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Reflexive Coordination

Thoughts on the Social Model of the European Union

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Abstract:

The paper argues that at the heart of the Social Model of the European Union (ESM) lies not a substantive concept but efforts to coordinate the social and employment policies of its Member States. In order to understand the true nature of the ESM it is thus necessary to develop a legal theory that is capable of depicting the procedural character and the policy-oriented focus of coordination. It is suggested that the theory of reflexive law can be of assistance in this respect.

The paper reconstructs the evolution of soft law instruments in social and employment policies of the European Union as a move from open to reflexive coordination. It develops the argument in three steps. In a first part it outlines the expansion of the use of the open method of coordination (OMC) in the European Union from economic policy to employment policy and to various areas of social policy. In the second part the paper assesses OMC as reflexive coordination, thereby interpreting the current emphasis on streamlining of policies as a reflexive process of “coordination of coordination”. In the third part the ESM of the EU is characterized in functional terms by highlighting its multi-layered and decentred structure, its plural nature and its reflexive style of policy making, whereby the OMC as reflexive coordination plays a central role.

1) Evolution of Soft Coordination of European Social and Employment Policy

European labour and social policies were given a new direction in the context of the introduction of the European Economic and Monetary Union during the 1990s. The focus on labour and social law shifted to employment and social policies and an economically oriented employment discourse replaced a rights-focussed social policy discourse¹. In White Papers on Growth, Competitiveness and Employment issued in 1993 and on European Social Policy issued in 1994 employment protection and social policy were evaluated in terms of having positive or negative effects on economic processes and employment rates². The white papers endorsed policies of combating unemployment through flexibilisation of existing laws and policies as well as support for businesses in their hiring efforts. In addition a new style of regulation was promoted that favours soft measures of coordination over hard regulation. This new governance approach brought social and employment policies in line with efforts of economic coordination in the context of the introduction of the Economic and Monetary Union (EMU).³

Since the European Council summit in Essen in December 1994 the Commission and the Council play an active role in monitoring labour market and social policies of the Member States. A decisive step in relation to employment policies was taken at the 1997 Intergovernmental Conference in Amsterdam. In it a discussion took place of establishing a specific EU unemployment criterion, similar to the four EMU convergence criteria. However, this was rejected and a compromise was reached to adopt for employment policymaking the “multilateral surveillance process” originally set up to monitor Member State economic policies in order to ensure economic convergence in the run-up to the EMU.⁴

At the extraordinary summit on employment in November 1997 in Luxemburg the process envisioned by the new Employment Chapter of the EC Treaty, introduced by the Amsterdam Treaty, was launched under the name of the European Employment

¹ Ashiagbor 2001. See also Ashiagbor 2005, ch. 3.

² Commission 1993; Commission 1994.

³ The Commissions understanding of the new governance approach is spelled out in its white paper on European Governance. See Commission 2001a.

⁴ Trubek/Mosher 2003, p. 38.

Strategy (EES). It introduced a new governance mechanism that uses soft law methods to link the EU-level to the national and local levels. This new governance approach, called the 'open method of coordination' (OMC), has been adopted as a general model to be used in a number of policy areas, including social policies, and it was clearly designed on the model used to introduce EMU⁵. Through peer review and exchange of best practices, each Member State is directly confronted with the plans and experiences of others, thus acquiring benchmarks by which they can measure their own performance.

Four steps can be distinguished in relation to the OMC:

1. Setting up of guidelines supplemented by timetables for achieving the goals in the short, medium and long term (the Commission makes proposals on the guidelines);
2. Introduction of quantitative and qualitative indicators and benchmarks as a means of comparing best practices (the Commission organizes the exchange of best practices and makes proposals on indicators);
3. Translation of the European guidelines into national action plans by setting specific targets and adopting measures, thereby taking into account national and regional characteristics;
4. Follow up system: monitoring and evaluating combined with peer review (this provides support to the processes of implementation and peer review). In their review of the national action plans the Commission and the Council regularly provide comments and recommendations that are often based on comparisons with the best performers and create additional benchmarks for each Member State.

In relation to the EES the OMC requires Member States to provide the Council and the Commission with National Action Plans. In these they report on measures taken and outline how they plan to respond to the guidelines in the future. The Commission monitors the Member States performance by commenting on the action plans and makes specific recommendations.⁶ In a formal legal sense OMC is non-binding and ultimately voluntary in nature. OMC is meant to be flexible. Its voluntary nature allows Member States to adjust reforms in accordance with the structures of their

⁵ See Hodson/Maher 2001.

⁶ Ashiagbor 2005.

regimes, institutional networks and specific circumstances.⁷ It enables wide-ranging participation of social partners.⁸ However, if a member state decides not to cooperate or chooses “à la carte” which policies it wants to follow while resisting others, there are no hard sanctions that can be imposed.⁹ In the end the effectiveness of OMC depends on the participants’ willingness to cooperate.

