

New Governance in EU Social Law

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Hugo Sinzheimer Lectures

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ISSN: 1872-1745

Discussion Paper 2007-05

April 2007

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Library information:

Ashiagbor, D., 2007, New Governance in EU Social Law

Discussion Paper 2007-05

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April 2007

Ashiagbor, Diamond, Amsterdam, April 2007

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1. INTRODUCTION¹

I am very honoured to have been invited to speak to you as part of this lecture series to commemorate the work of Hugo Sinzheimer, one of the fathers of labour law, and of the sociology of law. Those of us who work as labour or social lawyers owe a huge intellectual debt to Hugo Sinzheimer in bringing about the recognition of labour law as a legitimate field of academic enquiry.

Those of us who have studied, practised and taught labour law in the UK are also particularly indebted to Sinzheimer's path breaking work. My approach to labour law has been influenced by the work of Sinzheimer's student, Otto Kahn-Freund, whom as you know played such an important role in the establishment of labour law as an independent area of legal study in the UK. I was fortunate to have studied labour law at the college in Oxford, Brasenose, where Kahn-Freund had been a fellow. And I have subsequently worked with British labour lawyers, such as Mark Freedland and Paul Davies, who are such significant interpreters of the approaches spear-headed by Sinzheimer and Kahn-Freund.

So, I am particularly delighted to be addressing the Hugo Sinzheimer Institute, as I share the approach of the institute, and indeed of Sinzheimer himself, to study labour law and regulation – infused with a strong tradition of humanism – by locating it in its wider social, political and economic context. In my work on EU social law and new governance, I have drawn upon theories and methods developed in a number of social science disciplines, including industrial relations, economics and sociology, in seeking to make sense of legal regulation. This, I hope, is very much in the tradition which Sinzheimer inspired.

¹ Paper based on the annual lecture in honour of Hugo Sinzheimer at November 9, 2006, at De Burcht – Vakbondsmuseum in Amsterdam. I would like to thank Professor Evert Verhulp and the Hugo Sinzheimer Institute for the invitation to give the annual Sinzheimer-lezing. I am especially honoured to have been asked to speak after such distinguished previous lecturers such as Professor Bob Hepple, and most recently, Professor Günther Schmid.

1.1 Overview of the lecture

In this lecture, I want to make sense of the phenomenon of soft law and ‘new governance’ in EU social law and employment policy. The turn away from hard law, from what has been labelled the ‘classic’ Community method of law-making, towards the use of soft law and new forms of governance to achieve policy goals, has been most marked in the realms of employment and economic policy. Of all the ‘new’ governance techniques with which the EU has been experimenting, the open method of coordination, or OMC, is the one which has been subject to the most scrutiny: OMC has generated something like a small cottage industry of commentary from lawyers, political scientists, sociologists, and the EU itself. Much of this literature on new governance is idealistic and aspirational, endorsing soft law processes as an appropriate supplement to, or even replacement for, more conventional modes of regulation. By contrast, I will be adopting a more sceptical stance, which nevertheless sees some positive potential in new governance.

I propose to structure this lecture by giving you a brief introduction to the European Employment Strategy, and exploring some of its implications for EU social law. I will then look more closely at the *form* which the Employment Strategy has taken, and consider the wider repercussions of this shift to new modes of governance. Next, I will consider the use of *both* legislation *and* new governance as a means of achieving the goals of EU social policy. In so doing, I want to explore with you the question of coexistence and hybridity: can the future of EU social law be built on the coexistence of new governance mechanisms alongside a revitalised use of the ‘classic’ Community method of law-making? Is the future of EU social law best understood in terms of hybrid regulatory techniques based on both hard and soft law?

2. THE EVOLUTION OF THE EMPLOYMENT STRATEGY

In re-visiting the origins of the European Employment Strategy, my argument here is that the form which the later Employment Strategy took and the place of social law within this Strategy were, in part, dictated by Member States’ reluctance to transfer competence to the EU. In an example of what Robert Salais labels ‘social

nationalism',² Member States have been reluctant to cede sovereignty over an area, employment policy and to some extent social law, which is so closely tied to national economic performance, and hence, national identity.

As we know, social law and policy at EU level has traditionally been under-developed, in particular, lacking a clear Treaty basis. The fragmented nature of the competence for social policy law led to years of stagnation in this area. But whilst the EU's competence in the area of *social* policy has undoubtedly grown from that envisaged by the Treaty of Rome, *employment* policy remained the preserve of Member States, with the exception of small areas such as vocational training.³

This reluctance to transfer competence in employment matters was exemplified by the negotiations in the Intergovernmental Conference prior to the 1992 Treaty on European Union. A moot point during the IGC had been whether or not to include employment *targets* within the convergence criteria which Member States had to respect if they wanted to participate in Economic and Monetary Union.⁴ Ultimately, however, the anxiety of most Member States to retain their competence in the area of employment policy, led to the exclusion of this policy area from the convergence criteria.⁵ However, following the ratification of the Treaty, Member States came to recognise the need to coordinate employment policy, and combating unemployment and encouraging non-inflationary growth became central aims of the European Community and of the newly-formed European Union.⁶

² Robert Salais, 'Filling the Gap Between Macroeconomic Policy and Situated Approaches to Employment: A Hidden Agenda for Europe' in Lars Magnusson and Bo Stråth (eds.) *From the Werner Plan to the EMU: In Search of a Political Economy for Europe* (Brussels: PIE-Peter Lang, 2001)

³ Mark Freedland, 'Vocational Training in EC Law And Policy - Education, Employment or Welfare?' (1996) 25 *Industrial Law Journal*, 110-20.

⁴ To ensure that the sustainable convergence required for the achievement of EMU came about, the TEU set five convergence criteria which needed to be met by each Member State before it could take part in the third stage of EMU. Checks on whether the criteria are being met were to be carried out on the basis of reports by the Commission and the European Monetary Institute.

