

**Hard and Soft Law in the Construction of Social Europe: the Role of  
the Open Method of Coordination**

by

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Much of the debate concerning the Open Method of Coordination in general and the European Employment Strategy in particular concerns the respective merits of “hard” and “soft” law in the construction of Social Europe. Both those who favor the OMC as a mode of governance and those who question its desirability compare the OMC, implicitly or explicitly, with the Community Method. The Community Method is thought of as “hard law” because it creates uniform rules that Member States must adopt, provides sanctions if they fail to do so, and allows challenges for non-compliance to be brought in court.<sup>1</sup>

In contrast, the OMC, which has general and open-ended guidelines rather than rules, provides no formal sanctions for Member States that do not follow the guidelines, and is not justiciable, is thought of as “soft law”. Proponents of the OMC argue that it can be effective despite – or even because of – its open-ended, non-binding, non-justiciable qualities. Opponents question that conclusion. They argue not only that the OMC cannot do what is needed to construct Social Europe and that “hard law” is essential; they also contend that use of the OMC could undermine efforts to build the hard law they think will be needed.

On close analysis, this debate turns on a number of highly contested issues. These include the relative effectiveness of the Community Method and the OMC, the goals for Social Europe, and the nature of the obstacles to reaching those goals. When proponents of the OMC contend that it is better suited than the Community Method for certain tasks, they are not only making assumptions about the nature of the tasks and the capabilities of the open method; they are also implicitly or explicitly making assumptions about the capabilities of the Community Method. Similarly, when opponents of the OMC argue that its use should be limited in order to prevent erosion of the *acquis* or block future efforts to use hard law, they do so because of beliefs both about the OMC and the

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<sup>1</sup> Snyder defines “soft law” as ‘...rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effect’.(Snyder, 1994: 198). This suggests the term is quite appropriate in reference to the OMC although some prefer the term “soft governance” to distinguish the OMC from situations in which non-binding forms of guidance are rendered binding by being used to interpret legal obligations. (Jacobsson, 2003b).

Community Method as well as assumptions concerning the proper role of the Union in social policy.

To a large degree, the people in this debate seem to be talking past each other. The policy discussion should be about the goals for Social Europe and the tasks needed to reach those goals. The institutional debate should be about the *relative* capacities of different modes to handle specific certain governance tasks, and discussion should focus on evidence relating to those capacities. Yet one often sees people on both sides making *a priori* assumptions about goals and unsupported assertions about the superior capacity of the mode they favor with little reference to data or alternative views. As a result, issues sometimes get framed in an either/or fashion: either one should only use soft law, or one should only employ hard law. Such framing not only cuts off much-needed empirical inquiry into relative capacity; it also deters exploration of hybrid (hard and soft) governance modes and possible synergies between binding and non-binding mechanisms.

The debate over hard and soft law has recently come to a head. The issue took on special importance because it was injected into the discussion of the future Constitution of the European Union where there was been substantial discussion concerning the Open Method of Coordination. The debates in the European Constitutional Convention confirmed what was already apparent in the literature: the debate is not just about governance modes: it is also about policy options with many who favor hard law also holding a very different policy position than the proponents of softer methods.

The goal of this paper is not to resolve these debates, but to help clarify the issues and identify questions for further work. We want to unpack the arguments on both sides, identify contestable assumptions, and expose false dichotomies. While we favor continued use of “soft law” as well as hard/soft hybrids, we recognize that further work on relative capacities and their relationship to policy goals must be done before any final conclusions are reached.

## **1) Issues for Social Policy After the EU's Lisbon Summit**

To understand the OMC and the debate around it, we must first look at the changing nature of social policy at the EU level and the factors that led up to the Lisbon Summit's endorsement of the OMC as an important tool for EU governance. At the Lisbon Summit the Member States pledged that Europe would become the most competitive knowledge-based economy in the world by 2010 while at the same time maintaining a commitment to solidarity and equality. Needless to say, the challenge of restructuring the economy while preserving the "European social model" is a daunting one.

Among the areas thought to need substantial reform if the EU is to meet the broad goals set in Lisbon are employment and social policy. In those areas Europe confronts such problems as: high rates of unemployment, low levels of labor market participation, high and rapidly mounting expenditures for social welfare and state pensions, inflexible labor markets, inefficient public services, and serious skill shortages. Something had to be done to create more jobs, cut unemployment, get a larger percentage of the population into the workforce, and cope with mounting pension costs.

## **2) Welfare State Interdependences**

While there was wide agreement on these goals, that did not answer the question whether action at the EU level was necessary or even desirable. In the past, these matters had largely been attacked at the national level. But with the single market and the euro, conditions changed. The creation of a truly integrated market and a common currency led to a new context for social policy, generating new constraints, creating new interdependencies, and setting the stage for enhanced EU involvement.

The *constraints* came from monetary integration. Because of the common currency, national governments no longer could use monetary policy as a tool for job creation. And because of the Stability and Growth Pact they were also constrained in their ability to use fiscal policy for the same ends. The increased *interdependencies*, on the other hand, arose

because the common currency made each eurozone country vulnerable to budget policies in the others and made the competitiveness of the whole EU economy depend on national level decisions on social policy.

Social policy can have an important effect on budgets and competitiveness. As long as national markets are relatively closed and national budgets relative independent, social policy is basically a domestic concern. But once nations create a common currency and join in a single market, then social policy in one country becomes relevant to other nations because it may affect both the common currency and the competitiveness of the single market. In such a situation, there is a need for some form of transnational policy coordination.

On the side of competitiveness, social policy coordination may be desirable in order to secure the productive benefits of a social market economy. Thus, proponents of the European social model have seen Europe's commitment to relative equality, social inclusion, and economic risk-reduction as a productive asset that would make the single market more competitive in global terms. From this point of view, it is important that all states in the single market adopt policies that maintain this commitment while adjusting their policies to take account of new realities.

