle, but an institution whose operations are open to external scrutiny. As Mark Bovens has argued, while a transparent form of review is unlikely of itself to be sufficient to satisfy demands for public accountability in EU governance, it is difficult to imagine meeting its requirements without it (Bovens 2007: 107). How can states be held accountable on a "dynamic" basis if their activities are covered in a cloud of secrecy, or if the range of "accounting" actors is an "insiders club", insulated from external review (Harlow and Rawlings 2007)? In the OMC context, "dynamic accountability" also seems to imply a degree of procedural openness – that actors do not simply *justify* their positions, but that others (e.g. other governments, or participants of organised civil society), have the necessary information to evaluate those justifications. While one can see why such a "dynamic" model may be alluring to such a diverse environment as European social policy, one of the functions of the next section will be to enquire whether the basic pre-conditions of this "dynamic accountability" appear in practice.

The second feature which "transformation" sees new governance and the OMC as reforming concerns *subsidiarity*. As a legal principle, subsidiarity was defined under the Amsterdam Treaty. Traditionally, it means that the Community is able to take action:

"Only if and so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community" (Treaty of Amsterdam 2007: Art. 5).

It represents – at least in its official incantations – the idea that power should be exercised as closely to the lives of EU citizens as possible. Part of the claim of the transformation thesis is that the OMC is capable not only of respecting this principle, but of radicalizing it. Whereas subsidiarity, under its earlier definitions, only refers to the need to hand power back to national governments, the method could go further, both devolving power to local and non-governmental actors, and using their input and political strategies to inform the formulation of goals, indicators and objectives at the "central" or EU level (Sabel and Zeitlin 2008: 273-274).

This also implies particular conditions. Firstly, it suggests that there is, in the method, a *devolution* of legislative power. It would imply, in the concrete case of the OMC SPSI, that those bodies with the competence in the domestic sphere to enact and frame social inclusion policies (often local and regional bodies) actually *have a say* in how "European" objectives are to be re-framed in a more local context (that they are not simply forced to apply rules of which they are in no sense authors). Only in this way can the unique experience and information that they hold inform the choices and preferences of the policy community as a whole.

Secondly, it would imply that local "experiments" "feed-in" to the way in which "central" rules or overall objectives and indicators are formulated. It is important for the model not just that power is shifted downwards, but that local experience is used, and taken seriously as a means of creating a more legitimate, effective and responsible EU-level strategy – that there is what we might call a "reflexive loop" between overall objectives and national efforts to meet them (Gerstenberg and Sabel 2002: 291-292; Sabel and Zeitlin 2008: 274). While these two features do not exhaust the many complex aspects of transformation literature, they may represent two of its most important constitutive elements.

What though are we to make of them? Their advantage is that they potentially explain examples of inter-change or "hybridity" between methods like the OMC and other parts of European law (Trubek, Cottrel and Nance 2006; Trubek and Trubek 2005). "Transformation" sees EU law not in the stylised manner of much literature on new governance – as a fixed, static and uniquely authoritative standard - but as itself a "moving object". The transformation thesis thus marks a radical effort to re-imagine both law and governance in the EU in light of the distinct conditions of the European polity. It sees new governance not as external to law, but as part of a process where other parts of EU law too (e.g. the development of framework directives, the move to a social dialogue in employment policy) are also changing.

Its disadvantage, however, is that the dominant features of "transformation" have often been assumed, rather than subjected to robust empirical testing or scrutiny. While the transformation thesis has been applied to a plethora of different fields (Sabel and Zeitlin 2008), we have seen little of the "micro-analyses" that (a number of) the papers of this issue have tried to conduct. We have to ask – when we remove "transformation" from the ether of experimentalist theory and apply its dominant features to a particular process – the OMC SPSI – do its radical claims about EU law still stand?

The next sections of this paper will attempt to remedy this deficit through applying the two concepts of accountability and subsidiarity – as they have been developed in experimentalist literature – to the development and practice of social protection and inclusion. As we will see, in this practical realm, while the evidence for a changing role for EU law is very real, the experience of the OMC SPSI to date may undermine some of the basic assumptions – about creating a more flexible, participatory and accountable form of rule – that underlie the transformation model.