In theory OMC instigates a learning process in which Member States are subjected to evaluations of their progress, peer review and benchmarking.¹⁰ However, the operation of OMC is not without sanctions. The outcomes of evaluations and benchmarking can lead to open criticism of member state governments. In addition so-called soft sanctions of “naming and shaming” can harm the reputation of Member States that score less favourably and put their governments under pressure to conform.¹¹

As part of the EES the Commission and Council issue a Joint Employment Report as result of evaluations of the National Action Plans which creates the basis for the design of new guidelines. While drawing up the guidelines the Commission consults a number of actors, including the Member States, the European Parliament, the Employment Committee, the Committee of the Regions, the Economic and Social Committee as well as the relevant social actors, i.e. trade unions and employer associations. The first employment guidelines were introduced in 1997 and contained nineteen separate guidelines, falling under four pillars:

Employability: Measures to endorse active labour market policies and to increase skill levels among workers. *Entrepreneurship*: Support for small, innovative businesses, including tax reform, in order to encourage them to create jobs. *Adaptability of Businesses*: bridging the need for modernisation of work organization and increasing the flexibility of workers through training. *Equal Opportunities for Women and Men*: Promoting gender equality in employment.

The guidelines have changed significantly since 1997. Some of these changes can be seen as an effort to refine the original guidelines in light of experience while others introduce new objectives and set new targets. In general we can observe a shift from

⁷ Barbier 2005.

⁸ Rogowski/Schömann 2002.

⁹ Regent 2003, p. 210.

¹⁰ See Jacobson 2004. See also Kajtár/Rogowski 2005.

¹¹ Scott/Trubek 2002.

‘passive’ to ‘active’ unemployment-reduction policies. Particular emphasis has been given to modernisation of the public employment services of the Member States. Other refinements of the original strategy which seem to be the result of learning at the European level are the introduction of incentives for persons aspiring to become entrepreneurs, of efforts to eliminate poverty traps by changing tax and benefit policies, and support for lifelong learning initiatives as well as improvements of procedures for skills certification.

A new and revised EES gained shape in 2000 when at the Lisbon European Council Summit an ambitious employment rate target was adopted according to which 70% of employable European citizens should actually be in employment by 2010. This reorientation of employment policies demands from active labour market policies privileging measures that encourage the creation of new jobs and the removal of unemployed from being dependant on unemployment benefit.

On the basis of an evaluation of the first 5-year EES-cycle¹² the Barcelona European Council in 2002¹³ called for a reinforced, simplified and streamlined process in order to meet the Lisbon target. Further improvements were suggested in 2003 by the Commission in its Communication on the Future of the Employment Strategy.¹⁴ The new strategy adopts a more focused approach and replaces the four pillars with three overarching objectives that are especially geared to reinforce the Lisbon agenda:

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

“Full employment” calls for both demand and supply side policy measures. “Quality and productivity at work” reflects the call of the Lisbon agenda for the creation of not only more but also better jobs. “Cohesion and an inclusive labour market” aims at reduction of unemployment and promotion of equal access for everyone to the labour market. Since 2003 the Commission has introduced a new set of employment guidelines organised around these three overarching goals.¹⁵

¹² European Council/European Commission 2003.

¹³ European Council 2002.

¹⁴ Commission 2003b.

¹⁵ For details see Pochet 2005, pp. 55-63..

The new EES aims at specific sectors of the labour market such as young and elderly workers, women, minorities, third country nationals and disabled workers. It favours activation policies that promote training and lifelong learning and supports institutional innovations like employment agencies that view themselves as service providers and treat the unemployed as clients. The renewed EES also encourages mutual 'learning' between the Member States, suggesting governments and enterprises to see themselves as 'learning units'. An important learning instrument in this context is peer review, which is meant to identify, evaluate and distribute useful active labour market practices that could be transferred between Member States.

A further redirection of the EES was introduced in spring 2005.¹⁶ The very ambitious Lisbon target of creating 22 million jobs was reduced to 6 million and new 'streamlining' efforts are undertaken in order to align economic, employment and social policies. The new approach calls for joint economic and employment reports. The annual cycle is from 2005 onwards replaced by a 3-year cycle. In line with the Lisbon criteria and agenda for a successful competitive European common market the main concern of employment policy is now also competitiveness.

The use of soft law coordination in form of the OMC is not confined to economic and employment policies. The OMC increasingly plays an important role in the modernisation of European social and welfare policies as well. The OMC has been used in social policy since 2000, first in the area of social inclusion at the Lisbon Summit in March 2000, then in the area of pension at the Stockholm Summit in March 2001 and finally at the Gothenburg Summit in June 2001 in the area of health care and care for the elderly.¹⁷ The final report of the Working Group XI on Social Europe of the European Convention on the Constitution, issued on 30 January 2003,¹⁸ lists a number of areas for further use of the OMC. These include the areas of education, tax harmonisation and the establishment of minimum social standards. However, with the factual demise of the Constitution, the extension of OMC to these additional areas might no longer be a top priority on the agenda of social policy coordination.

¹⁶ Joergensen 2005.

¹⁷ De la Porte 2003, p. 340.

¹⁸ European Convention on the Constitution 2003.

In general coordination of social policy follows the original OMC model. In accordance with the guidelines the Member States draw up national action plans that are then evaluated by the Council and the Commission. However, there are two significant differences between the OMCs used in employment and social policies. First, detailed quantitative indicators are relied upon in the social policy fields in order to assist monitoring national policies. This is widely regarded as a successful achievement of the Social Protection Committee and in particular its subgroup on social indicators. Second, there exists not one social policy OMC but a variety of slightly different OMCs used in the various social policy fields. Furthermore, in social policy we can distinguish between hard coordination, which is the traditional coordination of social security entitlements based on hard law and the new soft open method of coordination of policies.

