CHAPTER 3

Variations in institutionalisation of the Social OMC’s: the choice for non-constitutionalisation and the emergence of ‘hard soft law’


3.1 Policy coordination after Lisbon

In March 2000 the Heads of State and Government set ‘a new strategic goal’ for the Union: to become, within a decade, ‘the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion’ (European Council, 2000a: §5). The European Council meeting, which was held in Lisbon, envisaged implementing this strategy ‘by improving the existing processes, ‘introducing a new open method of coordination’ (Ibid.: §7). The Presidency Conclusions of this Lisbon Summit refer to the OMC as ‘the means of spreading best practice and achieving greater convergence towards the main EU goals’. Still according to the same source, this involves: fixing guidelines (with specific timetables), establishing quantitative and qualitative indicators and benchmarks (against the best in the world), national and regional targets and periodic monitoring, evaluation and Peer Review organised as mutual learning processes (Ibid.: §37).

Based on these features, Vandenbroucke (2001a: 2) summarised that open coordination ‘launched a mutual feedback process of planning, examination, comparison and adjustment of the social policies of Member States, and all of this on the basis of common objectives’. Thus, in terms of governance, the Open Method of Coordination is, like other forms of policy coordination, a form of European ‘soft law’: there is no legislation involved, only ‘governance by persuasion’ (Streeck, 1996: 80) or governance by objectives. Wallace (2000: 28) therefore identify ‘policy coordination and benchmarking’ as one of the 5 variants of the EU policy process.

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1 I substantially revised the text of this chapter for my ‘Second Year Paper’ (Vanhercke, 2007). This revision included a new section 3.4 describing the institutionalisation process of the Health Care strand of the Social OMC. The revised text also includes new insights I drew from presenting at the WAGE and NEWGOV/CONNEX conferences in 2006 (see section 1.6 for further details) about the limitations of the ‘legalisation’ perspective: these have been introduced in section 3.6 of the present chapter, and have been further elaborated in the concluding chapter.

2 The other modes are (1) the ‘community method’ or ‘hard law’ (e.g. common agricultural policy), (2) the ‘EU regulatory model’ (e.g. internal market or competition legislation), (3) ‘multi-level governance’ (e.g. structural funds) and (4) ‘intensive transgovernmentalism’ (e.g. Economic and Monetary Union) (Wallace, 2000).
3.1.1 Open coordination: old wine in new bottles?

The OMC provides a Europe-wide approach to, amongst others, social policy and is now being applied to social inclusion (winter 2000), pensions (winter 2001) and health care (autumn 2004). But that is only the beginning of the story: the Lisbon Council Conclusions stipulated the introduction of the OMC ‘at all levels’ (European Council, 2000a: § 7), and, apart from social exclusion, explicitly referred to the use of the OMC with regard to information society/e-Europe (Ibid.: § 8), innovation and research and development (Ibid.: § 13). Furthermore, even though the term OMC was not explicitly used with regard to social protection (pensions more particularly), enterprise promotion, economic reform and education and training, the wording of the Lisbon Council Conclusions were such that they gave, de facto, authorisation to launch or strong political backup to continue open coordination in a host of policy areas. According to Rodrigues (2001) the OMC was up and running in no less than 11 policy areas at the turn of the century. Furthermore Zeitlin (2005: 20) points out that since the Lisbon European Council ‘OMC-type processes and approaches have also been proposed by the Commission and other European bodies as mechanisms for monitoring and supplementing EU legislative instruments and authority such as immigration and asylum [...], as well as in areas like youth policy where the Union has few if any legal powers’.

Is the OMC as introduced by the Lisbon European Council then an entirely new mode of EU policy-making? At first sight certainly not: even though the concept of open coordination saw the daylight in 2000, the actual practice of policy coordination at EU level was by no means introduced by the OMC. Conceptually the OMC finds its roots in the Broad Economic Policy Guidelines which were introduced by the Treaty of Maastricht (1992) and which involved non-binding recommendations from the Council to Member States to monitor the consistency of national economic policies with those of the European Monetary Union (Caviedes, 2004: 295). Furthermore, the Luxembourg European Council (1997) brought the Treaty chapter on employment (introduced in Amsterdam) to life through what is now referred to as the Luxembourg process and which uses a similar set of instruments for policy coordination. Thus, a number of pre-existing European policy coordination processes have retrospectively been interpreted as full or partial examples of OMC avant la lettre (i.e., before the Lisbon European Council labelled the policy instrument as such). Apart from the BEPG and the Luxembourg process, one could also mention the Cardiff Process for structural economic reforms, the Bologna Process for cooperation in European higher education, and the code of conduct against harmful tax competition (Zeitlin 2005:20). Some have argued that policy processes such as that the OECD Economic Surveys, the Employment strategy undertaken by the Nordic Council and the Article

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3 To ensure that OECD Member States follow the code of conduct for sound economic policies laid down in the OECD Convention, the OECD produces, every 12 to 18 months, an Economic Survey for each country. Such a report results from a detailed surveillance procedure (Schäfer, 2004: 5).

4 The Nordic cooperation in the employment field involves Iceland, Finland, Norway, Sweden, Denmark, Greenland, the Faroe Islands and the Aaland Islands. Officials as well as experts meet on a regular basis within the ‘Nordic Committee of Senior Officials for Labour Market and Working Environment (or ‘EKA’) in order to discuss experiences with their national labour market policies (Nedergaard, 2005: 19).
IV Consultations by the International Monetary Fund (IMF)⁵, all of which have been up and running for at least 2 decades, are OMC-types of cooperation between countries as well (Schäfer, 2004; Nedergaard, 2005).

The question still remains whether the OMC brought something new under the sun as compared to these pre-existing ‘soft law’ processes? Schäfer, for example, sees no substantial differences whatsoever between the longstanding OECD Jobs Strategy and the new European employment strategy: ‘these procedures are forms of multilateral surveillance that do not differ in kind’ (Schäfer, 2004:1). According to the same author ‘comparative analyses of the OMC refutes claims to its novelty’ (Ibid.).

By contrast, Borrás and Jacobsson see no less than seven different points that make the OMC distinct from the ‘old soft law procedures and contents’ (Borrás and Jacobsson, 2004: 188). But it seems that questions can be raised with regard to the distinction made by these authors between the OMC and what they refer to as ‘the traditional soft law’. For example, Borrás and Jacobsson hardly provide any evidence for their claim that the European Court of Justice considered the ‘old soft law procedures and contents’ (a category which is not specified by the authors) as a source of law, thus giving it a strong supranational dimension which would contrast with the intergovernmental approach of the new OMC’s. Similarly, the authors claim that one of the differences between the OMC and the old ‘soft law’ is the high level of political participation in the OMC, both in the policy formulation phase and the monitoring phases. It remains to be shown whether political participation is indeed so high in all, or even most, of the (new) OMC’s, especially since the revision of the Lisbon Strategy in 2005. Just as it remains to be shown that previous ‘soft law’ in the EU or the Peer Review process of the OECD are really only managed at the administrative (and not at the political) level. Finally, the claim that OMC aims at enhancing learning processes and traditional ‘soft law’ does not, should be underpinned by empirical evidence, since there is no reason to assume, at face value, that older ‘soft law’ procedures ‘such as collective recommendation, review and monitoring, and benchmarking’ (Ibid.:188) were not aimed (explicitly or in practice) at enhancing learning.

It seems that the other differences between OMC and old ‘soft law’ identified by Borrás and Jacobsson are more significant. Thus, clear procedures and iterative process, systematic linking across policy areas, interlinking EU and national public action and seeking the participation of actors could be seen as features of the (new) OMCs. These can be contrasted, to some extent at least, to weak and ad-hoc procedures, no explicit linking of policy areas, no explicit linking of EU/national levels and no explicit mobilization of a wide range of actors, all of which could be considered as characteristic for pre-existing ‘soft law’.

The crucial question then is, however, whether these remaining differences between OMC and old ‘soft law’, even if they can be empirically confirmed, suffice to substantiate the claim that the OMC’s launched by the Lisbon European Council or thereafter actually represent a substantially ‘new’ pattern of EU governance as compared to the policy coordination processes which existed

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⁵ The ‘Article IV Consultations’ consist of an annual multilateral surveillance procedure, used with a view to ‘firm surveillance’ of the exchange rates of the IMF members (Schäfer, 2004: 7).
before (in the EU as well as on the international scene). Similarly, the question is how one should discriminate amongst the (new) OMCs: is open coordination some kind of fixed recipe that is being applied to every one of these new OMC’s? Or are there substantial differences between them? This chapter looks at the variations in the institutionalization of the Social OMCs, beginning in 1999 with a Commission Communication.

3.1.2 A Concerted strategy on social protection

In July 1999 the European Commission published a Communication in which it proposed a Concerted Strategy for Modernising Social Protection (European Commission, 1999). The proposed strategy would aim at deepening the co-operation between the Member States and the EU, based on common objectives, mechanisms for exchanging experience and monitoring of ongoing political developments in order to identify best practices (Ibid.: 12). Work would be organised around 4 key objectives, which are key issues of concern to all Member States:

- ‘to make work pay and to provide secure income;
- to make pensions safe and pension systems sustainable;
- to promote social inclusion and;
- to ensure high quality and sustainable health care’ (Ibid.: 12-14).

Four Months after the publication of the Commission Communication, ‘The Council of Ministers of Labour and Social Affairs approved this proposal on 29 November 1999, but not without discussion: although this process clearly does not violate the current distribution of competences, some Member States were suspicious’ (Vandenbroucke, 1999: 15). After the decision by the Council, under Finnish Presidency⁶, to get the Concerted Strategy on social protection on the tracks, things moved very quickly (see chapter 2 for a detailed account of this emergence of the Social OMC). Indeed, merely two months after the first meeting of the Interim High-Level Working Party on Social Protection, the Lisbon European Council considered that ‘modernising the European Social Model, investing in people and combating social exclusion’ was part of the overall strategy that was needed to reach the aforementioned new ‘strategic goal for the next decade (European Council, 2000a: §5). The social protection and social inclusion train was on fast tracks, and recognized at the highest political level.

The next sections looks into more detail at the institutional development and outcome of three social OMC’s which have developed since Lisbon: the social inclusion (discussed in section 3.2), pensions (section 3.3) and health care (section 3.4) strands of the Social Protection and Social Inclusion OMC. Section 3.5 looks beyond the surface of streamlining the three strands. The question whether these processes can be considered as different institutional architectures will be considered in section 3.6, in which I will propose and apply a theoretical framework for that purpose: legalisation. Section 3.7 concludes this chapter.

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⁶ Finnish Presidency of the EU: July - December 1999.
3.2 Social inclusion: a sense of urgency, leading to a full-blown OMC

3.2.1 From a blueprint to a detailed architecture for the social inclusion OMC: 2000

The Lisbon European Council stated that ‘The number of people living below the poverty line and in social exclusion in the Union is unacceptable. Steps must be taken to make a decisive impact on the eradication of poverty’ (European Council, 2000a:§31). In order to achieve this goals the Heads of State and Government stated that ‘Policies for combating social exclusion should be based on an open method of coordination’ (Ibid.: §32). Following the political guidelines laid down by the European Council meetings in Lisbon and Feira, the Council of Employment and Social Affairs reached agreement (at its 17 October 2000 meeting) on the implementation of the OMC on social inclusion, through the final adoption of (1) Objectives in the fight against poverty and social exclusion and (2) practical arrangements to pursue these objectives (Council of the European Union, 2000a).