On the side of currency stability, at least for those countries in the eurozone, it is important that all eurozone countries take measures to ensure fiscal stability in order to avoid the effect of persistent budget deficits on the stability of the common currency. Social policy costs represent a major part of state expenditure in all these countries. These costs are already high as a result of generous income maintenance plans and state pensions combined with low levels of labor market participation and relatively early retirement ages. They will get higher as populations age unless policies are changed and labor market participation rates increased. Because of the common currency, not only is this an issue for each Member State: all eurozone countries have a stake in the success of each other's efforts to change their policies on work and welfare to ensure fiscal sustainability in the face of mounting costs.

These two concerns have driven the gradual “Europeanization” of social policy that one can see in recent years. Because there are potential positive gains to single market performance from maintaining and reforming national social models, and potential negative impact on the common currency from failure to deal with unsustainable levels of social expenditure, issues previously treated as strictly national level concerns have moved onto the EU agenda.

To these primary reasons for gradual “Europeanization” of social policy, one should add two other factors that probably drive the Europeanization process. These are fears of a “race to the bottom” in social policy, and recognition of the opportunities for experimentation created by welfare state diversity. All countries in the single market have an interest in ensuring that others do not achieve fiscal sustainability by radically lowering standards and slashing social charges, thus setting off a race to the bottom within the single market. This has been a persistent concern since the creation of the Common Market. At the same time, the emergence of a European context for discussion of social policy creates another, very different kind of “interdependence” – since there is great variation in the degree to which countries have solved these problems, Member States can see opportunities for mutual learning. Thus Member States have an interest both in sharing information, but also in monitoring each other’s social policies to ensure that this does not become an area for intra-European rivalry.

### **3) The “new social policy vision” and its governance challenges**

As a result of the challenges, constraints and interdependencies, major changes have occurred in the way the EU and Member States deal with employment and social policy. The first is the emergence of a new social policy vision. In contrast to prior “welfare state” policies, this vision stresses the importance of a more skilled and adaptable workforce, gives greater attention to increasing labor market participation, places much more emphasis on active welfare state measures, introduces supply side efforts at job-creation, seeks measures to provide security other than life-time job tenure, adds efforts

to combat social exclusion and gender discrimination in the workplace, and recognizes the necessity of reforming state pensions. The second is the “Europeanization” of social and employment policy: In the wake of EMU and the consolidation of the single market, the EU began to recognize that it had to play a role in developing and implementing this vision and that the OMC might be an appropriate tool for that end.

The new social vision holds promise as a path towards the Lisbon goals and the OMC may have a vital role to play. But to understand the OMC and the debate around it, we must first look at the changing nature of social policy at the EU level and the factors that led up to the Lisbon Summit’s endorsement of the OMC as an important tool for EU governance.

The new vision presents a real governance challenge for the EU. Traditionally, the EU has played a limited role in social and employment policy. To the extent that it has intervened, however, it has tended to use “hard law” through the Community Method or the Social Dialogue. Using what Scott and Trubek (2002) have called the Classic Community Method<sup>2</sup>, proposed directives setting EU-wide standards were initiated by the technocrats in the European Commission and approved by the European Council with some participation of the European Parliament. A few directives emerged from the neo-corporatist track called “Social Dialogue” that allows peak organizations representing labor and management at the EU level to prepare directives for Council approval. However crafted, these employment and social policy directives usually led to more or less uniform rules which have been incorporated (“transposed”) into national law creating, at least in theory, a relatively harmonized area of law throughout the Union.

The new social vision presents immense problems for a governance approach based on the classical Community Method or the Social Dialogue. It takes the EU into areas that have traditionally been the exclusive province of the Member States. The States have been especially leery of extending legislative competence to the Union in these domains.

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<sup>2</sup> The Community Method has been changing in recent years, and those changes bear on the comparative analysis of “hard” and “soft” law. For a discussion of the “Classic Community Method”, see Scott and Trubek (2002)

It deals with areas of policy in which there are great differences among the Member States, and calls for reforms in areas of high political salience. It enters into areas where few preexisting formulae exist and in which the experts do not have all the answers. To succeed, the EU's new social policy initiatives would probably have to engage all stakeholders, seek new solutions to seemingly intractable problems; spread best practices, seek common goals without insisting on uniform measures, and ensure easy and rapid revisability of norms and objectives as new knowledge accumulates.

#### **4) The European Employment Strategy and the Emergence of the “Open Method”**

The EU has begun to respond to this challenge by crafting a new governance model that differs radically from the top-down, rule-based, centralized approach used in social policy heretofore. Zeitlin and Sabel (2003) have summarized the essential elements of this method as follows:

- a) Joint definition by the member states of initial objectives (general and specific), indicators, and in some cases guidelines.
- b) National reports or action plans which assess performance in light of the objectives and metrics, and propose reforms accordingly.
- c) Peer review of these plans, including mutual criticism and exchange of good practices, backed up by recommendations in some cases.
- d) Re-elaboration of the individual plans and, at less frequent intervals, of the broader objectives and metrics in light of the experience gained in their implementation.

The first and most developed example of this “open method of coordination” is the European Employment Strategy. The EES emerged in the 1990s when concern about unemployment was great and the EU was getting ready to launch the single currency. At that time, it was felt that for both political and economic reasons the EU had to tackle the growing problem of unemployment. This decision to Europeanize employment policy was a major change from the past. Therefore, employment policy had been seen as the

exclusive preserve of the Member States. But by the 1990s a consensus emerged that EU level action was needed.

While the Member States saw they had common problems in the employment area, and agreed that this issue demanded attention at a European level, they also recognized that it would not be easy to craft common solutions or pass uniform rules (Trubek and Mosher, 2003). There were several reasons for this conclusion. First, it was understood that the employment problem would require changes in many areas of law and policy, ranging from the rules governing welfare provision to those structuring tax systems. In many of these areas the EU lacked legislative competence and was unlikely to get it.