2) From Open to Reflexive Coordination

By adopting OMC in the employment and the social policy fields, a double shift has occurred.¹⁹ Firstly, at least in theory there is a shift in protagonists in the sense that “traditional” actors like the Commission, Parliament and ECJ have become less dominant, while Member States and the social partners have turned into “front line players”. Under the aegis of democratic participation, OMC also involves local and regional forces and other civil society representatives. Secondly, there is a shift in the legal nature of the instruments used for the coordination of policies. Two types or sets of OMCs can be distinguished. The Broad Economic Policy Guidelines and the European Employment Guidelines belong to the first and stronger set, as these are mentioned in the Treaty, foresee strong participation of the Commission and allow the use of pressure on the Member States. On the other hand, the OMCs in social protection (pension, social inclusion, and health) belong to the second set, which is characterised by a lack of a Treaty basis, a weaker role of the Commission, less pressure on the Member States and greater respect of national values.²⁰

¹⁹ Degryse/Pochet 2003, pp 13-15.

²⁰ De la Porte 2003, p. 340.

OMC has been criticised for a number of inherent weaknesses. Daniel Wincott sees dangers of overextension in using OMC in areas where it is unlikely to have a strong impact, thereby undermining the credibility of the process as a whole.²¹ Another issue is transparency of the process. The lack of knowledge among average citizens about the open method of coordination and relatively little media coverage indicates a democratic deficit as does the general lack of national parliamentary debates of the Lisbon Strategy.²² In a certain sense OMC depoliticises the unemployment issue and turns it into a matter for labour market experts.²³ Nevertheless, OMC is considered to be a democratic process because it inherently promotes a decentralised decision-making, suits multi-level governance, and prefers negotiated reforms.²⁴ OMC policy making is not restricted to governments, but allows social partners, interest organisations and actors at local and regional level to take part.²⁵ OMC fits the European approach to partnership and increases the role of regional and local policy making that is potentially closer to the citizens. The “multi-level dialog”²⁶ of the OMC supports the emergence of a European civil society and strengthens the legitimacy of the European Union as a whole.

The OMC is said to be capable of acknowledging the diversity of welfare states.²⁷ However, the range of options can only fall within a certain band. What is fundable in Scandinavian countries might not be achievable in the new Central and Eastern European Member States. In case of countries with less developed economies, the restriction on benefits is often a result of financial difficulties and not the lack of social awareness. Thus, if the band of reasonable options can be maintained, remains to be seen. Furthermore, there exist ideological differences among Member States that seem at certain times almost irreconcilable (Britain and Sweden often been cited as archetypical antagonists in this respect).²⁸

The instruments used by the OMC have become known as soft law instruments that for labour lawyers lack the advantage of legally enforceable hard law. However, policy-oriented labour market specialists widely share a belief that in areas like

²¹ Wincott 2003, p. 550.

²² Natali /de la Porte 2004, p. 16.

²³ Goetschy 2003, p. 73.

²⁴ De la Porte 2002, pp. 44-45.

²⁵ See Rogowski/Schömann 2002.

²⁶ Regent 2003, p. 206.

²⁷ Scharpf 2002, p 653.

²⁸ Scharpf 2002, p 650.

employment and social policy OMC is the appropriate method because Member States are largely unwilling to transfer sovereignty beyond coordination.²⁹ The soft law approach of OMC seems to have advantages for national governments because they might receive impulses for the reform of their systems without losing sovereignty.

Insights in the nature and function of the OMC can be gained from the theory of reflexive labour law³⁰. The theory stresses that legal regulation is dependant on self-regulation in the regulated system. Efforts of self-regulation are not obstacles to effectiveness and success of regulation but need to be actively facilitated and promoted in order to achieve the regulatory goals. The type of intervention favoured by reflexive law is procedural rather than substantive. Indeed these features characterise soft law in particular and can be used to analyse the OMC.

OMC can be assessed in terms of reflexive law at two levels. The method itself is reflexive in the sense that it provides a regulatory frame at the European level for regulatory processes carried out at member state level. The regulatory frame has to be facilitative and capable of respecting the logics of member state regulation. In short, for the OMC to be successful it has to develop an understanding of itself as regulation of self-regulation.

Furthermore, the “methods” used to reform OMC show signs of reflexivity at a higher level. Streamlining and simplification can be interpreted as processes in which the method is applied to itself in the sense that different forms of coordination are coordinated. Jonathan Zeitlin has detected the possibility of this form of reflexivity in relation to the OMC as well. In his view a reflexive reform strategy of the OMC for improving the operation of existing OMC processes would “apply to their own procedures the key elements of the method itself: benchmarking, peer review monitoring, evaluation and iterative design”³¹. In his view there is some hope for a reflexive reform of the OMC in the future.

However, such “coordination of coordination” is already happening. This can be demonstrated in relation to social policy. Streamlining social policy OMC’s is meant as promotion of effective operation of the policy triangle of economic, employment

²⁹ De la Porte 2002, p. 43.