3. Accountability and Peer Review

One of the outcomes of Wim Kok's influential review of the Lisbon Strategy (conducted in 2004) was a rejection of a more prescriptive strategy for the OMC's development. It was agreed that – while Lisbon suffered from a major "implementation gap" – the way to overcome it was through peer review and learning rather than "naming and shaming" (Kok's initial suggestion), or any other subtly coercive method. The "streamlined" OMC SPSI which Kok bequeathed has thus uniquely relied on peer review as a means of encouraging states to both follow the process and undertake substantive policy changes.

This reliance has been on a divided peer review structure. Peer review is undertaken firstly, on an inter-governmental basis through both the Social Protection Committee (SPC), and the inter-governmental discussions leading to the Commission and Council's adoption of its annual Joint Reports. In both of these procedures, national plans for social inclusion and protection reform are scrutinised in closed meetings of national representatives as well as selected Commission officials.

Secondly, peer review is conducted through the OMC SPSI's official *Peer Review and Assessment* programme. This programme is sponsored through the Community Action Programme for Social Solidarity – "PROGRESS", and is designed to allow 'concrete' examples of best practice found in particular member states to be reviewed and disseminated in a more in depth manner (through around 6 to 8 thematic meetings per year). Country peer reviews represent, in effect, the OMC's official "day out", with national representatives (and select invited NGO participants) visiting a country experimenting with a policy solution deemed to be innovative or exportable to other national contexts (in 2008, examples included active inclusion, social impact assessment, and the return of women to the labour market).

The "dynamic" hope for these peer review institutions is that they can foster a new (horizontal) accountability relation. While internally, they can encourage member states to consider or internalise the expectations and demands of other states (Dawson 2009); externally, they may force states to justify policy failures, or their inability to meet common European objectives. Some of the existing empirical literature bears out this optimism (Horvath 2007: 64-65; Jacobsson 2003: 15-17). As Kerstin Jacobsson (analysing Nordic cases) has described it:

"Externally, the OMC does exert a certain pressure on the Member States. As a minimum, governments have to actively defend their positions if they are not willing to conform to the common norms and they have to 'think twice' before introducing measures that go against [these] norms." (Jacobsson 2005: 133)

One wonders, however, whether, in the case of the OMC SPSI, this conclusion still holds. The responses commonly re-conceptualise the role of peer review in the OMC. Most states, rather

than view peer review seminars as opportunities to critically evaluate the plans of other countries, see their "central goal" as mutual learning, or the exchange of policy information (e.g. Latvia 2005: 8 (1); Netherlands 2005: 6; Slovenia 2005: 5; Slovakia 2005: 5). While on the one hand, the country peer reviews are viewed as opportunities to learn from, or adapt, foreign practices, on the other, the primary benefit of the SPC is considered in terms of the informal administrative networks between officials that it has created (Austria 2005: 6; Finland 2005: 8. See also, Horvath 2007: 56). The goal is not "dynamic accountability" – or indeed any other form of accountability relation – but either mutual learning, or the creation of informal contacts between officials. As the government of the Netherlands put it:

"The Netherlands view is that peer reviews, seminars and conferences help to promote mutual learning and discuss the operation of the OMC. However, a peer review is only successful if Member States are allowed to critically assess each others plans." (Netherlands 2005: 6)

The objectives of the peer review process, set out in its "operational guide", reflect this:

"It is important to note that the Peer Review programme is not based on competition, but should be regarded as an invitation to discover and exchange the wealth of experiences and good practices available at member state level, and to explore their applicability in other contexts." (Commission 2008: 8)

Similarly, the founding statute of the SPC (revised in 2004) clearly set-out its role as being one of facilitating mutual learning, rather than encouraging critical scrutiny or review of Member State practice (Council Decision 2004/689/EC: Art. 2). As a result, countries like Italy and the Netherlands see peer review as "watered down" (Italy 2005: 11), or successful "only when member states dare to be open, honest and critical to one another" (Netherlands 2005: 6). The practice of peer review in both structures to date reflects little of the "open exchange" of critical opinions that the dynamic model suggests.

