

Governance of EU Social and Employment Policies as Reflexive Coordination

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The governance of social and employment policies in the European Union has witnessed fundamental transformations since the beginning of the 1990s. The traditional rights-based approach has largely been replaced by a policy-centred approach that concentrates on economic effects of social and employment policies rather than increasing levels of protection. Furthermore, the reorientation towards policy was accompanied by the introduction of new instruments of governance. They consist of a variety of so-called soft law measures which were of central importance for the adoption of a wide range of coordination policies at the supranational level of the EU.

The paper concentrates on the policy field of social and employment policies in analysing new forms of governance. However, the development of new forms of governance in these policy fields was result of a number of related processes. These include in the first place the impact of coordination of economic and fiscal policies on employment and social policies, but also efforts of the European Commission to develop a distinct European approach to conducting the economy encapsulated in the debate over a European Social Model.

The paper argues that the experiment with new forms of governance at the EU level has reached a stage of maturity and a level of complexity that can already be observed in reform efforts of coordination policies. The reform requires in fact a rethinking on

the part of the European institutions. We increasingly witness elements of reflexivity in these supranational efforts of policy making. The central thesis of the chapter is that in order for soft forms of governance to be effective, European law and policy must adopt a reflexive self-understanding. In the areas of European social and employment policies, flexicurity and the debate over a European Social Model play an important role in this process.

1) From Open to Reflexive Coordination

The introduction of new forms of governance in the EU, and in particular the open method of coordination (OMC), has fundamentally changed the regulation of social and employment law in the EU. The steps taken in adjusting economic policies in preparation for the European Economic and Monetary Union (EMU) during the 1990s and its launch in 2002 were most important factors for a reorientation of European policies. It entailed a fundamental change of methods of governance at the supranational level.¹ The coordination of fiscal policies served as the model for the introduction of new policies of coordination of employment in the form of the European Employment Strategy (EES) and also for the introduction of coordination policies in various social policy fields.²

The main tenets of the new governance approach were outlined by the Commission in its White Paper on European Governance of 2000.³ In it the Commission promised a fundamental reform of European governance through an increased use of the OMC. The nature of OMC was seen as conducive to achieve policy goals in areas in which hard legislative competences were lacking. Furthermore, it was viewed as a way of encouraging co-operation and exchange of best practices between Member States. It operates with common targets implemented in guidelines adopted at the supranational level, which Member States have to respond to, for example by establishing national action plans as in the case of employment and social exclusion. The Member State reactions are regularly monitored by the Commission in order to establish if progress

¹ See various contributions in de Burca and Scott 2006. See also Ashiagbor 2001.

² Overviews of the introduction of OMC in employment and in various social fields can be found in Zeitlin, Pochet; Magnusson 2005 and Kilpatrick 2006.

³ Commission 2001.

has been made to meet those targets. An important aspect of central monitoring is that it allows Member States to compare their efforts. Furthermore, the Commission supports Member States efforts to learn from the experience of others.

Two types or sets of OMCs can be distinguished. The Broad Economic Policy Guidelines and the European Employment Guidelines belong to the first group, 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 a second group, 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.⁴

Several changes have occurred as a result of adopting the OMC and other forms of new governance. A shift can be witnessed from vertical to horizontal relations of the Commission, Parliament and the European Court of Justice on the one side and Member States, local and regional actors, the social partners and other civil society representatives on the other. Furthermore, as regards implementation the legal nature of the instruments regulating policy changed from reliance on hard to soft law measures.⁵

The open method of coordination is itself under debate. The 2003 redesign of the OMC in employment did address the problems of effectiveness, legitimacy and visibility⁶ by calling for a broader set of actors to be involved at Member State level. Some of the concerns about the operation of the EES, voiced for example by Günther Schmid and Silke Kull, who echo issues raised in the 2003 and 2004 Kok Reports,⁷ which include the lack of qualitative dimensions of indicators and insufficient support for mutual learning,⁸ were addressed in the 2003 reform of the Employment Guidelines. Other issues like the specificity of employment policy targets and democratic participation remain to be problematic.

The OMC has been assessed in a number ways. Doubts have been voiced for example about the implementation process of the EES, alleging that the production of the National Action Plan is often an affair solely involving technocrats and government

⁴ De la Porte 2003, p. 340.

⁵ See Degryse/Pochet 2003, pp 13-15.

⁶ See Kilpatrick 2006, pp. 140-2.

⁷ European Council 2003 and 2004.