³⁰ See Rogowski/Wilthagen 1994 and Rogowski 2001. See also Teubner 1993.

³¹ Zeitlin 2005, p. 483.

and social policies. The Communication on “Strengthening the social dimension of the Lisbon strategy: Streamlining open coordination in the field of social protection”³² issued in 2003 proposes the linkage of the various social policy OMCs. The goal is to modernise social protection systems by making coordination of social protection more effective. In the beginning streamlining and simplifying the use of OMC was confined to the method itself by providing a clearer definition of the scope of OMC. However, streamlining of policy coordination was expanded and started to become an ambition linked to the overarching goal of improving the quality and the stability of socio-economic governance of the EU as a whole. The right policy mix was supposed to create a “virtuous circle” of economic and social progress. The idea is that by linking social, economic and employment OMCs these policies develop a propensity to mutually reinforce each other.³³ Social policy streamlining follows the model of streamlining of economic and employment policies. In these areas streamlining involved the creation of a unified timetable and the adoption of a switch from one-year to three-year cycles (the first cycle started in 2003 and the second in 2006).

A major innovation as result of the streamlined process is a Joint Social Protection Report of the Commission and the Council. The new report replaces the current Social Protection in Europe Report as well as the joint reports on social inclusion, on pensions and on policy cooperation in healthcare and long-term care. In the future, there will be a comprehensive and forward-looking Joint Social Protection Report issued every three years while in intervening years lighter updating reports will be presented.³⁴ The Member States’ contribution will change accordingly. From 2006 onwards, Member States will prepare National Action Plans that cover all three social policy fields together. Comprehensive and forward looking unified reports will have to be presented every three years while in intervening years they will only have to prepare lighter reports. Furthermore the streamlined process will be based on a renewed set of indicators that are supposed to increase visibility and comparability of developments. The indicators will also cover pensions, health and long term care and thus enlarge the responsibility of the Social Protection Committee’s Indicator Group.³⁵

³² Commission 2003a.

³³ Commission 2000, p. 6.

³⁴ Ibid, p 12.

³⁵ Ibid, p 13.

Streamlining of the use of OMC in social protection areas is supposed to follow the model of streamlining economic and employment policies. This seems particularly appropriate for pensions given their importance in relation to economic and employment policy making, a fact that has been acknowledged by the Commission in its Communication regarding Streamlining Open Coordination in the Field of Social Protection where a “close triangular relationship between the policy domains concerned”³⁶ is emphasised. The Commission envisages the streamlined cooperation on social policy to provide:

improved effectiveness;

less burden on the actors through a reduction in the numbers and the frequency of reports;

rationalisation and simplification of the procedure; and

greater emphasis on implementation of results.

The Presidency Conclusions of the Informal Council Meeting at Villach in January 2006 emphasised the link between coordination of policies at the European level and the reform of welfare policies in the Member States. The aim of streamlining of employment, social protection and social inclusion policies is the support of Member States in modernising and further developing their national social protection systems.³⁷ High hopes are put on improved exchange of information and opportunities for mutual learning in order to promote national reform processes. The streamlining of policies should lead to an identification of common challenges on the basis of the objectives defined, leading to an intensive exchange about possible approaches to solutions. Indeed the Presidency Conclusions expect the streamlined policies “to provide an adequate framework for national reform efforts”. In future the implementation of the National Action Plans should be more closely scrutinised and high priority will be attached to transparency and involvement of stakeholders.³⁸

³⁶ Commission 2003a, p. 6.

³⁷ On the subtle transformation of member state policies as a result of soft regulation see Jacobsson 2004.

³⁸ Presidency Conclusions on the social dimension of the revised Lisbon strategy at the Informal EPSCO Council Meeting Villach, 20 January 2006 <http://www.eu2006.bmsg.gv.at/cms/eu2006EN/detail.htm?channel=CH0601&doc=CMS1137851810205>.

Furthermore, it called for an in-depth analysis of the streamlining of the open method of coordination and measures in order to increase public awareness at the European level. However, it almost turned into a marketing exercise because a major concern expressed was the visibility for the citizens of the streamlined process in the social field. The ministers are concerned that citizens do not recognise and experience that social protection, social cohesion and social inclusion are top priorities at EU level and that streamlined open coordination leads to mutual strengthening of economic, employment and social policies.

The various efforts of the Commission to strengthen OMC through reflexive coordination of coordination should not obscure the limited regulatory capacities of soft law. A realistic assessment of its use has to emphasise that OMC is non-binding. Like in the field of international law it is a means to foster compromises in the absence of substantial agreements.³⁹ In the end the Member States are responsible for the regulation of their social and employment policies. European initiatives and coordination efforts can only be facilitators of their self-regulation. At best the effort of streamlining OMC leads to a new awareness among the parties involved that coordination gains its strength through accepting its limits. However, such awareness could form the basis for reflexive coordination and there are strong signs indicating that European coordination is developing in this direction.⁴⁰

3) The European Social Model and Reflexive Coordination

The coordination of employment and social policies has to recognise differences in welfare regimes and regulatory styles and traditions. Indeed the need for coordination arises from these differences. Coordination, unlike harmonisation, does not aim at overcoming these differences but makes creative use of them.

