

# Activation through law - National Social Security Law from a European Perspective

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## Introduction

Direct activities for the promotion of social welfare at EU level are minimal. There are some common activities for fighting poverty and social exclusion but the budgets for direct actions are not comparable to the levels of national welfare budgets. The actions taken are also not of supra-national character hence it can be characterised as a soft-law or multi-level policy process where the main competence is kept on national level.

With starting-point in 1986 a new discourse was introduced in European policy with the Delors-commission introducing the concept of Social Europe. However, scrutinising the content of the Social Europe-policies, focus is rather on employment than on welfare and poverty. This work-line approach was already manifested in the preparing stages of the EES where the Council urged the member states to also adapt their social protection systems to support employability. The goal of a high employment level is after Amsterdam an overarching goal of the European Union to be integrated in all common policies (EC art 127).

Already by its launch the EES received some criticism which in essence pointed at the fact that the normative goal of the strategy did not coincide with that of the welfare regulation of the Member States', ie. the fight against social exclusion and (re)employment is quite different from the concept of an EU solidarity. Looking at the development of the EES within the Lisbon-process, it seems as if the EU has retreated from promoting social citizenship and moved towards a narrower work-line oriented conceptualisation of social security. This would mean that there is an expressed common EU normative structure within the OMC governance method, with a potential impact on national welfare policies.

This chapter examines the real and possible impact of the EES/OMC method in relation to other methods of Community integration.

## Unpacking the concepts of “Europeanisation” and “European integration”

The concept “Europeanisation” is predominantly used to describe national adaptation and integration due to EU-membership, however there is no shared definition of the term. Instead, Europeanisation is used in a variety of ways to describe different phenomena and processes of change. It is often linked to other terms as globalisation and internationalisation aimed at describing an integrative development in politics, economy, culture and law.<sup>1</sup> Efforts to model its dynamics have proven that the term is not used without problems and the empirical evidence is uneven and often contested. Still, it has been argued that with some effort the term can be useful for the understanding of the evolving European polity.<sup>2</sup>

The term “legal Europeanisation” is also often used as an expression of the impact of EU law on the legal systems of the Member States. Shared institutions adopt legislation in the forms of directives, regulations (and more) on EU level and these legal acts are then implemented on the national level. In a broader perspective the term is also used to identify the shift of national policy paradigms and instruments to the EU level.<sup>3</sup> This implies that the term refers both to the study of change at national level (top-down) and the study of how the domestic level initiates change at the EU level. Legal Europeanisation is then assumed to be a two-way process between the national and European levels.

“Europeanisation” and “European integration” are often used interchangeably although the uses of these two concepts are separated by the political scientists. Europeanisation refers to what follows from a process where European integration to an increasing degree is relevant and useful as a source of change and adaptation in national policy making and in the domestic way of law-making and organisation, put very briefly, domestic change caused by European integration.<sup>4</sup> Obviously, the research agenda on Europeanisation relates strongly to the theories of European integration.

The meaning that we have given the concept of Europeanisation includes the rational adaptation that the EU brings. Thus, we are aware of that this use of the concept does not have the analytical precision to isolate it from other integrative cooperation. Target for our discussions on Europeanisation are the national reactions and adaptations to EU activities related to activation policies.

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<sup>1</sup> Wallace (2000), pp. 369-82.

<sup>2</sup> Olsen (2001).

<sup>3</sup> Howell (2002).

<sup>4</sup> Ibid.

In the legal field, the development of European integration is often described as a linear progression towards a specified goal,<sup>5</sup> often with reference to Balassa's integration "stair-case",<sup>6</sup> where unification of law is the final step. The degree of integration is then a measure of to what extent law is unified and the concept of integration is then unpacked into separate concepts such as convergence and harmonisation. In the field of social law, focus is both on the way in which unification or harmonisation should come about (legal instruments) as well as to what extent further harmonisation is possible or wanted.<sup>7</sup>

Balassa described European integration as a process driven by the elimination of discrimination between national economies. The result of integration is characterised as a lack of discrimination in a variety of areas. The meaning of economic integration is not isolated to total unification but can be referred to various degrees or "steps" of integration; 1. free trade; 2. customs union; 3. common market; 4. economic union as distinct from the common market in that it combines restrictions on commodity movement with a certain degree of harmonisation of economic, monetary, fiscal, social and countercyclical policies, and; 5. total economic integration presupposing a unification of economic, fiscal, and social policies which also requires a supra-national authority whose decisions are binding for the member-states. Balassa makes a specific reference to social integration, reminding that there is a need for social integration to accomplish total integration, but also to some degree necessary to induce labour movements already in the stages 2 and 3.<sup>8</sup>