⁵ The convergence criteria are referred to in Article 121 of the EC Treaty and set out in Protocol 21 annexed to the Treaty.

⁶ Article 2 EC. The Treaty of Amsterdam subsequently amended Article 2 EC again, but immediately after the TEU, it stated that the Union's tasks included promotion of 'sustainable and non-inflationary growth respecting a high level of employment and social protection'. See also Catherine Barnard, *EC Employment Law*, (Chichester: Wiley, 1995) at 65.

This task of coordinating efforts at job creation across the EU became more urgent as the 1990s progressed. By the time the Employment Strategy was launched in 1997, unemployment across the EU as a whole had reached a 'stubbornly high' rate of 10.8 per cent,⁷ more than double the rate of the EU's main competitor, the US, with its rate of 5.0 per cent.⁸ Long term unemployment was particularly problematic, as were levels of youth unemployment, and the low rates of labour market participation, again in comparison with the US, especially among older workers and women.

But, having recognised the urgency of the need for a coordinated effort to tackle unemployment, Member States were divided over the nature of such intervention. In the mid-1990s, when the Commission issued its agenda-setting White Paper on *Growth, Competitiveness and Employment*,⁹ the Commission's proposals for large infrastructure and public works programmes had been blocked by Member States who refused to sanction the necessary centralization of expenditure and competence for employment policy which this would have necessitated. Later, it was equally apparent during the Intergovernmental Conference which led to the Treaty of Amsterdam, that several Member States were opposed to any extension of the Community's competence in this field.¹⁰

It has generally been the case that (social) nationalism has most strongly been linked with neoliberalism - Wolfgang Streeck talks of an 'elective affinity' between nationalism and a neoliberal programme of deregulatory market expansion based in

⁷ *Employment in Europe 1997*, COM (97) 479 final, 1.

⁸ Eurostat: Statistical Office of the European Communities in Luxembourg, News Release 78/99, 10 August 1999. However, by June 2003, the EU unemployment rate had fallen to 8.1%, compared with 6.4% for the US: Eurostat, News Release 90/2003, 5 August 2003.

⁹ Commission of the European Communities (hereinafter CEC) White Paper on *Growth, Competitiveness and Employment: The Challenges and Ways Forward into the 21st Century*, COM (93) 700 final (Luxembourg: Office for Official Publications of the EC, 1993).

¹⁰ The UK government's rather critical submission to the IGC had been published by the Foreign and Commonwealth Office on 12 March 1996 (*A Partnership of Nations: The British Approach to the European Union IGC*, Cm 3181 (London: HMSO, 1996). However, there was a change of government in May 1997, from Conservative to Labour who, when in opposition, had given their support to a chapter on employment in the new Treaty: see Karl Magnus Johansson, 'Tracing the Employment Title in the Amsterdam Treaty: Uncovering Transnational Coalitions' (1999) 6:2 *Journal of European Public Policy*, 85-101, at 98.

decision-rules of intergovernmental diplomacy.¹¹ But the reluctance to transfer competence to the European level may also exist in conjunction with a desire to retain *high* levels of labour standards and social protection, due to concerns over the lack of democratic legitimation at supranational level for such redistributive policies, and also due to fear of a dilution of such high standards.

Having gained a clear competence to legislate on social policy following the Treaty on European Union, through the inclusion of the Protocol and Agreement on Social Policy in the Maastricht Treaty (a competence which was further confirmed through the introduction of a new Title on Social Policy by the Treaty of Amsterdam) the EU institutions then appeared to shy away from making new social policy proposals which would, it was feared, increase the regulatory burden. For example, in the 1997 Green Paper on *Partnership for a New Organisation of Work*,¹² the Commission envisaged the need to move 'from rigid and compulsory systems of statutory regulations to more open and flexible legal frameworks'.¹³

So, what then is the *current* discourse on job creation and labour market reform within the EU? What are the objectives of EU policy- and law-making in the regulation of the labour market? Has the belief in the European social model been abandoned or diluted?

As originally formulated, the Employment Strategy placed an emphasis on the achievement of 'a high level of employment', and the promotion of 'a skilled, trained and adaptable workforce and labour markets responsive to economic change'.¹⁴ The key guidelines within the Strategy were improving employability, developing entrepreneurship, encouraging adaptability in businesses and their employees, and strengthening equal opportunities. However, since 1997, the European Employment Strategy has been relaunched twice: at the European Council meeting Lisbon in 2000 and more recently in spring 2005. In particular, it became clear that years of

¹¹ Wolfgang Streeck, 'Public Power Beyond the Nation-State; The Case of the European Community' in Robert Boyer and Daniel Drache (eds.) *States Against Markets: The Limits of Globalization* (London: Routledge, 1996) at 305.

¹² CEC, Green Paper: Partnership for a New Organisation of Work, COM (97) 128 final (Luxembourg: OOEPEC, 1997).

¹³ *Ibid.*, para 44.

¹⁴ Article 125 EC.

faithful implementation of the Employment Strategy had nonetheless resulted in relatively weak growth performance and insufficient job creation.

The post-Lisbon Employment Strategy is strongly supply-side oriented,¹⁵ for example, placing a great deal of emphasis on an ‘active and dynamic welfare state’,¹⁶ on active rather than passive labour market policies, and on modernised systems of social protection. Crucially, the Lisbon Strategy commits the Union and the Member States to the achievement of *full employment* and investment in human capital so as to boost the employability of the unemployed. The successive relaunches of the Employment Strategy did, however, recognise there was a danger that, in simply advocating a **quantitative** increase in jobs, and the pursuit of higher labour market participation, European policy runs the risk of encouraging the creation of **low quality** jobs. I mentioned the ‘European social model’ earlier. We’re perhaps all guilty of using this phrase without offering a clear definition of what we understand it to mean, and there’s certainly no authoritative definition of the ‘social model’ within the discourse of the EU institutions. At the core, however, the phrase is used by European policy makers to refer to an ideal, central to which are full employment, good quality jobs, equal opportunities, social protection, and social inclusion. And a significant element of the discourse of the EU institutions since Lisbon is that there is an essential synergy between Europe’s economic strength and its social model. The key goal set by the heads of state and government at Lisbon was for the EU to become a competitive and dynamic, world-beating economy, whilst retaining a modernised version of this social model. The implication is that the creation of low quality ‘McJobs’ is not the solution to high levels of unemployment, least of all to high youth unemployment.