However, if we look at coordination analytically, it is easy to see that in order to coordinate there have to be some commonalities among the coordinated policies. For example, they must be capable of being coordinated. It is true that in the early stages of European integration, when coordination efforts were mainly concerned with social

³⁹ Schäfer 2006. See also Murray 2001.

⁴⁰ See Zeitlin 2005.

security entitlements in order to enable the free movement of workers, not much thought was given to the basis of coordination. The original approach to coordinate welfare rights of migrant workers can be labelled hard coordination because it was based on clearly defined competences and linked to the enforcement of rights. Remarkably little change occurred also when the protection of social security rights was extended in the 1990s to all citizens of the European Union beyond the group of migrating workers. Despite the general move from negative to positive integration in the European integration process that according to Fritz Scharpf requires the “reconsideration of the legal scope of negative integration in the light of social and political goals other than the maximisation of market competition”⁴¹, hard coordination of social security was relatively easily adjusted.⁴² Hardly any discussion of the nature of coordination took place.

Nevertheless, already the original approach was implicitly dependent on a common understanding of goals and basic welfare provisions among the Member States as a precondition of coordination. Hard coordination simply assumed that social security entitlements were accrued in the home country and protected as rights in all participating Member States and that these rights were of a somewhat similar kind, aiming at a similar level of welfare protection. Furthermore the justification for coordination at the European level was linked from the start to an overarching European value. This was non-discrimination and the antidiscrimination approach that granted migrant workers the same rights as domestic workers formed the basis of the early social security coordination.

The situation changed in the 1990s when in addition to hard coordination of social security softer methods of coordination of policies were introduced. The call to define the core elements of social protection at the European level became pertinent and eventually led to the debate of a European Social Model (ESM) in Europe and at the European level. In political and academic discussions the ESM serves a multiplicity of purposes. Some view it as an ideal type, some as a reality, and some as a political project.⁴³

⁴¹ Scharpf 1999, p. 160.

⁴² See only Pennings 2003 and Fuchs 2002.

⁴³ See Adnett 2001, Ebbinghaus 1999, Ferrera 2004, Jepsen/Serrano Pasqual 2005, Kleinman 2002, Lynch-Fannon 2005, Martin/Ross 2004, Offe 2003, Rogowski (forthcoming), Scharpf 2002, Schmid/Schömann 2004, Sisson 1999, Streeck 1999, Tharakani 2003, Vos et al. 2004, Wickham 2002.

In academic debates about the distinct character of the ESM we can distinguish two main approaches. One approach argues that social and employment policy coordination is needed for the sake of solidaristic social values. The alternative approach emphasises its role in relation to economic efficiency. A prominent example of the second type is Claus Offe's account of the ESM. He has argued that notions related to the ESM constitute the very core of the distinct European character of the political economy of the EU.⁴⁴ It might indeed be contended that the success of further economic integration of the European economy depends on increased attempts to coordinate social protection and to combat social and economic insecurity and social exclusion, albeit only on a "neo-voluntary" basis as Wolfgang Streeck sceptically points out⁴⁵. At stake is the unity of the European Union in economic terms and the protection of Europe as an economic community. The disparity in social protection systems and in particular in the resulting labour costs disadvantages certain states and is harmful for the Community as a whole, thus providing further incentives to coordinate social policies.⁴⁶

Anton Hemerijck has gone a step further in his analysis of the ESM. He has argued that the EU's main function in bringing about social integration is that of a facilitator in reforming welfare, assisting processes of self-transformation of national welfare policies through coordination.⁴⁷ The key idea is that of a close link of economic and social development. This approach represents a shift from a normative to a cognitive understanding of the ESM. In cognitive terms the ESM not only promotes social justice but contributes to economic growth. Social policy is no longer considered an obstacle but a beneficial economic factor that creates security for economic activities and provides, among other benefits, incentives to pursue collective goods.⁴⁸

A number of factors that have influenced the ESM debate can be identified. It certainly meant to capture the core of social protection in the European Union. In addition the ESM is often contrasted to a US model of a neo-liberal minimalist welfare state. It is prominently linked to the ambitious project of a political European Union that is capable of coordination of economic policies as well as foreign and security policies of the Member States. The European Economic and Monetary Union

⁴⁴ Offe 2003.

⁴⁵ Streeck 1996.

⁴⁶ Ibid, p. 458-460.

⁴⁷ Hemerijck 2004.

⁴⁸ Hemerijck 2002, p. 173-4.

(EMU) that forms the core of the EU (in contrast to the EC) has become the driving force behind coordination efforts in employment and social policies. However, a most important factor for the elevation of employment and social policy within the canon of European policies is the persistently high unemployment rate within the European Union and its political and economic consequences as well as the effect this fact has on the legitimacy of the entire project of a European Union.⁴⁹

Since the adoption of the Maastricht Treaty in 1992 and the creation of a political union the Commission supports the view that European integration and coordination policies “must ... be seen from the perspective of European citizenship and the building of a Social Europe.”⁵⁰ Furthermore the European Commission is of the opinion that there are underlying values that constitute unifying aspects of the welfare policies in the Member States. On several occasions it has provided in recent years ideas on these unifying aspects of European social and welfare policies on which its coordination efforts can be based. However, in my view these attempts should be understood in the first place as attempts of supporting the Commission’s own efforts to coordinate policies. They were mostly instrumental and only afterthoughts following changes in policy directions and were never meant to impose a particular understanding of European values.