The four objectives of the new strategy are as follows (Ibid.: 5):

- to facilitate participation in employment and access by all to the resources, rights, goods and services;
- to prevent the risks of exclusion;
- to help the most vulnerable; and
- to mobilise all relevant bodies.

The four common objectives (including their more detailed elaboration) reflect the Council’s wish, first, to adopt a multi-dimensional approach towards social inclusion ‘which require the mobilisation of a wide range of policies’, second, to mainstream the objective of fighting poverty and social exclusion into relevant strands of policy (Ibid.: 3) and, third, to involve the full range of the bodies concerned, in particular the social partners and NGOs (Ibid.: 5). The Nice European Council (December 2000) ‘approves the objectives of combating social exclusion adopted by the Council’ and confirms the request to submit national action plans (covering a two-year period) by June 2001, as well as the need and to define indicators and monitoring mechanisms (European Council, 2000c:§18). On the latter issue the European Social Agenda, which was also endorsed by (and annexed to) the Nice European Council, requested ‘progress, as from 2001 […] towards achieving compatibility as regards […] indicators and the defining of commonly agreed indicators’ (European Council, 2000d: 16).

3.2.2 Operationalisation of the social inclusion OMC: 2001

This open-ended mandate with regard to indicators was further detailed by the Stockholm Spring European Council in March 2001, which ‘asks the Council to improve monitoring of action in this field by agreeing on indicators for combating social exclusion by the end of the year’ (European Council, 2001a: §29, underlining BV). The Stockholm meeting also invited the Council and the European Parliament ‘to agree in the course of 2001 on the proposal for a social inclusion programme’ (Ibid.). Following the request by the Nice European Council, Member
States indeed submitted their first National Action Plans during June 2001, presenting their priorities and efforts in promoting social inclusion and combating poverty and social exclusion. According to Pochet (2005: 58) these were ‘NAPs/Incl with wide diversity both in form and in their degree of compliance with European priorities’.

At the Informal meeting of the minister for Employment and Social Affairs in Liege (July 2001), the Belgian Presidency made it clear that it wanted to adopt ‘at the Laeken Summit, a set of commonly agreed and defined key indicators on social inclusion’ (Council of the European Union, 2001a:6). By referring to commonly agreed and defined indicators, the Belgian Presidency clarified any remaining doubts: the objective was to establish a harmonised statistical tool (Belgian Presidency of the European Union, 2001a: 28). The work on indicators during the second half of 2001 was built around 3 strands (SPC, 2001a: 8):

- the work carried out by the SPC Indicators Sub-Group (which started meeting in February 2001). At the aforementioned Informal Council in Liege the Chair expressed his expectation that ‘Ministers are following the work undertaken in the Sub-Group through their representatives, which undoubtedly will facilitate our political decision-making’ (Council of the European Union, 2001a: 6).
- the structural indicators suggested by the Commission in its 2001 Spring report (European Commission, 2001a) and the Draft Joint Report on Social Inclusion which the Commission prepared on the basis of the 15 national Action Plans submitted in June (European Commission, 2001b);

As can be read in the first Report of the Chairman⁹ of the Indicators Sub-group of the Social Protection Committee, these different strands worked, effectively, closely together:

‘We [the SPC-Sub-Group, BV] have been well informed of the work being done on indicators in preparation for the Belgian Presidency of the EU. The report on ‘Indicators for Social Inclusion in the European Union’, drafted for the Presidency under the coordination of Professor Sir Tony Atkinson, has been submitted for comments to all the members of the Indicators Subgroup. I have had informal discussions with Professor Sir Tony Atkinson and his colleagues and we were given a presentation of this work by Brian Nolan and Bea Cantillon at our meeting on July 2⁰⁰.

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⁷ Earlier European Council Conclusion were much less specific when referring to ‘commonly agreed indicators’ (European Council, 2000a: §32) and ‘common approaches and compatibility’ with regard to indicators (Council of the European Union, 2000a: 5). Indeed, these Conclusions left doubts about what aspect of the work on indicators would be ‘common’ (i.e., ‘commonly agreed indicators’ can be interpreted as a ‘common’ understanding about which ‘national’ indicators and definitions are acceptable).


⁹ David Stanton, Department for Work and Pensions (DWP), United Kingdom. David Stanton has now retired from the DWP, but is still President of the Indicators Subgroup.
Members of the Indicators Subgroup also attended the Presidency September Conference on 'Indicators for Social Inclusion: Making Common EU Objectives Work'. Some of the recommendations report reflected the Indicators Subgroup's own thinking and is therefore useful independent support for our work' (SPC, 2001a: 8).

Thus, 8 months after the Indicators Sub-group started meeting, the Chairman of the Subgroup, presented his Report to the Social Protection Committee which included an agreement on precise definitions of 18 indicators in the field of poverty and social inclusion, i.e. 10 primary indicators and 8 secondary indicators (SPC, 2001a: 11-12). This initial set of indicators covers four aspects of social exclusion: financial poverty, employment, health and education, thus reflecting the multidimensional approach taken. As far as the key dimension of housing is concerned, the Subgroup was not yet able to put forward a proposal for a harmonised indicator, but, its members agreed on a common approach of the issue in the National Action Plans (Ibid.: 20-21). It should be stressed that these 18 indicators are all 'commonly agreed and defined', i.e. harmonised at EU level, and based on 9 formalised methodological principles for the construction of social indicators (SPC, 2001a: 11). The indicators are deliberately focussed on policy outcomes rather than policy effort (Ibid.).

A few days after the Sub-Group's agreement on the first set of indicators, the European Commission published (on 10 October 2001) its first Draft Joint Report on Social Inclusion (European Commission, 2001b), which analyses the national action plans on social inclusion (NAPs/Incl) submitted in June and is structured around the abovementioned Nice common objectives. Importantly, the report states that is 'does not evaluate the effectiveness of the systems already in place in different Member States. Rather it [...] examines Member States' NAPs/Incl focussing on the quality of analysis, the clarity of objectives, goals and targets and the extent to which there is a strategic and integrated approach' (Ibid.: 4). On this topic the Commission is rather straightforward: 'Only a few [Member States] have moved beyond general aspirations and set specific and quantified targets which provide a basis for monitoring progress' (Ibid.: 7).

Insisting on this point, the Commission also established, in this first version of the Draft Joint Report, a 'typology [...] in order to highlight how NAPs/Incl develop a strategic and integrated approach to tackling poverty and social exclusion, without analysing the performance of every country'. Thus, the Commission judged that (European Commission, 2001b: 22):

- The NAPs/Incl of Denmark, France and Netherlands provide a comprehensive analysis of important structural trends [...] . The overriding response in these NAPs/Incl is proactive, set in a framework that includes time horizons, objectives and quantitative targets extending beyond 2003 [...].

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10 National Action Plans should contain quantitative information covering three issues: (1) decent housing, (2) housing costs, and (3) homelessness and other precarious housing conditions (SPC, 2001a: 20-21).

11 Six of these 'methodological principles' refer to individual indicators (e.g. 'an indicator should capture the essence of the problem and have a clear and accepted normative interpretation'); the three remaining methodological...
• The NAPs/Incl of Portugal, Finland, Sweden and the UK are solidly underpinned by diagnoses of key challenges and risks and set out reasonably coherent and strategic approaches [...].

• The NAPs/Incl of Belgium, Germany, Spain, Italy and Ireland contain elements of a national strategy that is being improved in order to reflect new realities or made more coherent. [...] None of these NAPs/Incl have either set overall targets or developed a comprehensive set of regional or local targets [...].

• The NAPs/Incl of Greece, Luxemburg and Austria basically provide a snapshot analyses of the situation on poverty and social exclusion [...] The analysis of longer term structural trends [...] is less developed and as a result these plans do not present long-term quantified targets [...].

According to many Member States, the European Commission crossed a line by proposing this typology: this feeling was further strengthened by the fact that the Commission also referred, in the same Draft Joint Report, to:

'Member States with the most developed welfare systems [...] such as Luxembourg, Denmark, Netherlands, Sweden and Germany’, which stand in contrast with ‘Member States with less developed welfare systems’, among which the Commission counted Portugal, the UK and Greece (European Commission, 2001b: 13-14).

The combination of the proposed typology and the identification of ‘most/less developed Member States’ led to a highly tensed meeting of the Social Protection Committee on 18 October 2001, in which some Member States accused the Commission of a naming and shaming exercise. It seems relevant to summarise the most salient interventions of this SPC meeting:

Germany refers to the typology as a ranking and has serious problems with it; the UK finds the typology difficult to dealt with and classifies the label ‘less developed welfare state’ as unacceptable; Finland refers to ‘a ranking, a classification, whatever you want to call it’ and calls it ‘not wise and politically confusing’; Sweden states that a ranking is not reasonable under OMC; Italy believes that this is not what was agreed upon at Nice; Austria wonders about the added value of the typology and states that ‘we would better not give school grades to one another’; Greece would prefer a holistic approach; Ireland fears the negative consequences of a similar ranking and claims to have been ‘crucified’ in the press because of the country’s low place in it (SPC, 2001e; participant observation).

The Commission argued, at the end of the meeting, that removing the typology now might have perverse effects in the press. But, in the end, it would rewrite the most sensitive paragraphs:

• the typology was replaced by the identification of Member States that performed well (and not bad) on one or more of the following three criteria: (1) a high a high quality analysis of the key risks and challenges, (2) the establishment of clear priorities and (3) an integrated and multi-dimensional approach to policy development. The Commission also adds that ‘All

principles refer to the portfolio of indicators (e.g. ‘the portfolio of indicators should be balanced across different dimensions) (SPC, 2001a: 11).
Variations in institutionalisation of the Social OMC's

plans contain some or all of these three dimensions to a greater or lesser extent' (European Commission and Council of the European Union, 2001:28).

- the reference to 'most developed Member States' simply became, in the redrafted proposal by the Commission, 'Member States with high per capita social expenditure levels'. Similarly, 'less developed Member States' became 'In some Member States there are lower levels of expenditure on social protection'. Portugal and Greece are still mentioned in the latter category, but without quoting the relative poverty rates, as was the case in the first version of the text. The UK is no longer mentioned in this section (Ibid.: 17).

In spite of the tensions which arose in the Social Protection Committee in the context of the Draft Joint Inclusion Report, the Committee reached agreement, during that same meeting on 18 October 2001, on the 18 indicators of poverty and social exclusion (including their precise definition and the underlying methodological principles), as well as on an agenda for further work on social inclusion indicators (SPC, 2001b: 3-4). The Social Protection Committee also called for the further development of the EU and national statistical capacity, and 'recognises the importance of increasing the involvement of excluded people in the development of indicators' (Ibid.: 5). Finally, the SPC agreed with its Sub-Group that the indicators should be 'used [...] in the next round of National Action Plans on Social Inclusion and [...] in the Joint Report on Social Inclusion' (Ibid.: 3).

After the redrafting by the European Commission, the Draft Joint Report, too, was adopted by the SPC (November 2001). According to some, an important part of this achievement was played by Frank Vandenbroucke (then Chair of the Council for Social Affairs and Employment), in that he helped to restore confidence in the OMC amongst some of the most critical Member States in the aftermath of the stir around the Draft Joint Inclusion report. As an illustration of the significance of the stir that was caused at the time, note that the aforementioned league table, which presented Germany as a rather bad performer, 'caused significant internal upheaval in the Federal government and even Chancellor Schröder learnt about this issue' (Büchs and Friedrich, 2005:273). That is why Vandenbroucke called an informal meeting in Berlin, on 9 November 2001 with high level civil servants from Germany, the UK and the Netherlands, and assured them that he would never accept that the OMC would become a naming and shaming exercise (participant observation). As we will see below, this Berlin meeting was also crucial in gathering the necessary support for the launch of the OMC on pensions.

