

# Chapter 11

## Employment Policy

Between Efficacy and Experimentation

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### Summary

Attempts to put in place an employment policy for the European Union (EU) have been bedevilled from the outset by one of the EU's most complex regulatory conundrums: how to create a system of regulation that accommodates the diversity of historical, legal, and institutional traditions of the member states *and* resolves continuing conflict, over the desirability of new forms of labour-market regulation, *and* the assignment to the EU of policy powers in this domain. Nevertheless, the past several decades have witnessed the creation of a regulatory pattern based on three pillars, each with a different mode of policy-making and governance: (1) EU legislation promotes employment rights, produced by a version of the 'Community method'; (2) 'law via collective agreement' is a negotiated alternative to pillar one, and involves agreement among the social partners prior to legislation; and, (3) a more recent and more radical shift from hard law to soft law embraces an expansion from employment protection to employment *promotion*, the European Employment Strategy (EES). All three modes have been characterized by: an continuing contestation of the form, substance, and level of regulation; the centrality, especially since the 1980s, of the Commission, acting as a policy and norm entrepreneur and as mediator between the member states; the weaknesses of the institutional

architecture underpinning this policy arena; political power games, involving the member states and the supranational institutions, that have driven the locus of policy-making over time from one governance mode to the next; and a series of trade-offs over time between efficacy and experimentation in policy formulation and execution.

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## Introduction

Employment policy has always appeared to be marginalized in European policy-making, and was written only lightly into the original treaties. Its peripheral role has often been associated more with a general failure to create a 'social dimension' of 'positive' integration to accompany the 'negative integration' of the EU's more central market-making mission. Chapter 10 in this volume argues that interpretations minimalizing the importance of the EU involvement in social policy are profoundly mistaken in that European social integration has eroded both the sovereignty and the autonomy of national welfare states. The history of European employment policy development has run parallel to, and frequently overlapped with, that of social policy. Employment policy—in its multiple forms—has contributed to a reordering of relations between national and supranational power and influence. National employment policy is understood here as the laws and conventions that establish the rights and entitlements of workers and structure the work relationship, as well as measures to protect and promote employment more generally. A complete understanding of this is impossible without taking the European dimension closely into account.

Nevertheless, employment has been and remains one of the most contested areas of policy-making in the EU and the structural obstacles to a 'European' policy, rather than a weak European coordination of national policies, are considerable. Employment policy may have moved closer to the centre of EU policy preoccupations, after several decades of policy initiatives, institutional and treaty innovations, experimentation with negotiated and 'new' modes of governance, and the creation of new forums for policy interaction. However, it remains a 'Cinderella' of the European integration project. In the absence of firm treaty foundations, the development of employment policy has relied critically throughout the entire period on the capacity of the Commission to engage in entrepreneurial agenda-setting and coalition-building around its legislative agenda, or to solicit the support (which has been frequently provided) of the European Court of Justice (ECJ), or to forge coalitions—both with member states, behind social action programmes and treaty innovations, and with the national and European associations of capital and labour in support of new methods of policy-making. More recently, a more experimental technique has become evident, namely the creation of new 'policy spaces' for actors to fill and to develop across the multiple levels of the EU, providing a weak and insubstantial proxy for more traditional forms of institutionalization.

To employ the categories of EU policy-making set out in Chapter 3 of this volume, employment policy has undergone a series of policy models, from the use of the Community method of legislating (albeit somewhat hesitantly due to the fragility of its treaty bases), through a peculiar and unique hybrid of the Community method and

the regulatory approach in the post-Maastricht method of 'making law via collective agreement', to the softer modes of intervention characteristic of policy coordination and benchmarking in the EES. This transition is explained in our analysis of the three modes of policy-making currently extant in this sector. This analysis of EU policy is necessarily mainly rooted in the experience of western European countries, the old members of the EU. The contemporary EU25 brings into the frame a group of central and east, as well as south, European countries with other features.

Why has there been so much instability and continuous renovations to the architecture of European employment policy? There are several reasons: the changing nature of the employment 'problem'; the diversity of European labour-market organization and industrial relations; and the 'essentially contested' nature of employment regulation. First, the focus of employment policy-making has shifted quite radically over time, as the full employment in western Europe of the 1950s and 1960s gave way to a period of rising employment and declining employment rates in the crisis following the twin oil shocks of the 1970s. From then on, the link between GDP and job growth was broken. Successive economic upturns failed to return employment rates to pre-recession levels, revealing problems of industrial adjustment, mismatches between the supply and demand for skills, and a more general failure of west European welfare states to respond to the challenges of post-industrial economic development. By the 1990s, many west European countries were forced to cope with a crisis of 'welfare without work' and increasingly constrained policy choices. While still dealing with the legacy of the 1970s and 1980s in the form of long-term structural employment, they were also faced with a 'service sector trilemma' (Iversen and Wren 1998), in which the goals of employment growth, wage equality, and budgetary constraint come increasingly into conflict.

As some countries have discovered (the UK and Ireland), if service-sector employment is to be generated in the private sector, then adjustments to wage and non-wage costs for the less skilled and greater wage inequality (unless compensated for by tax credits or in-work benefits) may have to be tolerated. Creating such employment through the public sector (the traditional Scandinavian solution) entails increased budgetary pressure at a time when deficits and higher taxes are definitely out of fashion. The alternative to doing neither would appear to be continuing, if not rising, unemployment—the unpalatable choice made *de facto* by those continental countries (France, Germany, and Italy) which have retained their high levels of labour-market regulation and employment protection, but have also lost their capacity for state-promoted job-creation (Ferrera, Hemerijck and Rhodes 2001). But if European policy-makers have therefore had to shift their attention accordingly from employment protection to employment promotion, the diversity of European labour-market regulation and industrial relations complicates and frustrates attempts to tackle both of those goals with European rather than nation-specific policies.

National labour-market regimes are embedded in diverse social, political, and economic systems, or 'varieties of capitalism' (Hall and Soskice 2000), which render impossible both the harmonization of social protection and uniform approaches to job-creation. If 'welfare states are national states' (see Chapter 10), then employment regimes are coupled closely with them, and their social security, pensions, and unemployment benefit systems. Employment regime 'policy spaces' are densely occupied by national behavioural norms, long-standing entitlements backed by vested interest

and client groups, and diverse forms of labour-market organization. Their industrial relations rules—derived from law or collective agreement, or complex combinations of the two—differ considerably. Broadly speaking, European industrial relations systems break down into: those in which the state plays a central role through both the constitutional provision of workers' rights and comprehensive labour-market legislation (Belgium, France, Germany, the Netherlands, Luxembourg, Italy, and Greece); those where the state has traditionally abstained from regulating industrial relations extensively by codes and legislation (the UK and Ireland); and those where a functional equivalent to legal and legislative frameworks is provided by corporatist-type agreements between employers and unions (Denmark and Sweden). However, systems of labour-market regulation map imperfectly on to this configuration. If employers in Germany, the Netherlands, Belgium, and the Nordic countries are heavily constrained by hiring, dismissals, and contract regulations, but enjoy more within-firm flexibility (due to high levels of skills and consensual workplace rule-setting), those in the UK and Ireland enjoy higher levels of internal and external flexibility (though a less-skilled workforce can constrain adjustment capacities), while their southern counterparts (Italy, Greece, Portugal, and Spain) have typically enjoyed neither, due to tightly constraining, state-legislated labour regulations and adversarial industrial relations. Flexibility has been delivered instead through the evasion of regulations and the emergence of dual labour-markets, dividing those on full-time contracts, and who are protected by law or collective bargaining, from a growing number of less protected fixed-term and part-time workers. Enlargement to the east complicates the mix still further by adding a fourth model, one in which state intervention, akin to that of the southern countries, is combined with the weak levels of unionization and firm-level representation of the Anglo-Irish group.