In the context of economic integration, harmonisation of economic policy is seen as a necessary complement to the liberalisation of trade in order to ensure the participants a level playing field. This liberalisation of trade and harmonisation are thus characterized by two different approaches concerning the order of the two elements:<sup>9</sup>

- a) harmonisation as a consequence of liberalised trade
- b) harmonisation as a condition for liberalised trade.

With reference to the Treaty of Rome from 1958 it is quite obvious that the a)-approach was strong during the 1950s.<sup>10</sup> This is also reflected in the wording of the introductory article of the chapter on social policy in the Treaty. Article 136 in its modern wording states that harmonisation of fundamental social objectives will follow from the functioning of the common market, as a consequence of liberalised trade:

<sup>5</sup> Steiner, Woods, Twigg-Flessner (2006).

<sup>6</sup> Balassa (1961) p. 1-17.

<sup>7</sup> See Eichenhofer (2006) Pennings (2005). See for a discussion on Europeanisation of European Private Law, Wilhelmsson (2005).

<sup>8</sup> See Sapir, (1996) p. 543 f, and Watson (1980) p. 32 ff.

<sup>9</sup> Sapir (1996) p. 543 f.

<sup>10</sup> This is the "classical" neo-functional approach as described Haas (1958). Rosamond (2000) p. 50 ff.

*Article 136*

*The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.*

*To this end the Community and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Community economy.*

*They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.*

My view is that free movement under all circumstances contains a social dimension. A realisation of the freedoms will therefore also trigger the question and need for discussing harmonized measures in the social area. With reference to spill-over effects it might be the case that economic integration should come before a common social policy, but will lead to a common, or at least strong common features of, social policy.<sup>11</sup>

When promoting the b-strategy, harmonisation as a condition for liberalised trade, it might be argued that international differences in wage levels and other social advantages will be an unfair advantage for certain member states, with the side-effect that workers there have a lower social standard. Differences in social levels will lead to a distortion of competition putting labour cost in focus in order to increase competitiveness. A consequence will be lower wages etc.<sup>12</sup> Arguments like this are named social dumping and in order to avoid a dumping situation social circumstances should be harmonised before or together with a liberalisation of trade. The promoters of the a-strategy instead claim that differences in wages and social protection are reflection of differences in productivity and social preferences. It is obvious that the latter approach has been dominant in the development of the EU.<sup>13</sup>

No matter the strategy supported, we can note that integration theory provides us with a tool for explanation of what is happening in the process of European integration<sup>14</sup> as the EU steadily has been expanding its powers. Neo-functionalists de-

<sup>11</sup> Pakaslahti (2000) p. 68.

<sup>12</sup> Mosley p. 147-163. Hervey (1998), p. 9 f. Compare the discussions after ECJ judgments in case C-341/05, *Laval v. Svenska byggnadsarbetareförbundet*, [2007] ECR I-xxxx C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti*, [2007] ECR-xxxx, Joerges (2008).

<sup>13</sup> Chassard & Quintin (1992)

<sup>14</sup> Burley and Mattli, (1993), p. 41-76, esp. p. 43.

scribe this as a result of increasing interdependence between member-states.<sup>15</sup> It will be more effective to solve problems on the supra-national level which means that further legislative competences will be transferred to the institutions of the EU in a growing number of areas. This phenomenon is called spill-over effect, and means in a longer perspective that citizen and policy-maker loyalty gradually will be transferred from the nation-state to the EU-level.<sup>16</sup> With reference to Balassa we have seen an institutionalisation of economic policy via the completion of the internal market but also the Monetary Union and the Stability Pact introduced by the Maastricht Treaty. These changes have also been followed by EU competence in more policy fields and the development of more sophisticated regulatory procedures.