Following adoption by the SPC, the December 2001 Council meeting of Ministers for Employment and Social Policy 'adopted a series of indicators and approved the Commission and Council Joint Report' (Council of the European Union, 2001b:16). The same session of the Council also welcomed the final agreement that was reached, in conciliation with the European Parliament, on the aforementioned Community Action Programme that would explicitly support the OMC on social inclusion (European Parliament and Council of the European Union, 2002).

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12 Vandenbroucke was invited by his German colleague Walter Riester to address the International Conference on Open Co-ordination and Retirement Provision (Vandenbroucke, 2001b).

13 The Commission's proposal for a Decision establishing a Community Action Programme to combat social exclusion was published in June 2000 (European Commission, 2000a). A long codecision procedure, and disagreement...
The programme allows for a range of actions, as from January 2002, in a transnational framework.\(^{14}\)

Still in December 2001, the set of indicators and the Joint Report were endorsed at the highest political level, by the Laeken European Council (European Council, 2001c). In two years’ time the OMC social inclusion was fully operational, using nearly all instruments available to it.

### 3.2.3 Further strengthening of the Social Inclusion OMC: 2002-2003

_Nearly_ all instruments, indeed, because what was not required yet in the social inclusion OMC, was the use of targets. The European Commission tried to change this in 2002, and partly succeeded. Indeed, in its Spring Report to the Barcelona European Council, the Commission tried to convince the Heads of State and Government to adopt an EU-wide poverty target:

‘The European Council should set a target for 2010 of halving the number of people at risk of poverty across the European Union. Member States should indicate in their two year National Action Plans against poverty and social exclusion how they will contribute to its achievement. Work should build on the social inclusion indicators endorsed by the European Council in Laeken’ (European Commission, 2002a:16).

The Heads of State and Government gathered in Barcelona did not accept the Commission’s proposal to set an EU-wide target, but they did agree to introduce the requirement to set national targets.\(^{15}\) At the same time the European Council was clearly _more ambitious_ than the Council of Labour and Social Policy, which had, urged, in a rather vague wording, ‘the Employment and Social Protection Committees to continue working towards the adoption of specific objectives to reduce social exclusion’ (European Council, 2002: 46). As from June 2002, and with a view to maintain momentum, the European Commission started a reflection on how to take the social inclusion OMC forward (1) with regard to the preparation of the 2\(^{nd}\) Round of NAPs/I\(^{ncl}\), and more particularly the common outline the Member States would use as a guide for writing their plans, and (2) regarding possible adjustments to the Nice common objectives (SPC, 2002a: 1).

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\(^{14}\) The programme aims at (1) analysis of characteristics, causes, processes and trends in social exclusion, [...] the study of quantitative and qualitative indicators, the development of common methodologies and thematic studies; (2) exchange of information and best practices encouraging the development of quantitative and qualitative indicators, [...] assessment criteria and benchmarks and monitoring, evaluation and Peer Review; (3) promotion of dialogue involving the various actors and support for relevant networking at European level between organisations active in the fight against poverty and social exclusion, in particular non-governmental organisations.

\(^{15}\) The European Council stresses the importance of the fight against poverty and social exclusion. Member States are invited to set targets, in their National Action Plans, for significantly reducing the number of people at risk of poverty and social exclusion by 2010’ (European Council, 2002: 9).
Commenting on the Nice objectives, the Commissions judged, in the aforementioned June 2001 introductory discussion paper, that only ‘two issues should be given a higher degree of political impetus through amendments’ (SPC, 2002a: 2). First, the common objectives should reflect the Conclusions of the Barcelona European Council, i.e. Member States must ensure that the second round of NAPs/Incl are more strategic and concrete by setting clear and specific targets based on careful analyses of trends and causes. Secondly, Member States should address the gender dimension of poverty and social exclusion more fully (Ibid.: 4).

Using revised common objectives and the common outline agreed upon in the SPC as a framework, the then 15 Member States submitted their second National Action Plans for Social Inclusion in July 2003, explaining their priorities and actions for the period mid-2003 until mid-2005. According to the European Commission, the second round of NAPs/Incl represented a significant step forward. They were better focussed and more strategic (e.g. clear effort to set quantitative targets) and most adopted a more multidimensional approach. There was also more involvement of key stakeholders of civil society (especially NGOs), and Member States have ‘significantly strengthened their institutional arrangements for mainstreaming poverty and social inclusion into national policymaking’ (European Commission, 2003a: 6). The European Commission's analyses of the NAPs/Incl was published (in December 2003) in the second Draft Joint Inclusion report (European Commission, 2003a).

Both the Member States (while preparing their NAPs/Incl) and the European Commission (while drafting the Draft Joint report) were able to use a revised set of common indicators, which was adopted by the Sub-Group on Indicators at the very beginning of June 2003 (SPC, 2003a), and approved by the SPC a month later (SPC, 2003b). The revised set (now containing 19 indicators) consisted in fact of a refining and widening of the Laeken indicators, the definition of which posed a number of difficulties, e.g. with regard to self-perceived health, jobless households, working poor and literacy (SPC, 2003a: 4-7). The Sub-Group was not able yet to draw common guidelines for reporting on the non-monetary dimension of poverty, let alone to agree on common indicators (Ibid.: 8). The Sub-Group also agreed ‘that it is important to give children a special focus within indicators to be used in the fight against poverty and social exclusion. We therefore agreed to a standard breakdown by age of all the Laeken indicators, where relevant and meaningful’ (Ibid.: 8-9).

On 18 December 2003 European Commissioner Anna Diamantopoulou and the Social Affairs Ministers of the acceding countries formally signed 10 Joint Memoranda on Social Inclusion (JIM), one for each of the countries joining the Union in 2004. The purpose of these Joint Inclusion Memoranda was to prepare the country for full participation in the Open Method of Coordination on social inclusion upon accession. The JIM outline the principal challenges in relation to tackling poverty and social exclusion, present the major policy measures taken in the light of the agreement to start translating the European Union's common objectives into national policies and identify the key policy issues for monitoring and further review.
3.2.4 Extension of the Social Inclusion OMC to ten New Member States – preparing for streamlining: 2004-2005

The second Commission and Council Joint Report on Social Inclusion was adopted in time for the 2004 Spring European Council, by the Council of Employment and Social Policy (European Commission and Council of the European Union, 2004). Shortly after the 2004 Spring European Council, the European Commission published its synthesis of the abovementioned Joint Memoranda on Social Inclusion (European Commission, 2004a). The publication of this report was almost immediately followed, in July 2004, by the submission by the ten new Member States of their first National Action Plans against poverty and social exclusion, covering the two year period from mid-2004 to mid-2006.

The lessons drawn from this evaluation of the NAPs/Incl of the new Member States, served as an important input into the first Draft annual Joint Social Protection/Social Inclusion report which was published, in January 2005 and which replaces, in preparation of the new streamlined policy coordination in this area, the bi-annual Joint reports on Social Inclusion (cf. section 3.5) (European Commission, 2005a; European Commission, 2006b). The Council of Employment and Social Policy adopted the Joint Social Protection/Social Inclusion report at its 3 March 2005 session (Council of the European Union, 2005a:9) and submitted it to the Spring European Council (Ibid.: 9). As in 2004, the Heads of State and Government did not make an explicit reference to the report, but the European Council affirmed that ‘Social inclusion policy should be pursued by the Union and the Member States, with its multifaceted approach, focussing on target groups such as children in poverty’ (European Council, 2005: §36).

The 15 ‘old’ Member States who submitted their National Action Plans 2003-2005 (in July 2003, cf. supra) have submitted, in the summer of 2005, reports on the implementation and impact of these plans together with an update on action proposed for the period 2005-2006. Also, some of the new Member State, who submitted their first National Action Plans in mid-2004, accepted the invitation to submit updates reporting on new initiatives since submission of their National Action Plans. In section 3.5 below we will see what happened to the Social Inclusion OMC when it became, as of 2006, one strand of the Streamlined Social Protection and Social Inclusion OMC.

3.3 Pensions: a more prudent approach, leading to a ‘partial’ OMC

In this section we will look at the rather distinct development of the OMC on pensions, between November 2000 and October 2005. It followed a more prudent development path, leading to an unfinished architecture.

3.3.1 A progress report and a Commission communication: 2000

As explained above, the historical roots of the European co-operation on pensions in the context of the Open Method of Coordination can be traced back to the political agreement in the Council of Ministers of Labour and Social Affairs in the winter of 1999 to adopt a Concerted Strategy on social protection. And to organise work around 4 key concerns of the Member States, the 2nd of
which being 'to make pensions safe and pensions systems sustainable' (Council of the European Union, 1999: 7).

Following suit, the Lisbon European Council, rather than immediately requiring the development of common objectives or targets (as was the case with social inclusion, cf. section 3.2), gave a mandate to the High-Level Working Party on Social Protection to prepare, 'a study on the future evolution of social protection from a long-term point of view, giving particular attention to the sustainability of pension systems [...]. A progress report should be available by December 2000' (European Council 2000a:§31). Importantly, this progress report, which the High-Level Working Party needed to deal with 'as its first priority', needed to be prepared 'on the basis of a Commission Communication and 'taking into consideration the work being done by the Economic Policy Committee' (Ibid.). Also note that the Lisbon European Council did not explicitly refer to the OMC when considering pensions. Similarly, the Santa Maria Da Feira European Council of June 2000 did not refer to pensions when it enumerated a number of policy fields (amongst which social inclusion) where the OMC should be developed and improved (European Council, 2000b: §38).

As requested by the Heads of State and Government at Lisbon, the European Commission indeed published its Communication on Safe and Sustainable Pensions in October 2000 (European Commission, 2000b). The High-Level Working party did deliver its progress report to the Nice European Council (High-Level Working Party, 2000), which 'takes note' of the report (European Council, 2000c:§20) and ‘approves the Council's approach, which involves a comprehensive examination of the sustainability and quality of retirement pension systems'. As a follow up, The Nice European Council request a preliminary overall study on the long-term viability of pensions, which should be based on a presentation by the Member States of their national strategies in this area. The new study ‘should be available in time for the European Council meeting in Stockholm’ (Ibid.: §21). The Social Agenda, which was equally adopted by the Nice European Council, confirmed the need to continue cooperation and exchanges (as before, no explicit reference is made to the OMC) on pensions and already mentions ‘a study on this subject to be sent by the Employment and Social Policy Council to the European Council in Göteborg (June 2001), which will determine the subsequent stages’ (European Council, 2000d: 17).

### 3.3.2 Three new reports, another communication and a detailed architecture for the Pension OMC: 2001

We are not in Gothenburg yet, though. First, in preparation of the Stockholm European Council, the European Commission, in its February 2001 Spring report, announced that it ‘will adopt in September 2001 a Communication promoting co-operation at European level on the issue of pensions’ (European Commission, 2001a). Two weeks later the SPC adopted the requested preliminary study on pensions, in which it asked the Commission to give a detailed description, in its announced Communication on pensions, of the possibilities for further co-operation in this field (SPC, 2001c: 11).

