

“The European Employment Strategy as a new governance paradigm for EU-level social policy and its implementation through the Open Method of Coordination”

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Abstract

The paper looks at the European Employment Strategy (EES) within the discourse of EU Governance. In particular, I focus on three main research questions.

Does the EES, implemented through the ‘Open Method of Co-ordination,’(OMC) represent a new mode of policy-making?

What is the effective impact of self-regulatory codes of conduct, benchmarking, peer pressure and exchange of best practices at the national level?

What is the contribution of the EES and OMC to the extant EC Social Policy regulation?

I then present a model for the setting up of a new institutional framework for the EES and for EC Social Policy.

Recent actions and strategies by the European Union's Institutions in the area of Social Policy *sensu lato* reveal an increase in the use of new forms of governance that promote differentiation and pave the way towards voluntary networks of policy making.¹

The analysis of the European Employment Strategy as an innovative mode of governance in the decision-making process of the European Union must necessarily be included within the discourse of *differentiated integration*, i.e. a unification characterised by a strong differentiation between European countries. The whole Europeanisation process is in fact permeated by differentiation.

The EU system, which represents a Supra-system *sui generis*, can be sub-divided in two sub-systems, intergovernmental co-operation and an EU/EC Institutional-institutionalised system. This basic dual structure of the EU system has always characterised its conceptualisation. It has also originated a form of "divided sovereignty" between Member States and the Community Institutions, which is regulated by the principles of subsidiarity, proportionality and conferred powers.

It is within this broad framework of sub-systems and in particular within the context of the second sub-system, the EU/EC Institutional-institutionalised system, that the European Employment Strategy was created.

¹ See E. Szyszczak, "The New Paradigm for Social Policy: A virtuous circle?," (2001) 38 *CMLRev* 1125 & 1140-1144.

As a new form of soft law, which also represents a novelty compared to previous non-binding legal instruments,² the Employment Strategy represents a challenge to legal theory. In fact not only it represents a departure from social law and legislative initiatives but it also attempts to establish a nexus between the different EU policy areas, such as structural, regional, taxation and education policies, by widening its scope of action, which goes beyond the field of social policy *strictu sensu*. The Employment Strategy thus aims at developing a *social dimension* to the activities of the European Union. It has therefore brought a sea change in the objectives of the EU agenda.

The idea of adopting a common strategy for employment dates back to several years ago. A continuum can be traced from the 1993 White Paper on *Growth, Competitiveness and Employment* up to the recent Barcelona Summit. Over an arch of time that starts from the European Council of Essen (June 1994) up to the Laeken (December 2001) it is possible in fact to trace a progressive commitment to issues regarding employment, social cohesion, competitiveness and new technology.

The European Employment Strategy was formally adopted at the 1997 Amsterdam Summit. It was fast-tracked by the Luxembourg Summit in the autumn of 1997 and the first Employment Policy Guidelines were issued in December 1997.³ A common structure for the National Action Plans was agreed at the end of January 1998 and Member States agreed to submit the first employment reports by mid-April. The Employment Policy Guidelines are based on four Pillars:

² See S. Régent, "The Open Method of Coordination: A Supranational Form of Governance?" (2002) *International Institute for Labour Studies* 6-20.

Employability;

Entrepreneurship;

Adaptability;

Equal Opportunities between men and women.

The Employment Strategy looks at reform in the short run with a gradual shift towards major restructuring in the long run.

It does not cover all policies that are related to employment. Important areas such as monetary, fiscal and wage policy that concern economic and employment growth in the European Union are not included in the Employment Strategy. The latter has developed as a supply-side strategy focusing on altering structural impediments to employment. Nonetheless, the strategy embraces a much larger number of areas than have ever been addressed at the European level through traditional social policy regulation.

