

The European Employment Strategy

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Since the 1990s' a new mode of governance differing from the classical community method has been at the centre of political developments at EU level. This new mode of governance is called "Open Method of Coordination" (OMC). The OMC has (formally) been introduced by the Lisbon European Council of March 2000. It rests on soft law mechanisms such as guidelines and indicators, benchmarking and the sharing of best practice. Meanwhile the OMC has been spreading fast to a large range of policy sectors such as social inclusion, educational policy, pension reform but also issues related to the knowledge economy. Before being baptised as "OMC", this mode of governance had already been introduced in the sector of European Employment policy – under the name of European Employment Strategy (EES). The EES could therefore be considered as the "mother" of the OMC.¹

The following chapter discusses the EES under two aspects. First, it gives an overview of its historical development (A). Secondly, it summarizes briefly the current scientific discussion on its merits and problems (B).

It is not the aim to review all the blossoming academic literature on the EES² nor to analyse in depth the discussion on "soft vs. hard law" or the notions of "governance" and "Europeanization". Nevertheless, it is important to discuss some of the scientific findings in order to be able to answer an overarching question linked to the implementation of the EES: Can we consider the EES to have a normative structure and has the EES had an impact on national normative structures? In order to discuss these questions on the comparative basis of the national reports, it is useful to have an overview of the current scientific analysis on the character of the EES itself.

The EES from a historical perspective

The developing of the EES under the shadow of the Economic and Monetary Union

The EES should be analysed within the history of European Economic integration, which accelerated in the 1990s with the advent of Economic and Monetary Union

1 Smismans, EU Employment Policy: Decentralisation or Centralisation through the Open Method of Coordination?, EUI Working Paper Law Nr. 2004/1, p. 2.

2 For that, see for example de la Porte/Pochet, The European Employment Strategy: existing research and remaining questions, Journal of European Social Policy 2004, p. 71-78.

(EMU).³ Indeed, the completion of the internal market and especially the monetary union had considerably reduced the member states' political margin of manoeuvre. For example, in employment, traditional policy tools, such as competitive devaluation, adjustments of national interest rates, public deficit policies, state aid, or widespread hiring in the public sector were mostly invalidated.⁴ The Delors White Paper on *Growth, Competitiveness and Employment* that was published in 1993 gave birth to the very idea of a European employment strategy⁵ by making explicit reference to ensuring that jobs and other social objectives were not ignored. The paper was a reflection on the need to revitalise the European project and to counter scepticism towards Europe's monetary integration project.⁶ The White Paper's ambition was to meet the convergence criteria for the EMU, the implications of which were deflationary, and yet to achieve higher levels of employment in Europe. To meet such a challenge, one of the means was to broaden the debate beyond negative flexibility to more active labour market policies. The objective was also to integrate employment policy with other policy issues (fiscal, social protection, environment, equality of opportunities for men and women, new family patterns, demographic changes).

From the 1993 White Paper a path can be traced to the Essen European Council meeting of December 2004. At this meeting the Member States set themselves five objectives with respect to employment promotion, making special mention of people on the margins of workforce. The five objectives were: a) to invest in vocational training; b) to increase the intensity of employment growth, particularly through a more flexible organisation of work and working time and wage restraint; c) to reduce non-wage labour costs; d) to develop active labour market policies through the reform of employment services, encouraging labour mobility and developing incentives for the unemployed to return to work; e) to fight youth and long-term unemployment. The whole was underpinned by a multilateral monitoring procedure. This procedure can be considered as a precursor of the EES.

The White Paper and the Essen Summit were important catalysts for raising the issue of employment on the European Agenda.⁷ The subsequent European Council meetings, notably those of Madrid in December 1995 and Dublin in December 1996, contributed to the development of the process. The former identified job creation as a central objective of the EU. The latter underlined the need to pursue a

3 Goetschy, *The EES, Multi-Governance and Policy Coordination: Past, Present and Future*, in: Zeitlin/Trubek, *Governing Work and Welfare in a New Economy*, Oxford 2003, pp. 59-87, p. 60.

4 Casey, *Building social partnership? Strengths and Shortcomings of the European Employment Strategy*, *Transfer* 1/05, pp. 45-63, p. 48; Goetschy, *The open method of coordination and the Lisbon strategy: the difficult road from potential to results*, *Transfer* 1/05, p. 64-80, p. 66.

5 Goetschy, *The European Employment Strategy: Genesis and Development*, *European Journal of Industrial Relations* 1999, p. 117-137.