Moreover, the systems that needed changing vary greatly among the Member States: there are at least three major types of welfare state structures in the EU and equally great variation in their industrial relations systems (Esping-Anderson, 1990; Ferrerra, Hemerick, and Rhodes, 2001). So even if the EU had legislative competence, it would be hard to craft uniform rules for such diverse systems. Finally, no one was sure of the best way to deal with unemployment, so for many problems there was no ready-made set of solutions that could be legislated at any level of government. Faced with problems that were not well understood, whose solutions involved changes in many areas of law and policy and were sure to differ from country to country, and for which its legal competence was extremely limited, the EU could not rely exclusively on the Community Method. Instead, it had to craft another approach (Trubek and Mosher, 2003)

#### **a) how does the EES work?**

The result was the EES. Under this system, the Member States and the European Commission agree to a series of common objectives but each state is free to reach those objectives in its own way and more or less on its own timetable. Instead of uniform rules, the EES employs *guidelines*. Initially, the guidelines were grouped into four pillars: employability, entrepreneurship, adaptability, and equality. For each pillar there were numerous guidelines. Later, additional horizontal objectives were added. In 2003, however, in response to concerns from Member States and others, the EES was streamlined. Three major objectives were specified: full employment, improving quality

and productivity at work, and strengthening social cohesion and inclusion. To accomplish these goals, ten guidelines have been promulgated, along with an injunction to improve governance of the process. (European Council, 2003)

The EES also includes a series of indicators. These are agreed upon by the Employment Committee. Currently, there are 35 key indicators and 64 “context” indicators. The key indicators measure progress in relation to the objectives in the guidelines. For example, there are indicators that measure the total employment rate, the employment rate for people 55-64, the share of young adults still unemployed after six months, the tax rate on low wage earners, and several of dimensions of the gender gap in employment. The resulting tables are made available annually. They show the relative position of all Member States on these dimensions. They bring to light areas where improvement has occurred and document areas where Member States are not reaching common objectives and lag behind their peers.

Each year, each Member State must produce a National Action Plan (NAP) in which it lists progress in prior years towards the goals set by the guidelines, and sets forth plans for the coming years. These plans are discussed at national and EU level. Member States also review each other’s plans and exchange ideas about “good practices”. If the Commission and Council conclude there are problems that State is not addressing, they will make recommendations for policy change. While some of the guidelines are very specific and progress under them can be monitored using quantitative indicators, others are very general. The recommendations draw attention to poor performance, but neither the guidelines nor the recommendations are legally binding and there are no formal sanctions for countries that fail to make progress towards common objectives,

The overall goal of the strategy is to maintain generous European welfare states by reforming them. The Commission wrote in the preparatory documents for the extraordinary Luxembourg Employment Summit that "meeting the challenge of insufficient growth and intolerable unemployment requires a profound modernization of Europe's economy and its social system for the 21st century without giving away the

basic principles of solidarity which should remain the trademark of Europe" (European Commission, 1997)

The EES approaches the task of change and reform in a pragmatic fashion. The guidelines provide general direction. But each state is encouraged to experiment on its own and to shape solutions that fit its national context. The process is designed to make reform more transparent and to encourage sharing of information and practices from country to country. Thus, countries are encouraged to report successful experiments or "good practices" and share their experiences with others. The NAPs are supposed to be circulated widely with opportunities for comment by various levels of government, social partners, and civil society. The indicators provide transparent comparative data and facilitate benchmarking. Through a process of "multilateral surveillance," the Member States comment on each other's NAPs, the European Commission reviews them all, and the European Council issues recommendations to Member States whose performance is deemed to be wanting.

#### **5) EES is judged a qualified success and the OMC expands to other areas**

The EES has been in operation for over five years. It has not brought about sweeping changes but has been credited with contributing to reform in some areas in some countries.<sup>3</sup> The Commission conducted a comprehensive review in 2002 of the first five years. Its report was positive:

"...there have been significant changes in national employment policies, with a clear convergence towards the common EU objectives set out in the EES policy guidelines. ... Employment policies and the role of public employment services have been reshaped to support an active and preventive approach. In some Member States tax-benefit systems have been adapted.... Labor taxation started to become more employment friendly. Education and training systems increasingly adapted to labor market needs. Progress in modernizing work organization has occurred, notably in terms of working time

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<sup>3</sup> Assessing the impact of the EES presents complex issues of causation. It is easier to say it had no effect than to gauge how much it contributes to any change. If a country had a policy specified by the guidelines before the EES, or if it does nothing at all in a field, then it is fair to say the independent effect of the EES is nil. But as Milena Buechs has pointed out in a personal communication, when a country institutes a policy called for by the EES after the guidelines have been issued, it is a complex matter to determine if the EES is the cause of the change, and if so, to what degree. In such cases domestic factors will always play a role, and may be the dominant reason for change. One has to avoid falling into the logic of *post hoc ergo propter hoc*.

arrangements and more flexible work contracts. Gender mainstreaming has become generalized, with various initiatives taken to tackle the gender gaps, including the provision of childcare facilities to improve the reconciliation of work and family life. And new common paradigms such as lifelong learning and quality at work were recognized as policy priorities; with convergence in these areas starting to take place... the Strategy has brought a shift in national policy formulation and focus – away from managing unemployment, towards managing employment growth.” European Commission (2002) (Emphasis supplied)

At the same time, the Commission noted that employment problems persist and there was a need to restructure the EES to make it more effective:

“In order to cope effectively with these challenges, the Luxembourg process has to be refocused on its main priorities: creating more and better jobs, and promoting an inclusive labour market. To this end, the Communication identifies four main issues for the EES reform: (a) the need to set clear objectives in response to the policy challenges, (b) the need to simplify the policy guidelines without undermining their effectiveness, (c) the need to improve governance and partnership in the execution of the strategy and (d) the need to ensure greater consistency and complementarity with respect to other relevant EU processes, notably the Broad Economic Policy Guidelines.” European Commission 2002

Academic assessments are still coming in but they are mixed. A cautiously positive evaluation comes from a knowledgeable academic observers, Swedish sociologist Kerstin Jacobsson (2003) who notes the following positive effects:

- All countries have complied with the process
- It has facilitated cross-Ministry and multi-level cooperation
- It has influenced the policies of the European Social Fund
- National civil servants are deliberating with and learning from their peers in other countries
- The EES has made a difference in policy change in some countries
- EES-linked networks are developing common frameworks for policy planning and assessment
- New issues have been added to the EU agenda.