However, it must be questioned whether this process is to be considered as inevitable or if it can be controlled by policy-makers. Tension has been created between policy areas where decisions are taken on an EU-level (internal market) and other areas where policies are still a matter of national affairs (social security, labour market), a tension that in legal term are of a constitutional character.<sup>17</sup> It is quite obvious that a “deficit” in competence in the field of social policy threatens the democratic legitimacy of the deepened integration project, a “truth” obvious already for the Delors Commission after presenting the 1985 White paper on the completion of the internal market. These conflicts are further complicated by the fact that the ECJ has the task of interpreter of the constitutional balance provided in the basic treaties. The dynamic and teleological method used by the ECJ in the attempt to fulfil the integrative goals set out in the treaties has meant that national interests have been put aside in favour of other market goals provided for in the EC-treaty.<sup>18</sup>

In general terms it can be said that in the area of the establishment of the internal market the EU has exclusive competence for law-making. Also the next level of integration, with reference to Balassa, was reached when the monetary union was made a reality. However, when it comes to the field of social policy and welfare there are only a few signs of common policy-making with a hard impact. Regulation of social welfare is still an area in which responsibility lies with each state, at the same time we have seen an increasing effect from other policy areas, e.g. the internal market, meaning that there is an indirect pressure on national competence in the social field.

Must we then create positive (integration) decision-making in the social field to balance this indirect pressure, i.e. EU social law using the traditional legal EU-method with directives based on a common welfare ideology? A demand for this should not be a surprise as most member states have developed welfare regulation as a response to the short-comings of the market. This pressure and need for correc-

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<sup>15</sup> Haas (1958). Lindberg (1963).

<sup>16</sup> Weatherill (1995) p. 8. Pakaslahti (2000) p. 24 f.

<sup>17</sup> Joerges (2008) and Joerges (2007:1)

<sup>18</sup> E.g. C.120/95 Decker, C-158/96 Kohll on freedom of movement in relation to goods and services in the health care sector, see also the free movement of persons cases referred to in footnote 56.

tion can be expressed also on the European level. Without positive integration in the social field there is a larger risk for increasing conflicts between internal market and national social policy.<sup>19</sup> The dividing line of law-making competence between member-states and the EU, that in theory should exist, is difficult to assess at the same time as it is not static. It is changing due to constitutional adjustments in the treaties and secondary legislation with an indirect impact (jack-in-the-box) but also due to the activities of the ECJ. Leibfried and Pierson in 1995 described the ECJ as a “market-police”, upholding the limits for national legislative competences.<sup>20</sup>

Up until today the story has been one of steadily expanding powers, by an expansion of community competence at the cost of the room for exclusive national law-making competence. Lenaerts means that the member states have no powers to resist this development.<sup>21</sup> However, in the areas where decision-making is still made with unanimous voting, the veto power makes the integrative forces less powerful. This is of course not the case where qualified majority voting has been introduced. The problem with indirect effects of integration is that when paving way for market integration by means of setting aside national hindrance to free movement, there are very small chances of balancing these decisions on the same regulatory level.

By establishing the doctrine of supremacy the ECJ has struck the constitutional balance between the EU and the member states.<sup>22</sup> This principle regulates the priorities between national law and Community law from a national perspective. A direct consequence of the doctrine of supremacy of Community law is the doctrine of pre-emption that is directed towards the law-making powers of the Member States.<sup>23</sup>

The EC-treaty also contains norms whose direct objective is to regulate the relationship between Community law and national law. Article 5 EC-treaty is an example of concrete action taken by the Member States to clarify the outer limits of the competences attributed to the Community. The principles expressed in art 5, legality, subsidiarity and proportionality, are concerned with the use of the attributed competences. The use of these principles can block the exercise of Community competence in an individual case. In addition, Member States must be loyal to the objectives of the Community by not taking any measures that violate Community law. By simplification, the principle of loyal cooperation in TEC art 10 may be understood as an obligation whereby national lawmakers must not maintain or introduce rules that violate Community law. When attributing new competences to the Community, new obligations to which Member States must comply are created. The ECJ has used the principle of loyal cooperation to increase Community law efficiency. The duty to comply has proved to be a general duty and does not depend only upon what material area of national law that violates Community law. Na-

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<sup>19</sup> Leibfried and Pierson (1995) p. 52 f.

<sup>20</sup> Leibfried and Pierson (1995) p. 65.

<sup>21</sup> Lenaerts (1990), p. 220.

<sup>22</sup> Case 6/64, *Costa v. Enel*

<sup>23</sup> Case 218/85 *CERAFEL*

tional lawmaking discretion can be circumscribed in areas where the Community has not been attributed competences.