As you may know, the former prime minister Wim Kok went on to chair two reviews of the Employment and Lisbon Strategies in 2003 and 2004.¹⁷ What these reports, and

¹⁵ Kerstin Jacobsson, ‘Employment and Social Policy Coordination. A New System of EU Governance’ paper for the Scancor workshop on Transnational Regulation and the Transformation of States, Stanford, 22-23 June 2001; manuscript on file with the author, at 7.

¹⁶ Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000, Bull EU 3/2000, 7-17, at para 24.

¹⁷ Jobs, Jobs, Jobs: Creating more employment in Europe. Report of the Employment Taskforce chaired by Wim Kok (Luxembourg: OOPEC, 2003) and The Kok Report, Facing the Challenge: The Lisbon Strategy for Growth and Employment. Report from the High Level Group chaired by Wim Kok (Luxembourg: OOPEC, 2004).

the Commission's own assessment of the first five years of the Employment Strategy pointed to was an 'implementation gap'. As Commission President José Manuel Barroso put it: "The overall Lisbon goals were right, but the implementation was poor".¹⁸ Likewise, the central message of the Kok Report was the urgent need to improve governance, and to engender a sense of 'ownership' of the Lisbon Strategy, not only within national governments, but in wider civil society.

3. THE OPEN METHOD OF COORDINATION AND EMPLOYMENT POLICY

The task for the EU therefore was, and remains, how to construct a method of policy coordination in social and employment matters given, first, Member States' reluctance to cede more in the way of competence to the central EU institutions and, second, the difficulty in creating a single set of policy prescriptions which could apply equally to the disparate welfare regimes of 15, now 25, Member States. What is needed is a form of governance with a sufficient element of subsidiarity so as not to alienate Member States; a sufficient degree of flexibility in how it is applied so that it can permit national diversity and experimentation; sufficiently flexible that it can be revisable and adaptable to changing economic circumstances; an element of participation so as to allow input into policy making by a wider range of actors, thus conferring more legitimacy; but with sufficient normative bite that it can further the objective of reforming labour markets and lead to positive outcomes in terms of job creation. All of this without endangering the European social model. This is a tall order.

Traditionally, within the EU, soft law has been used where there is no Community competence in a particular area, or in order to initiate new kinds of policy for which there is no adequate legal basis.¹⁹ In the case of the European Employment Strategy, there *is* a Treaty basis, but it is a rather narrow one, so we can also include the resort to soft law as a means of finding a middle ground between legal and

¹⁸ Commission President José Manuel Barroso, quoted in CEC, 'Commission launches ambitious Growth and Jobs strategy for the EU', Press Release IP/05/130, Brussels, 2 February 2005.

¹⁹ See K C Wellens and G M Borchardt, 'Soft Law in European Community Law' (1989) 14 *European Law Review*, 267-321, at 302.

political intervention.²⁰ Nevertheless, the *tools* adopted have resulted, as we shall see, in very powerful political pressure on Member States to comply with the centrally designed policies.²¹

The objectives of the Employment Strategy, such as the attainment of a high level of employment, were to be achieved through what has become known as the open method of coordination. This was the label given by the Lisbon European Council to the methodology which had evolved since 1997 for the elaboration and implementation of employment policy: an annual, iterative procedure using soft law to improve the efficiency of labour markets through the setting of guidelines, benchmarks and indicators at European level, their translation into national policies, and the periodic monitoring of such implementation, mostly by means of peer review.²²

It was clear that the Employment Strategy, and the regulatory tools at the heart of it, represented something new, but the constitutional implications of this new form of governance only fully crystallized at the Lisbon European Council. At the core of this new method was the idea that facilitating mutual learning and sharing knowledge of best practices was essential for Member States to improve their records on employment. The open method presupposes that Member States should define certain areas as a 'common concern', whilst the actual choice of policies remains a national responsibility.²³ Instead of a single harmonised model which seeks to impose particular distributive outcomes, benchmarking and peer review adopt a system of formalised comparison. Benchmarking of employment policies consists of evaluating labour market performance against a common yardstick – the average of the three best-performing Member States for a given indicator (such as labour market participation by workers aged between 55 and 64). Peer review, on the other hand, involves the detailed assessment of the performance of each Member State by the others, as well as the auditing of Member States' policies by the Council and the

²⁰ *Ibid.*, at 270.

²¹ See Sally Ball, 'The European Employment Strategy: The Will but not the Way?' (2001) 30:4 *Industrial Law Journal*, 353-74, at 357-8.

²² Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000, Bull EU 3/2000, 7-17, at para 37.

²³ See Fritz W. Scharpf, 'European Governance: Common Concerns vs the Challenge of Diversity' Jean Monnet Working Paper No 6/01, New York University Law School, Symposium: Responses to the European Commission's White Paper on Governance, at 9.

Commission. Despite such auditing, a central rationale for borrowing the concept of benchmarking from the world of business was that it would permit the maintenance of *national* control over the content of policy: Member States could work together towards common goals 'without jeopardising their freedom to take their own decisions in the light of their own circumstances'.²⁴

Some advocates of new governance see it as heralding a brave new era of reflexive harmonisation or democratic experimentalism. Reflexive or regulatory law operates to provide a framework, a set of background rules, leaving actors to operate, deliberate or bargain 'in the shadow of the law'. It is true that OMC is an example of the EU forsaking direct regulatory intervention in Member States, and instead seeking to achieve common goals not by imposing them, but through establishing a framework within which Member States are free to be self-regulating. The open method is thus described as a form of regulation which aims to 'preserve spaces for experimentation in rule-making, and ... promote regulatory learning through the exchange of information between different jurisdictional levels'.²⁵ With regard to democratic experimentalism, new governance is seen as 'democratic' in the sense that power is decentralized to enable citizens to participate in decisions affecting them; and 'experimental' in that there is the freedom to try out alternatives at local level. In contrast to traditional regulation, based on rigid, authoritative standards, the hallmark of democratic experimentalism is the use of continually evolving best-practice rules based on benchmarking.²⁶

²⁴ Keith Richardson, 'Big Business and the European Agenda', Sussex European Institute, SEI Working Paper, No. 35, September 2000, at 8.