Instead, peer review often carries a different function. Following Kok's message of "simplification", national and joint reporting was significantly reformed from 2005 on. Under the 2007 "National Strategy Reports" (the now re-named National Action Plans, NAPs), member states were asked to identify particular areas of strategic priority for social protection and inclusion. These priority areas were then to be reported on in the next cycle, with thematic issues raised providing an agenda for later peer reviews and studies (for 2008, on child poverty, inequalities in health and longer working lives). An example of this cyclical process is the issue of "active inclusion" – a policy agenda identified as common to a number of member states in the 2006 Joint Report, leading firstly to a public consultation (conducted in 2007), secondly to a stakeholders conference (on minimum income schemes, in June 2007) and finally to a formal Commission Communication on the subject (Commission 2007). Peer review and national reporting was used in this example firstly, to establish a policy consensus among the member states, and secondly, to push the issue firmly onto the European agenda.

This example is indicative of how peer review and reporting function in a broader sense. Peer reviews rarely "review". They do not aim – in the words of democratic experimentalism – to contest, demand justifications from, or "de-stabilise" settled policy decisions (Sabel and Zeitlin 2008: 46-49). Instead they aim towards precisely the opposite – the identification of common approaches among different national contexts; approaches which can be "generalised" at the EU level, or exported to other countries (potentially providing a basis for common policy-making in the future). While this process of policy formation or exchange could itself be useful, it falls significantly short of the demand for accountability and critical evaluation that the transformation literature suggests.

Finally, the responses indicate two further factors that inhibit the possibility for a "dynamic" form of accountability. The first is enlargement. The need for a Constitutional Treaty in 2003 was often justified by governments on the basis that new institutional rules were needed to avoid decision-making paralysis in an enlarged Union. The responses indicate a concern that a similar problem could occur in the case of the OMC SPSI. Enlargement is seen by some

respondents as making the reaching of consensus opinions within committees, and the pace of deliberative exchanges within peer reviews, more difficult. For the Finnish government, for example, "with the increased number of Member States, the [peer review] process has become heavier, and this limits the handling and capacity to make use of, information" (Finland 2005: 5). For Denmark, enlargement makes the present process "unsustainable… it is more difficult to go into depth when so many countries meet at one time" (Denmark 2005: 7). Paradoxically, while enlargement may be one of the reasons behind the move to a more "flexible" form of policy-making in the first place, it may also stand precisely in the way of making "dynamic" forms of accountability, based on peer review, a useful exercise (see also, on this point, Horvath 2007: 63-66).

Lastly, dynamic accountability depends not only on actors who are willing to question and demand explanations from each other, but on a degree of transparency in the process. This basic level of transparency (e.g. one where the essential rules and participants of the process are clearly defined) also, however, seems to be lacking (see also, Kröger 2007: 576-579). Firstly, peer review procedures are seen by the respondents as closed and intransparent. Even states who *are* included in the process complain about the apparent contradiction between the EU's commitment to transparency and open access to documents contained in Article 255 of the Treaty establishing the EC, and the secretive and inaccessible nature of meetings of the SPC (UK 2005: 18; Finland 2005: 10; Lithuania 2005: 10-11; Czech Republic 2005: 10). While one could defend this intransparency i.e. by arguing that it allows governments to admit to things that they would otherwise prefer to keep from public exposure, such a position is neither defended in the responses, nor is it broadly consistent with "transformation's" commitment to a more open, and less technocratic, form of rule.

Second of all, the "reviewing" actors (in both the SPC, and the official peer assessment programme) tend to be national administrators and little else (Kröger 2006). This is a particular complaint among the social NGO respondents, all of whom raise complaints regarding their effective exclusion from peer review procedures (European Disability Forum, EDF 2005: 7; AGE 2005: 12-13; Eurochild 2005: 5; European Council of Municipalities and Regions, CEMR 2005: 4). As Eurocities put it in their response, there may be a need, under peer review, for "more transparency regarding who is invited, how and why" (Eurocities 2005: 13). The case is put best by the Belgian authorities:

"More than being an engine, the OMC is sometimes felt by some actors as an administrative burden, and is not yet sufficiently anchored in practice on the ground. It remains too limited to a restrictive circle of responsible political and administrative 'Europeanised' officials, rather than those directly in charge of putting the OMC into practice at the national level." (Belgium: 12 Author's translation).

Rather than forge a broader "dynamic" accountability, the method has relied too frequently on those *already within* the 'inner circle' of "Europeanised" participants (pan-European networks, national executives, and Commission officials). Given these limits, the method as it stands seems to have little to contribute to better realizing a more "dynamic" form of accountability in EU governance.