⁸ See Schmid and Kull 2004, pp. 338-9.

officials.⁹ Furthermore, sociological accounts of the monitoring process see it riddled with cultural misunderstandings and linguistic ambiguities.¹⁰

What is lacking, however, is a proper theoretical account of the use of OMC in economic, employment and social policies. It is suggested in the following that the theory of reflexive labour law¹¹ can provide insights in this respect. The theory of reflexive labour law is an attempt to assess trends in modern labour law from the perspective of Niklas Luhmann's social systems theory of modern society.¹² According to Luhmann's theory, law, politics and the economy constitute systems of specialised communication in a functionally differentiated society, whereby each of the function systems of society develops along separate trajectories of self-reproduction or autopoiesis. Modern society is conceived as a risk society in a specific sense insofar as increasing internal complexities of its function systems constitute problems not only for themselves but for other social systems and society at large, including its physical environment. However, the regulation of these risks through economic, labour and welfare law is confronted with systemic barriers. Each of the function systems attempts to reduce complexity in system-specific ways and these efforts have to be recognised by law and politics in their attempts to regulate the function systems in order to be successful.

A fundamental insight of social systems theory is that the modern functionally differentiated society tends to establish system-specific thresholds and barriers for attempts of external regulation. If legal regulation tries to impose inadequate solutions, it is confronted with problems of ineffectiveness and non-compliance. The theory of reflexive law stresses as a solution for systemic resistance to regulation a rethinking of the role of regulation. Legal regulation has to realise that it is dependant on self-regulation in the regulated system which it has not only to acknowledge as obstacles to effectiveness and success but has to actively facilitate and promote in order to achieve its goals. The type of intervention favoured by reflexive law is procedural rather than substantive.

“In distinguishing functions (with respect to society), performance (with respect to other social systems), and reflexion (with respect to the system itself) a sophisticated

⁹ See Zeitlin 2005, p. 460.

¹⁰ See Barbier 2003.

¹¹ See Rogowski 2001 and Rogowski/Wilthagen 1994.

¹² See Luhmann 1995 and Luhmann 2002.

labour law approach tries to ‘regulate’ not only through ‘performance’ but also through influencing centres of ‘reflexion’ within other social subsystems. In becoming reflexive the form of legal regulation changes from substantive to procedural law.”¹³

It can be argued that these features characterise not only advanced national labour law but also the new legal instruments adopted in the European Union. Its soft law approach understands itself as facilitative rather than imposing standards. And it is the emphasis on procedure that makes the use of the OMC attractive as an instrument of new governance.

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”.¹⁴ In his view there is some hope for a reflexive reform of the OMC in the future.

However, this reflexive “coordination of coordination” is already happening in economic and employment as well as social policy. The idea of linking economic, employment and social OMCs in order for these policies to mutually reinforce each other has partly become reality. In 2005, as a result of a critical assessment of the OMCs in economic and employment policies, in particular with respect to its actual effects on unemployment as well as employment rates, and as a measure to increase the chances to reach the Lisbon targets (also referred to as a relaunch of Lisbon), the Broad Economic Policy Guidelines (BEPG) and the Employment Guidelines were

¹³ Rogowski/Wilthagen 1994, p. 7.

¹⁴ Zeitlin 2005, p. 483.

combined to Integrated Economic and Employment Guidelines.¹⁵ It meant the creation of a unified timetable that accompanies the switch from one-year to three-year cycles that was already agreed in 2003 (the first cycle started in 2003 and the second in 2006).

In addition, there is “coordination of coordination” in form of ongoing streamlining of the social policy OMCs. Streamlining social policy OMCs is meant as promotion of effective operation of the policy triangle of economic, employment and social policies and follows the model of streamlining of economic and employment policies. The goal was to modernise social protection systems by making coordination of social protection more effective. In the beginning, streamlining and simplifying of the social policy OMCs was confined to the method itself by providing a clearer definition of the scope of OMC. However, streamlining of policy coordination was expanded¹⁶ 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.

A major innovation as result of the streamlined process in the social policy area is the Joint Social Protection Report of the Commission and the Council. The new report replaced in 2005 the Social Protection in Europe Report as well as the joint reports on social inclusion, pensions and policy cooperation in healthcare and long-term care. The Member States contribution changed accordingly. Since 2006, Member States prepare National Action Plans that cover all three social policy fields together.¹⁷

The Presidency Conclusions of the Informal Council of Employment and Social affairs in Villach (19-21 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. 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

¹⁵ See Jørgensen, 2005.

¹⁶ Already in its 2003 Communication on Strengthening the social dimension of the Lisbon strategy: Streamlining open coordination in the field of social protection (Commission 2003a) the Commission proposed a linkage of the various social policy OMCs.

¹⁷ The 2007 Joint Social Protection Report will be the first report that evaluates integrated National Reports on strategies for social inclusion, pensions, healthcare and long-term care.