6 The rise of euro-scepticism after Maastricht reflected widespread belief that economic integration was one cause of growing unemployment, and there were also increasing criticisms of the "demographic deficit" at the heart of the European Construction; Goetschy, *European Journal of Industrial Relations* 1999, p. 120.

7 Pochet, *The OMC and the Construction of Social Europe – A Historical Perspective*, in: Zeitlin/Pochet, *The Open Method of Coordination in Action*, Brussels, 2005, pp. 37-82, p. 48.

macroeconomic policy favourable to growth and employment. Based on the Commission's proposal, the Irish Presidency at the end of 1996 made a first draft of what was to become the Employment Title of the Amsterdam Treaty.

The gestation of the European Employment Strategy was encouraged by the accession of countries in which explicit or implicit form of social partnership and full employment pretensions predominated (Sweden, Finland and Austria) and the accession to power of center-left governments in existing Member States (France, Italy and the UK). Moreover, the director-generalship of Employment and Social Affairs at the Commission had passed to the hands of an official (Allan Larsson) from Sweden – a country that had a reputation for utilising “active labour market policy” to maintain high levels of employment. Larsson's argument was that economic, monetary and employment policies were to be intricately linked with each other to meet mutually supportive goals.

The EES itself was part of a global deal including the adoption of the Stability and Growth Pact. The new French Socialist government, led by Lionel Jospin, agreed to the Pact in exchange for adding a new Employment Title to the proposed Treaty.⁸ For most of the Member States and in particular Germany, the Pact was intended to be a key instrument for fiscal management after the selection of the members of the Eurozone. The Council agreed to the French proposal. At that time, little attention was paid to the softer side of economic policy coordination, which was set out as a complement to fiscal policy co-ordination. The “soft” coordination of economic policies was conceived to monitor the consistency of national economic policies with the economic objectives of the EU. In case of a deviation from the so-called “Broad Economic Policy Guidelines” (BEPGs), the Council could adopt a non-binding recommendation directed to the Member State concerned; there is no other formal sanction. A guidelines procedure, based on the idea of sharing of experience and reform experimentation – inspired by the idea of benchmarking often used in industry – allowed working towards common goals at European level without encroaching on national sovereignty.⁹ The sanctions for non-compliance with the BEPGs take “only” the form of peer pressure and public opinion.

During the Amsterdam Summit in 1997, agreement was eventually reached in the form that the employment strategy should take: the multilateral process associated with the coordination of economic strategy – the guidelines procedure – would be adapted to employment policy. An Employment Title was integrated into the Treaty. Although the Treaty was ratified by all Member states only in 1999, the Employment Title became already fully operational in 1997: A special “jobs summit” of EU heads of state and government was organised in Luxembourg in No-

8 Pochet, in: Zeitlin/Pochet, p. 48-49.

9 Wallace, *The Changing Politics of the European Union: An Overview*, *Journal of Common Market Studies* 2001, p. 581.

vember 1997; as a result of this summit, the European Employment Strategy was launched.¹⁰

The creation of such guidelines procedure was (thus) a compromise between two positions: on the one hand, the conviction that European Intervention based on the Community method and a real common European employment policy would be too intrusive into the member states' competencies; and on the other hand, the awareness that high and rising unemployment represented a major social and economic challenge for Europe.¹¹

The Employment Title in the revised Treaty stipulated that employment was a matter of "common concern" to the member states. It laid the basis for an EU role in coordinating member states labour market policies – with the BEPGs-procedure being a "role model", as mentioned above. This method subsequently received the title "open method of coordination" at the Lisbon summit in 2000.

The EES Process as designed by the Amsterdam Treaty is the following: Each year, following the Commission's proposal, the Council adopts common European Employment Guidelines by a qualified majority vote. Afterwards they have to be translated into national employment policies on which each Member State reports to the Commission and the Council in their yearly "National Action Plans" (NAPs). These are analysed by the Commission, who makes recommendations to the Member states. Since 2000 the national recommendations have been integrated in a so-called "employment package", along with proposals for new guidelines for the following year. The Employment Guidelines (EGs) are then endorsed by the European Council and formally adopted by the Council (of labour ministers). Thus the cycle recommences.

Though the recommendations to individual states, which are deemed not to have followed the guidelines, have no binding effect, they could however be politically powerful.

The EES from 1997 to 2002

Between the Luxembourg summit of 1997 and 2002, the annual Employment Guidelines were organised under four pillars:

- a) improving employability: aimed at improving the access of the unemployed to the labour market, it focused on the development of a "preventive approach" to avoid long-term unemployment as well as on the implementation of "activation policies";
- b) developing entrepreneurship: making it easier to start and run a new business and to hire people in it by reducing administrative constraints and rendering taxation more employment-friendly;

¹⁰ For that reason the EES is also often characterised as the "Luxembourg process".