At their first regular Spring European Council meeting in Stockholm (March 2001) the Heads of State and government for the first time made explicit reference to the Open Method of
Coordination in the field of pensions. In fact, the Council Conclusions stated that in the field of pensions ‘the potential of the open method of coordination should be used to the full’ (European Council, 2001a:32). The requested SPC’s follow-up to the preliminary study was adopted in May 2001 (SPC, 2001d). The document was discussed at the Council for Employment and Social Policy on 11 June and was ‘generally considered as a good point of departure for future work in the sector of social protection’ (Council of the European Union, 2001c:8). Crucially, the Commission announced, during the same Council meeting, that it would advance the publication of its Communication (announced for September), the planning being ‘to adopt the communication in mid-June in time for the ministerial meeting in July’ (Ibid.), i.e. in the first week of the Belgian Presidency in 2001. This was by no means a coincidence, but part of the games real actors play, as shown in box 3.1.

**Box 3.1  Games real actors play**

During the spring of 2001, the Belgian Minister for Social Affairs and Pensions, Frank Vandenbroucke, preparing at that time the EU Presidency later that year (July–December 2001), received a special visitor in his cabinet. Odile Quintin, then Director General of DG Employment, Social Affairs and Equal Opportunities of the European Commission, was invited to share her views on the priorities of the future Belgian Presidency and altered them. Indeed, up to that point Frank Vandenbroucke wanted to limit the agenda to, first, further developing EU co-operation with regard to social inclusion and, second, finding agreement on the modernisation of former Regulation 1408/71. Obviously, Odile Quintin had made a correct judgement when she firmly insisted on speaking directly to the minister, and not to the Head of Cabinet: one hour of discussion later, the Social Affairs side of the future Belgian Presidency had a third priority, suggested by Odile Quintin: preparing the Open Method of Coordination on pensions.

Frank Vandenbroucke asked something in exchange: he urged the Commission to publish the blueprint of the pensions OMC (through a Communication) two months before it had intended to do so. The reason was simple: the Belgian Minister’s ambition went beyond preparing the ground for the incoming Spanish Presidency. His ambition was to arrive at a final decision, i.e. launching the OMC in this field, during his own Presidency during the second half of 2001. On 11 June, during the Council for Employment and Social Policy, European Commissioner Anna Diamantopoulou officially announced that the Commission would indeed advance the publication of its Communication (previously announced for September 2001) to mid-June. Odile Quintin honoured Diamantopoulou’s promise: the Pensions’ Communication was published 3 days before the Informal Council in Liege on 6-7 July 2001 (Council of the European Union, 2001d). Frank Vandenbroucke did his part of the job, and got the pensions OMC on tracks 6 months later.

(Interview with Frank Vandenbroucke, 27 February 2006; participant observation).

The SPC’s first full-blown pensions study was then submitted to the Göteborg European Council in June 2001, which endorsed the 3 broad principles (the triple challenge) for securing the long-term sustainability of pension systems, and which relate to meeting social objectives, maintaining financial sustainability and meeting changing societal needs (European Council, 2001b: §43). This European Council meeting also determined the ‘subsequent stages’ of the

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work on pensions: the Social Protection Committee and the Economic Policy Committee were requested to prepare, ‘in conformity with the open method of coordination’, a joint ‘progress report for the Laeken European Council, on the basis of a Commission communication setting out the objectives and working methods in the area of pensions, in preparation for the Spring 2002 European Council’ (Ibid.). Note that for the previous reports the SPC was only asked, by the Lisbon and Stockholm European Councils, to take into account the work being done by the Economic Policy Committee (European Council, 2000a: §31; European Council, 2001a: §33), whereas now the requirement is to prepare a joint report with the SPC. Importantly, the Göteborg European Council also concluded that: ‘The results of the work will be integrated into the Broad Economic Policy Guidelines’ (European Council, 2001b).

The European Commission published its Communication on 3 July 2001, just in time, as requested by the Belgian Presidency, for the informal Council meeting in Liege on 6-7 July (European Commission 2001c). The core of the Communication is a detailed proposal of 10 common objectives for future pension provision, 2 of which under the heading Adequacy, 5 under the heading financial sustainability, and 3 under the heading modernisation of pensions. The Communication also stressed that it would be necessary to measure progress towards these objectives using a large variety of (commonly agreed and defined) indicators, a first list of which should be submitted to the Barcelona European Council (Ibid.: 8-9).

The Commission invited the Council to endorse the objectives and working methods which should be presented to the European Council at its meeting in Laeken in December 2001. National strategy reports should be updated ‘as appropriate’ in subsequent years, and in 2005 ‘a major review should be carried out’ (Ibid.: 11). Note the open-endedness of the working methods proposed by the European Commission: it is not clear at all what happen after the publication of the first Joint Report or the major review. Some exploited this open-endedness later to argue that the OMC pensions was never meant as a cyclical process, but as a one-shot exercise.

In spite of the reservations of a majority of the Member States (including Spain, Portugal, UK, Sweden, Ireland, France, Italy and Austria) with regard to the ambitious the schedule of the Belgian Presidency (Belgian presidency of the European Union, 2001b:2-5) the SPC and the EPC got to work immediately, and were able to present an agreement on objectives and working methods in the field of pensions to the Council of Employment and Social Policy of 3 December 2001. This implies that the Member States accepted the interpretation of the Belgian Presidency and the European Commission that the progress report for the Laeken European Council would contain a political agreement on the objectives and working methods in the area of pensions.\(^\text{17}\)

Regardless of the progress made by the SPC and the EPC with regard to the common objectives by the fall of 2001, an important hurdle needed to be taken in order to reach an agreement. Indeed, as discussed before, the publication of the first draft Joint Inclusion Report on

\(^\text{17}\) The Göteborg European Council Conclusions did leave some doubt about which document should be ‘setting out the objectives and working methods in the area of pensions’: the progress report for the Laeken European Council, the Commission communication, or both (European Council, 2001b: §43).
October 2001 (European Commission, 2001b) caused a big stir in the meeting of the SPC of 18 October 2001: some Member States accused the Commission of ranking Member States performance (cf. section 3.2). Since pension policies are a politically even more sensitive issue than social inclusion policies, it will be no surprise that many questions were raised about what would happen if the OMC on pensions was actually adopted: would the Commission, again, come up with a ranking of performance? As mentioned above, it seems that Vandenbroucke played an important role in restoring confidence among some of the most critical Member States in continuing work on the OMC on pensions, i.e. during the aforementioned meeting in Berlin, on 9 November 2001 with high level civil servants from Germany, the UK and the Netherlands. Vandenbroucke assured the participants of the meeting that he ‘would never accept that the OMC would become a naming and shaming exercise’ (participant observation).

The Social Protection Committee and the Economic Policy Committee presented their Joint Report on Objectives and Working Methods in the area of pensions to the December 2001 Council meeting of Employment and Social Policy, which was invited to endorse it (SPC and EPC, 2001). The core of the Joint Report is obviously the set of 11 broad common objectives, which relate to (Ibid.: 6-7; the full list of common objectives can be found in Annex 3):

- Adequacy of pensions (3 objectives): Member States should safeguard the capacity of pension systems to meet their social objectives.
- Financial sustainability of pension systems (5 objectives): Member States should follow a multi-faceted strategy to place pension systems on a sound financial footing.
- Modernisation of pension systems in response to changing needs of the economy, society and individuals (3 objectives).

These common objectives were, as was the case with the Nice Common Objectives on social inclusion, accompanied by a proposal to the European Council for working methods, which constitute the detailed architecture of the pensions OMC (SPC and EPC, 2001: 8-9). The open-endedness of working methods proposed in the July 2001 Commission Communication is also reflected in the SPC-EPC agreement. Indeed, the working methods agreed by the two Committees stipulate that ‘The Council and the Commission will assess before the end of 2004 the objectives and working methods established here and will decide on the objectives, methods and timetable for the continuation of this coordination’. Again, some claimed that by referring to ‘this coordination’ and not to ‘the OMC’, these working methods were inconclusive with regard to the question whether the OMC was there to stay (i.e., a cyclical process), rather than a one-shot exercise which should be integrated later in existing coordination processes like the BEPG.

The Council for Social Affairs and Employment of 3 December 2001 approved the first Joint report on Pensions and ‘held an exchange of views in which those Member States which spoke supported the method followed but also urged vigilance in view of the sensitivity of the subject’ (Council of the European Union, 2001b:18). The Council then submitted the report to the Laeken European Council, not for adoption but, note the nuance, ‘with a view to preparation for the Barcelona European Council in spring 2002’ (Ibid.). What happened, then, at Laeken? The European Council did not ‘endorse’ the progress report, but simply ‘noted the Joint report on
pensions drawn up by the Social protection Committee and the Economic Policy Committee’ (European Council, 2001c: §30).

### 3.3.3 Operationalisation of the Pensions OMC: 2002-2003

At the Spring 2002 European Council meeting it became clear why the operational part was left out of the Laeken Conclusions with regard to the pensions OMC: the Barcelona European Council ‘stresses the importance of the joint Commission and Council Report on Pensions to the Spring 2003 European Council’, and calls for the preparation of ‘National Strategy Reports due in September 2002’ (European Council 2002:25), thus confirming the launch the OMC on pensions at the highest political level under Spanish Presidency. As President Aznar had wished it.

After the Barcelona Spring European Council the Member States started to prepare their first National Strategic Reports, based on a common SPC-EPC outline. The Social Policy Agenda adopted at Nice (December 2000) already asked for the development of ‘appropriate indicators’ in the field of social protection, a mandate which was confirmed, with regard to the 3 broad strands of the OMC on pensions (adequacy, financial sustainability and modernisation of pension systems), by the 2003 Spring European Council. And yet, after 2.5 years of work in the SPC and especially its Subgroup on indicators, agreement has only been reached on a very limited number of indicators (compare this to the 18 Laeken indicators on social exclusion, which were agreed upon within a period of 6 months). So, even though work on indicators continued, progress has been very slow and revealed to be ‘particularly difficult in the context of pensions’ (SPC, 2002b: 2), leading the SPC to acknowledge that ‘indicators developed to date represent second-best measures of the success of current and future pension systems [...]’ (Ibid.: 3).

The National Strategic reports were submitted in September 2002 and followed by the adoption of a Draft Joint Report on pensions in December (European Commission, 2002b). Note that the European Commission, before adopting its Draft Joint Report on Pensions allowed the SPC, first, to discuss an outline of the Report, then a first draft, and finally took the effort of engaging in bilateral discussions with all the Member States on the pre-final draft. The first Joint Commission/Council Report on Pensions was endorsed both by the Council on Employment and Social Policy and by the Council on Economic and Financial Affairs on 6 and 7 March 2003 respectively (European Commission and Council of the European Union, 2003).

The European Council in March 2003 welcomed the joint report and ‘calls for the continued application of the open method of coordination in the field of pensions and a review of the progress achieved in 2006’ (European Council, 2003:§49). Thus, formally speaking it is the European Council itself, under Greek presidency, which confirms that the OMC is there to stay, and not a one-shot exercise.

### 3.3.4 Extension of the Pensions OMC to 10 New Member States – preparing for streamlining: 2004-2005

After completion of the first cycle of the OMC on pensions, and the strong confirmation of its continuation by the Heads of State and Government, a number of initiatives were taken, at the
request of the 2003 Brussels Spring European Council, to ‘maintain the momentum for cooperation by delivering special studies focusing on common challenges for pension systems’ (European Council, 2003: 49). Thus, studies were adopted on ‘promoting longer working lives’ (SPC, 2004a) and on ‘Privately managed Pension Provision’ (SPC, 2005a).

