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EXPERIMENTS IN THE OPEN METHOD OF COORDINATION: MEASURING THE
IMPACT OF EU EMPLOYMENT POLICIES

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1) Lessons from comparative labour law in Europe

A long-lasting tradition in European comparative labour law goes into the direction of explaining legal developments as a 'process', namely as the building up of a dynamic set of rules and institutions, influenced, among other factors, by the role of organised social groups (Hepple 1986; Hepple and Veneziani 2009). An historical approach to changes occurring in legislation, as well as to the impact of private governments on law making, has typically been pivotal to the understanding of functions related to labour market institutions. Changes are thus mirrored in the best comparative scholarship as a way to capture ways in which adaptations have occurred among institutions, marking continuity with the past.

One could argue that in post-war European labour law, experiments were mainly in the hands of powerful organizations, representing management and labour. This was, after all, one of the leading ideas spread around by Otto Kahn-Freund and successfully inherited by younger scholars in many different countries.

Experiments were enshrined in a virtuous relationship among law and collective bargaining, whereby the latter was thought of as incremental and explanatory to the former. In national legal systems in which tripartite bodies were active, experiments were – and in some cases still are – the product of joint decision-making.

Comparative labour law tracks down all relevant changes occurring in the evolution of labour law and points to the cases in which such equilibrium among legal and voluntary sources is upset. This has to do, for example, with the consequences of asymmetric shocks in the mid-Nineteen Seventies, following the first oil crisis. That exogenous event caused deep changes in the organization of enterprises and gave rise to widespread restructuring and to significant collective dismissals.

In the Nineteen-Nineties European comparative labour law had to deal with the consequences induced by the adoption of the single currency within national systems of industrial relations. Experiments, once more, were made through collective bargaining, attempting cross-border co-ordination of wage policies (Ahlberg et al 2005) or setting up – as in the 1997 Finnish experiment – buffer funds, to shield national wages from asymmetric shocks.

It is of some interest that all such experiments, aiming at the efficiency of national collective systems of wage setting, have been recently recalled in the formulation of policies by European think-tanks, when the Greek and the Spanish crisis first occurred (Marzinotto et al 2010).

It is debated that the social partners should be able to continue having an influence in the overall institutional equilibrium within the EU. Whereas some commentators seem to dismiss their function in enhancing consensual decision-making and in promoting social justice through the standardization of economic and working conditions, some

others seem to believe that there is a place for collective settlements even in times of deep uncertainties, such as the present ones.

The current economic and financial crisis is changing the attitude of collective actors towards national issues. Different notions of solidarity emerge and new mandates must be given to the bargaining agents, when they enter complex negotiations.

Comparative labour law teaches us important lessons, inasmuch as it indicates ways ahead for understanding and absorbing changes.

It is maintained in this paper that efficiency in legislation can be profitably measured bearing in mind the weight of legal traditions and the consolidated function of labour market institutions.

2) EU employment policies. The Open method of coordination

Rising unemployment throughout Europe was at the origin of harsh criticism of the Nordic countries, campaigning for the inclusion of an Employment Title in the Treaty. The underlying idea was to counteract the coordination of broad economic policies, occurring through a binding system of guidelines issued by the European Council, with a similar system, albeit not assisted by similarly efficient sanctions. This innovation saw the light in 1997 in the Amsterdam Treaty and is now dealt with in Title IX TFEU.

Art. 3 TEU lists full employment among the objectives of a 'social market economy', a paradigm of the current institutional set up. Furthermore, a high level of employment is included among the aims of the so-called horizontal or mainstreaming clause, dealt with in art. 9 TFEU. Such a novelty in the Lisbon Treaty implies that all actions and policies of the EU should be inspired by prevailing and binding outcomes.

European employment policies have been associated with the rise of soft law – as opposed to hard law – regulatory techniques.

Whereas hard law aims at harmonisation, soft law does not imply transposition into national legal systems. The latter can be the object of coordination at a supranational level, taking the form of 'soft' recommendations or guidelines. Thus the definition of 'Open method of coordination' (OMC) has been widely used to describe a difficult balance between centre and periphery of a multi-level legal order. It has also been intertwined with discussions on competences, since employment policies are proudly advocated by national governments as a component of state sovereignty, not to be shared with European institutions.