4. Subsidiarity

While we traditionally think of EU integration, and the agreement of EU laws, as a matter for bi-lateral negotiation between the European institutions and national federal governments, social inclusion and protection policy is an area where an unprecedented degree of legislative and political power is held at local or regional levels. Of the 25 then member states consulted by the Commission in its 2005 review, considerable legislative competence in formulating and implementing social inclusion and protection policy was held at local or regional levels in each and every state (CEMR 2005). To take social assistance policies as an example i.e. to define social inclusion only in "minimal" rather than "multi-dimensional" terms, this area is a *primary* competence for local or regional authorities in 15 member states. In the others,

competence in this area is shared with the federal government or between federal, regional and municipal levels. It is thus little more than stating the obvious to say that this field is a particularly pressing area for the principle of subsidiarity to apply. A failure to properly involve local authorities (who have precisely the capacity to implement social inclusion's most significant objectives) could not only impair the OMC's legitimacy, but deprive it of the input of the very actors who can remedy the EU's primary social challenges (Büchs and Friedrich 2005: 259).

In addressing the question of local participation, the responses to the Commission evaluation offer some initial optimism (see also, Zeitlin 2005: 466-468). Each and every national respondent reports some level of local involvement, ranging from the ubiquitous model of a working group, coordinated by a national labour or social affairs ministry, and including non-governmental and local organisations in the drawing-up of national plans (used by 13 respondents) to more direct efforts to delegate responsibility downwards. As an example of the latter, the Spanish government, in its response, draws attention to three different levels of actor participation (Spain 2005: 7-8). At the federal level, cross-departmental coordination is facilitated by an inter-ministerial Commission, while at the local level, the Commission for social services within the Spanish Federation of Municipalities and Regions has been given specific responsibility to monitor, review and report upon regional and local policy. A further body – the "Working Group for Social Inclusion and Employment" – is entrusted with fostering civil society involvement.

Opportunities for local and regional participation in national reporting have particularly emerged under certain conditions. While in "older" EU members, procedures for legislative consultation are often well established, or based on corporatism, the Joint Inclusion Memorandum, signed by the accession states in 2004 indicates a different picture in newer member states. There is a recognition that many states have emerged from a heavily "top-down" tradition in managing government policy. Local and non-governmental involvement "had tended to be limited or haphazard" (Commission 2004: 36). The OMC was thus introduced in these countries at a time of transition for their political and decision-making culture.

While this transition period presents the method with significant challenges, it may also have provided a window of opportunity for the method to influence policy-making practice (for an extension of this idea in the Belgian context, see Vanhercke this issue). For two NGO organisations, ATD 4th World and AGE, the process had succeeded in "creating a whole new dynamic, bringing different people and groups together both horizontally and vertically" (ATD 4th World 2005: 2-3). Similarly, a number of national respondents in the newer member states indicate that the further development of the OMC SPSI has incentivised them to develop new participatory structures (Hungary 2005: 6; Czech Republic 2005: 5-6). Here, the method can be seen as something of an "opportunity structure" for the local level; a chance to forge new relationships in an environment where the domestic constitutional space is unsettled. This opportunity may not only arise in the post-Communist East, but also in states undergoing a period of contestation between federal and regional authorities (Belgium 2005: 2-3; Italy 2005: 5).

Such optimism, however, is far from ubiquitous. The most common view from the respondents is that the lack of extensive local and regional participation is one of the primary obstacles to both the method's effectiveness and its legitimacy. 12 respondents voice this complaint. To give one example, CEMR reports that:

"The experience from the first rounds of the NAPs on social inclusion have revealed that, while central governments have stepped-up their efforts to consult with the regional level, in most cases, this consultation process has not been formalised and rarely allows genuine consultations from regions to the design and delivery of anti-poverty measures." (CEMR 2005: 10)

The lack of a proper formalisation of the process – in so much as it has allowed for a "flexible"

institutional design – has had a significant further effect. It has also left national executives as the "gatekeepers" of local participation (and indeed of NGO involvement as well). While the objectives and indicators of the process are agreed inter-governmentally (elaborated through committees in which local representatives and actors from civil society have no voice), the action undertaken to meet them is guided through national reports, which remain the prerogative of the federal government.