The new Member States submitted their first National Strategic Report on Pensions, and the old Member States their second one, in July 2005, based on a Guidance Note endorsed by the SPC and the EPC (SPC and EPC, 2005), and 11 Common Objectives which were not changed since the first Round (SPC and EPC, 2001). The analyses undertaken by the European Commission primarily served as input in the 2005 Social Protection and Social Inclusion report (the Joint Pension Report was abandoned under the new streamlined process, cf. section 3.5). On September 14 and 15 the 2nd Round of Peer Reviews on the national Strategy Reports took place, completing the 2nd cycle of the pensions OMC. Section 3.5 below discuss what happened to the Pensions OMC when it became, as of 2006, one strand of the Streamlined Social Protection and Social Inclusion OMC.

3.4 Health care: the European Commission’s purposive opportunism, Member States’ foot-dragging and discursive juggling

As with the two OMC strands discussed above, European co-operation on healthcare in the context of the OMC originated in November 1999, when the EU Social Affairs Council identified ‘high quality and sustainable health care’ as the fourth objective which should be pursued at the EU level (Council of the European Union, 1999:7).

3.4.1 Setting the terms of the healthcare debate: discursive imagination and Commission agency: 2000-2002

Contrary to the social inclusion and pensions OMC, the healthcare OMC was not launched by the Lisbon European Council, which merely stated that social protection needs to be adapted to be able, amongst others, to provide quality health services. The Social Agenda which was adopted at Nice in December 2000 did provide for a (rather cryptic) mandate to start work in this field:

‘Before 2003, conduct a study on how, with due regard for the requirements of solidarity, a high and sustainable level of health protection can be guaranteed, taking into account the impact of ageing (long-term care) […]. Examine, on the basis of studies undertaken by the Commission, the evolution of the situation with regard to cross-border access to quality health care and health products (European Council, 2000d: 17).

The reader will notice that a period of no less than two years is provided as the time span for the requested study, which is very long when compared to the very short time spans provided for the initial social inclusion and pensions reports. Secondly, it should be noted that in this initial mandate the SPC is simply requested to ‘take into account the impact of ageing’, notably when studying the long-term care dimension.
The mandate to continue work on this issue is modified in an important way by the Gothenburg European Council in June 2001: whereas so far reference was made to healthcare, which was dealt with under the heading ‘modernising social protection’, the European Council now refers to healthcare and care for the elderly, which is now considered, together with pensions, as part of the ‘meeting the challenge of an ageing population’ agenda (European Council 2001b:§43). The mandate to continue work in this area was not only modified but also made more precise by the European Council: it stipulates that the initial report (i.e., the Study requested at Nice), should be prepared by the Social Protection Committee and the Economic Policy Committee, which should provide orientations by the Spring of 2002. Note that, first, no reference is being made so far to the term Open Method of Coordination, and, second the European Council so far has not requested the European Commission to support this emerging form of EU-cooperation.

In spite of this, using its right to initiative, and arguing that it acts ‘in the spirit of the conclusions of the Lisbon European Council, which defines the Open Method of Coordination as being based on partnership between different actors’, the Commission esteems that drawing up a Communication is no less than ‘the task conferred upon it’ by the Gothenburg European Council (European Commission, 2001d: 3). The short Communication on the future of health care and care for the elderly was published less than two weeks before the Laeken European Summit (December 2001) and, by no means coincidentally, two days before the international Conference organized by the Belgian Presidency of the EU in December 2001 on European Integration and National Health care Systems. The Communication identifies the common challenges all EU-Member States are confronted with in their healthcare policies\footnote{Demographic ageing, growth of new technologies and treatment, improved wellbeing and a better standard of living.}, describes the diversity of national systems and the impact of Community policies on national health care systems. It concludes that health care systems in the EU (and the candidate countries) all face the challenge of attaining simultaneously the three-fold objective of access to health care for everyone, a high level of quality in health care and the financial viability of health care (European Commission, 2001d:14). Note that the Communication essentially deals with healthcare (systems), far less with care for the elderly.

The agency from the side of the Commission worked out well for this institution: the Laeken European Council (December 2001), first of all calls on the Council to prepare the initial report on health care and care for the elderly (asked for at Nice and Gothenburg, cf. supra) ’in the light of the Commission communication’. Secondly, and even more importantly, the Heads of State and Government gathered at Laeken ask the (Social Affairs and Health) Council ‘to take a similar approach’ as the one that was used when drawing up the first Joint Report on Pensions (European Council, 2001c:30). Thereby the European Council endorsed, at a very early stage, the broadly-based approach taken by the Commission in its health Communication, in which it balanced access, quality and financial sustainability. In other words: the Commission, which was called upon by the Belgian Presidency to fine-tune the exact wordings of the Laeken Council Conclusions on this issue, successfully set the terms of the healthcare debate.
The requested (very brief) initial Report on health care and care for the elderly was drafted by the SPC and the EPC at the beginning of 2002, on the basis of the aforementioned Commission Communication (which represents 'a good basis for future co-operation') while also drawing on financial projections undertaken by the Ageing-Subgroup of the EPC (EPC and SPC, 2002). It recalls that the debate on healthcare and care is still 'at an early stage' and that it is 'even a more complex process', making it necessary to involve those responsible for health policy (Ibid.: 3). On those terms the Council adopted the report, since it 'agreed on the need to initiate and to develop cooperation between the Member States over 2002 and 2003' (Council of the European Union, 2002:§12), namely around the 3 long-term objectives set out in the Commission Communication: accessibility, quality and financial sustainability of systems. These were also endorsed, with the initial report, at the highest political level in Barcelona in March 2002 (European Council, 2002: §25).

Whereas by now the Common Objectives on Social Inclusion (2000) and on Pensions (2001) have been adopted by the European Council (cf. supra), the Council seems prudent with regard to the next steps to be taken with regard to health: work during 2002-2003 should concentrate on information gathering and exploring possibilities for mutual learning and co-operation. In practice a questionnaire to elicit the information necessary to start the exchange will be prepared, and on the basis of the responses by the Member States a new SPC/EPC report will be drafted for presentation to the 2003 Spring European Council. Note that, once again, the wording of the mandate has shifted: the Council now starts referring to 'health and long-term care for the elderly', rather than 'healthcare and care for the elderly'. The difference is subtle, yet crucial: whereas the latter label could be read as a mandate to work on healthcare (in general) on the one hand and care for the elderly (aimed at a specific age group) on the other, the new formulation clearly suggests that work deals with healthcare and long-term care, both with regard to the elderly. This interpretation is confirmed by the questionnaire on Health and Long-Term care for the elderly that is being drawn up in 2002 (SPC 2002c) around the three guiding principles for the cooperative exchange in this field (accessibility, quality and financial sustainability) (Ibid.: 1).

As said before, EU-cooperation in this new policy area has moved, at least at the level of discourse, from health care (with attention to the challenge of ageing) over health care and long-term care, to health care of the elderly and long term care. This shift was by no means coincidental, but part of the political engineering by the European Commission.

3.4.2 Health Care OMC launched avant la lettre, but Member States drag their feet: 2003

It was no coincidence either that the Commission decided to label its draft analyses of the Member States’ replies to the 2002 Questionnaire a ‘Proposal for a Joint Report’ (European Commission, 2003b), thereby linking the exercise, in terms of wording, to the up and running OMC’s on social inclusion and pensions. It should be recalled here that the term Open Method of Cooperation has not been mentioned once so far, in the context of healthcare. One could argue that the OMC on health care in practice took off through this draft Joint Report on Health care
and care for the elderly, be it still *avant la lettre*, in the absence of an agreed set of common objectives or a reporting framework.

It seems worthwhile to have a closer look at this draft Joint Report, which differs in some important respects from the Joint Report that was ultimately adopted by the ECOFIN and Social Affairs Council formations (Council of the European Union, 2003a). Most noticeable is the fact that throughout the text the large majority of references to individual Member States have been deleted from the final Joint report, to be replaced by more general denominators. In some instances, it can be argued that such changes were made simply because it was felt as unnecessary and sometimes unfair that only one (or a few) Member State were quoted in a specific context, while examples of other countries could have been given. A few examples can illustrate this:

- the final Joint Report states that 'only a few countries are running ranking systems of hospitals by quality of service rendered' (Council of the European Union, 2003a: 17), the addition 'such as the UK' (European Commission, 2003b: 11) having been dropped from the Draft Report.
- whereas 'Finland, the UK and Sweden' were quoted in the Draft Joint report as being amongst those to 'have identified staff shortages, high turnover and increasing work pressure' (European Commission, 2003b: 13), the final Joint Report refers to 'A number of Member States' (Council of the European Union, 2003a: 19).

In a few other instances it seems the Member States (through the SPC and EPC) wanted to avoid naming with regard to politically sensitive issues:

- The Commission Draft Joint report referred to 'countries such as Belgium, Germany, Italy, Luxembourg and Portugal' as Member States in which 'rapid expenditure growth is causing concern' (European Commission, 2003b: 14). The final Report only refers to 'a number of Member States' (Council of the European Union, 2003a: 22);
- The claim that 'Spain is among the Member States that have introduced market mechanisms to the greatest extent into the health sector' (European Commission, 2003b: 17) was deleted in the final Joint report (Council of the European Union, 2003a: 26);
- The (prudent) criticism that the French and Portuguese reports 'do not state whether they are effective in controlling costs' (European Commission, 2003b: 18) is abandoned in the final Report (Council of the European Union, 2003a: 28);
- The reference to 'Luxembourg where the decency insurance is still in its infancy' (European Commission, 2003b: 18) is equally abandoned in the final version of the Joint Report (Council of the European Union, 2003a: 27).

Finally, the Member States agreed that a process of mutual learning and co-operative exchange should be continued on the basis of a new Commission Communication, but with 3 important caveats: (1) this cooperation should not pre-empt the outcome of discussions in the High Level Process of reflection on patient mobility (2) this cooperation will take place in full respect of Member States' competencies in the field of health care and (3) the Council deleted the reference
made by the Commission to the particular focus on indicators (Council of the European Union, 2003a:30). In other words, the Council remains very prudent.

The Joint Council/Commission report on health care and long-term care for the elderly was ultimately adopted by the 2003 Spring European Council, which highlighted the need to intensify the ‘cooperative exchange on this topic on the basis of further proposals which the Commission should present by Autumn 2003’ (European Council, 2003:§49). Before setting to work on this Communication, the European Commission tried to obtain a more ambitious mandate from the next Spring European Council, in March 2004: in its annual Spring report, the Commission asked the European Council to ‘Extend the open method of coordination in the social protection field to the modernisation of healthcare schemes’ (European Commission, 2004b: 26). Significantly, the 2004 Spring European Council did not take the bait. By contrast, the European Parliament in March 2004 does explicitly ask ‘the Council to adopt as a matter of principle the application of the open coordination method’, and calls for the Commission to submit proposals in this view (European Parliament, 2004:§7).

3.4.3 Formal launch of the Healthcare OMC, but subject to conditions and with a provisional institutional architecture: 2004

Explicitly drawing legitimacy from this European Parliament resolution while lacking a clear (European) Council mandate, the European Commission continued to work: it presented its Communication in April 2004 (more or less 6 months later than it had planned to) and now formally proposes to support national strategies on health care and long-term care by ‘using the open method of coordination’ (European Commission, 2004c). Note that any reference to the elderly is now completely dropped. Apparently the Commission no longer felt the need to sell this new OMC as being part of an ageing agenda.