In understanding the balance between Member State and Community competences the following picture emerges. There are areas where the Community has no competence and hence Member States have exclusive competence, there are areas where the Community has been attributed exclusive competence and finally, there are areas where the Community and the Member States share competence. Thus, it appears that the balance between Community and Member State competence is changed when the Treaties are changed. The doctrine of pre-emption answers the question under which circumstances that Member State lawmaking is pre-empted by the competence given to the Community, it determines when there is an actual or potential conflict.<sup>24</sup>

When widening Community competences, the effect of Community law on national law has become more heterogeneous. By subjecting questions of Community and Member State relations to the jurisdiction of the ECJ a new institutional structure with the ECJ at the centre is created. Accordingly, Member States will seek new methods of integration that has little or no pre-emptive effect. The expansion of the use of soft law and the new techniques for governance can be seen as symbols of this development.<sup>25</sup>

To summarise, the main argument in favour of harmonisation in the social field has been that harmonisation will prevent the distortion of competition on the common market; in addition harmonisation is necessary for the completion of the free movement of workers. In reality, the sovereignty of the Member States, i.e. hard law impact on the legal authority of the Member states, has only been restricted to small areas such as social security for migrant workers, health and safety at work and in the field of equal treatment. However, there are also indirect effects of European integration irritating the legal authority of the Member States in the field of welfare law and the most powerful actions in European Welfare law have been non-regulative. It can also be stressed that the hard-law regulation on social security, regulation 1408/71, merely co-ordinates and have no further intention of creating the same technical approach to social security or creating a similar ideology in relation to the national regulation of the same area. As a parallel process, the EU has since 1989 (Community Charter of Fundamental Social Rights for Workers, Council recommendation 92/442/EEC of July 1992 on the convergence of objectives and policies in social protection) worked with formulating legally non-binding standards that then have functioned as starting points for further discussion and actions by the institutions and Member States. The OMC has brought this dimension of non-binding norms to a higher level, however these soft procedures have no pre-emptive effects on Member State legal competence.

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<sup>24</sup> Cross (1992).

<sup>25</sup> Pochet, (2005).

## European framework - Balance between national and European competences in the social field

Although the welfare area is still described as an area where the member states retain primary competence and the influence from the EU is indirect or minor, the EC for many years have had legal competence to regulate aspects of employment. In general this has meant that more general welfare questions have been left to the Member States while as the question of labour market participation has been an area of EU-interest.<sup>26</sup> After Treaty revision in Amsterdam the Employment chapter of the EC-treaty was inserted, art 125-130. At the same time we saw a widening of the Treaty-scope on social policy as the social protocol was signed by the UK and moved from the Annex into the Treaty-text. The new wording of art 137, for the first in the history of European integration, attributes original legal competences in social security to the EU.<sup>27</sup> Szyszczak means that social policy has undergone a quiet revolution when being reformed in Amsterdam, as the employment strategy will have major repercussion for Member State competence in this area.<sup>28</sup> Here, I will give a short overview of the competences expressed in the employment and social policy chapter with focus on the OMC as a “new” governance method.

The EC treaty contains limited legal basis for the adoption of regulations and directives in labour law and health and safety at work (art 137), social security for migrant workers (art 42 and 137), free movement of workers and services (art 39 and 49). There also wide competences for providing secondary legislation in the field of non-discrimination on the basis of gender (art 141), ethnicity and functional incapacity (art 13). Art 137 h) also contains a specific legal basis for the adoption on the integration of persons excluded from the labour market. However, the width of the legislation adopted, actually or potentially, under this legal basis can by no means be compared to the comprehensive welfare state regulation of the Member States. As mentioned above, the neo-functionalists argued that negative integration, such as the removal of trade hinders for the functioning of the common market, would trigger pressure for common policies also in the social area. These measures have this far not been so significant that they can be described as creation a common EU social policy. On the other hand, negative integration has had large impact on national social law, “irritating” finely adjusted and comprehensive social regulation of the member states.<sup>29</sup> This legal pressure has been most noticeable in the ECJ judgments delivered in the area of free movement, although it is obvious that regulation 1408/71 has had much more far reaching consequences than what is ex-

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<sup>26</sup> de Búrca (2005).