At the Lisbon Summit followed by subsequent Summits the Employment Strategy has been defined as a regulatory tool to be included in the ‘Open Method of Coordination.’⁴

This new mode of governance can be described as constituting an enmeshment of open participation in the implementation of policies, consensus building, use of benchmarks, exchange of best practices and information, self-regulatory codes of

³ See E. Szyszczak, “The Evolving European Employment Strategy,” in J. Shaw (ed) *Social Law and Policy in an Evolving European Union*, (Oxford, Hart Publishing, 2000), p. 197; E. Szyszczak, “The New Paradigm for Social Policy: A virtuous circle?,” (2001) 38 *CMLRev* 1132-1134.

conducts and more broadly co-operation and co-ordination within a multi-tiered framework of governance.⁵

It refers to the alternative “softer” method of policy-making that is used either in areas in which there has traditionally been a very narrow margin of opportunity for action at European level or in areas, which have never been in the remit of Community decision-making.⁶

Moreover, the Employment Strategy is an *iterative process*, which involves the participation of various actors, i.e. the European Council, the Commission, the Council, the Employment Committee, the Member States, the Social Partners and regional and local authorities.⁷ This shift from centralised legislation aiming at harmonisation to forms of concerted policy-making and partnership may be defined as a form of “co-operative subsidiarity.”

Globalisation has decentralised the central vision of the state in the making of law and politics. In addition to its fragmenting tendency, however, it has also integrated the different levels of policy-making, i.e. supranational, national and regional, creating a form of *trans-national* or *trans-border multi-level* of governance.⁸

⁴ See Presidency Conclusions of the European Council of Lisbon, 23-24 March 2000, [online]. Available at:<URL:http://ue.eu.int/presid/conclusions.htm>.

⁵ See E. Szyszczak, “The New Paradigm for Social Policy: A virtuous circle?,” (2001) 38 *CMLRev* 1129; S. Régent, “The Open Method of Coordination: A Supranational Form of Governance?” (2002) *International Institute for Labour Studies* 15-23.

⁶ See C. De La Porte, “Is the Open Method of Co-ordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?” (2002) 8/1 *European Law Journal* 38-39.

⁷ See J. Goetschy, “The European Employment Strategy, Multi-level Governance and Policy, Coordination: Past, Present and Future,” forthcoming in Zeitlin and Trubek (eds) *Governing work and welfare in a New Economy: European and American experiments*, (London, OUP, 2002), p. 9.

⁸ See S. Sciarra, “Global or Re-nationalised? Past and Future of European Labour Law,” in F. Snyder (ed.) *The Europeanisation of Law. The Legal Effects of European Integration*, (Oxford, Hart Publishing, 2000), pp. 269-289.

The creation of the European Employment Strategy is in a way, a product of globalisation. The Employment Strategy in fact enhances what I call a *transverse form of policy-making*. This new process draws upon a trans-national basis of self-regulation, voluntary networking links and more specifically on the interaction of actors distributed across the various levels of policy-making.

Contemporaneously, the Employment Strategy whilst introducing innovation and foreseeing an important and renovated role for the state and for the Social Partners, maintains intact the extant institutional design.⁹

The Employment Strategy aims at achieving six major objectives regarding both the European and the national level of policy-making:

- i. legitimacy of Community action;
- ii. promotion of policy learning;
- iii. efficiency of policy-making at the European and national level;
- iv. increase of policy co-ordination among all levels of government;
- v. greater inter-action between different policy areas;
- vi. promotion of differentiated forms of integration whilst maintaining a certain degree of convergence.

The first objective, legitimacy, has always been pursued by the EC Institutions in the difficult achievement of promoting further integration in policy areas, which have traditionally been considered as pertaining to the national domain. From this perspective the Employment Strategy does not represent an entirely new mode of

⁹ See EC Commission, *European Governance, A White Paper*, COM (2001) 428 final, Brussels, 25.07.2001, pp. 22-23.

governance. Rather it may be defined as constituting a *tertium genus* in that it presents elements of continuity with previous methods of policy-making in the field of social law and contemporaneously representing an innovative and qualitative break from the past. Likewise for the objective concerning the promotion of differentiated forms of integration whilst maintaining a certain degree of convergence.

The novelty of the Employment Strategy is instead clearly visible with regard to the promotion of policy learning and improvement of policy-making efficiency at the European and national level, the primacy given to the national level of policy-making in the implementation of the strategy, the increase of policy co-ordination among all levels of government and the promotion of greater inter-action between different policy areas.