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.¹⁸

It is quite revealing that the Conclusions 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. This emphasis on public awareness turned the official pronouncement into a marketing exercise. The major concern expressed was not the actual working but 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 almost obscure the fact that the regulatory capacities of soft law are limited. A realistic assessment of its use has to emphasise that OMC is non-binding regulation. It is in many respects a means to foster compromises in the absence of substantial agreements.¹⁹ In the end the Member States have to regulate 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.

¹⁸ 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>.

¹⁹ Standard practice in international law where a main reason for international organisations to introduce soft law is overcoming deadlock. See Schäfer 2006.

2) New Governance in the European Union: the Example of Flexicurity Policies

Any coordination of policies has to deal with a paradox. It has to recognise and preserve differences in welfare regimes as well as regulatory styles and economic traditions while at the same time paying attention to the unifying aspects on which coordination efforts can be based. The European Commission has embarked on a number of attempts to provide ideas on these unifying aspects of social and welfare as well as economic policies. Prominent examples among these are the concept of flexicurity and the European Social Model.

Flexicurity is a policy concept that was initially promoted by socialdemocratic politicians such as Poul Nyrup Rasmussen, Danish Prime Minister from 1992 until 2001. It was implemented in Denmark in the early 1990s, and with some variations, in other Nordic countries with strong traditions of social dialogue. In addition to Denmark, the Dutch labour market policy is widely seen as guided by flexicurity concerns, the most obvious example being the Dutch Flexibility and Security Act of 1999. Indeed the policies of these two countries are actively promoted by the European Commission as examples for policy learning.²⁰

In the Commission's view flexicurity is a key policy concept to foster the 'modernisation' of welfare policies. In the already mentioned preparatory Informal Council Meeting at Villach in January 2006 the responsible Commissioner Vladimir Spidla indicated the key role of flexicurity for promoting both labour market flexibility and job security with social protection by emphasising three aspects:

“that it (flexicurity, RR) is geared more towards protection of people rather than protection of jobs; that Europe needs both new types of security and greater flexibility; and that flexicurity is based on cohesion of the whole social system. This last point reflects the importance of the role of social protection, the social partners, employment policies and the State itself.”²¹

At its following Spring summit 2006 in Brussels, the European Council listed flexicurity as a measure to increase employment opportunities for priority categories and promised the establishment of a set of common principles on flexicurity:

²⁰ See Madsen 2006.

²¹ <http://eu2006.bmsg.gv.at/cms/eu2006EN/liste.html?channel=CH0601>.

“... the European Council asks Member States to direct special attention to the key challenge of ‘flexicurity’ (balancing flexibility and security): Europe has to exploit the positive interdependencies between competitiveness, employment and social security. Therefore Member States are invited to pursue, in accordance with their individual labour market situations, reforms in labour market and social policies under an integrated flexicurity approach, adequately adapted to specific institutional environments and taking into account labour-market segmentation. In this context, the Commission, jointly with Member States and social partners, will explore the development of a set of common principles on flexicurity. These principles could be a useful reference in achieving more open and responsive labour markets and more productive workplaces.”²²

Most importantly, the concept of flexicurity plays a main role in efforts to review current labour law systems in the EU. The European Commission issued a Green Paper on Modernising labour law to meet the challenges of the 21st century at the end of November 2006 and has launched a broad public debate on the regulation of non-standard contracts or self-employed in the European workplace. The discussion paper asks Member States, employers and workers’ representatives how labour law at EU and national level can help the job market become more flexible while improving security for workers (the flexicurity approach). The consultation is an important part of the EU's Social Agenda 2005-2010 and dovetails with several other Commission initiatives on the wider topic of flexicurity. The official consultation period is four months and ends on 31st March 2007.

However, a number of (critical) aspects can be noted with respect to the use of the concept of flexicurity in documents like the Presidency Conclusions or the Green Paper issued by the European Commission. These include

- a vagueness in the definition of the term flexicurity which allows to use it for an expression of a wide range of almost contradictory policy goals;
- the term flexicurity expresses an aspiration rather than a concrete policy;
- the notion of flexicurity carries positive connotations of balancing (of interests), integration (of different reform efforts) and inclusion (of actors) and avoids addressing negative consequences;

²² European Council 2006, Part One, Specific Areas for Priority Action (c) Increasing employment opportunities for priority categories.

- flexicurity is assessed as an opportunity, adding urgency to the need for labour market and social policy reforms, and downplays caution and restraint in reforming established systems of welfare protection.

So far the academic debate on flexicurity is largely confined to discussions of national models of labour market reform in selected countries of the European Union. It is predominantly comparative and tends to link flexicurity policies to particular welfare regimes. Of the four models in the world of welfare (Nordic, liberal, corporatist and Mediterranean), it is the Nordic model that has the most potential for embarking on flexicurity policies.