Nevertheless, the rhetoric of working towards a European social model has been prominently used by the European Commission since the beginning of the 1990’s. The current (October 2006) Mission Statement of the Directorate-General for Employment, Social Affairs and Equal Opportunities starts with the statement that it “has the task of contributing to the development of a modern, innovative and sustainable European Social Model with more and better jobs in an inclusive society based on equal opportunities”⁵¹. A number of official documents of the EU and the Council of Europe refer directly to the ESM. These comprise “benchmark documents”⁵² like the 1989 Charter of Fundamental Rights of Workers, the Charter of Fundamental Rights proclaimed at the Nice summit, the Lisbon social agenda as well as the Council of Europe’s revised Social Charter. In these official documents and statements, the ESM is characterised as a unique blend of economic and social aims.

⁴⁹ See also Shaw 2001.

⁵⁰ Commission 2003c.

⁵¹ http://ec.europa.eu/dgs/employment_social/index_en.htm.

⁵² ETUI 2000, p. 54

Competitiveness is said to be coupled with social justice and improving living and working standards, more jobs with better jobs. According to the Commission elements of the ESM can be found in the EC Treaty, which states that high level of social protection and promotion of social cohesion are amongst major aims of the EU, and is also encapsulated in the dual Lisbon aim of “growth with more and better jobs and greater social cohesion”. The European social dialogue is seen as a unique and indispensable component of the European social model.

A short quote from a speech given in 2003 by the Employment Commissioner at the time Diamantopoulou during a visit of a prospective new member state, Estonia, in Tallinn might serve as an example of the rhetoric used by the Commission in relation to the ESM:

“From the outset, the EU treaties spoke of rising living standards and higher levels of social protection. Improving working conditions. Promoting a greater quality of life. More than fifty years later, we remain true to that vision of the European Social Model.”⁵³

In the rest of the speech she lists the various initiatives undertaken by the Commission and the EU in general in the areas of employment and social policies. What is remarkable, however, is the lack of an analytically clear definition of the ESM. It merely serves as a frame for a description of competences and policies pursued by the European institutions. In the Commissioner’s own frank admission, “it escapes precise definition”. However, she insists that “the notion of 'model' is significant because it is 'anticipatory' or 'aspirational’”⁵⁴.

Increasingly the ESM has to combine contradictory sets of values in the Commission pronouncements. On the one hand, there are reduced public expenditure for social services, financial sustainability, competitiveness, deregulation, flexibility, privatization and individual responsibility – key concepts in neo-liberal economic policies. In appraisals of the ESM these values are often combined with on the other hand values like security, inclusive society and adaptability. Or in the language of the Presidency Conclusions of the 2002 Barcelona European Council: “The ESM is based

⁵³ Diamantopoulou 2001.

⁵⁴ Diamantopoulou 2003.

on good economic performance, high level of social protection, education and social dialogue”.⁵⁵

A main feature of the ESM in the Commission’s view is that it distinguishes the EU from the rest of the world. In its 2005 Communication on European Values in the Globalised World⁵⁶ it stresses that the social models adopted in Member States are based on distinctly European characteristics. Four features are identified in particular by the Commission:

“First, national **economic and social policies are built on shared values** such as solidarity and cohesion, equal opportunities and the fight against all forms of discrimination, adequate health and safety in the workplace, universal access to education and healthcare, quality of life and quality in work, sustainable development and the involvement of civil society. These values represent a European choice in favour of a **social market economy**. They are reflected in the EU treaties, its action and legislation, as well as in the European Convention of Human Rights and our Charter of fundamental rights.

Second, European citizens have greater expectations of the state than their equivalents in the Asia or America. The **public sector tends to play a big role, either through regulation or government spending, in the organisation and financing of national systems**. In addition, all Member States have played a strong role in the delivery of **high quality services of general interest** which have been a key feature of economic and social development. On average, the 25 EU Member States devote 27% of GDP to public spending on social protection, compared to 15% in the United States and 17% in Japan.

Third, a **strong “European dimension” reinforces national systems**. In contrast to other regions of the world, national systems here are reinforced by European level policies (such as the stability offered by macro-economic policy, the dynamism created by the internal market and the social agenda, and the cohesion promoted by EU Structural Funding).

Fourth, there is a **strong tradition of social dialogue and partnership** between governments, industry and trade unions – even if the detailed mechanisms vary

⁵⁵ European Council 2002, p. 8.

⁵⁶ Commission 2005.

considerably between Member States. At a European level, this has been reflected in the EU Treaties and, for example, the regular Tripartite Social Summits.”⁵⁷

In my view a proper assessment of the European Social Model needs to look not only at its contradictory content but at its function as well. The ESM has a number of specific characteristics in this respect that delineate it from any national welfare model. Three functional aspects of the ESM can be highlighted: its multi-layered structure, its decentred and plural nature and its reflexive style of policy making.