She concludes that “the EES can be said to have fostered a cognitive consensus around common challenges, objectives, and policy approaches” and says that is its major achievement so far. While Jacobsson echoes the Commission’s conclusion that the EES is a qualified success, it is important to note that others have been more critical and there is no academic consensus yet either on whether the strategy works or – if it does –how it brings about change.

The EU has moved ahead with the OMC. Not only has it decided to continue the EES process; it has also created similar processes in other fields. The OMC has now been expanded beyond employment to cover a wide range of policy domains. These include pensions, health, social inclusion, and education. Of course, what is being done is very varied. Although all the OMCs have some common elements, including EU-wide objectives, national action plans, and peer review, the processes vary considerably. For example, the OMC in social inclusion does not have specific guidelines, reporting and plan revision is on a two year, rather than one year cycle, and there is no provision for EU- level recommendations. The OMC on pensions, just getting started, is so far at least even more informal and open-ended.

#### **6) The battle over hard and soft law— competing visions of the pursuit of the social in the EU and over the place of the OMC in the EU Constitution**

The spread of the OMC has generated real concern in certain circles in Europe. Included among the critics are some groups on the left. For a long time, many people on the left in Europe have tried to give the EU a “social dimension”. They felt that the Union was too focused on economic matters and EU economic policy could, if not counteracted by an active social policy, undermine the welfare state in the Member States. To be sure, proponents of Social Europe have very different ideas about what this concept means and how best to accomplish it. They all believe that the Union has a role to play in the maintenance and development of the “welfare state” and the preservation of Europe’s commitment to solidarity. But there are very different ideas about how best to do that. While there are many approaches, they tend to stand between the poles set by two ideal-

typical alternatives which we shall call “euro-corporatism” and “decentralized cooperation”.

**a) Two ideal-typical visions of Social Europe and how to get there**

The *euro-corporatist* imagines Social Europe in terms drawn from the structure of *national* welfare states. In this vision, the European Union would have plenary power to act in all fields of industrial relations and social policy, using all appropriate modes but with a heavy emphasis on legislation. The Union’s role would be to set social welfare and industrial relations standards that would have to be met in all Member States. This would be done through a corpus of uniform and binding social law passed at the EU level that creates justiciable rights. Moreover, not only would the Union develop a major corpus of uniform social standards; to the extent possible, social laws would be created not through the Community Method, but by agreement between peak organizations representing labor and capital in the Social Dialogue.

To this vision, let us contrast an ideal-typical alternative. In the *decentralized cooperation* approach, the EU would still have an important role to play in social policy, but it would be limited primarily to supporting and coordinating national-level activity while supplementing it in a few limited cases. The approach would include efforts to develop cooperative relations among the various stakeholders, but would reach out to a broader range of interests and groups and concertation would be focused at the national level. In this approach, there would very little legislation at the EU level: to the extent that binding rules were thought to be desirable they would primarily be promulgated by the Member States. The Union’s role would be to establish broad objectives and then facilitate policy reform and experimentation at the local level. By setting some objectives, and monitoring progress towards them, the Union would ensure that Member State social policy was sensitive to concerns of the whole and Member state policy-makers learned from each other.<sup>4</sup>

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<sup>4</sup> To these two extreme visions, one might want to add a third model which might be called “networked technocratic governance”. In this model, the primary work of social and employment policy would be done by networks of technocrats at both the national and EU levels. The technocrats might employ guidelines not rules, and allow diversity, but they would rely more on expert knowledge than on broad participation and would look towards convergence.

## **b) The roots of these visions**

These two ideal-typical positions are based on very different ideas about what is needed to preserve the European Social Model, and very different ideas about the various instruments and modalities available to tackle the challenges that goal involves. Thus, pure euro-corporatist proponents of a European role in social policy would assume that without central legislation, there would be a race to the bottom in social standards. They would believe that uniform rules in these policy domains are both feasible and desirable. They would not see a need for much experimentation; assuming that the rules and policies needed to preserve the social model are pretty well understood and the only problem is creating the political will to impose them. They would assume that formal rules and justiciable rights are the only way to deal with the asymmetric relations of power that exist between labor and capital. They could also argue that such rules, approved in co-decision by the European Council and European Parliament, alone have democratic legitimacy at the EU level.

Contrast those views with ideas that would animate a hypothetical proponent of decentralized concertation in European social policy. Such a person could argue that there is a vast amount of diversity among Member States in social policy and industrial relations. They would see the stakeholders as more varied than the traditional social partners. They would see this diversity not as a problem to be overcome by centralization, but a lucky situation to be taken advantage of in the search for *new* solutions to seemingly intractable problems. They would stress the need for experimentation and believe this is best accomplished by fostering divergent models at national or sub-national levels. They would believe that the widest possible public participation in policy development is likely to lead to the most salutary results. They would argue that policy has to be flexible and revisable to cope with an increasingly complex and volatile world and that traditional forms of regulation may lack the necessary flexibility. They would believe that, with encouragement from the Union and advice from their peers, Member States have the capacity and will to restructure their welfare states. They would assert that Member States can fend off any “race to the bottom” pressures without the need for a centralized straightjacket and have already done so successfully in some areas. They would argue

that some degree of coordination and monitoring at the EU level, combined with peer review and exchange of best practices, will strengthen Member State capacities and thus enhance their ability to resist pressures for a race to the bottom.