The third reason for instability and volatility in this domain of policy-making is that the issue of employment inevitably touches on core ideological differences concerning the appropriate degrees of economic regulation and the levels at which it is applied. Thus the process of EU employment policy development has been riven by a two-way conflict, or double cleavage, from the early days of the European project, and in particular from the 1970s on: between the supporters and opponents of an EU social dimension which would elevate distributive policies and politics to the European level (i.e. between 'federalists' and 'subsidiarists'); and between competing conceptions of how labour markets and social systems should be organized (crudely put, between socialists/social democrats and market liberals) (Rhodes 1992). Actors (politicians, trade unionists, and public officials, both national and European) can be found in various locations across the 2 x 2 space of political contestation and policy debates produced by this twin dichotomy. Note that 'subsidiarists' are not always market liberals and centralizers are not always hyper-protectionists or even social democrats.

This characterization is a useful first step in understanding the nature of the coalitions that have mobilized behind or against EU employment policy over the past several decades. It helps us appreciate the continuing institutional weaknesses of Europe's employment policy-making architecture, and to assess the extent to which both 'old modes' and 'new modes' of governance in this policy arena have succeeded or failed. These difficulties confront both the traditional and the more innovative (albiet now ageing) channels of policy-making in employment policy, respectively the

Community method and what we term below the ‘negotiated’ method of law-making). The great strength of the EES—albeit also a critical source of weaknesses—has been its explicit and quite novel attempt to bridge these twin dichotomies, so as to overcome the ‘sovereignty’ disputes endemic to EU employment policy, to dilute opposition to a further development of the ‘social dimension’, and to accommodate the diversity of the employment and welfare systems discussed above. Its success in doing so is assessed below. Its fate as the most ambitious, but also the most weakly institutionalized, mode of EU employment policy-making will depend on whether greater effectiveness can be achieved. This would also have to forge links with the other, more traditional, modes of governance in this arena.

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## The three pillars of policy

Three institutional pillars of European employment policy have been constructed since the 1960s. The first is the legislated ‘rights’ pillar, based on the standard Community method, and used in fits and starts for employment issues from the 1960s onwards. Policy-making in this pillar has been conducted via decision-making rules based on both unanimity and (after the Single European Act, SEA), qualified majority voting (QMV) in the Council and implemented via directives, in which scope for variation in implementation has been restricted. The second pillar of ‘law via collective agreement’ has its roots in the sporadic instances of social dialogue promoted by the Commission between European-level employer and trade union confederations in the 1980s. This was backed by Article 118b (EEC) (now Art. 138 TEC), and formally institutionalized in the social policy agreement (Art. 4; now Art. 139 TEC) of the Maastricht Treaty on European Union (TEU). This allowed the social partners to request a Council decision on an employment policy agreement, or alternatively the implementation of directives via collective bargaining and ‘national practice’. The third pillar is the more recent, more experimental and more ambitious European Employment Strategy (EES)—a radically ‘new’ mode of governance (or ‘open method of coordination’), dependent for implementation on persuasion and ‘soft’ compliance via benchmarking and peer review. The construction of each of these pillars has been limited by the need to account for the member state diversity mentioned above, by the rapidly evolving nature of labour markets, employment challenges, and business organization over recent decades, and by the two-way conflict over appropriate forms and levels of regulation and the assumption and extension of supranational jurisdiction.

Each pillar links a particular form of policy-making with a specific mode of governance. In order to clarify those linkages and their implications for policy outcomes, we adopt the typology developed by Treib, Bühr and Falkner (2004), (see Fig. 11.1). The first pillar employs binding legal instruments (directives) with a rigid form of implementation via labour law, backed by the courts (national and European). This constitutes the most coercive form of governance. However, the treaty requirements insist that employment legislation respect variations in industrial relations and labour law systems. Employment directives therefore typically avoid harmonizing objectives and aspire instead to ‘partial harmonization’ or ‘diversity built on common standards’

**Figure 11.1** Policy instruments and modes of governance

		Legal instrument	
		Binding	Non-binding
Implementation	rigid	I Coercion (strand 1)*	III Targeting (strand 2)
	flexible	II Framework Regulation (strand 2)	IV Voluntarism (strand 3)

Source: Treib, Bühr and Falkner (2004).

Note: \*The term 'strand' has been used here in order to avoid confusion with the use of the term 'pillar' used in the broader analysis, despite the fact that the term 'pillar' is sometimes used in the relevant documentation.

(Kenner 2003: 30–1). Thus, except in those cases, such as equal opportunities and equal pay, where there has been a stronger treaty base for legislation, and in particular for ECJ case law, the real extent of coercion has been limited by the problems of implementing EU labour law across very different national systems. The second pillar of 'law via collective agreement' produces binding but flexible instruments (e.g. framework legislation that offers a menu of alternatives for member states to choose), as well as non-binding but rigid instruments (e.g. targeted recommendations that contain explicit rules of conduct for workers and employers). This approach relies heavily on negotiation—at both the European and national levels—between social actors. This is a flexible form of governance, but one still potentially conducive to effective implementation. Nonetheless, the impact of directives produced in this pillar has been weak, owing to political opposition to upward harmonization and the institutional fragility of this experimental form of law-making. The third pillar comprises the EES through the open method of coordination, using non-binding and flexible instruments. This is a 'voluntarist' form of governance with still weaker implementation capacities than the second pillar, and uncertain links between policy inputs and outputs. Open-ended experimentation, in both the form and substance of policy-making takes priority over the search for efficacy as such.

Over time, there has been a shift of focus from the first, to the second, and then to the third pillars, involving (to use the terminology of Chapter 3) a diversification of policy modes away from the distinctive Community method, through the EU regulatory model, to policy coordination and benchmarking in a context of multi-party, multi-level interaction. This is largely due, we argue, to the efforts of the Commission and pro-integration élites to work around vetoes and to neutralize the operation of the 'double cleavage'. However, 'new' and experimental modes of governance and policy instruments have not decisively replaced the old: policy-making continues to be conducted differently in each of the three pillars. Moreover, it is important to note that 'soft law', in various forms, has a long history in European employment policy-making. It has promoted, consolidated, and sometimes supplanted more coercive 'hard law' initiatives, and is far from being restricted to the more recent phase of the EES.

## Employment policy-making before Amsterdam

### Pillar one: between the 'Community method' and the EU regulatory model

In the first pillar of employment policy, that concerned with the production of directives, the distinctive Community method defined in Chapter 3—with a strong Commission involved in policy design, policy-brokering and policy execution, and a fully-empowered Council engaged in strategic bargaining and package deals—has been an aspiration rather than a reality. Much of the frenetic political activity in this arena since the 1960s has been linked to this ambition, and each of the major treaty revisions has witnessed a struggle over providing a more solid legal base for European employment intervention. However, the history of EU employment legislation has been a tortured one, with the Commission acting as tireless promoter of new regulatory objectives and rules, often in the face of intense political opposition, the Council forging agreement on minimum standards, to be implemented differentially in individual countries, and the ECJ providing backing for those standards, but refraining from over-zealous judgments where the treaty basis was unclear. These are all characteristics of the EU regulatory model, and use of the Community method as such has been restricted to those few areas where there has been a sound treaty basis for legislation (some aspects of health and safety, for example, and gender equality at work), or where the original legal base for employment directives has, in certain limited cases, been replaced by a stronger treaty alternative.