First, the ESM consists of a multi-layered and decentred structure. The European Union as such is not the main player in devising and carrying out social and employment policies, the responsibility for carrying out and financing of these policies rests with the Member States and they stay ultimately in control. The European Union only assists the Member States and acquires competences beyond coordination only in rather specific areas. Decision-making and the provision of welfare and protection is inherently decentred in the European Union. Even the most sophisticated coordination efforts at the centre cannot change this fact and decision-making at various levels is widely viewed as a positive feature, and indeed appreciated as a major virtue of the model. It enables pursuit of different social aims in different settings but also learning from different experiences. Coordination is not disguised harmonisation. It is deliberately designed to preserve the right of the Member States to be the ultimate decision-makers, as reinforced by the subsidiarity principle.

Second, the ESM is plural. It does not consist of one but of several models. The plural nature of the ESM supports both homogeneity and diversity. The ESM does not favour a European federal welfare state that replaces national welfare approaches but encourages instead “competitive federalism”⁵⁸ in its coordination policies. Depending on the intensity of the role of state intervention it is possible to distinguish four basic social security models that are in operation in a variety of combinations among the Member States. In the *statist model* the state is responsible for providing welfare financed out of general taxes. In the solidarity-based *social insurance* model the role of the state is to provide general regulation under which employees are insured against social risks and employers and employees are obliged to pay contributions. In

⁵⁷ Ibid, pp. 4-5 (emphasis in the original).

⁵⁸ Barnard 2000.

the *corporatist model* the state supports the regulation of welfare through collective agreements or company agreements between trade unions respectively employee representatives and employer associations or companies. Finally under the individualist solution, favoured by neoliberal economic policies, protection against risks is left to the individual seeking it through *private insurance*, thereby reducing the role of the state to granting tax relief or other concessions. The EU's ESM does not add a separate model to these approaches but comprises all.

A third functional aspect of the ESM is that it is at its core characterised by reflexive policy-making and uses reflexive law instruments. It can only function by realising its limits as a multilayered and plural model. In practicing OMC the EU makes creative use of the limits of the ESM, in particular limited legal competences. The OMC is policy-making in the absence of hard legal competences. In fact, the EU takes advantage of lacking hard law in order to become innovative in introducing new soft law instruments. It views its own multi-layered, decentred and plural character as virtue. This self-awareness makes the European Union's understanding of the ESM particular and reflexive.

The EU views as a main task supporting the member state efforts to reform their welfare policies. It operates on the assumption that the post-war combination of "strong economic growth, low inflation, confidence in public affairs as well as in individual rights"⁵⁹ is no longer reality. The reform of the welfare systems is not without risk. Gareth Davies has shown what the consequences of introducing a market for welfare are for social cohesion and identity, while at the same time providing opportunities for deepening European integration and involving the EU in central aspects of individual life.⁶⁰ Furthermore new risks have emerged and these new risks require welfare states to adopt a reflexive approach and undergo processes of self-transformation. Reflexive modernisation of welfare states is demanded in order to cope with the challenges that both the risk society and globalisation pose.⁶¹ In this context, the EU becomes itself reflexive by acting as amplifier⁶² the coordinator of the welfare states self-transformation.

⁵⁹ High Level Group on the future of social policy in an enlarged European Union 2004, p. 28.

⁶⁰ Davies 2006.

⁶¹ See only Beck 1992.

⁶² Visser 2005.

The theory of reflexive law provides tools to understand this form of policy-making. Reflexive law emphasises a transformation in the rationality structure of the modern legal system from formal and substantive rationality to procedural rationality. Policy making becomes multi-level governance and is embedded in an ongoing dialogue based on mutual learning and policy transfer. This is supported by peer review and benchmarking. However, crucial is the respect for autonomy and self-regulation. European regulation has to turn into regulation of self-regulation. Soft law instruments are often more appropriate than conventional hard law.

There are a number of recent studies that shed light on the reflexive nature of European governance. For example, in their analysis of social regulation, industrial relations and labour market policies, the two studies of de Schutter and Deakin⁶³ and van der Meer, Visser, and Wilthagen⁶⁴ detect what they call reflexive governance in EU policy making. They describe it as a form of regulation and steering through procedures which is not without dilemmas, but nevertheless advantageous in general because it requires less state intervention, reduces the costs for the participants and leaves more room for innovative processes of self-transformation.

Furthermore, the processes that occur in conjunction with the establishment of a European polity are assessed in terms of reflexivity. In this context studies highlight reflexively organized learning processes, reflexive constitution-making and reflexive integration.⁶⁵ The European constitutionalisation process for example is assessed as establishing a reflexive form of transnational governance without domination that establishes a legal order realised in spontaneous and horizontally dispersed polyarchies. However, these analyses of European polity making have developed a rather strategic relationship with reflexive law. Their main interest is to analyse increasing proceduralisation in European governance as providing the background and creating opportunities for increased deliberative democracy.⁶⁶

There are also a number of attempts to analyse reflexive trends in modern welfare policies. These include the creative use of comparative labour law for reflexive

⁶³ De Schutter/Deakin 2005.

⁶⁴ Van der Meer, Visser, and Wilthagen 2005, in particular p. 355.

⁶⁵ See the essays in Eriksen 2005, in particular Bohman 2005, Eriksen 2005, Fossum 2005 and Schmalz-Bruns 2005.