**c) For each vision, the other is a distopia**

From each of these hypothetical viewpoints, the other would be a distopia. If you think that centralized legislation is the only way to avoid a race to the bottom, you are not likely to be enchanted by approaches that downplay EU-level law making. If you think that solutions are well known and all that is missing is the will to impose them on the Member States, you are likely to be suspicious of those who call for local experiments. If you feel that social policy is basically a deal between organized labor and capital to be struck in the shadow of the state, you will see widespread participation of NGOs in policy processes as at best a distraction. If, on the other hand, you think that only through experiments and mutual learning, Member States will discover new solutions that will avoid races to the bottom, if you feel that there is an irreducible degree of diversity in social policy, and if you think that experimental governance to be effective must involve all stakeholders, then you will be attracted to open processes and local autonomy and distrustful of uniform solutions coming out of deals which may affect all citizens yet are set behind closed doors by unions and management

**d) Social Policy, the OMC and the EU Constitution**

The European Convention debated whether to include social policy as a major objective in the proposed Constitution for the Union, and whether to give constitutional status to the OMC. The resulting debates revealed aspects of these competing visions of Social Europe and the role of hard and soft law in its construction.

Referring back to our ideal typical distinction between euro-corporatists and those who favor decentralized coordination, what might people with these competing hypothetical viewpoints have hoped for in such “constitutionalization”? A hypothetical euro-corporatist would have hoped that the Convention would significantly expand the EU’s competence so that it could legislate in all areas of social policy and industrial relations if

needed, and expand the role of Qualified Majority Voting (QMV) to remove excessive veto possibilities that could block needed laws. On the other hand, a proponent of “decentralized concertation” would have hoped for a ringing endorsement of the processes and policies needed to make decentralized experimentation work. In the current context, this would mean embracing and strengthening the open method of coordination (OMC).

The debates in the Convention over social policy and about the OMC were complex and the outcome, as reflected in the draft Treaty, suggests that no clear-cut view prevailed. The results are murky, and texts ambiguous. Although the draft does contain sections legitimating EU action in social policy, they are carefully constrained and fall far short of any move towards centralizing the welfare state. And while the OMC is mentioned, albeit indirectly, it is hardly given the robust endorsement and full-blown constitutional status some hoped for.

The reasons for this outcome are complex. While the lines of disagreement in the Convention do not fit neatly into our two ideal-typical categories, it can be argued that competing views on the merits of hard and soft law of the type we have sketched did play a role. In the discussions, questions were raised about the OMC that were based on assumptions the relative merits of the Community Method and Social Dialogue on the one hand (“hard”), and the OMC (“soft”) on the other. Specifically, there was opposition to the OMC by people who thought that unless the “soft” option is severely restricted, it would crowd out opportunities for “hard” legislation. In such a view, the OMC is sort of like a virus that needs to be quarantined before it infects the whole community. If it were let loose in areas of existing legislative competence, it would sap the Union’s will and capacity to do what really needs to be done which is to pass uniform, binding, and justiciable laws.

From such a perspective, if that competence exists now, it must be saved from OMC infection. If it is not there now but might be authorized in the future, the Constitution should stop any use of the OMC in the future competence expansion areas. It seems those opposing the OMC wanted to set up rigid border controls, ensuring that no infection can

occur in any area with legislative competence. That way, existing areas of competence are rendered safe, and future ones will not come with a built-in tendency to “go soft”.

This extremely negative view of the OMC did not prevail. The Treaty does mention the OMC process and does so with any of the clear limits on its use desired by the “hard law” camp. But at the same time the section on the OMC does not provide a strong endorsement of the method. The clause does not enshrine the OMC as a clear alternative to the Community Method nor contain many of the procedural safeguards OMC proponents had hoped for.

## **7) Transcending the “hard/soft” law debate**

While the hard/soft law debate has raised important issues concerning the future of the Union, both sides of this debate over governance modes seem stuck in untenable positions. However, there is evidence that some people have sensed that it is possible to transcend the debate. This section explores such efforts and their significance.

### **a) seeking theories of OMC operation and of hard law effectiveness underlying the move to quarantine OMC**

The first step is to get a better understanding of some of the assumptions underlying efforts to “quarantine” the OMC. What are the views about the OMC on the one hand, and traditional EU legislative routes, on the other, that might lead one to reach such a conclusion? That is what the debate about hard and soft law is all about. Those who want to curb the use of soft law do so because they think the OMC can never “deliver the goods” the way “hard law” can. On the one hand, it is argued, the OMC cannot bring about real change or create real rights. On the other, legislation does. So to choose one over the other is to choose the simulacra of action (OMC) over the reality (law).

It is our view that this position is wrong on both counts. We suggest that the OMC may not be a paper tiger, but rather could emerge as a powerful tool. And the idea that all EU legislation creates hard and fast uniform rules that are easily enforced and will bring about change is a chimera that flies in the face of the record of implementation of EU directives, recent developments in the Community Method, and much of the learning in

the sociology of law ever since the famed gap between the law on the books and the law and action was first identified.

**(b) Soft law may be harder than you think**

If you look at the OMC you may say: how can this change anything? Some of the OMCs do not even have guidelines, and those that do have few that are highly specific or yield benchmarks that are easily measured.<sup>5</sup> So how can one say if a Member State is “complying”? And the Member States are not subject to any formal sanctions if they do not conform to the guidelines so why do we think they would comply (assuming they knew what it would mean to “comply” with some of the guidelines, vaguely worded as they sometimes are) if they do not want to do so? Isn’t the whole thing, asks the skeptic, just a charade in which the Member States pretend to make changes and the Commission pretends the EU has had an impact?