²⁵ Catherine Barnard and Simon Deakin, 'Market Access and Regulatory Competition' in Catherine Barnard and Joanne Scott (eds.) *The Law of the Single European Market: Unpacking the Premises*, (Oxford: Hart Publishing, 2002) at 218-9. See also Catherine Barnard and Simon Deakin, 'In Search of Coherence: Social Policy, the Single Market and Fundamental Rights', (2000) 31:4 *Industrial Relations Journal*, 331-45.

²⁶ Michael Dorf and Charles Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98: 2 *Columbia Law Review*, 267-473 at 350. They explain this more fully, thus: 'Although benchmarking is formalized in a fully fledged system of democratic experimentalism, it can begin informally as a rough comparison of competing models and alternative performance measures. So long as the comparisons meet the pragmatist criterion of casting doubt on the assumption that current arrangements cannot be improved and suggest directions for improvement (including refinement of the comparisons), they count as polyarchic benchmarking, and encourage the generalization of forms of deliberation on which their own improvement depends, whether institutionalized or not'. *ibid*, at 321.

However, I would argue that the intensification of the processes at the heart of OMC, albeit processes of soft law, has led to the narrowing of the range of legitimate responses to unemployment. The growing sophistication in the use of indicators evidences a strengthening of the system of *management by objectives* and a tightening of the permissible range of policy options open to Member States. For example, although the open method is intended to allow a 'fully decentralised approach' and to respect national differences,²⁷ in practice, it necessitates some rather fundamental structural alterations within Member States. For instance, countries with 'Southern' and 'Continental' welfare state regimes²⁸ arguably have to make radical adjustments to their welfare systems in order to be in a position to comply with certain employment guidelines. The objective of raising the overall employment rate and the rate for women in particular has become the lynch pin of the Lisbon Strategy and its goal of full employment.²⁹ The indicators and benchmarks centred on the employment rate enjoy a closer fit with the welfare state models of the Scandinavian and, to some extent, the Anglo-Saxon countries, which already have high participation rates, especially among women. The Member States with the highest employment rates are Denmark, the Netherlands, Sweden and the UK, which already meet the overall EU target for 2010 of an employment rate of 70% and an employment rate target for women of 60%;³⁰ whilst those with the lowest include Italy, Greece and Malta.³¹ The latter countries are therefore under particular pressure to converge with the benchmarked standards, to reformulate their welfare state systems away from the male breadwinner/female carer model. A typical example of the sort of changes required by such Member States is indicated in one of the recommendations contained in a recent report on the implementation of the Broad Economic Policy

²⁷ Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000, Bull EU 3/2000, 7-17, at paras 37 and 38.

²⁸ See Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism*, Cambridge: Polity Press, 1990 and Gøsta Esping-Andersen (ed) *Welfare States in Transition: National Adaptations in Global Economies*, London: Sage, 1996.

²⁹ From an overall average of 61% to 70% by 2010, and to raise the female employment rate from an average of 51% to more than 60%.

³⁰ CEC, *Employment in Europe 2006*, Luxembourg: OOEPEC, 2006 at 30-31.

³¹ Ibid. In 2002, Italy had an employment rate of 55.5% overall and 42% for women; Spain 58.4% and 44.1%; Greece 56.7% and 42.5%; Denmark 75.9 and 71.7; Sweden 73.6% and 72.2%; the UK 71.7% and 65.3%; CEC, *Joint Employment Report 2003-4*, Luxembourg: OOEPEC, at 97. The Netherlands stands as an exception, in that although its welfare regime belongs to the 'Continental' family, it has undergone adjustment strategies, and its overall employment rate is 74.4% and 66.2% for women.

Guidelines, that Italy should 'further encourage increased labour force participation, especially among women, [...] by adequate provision of childcare facilities, and among older workers, stepping up and reinforcing measures targeted at postponing retirement from the labour force'.³²

Such an emphasis on high rates of participation suggests that the 'mutual learning' which is one of the core features of the open method may in some cases necessitate a rather '*discontinuous* jump towards new ways of organizing knowledge',³³ for a Member State whose labour market is structured according to a different paradigm.

3.1 How effective, or 'hard', can soft law be?

I've said something about how soft law can have quite a hard impact. But what about the desire to preserve some version of the European social model?³⁴ There have been two broad responses to the fact that soft law mechanisms such as the open method seem to avoid hard law sanctions and often avoid imposing distributive outcomes. One interpretation is that, since such new forms of governance do not produce binding norms, and decentralise decision-making, they signal a rejection of social legislation at European level, which will eventually lead to an erosion of the European social model. An alternative view is that soft law methods such as OMC can provide an innovative regulatory strategy which in fact leads to more effective coordination of social policy, by providing a flexible framework in which Member States can achieve the aims of European social policy on their own terms.

Newer, softer forms of governance such as the open method can have a strong normative impact, and are in fact resulting in a form of convergence. I have already given the example of benchmarking and convergence around the objective of increased labour market participation. A similar story could be told about exhortations

³² CEC, Second report on the implementation of the 2003–05 broad economic policy guidelines, Luxembourg: OOEPC, 2005 at 157.

³³ Claudio Radaelli, 'Discourse and Institutional Change: The Case of Italy in the Euro-Zone', Queen's Papers on Europeanisation, No. 5/2000; emphasis added. Paper available at: <<http://www.qub.ac.uk/ies/onlinepapers/poe.html>>.