⁶⁶ They present another attempt, without however acknowledging it explicitly, in combining Luhmannian systems theory and Habermasian discourse theory.

domestic regulations⁶⁷, the link between reflexive regulation of occupational health and safety procedures and participation⁶⁸, the reflexive link of the OMC with fundamental and human rights⁶⁹, and the solution that the concept of regulation of self-regulation offers for the global challenges to national and supranational labour law⁷⁰.

Returning to the debate of the ESM as practiced by the EU we can see that it is increasingly showing signs of second-order reflexivity.⁷¹ The EU has recently embarked on reforming the method itself. It derives from the situation that the EU is confronted with problems that arise from using different OMCs for different social policies. The EU calls these reforms of the OMC simplification. However, in my view this can be interpreted as an attempt to cope with self-created complexity and engage in “coordination of coordination”, a typical form of reflexivity using the very idea of OMC to reform the method itself. This is true reflexive coordination.

Concluding Remarks

The ESM is an established concept that is largely synonymous with the discourse of a social dimension of European integration. It consists at the European level of a social *acquis* that comprises core employment and welfare policies. During the fifty years of the European Community quite a number of rights have been established by using hard law instruments like regulations, directives and decisions. Since the last ten years we also witness a new approach in employment and social policies that uses fairly successfully soft law mechanisms in order to coordinate economic and welfare policies.

The use of the OMC in ever increasing fields has come to a crossroad. Its future depends not only on the willingness of the participating governments to overcome political obstacles. It also depends on the successful attempt to become reflexive by applying the elements of the method to itself. OMC has been used in different social

⁶⁷ Dorey 2005.

⁶⁸ Smismans 2004.

⁶⁹ Smismans 2005.

⁷⁰ Scheuermann 2001.

⁷¹ On second-order reflexivity see Bora 2006, in particular 45-6.

policy fields with differing success. In some fields, like in employment policy, it is said to be “remarkably successful” and, according to the High Level Group on the Future of Social Policy in an enlarged European Union, it “had very positive effects in social inclusion.”⁷² The OMC has been beneficial during the enlargement process as it helped in catching-up and benchmarking new Member States.⁷³ Thus the use of the OMC is spreading and there are remarkably few academic voices that are not optimistic.

This seems somewhat astonishing given the fact that the OMC lacks the advantages of binding hard law in achieving policy goals. In some praises of OMC the rather weak resort to moral or political pressure (shaming) loses the character of being only the second-best solution to proper legal regulations. In this context it seems necessary to emphasise that the lack of binding legal instruments can very well turn out to be a crucial weakness of the European Social Model.

Some authors see a tension between soft and hard law, and in particular between OMC and proper employment protection. It is indeed the case that the hard law measures, mainly Framework Directives, which have been adopted since the introduction of EES are all more or less subsumed under the heading of combating unemployment. It is significant that they are concerned with issues like fixed-term and part-time work or parental leave. These are issues of employment promotion rather than employment protection.

Conventional labour lawyers like Silvana Sciarra⁷⁴ and Manfred Weiss⁷⁵ fear crowding out of hard law by soft law. On the other hand sociolegal scholars like David Trubek⁷⁶ are more optimistic about the future use of soft law and predict rather innovative new combinations of soft and hard law measures. I personally think that it is the second scenario that is more likely to depict the future without denying, however, that there are real tensions between soft and hard labour law measures.

In any case the sharp distinction between hard and soft law seems to be softening. Directives become more open-ended and there is an increasing use of framework

⁷² Commission 2004, p. 36.

⁷³ Ibid, p. 36.

⁷⁴ Sciarra 2004.

⁷⁵ Weiss 2004.

⁷⁶ Trubek/Trubek 2005a and 2005b and Trubek et al 2005. See also Mosher/Trubek 2004, Scott/Trubek 2002 and Trubek/Mosher 2003.

directives. Both developments allow Member States to exercise greater flexibility and to maintain diversity.⁷⁷ In addition there are suggestions to combine hard and soft law measures. Fritz Scharpf's proposal⁷⁸ to combine OMC with framework directives would mean that it is no longer possible for national policy-makers to ignore the policy discourses of open coordination while at the same time introducing scope for flexibility and negotiations. His proposal of opening up the possibility of OMC to subgroups of Member States with more or less similar welfare states and similar economic and institutional challenges seems particularly promising. These sub groups would not constitute solid blocks but rather overlapping clusters.

The future of the ESM depends on the political climate being favourable towards social integration of Europe. If social policy is considered as a beneficial economic factor that contributes to create security for economic activities, it provides incentives to pursue collective goods and thereby increases the attraction and competitiveness of the European Union. If this cognitive understanding of the ESM is shared widely, it creates the ideal basis for the development of reflexive coordination and other reflexive policy-making.

However, there are also worrying developments. Of particular concern is the lack of a clear vision of social cohesion pursued by the current Barroso Commission. What is needed in this situation in my view is not downgrading social and employment policies but consolidation in the form of "coordination of coordination" or, to give it another name reflexive European law and policy-making..

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⁷⁷ Tubek/Trubek 2005b, pp. 95-6.

⁷⁸ Scharpf, 2002 pp. 662-666. See also Klosse 2005.

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