Certainly, the main obstacles to an EU-wide regime of employment regulation have been structural—the contrasts between national employment and industrial relations systems, the close links between employment protection and national welfare systems, and the constantly moving target of employment policy over recent decades, as the economic and business environment has evolved. However, even this constrained approach has been made more difficult by member states' jealousy of their jurisdiction over social and employment policy, which has limited efforts to strengthen the legal foundations for European intervention. The Treaty of Rome (EEC) made only highly ambiguous provision for EU social or employment policy. Articles 117–122 (EEC) (social provisions) conferred few real powers upon the EU institutions. Under Article 117 (EEC) working conditions and standards were intended to flow from the functioning of the common market, as well as from law, regulation, or administrative action, thus providing the basis for the ensuing conflict between pro-integration forces who relied on the first, and their opponents who invoked the second. Article 118 (EEC) simply required the Commission to promote cooperation between the member states through studies, opinions, and consultations. Given the market-oriented nature of the Treaty of Rome, social and employment policies were to be used for correcting obvious market failures, not for creating a supranational welfare state. But there was early intergovernmental conflict over when European regulation could be used to defend national systems from regulatory competition. The French believed that some form of social security harmonization would protect their high social charges from creating competitive disadvantage, and that gender equality provisions in the French constitution should be transferred to the Treaty, while the

Germans were opposed to any legal competence for the supranational authorities in this area (Rhodes 1999). The only substantial concession made to the French position was Article 119 (EEC) on the principle of equal pay. As a result, many of the employment policy advances from the 1960s onwards were based on alternative articles. In the early 1970s, for example, the Council of Ministers made use of Articles 100 and 235 (EEC). This empowered the Council to issue directives and regulations for the approximation of national regulatory systems, including laws, insofar as they directly affected the establishment and functioning of the common market, and led to directives on dismissals (in 1974) and workers' rights in the event of mergers (1975).

Subsequent treaty revisions sought to strengthen the basis for employment policy, but only meagre steps were made, and each time only after major clashes and compromises between member states. In the SEA, Community competences were bolstered, but only for health and safety issues where regulation could be justified as preventing potential market distortions. Article 118a (EEC) thus granted the Commission the power of proposition in health and safety legislation after consultation with the Economic and Social Committee, gave the EP a second reading of proposals through the then new cooperation procedure, and allowed the Council to act under QMV. Yet such directives were constrained by the proviso that small and medium-sized firms should be protected from excessive regulatory burdens. Elsewhere in the SEA, although Article 100a (EEC) introduced QMV for measures essential for the construction of the single market, British and German opposition ensured that those relating to the free movement of persons and rights and interests of workers were explicitly excluded (Rhodes 1992; Majone 1993).

By the time of the TEU, there was a broader coalition of member states in favour of European regulation of employment and other social issues to provide safeguards against a regulatory 'race-to-the-bottom', as the single market deepened and the prospect of eventual currency union became closer. Yet ferocious opposition from the British government placed a major constraint on any new supranational transfer of powers, and the reinforced subsidiarity principle in treaty terms as a means of forestalling federalism also limited the effect of new provisions (van Kersbergen and Verbeek 2004). The ambition, especially of the northern member states (apart from the UK), was to resolve procedural disputes by bringing most areas of labour-market policy under QMV, and to extend Community competence to contractual rights and workers' representation and consultation. In the final agreement adopted as the Social Protocol by eleven member states (the UK opted out), only health and safety, work conditions, and equality at work fell under QMV. In the revised Articles 117–118 (TEC) (Articles 1–2 of the Social Agreement), there were bolstered references to the need to respect member state differences and to avoid new regulatory burdens on small and medium-sized firms.

Only with the Treaty of Amsterdam (ToA) in 1997—when the UK also revoked its opt-out under a new Labour government—was QMV extended to worker information and consultation and the integration of persons excluded from the labour market. But most areas of employment policy remained under unanimity voting, while pay, the right of association, and the right to strike and to impose lock-outs were excluded from Community competence altogether (Art. 137(6) TEC).

Given these constraints, the Commission sought to exploit the fragile treaty bases to the maximum, sometimes backed up by the ECJ in its case law, and sometimes

making what lawyers call 'soft law' initiatives. Thus, it put forward recommendations and codes of practice so as to strengthen the application of existing laws, and 'solemn declarations', such as the 1989 Social Charter, or 'social action programmes', to push forward the processes of coalition-building and to set the agenda for further measures. Thus, in the mid-1970s, the Commission's social action programme, adopted by a Council Resolution, provided the soft-law basis for negotiation and coalition-building around a new series of subsequent employment policy directives (see Kenner 2003: ch. 2). During the period of acute intergovernmental conflict over social policy between the SEA and Maastricht, the Commission proposed a series of employment initiatives by playing the 'treaty-base game', in which it stretched as far as possible the interpretation of 'health and safety' and workplace directives, using QMV for the treaty base in order to minimize member-state opposition (Rhodes 1995). Even the 1989 Social Charter emerged from a process of conflict and eventual compromise as a vague and non-binding document setting out the basic social rights of workers in the EU. Efforts to introduce 'harder' instruments, such as a framework directive on basic rights and a binding European workers' statute, were defeated. Nonetheless, an important social action programme of legislative proposals emerged in the early 1990s and provided an important impetus for mobilizing the social policy advances eventually achieved at Maastricht and Amsterdam (Rhodes 1991).

This did not, however, add up to a more solid legal base. The 1974 social action programme and the 'treaty-base game' of the 1980s and 1990s revealed a considerable difference in the nature and quality of regulation in those areas with solid legal foundations, and those based on 'creative regulation', which usually translated into poor law with limited effects. The social action programme, developed at the time of the first oil shock, allowed for a series of innovations in employment protection. The Council went along with the occasional use of Article 100 (EEC) (now Art. 94 TEC) for single market measures and Article 235 (EEC) (now Art. 308 TEC), providing for law-making not covered specifically in the Treaty. Measures were agreed to improve labour mobility and to create a level-playing field for competition, including Directive 75/129 on procedural rights under collective redundancies, Directive 77/187 on rights of employees under changes of ownership of undertakings, and Directive 80/987 guaranteeing state compensation to employees of insolvent companies. These were deemed appropriate in a period of extensive industrial restructuring and could be subject to different forms of implementation in line with national practices. A further half dozen directives on equal pay and equal treatment were based on the more solid Article 119 (EEC) (now Art. 141 TEC), which has a legal base of unanimity, in the mid-1980s. These were spurred on by the role of the ECJ, which had linked direct effect with the principle that community law had supremacy over national law. Jurisprudence on equal pay and equal treatment helped ensure the implementation of directives. Furthermore, the first framework directive (80/1107) on health and safety at work, produced a series of 'daughter directives' on specific hazards, plus further soft law in the form of a Council Recommendation on a forty-hour week and four weeks annual paid holiday (a forerunner of the later working time directive). A second framework directive (89/391) laid down general objectives and obligations on employers and workers, while leaving scope for varied application at the national level, and ultimately producing fourteen daughter directives and a series of action programmes.

The legislation of the late 1980s and early 1990s based on soft law was much less successful. The effort to define workers' rights as a health and safety issue, thus subject to QMV so as to avoid the British veto (during the Thatcher, then Major, Conservative governments), severely weakened the impact of the directives. Thus, the Pregnancy and Maternity Directive (92/85) has ensured health protection, but has been less effective with regard to employment discrimination. The Working Time Directive (93/104) was innovative in allowing some elements to be implemented through collective agreements (a practice which widened under negotiated pillar two), but it excluded a number of sectors, and allowed important derogations for member states, such as the UK opt-out for individual workers. The Young Workers Directive (94/33) created rights for workers under the age of eighteen, and banned work under the age of fifteen, but contained many derogations, such as the UK's special entitlement to delay implementation (Kenner 2003).