³⁴ See Michael Wynn, 'European Social Dialogue: Harmonisation or New Diversity?' in Hugh Collins, Paul Davies and Roger Rideout (eds.) *Legal Regulation of the Employment Relation*, WG Hart Legal Workshop Series (London/The Hague: Kluwer, 2000) at 492.

to Member States to implement labour market reforms, such as reducing social security contributions and reforming benefit systems, to prevent the early withdrawal of workers from the labour market, or removing 'rigidities' from labour markets.

Compliance with the demands of social policy is not measured in the way that one might measure Member State compliance with a directive, nevertheless, the open method does have a powerful constraining influence on Member States' employment policies and social law. But in the absence of what one might label 'social benchmarking'³⁵ there is the danger that such convergence will inevitably follow the dominant criterion by which progress in employment policy and labour market reform is currently evaluated, namely, an economic criterion.

This statement needs further elaboration. OMC is 'open' to the extent that Member States retain choice over how they achieve the objectives of social policy, experimentation in implementation is envisaged and permitted by the method. However, this is experimentation within carefully determined parameters; determined in great part by the EU's economic policy in the form of the annual Broad Economic Policy Guidelines and the demands of the Stability and Growth Pact.

The open method of coordination of employment policy is modelled on - and subject to - coordination of monetary policy for the Union as a whole, and particularly for Member States participating in the Euro. The version of OMC in operation for economic policy involves some rather 'hard' monetary policy coordination, especially in the context of the Stability and Growth Pact, enforced through multilateral surveillance and the excessive deficit procedure (the '3 per cent budget deficit rule'). Although the Employment Strategy almost entirely takes the form of soft law, Member States are subject to a Treaty obligation that, in pursuing their employment policies, they must do so 'in a way consistent with the broad guidelines of the Union's economic policies'.³⁶ What this means in practice is that the background values of

³⁵ The Lisbon European Council raised the possibility of extending the benchmarking procedure to social protection, and the combating of poverty and social exclusion. However, this is unlikely to amount the sort of 'institutional means by which the harmonization of social rights can be built into the employment strategy' as envisaged by Deakin and Reed: see Simon Deakin and Hannah Reed, 'The Contested Meaning of Labour Market Flexibility: Economic Theory and the Discourse of European Integration' in Jo Shaw (ed.) n. 41 above, at 97.

³⁶ Article 126 (1) EC.

EU economic policy in general, and Economic and Monetary Union in particular, constrain national employment policies and necessitate an employment policy based on strict fiscal policy, restrictions on public expenditure, 'modernization' of social protection systems, and 'structural reforms' to make labour markets economically responsive and enhance their competitiveness.³⁷

Within economic policy discourse therefore, social policy and social protection have a subservient role, in that they should be made more 'employment friendly'³⁸ and not undermine the economic goals of controlling inflation and reducing public expenditure. In a change from the rhetoric of the mid-1990s, the collective EU economic policy discourse increasingly emphasises flexibility and structural reform of European labour markets. For example, economic policy guidelines between 1997 and 2005 have consistently urged that priority should be given to: (a) wage flexibility in the form of greater labour cost dispersion, such that wage levels take greater account of differences in productivity;³⁹ (b) reductions in non-wage labour costs and lower income taxation; reform of the taxation and social protection systems; (c) new patterns of work organization, including more flexible working-time arrangements; and (d) adaptation of educational and vocational training to the needs of markets and to improve human capital, in particular, to 'improving the employability of the unemployed'.⁴⁰

Ultimately, one could argue that compliance with the Employment Strategy is best measured not simply by failure or success in meeting a centrally-determined 'target' (though that, too, is important) but by assessing the extent to which Member States' understandings of what is a legitimate policy response to unemployment have been conditioned by the process of coordination. I would contend that the range of

³⁷ At the heart of the EU's economic policy is the Stability and Growth Pact, and a central part of this Pact is the Excessive Deficit Procedure, which provides that Member State must not a budget deficit of more than 3 per cent of GDP nor can total government debt exceed 60 per cent of GDP. If either measure is breached, a Member State will be required to make an annual interest-free deposit up to a maximum of 0.5 per cent of GDP; if the excessive deficit is not rectified within two years, the deposit will be converted into a fine: Council Regulation (EC) No 1467/97 of 7 July 1997, Articles 12 and 13.

³⁸ *Ibid.*, para 4.

³⁹ Para 6(i) of Council Recommendation 97/479 states that priority should be given to 'higher employment growth fostered by the maintenance of appropriate wage trends and by wages that better take into account differences qualifications and regions'. But see also CEC, Recommendation/Proposal for Integrated Guidelines for Growth and Jobs (2005-2008) COM (2005) 141 final, Brussels, 12.4.2005.

⁴⁰ Council Recommendation 97/479, para 6.

permissible policies has been narrowed, as Member States develop collective understandings of concepts such as ‘full employment’, ‘employability’ and ‘active labour market policies’. The consistency with which the supply-side policies of the Employment Strategy are adopted by Member States makes it almost unthinkable for a Member State to contemplate encouraging early retirement, adopting passive labour market measures, or accepting low labour market participation. What remains to be seen is whether policies which leave ‘rigid’ or ‘inflexible’ labour market regulations unreformed still fall within the range of what is permissible or acceptable in the context of the Employment Strategy.

The soft law nature of the Guidelines, the lack of sanctions for failure to meet targets, and the openness to approaches such as the French 35-hour week, mask the fact that Member States face peer pressure to act in accordance with the main thrust of the Employment Strategy, and its ‘policy mix’. They further mask the fact that the policy ‘experimentation’ which is the hallmark of the open method of coordination in fact permits experimentation only within a framework firmly wedded to sound public finances, comprehensive economic reform and restructuring of welfare states and the labour market, thus limiting the extent to which Member States can depart from the Employment Strategy and the Lisbon Strategy without also breaching the Broad Economic Policy Guidelines and the Stability and Growth Pact. By this reckoning, therefore, Member State compliance with the Employment Strategy is extremely high.

