Which mode(s) of governance for a floor of rights of worker protection?

ILERA congress, Amsterdam, June 2013

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1. INTRODUCTION

This contribution will explore the potential role the EU could play in enhancing worker protection. It is maintained here that there *is* a role to play for the EU in the field of labour law, for not only is the European integration process now advancing significantly towards fiscal and economic union. Additionally, the fact that the pursuit of labour market flexibility is integral to the EU concept of competitiveness[2] has raised a new "social question" (cf. Delanty 2008, 679). The Commission itself (2012a, 10) has recognised "a need for measured and balanced reforms in employment protection legislation in order to remedy segmentation or to halt the excessive use of non-standard contracts and the abuse of bogus self-employment". In view of the social costs resulting from growing inequalities (cf. Stiglitz 2012), that role could lie in reclaiming labour law's 'equalising' function through a genuine floor of rights at EU level by making optimal use of the existing means, namely the governance tools at the Union's availability. Accordingly, this paper will deal with the question of *how* to realise inclusive worker protection at European level.[3] Or to be more precise and use the title of this paper: Which mode(s) of governance for a floor of rights of worker protection?

In order to answer this question, the study will begin with a short description of recent developments concerning EU employment law and policy[4] to set the stage. Against this background a selection of proposals on the strengthening of the social dimension of European integration will be reviewed. From this examination, forms of hybrid regulation will emerge as the more realistic and hence appealing solutions, which will lead us to question the prevalent governance paradigm as an adequate basis to cultivate the EU's social dimension. The analysis will eventually advance towards a 'legally embedded' cognitive framework. This may not only be capable of complementing the certainly incomplete, existing EU governance structure designed to achieve economic and fiscal union but also of accommodating new regulatory tools devised to promote a more balanced integration process.

2. EUROPEAN GOVERNANCE UNTHINKABLE WITHOUT HYBRIDITY

2.1 Making or coordinating social policy at EU level?

Faced with the challenges of (post-) enlargement and Member States' opposition to surrendering their sovereignty in the social field, in the past years political preferences in Brussels have focused on soft policy

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[1] As this remains a draft paper, please do not quote without prior permission from the author. I am grateful to S. Klosse for constructive discussions and valuable comments on earlier drafts.

2 A country's rate of employment and productivity are considered two of the key drivers in the EU concept of competitiveness (cf. European Commission 2012d, 19-21; European Commission 1997, 7).

[3] The 'floor of rights'-theme forms an essential part of my thesis with the working title "Towards an innovative legal framework for employment protection". It deals with the question of how to improve labour law protection for atypical workers and advocates a more inclusive approach to be taken towards worker protection than the rather meagre equal treatment-line currently offered by the three Directives on atypical employment. A more detailed discussion of these aspects, however, lies outside the scope of this paper.

[4] The scope of this research is limited to the field of employment. However, irrespective of the structural distinctions made in the Treaty employment will be understood as entailing both a quantitative (i.e. number of jobs) and thus economic dimension, and a qualitative (as terms of employment and working conditions) and thus a social dimension. For purposes of practicality, other social OMCs will not be considered, as they mostly remain outside the remit of EU competence (e.g. regarding education, vocational training and youth policies).

coordination in the area of employment and social policies. However, the deregulatory tendencies in the realm of social protection, especially since the onset of the European sovereign debt crisis (Clauwert & Schömann 2012), and the concomitant increase of social inequalities (OECD 2011) could certainly not be considered as favourable developments towards achieving the objective of 'social progress' introduced by the Lisbon Treaty.

In the field of employment, the latest hard law measure to be adopted was the Directive on temporary agency work in November 2008[5], the product of a politically controversial legislative process of about nine years. In the meantime, the common Flexicurity principles had been adopted. These have henceforth become the dominant paradigm for employment and social policy coordination first under the Lisbon and then under the Europe 2020 multi-annual growth strategies. Further harmonisation of minimum requirements thus seems little feasible at the moment. Due to the variety of welfare systems existing side by side in the EU the desirability of such far-reaching harmonisation in the social domain has moreover been questioned (e.g. Smismans 2005, 218).