The implementation of the Employment Strategy through the ‘Open Method of Co-ordination’ represents a form of dynamic soft law instrument. The same definition of this novel regulatory tool as an “open method” clearly signifies the decision to include different policy areas of EU law into the Employment Strategy.

Furthermore, with the submission of National Action Plans for Employment by Member States in accordance with common objectives and indicators established in the annual Employment Policy Guidelines, the evaluation made by the European Institutions through the Joint Employment Report and the Assessment Report on the Implementation of the Employment Policy Guidelines, the Employment Strategy illustrates the way the Europeanisation process operates, which is an open process

itself leading to a re-nationalisation or re-regulation of national policies to meet supranational standards.¹⁰

The Employment Strategy represents a new standard by which to assess both economic and social policies and thus an excellent observatory from which future trends in legal studies can be foreseen.

Hence, we can conclude that whilst the rationale of the creation of the European Employment Strategy presents elements of continuity with the past, the whole process through which the Strategy is implemented does represent a new mode of policy-making within the European Union.

One of the main objectives of the Employment Strategy is the promotion of policy learning. It may be argued that this is an area where the Employment Strategy has been most successful.

The promotion of policy learning is based on the exchange of best practices and on the use of benchmarking.¹¹ The latter was first introduced in the context of industry as a management tool to ameliorate firms' competitiveness. Within the Employment Strategy, the term benchmarking refers to the comparison of performance data in the light of agreed guidelines in order to examine and establish best national practices.

The exercise of benchmarking relies on non-legal sanctions and more precisely, on peer pressure, which is designed to have a psychological effect. It can thus be defined

¹⁰ See S. Sciarra, "Global or Re-nationalised? Past and Future of European Labour Law," in F. Snyder (ed.) *The Europeanisation of Law. The Legal Effects of European Integration*, (Oxford, Hart Publishing, 2000), pp. 269-289.

as a moral or political constraint.¹² It is self-binding in that the national government concerned feels compelled to take the necessary measures to meet the targets required. The implicit comparison with other national governments that have met the criteria and the criticism upon their mode of operation exert consequently a strong pressure on governments since it affects their own existence and legitimacy. The use of peer pressure explains why the European Employment Strategy is defined as a “soft law” instrument.

A variety of EC and national documents and case studies confirm that the Employment Strategy is gradually reconfiguring policy networks, fostering co-operation between different policy areas, increasing the exchange of information on innovation, fostering the exchange and benchmarking of best practices, promoting deliberative modes of governance for problem solving through systems of partnerships between the different stakeholders and the different levels of authority.

The amendments introduced in the Employment Guidelines, in particular in the guidelines for 2001, are evidence of the fact that overall the Employment Strategy is fostering policy learning and innovation.¹³

Examples of these changes are the addition of an obligation to modernise Member States’ public employment services and apprenticeships systems. Other changes concern the new obligations to eliminate the levels of poverty by reforming tax and social benefit systems; improving skill qualifications, providing training for future

¹¹ See C. De La Porte, “Is the Open Method of Co-ordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?” (2002) 8/1 European Law Journal 41-44.

¹² See Degryse, C. and Pochet, P., *Social Developments in the European Union, Second Annual Report*, Observatoire Social Européen (OSE), European Trade Union Institute (ETUI), Brussels, April 2001, p. 14, [online]. Available at:<URL:<http://www.ose.be/en/default.htm>>.

entrepreneurs, introducing policies to keep older workers in the workforce and finally adopt new labour market policies to create a European knowledge-based society.¹⁴

The existence of these mechanisms, which foster policy learning clearly show that the Employment Strategy does aim at promoting policy learning and innovation.

However, at a closer look of Member States National Action Plans it becomes obvious that these mechanisms need to be implemented more effectively. An example is given with regard to the obligation that Member States have to exchange best practices.

Since the 1999 Employment Guidelines Member States have been required to present examples of best practices. The achievement of such a target has been quite scant so far.

Although the Joint Employment Report lists a few examples of best practices, the method used for the share of best practices consists in the review of the National Action Plans of those Member States, which have not given enough details of best practices, which are then circulated to all Member States. Moreover, most National Action Plans dedicate a section to the best practices only in the appendix, which is usually only 2-3 pages long. The Commission has therefore started a series of meetings with representatives of the national governments to identify the best practices and promote their exchange between all the Member States. Moreover, the Commission has recently, issued a document on examples of good practices in the field of gender equality where the measures adopted at national level have been little.