In looking at actual flexicurity policies, we can detect a clear focus on employment protection matters related to new or atypical forms of employment. This is also the overarching concern of the EU's Green paper on the reform of labour law currently under discussion. The Dutch Flexibility and Security Act of 1999 'balances' reduction of employment protection for employment in standard employment relations (shortening of notice periods and easing of dismissal procedures) and agency work (indefinite contracts allowed) with new rights granted to atypical workers (contractual rights for on-call and agency workers).²³

In focusing on new forms of employment and the flexibilisation of existing institutional and legal structures in order to cope with new social risks, flexicurity is closely related to debates about transitional labour markets which focus on solutions for the flexibilisation of employment in order to ease transitions in and out of the labour market.²⁴ In a certain sense the flexicurity concept continues the older debate of how to reconcile efficiency and equity concerns.²⁵ However, what seems to be new in the flexicurity debate is its link with new forms of governance and the focus on procedural aspects of implementation of flexicurity policies.

In Ton Wilthagen's²⁶ assessment, flexicurity is both a policy concept and an analytical frame. In his account flexicurity includes on the flexibility side external and internal numerical flexibility, functional and wage flexibility and on the security side job, employment, income and "combination" security. He emphasises the possibility

²³ See the "case study" of the Dutch Flexibility and Security Act of 1999 in Wilthagen and Houwerzijl 2005, in particular Table 2: Central Aspects of the Dutch Flexibility and Security Act on p. 119.

²⁴ See Gazier, in this Volume.

²⁵ See for example Schmid 1994.

²⁶ Wilthagen 2005 and Wilthagen and Tros 2004.

of mutual support of flexibility and security resulting in gains for both employer and employees.

In normative debates there are surprisingly few voices that criticise and warn against dangers of flexicurity policies. Leschke, Schmid and Griga²⁷ mention the possibility of a vicious nexus of flexibility and security leading to a downward spiral and losses for both the employer and the employee. They suggest integrating the flexicurity concept and a transitional labour market policy approach. Flexicurity policies would then be embedded in a dynamic perspective of life course and career changes (transitions). They also emphasise the potential of linking European and national flexicurity policies. For them the flexicurity debate provides a

“chance that it could be the vehicle to revitalise the social dialogue and promote the negotiation of new topics between the social partners, both at national and European level. Especially the improvement of employment security by establishing branch specific collective training funds or facilitating complementary relations between flexibility and security in the course of people’s lives seem to be issues for negotiations where all sides could win in the long run. The further stimulation and coordination of this debate at the European level could be a promising task for the Directorate General ‘Employment and Social Affairs’. Especially the creation of adequate indicators, the careful screening and the effective diffusion of good practices are worthwhile objectives.”²⁸

Given the already indicated vagueness and the contradictory and aspirational nature rather than concrete policy orientation in the pursuit of flexicurity policies at the European level, the hope in developing flexicurity into a comprehensive labour market policy programme seems rather unrealistic. Nevertheless, the flexicurity debate is very much in line with a reflexive style of policy-making. Suggestions to improve flexicurity policies like defining performance indicators, increased screening or monitoring policies and support for the diffusion of best practices are examples of a procedural style of law and policy-making. They are facilitative measures that aim at triggering and inducing externally processes of self-regulation. Thus flexicurity blends well with the new governance approach of the European Union.

²⁷ Leschke, Schmid and Griga 2006, p. 3-4.

²⁸ Ibid, p. 19.

3) Reflexive Coordination and the European Social Model

There is much overlap of the flexicurity discourse and the debate of a European Social Model (ESM). It is suggested here that the debates over an ESM as well as flexicurity are closely linked to the new governance approach adopted by the Commission. The ESM discourse is supposed to provide the main unifying aspects of coordination policies mentioned before. Furthermore, it indicates key policy goals of the wider project of a political European Union.

There are a number of background factors that have influenced the ESM debate. The ESM is an integral part of the ambitious project of a European Union that is capable of coordination of a wide range of policies including economic and employment as well as immigration, energy and foreign and security policies of the Member States. The ESM is central in the general move from negative to positive integration in the European Union. In Fritz Scharpf's analysis positive integration 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".²⁹ Or to use the Commission's language, European integration and coordination policies "must ... be seen from the perspective of European citizenship and the building of a Social Europe."³⁰

Since the beginning of the 1990s the European Commission has adopted the rhetoric of working towards a European Social Model. It has throughout the last ten or fifteen years maintained that the modernisation of this model has to be an important future target in the European Union. Indeed the current (March 2007) Mission Statement of the Directorate-General for Employment, Social Affairs and Equal Opportunities starts with the opening remark 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".³¹

In the Commission's pronouncements the ESM is portrayed as a unique blend of economic and social aims. Competitiveness is said to be coupled with social justice and improving living and working standards, more jobs with better jobs. A short

²⁹ Scharpf 1999, p. 160.