The Commission proposes common objectives evolving, as expected, around accessibility of care, high-quality care and financial sustainability; it refers to the involvement of the many actors in this sector (social partners, health professions and patient representatives) and to the close links the SPC will should forge with other competent bodies: EMCO, EPC, the High Level Group on Health Services and Medical Care (European Commission, 2004c); it refers to exchanges of experiences underpinned by joint indicators, work on which should start immediately (Ibid.:7). Finally, as the next step to be taken the Commission proposes that the Member States should (again) write preliminary reports, which would be used, first, to establish the (health care) common objectives if the future streamlined social security process and, second, as part of the 2007 Joint report on social protection and social inclusion (Ibid.:12).

The formal decision to launch an OMC on Health and Long-term Care was taken in October 2004 by the EU Council formation of ministers for Health and Social Policy (Council of the European Union, 2004a). The Council also confirms that the Member States will write a new set of preliminary reports by March 2005 (see also the pensions approach, and the contrast with the start of the social inclusion OMC), ‘covering the challenges facing their healthcare systems, current reforms and medium term policy’ (Council of the European Union, 2004a: 10). It thereby overruled the Economic Policy Committee, which had ‘strong doubts’ on the preliminary reports,
as they ‘may create very little value-added’, and would ‘create a too heavy burden on the Member States’ services’. The EPC therefore proposed that ‘the reporting on the OMC on health care should only start with the streamlined process in 2006’ (EPC, 2004: 2-3).

Note that the Council not only stressed that the health care OMC should be introduced ‘in a progressive and flexible manner, while placing a strong emphasis on added value’ (Council of the European Union, 2004a: 9), but also decided it should:

‘be subject to the following conditions: it should not impose an excessive administrative burden; health ministries should be directly involved in the OMC process; overlaps with the follow-up of the high level reflection on patient mobility should be avoided; coherence of views should be ensured within the single EU Council formation of ministers of health and social policy; the joint working with the Economic Policy Committee should continue’ (Ibid.: 9).

This is not the prose of the newly enamoured. There are more indications pointing to a very prudent stance from the side of the Council: while approving the launch of the OMC in this new policy area, the Council did not explicitly endorse the Common Objectives proposed by the Commission. Instead, it followed the SPC which stated in its Opinion on this matter that Member States, while drawing up the preliminary reports, ‘should not refer systematically to the full range of sub-objectives’ […]. Further work on defining common objectives for the health and long-term care pillar […] will be needed (SPC, 2004b:4). Unsurprisingly, the new developments had not escaped the attention of the Economic Policy Committee, which duly noted that:

‘It should first be recognized that defining objectives in 2004 only for the area of health care, which would primarily be valid for the possible 2005 exercise on health care, and might then by Spring 2005 be superseded by joint objectives for all three areas of social protection […] seems heavy handed’ (EPC, 2004: 2, emphasis BV)

Other examples of hesitation to engage in this new OMC are, first, the insistence on the respect, at all times, on ‘the responsibilities of the Member States for the organisation and delivery of health services and medical care’ (SPC, 2004b:3), second, the insistence on taking stock of data already available from a range of sources (rather than on indicators to be developed) (Ibid.: 5). Arguably, this hesitation was also shining through in the fact that the Council’s decision to launch the OMC in the field of healthcare and care was not even listed amongst the ‘Main Results of the Council’ of 4 October 2004.

3.4.4 Occupying the territory and adoption of a light basic architecture: 2005-2006

In view of the above, it will not strike the reader as a surprise, that even though the 2005 Luxemburg and UK Presidencies declared to pay due attention to ‘the extension of the open method of co-ordination to health’ (Council of the European Union, 2004b:22), the next steps were again taken with great care. Thus, the 2005 Key Messages paper of the Social Affairs Council, which was adopted 4 months after the formal launch of the healthcare OMC, very prudently referred to ‘the planned extension of the OMC to health care’ (Council of the European
Union, 2005b:7). The same wording was used in the first Joint Report on Social Protection and Social Inclusion, which was adopted by the Council in February 2005 without addressing the healthcare issue in any substantive way, either in the Joint Report itself, or in its technical annexes (European Commission and Council of the European Union, 2005). As significant, and in great contrast to the two OMC strands discussed above, is that the Spring European Council did not confirm the launch of the health care OMC at its 2005 gathering.

This clearly did not stop the co-operation at EU-level: responding to the SPC/Council’s request, the Member States submitted Preliminary National Reports, on the basis of a guidance note prepared by the European Commission (European Commission, 2005b). The reports identified many issues for further work, as one can read in the memorandum of the SPC on this issue (SPC, 2005b), and fed into the 2006 Joint report on Social Protection and Social Inclusion. This report for the first time contained separate sections and analyses on health care and care, both in the core report and in the Country Profiles (European Commission and Council of the European Union, 2006). Maybe most importantly, the initial reports helped, in the words of the Belgian head of Delegation in the SPC (interview Elise Willame, 26 June 2007) to ‘occupy the health care territory’, vis-à-vis the Economic Policy Committee and the High Level group on Health Services and Medical Care.

The National Preliminary Reports also inspired the European Commission’s Streamlining proposal of late 2005, which also covered the area of health care and care, including Common Objectives in this strand (European Commission, 2005c). With the adoption of the streamlining by the (European) Council the healthcare OMC is now one of the three strands of the streamlined Social Protection and Social Inclusion OMC, as can be seen in the 2007 Joint Report (see section 3.5).

3.5 Beyond the surface of the streamlined Social OMC

In March 2007, the 7th Spring European Council adopted the Joint Report on Social Protection and Social Inclusion, i.e. the first Joint Report after the endorsement of the streamlining of the open methods of coordination on social inclusion, pensions and health care. Indeed, the new Joint Report is based on integrated National Reports on strategies for Social Protection and Social Inclusion (rather than separate National Action Plans and Strategic Reports) and assesses Member States’ progress in reaching the new streamlined objectives (rather than separate objectives for every process).

At first sight the 2007 Joint Report looked pretty straightforward: a very short actual Joint report summarising the key policy messages; a supporting document that analyses the economic and demographic context in which social policies take place in Europe; and another supporting document with separate sections covering in more detail the 3 policy strands of this OMC, namely social inclusion, healthcare and long-term care, and pensions (SPC and European Commission, 2007).
And yet, a closer look reveals important differences between the policy-specific sections of the Joint Report. Thus, the analyses of the Social Inclusion strand is based on the third round of National Action Plans for which Member States were asked to identify 3-4 key priorities which they think best contribute to achieve the Common Objectives, and they were ‘requested to explain and justify’ why these particular policy objectives have been selected (SPC and European Commission, 2006: 8). Based on these justifications, this section of the Joint report assesses ‘how well policy priorities have been based on an effective analysis of the situation in the Member States’ (European Commission, 2006a: 3).

By contrast, the healthcare and long-term care section of the Joint Report is based on the very first round of National Reports (not Action Plans) on this issue, and highlights (rather than assesses) common challenges and ongoing/planned strategies in the policy area (which need not be justified by the Member States), and it proposes a number of policy issues where European action (e.g. through mutual exchange and learning) could bring the most added value. Finally, the pensions section of the Joint Report is based on light updates – reports on key reforms to Member States’ pensions systems in the last year – of the second round of National Strategy Reports that all Member States submitted in 2005. Rather than assessing policies (as is the case in the social inclusions section), this section outlines significant new developments in the area of pensions and furthermore reports on the recent work carried out on (replacement rate) indicators as well as on the results of in-depth analyses carried out on two topics: the design of minimum income provisions for older people and the link between flexibility in the age of retirement and longer working lives.

In sum, there are significant differences between the sections of the first streamlined Joint report, both in terms of the kind of analyses and the source these are based on. The differences between the 3 strands are also apparent in the European Commission’s assessment of the use (by the Member States) of indicators, targets and monitoring in policymaking. Whereas the Social Inclusion section of the Joint Report deals more or less elaborately with this issue, the pensions and health sections barely mention it at all. In a way, this is not so surprising since the Joint report draws on the new ‘Portfolio of streamlined Social Inclusion, Pensions and Health indicators’ which was adopted in June 2006 by the SPC: apart from a list of overarching indicators, the list clearly shows the imbalance between the statistical tools available for each strand of this OMC (SPC, 2006). Indeed, the streamlined social inclusion objectives are underpinned by a full-blown battery of commonly agreed EU indicators (largely drawn from the existing set of Laeken indicators), and one commonly agreed national indicator. The pension’s indicators are still confronted with a number of methodological problems, and only cover some of the dimensions dealt with in the context of the OMC. The list contains a significant amount of commonly agreed national pension’s indicators, which do not allow for direct cross-country comparison. Finally, the health and long-term care indicators portfolio is labelled as preliminary, amongst others because the area of long-term care is, in spite of its high relevance not well covered by internationally available and comparable statistics. The health portfolio is largely made of commonly agreed national, and not EU, indicators (SPC, 2006: 37-48).

These differences between the 3 strands of the streamlined OMC are to a certain extent the logical consequence of the fact that the Guidelines for preparing the abovementioned integrated
Social Protection and Social Inclusion National Reports, on which the Joint Report is based, vary significantly between each policy strand (SPC and European Commission, 2006). Thus, the guidelines, which were agreed between the Member States and the Commission, invite the Member States to 'set clear specific quantified targets' in their NAP/Incl (Ibid.: 8), while a detailed Appendix on 'Setting Targets' details how they should go about this (Ibid.: 20). No reference is made to targets in the guidelines for the pensions or health sections. Also note that after the first debate in the SPC on the draft Guidelines, a sentence was added, in the 2nd version of the text, specifying that 'Many Member States may draw [...] from more detailed national plans on poverty and social exclusion which may be attached as an annex if so wished' (Ibid.: 6). Still with regard to Social Inclusion, 'Member States are invited therefore to be forward looking [...] rather than just report on existing actions' (Ibid.: 6). Neither the explicit suggestion to attach (and thus continue to draw up) full-blow National Action Plans, nor the request to be forward looking is formulated for the pensions or health strands. Also note that the Guidelines invite Member States to outline, in their NAP/Incl., 'what forms of dialogue they are using to ensure the involvement of as broad a range of actors as possible [...]’ (Ibid.: 8) and ‘what new or additional arrangements will be put in place during the period of the plan’ (Ibid.: 10). The guidelines for the pensions and health sections merely refer to reporting on 'the involvement of and consultation of stakeholders’ (Ibid.: 4).

More examples could be given to illustrate that beyond the surface of a streamlined OMC on Social Protection and Social Inclusion many differences subsist between the 3 previously existing OMC's. To some extent, this is not so surprising: these variations clearly reflect the understanding between Member States and the Commission that 'In bringing together the three pillars into a streamlined process [...] it will be important to respect the specificities of each strand and to take account of the rather different characteristics and stages of development of each’ (SPC and European Commission, 2006:1). This position has been repeated by a number of the stakeholders involved in the social protection OMCs, and at the political level, it was confirmed when the Chairman of the SPC declared in the Social Affairs Council on 10 March 2006 that 'the specific characteristics of each strand in the Reports will be respected' and 'the National Action plans for inclusion will be retained' (Council of the European Union, 2006: 2). Thereby he confirmed the key concern which had been expressed by the SPC, and was endorsed by the Council as far back as in October 2003, concerning the ‘importance of maintaining the distinct public identity that has been created for the different processes [...]’ (Council of the European Union, 2003b:13). The first Joint Report on Social Protection and Social Inclusion, adopted in March 2005 by the Heads of State and Government had requested the same respect for 'the specificity of each strand' (European Commission, 2005a:11).