¹³ See Council Decision of 19 January 2001, *on Guidelines for Member States' Employment Policies for the Year 2001*, 2001/63/EC, OJEC, L22/18, 24.1.2001.

¹⁴ *Idem.*

Finally, Member States are now required to present their National Action Plans to all the other Member States in order to comment and compare the measures adopted. While this does certainly promote benchmarking the whole session allocated on each National Plan is only of one hour. The session includes a brief presentation by the Member State, comments by two other Member States and discussion. Thus it is necessary to review these learning policy mechanisms in order to make them more effective.

It may be concluded that the Employment Strategy has introduced significant learning policy mechanisms, which are still at an embryonic stage. However, some of the changes inserted in the Employment Guidelines exemplify the fact that the learning process is gradually affecting policy development and the preliminary results achieved so far suggest that more changes will be made also at the national level in the following years.

The issue is to assess or better said how to assess to what extent the Employment Strategy introduces changes at the national level. Cross-country comparisons are difficult to make and to examine given the difficulty in selecting, which indicators and benchmarks are appropriate. Secondly, given the lack of any legal sanctions Member States may not only decide not to comply with a given Council recommendation if a particular economic or political situation is unfavourable for new reforms but Member States may also claim the lack of legitimacy of policy-making in the European Union due to the existing democratic deficit of the European Union's policy-making process.¹⁵

The implementation of the Employment Strategy through the Open Method of Co-ordination has created a new cultural framework within the European Union¹⁶ by gradually reconfiguring policy networks, fostering co-operation between different policy areas, increasing the exchange of information on innovation, fostering the exchange and benchmarking of best practices, promoting deliberative modes of governance for problem solving through systems of partnerships between different stakeholders and different levels of authority.¹⁷

This has been possible by dint of soft regulatory measures, such as exchange of best practices and benchmarking, which have generated self-regulatory codes of conduct and voluntary networks that aim to optimise the efficiency of national policies. It has thus fostered the inclusion of new social policy areas on the agenda of the Community.

Contemporaneously, however, some of the elements on which the Employment Strategy is based upon also constitute its weaknesses.

The proliferation of new actors and bodies in the European Union, the different typology of acts and the new processes that it has established, maintaining intact the Community's institutional design, has generated confusion among lawyers and policy-makers.¹⁸

¹⁵ See Hodson, D. and Maher, I., "The Open Method as a new mode of governance: The case of soft economic policy co-ordination," in Wallace, H. (ed) *The Changing Politics of the European Union: An Overview*, special edition of the Journal of Common Market Studies, November 2001, Vol. 39, 10.

¹⁶ See M. Biagi, "The impact of the European Employment Strategy on the Role of Labour Law and Industrial Relations," (2000) 16 *IJCLLR*, 161.

¹⁷ See J. Goetschy, "The European Employment Strategy, Multi-level Governance and Policy, Coordination: Past, Present and Future," forthcoming in Zeitlin and Trubek (eds) *Governing work and welfare in a New Economy: European and American experiments*, (London, OUP, 2002), p. 11.

In fact various questions arise in this context. How do these complementary forms of policy-making interact with one another? How does the establishment of an epistemic community with the creation of a voluntary network system, which now includes civil society and reinforces the consultative role of extant committees such as the Economic and Social Committee and the Committee of the Regions and the creation of the Social Protection Committee fit in effectively with the Community method, which the Commission has clearly stated as being the primary method of decision-making at the European level? What changes does it bring to the implementation of EC primary law? What is the relationship between hard law and soft law? With regard to the recent directives on sex discrimination or race discrimination, how does their effective implementation interact with the implementation of the fourth Pillar of the EES on equality between men and women? Neither types of law can be analysed in an isolated way.

The issue of soft law is also related to that of the distribution of competences and division of powers in the European Union.

In particular, the promotion of the social dialogue at Community level seems to be used as a regulatory tool or technique by the Commission to resolve in a patched up way the important issue of democratic deficit at the European level, to the detriment of the EU Parliament.¹⁹ This view is confirmed by the current status of those framework agreements, which lack of any legal relevance compared to those, which are implemented by way of a Council Directive.