4. THEORISING NEW GOVERNANCE

4.1 Role of legislation and coexistence between law and new governance

I think we need to interrogate further the reasons behind this shift to new governance, this movement towards more ‘experimental’ forms of governance, to understand what space there can be for social law. New forms of governance can be seen as reactions to the difficulties inherent in attempting to regulate complex fields, and in attempting to regulate for a diverse number of jurisdictions, by means of

conventional 'command and control' mechanisms.⁴¹ New governance can also be seen as a response to regulatory failure, a response to the 'joint decision trap' in social policy and employment policy.⁴² The 'joint decision trap' describes the situation in which the national capacity to regulate markets is severely reduced as a result of economic integration (with its associated mobility of financial assets and firms), whilst the problem-solving capacity at European (or international) level is constrained by conflicts of interest among governments. The reduced capacity to control their economic borders, following economic integration, limits the freedom of national governments to raise the regulatory and wage costs of firms, and places pressure on them to deregulate to remain competitive. However, the regulatory capacity lost at national level has not necessarily been regained through social regulation at European level.

OMC, though, is a form of governance which has the potential to solve this conundrum. It can potentially achieve policy coordination without threatening jealously-guarded national sovereignty, and in theory to allow Member States to implement policy in accordance with their socio-economic development. The open method of coordination, as it operates in the Employment Strategy but also in other policy areas, has been welcomed by some as a 'third way' in EU governance: it is an option when harmonisation is unworkable, but also a substitute for mutual recognition and the resulting regulatory competition.⁴³

However, in an important respect, one could say that rather than a sharp jump from one method of governance to the other, we can instead observe an evolving process, in which different forms of governance are used contemporaneously. In fact, it is arguable that even the 'classic' Community method always contained elements of more 'open' or flexible methods of governance, both with regard to the 'input' and the

⁴¹ See Nick Bernard, 'Legitimising EU Law: Is the Social Dialogue the Way Forward? Some Reflections Around the *UEAPME* Case', in Jo Shaw (ed.) *Social Law and Policy in an Evolving European Union* (Oxford: Hart Publishing), at 280.

⁴² See Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: OUP, 1999) at 76-7; Scharpf, 'Negative and Positive Integration in the Political Economy of European Welfare States' in Gary Marks, Fritz W. Scharpf, Philippe C. Schmitter, and Wolfgang Streeck (eds.) *Governance in the European Union* (London, Sage, 1996) at 15; and Scharpf, 'The Joint-Decision Trap Revisited' 44:4 (2006) *Journal of Common Market Studies*, 845-64.

⁴³ David Trubek & James Mosher, 'New Governance, Employment Policy and the European Social Model', New York University School of Law: Jean Monnet Chair Working Paper 15/01, 2001, at p 21.

'output' stages.⁴⁴ The 'classic' Community method can be summed up as the style of decision-making established in the Treaty of Rome, within which the Commission has the sole right of initiative with regard to legislative and policy proposals, the European Parliament has an increasingly important voice, the Council of Ministers takes the final decision – often now by qualified majority voting – and the resulting Community law is enforced by the ECJ.⁴⁵

The success of the Community project and the 'classic' Community method has been that, whilst constructing a constitutional order with state-like properties, there has been flexibility and differentiation, even within the common market 'core'.⁴⁶ Experiments with alternatives to the classic Community method have been emerging over decades so we can understand 'soft law' as referring, at a very basic level, to the variety of departures from or exceptions to the classic Community method. From this perspective, it's possible to see one of the softest forms of soft law, the 'open method of coordination' as an evolution, not a revolutionary new approach to regulation, because it draws upon a history of experimentation with 'softer' forms of governance.

One example of *departure* from the standard Community method is comitology, namely the increasing use of committees in the process of EC policy-making, particularly in regulatory fields.⁴⁷ Another example would be the European Social Fund: operational since 1960, the Social Fund is the main financial tool through which the European Union translates its strategic employment policy aims into action.⁴⁸ It can be viewed as an early instrument of Community employment policy,⁴⁹

⁴⁴ See Joanne Scott and David Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union', (2002) 8:1 *European Law Journal*, 1-18

⁴⁵ See CEC, *European Governance: A White Paper*, 27.7.2001, COM(2001) 428, at 8.

⁴⁶ See Gráinne de Búrca, 'Differentiation within the Core: The Case of the Common Market', in Gráinne de Búrca and Joanne Scott (eds) *Constitutional Change in the EU: From Uniformity to Flexibility?*, Oxford: Hart Publishing, 2000.

⁴⁷ See Ellen Vos, 'The Rise of Committees' (1997) 3:3 *European Law Journal*, 210-229; and Christian Joerges and Jürgen Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', (1997) 3:3 *European Law Journal*, 273-299.

⁴⁸ 'The ESF is likely to account for about 35% of the entire Structural Funds budget in the new programming period, i.e. approximately ECU 70 billion': European Parliament Fact Sheets, No 4.8.2. The European Social Fund, 1.12.2000.

⁴⁹ See Fernando Valdés Dal-Ré, 'Economic and Social Cohesion and the European Social Fund' in Paul Davies, Antoine Lyon-Caen, Silvana Sciarra and Simitis Spiros (eds.) *European Community Labour Law: Principles and Perspectives*, Liber Amicorum Lord Wedderburn (Oxford: Clarendon

since it gives financial support to active labour market measures in Member States, by means of vocational training, retraining and job creation schemes. A good example of a *convergence* between the old and the new forms of governance is social dialogue, wherein agreements between the social partners are transformed into binding directives by virtue of Council decisions.