<sup>27</sup> Eichenhofer, (2000). Eichenhofer points out that the Treaty-changes together with the case-law development starting with the judgments in C-120/95 Decker and C-158/96 Kohll question whether social security can be upheld as an area of exclusive national competence.

<sup>28</sup> Szyszczak (2000), p. 197.

<sup>29</sup> Erhag (2002).



pressed in the regulation itself.<sup>30</sup> The free use of legal argumentation based on non-discrimination and hindrance to free movement together with the solidarity principle has led some (Nordic) lawyers to talk about an EC jack-in-the-box effect, making it very hard to predict the possible impact of EC law on national law.<sup>31</sup>

As mentioned, there were some changes in the Amsterdam Treaty which made it clear that social security falls within the framework of the Treaty and there is now in art 137 a hard legal basis for the adoption of EU social security law. This Treaty change came together with the introduction of the chapter on employment, art 125-130, forming Treaty legal basis for the adoption of the “soft” common employment policy. The turn from scarce instrumental regulation to broader soft governance has been characterized as a shift from deepening to widening of EU social policy, and it has been pointed out that seen together this also implies a much stronger role for the Council vis à vis the Commission and the ECJ in the area of social policy.<sup>32</sup> The Council thus adopted the EES in 1997 using the open method of co-ordination, this was followed by the Social Inclusion Strategy in 2000 and Pensions Strategy in 2001.

The construction of the legal instruments forming the basis of these strategies, can be compared to that used in the earlier recommendations 92/441 and 92/442.<sup>33</sup> These recommendations are based on laying down common objectives which are measured by reporting social achievement in relation to structural indicators. The common objectives are executed through the adoption of national action plans, these are scrutinized by the Council and Commission and on the basis of this process a common employment report is presented. Finally, country specific recommendations are elaborated by the commission. However, the legal rules adopted are not intended to be legally binding and no economic sanctions are connected. Normal Treaty procedures for non-compliance can thus hardly be used.

It is important to see the introduction of the EES in 1997 together with the intentions of the negotiations before Maastricht, where the Member States decided to take the important integrative step of the Economic and Monetary Union. The EMU is such a comprehensive project that hardly any other national policy area can avoid being affected. It was apparent that the EMU would and will have effects of negative integration.<sup>34</sup>

In the Commission report on social security in 1999,<sup>35</sup> the demands for consolidation of financial policy in the Growth and Stability pact is pointed out as a factor which has had a negative impact on the abilities of national governance of economic development together with demographic development, increasing female labour market participation, long-term unemployment, globalisation and technologi-

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<sup>30</sup> An example is provided by the judgments in cases C-120/95, Decker, C-158/96 Kohll.

<sup>31</sup> Andersson, (1997), p. 328. Wilhelmsson (1996) p. 45 ff.

<sup>32</sup> Kvist (2004) p. 303.

<sup>33</sup> OJ No. L 245, 26/8 1992, p. 46, OJ No. L 245, 26/8 1992, p. 49.

<sup>34</sup> The social dimension of the EMU has been critically reviewed in literature, see eg. Guild, (1999) p. 22. Pacolet (1996). Pochet & Vanhercke 1998. Also Pakaslahti, (2000), s. 254 ff,

<sup>35</sup> COM (2000) 163 final.

cal development. The Commission notes that this will make Member States turn focus to social security as representing a large part of public expenditure. The need for active policy measures and lower non-wage labour costs was seen as essential factors for providing increased labour market participation.<sup>36</sup> The EES has come to rest upon these two concepts, active labour market measures and the justification of certain deregulatory measures.<sup>37</sup> But already in 1992 the Commission started to show interest in the financing of social security and made normative recommendations with reference to the EMU. The White Paper on growth, competitiveness and employment from 1993 presented the mentioned three policy areas as bound up together.

A more concrete example is that the Commission recommended that wage costs should be cut by 1-2 % within the EU.<sup>38</sup> This question was later discussed at the European Council in Essen in 1994 and was made a main question for the combat of unemployment. The question of lower non-wage labour costs as a method for increasing employment was then together with an emphasis on active labour market policies made central parts of the employment strategy,<sup>39</sup> and together serving the higher purpose of the Lisbon strategy 'to make the European union the most competitive knowledge society in the world'.