Not for those who are developing theories of how and why the OMC may bring about change, and do it in ways that might even be better than traditional legislation. While the OMC is too new for us fully to understand its dynamics, scholars have pointed to several features that could explain why, despite a lack of clear and uniform rules or formal sanctions, it might work to bring about change. The literature identifies at least six different ways change may occur as a result of the OMC: shaming, diffusion through either mimesis or discourse, deliberation, learning, and networks,

These mechanisms are not mutually exclusive and scholars may deploy several at the same time.<sup>6</sup> But it is worth noting that these accounts fall into two broad categories. Some theorists emphasize the top-down effects of the OMC, stressing how ideas developed at the EU level gradually influence developments at national or sub-national level. Others assume that the transmission of ideas and the vectors of influence for policy change may be as much bottom-up as top-down. Thus in the top-down approach, we find more stress on shaming, diffusion through mimesis and discourse, and one version of

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<sup>5</sup> It is, however, worth noting that the the Commission favors increased use of quantitative targets. Commission (2003b)

<sup>6</sup> For an excellent study that intergates most of these elements in a comprehensive theory of how the OMC operates as a change-inducing process, see Jacobsson (forthcoming).

network theory. In the bottom-up category we find more attention to deliberation, experimentation, learning and another version of network theory.

One explanation for how the OMC might bring about change is through “*shaming*”. This account is closest to the “hard law” model because it treats the clarification of guidelines through preparation of specific recommendations as somewhat similar to a judicial interpretation of general statutory language and the informal sanction of “shaming” as more or less equivalent to formal sanctions. In this account, Member States will seek to comply with the guidelines in order to avoid negative criticism in peer reviews and Council recommendations. The “recommendations” issued by the Council are often in fact rather pointed observations about poor performance: the assumption is that nations will seek to avoid such negative publicity and thus will either make policy changes in advance to avoid future recommendations or quickly adopt the recommendations once issued in order to limit the negative publicity they generate.

A second approach relies on *diffusion* to explain the relationship between the EES and national policy change. In this approach, change is said to come about through the diffusion of models developed in other polities and/or promoted by international organizations. The diffusion approach can, in turn, be divided into two sub-theories. One stresses diffusion through mimesis. The other emphasizes diffusion through discursive transformation.

In the mimesis approach, the guidelines and information provided by the Commission and peer States put before national policy makers a coherent policy model they are encouraged to copy. The EES processes for benchmarking and peer review further facilitate mimesis since they require Member States to study the experiences of others and enter into a dialogue with them about “good practices”. Member States adopt these models from a variety of motives.

Another way diffusion may come about is through discursive transformations. Jacobsson describes discourse-driven change as the construction of a new “...perspective from which reality can be described, phenomena classified, positions taken, and actions justified” (Jacobsson, forthcoming). She points out that the EES has introduced a series

of concepts such as employability, adaptability, flexibility, active welfare, etc. Some of these concepts are reinforced by being reflected in statistical indicators and annual “league tables”. As policy makers begin to take these concepts and indicators on board, adopting them as their own way of organizing reality, they tend to shift policy orientation.

Discursive diffusion theory suggests that various processes, including the requirement for annual reports, committee meetings of various types, peer review and various monitoring efforts, subtly transform national discourse and thus national policy. Thus when reports must be written in terms set by the guidelines, new concepts, with definitions of reality embedded in them, come to be accepted at national level. When national administrations come to see their performance measured qualitatively through peer review and Council recommendations and quantitatively through indicators and league tables they must confront new policy paradigms and take on board new concepts and vocabularies. This process requires them to adopt new cognitive frameworks, a transformation facilitated and reinforced by the need to prepare annual National Action Plans and defend performance to various audiences that themselves employ the discourse of the EES. Such changes in the way issues are conceptualized, it is suggested, may lead to policy change.

A third, overlapping account of how the OMC might bring about change is through the creation of *new policy networks*. The networking generated by OMC occurs at several levels. In the EES, because the NAPs require cooperation from many ministries, EES can create new networks of government officials at the Member State level. Second, since the EES procedure requires input from social partners and civil society, it can expand the national level networks to reach beyond government. Finally, through the Employment Committee and otherwise, processes operate to link civil servants and others from all Member States with the Commission and Council staff in a multi-level, public/private transnational network through which new ideas diffuse and from which a common set of policy positions emerge (Jacobsson, 2003). If the process works as it should, people from Labor, Welfare and Finance Ministries will cooperate at national level, and then meet with counterparts from other EU Member States to deliberate about the best way to deal with common problems. At the same time, employers, unions, and NGOs would have an

opportunity to engage with the process at both levels. Finally, as these contacts go on, a common European way of thinking about employment should emerge and eventually affect actions at the national level.

The network idea is really a part of other approaches and thus there are different ways to conceptualize the function of networks in the OMC. Networks can be seen as part of a top-down model, with the networks serving as transmission belts for ideas coming from the top. But in alternative accounts, they are the settings for deliberation and mutual learning, and thus can be channels to move ideas “up” as well as “down”.

That takes us to a very different set of theories about how the OMC may bring about change. Where shaming, mimesis, and discursive transformation theories focus on how ideas originating at the top and embedded in the guidelines “diffuse” throughout the EU, alternative accounts stress ways in which the new processes foster *experimentation, deliberation and learning*. These accounts see the policy-change process not as a strictly top-down enterprise, but rather as one in which forces for change operate in both directions. In this approach, the diversity of the EU is a great asset, for it means that there will be many different policies being tried out at any time. In such a context, the process of annual planning and review, the exchange of best practices, and the system of multilateral surveillance all help Member States find new solutions to problems often thought to be unsolvable. Trubek and Mosher (2003) note that policy learning is facilitated by:

“...mechanisms that destabilize existing understandings; bring together people with diverse viewpoints in settings that require sustained deliberation about problem-solving; facilitate erosion of boundaries between both policy domains and stakeholders; reconfigure policy networks; encourage decentralized experimentation; produce information on innovation; require sharing of good practice and experimental results; encourage actors to compare results with those of the best performers in any area; and oblige actors collectively to redefine objectives and policies.”