3.6 Making sense of differences and similarities in ‘soft law’ modalities and procedures: the concept of legalization

In a similar fashion as Radulova (2007) has done with regard to the Employment Strategy (EES) and the Research OMC, I will employ the concept of legalization as developed by Abbott et al. (2000) in order to make sense of the differences between the coordination procedures that have proliferated since the Lisbon European Council. The concept of legalization is understood by
Abbott and colleagues as a particular form of institutionalization (Ibid.: 401) characterized by three components: obligation, precision and delegation. Any institution can, according to the authors, be described in terms of these three dimensions of legalization.  

How are these dimensions defined then?

Obligation, first of all, refers to the degree in which states or other actors are bound by a rule or commitment or by a set of rules or commitments (Ibid.: 401). Given that we are discussing international public law, in practical terms this category demands a measure for the subjective acceptance by states of a particular rule as a legal rule or not, i.e. as binding or non-binding as a matter of international law (Radulova, 2007). The subjective acceptance refers to the fact that compliance with rules occurs for many reasons other than their legal status: concern about reciprocity, reputation, and damage to valuable state institutions, as well as other normative and material considerations, all play a role (Abbott et al.: 419).

Precision is the extent to which rules unambiguously define the conduct they require, authorize, or proscribe (Abbott et al., 2000: 401). A precise rule specifies clearly and unambiguously what is expected of a state or other actor (in terms of both the intended objective and the means of achieving it) in a particular set of circumstances. And precision implies that the rules are related to one another in a noncontradictory way, creating a framework within which case-by-case interpretation can be coherently carried out. In other words: precision narrows the scope for reasonable interpretation (Ibid.: 412-413).

Delegation, the third dimension of legalization, is the degree to which states and other actors delegate authority to designated third parties—including courts, arbitrators, and administrative organizations—to implement agreements, to interpret, and apply the rules to particular facts; to resolve disputes; and (possibly) to make further rules’ (Ibid.:401; 415). Following Abbott and Snidal, I will make a distinction between ‘managerial’ delegation i.e. the power to apply and elaborate agreed rules, and ‘enforcement’ delegation i.e. the power to evaluate, judge and sanction performance (Abbott and Snidal, 2000: 430).

Importantly, each of these dimensions of legalisation is a matter of degree and gradation, not a rigid dichotomy, and each can vary independently (Ibid.: 401), as can be seen in Figure 3.1. Thus, the subjective commitments of Member States can vary widely along the continuum of obligation, ranging from unconditional obligation to a binding rule to commitments to instruments which explicitly negate any intent to create legal obligations (Ibid.: 410), such as recommendations and guidelines in the framework of the OECD or the OMC. With regard to precision institutions vary between, on the one hand, precise and highly elaborate, determinate rules and, on the other, vague and general provisions which are so imprecise that one cannot meaningfully assess compliance, casting doubt on their legal force. Delegation, finally, varies.

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19 In the international relations literature, the conventional conceptual definition of ‘hard’ and ‘soft’ law is laid out in a special issue of International Organization entitled ‘Legalization and World Politics’ (Goldstein et al., 2000).

20 I would like to thank Elisavetta Radulova for pointing this out to me during an intense Summer School discussion in Florence in 2006.
between binding third-party decisions and binding regulations on the one hand and pure political bargaining on the other (see Figure 3.1), with the issuing recommendations and monitoring (gathering and disseminating information) by third parties taking a position in between those extremes.

Consequently, the concept of legalization encompasses a multidimensional continuum, ranging from the ideal type' of legalization, where all three properties are maximized; to ‘hard’ legalization, where all three (or at least obligation and delegation) are high (e.g. much of European Community law); through multiple forms of partial or ‘soft’ legalization involving different combinations of attributes (e.g. the various OMCs); and finally to the complete absence of legalization (i.e. the absence of legal obligation, precision or delegation), which represents another ideal type (Ibid.: 401-402).

**Figure 3.1 The dimensions of legalization**

- **Obligation**
  - Expressly<br>
  - nonlegal norm

- **Precision**
  - Vague<br>
  - principle

- **Delegation**
  - Diplomacy
  - International court, organization<br>
  - domestic application

*Source: Abbott et al. (2000: 404).*

In the remainder of this section, the particular arrangements of the Social OMC's are plotted on the obligation, precision and delegation dimensions of the legalisation concept. This should allow to depict variations in the degree of legalization, and thus of institutionalization, between them. Where relevant I will indicate, within each of these OMC's, variations in the degree of institutionalization over time. My key hypothesis is that the Social OMC has been growing teeth over time: partly in a similar fashion between the 3 strands, but also with important differences remaining.

**3.6.1 Obligation**

The first question is: how to operationalise the concept of ‘obligation’ in a way that one can compare the scores on this dimension between the social inclusion, pensions and health care OMCs?

A first way of measuring the degree in which states or other actors are bound by the commitments of these OMC's would be to differentiate ‘between coordination procedures that have been codified in the treaties, and to coordination procedures based on an European Council mandate. The rationale of distinction here is that if Member States wished to demonstrate that they feel legally bound to coordinate their policies, they would have enshrined this in the
Variations in institutionalisation of the Social OMC’s primary law of the Union’ (Radulova, 2007). Since, in contrast to the European Employment Strategy, this is neither the case for the social inclusion OMC, nor for the pensions or health care strands (only the Social Protection Committee has a legal base in the Treaty\(^{21}\)), it would seem, at first sight that this dimension does not depict lots of variation between the three processes: they draw their legitimacy merely from (European) Council Conclusions.

However, one should not disregard the fact that the Amsterdam treaty (which came into force on 1 May 1999), granted the Union explicit competencies with regard to combating social exclusion\(^{22}\). Apart from the fact that this Treaty base is in itself bound to increase Member States’ subjective commitment to EU action in the field of social inclusion (including the OMC), this commitment was further increased by the formal adoption (through a European Parliament and Council Decision), based on these explicit Treaty competencies, of a Community Action Programme that was explicitly aimed at supporting the OMC on social inclusion. This Action Programme, which was decided upon in 2001, was consequently used to strengthen the technical infrastructure of the OMC inclusion, namely through the setting up of a new statistical tool to be named EU-SILC.

Importantly for our argument about ‘obligation’, EU-SILC (a) retains the Laeken indicators on social inclusions (b) was accompanied by various informal and formal means of collaboration between Eurostat (European Commission) and the Subgroup on Indicators of the SPC and (c) was institutionalised in a formal way, namely through a set of clear legal acts and implementation regulations (e.g. a Framework Regulation of the European Parliament and the Council). Thus, it can be argued that the Amsterdam Treaty and the Action Programme increased both the subjective and the legal commitment of the Member States to the social inclusion OMC. So far, there has been no similar financial foundation for the pensions or healthcare OMC. Future research will need to establish whether the current shift with regard to the financial foundations of the OMC, namely the replacement of the Community Action Programme by the new PROGRESS Programme (2007-2013), which will now also underpin the pensions and health care OMCs, are increasing the level of obligation within these OMC’s.

Are there other indicators of varying degrees of obligation between the three social protection OMC’s? It seems there are. Within the framework of the social inclusion OMC Member States are committed to writing National Action Plans (NAP/Incl), in which they are supposed to describe the policy measures they will undertake in order to meet the common objectives as well as the (national and European targets they set. By contrast, in the pensions and healthcare strands Member States merely write National (Strategic) Reports, which are even more backward-looking in the sense that they describe what has been done and achieved so far. It seems that the choice of the Member States to differentiate between NAP/Incl and NSR, which clearly have a different status, is a deliberate choice which, again, creates different kinds of subjective commitments.

\(^{21}\) The SPC was set up by a Council Decision in 2000 (Council of the European Union, 2000b).

\(^{22}\) The Treaty of Amsterdam incorporated into the EC Treaty the Maastricht ‘Agreement on social policy’ (see Chapter 1 of the new Title XI and new Articles 136 to 145). Under Article 137 the Council may adopt measures designed to encourage the combating of social exclusion.
But there is more: the previous sections of this chapter made it clear that the social inclusion, pensions and health care OMCs developed in a very different time frame. Whereas the Lisbon Council conclusions referred to pensions as the first priority it took in practice many intermediate steps to actually get to an OMC on pensions. As a result, it took 2 years to arrive at a formal agreement at the highest political level (in Barcelona) on a set of common objectives on pensions. Compare this to the social inclusion OMC, where an agreement on common objectives, was reached within 6 months. We also see this difference in development in the time needed to develop the architecture of each these OMC’s: the whole architecture of the social inclusion OMC was brought about between November 1999 (launch of the concerted strategy) and March 2002 (requirement of setting national targets at the Barcelona European Council). The operationalisation of the pensions OMC took a year longer: from November 1999 until March 2003 (endorsement of the first Draft Joint Report by the Brussels European Council), and with some crucial elements (like common indicators or national targets) still missing, as is the case with the healthcare strand.

The health care strand followed a significantly different development path. Not only has it taken much longer for it to be formally launched (1999-2004), but even after its launch Member States have been reticent to fully engage in it: Member States continue to be hesitant towards the development of joint indicators. As a result, and also because the NAP/Incl were written every two years and the NSR every three years, the social inclusion OMC went, at the time of writing of this chapter, through three full cycles. The pensions OMC only went through two cycles so far, the healthcare OMC has only gone through a single cycle (and even that one was based on preliminary national reports). Clearly, the difference in routinisation of these OMC’s creates a different kind of commitment from the side of the Member States, but especially from the other actors involved (especially in the inclusion OMC, cf. infra).

Member States are expected, in the social inclusion strand, to set national targets in their National Action Plans. Since this commitment has been adopted by the Council of the European Union (as part of the revised Common Objectives), and confirmed by the Barcelona European Council, it seems fair to say that this political obligation further increases the subjective commitment of the Member States to the social inclusion OMC. There is no similar obligation in the pensions or healthcare strands. And yet, it seems that there are at least two indications of increased obligation on the side of the pensions and healthcare OMC, as compared to the social inclusion strand. First of all, the pension reports were prepared, at the explicit and repeated request of the Council of the European Union and the European Council, in collaboration between the Social Protection Committee and the Economic Policy Committee; similarly, the major documents adopted by the EU Council (Common Objectives, Joint Report etc.) were adopted by two Council formations: the Social Affairs Council on the one hand and ECOFIN on the other. In the social inclusion strand, by contrast, the SPC and the Social Affairs Council are totally independent from any other Committee or Council Formation. Secondly, and importantly, the European Council itself decided, and repeated, that the results of the OMC on pensions and healthcare ‘will be integrated into the Broad Economic Policy Guidelines’ (European Council, 2001b), which is not the case for the social inclusion process. Both of these factors can be expected to increase, at least in theory, the degree of commitment of the Member States in the pensions and healthcare strands.
3.6.2 Precision

Are there also differences over time and between the three OMC strands in the way they narrow down the scope for reasonable interpretation, which is the main attribute of the precision dimension of legalisation? There clearly are. Most importantly, we have shown above that the basic architecture of the social inclusion OMC was completed by the adoption of a set of 18 indicators which have been harmonised at EU level, and which were endorsed at the highest political level. In 2003, the indicators have been revised and completed with new indicators; and the Luxembourg Presidency in 2005 triggered the routinisation of the involvement of external academic experts in this OMC, by commissioning an expert report with the original team (led by Sir Tony Atkinson, see section 3.2.2) that developed the indicators in 2001, so as to continue feeding the further technical redefinition and widening of the scope of the Laeken indicators. By linking these indicators, which cover multiple aspects of social exclusion, to the common objectives, the Member States are able to set precise targets, and the European Commission is able to assess in a rather precise way the progress that has been made towards reaching the common objectives. Compare this to the very slow progress with regard to the handful of pension and healthcare indicators which remain, until this day, second-best measures of the success of current and future social protection systems.