³⁰ Commission 2003b.

³¹ http://ec.europa.eu/dgs/employment_social/index_en.htm.

quote from a speech given in 2003 by the Employment Commissioner at the time during a visit of a prospective new Member State, Estonia, in Tallinn might serve as an example of the Commission's rhetoric:

“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.”³²

The speech then lists the various initiatives undertaken by the Commission and the EU in general in the areas of employment and social policies. At no stage does the speech offer an analytically delineating definition of the ESM, which is in fact acknowledged by the Commissioner: There is an acknowledgment that the ESM “escapes precise definition”, followed by the revealing statement that nevertheless “the notion of ‘model’ is significant because it is ‘anticipatory’ or ‘aspirational’”.³³ The lack of coherence and theoretical distinction in referring to the ESM is compensated by enumeration and description of competences and policies pursued by the European institutions.

The ESM is the main feature that distinguishes the EU from the rest of the world in the Commission's view. In its Communication on European Values in the Globalised World³⁴ it stresses that the social models adopted in Member States are based on distinctly European characteristics. Four features are identified in particular:

“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

³² Diamantopoulou 2001.

³³ Diamantopoulou 2003.

³⁴ Commission 2005.

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 considerably between Member States. At a European level, this has been reflected in the EU Treaties and, for example, the regular Tripartite Social Summits.”³⁵

Despite wordy documents like this Communication of the European Commission, there is, however, no common understanding of the function or of the core elements of the ESM. In the debates some view it as an ideal type, some as a reality, some as a political project.³⁶ 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 of argument 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.³⁷ 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 out.³⁸ 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.³⁹

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

³⁵ Ibid, pp. 4-5 (emphasis in the original).

³⁶ See, for example, Giddens et al. 2006, Jepsen/Serrano Pascual 2005, Offe 2003, Rogowski (forthcoming), Scharpf 2002, Schmid 2002, Sisson 1999, Streeck 1999, Wickham 2002.

³⁷ Offe 2003.

³⁸ Streeck 1996.

³⁹ Ibid, p. 458-460.

in reforming welfare, assisting processes of self-transformation of national welfare policies through coordination.⁴⁰ 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.⁴¹ If this cognitive understanding is shared widely, it creates the ideal basis for the development of reflexive coordination and other reflexive policy making.

It is apparent that the ESM has to combine contradictory sets of values. 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 Barcelona European Council: “The ESM is based on good economic performance, high level of social protection, education and social dialogue”.⁴²

However, 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 structure. The European Union as such is not the main player in devising and delivering 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 decentralisation is widely viewed as a positive

⁴⁰ Hemerijck 2004.

⁴¹ Hemerijck 2002, p. 173-4.

⁴² European Council 2002, p. 8.

feature, and indeed appreciated as a major virtue of the model. Coordination is not disguised harmonisation. It is deliberately designed to preserve the right of the Member States to be the ultimate decision-makers, captured 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”⁴³ 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 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 third functional aspect of the ESM is that it is at its very core characterised by reflexive policy-making and the use of reflexive law instruments. In practicing OMC the EU makes creative use of its limits, 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. This self-awareness makes the European Union’s understanding of the ESM particular and reflexive. It reflects on the needs for reform of the Member States’ welfare policies and understands its role as being a facilitator of their processes of self-transformation. Reflexive modernisation of welfare states is demanded in order to cope with the challenges that both the risk society and

⁴³ Barnard 2000.

globalisation pose.⁴⁴ In this context, the EU becomes itself reflexive by acting as the coordinator of the welfare states self-transformation.

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. In an optimistic scenario, a successful reflexive turn enables law to regulate social affairs through a combination of policies that increase democratic participation (Habermas) and support centres of reflexion in social systems (Luhmann).⁴⁵ However, reflexion means in the first place a self-realisation of the limits of legal regulation within law and an acknowledgment of its dependency on self-regulation in the regulated fields.

An analysis of European law as reflexive law emphasises its function as part of multi-level governance and an ongoing dialogue based on mutual learning and policy transfer. Furthermore, in order to become reflexive European law has to reassess its limited competences as virtuous. Respect for autonomy and self-regulation are preconditions of successful regulation and European regulation thus has to define its role as facilitator in the form of regulation of self-regulation. Soft law instruments like peer review and benchmarking are crucial in this respect and in many cases more appropriate than conventional hard law in achieving the policy goals.

Furthermore, the ESM as practiced by the EU is increasingly becoming reflexive in another sense. As shown previously, economic, employment and social policy making using the OMC is confronted with problems that arise from using different OMCs for different policies. The EU has recently embarked on reforming the method itself under the heading of simplification. In a social systems theory perspective this is 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.⁴⁶ This is true reflexive coordination through which the ESM gains its real strengths.