The EES contains all these elements to one degree or another. The guidelines challenge national policies in many countries. The process engages diverse groups and crosses intra-public and public-private boundaries thus creating opportunities for policy

dialogues. Indicators, benchmarking, peer review and exchange of good practices bring new ideas to the surface and encourage poor performers to rethink their strategies. Moreover, the EES process is iterative and iteration fosters deliberation concerning the best way to solve problems.

Of course, regardless of which of these theories or combination of theories, you accept, the question remains whether the hypothesized mechanisms actually operate in the ways the theories predict. To be sure, there is empirical evidence that supports the claim that the EES has made a difference in some countries in some areas. Yet there remains disagreement about how much change in employment policy has actually occurred since EES was created; to what degree any change that has come about can be attributed to the EES rather than purely domestic factors; and just how the EES influenced change when it can be shown to have been a factor.

There is evidence that suggests that it does not always work as it is ideally pictured, and that in some areas it has little, if any, impact. Governments may treat the NAPs as a routine administrative burden, not an opportunity for real debate and deliberation; peer reviews and benchmarking may be paper exercises; social partners may be unwilling to participate actively; some countries may resist change because they think the EES model does not fit their labor markets; others may feel they need not change because they have largely met the EES goals. (Trubek and Mosher, 2003)

Nonetheless, we think the theoretical discussion is robust, and the limited empirical data positive enough, to erect a presumption that in the current situation of EU governance in social policy, “soft law” in the form of the OMC can make a difference and that the EES can be a useful instrument to deal with the employment problem. This view is strengthened by recent developments, which indicate that the Commission and the Council, rather than walking away from the EES, decided to recalibrate the process in order to make the process more focused and effective. (European Council, 2003)

### **c) How hard is hard law anyway?**

In any overall assessment of the hard-soft law debate, one also has to take into account how “hard law” really works. Since by definition the case against “soft law” in general is also a case for some kind of “hard law”, and thus the case against the OMC is largely a case for the Community Method, we have to ask what assumptions are being made about that method and its capabilities. Here we must examine two very different issues.

The first are the changes in the Community Method in recent years. Note that like the OMC, the Community Method is, in part, a process designed to bring about changes in *national* law. To become law, directives must be transposed into national law. Under what Scott and Trubek (2002) call the “Classic Community Method”, this process led to the creation of more or less uniform rules throughout the Union. But in part under the influence of the *Protocol on the Application of the Principles of Subsidiarity and Proportionality*, the Community Method has changed and, as a result, many newer directives are quite open-ended, leaving Member States with much more flexibility and discretion in shaping national legislation than under the “classic” approach. At the same time, these new directives may mandate broad participation in the processes by which general principles are incorporated into national law. By allowing Member States more flexibility and diversity and relying heavily on participation to provide legitimacy, the new approach to Community legislation has somewhat blurred the distinction between “hard law” and the OMC. (Scott and Trubek, 2002; Sabel and Zeitlin 2003)

A second issue that must be taken account of in making the relative assessment of the capacity of hard and soft law is the famed gap between law on the books and law in action. Proponents of “hard law” tend to assume that if uniform rules could be passed through the Community Method, they would be automatically transposed into binding national law which would then be effectively enforced. This seems to be an heroic set of assumptions, especially in view of what is known about the problems of transposition of EU law as well as those of implementation in all legal systems. There is substantial room for delay and slippage in the transposition process. And even if EU-level hard law is successfully transposed, enforcement may prove difficult. Anyone familiar with the

sociology of law knows that behind the façade of formal law operate many informal processes. That may modify or even negate the impact of formal rules. To say there is a rule or a right on the law books is not to say it is enjoyed in reality. For example, Claire Kilpatrick (2003) has noted that, even with clear and uniform norms in an area like employment discrimination, a purely rights- and litigation-based enforcement system may not be fully effective in achieving the equality goals.

In any comparison of governance modes, it is important to be sure we are contrasting a realistic picture of hard law, not an idealized model. When opponents of the OMC suggest it is weak in comparison with the hard law of the Community method, they may be comparing an idealized version of the capacities of the mode they prefer, not a realistic picture.

**d) Hybrid Constellations: Can the EU combine hard and soft mechanisms for optimal results?**

Finally, we have to get beyond the idea that there must be a choice between hard and soft law. These are not mutually incompatible and perhaps the most promising ideas are those that would yoke the two together. This possibility has been recognized by policy makers: thus, in a report to the European Convention on the OMC, the Convention Secretariat noted that:

“The open method of coordination therefore proves to be an instrument of integration among others. For the same subject matter and within the limits of the Treaties, it can therefore be combined with and linked to other instruments of Community action, including traditional Community legislative action.”  
(Secretariat, 2002)

Scholars have also suggested the utility of hybrid combinations. For example, Fritz Scharpf (2002) has proposed the use of framework directives combined with on OMC to monitor and coordinate national responses under the framework which could, in turn, provide information for revision of the framework itself. And Claire Kilpatrick (2003) has shown that such coupling has already started to occur in the area of employment law and employment policy. Kilpatrick notes that hard and soft law can play different but mutually reinforcing roles in dealing with issues such as part-time work and gender

discrimination. She demonstrates that such hybrid combinations have existed at Member State levels for some time and suggests that the EU's adoption of hard/soft hybrids may be a continuation of a general trend.

Similar ideas are set forth by Edward Best of the European Institute of Public Administration. In an article entitled "Alternative Regulations or Complementary Methods? Evolving Options in European Governance", Best reminds us that "in many areas, European policy is formulated and implemented through a mixture of methods both legal and non-legal, European and national, public and private..." (2003:2) In a review of how these several modes operate and interact, he stresses the importance of exploring possible complementarity between these methods.