And even with the classic Community method itself, there are soft law elements. Whilst the classic Community method leads to binding, uniform laws, such as directives, even within those forms of hard law there is scope for flexibility in the way Member States implement the provisions. Such hard law measures with soft law elements have important implications for what we understand by the ‘newness’ of new governance, and what this means for the future of social law. They add strength to the claim made by some proponents of new governance that legislation was always a flawed means of achieving the goals of EU social policy. For example, as Catherine Barnard reminds us,⁵⁰ regulations, which are seen as the epitome of uniformity and hard law, have never been used to set EU employment standards. The principal regulatory instrument in the social field has been Directives, which by their nature allow for a degree of flexibility in the way they are implemented by Member States.

As for those social policy directives which *were* enacted, flexibility has further been increased in a number of ways: *first*, by the use of framework directives which lay down certain core standards but the detail of their operation is left to be decided by the Member States; *secondly*, through the use of directives aimed at partial harmonisation; and *thirdly* through the use of directives setting minimum standards which Member States are free to improve on. An example of more flexible legislative instruments is the 1997 Part-time Workers Directive.⁵¹

With regard to the argument that legislation was always a flawed means of achieving the goals of EU social policy, it is important to recognise that, in the areas of employment and social policy, the relatively rigid ‘top down’ regulation which

Press, 1996) at 261-2, 267-8; see also Mark Freedland, ‘Employment Policy’ in Paul Davies *et al.* (eds.), *op cit*, at 294-5.

⁵⁰ Catherine Barnard, *EC Employment Law*, 3rd edition, Oxford: OUP, at 77-83.

⁵¹ Directive 97/81 OJ [1998] L 14/9.

characterises the 'classic' Community method was never well suited to attainment of the goals of social policy.

In thinking about the respective roles of law and new governance, we need to think about the coexistence of the two; the simultaneous recourse to hard and soft law. As Claire Kilpatrick points out, traditionally, worker protection was associated primarily with hard law, whilst job creation with soft law (employment policy, such as ALMPs).⁵² These two goals are now being combined in the EES, so there is a need for regulatory tools which do something different. It is difficult to envisage legislation on its own being a satisfactory mechanism by which to achieve objectives such as 'full employment' or 'employability' or improving investment in human capital.

Traditionally, many labour lawyers and observers of the EU social dimension, have stressed the need for hard law as a means to achieve EU social policy goals.⁵³ This view can at times be expressed in rigid terms, characterised by an unwillingness to recognise that diversity of Member States might necessitate something other than the traditional classic Community method of law-making.

I have some sympathy with this view, and share the concern that, without some centralised legislation in the social policy area, at the very least setting a minimum floor of rights, that there would be a risk of a race to the bottom in social standards.

But in arguing that the coexistence or interaction of hard and soft law may well be the most effective means of achieving the goals of EU social law and policy, one needs to be clear about what the goals and objectives of EU social policy are. And here, it is important to recognise that the EU is pursuing a new vision, a complex diversity of goals, a modernised version of the social model – which may well necessitate a variety of regulatory techniques.

⁵² Claire Kilpatrick, 'New EU Employment Governance and Constitutionalism' in Gráinne de Búrca and Joanne Scott (eds) *Law and New Governance in the EU and US*, Oxford: Hart, at 127.

⁵³ Jeff Kenner, 'EC Labour Law: The Softly Softly Approach' (1995) 11 *The International Journal of Comparative Labour Law and Industrial Relations*, 307-326; Damian Chalmers & Martin Lodge, 'The Open Method of Coordination and the European Welfare State' (2003) Discussion Paper No 11, Centre for Analysis of Risk and Regulation, LSE.

The Lisbon version of full employment shies away from a full-blooded commitment to extending labour standards and social protection to previously unprotected (non-standard) workers. Instead, all workers are to achieve employment security by virtue of making themselves more employable. Further, in the modern welfare state, member states are urged to withdraw from a commitment to providing income guarantees in the form of generous unemployment insurance or social benefits.

An example of coexistence of hard and soft law which is less than satisfactory is the governance and regulation of atypical work. There are a number of differing, possibly conflicting, objectives underlying the regulation in the EU of those forms of work which diverge from the standard employment relationship. First, there is the desire to increase the employment rate in the economy: the use of non-standard work is promoted as a means of improving the human capital of those formerly excluded from the labour market – in particular women – and encouraging entry to the paid labour force. A second objective is to enhance the competitive efficiency of enterprises: the use of flexible work patterns and flexible work organisation will, it is hoped, help match the supply of labour to the demands of employers for workers. A third objective has been to improve or protect workers' quality of working life, or their 'work/life balance'.

Such regulatory objectives are being pursued within the overarching framework of the Employment Strategy which is dominated by a supply-side rhetoric, and indeed a great deal of the policy discourse at EU level sees the spread of what might be seen as precarious work as instrumental to the modernisation of European labour markets so that they can better match the changing demands of goods and services markets. Although the European Employment Strategy calls on Member States to create not just 'more' but also 'better' jobs, it remains to be seen whether the EU's discourse on full employment can avoid the pursuit of higher labour market participation rates leading to low quality jobs, to the encouragement of precarious jobs as a route to job creation. So OMC encourages the creation of atypical jobs, without seeming to provide a clear extension of employment protection to these workers. However, in terms of employment protection law, there is a lack of substantive 'bite' to directives

that might otherwise provide security to atypical workers. We see this most clearly in the Part-time Work Directive.⁵⁴

But a more positive example of coexistence is in the area of gender equality, in that it is an instance of a relatively coherent interaction between the classic Community method, old style soft law, and new forms of governance. The EU has long-standing commitment to gender equality, as manifested by Article 141 and developed by the Court of Justice and the equality directives of the 1970s. This commitment was strengthened in the mid-1980s, with the adoption of a variety of soft law measure: for example, measures such as the 1992 Recommendation on Childcare,⁵⁵ and the integration of equal opportunities into the Structural Funds, such as the EQUAL programme of the ESF.⁵⁶ And finally, this commitment has been matched by an early focus in the Employment Strategy on equal opportunities between men and women,⁵⁷ with ‘equal opportunities’ as one of the four key guidelines or ‘pillars’ of the Strategy. Subsequently, it was decided to ‘mainstream’ or integrate gender into specific policy areas, with a view to encouraging female labour market participation and achieving a substantial reduction in gender gaps in employment rates, unemployment rates, and pay by 2010.⁵⁸