¹¹ Smismans, EUI Working Paper Law No 2004/1, p. 2.

- c) encouraging adaptability both for employees and businesses: this entailed modernisation of work organisation;
- d) strengthening equal opportunity policies; this involved a gender mainstreaming approach for all four pillars, reducing the gender gap, reconciling work and family life, and facilitating re-integration into the labour market.

About 20 EU guidelines were formulated each year by the Commission under the four pillars described above. In practice, the changes made to the Employment Guidelines until 2003 were fairly minor. In 2001, six “horizontal objectives” (i.e. cross-cutting the four pillars) were added:¹² increase the employment rate; improve the quality of employment; define a global strategy for life-long learning; involve the social partners in all stages of the process; develop relevant social indicators; find a balanced approach to the four pillars. Especially the first “horizontal objective”, to increase the employment rate (rather than simply cutting registered unemployment), became the centre and the main goal of the EES.

Along with the guidelines, the EES also includes a series of indicators.¹³ The so-called “key indicators” measure progress in relation to the objectives of the guidelines. For example, there are indicators that measure the total employment rate, the employment rate for people aged 55-64, the share of young adults still unemployed after six months, the tax rate on low-wage earners, and several dimensions of the gender gap in employment. The resulting tables are made available annually and show the relative position of all Member states on these dimensions.

In the frame of the EES-development, the Lisbon European Council of 2000 can be considered as its climax. The EU launched the “Lisbon process” and a new strategic goal – “to become 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”.¹⁴ This process gave the EES a new impetus by creating a ten-year plan to reach. Quantified objectives with target dates were agreed for the Union as a whole – to increase the European employment rate to 70% by 2010, the female employment rate to 60% and the employment rate among older workers (55-64) to 50%.

The EES from 2002 until today

Ten years after the Maastricht Treaty and five years after the beginning of the Employment Strategy much had changed in the European process. Despite the fact that the 1999-2000 transition to the single currency was a success, the central question at the beginning of the 1990s, regarding which economic and social model in the context of a centralised monetary regime is the best, remained unanswered.¹⁵ The objectives of the Stability and Growth Pact (especially the one not to exceed the ceiling of 3% for the

12 Watt, Reform of the EES after five years: A change of course or merely of presentation?, *European Journal of industrial relations* 2004, pp. 117-137, p. 119; Pochet, in: Zeitlin/Pochet, 2005, p. 51.

13 Currently there are 35 key indicators and 64 “context” indicators.

14 Conclusions of the Portuguese Presidency.

15 Pochet, in: Zeitlin/Pochet, 2005, p. 53-54.

budget deficit) initially were considered to be consensual and accepted by all key actors – i.e. the central bankers and the Ministers of Economics and Finance. But after the debate about whether or not to send an early warning to Germany and Portugal (whose public deficits were approaching the 3% deficit ceiling), the Pact itself became a much more disputed theme, leading the former President of the Commission Romano Prodi to call it “stupid”. Recently, proposals from the Commission were put under discussion at the Ecofin Council to modify the Stability and Growth Pact and make it more flexible.

If the Stability and Growth Pact is under revision, the softer side of economic coordination – the BEPGs – has proved to be inefficient in its principal goal of coordinating economic (and social) reforms. The real effectiveness of the economic policy coordination tools has been questioned; a study carried out for the European Parliament showed a lack of awareness of the BEPGs nationally and therefore a lack of integration into national policy processes.¹⁶ The (non) compliance by the Member States with the BEPGs recommendations seemed to be similar to their response to the European employment guidelines.

In the first half of 2002 Commission and Member States jointly carried out a comprehensive evaluation of the EES’ merits and shortcomings. Initially, the evaluation process was rather secretive. The national researches regarding the advantages and the limits of the method followed no common methodology. On the other hand, it was the first time that the Member states evaluated their employment policies at the same time. Under the pressure of the Commission’s discourse on openness, all Member states decided to publish the results of the national evaluations on the web. The Commission’s synthesis of the results of the evaluation and the policy conclusions it drew from this exercise were published in two Commission Communications.¹⁷ In the first Communication, the EES was judged a success in terms of both labour market outcomes (reference is made to 10 million jobs being created in Europe between 1997 and 2002) and policy-making: “there have been significant changes in national employment policies with a clear convergence towards the common EU objectives set out in the EES policy guidelines”. Challenges remained, however, in demographic trends, regional differences, restructuring, globalisation and enlargement. In addition, it was noted, though fleetingly, that EU unemployment and the number of long-term unemployed remained high.¹⁸