⁴⁴ See Beck 1992.

⁴⁵ See Gunther Teubner’s account of a “new proceduralism” in Teubner 1983.

⁴⁶ See for further discussion Rogowski 2007.

Concluding Remarks

The new forms of governance in social and employment law of the European Union have reached a threshold. The current attempts to introduce policies at the supranational level that contribute to the overarching economic goals defined by the Lisbon agenda have to be reconciled with limited capacities of the Member States to respond to these European efforts. In this context it is important that the European policies are able to influence self-transformation processes at Member State level in order to reach their own goals. The future reform of labour law systems as envisaged by the 2006 Green Paper on Modernising Labour Law to Meet the Challenges of the 21st Century will to a large extent depend on the capability of coordination policies to become reflexive.

Policies pursued under the heading of flexicurity, for example, demonstrate how the new employment policies are shaped and at the same time influence the discourse on new techniques of governance in the EU. The balancing of flexibility and security requires a fairly open-ended negotiation process. It is the process that matters and not particular policy goals. What is of importance from a regulatory point of view are the dynamics of the process and what makes it happen. Thus the main legal concern lies with procedure and not with content. This coincides well with new methods of governance pursued at the supranational level that focus on procedural aspects in order to influence Member State policies. Annual reports, monitoring, evaluation, benchmarking and peer review are soft legal instruments that are procedural and facilitative in nature. They are characterised by a reflexive understanding of the role of law as mechanism of regulation which ultimately aims at support of self-regulation.

Flexicurity as a concept fits well within the debate of a European Social Model. It gives guidance for welfare reform processes at Member State level that have to balance establish systems of welfare and employment rights and institutions with demands for new forms of employment. It is process-oriented and provides incentives for bargaining rather than imposition of solutions. There is a danger, however, in the current debate at the EU level. Like the notion of the European Social Model, the flexicurity concept can lose its meaning and become empty and then be used in a superficial manner. The tendency of the current Barroso Commission to downplay

social protection and to prioritise the Lisbon agenda in reforming coordination policies leads to a concentration of efforts on issues of transparency and marketing rather than substantive discussions of policies. However, the success of coordination of policies like flexicurity and its impact on self-transformation of welfare regimes in the Member States of the EU will not depend on improved rhetoric but on the ability of European policies to become reflexive by adequately taking into account the needs and conditions of self-regulation in the Member States. The reflexive turn in policy-making is thus central for the future of successful multi-level governance in the European Union.

Bibliography

Ashiagbor, D. (2001) EMU and the Shift in the European Labour Law Agenda: from 'Social Policy' to 'Employment Policy'. *European Law Journal*, Vol. 7 (3), pp. 311–330.

Barbier, C. (2003) Research on 'Open Methods of Coordination' and National Social Policies. What Sociological Theories and Methods? In: Bredgaard, T. / Larsen, F. (eds.) *Employment Policy from different Angles*. Copenhagen; DJØF Publishing, pp. 47-74.

Barnard, C. (2000) Regulating Competitive Federalism in the European Union? The Case of EC Social Policy. In: Shaw, J. (ed.) *Social Law and Policy in an Evolving European Union*. Oxford: Hart, pp. 49–69.

Beck, U. (1992) *Risk Society: Towards a New Modernity*. London: Sage.

De Burca, G. / Scott, J. (eds.) *Law and New Governance in the EU and the US*. Oxford: Hart.

De la Porte, C. (2003) The Soft Open Method of Co-Ordination in Social Protection. *European Trade Union Yearbook 2001*, pp. 339–362.

Degryse, C. / Pochet, P. (eds.) (2003) *Social Developments in the European Union 2002: Fourth Annual Report*. Bruxelles: ETUI, OSE, SALTSA.

Diamantopoulou, A. (2001) The European Social Model: Promoting economic and social progress. Speech of the Commissioner responsible for Employment and Social Affairs at the European Commission in Tallinn on 19 March 2001. Address to the International Conference on Achieving Balanced Economic and Social Growth. http://europa.eu.int/comm/dgs/employment_social/speeches/010319ad.pdf

Diamantopoulou, A. (2003) *The European Social Model – Myth or Reality?* Speech of the Commissioner responsible for Employment and Social Affairs at the European Commission delivered at the Labour Party Conference, Bournemouth, 29 September 2003.

Giddens, A./ Diamond, P. / Liddle, R. (eds.) (2006) *Global Europe, Social Europe*. Cambridge: Polity.