In this context, rather than "transform" the bilateralism of traditional forms of agreeing European law, the method has simply extended that bilateralism into areas of policy where local authorities had often been the main drivers of social reform. While national governments are free to meet EU level objectives "as they see fit", such a move – the ability to "frame" national social inclusion policy, or make strategic decisions – in an environment where competences are held *below* the federal level, can *centralise,* rather than devolve, decision-making power. At the same time, as a 'non-binding' procedure, local and regional governments lack the legal remedies necessary to contest their exclusion. In a first and important sense, local and regional authorities remain, under the OMC SPSI, "voluntarily consulted" actors, reliant on the good-will of their governments to both organise structures of local and non-governmental participation, and decide whether or not the contributions offered there are valuable enough to "feed-in" to national reports.

Secondly, the responses indicate that the OMC SPSI's participatory potential may have been limited by the very need to forge a more adaptive form of rule. One of the core features of the transformation approach is that it seeks to address the rapidly changing nature of regulatory challenges in the EU through encouraging *flexibility* in law-making. The embodiment of this feature in the OMC is the constant adaptation and iteration of national reports (the presence of a relatively short (one year) time-frame in which to draft, consult-upon and adopt National Action Plans).

There may, however, be costs to this flexibility. While this time-frame may be an advantage for governments intent on "speeding-up" the legislative process, a vocal minority within the responses argue that the OMC has given-up on participation requirements precisely in order to guarantee greater 'flexibility' in its approach to regulatory reform (CEMR 2005: 5; Solidar 2005: 4; Eurocities 2005: 5). Eurocities gives the example of the city of Copenhagen, which was given only 5 days to respond to the Danish NAP. Furthermore, numerous respondents indicate that the short time-frame for consultation has effectively foreclosed possibilities for scrutiny by national parliaments (AGE 2005: 11; Austria 2005: 5; European Anti-Poverty Network (EAPN) 2005: 6; Hungary 2005: 7; UK 2005: 17). Both of these exclusions can do little but contribute to the feeling that the procedure is dominated by executive actors, with little possibility for external influence.

Where there is not exclusion, participation often comes at a point where its practical effect is limited. One of the most common complaints offered is that – where the consultation of key NGOs, and local authorities, is common practice – this has often occurred relatively late in the reporting process (EPSP 2005: 10; Malta 2005: 6; Hungary 2005: 7-8). In these cases, consultation only occurs *after* the strategic objectives and priorities of each plan have already been set. In these circumstances, the dilemma of a more "flexible" form of policy-making becomes clear. Whereas on the one hand, "flexibility" is sought as a means of allowing access to new forms of knowledge, on the other, the constant drive for renewal may make public involvement more difficult (or alternatively, more selective).

Lastly, the presence of significant local involvement is inhibited by the lack of reflexive links between local practice and the OMC SPSI's "European dimension" (Preunkert and Zirra 2009: 196-197). There is little indication, in the responses that local "practice" feeds-in to larger indicators and objectives (e.g. ATD 4th World 2005: 7; Solidar 2005: 5; EAPN 2005: 9). To take an example, the annual roundtables on Social Exclusion coinciding with the Spring European Council often includes local (e.g. the Committee of the Regions) and non-governmental opinion normally excluded from EU-level processes. These events, and other seminars, expert studies, and trans-national exchanges, sponsored through "PROGRESS", are

mentioned by a number of respondents as providing both financial and informational incentives for local, regional and NGO involvement (Czech Republic 2005: 6; Spain 2005: 9; Finland 2005: 7-8; European Association of Craft, Small and Medium-Sized Enterprises, UEAPME 2005: 5)

Troublingly, the responses indicate that – while such institutions may have an important deliberative function – they often fail to produce any reflexive link between "local" and "European" priorities. The UK response notes that – while the roundtable has seen "a community of actors emerging" – "[it] has not been a consistently effective means of driving the process forward, or assisting the transition from process to outcome" (UK 2005: 18. See also CEMR 2005: 5). While "transformation" relies on the ability of local experience to foster a more responsive and more legitimate legal order, there is neither evidence of consistent local involvement, nor (where there is participation) of local input "feeding-up" into the process of framing "central" or EU objectives.

To this extent, the promise of the transformation thesis – that new modes of governance like the OMC could empower a form of EU law that takes subsidiarity seriously – remains unfulfilled. The process – in the field of the OMC SPSI – remains one dominated by the bi-lateral negotiations of national and European executives, rather than influenced by a wider set of local or "bottom-up" participation.