¹⁸ See E. Szyszczak, "The Evolving European Employment Strategy," in J. Shaw (ed) *Social Law and Policy in an Evolving European Union*, (Oxford, Hart Publishing, 2000), p. 197.

¹⁹ See M. Biagi, "The Implementation of the Amsterdam Treaty with regard to employment: Co-ordination or Convergence?," (1998) 14 *IJCLLR*, 325. The author argues that the Commission reduces Member States' decision-making power in the field of employment policy through the introduction of co-ordination.

Moreover, the use of soft law instruments with no legal sanctions leads to another issue, i.e. the effectiveness of the European Employment Strategy. The complexity of the institutional framework combined with the lack of legal sanctions and the absence of a rule of law approach entails a decrease in transparency and thus of credibility and legitimacy of the European Union's regulatory system.²⁰

Finally, the limited number of quantified targets and the confusion regarding the results to be achieved undermines the effectiveness of the Employment Strategy and, more generally, the validity of the Open Method of Co-ordination as a new mode of governance.

Other weaknesses of the Employment Strategy and the Open Method of Co-ordination are the lack of co-ordination of the former with other EU policies namely Economic and Monetary Union and EU State Aid Regime, in particular the existing subordination of the Employment Guidelines to the objectives listed in the Broad Economic Policy Guidelines and also the insufficient allocation of EU financial resources.²¹

These weaknesses are also aggravated by the lack of a system of protection of social rights in the implementation of the Employment Strategy. In particular, the lack of means of redress available to civil society and individuals against non-binding EU acts.

²⁰ See See Hodson, D. and Maher, I., "The Open Method as a new mode of governance: The case of soft economic policy co-ordination," in Wallace, H. (ed) *The Changing Politics of the European Union: An Overview*, special edition of the Journal of Common Market Studies, November 2001, Vol. 39, 10.

²¹ See S. Ball, "The European Employment Strategy: The Will but not the Way?," (2001) 30 *Industrial Law Journal* 359-366.

My contention is that it is necessary to create a new institutional framework in the context of EU Social Policy,²² in accordance with the principles of subsidiarity and proportionality in order to guarantee a clear distribution of competence among the relevant actors with an accurate definition of tasks, functions, consultation procedures and legal processes in creating legislation. This new institutional framework eliminates situations of uncertainty with regard to the distribution of competences and it increases transparency, legitimacy and the respect of the rule of law. This reform becomes particularly relevant in view of the enlargement process.

In order to create this new institutional framework it is necessary to establish a link between the Employment Strategy/Open Method of Co-ordination and the “acquis communautaire” of Labour Law, which is at present missing. Some first attempts towards the creation of this mutual relationship between soft law and hard law have already been made in the recent framework agreements and the Directives adopted according to Article 139 EC, e.g. the European Framework Agreement on Part-Time Work, on Fixed-Term Work, the Council Directive on Fixed-Term Work, and the Directive on Race and Ethnic Discrimination.

Firstly, it is necessary to establish a hierarchy of acts that would draw a clear distinction not only between primary and secondary legislation but also between legislative and executive acts. Such a reform would simplify the EU decision-making and enhance democratic scrutiny. It would also have the purpose of reducing in number and sharpen the focus of the decisions, recommendations, opinions, guidelines, declarations, resolutions and statements.

²² See S. Sciarra, “The Employment Title in the Amsterdam Treaty. A Multi-language Legal Discourse,” in O’Keefe D. and Twomey P. (eds) *The Treaty of Amsterdam* (Oxford, Hart Publishing,

The hierarchy of acts should also define the scope and the role of soft law instruments, such as co-regulation, Open Method of Co-ordination and more generally, self-regulatory codes of conduct or benchmarking.

With this regard, it becomes necessary to amend Article 308 EC in order to eliminate the ambiguity of the provision and to shed more clarity on when “action by the Community should prove necessary” and when the “Treaty has not provided the necessary powers.” The amended provision could list a series of concrete circumstances in which Community action might be needed rather than simply stating “during the course of the operation of the common market.”