As lawyers, we are at times overly preoccupied with ‘old governance’ measures such as directives, as a means of achieving the goal of gender equality. Clearly, that model has flaws, in that after decades of EU equal treatment and equal pay law there is still a gender pay gap in the EU of about 15 per cent.⁵⁹ The new role for lawyers is to analyse these traditional forms of governance and regulation in the wider context. As Tamara Hervey has argued, ‘where we seek to resolve complex social problems, such as inequality of women and men, a notion of “mixity” or “hybridity” of old

⁵⁴ Now see the European Commission Green Paper: *Modernising labour law to meet the challenges of the 21st century*, Brussels, 22.11.2006 COM(2006) 708 final.

⁵⁵ Council Recommendation 92/241/EEC of 31 March 1992 on childcare.

⁵⁶ Barnard, n 50 above, at 303-308. See http://ec.europa.eu/employment_social/equal/index_en.cfm.

⁵⁷ See Kilpatrick, n 52 above.

⁵⁸ Council Decision of 22 July 2003 on guidelines for the employment policies of the Member States (2003/578/EC) OJ L 197/13, 5.8.2003; and Council Decision of 4 October 2004 on guidelines for the employment policies of the Member States (2004/740/EC) OJ L 326/45, 29.10.2004 - the 2004 Guidelines contained a sole article, which simply maintained in force the 2003 Guidelines.

⁵⁹ CEC, *Report on equality between women and men, 2005*, Brussels, 14.2.2005, COM(2005) 44 final, at 5.

governance and new governance probably holds the key to the realization of our goals'.⁶⁰

But there remains a need for hard law, as a back-stop. Otherwise there is the risk, again given the Lisbon goals of high rates of labour market participation, that equality is viewed instrumentally, not as a value or a goal in itself, but as a means to counter the economic loss resulting from not making full and effective use of the productive capacities of all sections of the population'.⁶¹

5. CONCLUSIONS

In conclusion, I mentioned earlier the theoretical characterisation of OMC as form of reflexive harmonisation or as an example of democratic experimentalism. However, a question for me is the extent to which the lived reality of OMC matches up to these ideal types. These perspectives may well overstate the extent to which the open method of coordination is truly 'open' and participatory.⁶² The 'openness' of the open method of coordination can refer to the fact that the input is open (that there is deliberative input), as well as to the fact that the output or outcomes are open (possibly less so in the case of employment policy coordination and economic policy coordination). However, empirical analysis of the operation of the open method in the context of the Employment Strategy does point to signs of it being much more 'top down' (i.e. that the regional level should simply ensure implementation of the Employment Strategy) than 'bottom up' (i.e. recognizing national diversity and the need for experimentation).⁶³ Furthermore, as I have shown, the Lisbon Strategy and the instruments of economic governance (the Broad Economic Policy Guidelines and the Stability and Growth Pact) establish the parameters within which Member States

⁶⁰ Tamara Hervey, 'Thirty Years of EU Sex Equality Law: Looking Backwards, Looking Forwards' (2005) 12 MJ, 307 at 322.

⁶¹ The Commission's summaries of the four pillars are taken from the website of DG-V on the European Employment Strategy, at: <http://europa.eu.int/comm/employment_social/empl&esf/pilar_en.htm>.

⁶² Cohen and Sabel indeed contend that their aim is 'neither to articulate a set of normative principles and deduce institutional conclusions from them, nor to predict the course of current institutional evolution': *ibid*, at 317.

⁶³ Cécile Barbier, Caroline de la Porte and Philippe Pochet, 'European Briefing' (2002) 12:3 *Journal of European Social Policy*, 241-8, at 242.

are free to be self-regulating. Thus, the space within which Member States have autonomy may in truth be seriously curtailed as far as *employment* policy is concerned, although in other policy areas where the open method is deployed, coordination is more 'light' or 'open', thus suggesting that reflexive harmonization or democratic experimentalism may well be an apposite analytical framework by which to understand OMC more generally.

As far as critics of new governance are concerned, it comes as no surprise that the European Parliament is wary of a new form of governance which threatens its hard-won role in law-making (OMC completely side-steps the co-decision procedure of Article 251 EC).⁶⁴ New forms of governance such as the open method of coordination would at first sight appear to represent a retreat of law from EU governance. The European Parliament is concerned that this retreat from hard law is a troubling withdrawal from harder and firmer legal commitments to a more social Europe; and is an inherently weak form of governance because of its non-binding nature.

In my view, OMC has the capacity to ease the tension between intergovernmentalism and supranationalism since it avoids the need to resort to the 'classic' Community method in politically sensitive areas, and involves a wider range of actors in policy-making, through mechanisms such as subsidiarity and 'partnership'. However, this optimistic view of new governance is tempered by a concern to provide a strong framework of social rights at EU level, to counterbalance the otherwise dominant economic policy discourse, but in such a way as to preserve a space for national diversity.

The newest forms of new governance, on their own, are unable to provide a sufficiently strong normative framework to balance the economic policy discourse which pervades the Employment Strategy. My argument is that there is a need for a strong social dimension to the EU project, and that hard law or 'old' new governance, plays an important role in creating the social dimension, in part countering the rather 'hard' effects of the soft governance dominated by the concerns of economic

⁶⁴ European Parliament, *Report on the Commission's Social Policy Agenda*, A5-0291/2000 final, 16 October 2000.

governance. My contention is not that hard law is still necessary because new governance methods such as the open method are too 'soft' to bring about social change. Rather that the open method of coordination contains some rather hard elements, which need to be underpinned by an equally hard framework of social rights.

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