The policy conclusions drawn by the Commission in its second Communication were that the EES needed to be focused more clearly on implementation rather than procedure. Steps had to be taken to raise awareness of the EES and to improve its visibility and impact. Also, coherence between the various policy processes, and especially the BEPGs, needed to be improved. During the Barcelona Council in March 2002 it had been decided that the BEPGs and the EEGs should be synchronised in terms of yearly

16 TEPSA, *The Broad Economic Policy Guidelines, Final Report*, Project Nr. IV/2001/05/01 for the European Parliament, Directorate General for Research, 24 January 2002.

17 European Commission, *Taking Stock of Five Years of the European Employment Strategy*, COM (2002) 416 final, 17.7.2002; European Commission, *On Streamlining the Annual Economic and Employment Policy Coordination Cycles*, COM (2002) 487 final, 3.9.2002.

18 Watt, *Reform of the EES after five years: A change of course or merely of presentation?*, *European Journal of industrial relations* 2004, pp.117-137, p. 125.

scheduling, rather than having the EES take place in the autumn and the BEPGs in the spring. Following this decision the Communication designed a new policy cycle which would be built on two blocks: a) the “Guidelines Package” (every April), composed of the BEPGs, the Employment Guidelines and the employment recommendations and b) the “implementation package” (every January), which included the BEPGs implementation report, the draft Joint Employment Report and the implementation report on the Internal Market Strategy. This was called the “streamlined Policy Coordination Cycle”. An important change was that both BEPGs and EES focus on implementation in a longer cycle of three years.¹⁹

Following the 2002 evaluation, the Commission adopted a Communication on the future of the EES in January 2003.²⁰ The four-pillar structure (employability, adaptability, entrepreneurship and gender equality) which had underpinned the guidelines since 1997 was replaced by three overarching objectives:

- full employment
- quality and productivity at work
- social cohesion and an inclusive labour market.

From that point on, all of the Employment Guidelines in the following years were – more or less – based on these three objectives.

Yet, in 2003, a lot of the employment targets the EU had set in the previous years turned out to be unmet. For that reason – and also in order to identify specific measures geared to helping the Member States implement the revised EES – a Taskforce was established in March 2003. The Taskforce was headed by ex Prime Minister Wim Kok of the Netherlands. The first report was issued in November 2003 and had the title “Jobs, jobs, jobs: creating more employment in Europe”. The main ingredients of the Taskforce’s recipe were the following: a) increasing adaptability of workers and enterprises; b) attracting more people to the labour market; c) investing more and more effectively in human capital; and d) ensuring effective implementations of reforms through better governance. The notions of adaptability and flexibility are stressed in the report; particular attention is drawn to the “best practices” in Denmark and the Netherlands for creating a balance between flexibility and security. The report also stresses the importance of lifelong learning and of “active ageing”.

The Commission welcomed this report and used most of its messages for clearer Recommendations in the year 2004.²¹ In this year, the Member States presented their first triennial NAPs and the streamlining process was tested. Also in 2004, another

19 This means that, while remaining annual, guidelines would, in principle, only be fully reviewed once every 3 years. In intermediate years guidelines would only take account of major changes.

20 European Commission, The future of the EES – “A Strategy for full employment and better jobs for all”, COM (2003) 6 final, 14.1.03.

21 European Commission, Communication from the Commission „Strengthening the Implementation of the European Employment Strategy, Proposal for a Council Decision on Guidelines for the Employment Policies of the Member States, Recommendation for a Council Recommendation on the Implementation of Member States’ Employment Policies, COM (2004), 239 final, 7.4.2004.

important change took place: The ten new Member States of the EU prepared their first NAPs for employment along with the 15 other Member States.

After the first report, the Taskforce was asked to present a second report on the Lisbon strategy as a whole. It was published in November 2004 under the title “Facing the challenge”. It should not be swept under the carpet that the reason to establish the task force in the first place was the underperformance of national policies in respect to the Lisbon targets. Concerning policy priorities, the report highlights improved economic growth, increased employment and productivity. Other priorities, which concern especially the labour market, include (again) strategies for investment in human capital formation, lifelong learning, active ageing as well as improving the adaptability of workers and enterprises.

