

Soft Law in the Multi-Level Governance of
Social Policy: Portraits from Two EU
Member States

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Introduction

This paper is based on my dissertation research, which is a study of new governance processes (including local partnerships and the open method of coordination) at the local and national/European level in Portugal and Ireland. Though I was always interested in the links between the different levels, I naturally learned much more about the individual processes than I did about the relationships between them, and this will likely be reflected in most of the scholarly work I produce from my dissertation research. Despite this, and despite the fact that, having completed fieldwork relatively recently, I have only begun to analyze my data, I am still able to offer an initial sketch of how soft law processes at different levels interact with one another, and how soft law processes interact with governance at different levels more generally. I would like to emphasize that since I have not yet been able to complete the analysis of my data (which includes over 100 in-depth interviews and hundreds of related documents), these results are preliminary, tentative and incomplete. I should also apologize in advance for me trailing off in the middle of a sentence here and there – I have a less than two week-old baby at home, who has of course prevented me from adhering to anything resembling a sleep schedule.

I'm aware there are objections in some quarters to the use of the term soft law to describe the open method of coordination and similar new governance mechanisms, since hard law is often much less hard than one would imagine, and since what is described as soft law can resemble hard law in its effectiveness in stimulating action. I might add that much of the current literature on soft law focuses on such things as international environmental treaties, which really have little resemblance to the open method of coordination. But although I'm not committed to the term soft law, I do think that it makes sense to analytically parse out the elements that distinguish plan-based processes like the open method of coordination and the other programs I studied in my dissertation, from other rule-making, monitoring and enforcement mechanisms. Conversely, and more importantly for the topic of this presentation, it also worth considering what plan-based processes – I'm tempted to say plan-based law – at different levels of governance have in common with one another, and how they interact, if at all, within the multi-level governance of the European Union and its member states. My eventual aim is to see these results contribute to the theorization of soft law, new governance processes, and multi-level governance.

What are these different soft law or plan-based processes? (From this point forward I will use the terms “soft law processes,” “new governance processes,” and “plan-based processes” interchangeably.) The open method of coordination, which should be familiar to everyone here, involves the setting of common guidelines or objectives by all member states, each of which produces documents detailing their plans and accomplishments in terms of these documents. These documents, and the reality that they purport to describe, are scrutinized by other member states, independent experts, social partners, and the European Commission, resulting in reports or recommendations, depending on the OMC, that assess the progress of each country.

In national social dialogue, also known as social partnership or social concertation, deliberations between social partners from labor and industry, government representatives, and non-profit organizations, including sectoral and single-issue

organizations, result in a plan which outlines the expected behavior of each partner. Often seen as mainly wage deals, in which labor unions and businesses agree to pay raises within a certain range, concertation often delves into other realms, involving promises or suggestions that social partners or more often government will develop certain actions associated with employment or social inclusion. This area is really not the focus of my dissertation, but I learned enough about it that it will be possible to make a few relevant observations, since these are arguably plan-based processes with much in common with other “soft law” arrangements. While concertation is probably assumed by most to be hard law, because of the hard commitments implied by the government’s and partners’ signatures, this would be misleading, since agreements are not strictly enforced, since the process is based on the writing and implementation of plans (the compliance with which is open to interpretation), and since it sometimes creates ongoing processes meant to encourage (but not mandate) policy changes in a certain direction.

What I’m calling local partnerships consist of two main types. In the state-based variety, which include Ireland’s City and County Development Boards, Ireland’s RAPID program, and Portugal’s Social Network Program, various government agencies, non-profits, service providers, businesses and other entities develop through deliberation diagnoses of social problems and medium-term strategic plans for actions to improve the local social policy regime, through promoting coordination, cooperation and partnership among the different entities, both to develop new programs and better spend the available resources by reducing overlap and duplication of efforts. Another kind of local partnerships, among them Ireland’s “local partnerships” and Portugal’s local development associations, are private organizations that run various projects and programs indirectly funded by the national state and the EU; especially in Ireland, these partnerships are well-known for their policy experimentation. Before going on, I should note that ultimately I was quite impressed with most of these local partnerships, and there were many interesting examples of good practices. But since I’m focusing here on the connections between processes, I’m not really going to describe any of these substantive accomplishments in this talk.

Interactions Between Plan-Based Processes and Different Levels of Governance

This section of the paper gives outlines of my data about the interactions between different plan-based processes and between these processes and different levels of governance.

The OMC and the National Level. The OMC has affected national-level politics in Portugal and Ireland in four principal ways. First, it has encouraged policy revision and the creation of new policies, especially in the field of active labor market policies. The guidelines and objectives associated with the OMC has affected policy developments in a number of ways. Also, because of the existence of the OMC, policymakers sympathetic to the OMC’s goals have been able to introduce new policies “under European cover” (as one respondent put it).