Secondly and related to the former, Article 5 EC should be reviewed in the light of the new developments, which the principle of subsidiarity has been subject to over the years. The Protocol attached to the Amsterdam Treaty in fact allows for a broader interpretation of subsidiarity: “subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its powers to be expanded where circumstances so require.” The distinction between horizontal and vertical subsidiarity, which has been defined in academia, should be included in the provision that only refers to the distribution of competence between the Member States and the Community in order to give an institutional framework to the multi-tiered structure of the European Union. The amended provision should include in paragraph 2: “[...] only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, by the regional, local authorities or by civil society..[...].” A reviewed

1999), pp. 169-170.

Protocol on the principle of subsidiarity could define what is meant by “regional,” “local” and “civil society” and establish a criteria to determine when to apply the principle of horizontal subsidiarity or when to apply vertical subsidiarity.

In order to guarantee a full protection of individual and collective rights EU soft law instruments, which smoothly introduce changes should be given a definite period of efficacy or validity at the end of which they should be transformed into hard law instruments. The period should be established *a priori* and be included in the preamble of the concerned soft law act. This would guarantee the principles of legal certainty and legal economy.

In this context the role of the social partners becomes pivotal. With their participation in the decision making process, pursuant to the provisions laid out in Title XI of the Treaty, they establish a network system between the European level and the national and local level and can thus monitor the effective implementation of EU law at these levels of policy-making, including the sectoral and inter-sectoral levels.²³ Furthermore, in the context of the Employment Strategy, the exclusive responsibility given to them in the Adaptability Pillar with regard to the modernisation of work organisation (G13) and the contribution of education and life long learning to adaptability (G15) provides them with valuable tools of information to be transposed in the framework agreements, which may be transformed into EU secondary law, via a Decision of the Council.

²³ See E. Szyszczak, “The New Paradigm for Social Policy: A virtuous circle?,” (2001) 38 *CMLRev* 1147-1150.

The Treaty of Amsterdam with the introduction of Title VIII in the EC Treaty on Employment and by establishing the European Collective Bargaining System with Title XI has certainly provided the legal base for the establishment of an institutional framework, which mutually reinforces measures at both EU and Member State level. However, the provisions laid down in the two Titles do not suffice. There is no direct link in fact between the co-ordinated employment strategy outlined in Articles 125-130 EC and the European Social Dialogue established in Articles 136-140 EC.

The only indirect reference is made in Articles 136 EC paragraph 1, “the development of human resources with a view to lasting high employment and the combating of social exclusion” and Article 140 EC paragraph 1, “the Commission shall encourage co-operation between the Member States and facilitate the co-ordination of their action in all social policy fields under this chapter, particularly in matters relating to: - employment; [...] basic and advanced vocational training, and –social security.” In both provisions, however, the reference is made in rhetoric terms.

I therefore argue that the provisions of Title VIII should be amended to include the European Social Partners. In particular, Article 128(2) EC should be linked to Article 138(2) EC, which states: “To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action.”

Secondly, Article 128(2) EC would also have to be amended in order to enhance the role of the European Parliament in the adoption of the Employment Guidelines. Thus, the decision-making process concerning the Employment Policy Guidelines should be

changed in the following way: the Parliament rather than being *consulted by* the Council should *act together* with the Council in the adoption of the guidelines for employment. The legislative route to be used would be the co-operation procedure, pursuant to Article 252 EC. The Community act would take the form of a Directive rather than of a Decision. The Directive in fact would respect the diversity of Member States national welfare state and industrial relation systems, allowing them to maintain a great level of discretion in the implementation of the Employment guidelines.

Within this context amendments should be made to the last sentence of paragraph 2 so as to change the underlying secondary position given to the Employment Policy Guidelines in comparison to the Broad Economic Policy Guidelines.

Thirdly, Article 128(3) EC should be reviewed to include the participation of the social partners in the elaboration and implementation of the National Action Plans at the national level.

The new provision in Article 128(2) EC would be as follows:

“On the basis of the conclusions of the European Council, the Council together with the European Parliament on a proposal from the Commission according to Article 138(2) EC and after consulting representatives of the Economic and Social Committee, the Committee of the Regions and the Employment Committee, shall each year draw up guidelines, which Member States shall take into account in their employment policies. These guidelines shall be adopted in accordance with the objectives of the broad guidelines adopted pursuant to Article 99(2) EC. To this end,

the Spring European Council shall assess the implementation of both guidelines, which are devoted to an overall social and economic strategy.”