Inspired by the second Taskforce report, in February 2005 the Commission made a proposal for a revamp of the Lisbon strategy. This proposal was based on a very critical evaluation of the first five years.²² It was stated that without further action, the 2010 target of a 70% overall employment rate would not be achieved. Labour productivity growth has continued to slow down and quality of work and inclusive labour markets remain important challenges in many Member States. The Commission observes very critically that the poor progress made was “not just a question of difficult economic conditions since Lisbon was launched, it also results from a policy agenda which has become overloaded, failing co-ordination and sometimes conflicting priorities”. From now on, focus should be put on delivering stronger, lasting growth and more and better jobs.

The Lisbon strategy revamp has led to a complete revision of the EES.²³ Its guidelines will from now on be presented in conjunction with the macroeconomic and microeconomic guidelines and for a period of three years.²⁴ This new EES covers a three year period, from 2005 to 2008. In this frame, the former NAPs are now called “National Reform Programmes” (NRPs).

The Employment Guidelines – as part of the integrated package of EGs and BEPGs – are as follows (for the period 2005-2008):²⁵

- Guideline No 17: Implement employment policies aimed at achieving full employment, improving quality and productivity at work and strengthening social and territorial cohesion,
- Guideline No 18: Promote a lifecycle approach to work,

22 European Commission, Communication to the Spring European Council “Working together for growth and jobs – A new start for the Lisbon strategy”, COM (2005) 24, 2.2.2005.

23 European Commission, Delivering on Growth and Jobs: A new and integrated economic and employment co-ordination cycle in the EU, Companion document to the Communication to the Spring European Council 2005 (COM (2005) 24), SEC (2005) 193, 3.2.2005.

24 Despite the fact that the Treaty envisages separate annual guidelines for employment (Art. 128 EC-Treaty) and economic policy (Art. 99 EC Treaty).

25 Adopted Employment Guidelines 2005-2008, Council Decision of 12 July 2005 on Guidelines for the employment policies of the Member States (2005/600/EC).

- Guideline No 19: Ensure inclusive labour markets, enhance work attractiveness, and make work pay for job-seekers, including disadvantaged people, and the inactive,
- Guideline No 20: Improve matching of labour market needs,
- Guideline No 21: Promote flexibility combined with employment security and reduce labour market segmentation,
- Guideline No 22: Ensure employment-friendly labour costs developments and wage-setting mechanisms,
- Guideline No 23: Expand and improve investment in human capital,
- Guideline No 24: Adapt education and training systems in response to new competence requirements.

Some authors see the new phase after 2005 as the beginning of “realistic co-operation” between Member States and the EU.²⁶ As the limits of the EES had become obvious (the implementation, especially of the employment goals, was far behind the targets), the Commission now seems to accept the “national ownership” of the OMC process. This implies that the performances of the Member States will not be ranked even if the Taskforce had demanded such a ranking as a prerequisite for “naming, shaming and faming”.

Throughout the next cycle of the Employment Guidelines (2008-2010) the EES will focus especially on “flexicurity”, which strikes a balance between flexibility and security on the labour market.²⁷ Member States will be invited to use their National Reform Programmes to report explicitly on their flexicurity strategies and the Commission will report on the progress made at the end of the Lisbon Cycle.²⁸

The discussion on the EES

The scientific discussion on the EES is part of the overall discussion on the OMC as a new mode of governance in the European Union.²⁹ Literature on the OMC in general – and the EES in specific – wavers between excessive enthusiasm and doubts.³⁰ There are many different aspects that have been discussed, like issues of

²⁶ Heidenreich/Bischoff, *The Open Method of Coordination. A way to the Europeanization of social and employment policies?*, JCMS 2008, Vol. 46, No 3, pp. 497-532.

²⁷ European Commission, *Towards common principles of flexicurity – more and better jobs through flexibility and security*, COM (2007) 359; European Commission, *Communication to the Spring European Council “Strategic Report on the renewed Lisbon Strategy for growth and jobs: launching the new cycle (2008-2010) – Keeping up the pace of change”*, COM (2007) 803 final, p. 10.

²⁸ European Commission, *Ten Years of the European Employment Strategy*, 2007.

²⁹ Scott/Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, *European Law Journal* Vol. 8, No. 1 March 2002, pp. 1-18, p.1.

³⁰ For the latter, see Raveaud, *The European Employment Strategy: Towards More and Better Jobs?*, JCMS 2007, Vol. 45 No 2, pp. 411-434.

democracy in general (in the sense of participation, transparency and openness)³¹, the participation of the social partners in the EES³² or the OMC as a new form of governance.³³ For the purposes of our comparative project, it should be useful to focus on the discussion on the aspects of “soft versus hard law” and on the impact the EES might have on the Member States’ policies: if we want to find out more about the normative character of the EES, then we should ask under what premises it can influence national normative structures.