Second, especially in Ireland, the OMC has enabled the formation of processes through which ministries and other units within the government are pressured to make progress in certain policy areas, in order to contribute to the country’s performance in the OMC process. This occurs partially through the network of liaison officers connecting

people responsible for the OMC in different government departments, and partially through inter-ministerial committees.

Third, the OMC stimulates cross-ministerial collaboration, which is after all necessary for the very writing of the OMC plans. The inter-ministerial committees that have been set up appear to have some importance in setting policy agendas, especially in Ireland, though even there it is difficult to tell how influential they have been, beyond the vague statements occasionally made by the government about the committees. An interview with a Portuguese evaluator of the OMC for inclusion revealed a seemingly quite dysfunctional inter-ministerial process, resulting in numerous inaccuracies in national action plan (including a number of measures that were claimed to have been implemented but which in fact never existed) and frequent refusals to give information to EU-appointed evaluators. Even in Portugal, however, the OMC seems to have strengthened inter-ministerial collaboration in various ways.

Fourth, especially in Portugal in the case of the European Employment Strategy, the OMC has increased the negotiating power of national officials vis-à-vis European funders, since the OMC guidelines provide discursive resources and legitimacy that can be used to persuade European officials to fund national or local programs. An official with a long history in Portugal-EU relations told me that this change in power relations is “very very very important for Portugal,” emphasizing that it had increased policy innovation.

The OMC and National Social Dialogue. There is a sense in which the roles of OMC and National Social Dialogue may conflict. When I asked the Irish official responsible for writing the employment action plan about the participation of social partners, he told me that agreements on these issues had already been “hammered out” in national social dialogue (known, confusingly, as “partnership” in Ireland), and that this wasn’t the place to re-hash all of these old arguments. He said the only way partners could influence the plan would be to remind them to include something they had left out. This accords with the common impression in Ireland that partnership (national social dialogue) is a strong government commitment, while OMC documents carried less weight and importance. This was also true of the processes that preceded the OMC for inclusion, the National Anti-Poverty Strategy (NAPS). Despite the introduction of the OMC inclusion process, and the preference of the Office for Social Inclusion that the two processes be seen as one, the NAPS is still widely understood to exist, and to be a stronger commitment than represented by the OMC documents. One reason for this could be that many of the goals of the NAPS were committed to within partnership agreements.

More generally, national social dialogue and the OMC are seen as compatible and even complimentary, and there are at least two ways in which national social dialogue contributes to the participatory nature of the OMC. First, in some instances (in both Ireland and Portugal) the chief national social dialogue body (the National Economic and Social Council in Ireland and the Permanent Commission for Social Concertation in Portugal) has offered opinions that have been included as annexes in the employment action plans. Second, also in both countries, national social dialogue structures (the National Economic and Social Forum in Ireland) have organized “Social Inclusion Forums” which have given an opportunity for a variety of NGOs and partners to give their contributions to the OMC inclusion process.

The OMC and Local Partnerships. There are four main connections here. First, local partnerships are sometimes seen as ideal mechanisms for the local implementation of the national action plans of the OMC. So far, this role is largely aspirational. The European Commission wants to see that national action plans are implemented at the local level, but there is very little sense of how this might be done or if this has been done in any substantive way. One problem here is that if the national action plans are merely lists of current policies, or “strategic documents” that are not based on any new direction in policy developments intended or undertaken by the government, it is difficult to see how such a plan would be locally implemented. (It should be noted that this is not necessarily the norm, but rather what an OMC plan can be at its worst.)

Second, local partnerships have had some participation in the OMC process. This involvement takes two forms. First, in both Portugal and Ireland there were regional seminars for the social inclusion process in which actors from local partnerships were involved. This does not mean that these local actors had impacts on the plans, however. In one case the seminars occurred after the plan was written, and were meant to inform local actors about the OMC, as well as perhaps to provide an appearance of local implementation of or participation in the OMC. It was related to me by one Portuguese participant in these meetings that the local partnership actors were confused by the OMC for inclusion, which they at first thought was another European program they could apply to for funds. When it (Portugal’s second NAPincl) started to seem much more like a mere list of current policies, the local actors could not be made understand why this was necessary or useful, if there was nothing new promised and no new funds to do any of the things they would like to do. (This was in contrast to the first NAP, which promised many new programs, few of which were implemented, because of a shift in power from the Socialists to the (center-right) Social Democrats.)

Third, as mentioned earlier, the OMC can enhance the ability of national actors to obtain funds on behalf of local programs, projects, and partnerships. This benefits – and might even allow the continuation of – local partnerships and their activities.