Although much of the positive measures that are possible to take on an EU-level are soft law, it is apparent that this soft law has developed into less soft structures. From notes by the Commission in reports in the early 1990s, to an organised governance structure with a firm legal basis in art 128 where both Council and Commission are dominant actors. Additionally, the EC-treaty in art 137 expresses that questions on most aspects of working life are questions where the EU has (a limited) competence to legislate or at least use the OMC-method.<sup>40</sup> Seen together with the EMU the OMC can be seen as a complement to the traditional EU-method of hard law.<sup>41</sup> But seen in relation to the diversity of national welfare states, e.g. the differences found in the construction of legal instruments (benefit levels, personal scope etc.), level of economic development and normative aspirations and institutional structures, there are minimal chances to be successful in harmonisation of European social policies. Pochet, when comparing the possible effects of the EES and social inclusion OMC, states that they too are different in character and very limited as to defining the contents or substance of national policies. The EES seems to be more focused towards centralisation but without further debate about the contents (top-down). The social inclusion OMC uses more of an experimental dynamic with the involvement of local and regional actors (bottom-up).<sup>42</sup>

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<sup>36</sup> COM (2000) 163 final, p. 8.

<sup>37</sup> Ball, (2001), p. 354.

<sup>38</sup> COM (1993) 700.

<sup>39</sup> E.g COM (2001) 428 final.

<sup>40</sup> Scharpf, (2007).

<sup>41</sup> Scharpf (2002) pp. 662 ff..

<sup>42</sup> Pochet (2005)

The OMC can thus only reach very limited efficiency and leaves the question of asymmetry between market integration and social protection (market-correction) unsolved.<sup>43</sup> The OMC has also been described as a legitimising discourse for action in politically sensitive areas, i.e. welfare and labour market, where use of the ‘classic’ Community method is not possible.<sup>44</sup>

Although the EES OMC has connections to traditional EU-lawmaking it is a “neo-voluntary”<sup>45</sup> legal method which can be characterized as intergovernmental rather than a supranational procedure. There are supranational features in the sense that the Commission holds a central position and that the guidelines are decided upon with qualified majority voting in the Council. However, the member states have the last saying as it is up to them whether they want to follow the guidelines or not. This of course effectively limits the possible achievements of the open method of coordination. At the same time national policy choices are defined as matters of common concern and governments are willing to present their plans for joint discussion. Although the system is without sanction the joint discussions on national choice with the goal to set common indicators of achievement and objectives mean that the system is exposed to peer-review. This also strengthens the intergovernmental character of the legal procedure.<sup>46</sup> However, one should also note that the OMC development is joined with a, however modest, development of the “hard” Community competences in the field of social law. Substantially, the OMC cannot be considered to contribute to the development of a common social policy with a direct impact on national social law. But as a procedure it is new and complementary, and receives a position in law-making on the national level.<sup>47</sup>

## **The normative basis of the EES – a “work-line” approach**

What is then the normative message in the European Employment Strategy and what kind of impact can it be expected to have on the legal strategies for ‘return-to-work policies’ in the Member States?

A fundamental idea with the EES is that it is necessary to take action in several policy areas to be successful in activation, the goal to reach “full” employment. Coordination between policy areas is thus needed. Originally the EES was designed to assist the member states in efforts to reach higher levels of employment in ways that promote competitiveness and economic growth. In order to reach these goals the member states are guided by the policy guidelines and legal norms on employment issues.

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<sup>43</sup> Scharpf (2002)

<sup>44</sup> Radaelli, (2003).

<sup>45</sup> Streeck, (1996).

<sup>46</sup> Intergovernmental cooperation is characterised by respecting national sovereignty and thus being voluntary (veto). Weiler, J.H.H. (1999).

<sup>47</sup> See Eichenhofer (2006). p. 274 f.

In art 125 of the Treaty it is expressed that the Member States should “work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change with a view to achieving the objectives defined in Article 2 of the Treaty on European Union and in Article 2 of this Treaty.” However, in art 126 it is stressed that the employment policies should be developed in a way consistent with the broad guidelines of the economic policies of the Member States and of the Community adopted pursuant to Article 99(2). Full employment should contribute to competitiveness and economic growth but “without abandoning the values of solidarity, social justice and social right upon which the Union is built.”<sup>48</sup> This means that the EES should be seen in relation to the broader social and economic agenda of the EU, thus it implies that a balance should be sought between economic, employment and social policies.