The discussion on “soft” and “hard” law

Much of the controversy on the EES/OMC concerns the respective merits of “hard” and “soft” law in the construction of Social Europe.³⁴ A shift from “integration by law” to “Europeanization by figures” via benchmarking seems to have taken place.³⁵ Both those who favour the OMC as a mode of governance and those who question its desirability compare the OMC, implicitly or explicitly, with the Community Method. The Community Method is thought of as “hard law” because it creates uniform rules that Member States must adopt, provides sanctions if they fail to do so, and allows challenges for non-compliance to be brought in court. In contrast, the OMC, which has general and open-ended guidelines rather than rules, provides no formal sanctions for Member States that do not follow the guidelines, and is thought of as “soft law”. Proponents of the OMC argue that it can be effective despite – or rather because of – its open-ended, non-binding, non-justiciable qualities. Opponents question that conclusion. They not only argue that the OMC cannot do what is needed to construct Social Europe but also that “hard law” is essential. They also fear that the OMC might become the dominant method of regula-

31 Cohen/Sabel, *Sovereignty and Solidarity: EU and US*, in: Zeitlin/Trubek (eds.), *Governing Work and Welfare in a New Economy: European and American Experiments*, Oxford 2003, pp. 345-375; Borrás/Jacobsson, *The open method of co-ordination and new governance patterns in the EU*, *Journal of European Public Policy* (11) 2004, pp. 185-208.

32 Casey, *Building social partnership? Strengths and shortcomings of the European Employment Strategy*, *Transfer* 1/2005, pp. 45-63; Watt, *Reform of the EES after five years: A change of course or merely of presentation*, *European Journal of industrial relations* 2004, pp. 117-137.

33 See Borrás/Jacobsson, *The open method of co-ordination and new governance patterns in the EU*, *Journal of European Public Policy* 11:2 2004, pp. 185-208; de la Porte/Nanz, *The OMC – a deliberative-democratic mode of governance? The cases of employment and pensions*, *Journal of European Public Policy* 11:2 2004, pp. 267-288; Mosher/Trubek, *Alternative Approaches to Governance in the EU: EU Social Policy and the European Employment Strategy*, *JCMS* 2003 Vol. 41 No. 1, pp. 63-88; Eberlein/Kerwer, *New Governance in the European Union: A Theoretical Perspective*, *JCMS* 2004, Vol. 42 No. 1, pp. 121-142.

34 Trubek, D./Trubek, L., *Hard and Soft Law in Construction of Social Europe: the Role of the Open Method of Coordination*, *European Law Journal* 2005, Vol 11., No 3 pp. 343-364; Trubek/Trubek, *The Open Method of Co-ordination and the Debate over “Hard” and “Soft” Law*, in: Zeitlin/Pochet (eds.), *The Open Method of Co-ordination in action – The European Employment and Social Inclusion Strategies*, Brussels, 2005, pp. 83-103.

35 Bruno/Jacquot/Mandin, *Europeanization through its instrumentation: benchmarking, mainstreaming and the open method of co-ordination ... toolbox or Pandora’s box?*, *Journal of European Public Policy* 13:4 2006, pp. 519-536.

tion on issues which are subject to little or no EU competence and, more seriously, on issues which are subject to hard law, thus demoting the Community Method.³⁶

Some authors³⁷ point out that – in drawing the dichotomy between hard law and soft law – it is often forgotten that the EC has used a combination of these measures, not only in social law, but also in areas such as environmental law. They argue that hard and soft law should not necessarily exclude each other. Instead they underline the possible utility of hybrid solutions.³⁸ Some others argue that, if in its ideal-typical format the OMC can deliver “better governance”, then it is not a second-best option to hard legislation: it is a better way forward, because it fosters learning and provides flexibility to the policy process.³⁹

Regardless of what advantages or disadvantages soft law might have, a unanimity on the character of the OMC (and the EES as a prominent example of it) as “soft law” surely exists. Consequently – and beyond the theoretical discussion on what is better for the European Integration – the next step is to ask what kind of impact soft law might really have *in practice* on the Member States’ policies and legislation.

The discussion on the impact of EES on Member States’ policies

Did the EES influence the employment policies of the Member States? And if yes to what extent? This is an important question in the current scientific debate on the EES. The key-words are the “European Social Model” and “policy learning”.