Fourth, actors within local partnerships sometimes use the national action plans for informational or persuasive purposes. Informational purposes include such things as noticing the existence of a program that might provide funds for a local project. Persuasive purposes include the use of the document to show other local actors that the government is committed to or has prioritized some particular issue, in order to lessen their resistance to cooperate in a given activity.

National Social Dialogue and Local Partnerships. There are three main considerations here. First, in some cases, national social dialogue agreements support or even initiate the establishment of local partnerships. This seems to be the case with Portugal’s Social Network Program, for example.

Second, there is some overlap in participation between the two processes. In Ireland, a large number of non-profits participate in national social dialogue; a number of them are active in one or several local partnerships.

Third, as shown in one episode in Ireland, conflicts within the national social dialogue system can spill over into other realms, including that of local partnership. This can lead to a less participatory atmosphere at the local (and national) level, and even the destruction of actors important to local partnerships. When most members of the Community Platform (a bloc of organizations in the national social dialogue process)

refused to sign the last partnership agreement, they were subsequently ejected from the dialogue system. The government's memo indicating that these groups were no longer welcome in "partnership" venues was interpreted more broadly than it might have been, leading some groups to lose their access within some consultative processes. One organization that played a particularly vocal role the refusal of the Platform to sign, the Community Workers Cooperative, was de-funded by the government shortly afterward. While the organization has held on to its existence since then, its role in local partnerships – where it often provided training and other services – has been severely curtailed. Besides this, however, this episode does not seem to have a huge impact on the state of local partnerships or non-state participation in general, partly because the lines of communication between important groups (such as EAPN, which is also out of partnership) and state entities remains open on an informal basis.

Local Partnerships and the National Level. This is a complex issue and could be the subject of a presentation in its own right. In some cases, local partnerships were relatively neglected at the national level. The RAPID program in Ireland, meant to inject funding into disadvantaged areas, didn't start functioning until several years into its existence, leading to what RAPID coordinators described as a nightmare, since it was a constant struggle to keep local people involved when their efforts had born so little fruit. The Social Network Program in Portugal was severely limited by the lack of legislation underpinning it, which led to competition with other local networks, a rather narrow participation in many localities, and uncertainty regarding the involvement of businesses and business associations in the Program.

It is common for actors in local partnerships to ask how it was possible for them to coordinate policies at the local level if there wasn't a similar coordination at the national level. Since both countries are quite centralized, local officials often have little flexibility to use funds for local priorities. It seems that more effective cross-ministerial collaboration would be necessary to fully integrate policies and provide funding for the necessary projects. On the other hand, it is also common for national-level actors to decry the duplication of efforts and lack of coordination at the local level.

There is a certain amount of national coordination of local partnerships, but in most cases it is limited to the exchange of experiences and best practices, technical support, and national training sessions and conferences. Except in the case of one type of local partnership in Ireland (called "local partnerships" or just "partnerships"), national coordination mechanisms seem to do relatively little to discipline local partnerships. There also seems to be nothing like the process of the OMC, where participating units meet to agree to the goals or overall guidelines of the process; the guidelines for local partnerships are centrally set and are not revised in any democratic way, though local plans of course are by their very nature revisable.

The issue of mainstreaming regards the ways in which a certain experience of local partnerships (or any local projects for that matter) can be spread to other localities, continued on a permanent basis in the original locality, or established as national programs. While this sort of thing does occur, it is a difficult, ad hoc process, the coordination of which is not in most cases the responsibility of a particular entity.

National funding for local partnership occurs in a number of ways, besides the simple allocation of funds by the national government through an act of parliament or administration. Accords are often struck with particular agencies or departments for the

continued funding a project initiated by a partnership. The presence of local partnerships can improve the application-writing of local actors, leading to increased competitiveness in the market for social-policy grants. Since there are more and more local partnerships and fewer and fewer funds available for local projects, the overall effect is to intensify the competition for project funding. In at least one case (the RAPID program in Ireland), local partnerships have benefited from ministerial deal-making. Though national funds were never officially transferred the RAPID program, a particularly entrepreneurial minister scraped together commitments of a few million dollars here and there from various different agencies who would benefit from having their ministry's name attached to these projects. But even these projects were often quite distant from the priorities of the localities, who had spent years of research and consultation determining what the community needed to advance social inclusion. The long-awaited implementation of this project thus resembled creative crisis-management rather than the strategic planning that is naturally associated with social policy experimentalism.