- Hemerijck, A. (2002) The Self-Transformation of the European Social Model(s). In: Esping-Andersen, G. / Gallie, D. / Hemerijck, A. / Myles, J. (eds.) (2002) *Why We Need a New Welfare State*. Oxford: Oxford University Press, pp. 173–213.
- Hemerijck, A. (2004) Recasting Europe's Semi-Sovereign Welfare States and the Role of the EU. Paper delivered in the WZB seminar series "The European Social Model" on 16 December 2004, Berlin.
- Jepsen, M. / Serrano Pascual, A. (2005) The European Social Model: an Exercise in Deconstruction. *Journal of European Social Policy*, Vol. 15 (3), pp. 231–245.
- Jørgensen, H (2005) The European Employment Strategy up for Revision – Effective Policy or European Cosmetics? In: Bredgaard, T. / Larsen, F. (eds.) *Employment Policy from different Angles*. Copenhagen; DJØF Publishing, pp. 23-46.
- Kilpatrick, C. (2006) New EU Employment Governance and Constitutionalism, in: De Burca, G. / Scott, J. (eds.) *Law and New Governance in the EU and the US*. Oxford: Hart, pp. 121-151.
- Leschke, J. / Schmid, G. / Griga, D. (2006) On the Marriage of Flexibility and Security: Lessons from the Hartz reforms in Germany. WZB discussion paper SP I 2006-108. Berlin.
- Luhmann, N. (1995) *Social Systems*. Stanford: Stanford University Press.
- Luhmann, N. (2002) *Theorie der Gesellschaft*. 9 Vols. Frankfurt/Main: Suhrkamp.
- Madsen, P.K. (2006) Flexicurity. A new perspective on labor markets and welfare states in Europe. Paper for the conference "Flexicurity and Beyond". Carma, Centre for Labour Market Research, Aalborg University, 12-13 October 2006.
- Offe, C. (2003) The European Model of 'Social' Capitalism: Can it Survive European Integration? *The Journal of Political Philosophy*, Vol. 11 (4), pp. 437–469.
- Pochet, P. (2003) The European Employment Strategy at a Crossroad. In: Degryse, C. / Pochet, P (eds.) *Social Developments in the European Union 2002: Fourth Annual Report*. Bruxelles: ETUI, OSE, SALTSA, pp. 61–95.
- Regent, S. (2003) The Open Method of Coordination: a New Supranational Form of Governance? *European Law Journal*, Vol. 9 (2), pp. 190–214.
- Rogowski, R. (2001) The Concept of Reflexive Labour Law. Its Theoretical Background and Possible Applications, in: Priban, J. / Nelken, D. (eds.) *Law's New Boundaries. The Consequences of Legal Autopoiesis*. Aldershot: Ashgate, pp. 179-196.
- Rogowski, R. (2007) Reflexive Coordination. Thoughts on The European Social Model, Jean-Monnet Working Paper, New York University School of Law, New York.
- Rogowski, R. (ed.) (forthcoming) *The European Social Model. Law and Policy of Transitional Labour Markets*. Aldershot: Ashgate.
- Rogowski, R. / Schömann, I. (2002) The Role and Impact of Social Partners on Training in the European Union, in: Rouault, S. / Oschmiansky, H. / Schömann, I. (eds.) *Reacting in Time to Qualification Needs: Towards a Cooperative Implementation?* Discussion Paper FS I 02-202. Berlin: Wissenschaftszentrum, pp. 196–222.