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### **Pillar two: the social dialogue and law via collective agreement**

One of the key innovations of the Maastricht TEU as regards social policy was its creation of an alternative mode of law-making involving the European social partners, in an 'inter-professional social dialogue' at the European level. There were several motives for this. The first was that it gave formal status and potentially considerable influence to employers and trade unions at the European level through a process of dialogue that had been promoted by the European Commission and lobbied for by Europe's most powerful labour movements. The German unions in particular, following their disappointment with the anodyne final form of the 1989 Social Charter, committed themselves to a reorganization and reinvigoration of the rather weak European Trade Union Confederation (ETUC). The second was the hope that, given continuing British opposition to any advances in European social and employment policy, this new approach to law-making would provide an alternative means for mobilizing support for such initiatives. Thirdly, this shift to directives produced at EU level, but implemented in the member states via negotiation, would better accommodate the diversity of European industrial relations, given the range between collective agreements and legal codes as systems for underpinning labour-market relations and policy development.

By 1991, employers had accepted, at least in principle, the procedural importance of rule-setting at the EC level through the social dialogue. In the past, employers had tried to keep the social dialogue in check, and the Union of Industrial and Employers' Confederations (UNICE), the peak European association, had consistently opposed both EU-level collective bargaining and any legislative enhancement of workers' participation rights in transnational companies. But Article 118b (SEA) obliged the Commission to promote dialogue between management and labour, and in October 1991 UNICE and ETUC were able to agree to a joint proposal for a new form of bargaining over employment legislation. In the meantime, the Commission had promoted discussions between UNICE, CEEP (European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest), and the ETUC through joint union-employer working parties on the economy, employment, social dialogue, and new technologies. Thus, the Commission succeeded in creating new

'policy spaces' and extending European responsibilities into new domains as the basis for future institutional development. After 1989 this process became more focused, prioritizing education and training, and producing four joint opinions on: the promotion of labour mobility; education; vocational guidance; and management-labour partnerships. These provided the groundwork for two key agreements: the September 1990 framework agreement, signed by CEEP and the ETUC, on improving vocational training and health and safety via social dialogue; and, most importantly, a joint submission to the Intergovernmental Conferences, which in 1991 negotiated the TEU, proposing a new role for the social partners in making and implementing EC policy (Rhodes 1995; Falkner 1998).

To the surprise of its proponents, this submission was inserted almost *verbatim* into the Social Protocol of the TEU (later integrated into the ToA), creating a complex set of procedures for the pursuit of law via collective agreement. First, all directives, whether adopted by QMV or by unanimity, can be entrusted to 'management and labour' at their joint request for implementation via collective agreement. Secondly, the Commission is obliged, before submitting proposals, to consult management and labour on the possible consequences of Community action. The social partners may in response forward an opinion or, if appropriate, a recommendation. Thirdly, and most importantly for the discussion here, the social partners can opt for the contractual option and negotiate directly the content of Commission proposals, proceeding, if they are able, to a collective agreement. With even more flexibility, any such agreements can then be implemented by a further negotiation in the member states in accordance with their own procedures and practices, or via a Council decision on a proposal from the Commission.

The negotiation procedure was first used in 1993 when the Commission presented a modified version of a legislative proposal on the creation of European works councils that had failed the normal legislative route in various forms in preceding years. However, this tactic failed when the British employers in effect vetoed any agreement on the part of UNICE, and the Commission was forced to return to the standard method of submitting proposals for legislation to the Council. It finally steered through a directive on the establishment of European works councils under the Social Protocol (i.e. the standard legislative process, but excluding the UK), under which management must institute for a for informing and consulting employees in all companies with more than one thousand employees and more than 150 in at least two member states. Several other proposals have been successfully translated into social framework agreements in subsequent years: Directive 96/34 on parental leave; Directive 97/81 on part-time work; and Directive 99/70 on fixed-term work. Like the proposal on a works council, all three were redirected by the Commission to the social agreement channel after failure to achieve success via the standard legislative route.

Although representing a triumph for those seeking a European level of employment regulation, the limited use of the new social policy agreement procedures prior to Amsterdam has been described as 'a derisory outcome' for those who had worked to break the impasse in social and employment policy-making at Maastricht (Kenner 2003: 291). The legislation does provide real regulatory added value, in that its minimal standards and flexibility limited its impact to the least well regulated

countries. While the directive on parental leave has been criticized as a 'lowest common denominator' agreement, the directive on part-time work has been characterized as weak, consisting of a series of non-obligatory provisions that are unlikely to achieve the objective of removing discrimination against this category of workers, and the directive on fixed-term work has been called a 'missed opportunity' to regulate one of the most insecure forms of agency work, and in most member states little or no change was required to existing national laws (Kenner 2003: 290).

The gradual shift towards negotiated and 'non-coercive' framework agreement had facilitated political agreement in a period of intransigent opposition to European employment policy initiatives; this came especially from European employers and the British governments, but also from other member states committed to enhanced subsidiarity. However, the compromises required to achieve this meant a major loss in policy effectiveness. At the most, the negotiated framework legislation put a minimum floor of rights under existing systems of regulation. The relative weaknesses in the organization and representation of the social partners at the European level also militated against a major leap forward. Most important, however, was the shift in focus of European policy-making soon after Maastricht away from employment protection towards new objectives of employment promotion.

AQ: Please check the deletion of 'on' in sentence "While the directive on on parental leave."

## Employment policy post-Amsterdam

### Pillar three: the EES and the OMC

The European Employment Strategy (EES) marks a radical departure from the policy developments of the past, in at least two ways. First, it moves beyond the traditional preoccupation with employment protection to the issue of creating new employment. This implied the involvement of 'Europe' in areas of national sovereignty that had previously been jealously guarded from intervention. The second innovation was the elaboration of a strategy and instruments that would simultaneously target the issue of job-creation—in terms of both quantity and quality—while also allaying fears in the member states of unwarranted intrusion into their domestic social, employment, and broader economic policies. In part the EES was a policy response from a pro-integration coalition, spanning the Commission, the Parliament, and member states, to the failures and blockages afflicting policy development over the years in the other two pillars. It was also a political response to economic and monetary union (EMU) which prevented individual countries from using expansionist monetary and fiscal policies to stimulate economic and employment growth (see Chapter 6). What emerged was a broad, multi-faceted job-creation strategy, based on non-binding, soft-law instruments of peer review, benchmarking, and persuasion. The EES also represents an ambitious attempt to overcome the enduring double cleavage between 'federalists' and 'subsidiarists' on the one hand, and between socialists/social democrats and market liberals on the other, by means of a new, experimental method of policy-making. This aim of accommodating and defusing ideological divisions and

AQ: Please provide the citation of table 11.1.

**Table 11.1** The European employment strategy (EES) and the open method of coordination (OMC)

	EES	OMC
Source of legitimacy	Legal	Political
Legal or political	Treaty of Amsterdam: Employment Title	Lisbon Summit (2000) Part 3 Draft Constitutional Treaty
Policy area education,	employment	social inclusion, pensions, research, and innovation
Policy aim	unidimensional	multi-dimensional
Instrumental differences	stronger	weaker

sovereignty dispute, is the major strength of the EES, but also a critical source of its weakness.