One area where soft law is being used with hard law, and hybridity seems to be well developed, is EU environmental law. This area is especially important because unlike employment where the EU's legislative competence is quite limited, this is an area where the EU has substantial legislative powers. In that context, the fact that nonetheless the EU has chosen to proceed in part through OMC-like mechanisms suggests that it is fully aware of relative functional capabilities and prepared both to use different modes for different issues and to combine them when they are complementary. (Scott and Trubek 2002; de Burca 2003; Best, 2003)

#### **e) The OMC and the EU Charter of Fundamental Rights**

Another area that has recently attracted attention is the possible use of the OMC to strengthen fundamental rights. Grainne de Burca (forthcoming) has suggested that the OMC might be used in conjunction with the EU Charter of Fundamental Rights if, as expected, the Charter becomes part of the EU Constitution. The proposal seems to envision two different roles for the OMC. In one area it would complement judicial action; in another it would, in essence, substitute for judicial enforcement.

This bifurcated proposal comes about because of ambivalent language inserted in the draft Treaty that limited the justiciability of the Charter of Fundamental Rights. While it is clear that the political and civil rights provisions of the Charter would be justiciable,

those that deal with economic and social rights may not be. Thus, in an apparent effort to avoid judicial enforcement of social and economic rights, a clause was inserted in the draft that limits the judicial cognizability of those provisions of the Charter which “contain principles”. If this awkwardly worded clause is interpreted to refer to economic and social rights, then direct judicial action in this sphere will be precluded.

In this context, de Burca argues, the OMC could be used both to buttress judicial enforcement of political and civil rights, thus mixing “hard” and “soft” elements, and to strengthen economic and social rights. In former case, OMC mechanisms might be used to supplement judicial decision-making, spreading best practices and encouraging proactive reforms. In the latter case, the OMC might substitute for direct judicial action by creating the kind of proactive and dense processes of measurement, monitoring, and shared problem-solving in the economic and social rights field that exists under the EES and other OMC mechanisms. In this area, the rights themselves could function like guidelines, and efforts might be made to translate them into specific benchmarks, measure progress through common indicators, and encourage experimentation and deliberation on ways to ensure fidelity to the norms.

### **Conclusion: Legal theory, hybrid solutions, and integration through law**

If we examine the views of people like Scharpf, Best, de Burca, and Kilpatrick, we can see that unlike euro-corporatists, they do not see a fundamental cleavage between hard and soft approaches. And once we see that there may not be a need to choose between these approaches, we have to ask: what is really going on in debate over hard vs. soft law in the EU? Is it possible that those who object to soft law are seeing these phenomena through a theoretical vision that precludes any possibility of casting it in positive terms? At the same time, is it possible that some proponents of soft law are so wedded to their approach that they fail to see the importance of hard law?

To the extent that this is true, it would represent a failure both of theoretical vision and empirical inquiry. Proponents of hard law have a theory of the nature of law that makes them incapable of grasping the value of soft law processes. When this theory of law is linked to a theory of European integration that stresses the importance of law in

promoting and sustaining European integration, we can see how the OMC could unsettle conceptual frameworks for it purports to be a tool of integration while lacking key features of prior legal mechanisms. We suspect that it is the combination of these two theoretical commitments leads to the observed hostility to the OMC and similar soft law processes.

It is not hard to see why soft law processes challenge both aspects of this body of thought. First, if one thinks that law by its nature must establish uniform rules, the rules must bind the behavior of all to whom they are addressed, the rules, to be legitimate, must have the sanction of elected representatives of the people, that the rules cannot be changed without the consent of those representatives, and that to the extent that the rules create rights, they must be enforceable by courts or quasi-courts, then whatever else a “soft” mechanism is, it cannot and should not be called “law”. Second, if one believes that law, so defined, has been important to the integration of Europe, and that the progress of integration can in part be measured by the number of areas that are brought under uniform rules originating at the EU level, then any shift from hard to soft “law” means a decline in the possibility of integration itself.

At the same time, it is possible to understand why proponents of soft law may ignore the continuing importance of binding, uniform, and justiciable norms. Because of the dominance of the hard law model in our imaginations, proponents of the newer, soft measures have had to carry a heavy burden of proof. That has included efforts to demonstrate the weaknesses of traditional regulatory measures, perhaps clouding their ability to pay attention to the positive features of such regimes and the situations in which they will be most needed and effective. What we need is more careful attention to the relative capacities of the different modes in operation and to their combination in hybrids. Until we have a more realistic assessment of relative capabilities, as well as complementarities between modes, people will keep talking past one another.

Especial attention needs to be given to developing a theory of hybrids. The discussion of hard/soft hybrids is just beginning. We are seeing more and more instances of such hybrids, suggesting this constellation represents an adaptation of legal culture to new

circumstances and challenges. Scholars have yet to develop explanations for this trend, or to craft the robust theories concerning the relative capacities of hard and soft law that is necessary to create a functional theory of hybrids.

We know that such combinations exist. And we know their interrelationship depends on the objectives sought and is context-specific. Thus, for example, Kilpatrick (2003) notes that the EU went from a hard law to a hybrid hard-soft approach to part-time work when it shifted from a largely negative approach to one that promotes part-time work as a means towards employment stimulation and increased competitiveness. And she shows that effective hybridity in this area may operate differently than in employment discrimination, another context in which hard/soft hybridity has emerged. These observations should help us as we seek to move past dichotomous thinking and fully engage hybrid constellations.

Once we understand the limits of approaches that stress one mode at the expense of the other, recognize that every judgment must be comparative and look at relative capacity for specific objectives in varied contexts, see that there are ways these approaches can be combined, and recognize that such combinations may be essential to accomplish specific goals, we should be able to transcend the terms of the hard/soft debate. And in doing that we will find ourselves with a new and richer understanding of what we mean both by “law” and “European integration”.

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