National governments were required to submit to the European Council 'National Action Plans' (NAP). These were documents of an uncertain legal nature, indicating promises, rather than precise commitments, towards future legal initiatives dealing with employment policies (Ashiagbor 2004).

Following the Commission's white paper on 'governance' in 2001, OMC became a leading example of governing by soft law. Hence, the difficulty to measure member states' non-compliance with Council's guidelines was proved, since no sanctions were provided for the lack of significant reforms at national level.

OMC expanded to cover other related fields, in particular social inclusion, so much so to become an 'emblem' in experiments of deliberative democracy. It was never fully ascertained, though, that social partners and other civil society organizations played a significant role both in setting the agenda and subsequently in scrutinising its enforcement.

2.a) Measuring by social indicators

In the early stage of OMC the emphasis was on measuring states' performances by social indicators (Atkinson et al 2002). The critical issue to be dealt with in this case is: which role for independent academic expertise? Should academics be guiding policy-makers?

Scholars, searching into social changes and attempting to measure them, elaborate indicators, supposedly apt to work in a comparative perspective. However, in an inter-governmental set up, like the one provided for in European employment policies, direct information was necessary, in order to facilitate the Council's coordination. Thus, governments' representatives have become increasingly crucial within specialised committees, aiming at the assessment of member states' performances, through social indicators.

This technocratic approach makes room for political compromises and facilitates interim decisions, not very useful for the perfect accomplishment of a goal. In other words, 'openness' seems to prevail on 'coordination', marking an inevitable decline of the 'method', if we wish to attach to this word a rather rigorous meaning.

OMC has possibly suffered from the lack of sanctions and so have new governance techniques within the EU. Furthermore, despite the implied duty of cooperation between EU and member states' institutions, no effective measures have been adopted to ensure that national technocrats would follow a coherent approach, regardless of changes occurring in governments.

The question is whether the expected outcome of 'open' and supranational experimental processes should be found in the building of solid institutions, acting as conveyors of consolidated practices.

Comparative research developed on the specific subject matter of part-time legislation proved that, within OMC national responses remained very different, following national traditions. It also proved that hard law played a significant role. Member states had to comply with the transposition of a Directive on part-time work and were active on this side, more than in pursuing soft law guidelines (Sciarra et al 2004).

Soft law regulatory techniques are controversial, when it comes to enforcing fundamental rights. Employment policies must typically pursue efficiency of labour markets and enhance competitiveness. However, they must develop taking into account legal boundaries and constitutional traditions of the member states. Hence, the urgency has been felt in the EU to combine market building with enforcement of fundamental rights.

This long process is now clarified in institutional terms, since the Lisbon Treaty recognises the binding nature of the Charter of fundamental rights, first adopted in 2000 (art. 6 TEU). The Commission strongly supports the full enforcement of such a source (Communication from the Commission, *Strategy for the effective implementation of the Charter of Fundamental Rights by the EU*, COM (2010) 573 final, 19.10.2010)

3) Employment policies revisited: Europe 2020

The need to revise employment policies has been at the heart of President Barroso's first mandate at the Commission. Without entering the details of his strategy, it may suffice to say that he convincingly pointed to the lack of efficiency of OMC and underlined a potential attack to national parliaments, since soft law techniques assign a role to governments and to state's administrations, rather than to parliamentary debates and procedures.

His idea to put national legislators again at the centre of attention coincides with a semantic choice. He symbolically re-named National Reform Programs (NRP) the documents that should be sent to the Council for evaluation and further on become the object of coordination. Rather than putting forward political promises, NRP should contain precise legislative plans and should give full account of enforcement mechanisms, with an emphasis on binding legislation.