### Origins and institutional development

How did the notion of a common European employment policy arrive on the agenda in the period leading up to Amsterdam? In essence, the Commission, by operating in full entrepreneurial mode, managed to fashion a coalition of social-democratic governments around the relaunching of employment policy as an active policy domain (Arnold 2002). It had to negotiate around the traditional vetoes to boosting supranational competencies in this arena. Many countries, for example, Sweden and the Netherlands, were sympathetic to the new emphasis on employment issues, but were keen advocates of subsidiarity and opposed to an unbridled transfer of power to Brussels. The spill-over from EMU was political rather than functional, and flowed from the need of social democratic governments to legitimize their almost unanimous support for EMU with their electorates and other domestic constituencies, primarily the labour movement (Notermans 2001; van Riel and van Meer 2002).

The EES began to take form after the Essen European Council (1994), following the spur to change in EU policy orientations given by the Delors Commission's White Paper, *Growth, Competitiveness and Employment* in 1993 (Commission 1993c). Highlighting Europe's poor performance in an era of accelerating economic and technological change, the Commission advanced a series of guidelines for reform. In an attempt to blend the political priorities of European social democrats, christian democrats, and liberals, the tactical aim was to strike a balance between solidarity and competitiveness. But due to counter-pressures from several member states, there was little real progress at the time (Goetschy 2003; Mosher and Trubek 2003). A stronger interpretation of the Delors vision developed through negotiations and bargaining between the member states, notably in sessions of the European Council, in Madrid in December 1995

and in Dublin in 1996, with the Commission spurring progress along, by striking alliances with key European coalitions (most importantly the Group of European Socialists) and organizing peer-pressure on the most reluctant states—principally Germany).

An agreement was reached on the form of the employment strategy at the 1997 European Council in Amsterdam. The aim and mode of functioning of the EES is set out in the Title VIII (later XI) of the ToA (Articles 125–130) on employment. The main objective was the achievement of a high level of employment, through the promotion of a ‘skilled, trained and adaptable workforce and labour-markets responsive to economic change’. Under Article 126 (TEC), the Community should contribute to that end ‘by encouraging cooperation between member states and by supporting, and if necessary, complementing their action’. The guidelines are not binding—an essential feature for the compromise that eventually brought all members states on board, but by its inclusion in the ToA, the EES became part of the processes in which member states are obliged to participate. The process of policy deliberation envisaged was put into effect at the Luxembourg European Council in November 1997, since when it has been repeated on a yearly basis. The first set of (nineteen) European Employment Guidelines (EEGs) was adopted, based on four strands: employability, entrepreneurship, adaptability, and equal opportunities, each containing between three and seven guidelines. The 2000 Lisbon European Council confirmed its support for the EES method, and also began its extension as a method of policy-making to other areas. It committed the member states to striving for ‘full employment’, coupled with new quantitative objectives: a 70 per cent overall employment rate and a 60 per cent female employment rate by 2010 (targets that had been lobbied for by the Commission, gathering allies where possible, but without result since the 1993 Delors White Paper). At Lisbon, and in the European Councils that followed at Nice and Stockholm, successive Council presidencies, held by social, democratic governments, acted closely in alliance with the Commission and the EP to sustain their coalition, to propel the EES forward, and to extend the coverage of OMC (van Riel and van Meer 2002). Nevertheless, and regardless of the attempt to appease those who opposed new EU powers over employment policy, the EES was to remain contested terrain, both ideologically and in power games between the Council and the Commission.

### **The EES as a ‘new mode of governance’**

When first launched, the EES had a relatively low profile as a complement to the process of building EMU. It is only since the elevating of the term ‘open method of coordination’ (OMC) at the Lisbon European Council in 2000, and its extension beyond the EES to other areas of policy-making, such as social exclusion, that the EES has become a topic of intense interest and debate. It exemplifies a ‘new mode of governance’, which differs along numerous dimensions both from the traditional Community method and from the older hard-law and soft-law procedures that preceded it. The growing literature on the subject has identified as its key characteristics: the heterarchical (i.e. non-hierarchical) participation of actors; a ‘new’ problem-solving logic based on deliberation and ‘policy learning’; the use of benchmarking and reference to ‘best practice’; and both vertical and horizontal policy integration across the EU’s multi-level polity (Scott and Trubeck 2002; Cohen and Sabel 2003; Borrás and

Jacobsson 2004). Undoubtedly, these features can all be found in the EES. They are argued to be in part a response to the functional requirements of an expanding (and deepening) EU, given its coordination problems, stalemates due to blocked or delayed transfers of policy powers, and the increasing functional interdependence of policy areas (Borrás and Jacobsson 2004).

Ultimately, the EES is a political strategy and the success of these new 'voluntary' methods (see Fig. 11.1) is linked to hard political realities. In terms of policy aims, the EES is closely linked politically to the Maastricht process and EMU. The EES was used to gain support for EMU and owes its existence—and institutionalization—to that strategy and the political coalition behind it. While that linkage helps make the EES stronger than other areas using OMC (social exclusion, pensions, etc), helped by the available range of policy instruments (relatively 'hard' forms of 'soft law', tough 'peer review', and so forth), it is much weaker than the Maastricht Social Protocol, and some would argue than the EMU's Stability and Growth Pact (SGP) in one critical respect, namely the incentive structure—or 'shadow of hierarchy' (Héritier 2003)—to compel member-state compliance. Both 'competition incentives' (exposure to market sanctions, whether for the individual country or for the EU as a whole), and 'cooperation incentives' (peer pressure on poor performers triggered by the adverse impact on the rest of the 'club') operate very differently in the two cases (Morelli, Padoan and Rodano 2002). In principle, at least, the rules for conformity in economic policy behaviour (regardless of recent infringements of the SGP by large member states), are easier to establish and to police than are targets for social policy and job-creation.

The core issue at stake here is the extent to which 'new modes of governance' such as OMC, based on guidelines, benchmarks, and notions of best practice, translate into the real world of policy influence and impact. As Héritier (2003: 118–19) has argued, there is a trade-off between political capacity (the costs involved in reaching agreement) and policy effectiveness, but even political capacity can be reduced, once an initial focus on general principles turns to more specific goals and indicators. That is certainly true for the EES, which has been a far from conflict-free zone. Its effectiveness is indeed difficult to determine, unless 'effectiveness' is redefined to include changes in policy outlook, the creation of new alliances, altered ways of thinking, and shifts in the equilibrium of domestic policy-making (Mosher and Trubek 2003).

### Actors and the EES policy process

In formal terms, the roles of the actors and relations between them can be set out in terms of the EES cycle of 'policy coordination'. This cycle was reformed substantially at the Brussels European Council in June 2003, not only to 'mainstream' the EES within the Lisbon strategy, but also in response to complaints from the member states over the excessive complexity and high level of detail in EES guidelines, the considerable overlap between the EES and other processes, and the duplication of work for national officials (see Jacobsson 2004a). The pre- and post-reform policy cycles are illustrated in Table 11.2.