- Rogowski, R. / Wilthagen, T. (eds.) (1994) *Reflexive Labour Law. Studies in Industrial Relations and Employment Regulation*. Deventer: Kluwer.
- Schäfer, A. (2006) Resolving Deadlock: Why International Organisations Introduce Soft Law, *European Law Journal*, Vol. 12, pp. 194-208.
- Scharpf, F.W. (1999) *Governing in Europe: Effective and Democratic?* Oxford: Oxford University Press.
- Scharpf, F.W. (2002) The European Social Model: Coping with the Challenges to Diversity. *Journal of Common Market Studies*, Vol. 40 (4), pp. 645–670.
- Schmid, G. (1994) Flexibilization of the Labour Market through Law? On Equity and Efficiency in the Regulation of Working-Time, in: Rogowski, R. / Wilthagen, T. (eds.) (1994) *Reflexive Labour Law. Studies in Industrial Relations and Employment Regulation*. Deventer: Kluwer, pp. 317-343.
- Schmid, G. (2002) Transitional labour markets and the European social model: towards a new employment compact, in: Gazier, B./ Schmid, G. (eds.) *The Dynamics of Full Employment. Social Integration through Transitional Labour Markets*. Cheltenham: Edward Elgar, pp.
- Schmid, G. / Kull, S. (2004) Die Europäische Beschäftigungsstrategie. Perspektiven der Offenen Methode der Koordinierung, in: Kaelble, H. / Schmid, G. (eds.) *Das europäische Sozialmodell. Auf dem Weg zum transnationalen Sozialstaat*. WZB-Jahrbuch 2004. Berlin: Sigma, pp. 317-343.
- Sisson, K. (1999) The “New” European Social Model: the End of the Search for an Orthodoxy or Another False Dawn? *Employee Relations*, Vol. 21 (5), pp. 445–462.
- Streeck, W. (1996) Neo-Voluntarism: A New European Social Policy Regime? In: Marks, G. et al., *Governance in the European Union*. London et al.: Sage, pp. 64–94.
- Streeck, W. (1999) *Competitive Solidarity: Rethinking the European Social Model*. MPIfG Working Paper 99/8. Köln: Max-Planck-Institut für Gesellschaftsforschung.
- Teubner, G. (1983) Substantive and Reflexive Elements in Modern Law, *Law and Society Review*, Vol. 17 (2), pp. 239-285.
- Trubek, D.M. / Cottrell, P. / Nance, M. (2006) ‘Soft Law’, ‘Hard Law’ and EU Integration, in: De Burca, G. / Scott, J. (eds.) *Law and New Governance in the EU and the US*. Oxford: Hart, pp. 65-94.
- Trubek, D.M. / Trubek, L.G. (2005) Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination. *European Law Journal*, Vol. 11, pp. 343 -364.
- Wickham, J. (2002) The End of the European Social Model: Before It Began? Working Paper of the Irish TUC, Dublin.
- Wilthagen, T. (2005) Striking a Balance? Flexibility and Security in European Labour Markets, in: Bredgaard, T. / Larsen, F. (eds.): *Employment policy from different angles*, DJØF Publishing Copenhagen, pp. 253-267.
- Wilthagen, T., Houwerzjl, M. (2005) How does flexibility affect social cohesion? In: Council of Europe (ed.) *Reconciling labour flexibility with social cohesion – Facing the challenge*. Trends in social cohesion, No. 15. Strasbourg, pp. 109-131.

Wilhagen, T., Rogowski, R. (2002) the legal regulation of transitional labour markets, in: Gazier, B./ Schmid, G. (eds.) *The Dynamics of Full Employment. Social Integration through Transitional Labour Markets*. Cheltenham: Edward Elgar, pp. 233-273.

Wilthagen, T. / Tros, F. (2004) The concept of 'flexicurity': a new approach to regulating employment and labour markets, *Transfer*, Vol. 10 (2), pp. 166-186.

Zeitlin, J. (2005) The Open Method of Coordination in Action. Theoretical Promise, Empirical Realities, Reform Strategy, in: Zeitlin, J. / Pochet, P.; Magnusson, L. (eds.) *The Open Method of Co-ordination in Action: The European Employment And Social Inclusion Strategies*. Bruxelles: Peter Lang, pp. 447-503.

Zeitlin, J. / Pochet, P.; Magnusson, L. (eds.) *The Open Method of Co-ordination in Action: The European Employment And Social Inclusion Strategies*. Bruxelles: Peter Lang.

Documents and Reports

Commission (2001) White Paper on European Governance. COM(2001) 428 final.

Commission (2003a) Communication on Strengthening the Social Dimension of the Lisbon Strategy: Streamlining Open Coordination in the Field of Social Protection. COM(2003) 261 final.

Commission (2003b) Amended proposal for a Regulation of the European Parliament and of the Council on Coordination of Social Security Systems. COM(2003) 596 final.

Commission (2004) Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Modernising Social Protection for the Development of High-Quality, Accessible and Sustainable Health Care and Long-Term Care; Support for the National Strategies using the "Open Method of Coordination". COM(2004) 304.

Commission (2005) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on European Values in the Globalised World. COM(2005) 525 final.

Commission (2006) Green Paper on Modernising Labour law to Meet the Challenges of the 21st Century. COM(2006) 708 final.

European Council (2002) Barcelona European Council, Presidency Conclusions, 15-16 March 2002. 100/1/02.

European Council (2003) Jobs, Jobs, Jobs. Creating more employment in Europe. Report of the Employment Taskforce chaired by Wim Kok. November 2003.

European Council (2004) Facing the Challenge. The Lisbon strategy for growth and employment. Report from the High Level Group chaired by Wim Kok. November 2004.

European Council (2006) Brussels European Council, Presidency Conclusions, 23-24 March 2006. 7775/06 CONCL 1

European Trade Union Institute (ETUI) (2000) Observatoire social européen (OSE), Social Developments in the European Union 2000. Second annual report.

High Level Group on the Future of Social Policy (European Commission Directorate-General for Employment and Social Affairs) (2004) Report of the High Level Group on the Future of Social Policy in an Enlarged European Union.