The Barcelona European Council in March 2002 identified "Active policies towards full employment: more and better jobs" amongst the three areas requiring specific attention. It underlined that full employment in the EU is at the core of the Lisbon strategy and constitutes the essential goal of both economic and social policies. In the launch of the “new start” for the Lisbon process it was made further clear that the fight against social exclusion means stimulating employment. Flexibility, work incentives in tax and benefit systems, vocational training for the young and active ageing combined with active labour market policies are the key features.<sup>49</sup>

Already in 1997 the EES received some criticism. Spicker (1997) means that the fight against social exclusion and (re)employment is quite different from the concept of a European Union solidarity, where the latter has been said to be the basis of the Commission’s white paper on social policy from 1994. The concept of poverty has been taken out of the discussion and been replaced by social exclusion. (Re)employment is seen as the solution to the problems of social exclusion rather than discussing citizenship and solidarity as basic concepts on which welfare are built.<sup>50</sup> Hervey (1998), also at an early stage of the EES, pointed out that “such an employment-centred position may reveal an underpinning of commodification of human beings, and may be insufficiently flexible to deal with the complex social and economic structures which make those in certain groups more vulnerable to social exclusion.”<sup>51</sup> When following the development of the normative message of the EES there are no signs of change in the line of what was asked for by Spicker and Hervey. Klosse (2005) argues that one way of coming around the side-effects of dominance by economic and financial targets is by using a “solid rights-based ap-

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<sup>48</sup> COM (2000) 379 and COM (2001) 104.

<sup>49</sup> COM (2005) 24.

<sup>50</sup> See Joint Report on Social Inclusion 2004. Employment promotion is (of course) seen as a key element of promoting social inclusion.

<sup>51</sup> Hervey (1998) p. 173. See also Scharpfs (2002) criticism towards OMC as creating constitutional assymetry that will have hard impact on the member states in forming their labour market and social policies.

proach”, referring in particular to the right of equal treatment expressed in the Treaty and the EU Charter of Fundamental Rights.<sup>52</sup>

A common feature of the critique seem to be that social values such as solidarity, social justice and social rights are not expressed legally in a way that can counter-balance EU-hard law impact in the areas of market freedoms and the EMU, an imbalance between economic and social objectives that is also reflected in the EES.<sup>53</sup>

Looking at the development of the EES within the Lisbon-process, it seems as if the EU has retreated from promoting social citizenship and moved towards a narrower work-line oriented conceptualisation of social security.<sup>54</sup> This would mean that there is an expressed common EU normative structure within the OMC governance method, having an impact on national welfare policies. Suggestions are made for specific action to provide for better integration of young people, immigrants and women in the labour market, promoting people to work longer and functional disorders by using active labour market policies. However, it must be stressed again that the commitments are free of clearly defined obligations for the Member States.

In non-discrimination law we see another kind of development. On the basis of Art 13 TEC<sup>55</sup>, the EU Council of Ministers agreed on a Directive about equal treatment in employment and occupation in November 2000.<sup>56</sup> The Directive states that both direct and indirect discrimination on the grounds of disability is prohibited within the EU and was to be implemented by Member States at the end of 2006. However, this is an outcome of the emphasis on individual rights derived from the free movement and non-discrimination articles of the Treaty and it is questionable whether there is “solidarity” embedded in these Treaty articles.<sup>57</sup>

In 2002, the Swedish Agency for Public Management (Statskontoret) presented a first evaluation of the impact of the EES on Swedish policy and politics. The result was striking as the general opinion among public servants in the Ministry and representatives from the labour market parties was that there was no such impact. Although they concluded that the basic ideas correspond well with Swedish employment policy there was no trace of a real impact or that this correspondence

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<sup>52</sup> Klosse (2005), p. 30.

<sup>53</sup> For further reflections on the responses to the social deficit of the European integration project, Joerges (2007:1)

<sup>54</sup> See e.g. European Commission November 2003. Also COM 2005 330 final.

<sup>55</sup> Introduced by Treaty revision in Amsterdam.