From 1997 to 2002, the policy cycle was repeated on a yearly basis. It began with agenda-setting. In practice, the rotating presidency of the Council has considerable influence in the agenda-setting process, as does the Commission, which provides the 'support team' as well as analytical and preparatory documents. Policy objectives

**Table 11.2** Key characteristics of the EES

Features/Process	European Employment Strategy (EES) 1997–2002	After adaptations, 2003
Started	1997	2003
Cycle	Annual	Tri-annual; synchronized with Broad Economic policy Guidelines (BEPG)
Policy objectives	+ / – twenty guidelines organized around four strands	ten 'result-oriented' priorities around three overarching aims
Number of cycles undergone	Five	One
Key participants, those who make the actual decisions	Ministers of social affairs and employment (in Council formation) in close collaboration with the European Commission	Ministers of social affairs and employment (in Council formation) in collaboration with the European Commission
Final veto point, through QMV	Ministers of social affairs and employment (in Council formation)	Ministers of social affairs and employment (in council formation)
Mandatory consultative participants	European and national social partners, European Parliament, ECOSOC, Committee of Regions (CoR)	European and national social partners, European Parliament, ECOSOC, CoR
Legal basis of process	Employment Chapter of ToA, 1997	Employment Chapter of ToA, 1997
Technical indicators and targets	99 indicators in 2002, 35 key indicators, and 64 context indicators; 70% overall employment rate (2000) to be reached 2010, 60% female employment rate (2000) to be reached 2010; 50% older workers employment rate (2001) to be reached 2010.	64 indicators in 2003: 39 key indicators and 25 context indicators.
Peer review (or in-built incentive structures for 'learning')	annual peer review of the National Actions Plans (NAPs) ('Cambridge process'); peer review programme on active labour market policies (from 1999 onwards)	annual peer review of the NAP ('Cambridge process'); peer review programme on active labour market policies (from 1999 onwards); political aim to focus the 'Cambridge process' on one objective only to render it more effective.

were decided in phase two. Until 2002 these objectives were set out in terms of twenty or so guidelines, organized around the four strands of employability, entrepreneurship, adaptability, and equal opportunities. Since 2003 they have been presented in the form of ten 'results-oriented' priorities structured around three objectives: full employment; quality and productivity at work; and social cohesion and inclusion (see Table 11.3). The Commission draws up the guidelines, which are then endorsed by the Council on a legal base of QMV. In the third phase, member governments prepare national action plans (NAPs), in which they set out the measures they will take to 'comply' with these objectives. The Commission prepares the draft of the joint employment report, assessing the overall change in the employment situation in the EU and the implementation of the employment guidelines. This is then modified, if deemed appropriate, and endorsed by the Employment, Social Affairs, Health and Consumer Affairs Council (EPSCO). Finally, it is approved by the European Council. In parallel, the Commission makes individual recommendations, which are also endorsed by the Council, to each member state. The recommendation tool, as defined in the ToA,<sup>2</sup> is a key element that distinguishes the EES from other areas covered by OMC. The Commission was given the right to make recommendations, subject to the approval of EPSCO. They were used for the first time in 1999, and have since then been deployed on a yearly basis as a means of placing pressure on the member governments to meet the guideline objectives. In the fourth stage of the cycle, member governments prepare their NAPs in response to the recommendations. These are then 'peer reviewed' in the so-called 'Cambridge process'—a closed two-day meeting of the Employment Committee (EMCO), which is comprised of two delegates from each member state and two members from the Commission, and which monitors employment and employment policies in the member states.<sup>3</sup> The peer review is followed by bilateral meetings on the NAPs between representatives of governments and the Commission. From 2003, it was decided that the peer review session should focus more closely on the implementation of the employment recommendations (King 2003).

In principle, this process is given an important infusion of democracy and legitimacy by the involvement of political and interest group representatives. According to the ToA, the EP has to be consulted on the EES, although in practice its role was somewhat marginal during the first five years. This was due, among other reasons, to the lack of time allowed by the process for the preparation of positions or opinions (European Parliament 2002; King 2003). However, the time-table of the EES as modified from 2003 creates additional time for the EP to prepare its opinion for the annual June European Council, where the EES is discussed (Commission 2002*f*), and this may provide an opportunity for closer involvement. The social partners have a treaty-based mandate for participating in the EES, although it is rather vague. According to Article 130 (TEC), in fulfilling its mandate EMCO 'shall consult management and labour', which in practice means employer and union organizations at the European level. The main treaty reference to *national* level social partner involvement is in Article 126(2), which states that 'Member States, *having regard to national practices related to the responsibilities of management and labour*, shall regard promoting employment as a matter of common concern' (our emphasis). While there is no formal requirement for the involvement of the social partners in drawing up the NAPs, in practice they are consulted, though their degree of involvement and satisfaction with their role, vary greatly from one country to the next.

**Table 11.3** The 2003 revision of the EES four-strand structure

Guidelines 1997–2002	Result-oriented priorities since 2003
Activation and the prevention of long-term unemployment, especially addressing young unemployed (employability strand)	Active and preventive measures for the unemployed and the inactive
Reviewing benefit, tax and training systems to reduce poverty traps and to make it more attractive and easier for the unemployed to access training and employment (employability strand)	Making work pay
<p>1. Making it easier to start up and run businesses, with a particular focus on promoting small and medium-sized enterprises (SMEs). Activities include the encouragement of greater entrepreneurial awareness across society and in educational curricula, the provision of clear and stable rules for the development of, and access to, risk capital markets, and the reduction and simplification of administrative and tax burdens on SMEs.</p> <p>2. Creating new opportunities for employment in the knowledge-based society and in services, where there is a considerable potential for job creation. There should not only be a focus on the quantity, but also on the quality of the jobs created.</p> <p>3. Enhancing regional and local action for employment by identifying and encouraging the potential of job creation at local and regional levels.</p> <p>4. Reforming taxation to favour employment and training. (4 guidelines under the entrepreneurship strand)</p>	Fostering entrepreneurship to create more and better jobs
	Transforming undeclared work into regular employment
Developing a comprehensive policy for active ageing (employability strand)	Promoting active ageing
	Immigration
1. Modernizing the organization of work to achieve an appropriate balance between flexibility and security, and to contribute to improving the quality of work. Flexible	Promoting adaptability in the labour market

<p>work arrangements are to be developed further. Atypical work contracts are also to be incorporated further into the national law, to provide atypical workers with more security and higher occupational status.</p> <p>2. Supporting adaptability and innovation in enterprises as a component of lifelong learning. All workers should be provided with the possibility to achieve information society literacy by 2003.</p> <p>(Both guidelines from the adaptability strand)</p>	
<p>Skill-development for a perpetually changing labour market in the context of life-long learning. This guideline targets the improvement of the quality of education and training systems, for optimal adaptation to the labour market. Special reference is made to e-learning. Particular attention is to be paid to youth in disadvantaged groups and to adult illiteracy (employability strand).</p>	Investment in human capital and strategies for lifelong
<p>1. Gender mainstreaming approach calling for integrating gender issues transversally into the EEG.</p> <p>2. Tackling gender gaps in unemployment rates, ensuring a balanced representation of men and women in all sectors and occupations, and taking measures to achieve gender pay equality in both the public and private sectors.</p> <p>3. Reconciling work and family life through the design and the implementation of family-friendly policies, including affordable, and high-quality care services for children and other dependants, as well as parental and other leave schemes.</p> <p>(3 guidelines under the gender equality strand).</p>	Gender equality
<p>Combating discrimination of access to and on the labour market. This guideline calls for the establishment of a coherent set of policies to promote the social inclusion of disadvantaged groups through employment (employability strand).</p>	Supporting integration and combating discrimination in the labour market for people at a disadvantage
	Addressing regional disparities
<p><i>Note:</i> The new result-oriented priorities do not include under-employability: setting out active policies to develop job-matching and to combat emerging bottlenecks in the new European labour markets.</p>	

### **Efficacy versus experimentation**

As we have seen, employment policy in the past has been characterized by conflict over the transfer of policy powers to the supranational authorities and the appropriate degree of EU-wide regulation. With the EES it was hoped that a political consensus on employment policy could be more easily achieved given the soft-law character of its policy instruments and its explicit acceptance of diversity among member states in the implementation of EES objectives. Much of the literature on the EES has focused on these deliberative, positive-sum, consensus-seeking qualities, as if the efforts on the part of certain European élites to escape from decades of political conflict in this arena had indeed been achieved. A closer analysis of the EES in operation reveals, however, several key features reminiscent of experience in the first two employment pillars: a struggle between the 'competence-maximizing' aspirations of the Commission and concern from the member states to contain them; sovereignty disputes over the extent to which European policy would penetrate still jealously-guarded national policy domains; and tension between the 'heterarchical' or 'network governance' pretensions of the EES and its tendency in practice to replicate more traditional top-down policy hierarchies.