This move towards a more transparent experimental phase coincides with the launch of 'flexicurity' as a key part of Council's employment guidelines. This new path in policy making is fascinating, inasmuch as it attempts to give new impetus to original national responses in the fight against unemployment (Sciarra 2008). However, it is equally uncertain, when it comes to measuring national performances. The dilemma to keep together market efficiency with full respect of fundamental rights is often unsolved. This is proved by a rich case law of the European Court of Justice, recurrently dealing with working time legislation and the protection of health and safety at the place of work.

It is submitted in this paper that very little coordination is currently taking place in the EU. This is happening despite the new proposals presented under the heading of 'Europe 2020'. The economic and financial crisis has marginalised employment measures and further accentuated the uncertainty of joint and consensual decisions of all member states.

Europe 2020 offers a very rich agenda: 75% of the active population among 20 and 64 years of age should be employed; governments should set 3% of GDP aside for research and development; legislation on climate change, energy and reduction of emissions should become a leading strategy in order to enhance the economy and employment; the number of school leavers should be reduced, whereas the number of people with university degree should increase; the trap for 'working poors' should be fought against, by supporting those socially excluded.

Europe 2020, as with the previous 'Lisbon Strategy', should be based on synergies among existing policies and on better integration of all measures to be adopted. ***According to arts 121 and 148 TFEU, member states must consider economic and employment policies as matters of common concern, therefore the object of coordination.***

The Council adopts Decisions for the issuing of employment and economic guidelines, in which it makes express reference to the previously mentioned art. 9 TFEU. Thus both national and supranational institutions should be bound to reach common objectives. Most points addressed in the agenda of Europe 2020 include the objectives of art. 9.

However, it is difficult at the moment to envisage a coherent plan to create a reasonable balance among social policies and broad economic strategies. Once more, decisions are mainly left in the domain of national competences, with a few supranational exceptions, which are worth mentioning.

One is the recourse to the European Social Fund (ESF), to support measures on flexicurity. This should imply selecting the most efficient responses to the Council's guidelines and also opening the ground for local initiatives, for example in training and long-life learning. Indicators have recently been provided in the official publications series of the EU (Manca et al 2010).

Another supranational measure, set in action by hard law, namely by a Regulation, has to do with recourse to the European Globalization Adjustment Fund (Regulation 1927/2006 EC, then revised as 546/2009 EC), which sets aside resources in response to national applications for serious threats to local markets, as a consequence of

globalization, or for significant job losses, due to the economic crisis. Even in this case, resources are mainly for training and re-training of those who lost their jobs. The automotive sector, for example, has widely benefitted from the Fund and so has the textile sector (one example is Prato, Italy). This Fund should be reviewed in 2013. Finally, support is granted to people who, after losing their jobs, are prepared to start a new business of their own by facilitating access to micro credits, up to 25.000 € and until 2013. (Decision N. 283/2010/UE of the European Parliament and of the Council, 25 March 2010).

4) Experiments by monitoring and reviewing

A close observation of documents recently produced by the European Commission shows that an intense gathering of data is pursued, in view of addressing relevant and urgent issues in policy making.

European restructuring monitor is a publication issued four times a year, based on data collected at national level, mainly through newspaper surveys and national correspondents. It relies on information released by enterprises undergoing some kind of restructuring. This publication is relevant because it has to do with tracing the impact of business strategies implying mass dismissals or consistent reductions in the workforce. Very little is known, in fact, about the answers given to such events, both in terms of resources and actors involved at national level. Monitoring of this kind is part of the actions pursued at European level for the 'anticipation of changes'. The most relevant outcomes of 'anticipation' are to be found in highly innovative transnational collective bargaining, which is currently promoted by European Works Councils (EWC) (Sciarra 2010 a and b).

In November 2010 the first issue of a yet another publication saw the light, under the auspices of the European Commission's DG Employment, Social Affairs and Equal Opportunities. ***European Vacancy Monitor*** collects information on national labour markets and in particular on unemployment, in view of enhancing national responses. At first sight, it contains a more accessible presentation of Eurostat data and of other data collected by sector organizations. It mentions 'bottle necks' situations in national labour markets; it gives account of statistics of skilled and highly skilled employees.