A good deal of policy-makers and academics look at the OMC (and the EES as part of it) as an instrument to build “Social Europe”. From a reform perspective, the EES can be seen as an additional instrument with which to enhance the social dimension to the European Union. Others, however, remain sceptical of its real added value to compensate the European Social Model for the liberal bias of EU integration.⁴⁰ Again others question how one can speak of one “European social model” when evidence from employment policy points to a conflict upon models, to such an extent that the real politics of the EES is all about finding out which models are under pressure. This question becomes even more complex if one takes research into account which demonstrates that: (a) The EU “social model” is more a discourse sponsored by some political elites in some countries than reality; and (b) EU social policy has been so far more “American” in style than “European”, in the sense that the US style approaches (by way of the British government) have greatly influenced the social and employment policy (keywords: workfare and la-

³⁶ Hatzopoulos, Why the Open Method of Coordination is Bad for You: A Letter to the EU, *European Law Journal* 2007, Vol. 13 No. 3, Pp. 309-342, p. 322.

³⁷ Trubek/Trubek, *ibid.*

³⁸ Scharpf, The European Social Model: Coping with the Challenges of Diversity, *Journal of Common Market Studies*, Vol. 40 No. 4 2002, pp. 645-670.

³⁹ Radaelli, The Open Method of Coordination: A new governance architecture for the EU?, *Sieps* 2003, p. 8, 22 and 52.

⁴⁰ See de la Porte/Pochet, The EES: existing research and remaining questions, *Journal of European Social Policy* 2004, pp. 71-78, p. 75 for the literature overview.

bour market flexibility).⁴¹ Also it has been argued that the EES is characterised by Third Way type ideas, including equity and activation.⁴² The guidelines on employment reflect the political options of New Labour;⁴³ as such they are not necessarily adapted to the macro-economic reality of other countries. Other authors differentiate more. They conclude that the employment policy model behind the EES is a compromise between the liberal and the Nordic models: on the labour demand side the EES, with its attention for entrepreneurship and adaptability, is inspired by the liberal model emphasising labour market deregulation and tax reductions; whereas on the labour supply side the EES is inspired by the Nordic model focusing on employability via training and active labour market policies.⁴⁴ In any case, it can be affirmed that most of the pressure to converge towards the EU's objectives under the EES – of which activation is an important component – is on countries with Continental and Southern European welfare state arrangements, with dominance of “passive” policies.⁴⁵

When it comes to the notions of “policy learning” and “policy transfer”, almost all authors agree that an assessment is difficult to make. One reason is that, when measuring the national impact of the EES, it is not easy to disentangle the effects of EU structural reforms from national structural reforms which would have been carried out anyway. Also, it is not easy to evaluate the respective merits of structural reforms and the macroeconomic situation when trying to explain, for example, the improving or worsening employment results.⁴⁶ Some authors state that “there is (...) some evidence that (...) OMC processes have contributed to specific changes in individual Member States’ policies. Such evidence is most abundant for the EES”.⁴⁷ But on the other hand, they agree that “the possibilities for mutual learning on behalf of the Member States seem to be rather limited; there are relative few examples of direct policy learning and cross-national policy transfer”.⁴⁸ Critics of the “change has happened because of the EES”-position claim that “we only know that some change took place but there is no empirical data which proves that the change really happened as a result of the EES”.⁴⁹

It has also been stated that the OMC process has transformed from a discursive operation to learn from each others’ best practices and to implement change, to a

41 Radaelli, *The Open Method of Coordination: A new governance architecture for the EU?*, p. 29.

42 Begg, *Hard and Soft Economic Policy Coordination under EMU: Problems, Paradoxes and Prospects*, Working Paper Series No. 103, Center for European Studies, Harvard University, Cambridge 2003.

43 De la Rosa, *The Open Method of Coordination in the New Member States – the Perspectives for its Use as a Tool of Soft Law*, *European Law Journal* 2005, Vol 11, No.5, pp. 618-640, p. 636.

44 Smismans, *EUI Working Paper Law Nr. 2004/1*, p. 15.

45 De la Porte/Pochet *op. cit.* note 2 *supra*.

46 Goetschy, *The open method of coordination and the Lisbon strategy: the difficult road from potential to results*, *Transfer* 1/2005, pp. 64-80, p. 69.

47 Zeitlin, *The Open Method of Co-ordination in Action: Theoretical Promise, Empirical Realities, Reform Strategy*, in: Zeitlin/Pochet (eds.), *The Open Method of Co-ordination in Action – The European Employment and Social Inclusion Strategies*, Brussels 2005, pp. 447-503, p. 451.