All three conflicts have characterized the functioning of EMCO, which lies at the core of the process. This has been characterized as a kind of 'deliberative institution' located between the Commission and the member states, although it has continued to be driven by intergovernmental, interest-driven bargaining rather than results-oriented open deliberation. It has become increasingly politicized as member governments have sought to use it as a forum for shaping the policy agenda. Thus, in an early 'sovereignty dispute' in the late 1990s, many member governments reacted with hostility to the overt early use of the recommendation tool. They were especially dismayed at the quasi-secretive manner in which the Commission had engineered the process, and then extensively publicized its recommendations so as to exert peer pressure. After intense debate, the Commission and EMCO jointly agreed that they should refrain from being polemical, should be open to amendments, and, rather than classify member states according to their performance, they should treat them on an equal footing. Member governments have since become closely involved in the elaboration of recommendations, and Commission proposals are discussed horizontally among governments, rather than being imposed top-down (Barbier and Samba Sylla 2004). But this often amounts less to deliberation than to old-fashioned bargaining. Discussions in EMCO, report Jacobsson and vifell (2003: 16), have increasingly taken the form of negotiations based on national positions rather than open-ended exchanges of opinion or reflections on best practice.<sup>4</sup>

A second 'sovereignty dispute' took place over a period of eighteen months in 2002–3 preceding the transformation of the EES guidelines, in line with pressure from member governments. Jobelius (2003) illustrates how preferences were mobilized on both sides and with what effect. While the Commission sought to promote further integration via new channels of influence over national policies, the latter actively resisted. The conflict was resolved only when the Commission abandoned its proposed new quantitative targets in all areas except for education and measures to 'activate' the unemployed. A Commission injunction on member states to ensure that adequate financial resources were deployed behind the employment policy

guidelines was also replaced by a call for more 'transparent and cost-effective' finance (Watt 2004: 131). The OMC and soft law supposedly provide the Commission with a proactive role in taking a broad rather than piecemeal approach to policy, allowing it to expand cooperation to new areas formerly under national competence, thus effectively by-passing the subsidiarity principle (Jacobsson 2004b). But the Council has fiercely resisted this *de facto* extension of Commission influence, and has arguably been the winner in the OMC power stakes (King 2003; Borrás and Jacobsson 2004). A further strengthening of member states' power *vis-à-vis* the Council is evident in other aspects of the EES reform. Although it has been claimed that that the EES has survived the 'litmus test of governmental shifts', the 2003 reform occurred at a time when right-wing governments dominated the European political landscape. The earlier social democratic coalition had fragmented. This had an inevitable impact on employment priorities. Liberal market concerns were evident in the shift from the four-strand approach to the three 'core objective' structure. They were also reflected in an increasingly tortured discourse to depict EES aims, given the difficulty of reconciling the priorities of social democratic solidarity with those of liberal market flexibility. Thus the Commission's 2003 statement on *The Future of the European Employment Strategy* (Commission 2003d) argued that labour-market flexibility should be encouraged, especially in the form of different contractual arrangements, 'while at the same time steps should be taken to prevent a segmentation of the labour market between different types of workers' (Raveaud 2005).

A good deal of prominence has been given to the involvement and participation in the EES of the social partners and other interest groups. Grand claims have been made for the development of a new form of 'networked governance'. The reality is rather more prosaic. The participation of the social partners, the ETUC on the union side, and UNICE, the CEEP, and the UEAPME (European Association of Craft, Small and Medium-sized Enterprises) on the employers' side, has been patchy to date, and the participation of labour and management in the EES has been widely recognized as one of its weakest parts (Smismans 2003; De La Porte and Pochet 2004). The EES policy cycle is not a heterarchical and deliberative process with open access to a wide range of groups. It is actually rather closed, élitist, and arguably much less democratic and accountable than standard community methods (Syrpis 2002). In particular, parliamentary influence (whether national or European) is extremely limited, and there is no judicial review. The Council and the Commission are in practice the key decision-makers.

What does this imply for the linkages between EU-level impulses and the transformation of national employment policies? One view suggests that that the linkages between supranational and national policy arenas in the EES are creating a new form of rationality in policy-making, in which efficiency and performance are backed by a new system of 'surveillance' (Haahr 2004). The truth, as usual, is less dramatic. For if the EES fails to break new ground in terms of experimental governance, its effectiveness as a means of shaping policy reform leaves a great deal to be desired. The adaptation of the employment strategy to the national level is essentially decided on by governmental actors—more closely resembling traditional top-down, technocratic government than multi-level governance (De La Porte and Pochet 2004). Despite some improvements in social partner participation within the member states in recent years, the national adaptation and implementation of the EES depend to a great

extent on existing institutional dynamics, the agendas of the social partners (not always or in all countries conducive to accepting and implementing EU recommendations), and national political circumstances. In addition, there is the issue of how broad policy initiatives apply to the complex, interdependent policy systems of national welfare states.

The most authoritative recent empirical investigations of the EES in practice are to be found in Jacobsson and Schmid (2002) and Jacobsson and Vifell (2003). They conclude that NAP procedures have been insufficiently integrated into national decision-making structures and budget allocations. Not so much a deliberative process of policy learning or best-practice diffusion, the EES can be more accurately described as a rational, two-level game between the Commission and the Council, in which governments do their utmost to retain control of domestic policy processes. They observe few examples of an upward transfer of learning from promising local solutions to the national or European levels, or of its subsequent cross-national diffusion. Far from being a force for decentralization, or the modification of national programmes and EU guidelines in the light of negative or positive experiences, for some observers (e.g. Syrpis 2002; Smismans 2004) the EES process actually *centralizes* the key locus of employment policy initiatives. In its most cynical manifestation, this amounts to a 'double standards game' in which governments endorse European guidelines, but fail to take responsibility for their implementation at home. A more optimistic appraisal, and one of the best surveys to date can be found in Zeitlin (2005).

One of the most thorough investigations to date, the Cologne-based Govecor project, concludes in its 2003 Interim Report that, at its best, the EES has encouraged better co-ordination among ministries, as well as between administrations and interest groups, in a limited number of member states (Govecor 2003; Zeitlin 2005). But even that conclusion is qualified by an analysis which argues that such influence is limited to a small group of actors, leading to little by way of institutional innovation, and figuring hardly at all in public discourse or inter-party competition. Moreover, as we have demonstrated above, after five years of the EES, there is little of a political support base for a hardening or upgrading of the rules for employment policy coordination. This was evident not just in the second round of the 'sovereignty struggle' in 2003 over attaching new quantitative targets for the EES, but also, in the same year, in divisions within the Economic Policy Working Group of the Convention on the Future of Europe over issues of economic government, and in the more general opposition to constitutionalizing the OMC.