A very active European organization, within the Europe 2020 agenda, is ***Eurociett***, which represents temporary work agencies. In the ten years 1998-2008 the latter have doubled employment (from 1.9 to 3.9 million in full time equivalent). This is interpreted as a consequence of the liberalization occurred in highly regulated labour markets such as Italy, Germany and the Nordic countries, and in the opening of new markets in Central and Eastern Europe.

Another field accurately monitored by the Commission is the one related to the supply and demand of skills (Cedefop 2009) particularly for collecting data on potential new job openings and on changes in production, which could give rise to new qualifications. ***'New Skills for New Jobs'*** is part of Europe 2020 and should concretely provide the experimental ground for areas of the green economy in which employment is expected to change, both in terms of professional qualifications and in figures.

This latter example shows an experiment in anticipation of future and perspective changes. There are no strong indications though on how such a strategy is supported by the European institutions, for example through funding specific actions in specific

fields. It is not clear either how coordination should take place, possibly by way of 'softly' insinuating the adoption of national measures in support of the green economy.

5) Concluding remarks

The intense monitoring exercises, currently favoured by the Commission, suggests that experiments are under way in the field of EU employment policies. It also shows that very little coordination is in place. Although there is a need to acquire relevant information, it then proves difficult to transform knowledge into political will and then into actions.

This may be due to more urgent economic and political issues that have filled the agenda of European institutions and of national governments. It may also be due to a decline in political consensus among member states, when employment issues are at stake. There are signs of a renewed emphasis on national competences, rather than on enforcing supranational strategies.

The setting up of specific EU level budgets lines – as in the examples quoted before – confirms that these remain nothing but isolated and temporary exceptions. The rule is that member states are sovereign in deciding supportive financial measures, as long as they comply with state aid regulations.

The question on how to use experiments in a most efficient way remains unanswered. There seems to be a problem of communication between centre and periphery of the EU. It may very well be that globalization strengthens peripheral initiatives, rather than centralised ones and forces us to re-discover the strength of labour law experiments in traditional systems of consensus building, such as collective bargaining and social pacts. All these queries are correctly put forward in an interdisciplinary and comparative framework. They require deeper investigation into the reasons why experiments are so rarely taken into account in the adoption of legal policies.

References

Ahlberg, K et al 2005, Collective bargaining and wages in comparative perspective, *Bulletin of comparative labour relations* n.56

Ashiagbor, D 2004, The European employment strategy and the regulation of part-time work, in Sciarra et al (eds) 2004

Atkinson et al 2002, Social indicators: the EU and social inclusion, Oxford, OUP

Cedefop 2009, *Identification of future skill needs for the green economy*, n. 2368

Hepple, B (ed) 1986, The Making of Labour Law in Europe: a Comparative Study of Nine Countries up to 1945, London and New York, Mansell Publ.

Hepple, B, Veneziani, B (eds) 2009, The transformation of labour law in Europe, A comparative study of 15 countries 1945-2004, Oxford, Hart Publ.

Manca, A et al 2010, Towards a set of Composite Indicators on Flexicurity: a Comprehensive Approach, Luxembourg, EU
<http://publications.jrc.ec.europa.eu/repository/handle/111111111/13518>

Marzinotto B et al 2010 , Two crisis two responses
<http://www.bruegel.org/publications/show/scholar/benedicta-marzinotto-1/category/0/topic/0/page/2.html>).

Sciarra, S, Davies, P, Freedland, M (eds) 2004, *Employment policy and the regulation of part-time work in the European Union*, Cambridge, CUP

Sciarra, S (2008) *Is Flexicurity a European Policy?*, Urge Working Paper n. 4/2008, http://www.urge.it/files/papers/2_wpurge4_2008.pdf.

Sciarra, S (2010 a) *Notions of Solidarity in Times of Economic Uncertainty*, *Industrial Law Journal*, 2010, vol. 39, 223

Sciarra, S (2010 b), *Collective Exit Strategies: New Ideas in Transnational Labour Law*. <http://centers.law.nyu.edu/jeanmonnet/papers/10/100401.html>