The new version of Article 128(3) EC would be as follows:

“Each Member State shall provide the Council, the European Parliament and the Commission with an annual report on the principle measures taken, in consultation with the social partners, to implement its employment policy in the light of the guidelines for employment as referred to in paragraph 2.”

One of the main criticisms that can be made to the Employment Strategy is that at the European level there is a clear lack of a democratic process. The fact that the strategy is an iterative process based on multi-level governance does not entail that it is also a democratic process. At a closer analysis of the various phases of the Employment Strategy, in fact Member States through the channel of the European Council Summit in December and the Council for the adoption of the future Employment Policy Guidelines have a great level of manoeuvre. This is confirmed by the fact that the legitimacy of the Guidelines adopted by the Council has never been questioned so far and more generally the whole exercise has been criticised by individual member States but in an informal rather than in an official context. The formal processes for exchange of best practice have been institutionally limited out of practical necessity.

In particular the meetings between the Member States concerning the exchange of best practices and since 1999 also with the participation of Commission officials should be given a formal format. Likewise, the informal meetings between government representatives of certain Member States and Commission officials aimed at providing feedback to the former over the implementation of the Employment

Policy Guidelines. With this regard a new Annex to the Employment Guidelines could define in more details the procedural aspects of these meetings.

The inclusion of both the Social Partners and the European Parliament represents a pivotal added value to the Strategy because it increases the democracy of the whole strategy and more specifically the legitimacy of the EC Institutions, which are made more accountable because there is more transparency in the process.

Contemporaneously, other related changes should be made:

- a) Amendments should be made to the Stability Pact, in order to change the 3% budget deficit limit to a more flexible cyclically adjusted measure, which takes into account the economic trend of a country of a specific regional area;
- b) Amendments should be made to Art. 105 EC so as to introduce growth next to the objective of price stability;
- c) Definition of rights. On the one hand, define a set of substantive social rights. On the other hand, identify the kind of legal rights to representation and participation in the Employment Strategy;
- d) The elevation of EU citizenship implicit in the European Charter of Fundamental Rights could entail the opening up of access by the individual to the Court of Justice. To date, Article 230 EC has limited the circumstances in which a non-privileged litigant can challenge the EU institutions, and the Court has been strict in its interpretation of the clause.

A very significant change to the quality of the jurisdiction of the Court would be to allow the citizen and by inference, non-governmental associations and the social partners to seek judicial review directly. Not only would this consolidate human rights

protection at the EU level, but it would also increase the means of redress available at the national level. More specifically, the European social partners, whose representativity should be ascertained, could introduce collective complaints when social rights are infringed by Member States, as well as when insufficient action is taken to permit the correct exercise of the rights themselves.

Moreover, the use of the Directive for the issue of the Employment Policy Guidelines is also important in the context of judicial review. This change combined with the establishment of a judicial framework, notably the opening up of the access by the individual to the European Court, combined with the existing provisions laid out in Part V, Title I, Chapter 1, Section 4 of the Treaty, in fact would entail a strong protection of social rights *sensu lato*.

A way of introducing a means of redress against non-binding legal instruments, could be to challenge the national measure adopted pursuant to the non-binding instrument. More precisely, national courts would assess the legitimacy of a national measure adopted pursuant to a soft law document by referring a question concerning their interpretation or validity to the European Court. Following the Grimaldi case the European Court stated that soft law acts could be read in parallel with binding sources either because it fostered the making of a particular provision of national law or because it can cast light on the interpretation of other provisions of Community law that are binding and relevant to the case under consideration.

This revitalised process would be based on principles of mutual recognition rather than on the objective of harmonisation, pursuant also to Article 125 EC. The

principle, which has been successfully applied in the area of product safety, would serve the purpose of approximating different national laws.

It may be argued that in the future the European Court of Justice may have to evaluate national employment policies and thus a similar system of sanctions provided for in Articles 104(9), (10) and (11) EC should be introduced.