48 Zeitlin, *ibid.*, p. 472.

49 Hartlapp, *Über Politiklernen. Überlegungen zur Europäischen Beschäftigungsstrategie*, WZB-Discussion paper 116, Berlin, 2006, p. 8.

sort of “beauty contest” showing one’s successes but omitting one’s failures.⁵⁰ Examinations of the peer review procedure – as one component of the EES – show that, whilst a learning process has been established, its impact has been limited. Although the EES has established labour market targets, the evidence reveals that Member States will rely on home-grown means – administrative, institutional and legal – to meet them. The peer review procedure was, at best, a learning process for a limited community of labour market technicians and experts. There were no significant efforts at emulation.⁵¹

Empirical evidence for a subtle, but nevertheless quite effective influence of the EES on the employment strategies of Germany⁵² and France has also been presented. Yet learning does not mean a transfer of concepts. In the German case learning consisted more of a mutual “irritation” of European and national patterns of perception and behaviour; and the French case is characterised by a mostly symbolic conformity to the European objectives.⁵³

Other researchers argue that the EES has been acting as a *framer* of employment policy in the Member States.⁵⁴ By doing so, the supranational level has restrained several dimensions of employment policy and labour market policies in the Member States mainly by: (a) defining and (reinforcing) what problems domestic policy-makers should attack to increase member state competitiveness; (b) pointing out and/or reinforcing the idea that a policy line is good or bad; (c) restricting and limiting the policy options and courses of action that domestic policy-makers should develop and (d) providing courses of action that allow policy makers to “learn” about ways to solve the problem in question. Under the influence of the EES, member states have been experiencing a “Europeanisation of labour market problems and solutions”.⁵⁵

The impact of the EES from a comparative law perspective: an outlook

Almost all of the above cited literature on the impact or influence of the EES/OMC on the Member States belongs to the field of political science or social policy. In fact, the concept of policy transfer or policy learning is well established in the political science literature. Lawyers have been slow to argue that the OMC is capable of offering a normative dimension to European integration processes or even to national structures. It has been seen as a *pre-legal* process or an *alternative* or as a

50 V. Maydell et al., *Enabling Social Europe*, 2006, p. 109.

51 Casey/Gold, Peer review of labour market programmes in the European Union: what can countries really learn from one another?, *Journal of European Public Policy* 12:1 2005, pp. 23-43, p. 36.

52 For the German case, see Eichhorst/Rhein, *Der Beitrag der gemeinsamen EU-Beschäftigungsstrategie zur Verbesserung der Arbeitsmarktlage*, *Bundesarbeitsblatt* 11/2004, pp. 4-11.

53 Heidenreich/Bischoff, *The Open Method of Coordination. A way to the Europeanization of social and employment policies?*, *JCMS* 2008, pp. 497-532.

54 López-Santana, *The domestic implications of European soft law: framing and transmitting change in employment policy*, *Journal of European Public Policy* 13:4 2006, pp. 481-499, p. 482.

55 *Ibid*, p. 494.

complementary political process.⁵⁶ Yet the role of the EES should not be underestimated: the framing of a policy through Guidelines, Indicators and Benchmarking is (as discussed) not a soft or neutral process, but rather it shapes – and restricts – the framework within which national actors work. As a prominent Belgian politician put it: “The open method of coordination” is both a cognitive and a normative tool. (...) It is a normative tool because, necessarily, common objectives embody substantive views on social justice”.⁵⁷ Member States are no longer free to determine national policy but must act within officially recognised Community Guidelines which have taken a normative status..⁵⁸

In a comparative welfare law approach, it will be certainly interesting to see to what extent the EES really has had an impact on national normative structures; or, in other words, to see to what extent “soft” law at the European level might prove to be “harder” at the national level. For that purpose, the comparative analysis of a specified aspect of the EES – such as the activation policies – certainly promises to be fruitful. Instead of asking *in general* what impact the EES might have on national employment *policies* or on reducing unemployment, it seems more rewarding to single out concrete laws, legal practices and questions in the Member States and compare them with each other. Even if we should come to the conclusion that the normative impact of the EES is not that significant in practice, the comparison itself may lead us to more “learning from each other”. It is exactly this goal that has been at the heart of comparison law for many years, long before the EES and OMC were invented.

56 Szyszczak, *Experimental Governance: The Open Method of Coordination*, *European Law Journal* 2006, pp. 486-502, p. 500.

57 Vandenbrouke, *The EU and social protection: What should the European Convention propose?* Paper presented at the MPI for the Study of Societies, Köln, 17 June 2002, p. 9.

58 Szyszczak, *The Evolving European Employment Strategy*, in: Shaw (ed.), *Social Law and Policy in an Evolving European Union*, Oxford 2000, p. 211.

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