Relations Among Local Partnerships. One problem in the relationship among local partnerships is that there are so many of them. The multiplication of local coordination mechanisms accords with Hooghe and Marks' type-II multi-level governance¹, in which there is a proliferation of overlapping, issue-based jurisdictions. Indeed, some of my respondents seemed embarrassed by the sheer multiplicity of self-avowedly innovative policy initiatives, since it implies duplication – which is after all one of the things local partnerships are supposed to work against. Because of this uneasiness, there is apparently a government commitment not to create any more structures at the local level, though they can't agree on much else. This results in what we can call, following Hooghe and Marks, a second-order coordination problem of how to coordinate all the disparate attempts at coordination.

There are occasional attempts to minimize the costs associated with this proliferation by integrating different local partnerships. In one case in Portugal, several networks would meet at the same time, since they had most of the same members anyway. In Ireland, a RAPID coordinator refused to set up three Area Implementation Teams, since it would be the same people anyway, and succeeded in gaining permission to set up a single body instead.

One way different local partnerships can maintain productive and cordial relations is through what one might refer to as interlocking directorates. Sometimes people who belong to another network are designated as a liaison to another local partnership, but more often there is enough of an overlap in membership that the networks are aware of what the others are doing.

As mentioned earlier, the Social Network Program in Portugal had difficulties because of its legal status. Since other local partnerships had *decretos-lei* (acts of parliament) while the Social Network Program had merely a *resolução do conselho de ministros* (resolution of the council of ministers), actors involved in other local partnerships will sometimes reject the attempts of Social Network Program participants to involve more agencies in their activities, either because the law doesn't obligate them to be involved, or on account of some kind of socio-legal snobbishness.

¹ Hooghe, Liesbet and Marks, Gary (2003). Unraveling the Central State, But How? Types of Multi-Level Governance. *IHS Political Science Series*: 2003, No. 87.

Discussion and Conclusions

How does one begin to explain the current state of relations among different plan-based processes at different levels? There are many possible approaches, and much could be said about each particular example given above. One approach is to think about the tensions and challenges in these relationships in terms of a conflict between, on the one hand, bureaucratic or political rationality, which is concerned with maintaining power and status within the realm of either electoral politics or state administration, and the social rationality advanced by the new governance, with such values as integration, strategic planning, partnership, participation and networking². The culture of new governance is quite widespread, and has true believers throughout the state apparatus and within much of the non-state and semi-state social sector. But its advocates do not have free reign to plan and coordinate policies as they wish, and the neglect, resistance or ignorance of their plans by key actors can interfere with their implementation.

Besides thinking about the incomplete assimilation of new governance culture into the sphere of social policy, it might also be useful to consider the incompleteness or immaturity of the new governance discourse and culture itself as one factor in its less-than-perfect implementation. A cynic might see new governance culture as consisting of little more than a handful of fashionable, positively-valenced concepts like partnership and networking that are poorly-defined, hard to distinguish from one another, and come with little guidance about how to proceed in the face of obstacles, including those – like second-order coordination problems – created in part by the success of the new governance agenda in setting up new structures and processes. By exploring such themes in a more sympathetic way, social-scientific analyses of new governance processes – perhaps in dialogue with public servants and non-profit activists who actually live and breathe new governance in their workaday lives – might enhance the usefulness and subtlety of the way new governance is conceived and practiced on the ground.

How might this understanding of an incomplete, imperfect, emergent new governance culture be integrated with current theoretical approaches to new governance and policy experimentation? For one thing, there sometimes seems to be an assumption of a core of rational, strategic planning underlying new governance, when in practice muddling or bumbling along, often with the neglect or interference of some actors or levels of governance, more closely characterizes policy experimentalism in many cases. But how does one theorize muddling? What is different about innovation or experimentation when it occurs in the absence of optimal levels of autonomy, strategic planning, or high-level coordination? Does analyzing such situations shift our conceptions of the mechanisms that produce institutional change in the direction of a new governance logic? Unfortunately I do not have the time here to begin to answer any of these questions.

Finally, what does this suggest about the prospects for the multi-level governance of soft-law or plan-based processes in new member states? If nothing else, one can point to the importance of a new governance ethos – including, among other things, a valorization of policy experimentalism, strategic planning, and responsiveness across levels of governance – being spread as widely as possible across the state apparatus

² . Political or bureaucratic *irrationality*, of course, is also important here, since incompetence, time pressures, lack of communication, poor organization and planning, and so on can impede state goals.

(Non-state groups should on the whole be expected to pick up on new governance culture more readily; for one thing, a mastery of new governance language is in most cases necessary for gaining European funds). Spending the EU funds that are being provided for the new member states will likely involve the creation of new structures, including no doubt a number of plan-based processes such as local partnerships. For such plan-based processes to succeed, they need more than good plans based on sound strategic planning – they need allies sympathetic both to their substantive goals and their procedural ideals at the national, regional and local levels, and not just within social affairs or employment ministries.