<sup>56</sup> Directive 2000/78/EC 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16, 2.12.2000. Another example of a broader approach in secondary legislation, responding to other values than purely economical in the Treaty is the adoption of directive 2004/38/EC, OJ L 158, 30.4.2004, p. 77; 1st corrigendum OJ L 228, 29.6.2004, p. 35; 2nd corrigendum (only for the English version) in OJ L197, 28.7.2005, p. 34. Verschueren (2006) means that the adoption of the latter directive together with the ECJ judgments in cases as, Case C-85/96, Martinez Sala [1998] ECR I-2691, Case C-184/99 Grzelczyk [2001] ECR I-6193, Case C-456/02 Trojani [2004] ECR I-7573, Case C-224/98 D’Hoop ECR [2002] ECR I-6191, Case C-138/02 Collins [2004] ECR I-270, Case C-209/03 Bidar [2005] ECR I-2119, “illustrate the switch in EC law from market-based citizenship to social citizenship.”

<sup>57</sup> Compare Paul Schoukens (2007).

would be a result of the EES.<sup>58</sup> The situation seem to be similar at the European level. The law professors Pieters and Schoukens have shown scepticism towards what can be achieved through using the OMC in the welfare area. When it comes to real effects their interviews with social security chief executive officers in Europe showed that there was no or very little impact of the OMC on national policy.<sup>59</sup>

In recent Swedish reports and travaux préparatoires, it seems evident that the EES-guidelines have the same normative message as is provided in Swedish employment and social policy.<sup>60</sup> However, the same travaux préparatoires do not contain any direct references to the EES or other OMC methods. Still, in order to create what is called sustainable welfare systems a central feature for the Swedish government has been/is e.g. to increase the employability of people who have been sick for a long time.<sup>61</sup> This “work-line” approach, which also has been expressed in the strategies for employment and social inclusion, has a long tradition in Swedish labour market policy and is also clearly expressed in the social security system. To this respect, full employment by using active labour market strategies is a well-known Swedish policy goal.<sup>62</sup>

However, when exploring the impact of the EES and OMC more closely, there seem to be very little (if any) evidence of real legal impact on national legal reforms, even if the policy formation and debate is carried out in an institutionalised European context.

## Final remarks

The EU has launched the Lisbon process in the context of globalisation. The challenge for Europe is to become more flexible in order to use the opportunities that globalisation brings and hence to overcome the threats by strengthening competitiveness on the global markets. Reform of the labour market and social policies is a key feature of these reforms. Historically there has been little real achievements in the field of European labour market and social law, at least on the European level. Since the 1990s several attempts have been introduced to strengthen EU competences in these fields. The EC-treaty now contains limited possibilities of introducing traditional hard law, measures also in the area of social security, discrimination law has been strengthened in order to promote participation on the labour market both by persons with functional disorders and among the ageing population. These traditional methods are accompanied by the introduction of new modes of govern-

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<sup>58</sup> Statskontoret 2002.

<sup>59</sup> See Pieters and Schoukens, , [www.eiss.be/whatsnew.php](http://www.eiss.be/whatsnew.php)

<sup>60</sup> For sickness insurance reforms see regeringsens proposition 2007/08:136 En reformerad sjukskrivningsprocess för ökad återgång arbete. Ds 2008:4 Ettårsgräns för sjukpenning och införande av förlängd sjukpenning. Ds 2008:3, SOU 2006:86. For unemployment insurance and labour market reforms see Ds 2007:47, prop. 2007/08:118,.

<sup>61</sup> E.g government report (regeringens skrivelse) 2005/06:23 as a reflection of e.g. COM 2004 239 final. See also the mapping of policy inputs and legal framework in Ds 2008:16.

<sup>62</sup> Socialförsäkringsutredningen (2006).

ance communicating a common normative message of full employment and the promotion of active labour market policies. Indeed, all these aspects of using different legal methods of European integration provides evidence of that there is really something happening in the evolution of Social law on a European level.

However, there are still four distinct welfare regimes present in Europe and even if the EES and OMC are attempts of redefining the social dimension in the EU towards a common agenda, the enlargements of the 21st century rather seem to have created more diversity in European welfare models. The Swedish, or perhaps Nordic model has always promoted both equity and efficiency. High benefit levels and a broad personal scope is combined with active labour-market policies and an emphasis on the “work-line”. This is however not a result of European integration. Additionally, when analysing the presented input of ideas in recent Swedish legal reforms a “European model”-impact is not to be found.

But there is something going on in Europe, where it will lead is however a question for the future. Today, we might only be able to conclude that the EES and the OMC in general is more a question of finding a legitimising procedure than of substance.

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