5. Conclusion

While the aspiration of transformation literature for the OMC is that it can bequeath not only a more effective, but also a more legitimate, model for European law, there is little evidence in the method's practice to support this conclusion. While "transformation" relies on a number of legal values that new modes of governance like the OMC are said to be reforming, the practice of the OMC SPSI displays a quite different type of reform. This is represented not through a more accountable and participatory form of rule, but either a perverted or under-developed version of these principles.

To take accountability as a first example, the method does indeed contain structures of horizontal review and scrutiny. Yet these structures are both designed, and used by administrative actors, as learning opportunities, rather than as a means to call other states "dynamically" to account. While this function may itself be important, the effectiveness of peer review has been further constricted by its confinement to a select group of explicitly "Europeanised" policy actors. Not only are traditional, hierarchical forms of accountability diluted under the method, but there is little evidence of the multiplication or "broadening" of accountable actors upon which the transformation thesis relies. While we may therefore have a more "dynamic" form of rule, this dynamism could precisely inhibit the necessary procedural frameworks, and temporal space, within which adequate accountability relationships can arise.

To take subsidiarity as a second example, here too, few of the normative aspirations of the transformation literature have been realised. While new structures of participation have arisen in certain contexts, these structures are manned by procedural "gatekeepers" at the national level. Local and regional governments – as the main "implementers" of EU level targets – have no automatic right of "structural entry" into strategic discussions of social inclusion and protection policy, either at national or European levels (see, for a different view vis-a-vis the European Employment Strategy, López-Santana this issue). Furthermore, where local input *is* evident, its capacity to feed back into, or "re-frame", central practice is limited. The second great hope of "transformation" – that it could use the diversity of the European polity, and the presence of local involvement, as a spring-board to a more legitimate European order – also seems unfounded.

Some would argue that these conclusions need not lead us to abandon the idea of "transformation" altogether. Perhaps – as Jonathan Zeitlin has suggested – a reflexive reform strategy for the OMC could remedy a number of these challenges (Zeitlin 2005; Zeitlin 2007).

This strategy would involve a greater commitment on the part of the Commission to monitor and enforce participation requirements (as well as a greater commitment on the part of the Member States to acquiesce in such monitoring). It would also involve demands for greater transparency, and integration between, different peer review bodies like the SPC and EMCO. Such reforms – some of them tentatively suggested by a recent Commission Communication (Commission 2008) – could help supply some of the surrounding infra-structure to make transformation feasible again.

A second objection may be that – while problems of political accountability and local participation may exist in the OMC SPSI – one cannot automatically generalise these findings from one field to another. Perhaps the main tenets of the transformation thesis are stronger, for example, in employment (where the EES, and its successor, the Integrated Guidelines for Jobs and Growth, carry a general Treaty basis) than in the highly under-prescriptive domain of social protection and inclusion policy.

At the same time, important doubts remain. Even if greater participation rights e.g. a commitment to local involvement, and a more robust peer review system, were available to the OMC, important disparities of power between the various actors involved could lead to distorted outcomes (Kröger 2006: 12-13; Büchs 2008). With no firm procedural basis for the method within the European Treaties, nor any indication of a political willingness on the part of the Commission to interfere in domestic constitutional structures, who could enforce or monitor participation requirements effectively? And would the Member States even agree to such a move? The constant clarion call of the Commission to deepen and broaden national reporting has been ongoing now for several OMC cycles, yet each call remains bound to the willingness of national governments to listen; and to take the commitment to a "reflexive OMC" seriously.

The second objection may be more pressing. While the lack of legal competences for the EU in social inclusion and protection policy may leave few alternatives to the types of soft law and horizontal coordination that a process like the OMC SPSI embodies, the specific factors of other policy fields (in terms of the level of institutionalization of OMC procedures, and constellation of actors involved at national and EU levels) demands further empirical work. This paper should in this sense be seen as a beginning rather than end for such analysis.

At the very least, it may be necessary to tone down the hyperbole with which both the OMC more broadly, and this particular section of its literature, has been greeted. The "lesson" of the OMC should not only be as an inspiration for reform of European law in a broader sense, but as a warning against the dangers of executive dominance and political alienation that lay dormant within the larger debate over "new governance" in the European Union. EU lawyers and policy-makers should take heed.

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Endnotes

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(1) Where country names or abbreviations are included, these represent questionnaire respondents. The numbers attached represent page numbers in the relevant responses.