Somewhat more difficult to operationalise, but at least as important is the fact that the Common Objectives with regard to social inclusion seem to be significantly more precise than their pensions or health care counterpart. The pension objectives indeed remain very general, pointing only to long-term objectives, but not to the means to achieve them (e.g. ensure that older people are not placed at risk of poverty and can enjoy a decent standard of living’. By contrast, the social inclusion objectives tend to be more precise (e.g. to make a decisive impact on the eradication of poverty; to move towards the elimination of social exclusion among children), whereas the interpretation of the more general social inclusion objectives is being narrowed down by sub-objectives (according to the format ‘To do A, in particular by doing X, Y and Z’). Also, the social inclusion objectives prioritise certain means of achieving the general objectives, e.g. by singling out child - and dependent care as a means to developing policies to promote the reconciliation of work and family life (Common Objective 1.1 (a), first indent). Finally, it seems that the common objectives on pensions are sometimes related to each other in a contradictory way (e.g. between the adequacy and financial sustainability objectives), making it difficult to carry out a coherent assessment of the National Strategic Reports. The Common objectives with regard to health care are equally vague and ambiguous, precisely because there is no fundamental agreement between the Member States (see chapter 8).

In sum, it seems that the social inclusion OMC combines somewhat more precise common objectives with very precise harmonised indicators, whereas more general pension’s objectives are not underpinned by a similar battery of indicators, thus leaving much more scope for reasonable interpretation, and rendering a meaningful assessment of compliance even more difficult. However, one could hypothesise that with the streamlining on the three Social OMCs (see section 3.7 below) the pressure on the pensions and healthcare strands to bridge the gap with the social inclusion in terms of precision will strongly increase, so that they may be growing teeth in this respect.
3.6.3 Delegation

With Radulova (2007) I will consider managerial delegation of an OMC mechanism to be high if the Member States have endowed the Commission to take care of the procedural routine of an OMC iteration i.e. to issue guidance notes, to monitor the process of implementation, to collect and summarise data about performance, in short to act as a mediator and operational interface of the OMC mechanisms. Conversely, if the principles (the Member States) have not endowed an agent (like the Commission) with managerial powers but have retained them (e.g. empowering an intergovernmental body), the managerial delegation will be considered low (Ibid.). It is clear that the European Commission does indeed play the role of mediator and operational interface in both the social inclusion, pensions and health care OMCs. And yet, one could argue that it does so to a varying degree because of the fact that the managerial delegation in the pensions OMC involves two Advisory bodies (SPC and EPC) as well as two DG’s of the European Commission. Each of these DG’s can (and does) invoke the possibility of the other DG/Advisory body not agreeing with elements of the operational tasks as an argument to agree or at least not to oppose. Consequently, it seems that the managerial delegation is larger within the pensions OMC.

However, it seems that the managerial power of the European Commission has been even stronger in the healthcare strand: above we have seen that the Commission has been the main driver all along the process, from its initiation until its integration into the streamlined process, as can be seen in the mandates it created (or at least stretched) for itself and, even more significant, in the way it went ahead even in the absence of political mandates to do so. A case in point is the way in which the Commission, first, reframed the healthcare debate into a health and long-term care for the elderly debate, and secondly, situated the future EU-cooperation on health in the demographic debate by referring to healthcare and care for the elderly, only to close the circle where it started: healthcare and long-term care.

All in all, drawing on institutionalist/rational actor accounts, the healthcare OMC seems to be a textbook example of the Commission’s purposive opportunism in the sense that this form of new governance does not significantly destabilise the independent agency of the Commission as the linch pin of Community law and policymaking. Indeed, the step-by step account of the emergence of the healthcare OMC may be read as Commission recapturing the policy initiative from the Member States, to an extent it had not been able (or willing) to do in either the social inclusion or pensions OMCs. Arguably, the insertion of the healthcare OMC in the streamlined Social Protection and Social Inclusion OMC presents the jewel on crown of the Commission’s purposive opportunism, in that it may prevent, at least in the short-term, that this strand – in which the Member States seems to be foot draggers more than anything else – would be quietly dropped, or allowed to wither through de facto lack of real participation. The more interesting question then is whether the Commission, which seems to have acquired an important role in the healthcare OMC can now expand the legitimacy it acquired in this strand to the other two strand, in the streamlined process. If it can, they could be said to be growing teeth.

23 See, for instance Armstrong and Bulmer (1998).
The enforcement delegation is another story: it will be deemed high in the case of an OMC mechanism when a third party (e.g. the Commission) has the power to propose recommendations to countries that underperform or are deemed to be on a wrong track toward the commonly desired outcome/objective (Radulova, 2007). It seems that this aspect of delegation too allows to depict variations between the 2 social protection OMC’s. Indeed, the fact that Member States submit different kinds of plans to the European Commission (more forward looking NAP/Incl and more backward-looking NSR, cf. supra), which can be combined with indicators which are at a very different stage of development (cf. supra), gives the Commission different tools for critical evaluation. To be more precise: the Commission has more leeway to issue soft recommendations to the Member States in the social inclusion OMC than in the pensions or health care OMC. The abovementioned typology in the first Draft Joint Report on Social Inclusion is a case in point, even though it seems that the Member States have effectively drawn the line for the European Commission, which may have overstated (or simply tested?) the limits of the enforcement delegation at the time. The description of the development of the healthcare OMC in section 3.4 has made it very clear that Member States find it extremely difficult to accept to be named in the Commission’s assessment.

There is another reason why the enforcement delegation of the Commission is bound to be higher in the social inclusion OMC: the institutional features of this OMC (e.g. the Community Action programme, the National Action Plans, the Joint Report, the Peer Reviews etc.), provide strong incentives for national and European NGO’s as well as other actors, which are to a large extent absent from the pensions OMC, to associate to this process. For example, a significant part (around 20%) of the Community Action Programme has been used to finance non-governmental networks of actors (like EAPN, FEANTSA, Eurochild and RETIS); EAPN routinised its voluntarily-initiated evaluation of the NAP/Incl, through which it influences the Joint Reports; a Peer Review programme was initiated through which the civil society actors lobby their specific thematic concern; an independent network of non-governmental experts in the field of social inclusion was set up by the European Commission to provide information and analysis enabling the Commission to assess the implementation of the NAPs; and the annual European Round Table on Poverty and Social Exclusion (later replaced by an Annual Convention) increases the visibility of the process and provides a forum national and European lobbying (de la Porte, 2006). Clearly, the involvement and investment of NGO’s and other actors in all these initiatives increases the expectations towards the social inclusion OMC, and thus adds pressure on the European Commission to use its enforcement delegation ‘to the full’. The question with the streamlined process is then: how will the enforcement delegation of the Commission evolve? Will it expand its rather strong enforcement delegation from the inclusion strand to the other 2? Or will its weaker enforcement delegation within the healthcare OMC become the standard for the streamlined process?
3.7 Conclusion: the emergence of ‘hard soft law’

By the end of the 1990s the Member States of the European Union felt the combined effect on their welfare states of, amongst others, the internal market programme, the Single European Act, economic and monetary union, strong global competition and factors such as ageing populations and changing household and family structures. Doing nothing was no longer an option. However, in view of the large differences in economic development between the Member States, the different development of their welfare state institutions and policies and, most importantly, the differences in taken-for-granted normative assumptions about the functions of the welfare state vis-à-vis private provisions, the option of European harmonization of market-correcting social regulations was foreclosed (Scharpf, 2002: 650). Thus, at a time when the partisan composition of the European Council allowed it, the Member States launched, in response to these pressures, EU-wide cooperation on social protection through a new governing mode: the Open Method of Coordination.

The OMCs on social protection was, contrary to its counterpart on Employment, not enshrined in the Treaty. According to a number of authors, this lower degree of legalization would make the social protection OMC’s even lighter than the EES, which would represent a harder, or ‘heavy’ coordination procedure (Radulova, 2007).

Yet, a closer analyses of the development of the social inclusion and pensions OMC questions this kind of dichotomy between ‘treaty-based/heavy OMC’ on the one hand and ‘not treaty-based/light OMC’ on the other. Indeed, nearly a decade after their launch it seems that these OMC’s have not only developed quite differently in terms of organisational features; to a certain extent, this was to be expected since the there is no legal definition of the OMC, and thus everything is possible. More importantly, the above analyses has shown that these social protection OMCs significantly differ from each other, first in terms of the (subjective) obligations they create for Member States; second, with regard to the precision of the conduct they require; and third as to the degree of delegation of the management of the procedural routine as well as of the power to propose soft recommendations.

Even more importantly, it seems that the recent streamlining of these three strands is, slowly but certainly, leading to a considerable strengthening of the streamlined SPSI OMC as a whole, through spill-over effects from one strand to another. Before streamlining it was clear that the social inclusion OMC created, in spite of the fact that it has not been constitutionalised, a higher level of (subjective and objective) commitment for the Member States, amongst others through more precise indicators and objectives, more enforcement delegation for the European Commission, higher participation of (EU and national) non-state actors, and more scope for revision of the institutional arrangements. Through streamlining, the pensions and healthcare strands have started growing teeth in a similar way as the social inclusion strand has done over the past few years.
Across the three strands there seems to be an increasing focus on governance: rather than focusing on substantive policies, the focus of the SPSI OMC seems to be shifting towards reporting on, evaluation of and learning about how policies come about. This is done by assessing whether and how indicators and targets are used, which actors have been involved at what stages of the policymaking process, what kind of measures is taken at what level of government, which kinds of interdepartmental coordination have taken place at national level etc. In other words, the SPSI OMC seems to have taken a governance turn, through which the growing of teeth has taken shape. The result of this turn, and of the strengthening of the institutional features of the OMC over time, is that the actors involved, notwithstanding the skepticism from mainstream academics and decreased attention from politicians, learn that this soft mode of governance is quite a bit harder, and much more useful, than they had thought. And thus they continue to support it.

In sum, it seems too easy to consider the Social Inclusion and Social Protection OMC as a light process, or as pure ‘soft law’. This soft, non-Treaty based institution, which was launched as a voluntary cooperation between Member States, seems to have grown, over time, much more commitment (growing teeth), than could have been expected. Further empirical research is needed to determine whether these observed institutional variations over time have substantially different impacts at national level. More generally, this analyses raises questions with regard to the distinction that is often made between 'hard' and 'soft' law in the European Union, and underlines the need to develop theoretical tools which can help to grasp the hybrid nature of many of these instruments. Only by bridging the paradigmatic divide between constructivist and rationalist approaches to EU governance can we grasp the significance of new modes of governance for the EU’s social architecture of the 21st century.

The questions whether these observed institutional variations between ‘soft law’ instruments have substantially different impacts at national level will be addressed in chapter 5, 6 and 7. But first the next chapter aims at demystifying the OMC’s learning tools.

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