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## Conclusions: assessing European employment policy

This chapter began by noting that employment policy poses some of the most difficult regulatory problems in the EU because it has been 'essentially contested', with regard to both the assumption of Community competences and the nature of the regulation it attempted. The analysis above has shown how, over time, the efforts of an EU employment advocacy coalition—spanning the Commission, the European labour movement, and certain supportive member states—have kept the issue alive, and

dealt with opposition and blockages by shifting the political parameters of the regulatory system. First, a creative interpretation of the treaty base for employment legislation was used, then legislative proposals were shifted to a second, alternative method of making law via collective agreement, and, finally, in the radically changed circumstances of the mid-to-late 1990s, with EMU and an eastward enlargement on the horizon, the emphasis moved to the wholly soft-law-based EES.

This shift has added to, rather than subtracted from, the regulatory options available for employment policy. Each pillar remains in place, holding out the possibility of a complementary or integrated use of policy instruments, so that efficacy is not necessarily sacrificed as the scope for experimentation widens. But what does an assessment of recent developments in each pillar reveal about the locus of innovation? The first pillar of traditional EU legislative policy-making remains surprisingly active. Significant advances in recent years include: the adoption of a framework equal treatment directive in 2000 (to combat employment discrimination on the grounds of religion or belief, disability, age, or sexual orientation; see Chapter 10); the adoption in 2001 of a Regulation governing the creation of a European Company Statute and an accompanying directive governing worker involvement; the adoption in 2002 of a highly controversial directive on national information and consultation rules (under which firms over a certain size must put in place mechanisms for informing and consulting employees, with a major potential impact on the Anglo-Irish countries); continuing discussion in the Council on a draft directive on working conditions for temporary (agency) workers, first proposed by the Commission in 2002; Commission proposals to amend and strengthen the Working Time Directive (2004); and political agreement in the Council on a draft directive implementing equal treatment between men and women outside the work place (2004).

However, pillar two—the more experimental social dialogue track—has visibly weakened over time, as the flow of draft directives transferred from the first legislative pillar has dried up and the focus has shifted to ‘new generation’ framework agreements. These latter include agreements on ‘teleworking’ (2002), and ‘work-related stress’ (2004), that are well-intentioned but (very much in line with UNICE preferences) do not have the force of a directive, and are fully open to interpretation by employers and employees in member state. The ‘mainstreaming’ of the social dialogue—for example, within the EES, where its role has been rather weak—has dispersed rather than reinforced its impact. As for the EES, the most significant recent innovation has been a shift in priorities which followed the creation of a European Employment Taskforce (EET) in March 2003 on a mandate from the European Council. Its first Report, *Jobs, Jobs, Jobs: Creating More Employment in Europe* (EET 2003), refocused EES objectives on the adaptability of workers and enterprises, attracting more people into the labour market, and investment in human capital. Rather than deliberation or ‘iterative learning’ through the EES peer review process, it was the latter which provided the basis for the EU’s recommendations on national employment policies in 2004.

Against this background, there are two key challenges to EU employment policy. The first, enlargement, poses a critical challenge, for the accession of the new member states has further extended the variety of social conditions, labour law standards, and social dialogue traditions in the EU. Their jobless growth casts a shadow over the EU’s already poor employment prospects (Falkner 2003a, 2003b; Ingham and Ingham

2003). The second concerns the EES and how to gain real value-added from the considerable investment that has been made in terms of political commitment and expectations over recent years. As has been observed by Jacobsson and Vifell (2003), the EES has had three aims: cooperation among actors; coordination of national employment policies; and convergence in outcomes. However, there is no clear institutional commitment to any of these goals across the EU member states, or to developing the means for achieving them. Once again, the eastward enlargement complicates the task of delivering results, as opposed to multiplying policy processes and procedures.

One solution to the trade-off between efficacy and experimentation (in evident favour of the latter) in the social dialogue and the four strands of EES would be to strengthen the links with the still vigorous first pillar, either by using instruments of soft law (e.g. peer review, and benchmarks) to facilitate the implementation of hard law, or by using hard law to ensure the implementation of soft-law directives. As revealed by the analysis of the first pillar, there is a long history of using soft-law methods to lay the groundwork for hard-law intervention, and to strengthen instruments of hard law once they are in place. This evolution suggests that the Community method, European social agreements, and the coordination mechanisms of the EES could be deployed together in pushing forward the employment policy agenda. Indeed, there have been numerous proposals (e.g. Scharpf 2002) for giving the OMC real bite by linking its provisions to framework directives, so as to harness the flexibility of this new mode of governance, and its associated utility in an age of subsidiarity, to the ultimate sanction of law and the courts. Detailed analysis of the use of binding legislative policy tools (regulations, directives, and decisions) in the employment policy area reveals that there has been no substitution of non-binding instruments for the Community method in the period since 1997 (Arnold, Hosli and Pennings 2004). This suggests that the panoply of policy instruments and modes of governance remains wide, and that, at least in theory, there is scope for such regulatory, 'cross-pillar' innovation. If that occurred, it might help rescue the EES from ultimate irrelevance and back its promise to provide a more effective and more legitimate form of policy-making (Eberlein and Kerwer 2004: 135).

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## Notes

- 1 This chapter has been written with the assistance and input of Caroline De La Porte.
- 2 Article 128, para. 4, sets out the process as follows: 'The Council, on the basis of the reports referred to in paragraph 3 and having received the views of the Employment Committee, shall each year carry out an examination of the implementation of the employment policies of the Member States in the light of the guidelines for employment. The Council, acting by a qualified majority on a recommendation from the Commission, may, if it considers it appropriate in the light of that examination, make recommendations to Member States'.
- 3 Before the meeting, each member state's NAP is read by one other member state and by the Commission, which is followed by a fifty-minute

examination of each NAP that includes a short presentation by the member state, questions and comments from the examining member state, and a response from the Commission. The other member states (including observers from the new member states since 2000) then have the opportunity to ask questions.

- 4 If there is a locus of deliberative policy-making in the EES, it lies in the specific—albeit voluntary—‘peer

review programme’ established in 1999 to identify, evaluate, and disseminate ‘good practice’ in active labour market policies in which country representatives discuss cases of policy success that they might like to emulate. Nevertheless, the obstacles to policy influence via learning and deliberation are not just procedural and institutional, but are also due to the structural and practical differences between systems.

## Further reading

Employment policy is very much a moving target, and a full understanding of the issues discussed in this chapter require excursions into the related literatures of law and political economy. For a legal perspectives, see the authoritative contribution by Kenner (2003), and the analyses in Shaw (2000) and Sciarra (2001). Falkner, Treib, Hartlapp and Leiber (2005) provide the best analysis of EU employment regulation from a political science perspective. For the development of EU and national employment policy, ECJ judgments, and industrial relations issues, including the European social dialogue, the European industrial relations observatory on-line (<http://www.eiro.eurofound.eu.int/index.html>) provides an indispensable resource. For an in-depth analysis of the first five years of the EES, see Foden and Magnusson (2003). One of the best recent analyses of European employment policies in comparative context is Zeitlin and Trubek (2003). Zeitlin, Pochet and Magnusson (2005) provide an in-depth treatment of the EES and OMC, while Borrás and Greve (2004) give a more general analysis of the OMC extending to other policy areas. The Cologne-based Govecor (Economic Governance through Self-Coordination) project

(<http://www.govecor.org/home/welcome.asp>) has focused on the combined impact of the legal provisions for the coordination of employment policy as set out by the ToA and the Stability and Growth Pact and provides a wealth of reports on this subject.

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