In this context and before considering the various options for and against hard and soft legal techniques, it seems reasonable to note the following reservation. The Agency Workers Directive, in fact, seems to be a good example for the decisive influence of inter-institutional relations and political trade-offs on the legislative outcome. This legislation exhibits a collection of vague norms (e.g. the cumbersome articulation of the principle of equal treatment in Article 5(1)) and significant room for derogation (e.g. to that same principle in the provisions of Article 5(2), (3) and (4)). From a legal point of view it could be characterised as the product of a stringent application of the European principle of subsidiarity (Article 5 TEU). From a governance perspective, though, it is certainly representative of the nature of EU law-making resulting in suboptimal inter-institutional compromises (cf. Kilpatrick 2011). Where regulation is intended to achieve 'hard effects', hard law may not necessarily produce the desired results, whereas such potential can instead be identified in certain areas of application of the Open Method of Coordination (OMC). (Ter Haar 2012, Lelie & Vanhercke 2013, Smismans 2005)

2.2 Soft law as 'alternative' – an OMC of fundamental rights?

Against this background, the discussion of proposals of strengthening the EU's social dimension will set off with those observers coming from a pragmatic stance that respects these current institutional and political constraints. One of these proposals that have found notable resonance in the literature is the option of creating an OMC for the implementation of the CFREU (e.g. Bernard 2003, 267-268; De Burca 2003, De Schutter 2005). In fact, this option was one of the recommendations of the E.U. Network of Independent Experts in Fundamental Rights (CFR-CDF, hereafter: the Network) in its first report on the situation of fundamental rights in the European Union and its Member States in 2002.[6] Installing an OMC in the field of fundamental rights was intended to encourage mutual learning among Member States (i.e. the exchange of experiences and the comparison of practices between national authorities). For the implementation of rights within the relevant national context regular meetings were to be organised to set in motion continuous processes of evaluation and interpretation. The collection of information by the Network was thought to facilitate these processes significantly. Such deliberative procedure would be supported by involving both the national authorities with competence in the field of human rights (e.g. consultative councils, independent authorities, ombudspersons etc.) and Community-based actors (like non-governmental organisations and unions). (CFR-CFD 2003, 27) A similar proposal of incorporating the monitoring of fundamental rights into an OMC process was also endorsed by Bernard (2003, 267).

5 DIRECTIVE 2008/104/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 November 2008 on temporary agency work

6 This Network was an advisory panel of experts to the European Commission and the European Parliament on the interpretation of the Charter. It was set up by the European Commission in September 2002 and operational until 2007. The Network prepared a Commentary of the Charter of Fundamental Rights as a practical guide to the EU institutions and the Member States when they implement Union law, which was finalized in June 2006. For more information, see http://cridho.uclouvain.be/en/eu_experts_network/ (last accessed on 25 April 2013).

He, too, saw its potential for offering "a public debate on National Action Plans for Fundamental Rights followed by exchange of views in the Council". This indeed, he argued, would help introducing "a fundamental rights discourse" into EU decision-making.

De Schutter (2005), who chaired the Network of Experts between 2002 and 2007, further elaborated on the proposal of instituting an OMC of fundamental rights. He stressed that the potential of such a method could best be utilised by incorporating and shaping the positive duties that emanated from those rights. In his view, fundamental rights "could serve to orient the use of these tools the Member States and the institutions now have at their disposal – benchmarking, exchanges of information and the identification of good practices, evaluation of experiences and the promotion of innovative practices". He explained the complementary value of such 'monitoring of rights' in relation to more traditional, i.e. judicial, methods of rights enforcement as follows:

> "It is important to note that the risks associated with the decentralised implementation of fundamental rights are distinct from the risk that the minimal requirements set by fundamental rights are not complied with by each Member State, considered separately. A judicial supervision of the Member States' activities is sufficient to ensure that they will not violate the fundamental rights which they are bound to respect – including, where they act in the scope of application of Union law, the Charter of Fundamental Rights. Such a judicial, *post hoc* monitoring will be insufficient, however, to ensure that the different rhythms at which Member States proceed to fulfil fundamental rights do not result either in the creation of obstacles to the internal market or to the cooperation in the area of freedom, security and justice, or in situations in which each State will be under an incentive to lower the level of protection of fundamental rights under its jurisdiction, for instance to ensure that undertakings located on its territory will not be at a competitive disadvantage vis-à-vis undertakings situated elsewhere in the Union. What we require therefore is a mechanism comprising regular exchanges of information on the fundamental rights policies pursued by each Member State, to ensure that where such situations emerge the Union may take an initiative, either by the adoption of a binding legal instrument in the exercise of its attributed powers, or by the adoption of a non-binding recommendation to the State the mode of implementation of fundamental rights of which is at the source of the problem identified." (De Schutter 2005)

His analysis was not untimely, as the first proposals for the establishment of the European Agency for Fundamental Rights (FRA) were circulating at the time. De Schutter saw the particular value of such an agency in conducting a systematic examination of "the evolution of fundamental rights in the Member States to identify the situations where diverging trends could imperil the unity of the internal market or create incentives for the Member States to practice 'rights dumping' – lowering the level of protection of certain fundamental rights, especially the fundamental social rights of employees, to gain a competitive advantage in the single market". He advocated that "[w]here such a risk appears, the added value of a form of open coordination at the level of the Union would consist in identifying ways in which it may be prevented from realising". On the one hand, the OMC could thus be instrumental in diminishing or even preventing conflict by pre-empting the (re)building of obstacles between the national economies. On the other hand, in particular concerning the risk of a 'race to the bottom' in the protection of fundamental rights, the OMC could prove its worth as a 'tool' of the subsidiarity principle. In such a case, De Schutter underlines, "it will be necessary to examine whether the EU should not have to use the powers it has at its disposal to impose a harmonisation at least at a minimal level, by the setting of a 'floor' obligatory on all states, to limit the impact of regulatory competition". If competence for legislative harmonisation were lacking, the EU institutions could still exert political pressure against the lowering of protective standards through appropriate recommendations and peer pressure.

2.3 'Return' to hard law protection? Only as a package deal…

In contrast to the above accounts receptive to the prevailing political and institutional sensitivities, other commentators have focused more on the question of what would be necessary (or desirable) to reinforce the social dimension of the EU. They have underlined the desirability of reinvigorating a hard law-approach at European level, albeit in combination with other softer legal means.

Although the revitalisation of hard law regulation currently seems to be politically off-limits, academics argue against full abandonment of the hard law approach by emphasising the achievements of European labour law hitherto. In order to make the EU's social objectives (more) attainable, a hard legislative basis appears to be indispensable, whilst it would necessarily have to be combined with other governance tools. Weiss (2011, 56), for instance, advocates "legislative re-regulation" at European level "as the predominant tool to be envisaged". He then goes on to acknowledge that this would have to be combined with international standard-setting and strengthening mechanisms of "collective self-regulation". "The most promising strategy" being, according to him, "a public-private policy mix as well as a combination between hard law and soft law".

Likewise, Deakin and Rogowski (2011, 250) maintain that for the advance of social policy "the issue of the EU's currently limited legal powers to harmonise the law in certain core areas, including social security law and collective labour law, must be addressed". They see the need to reassert "the binding force of the floor of rights set by Directive, a clarification of the autonomy of Member States to develop their own approaches to labour law and social policy above the floor, and a strengthening of transnational social dialogue". The room offered by the OMC for policy experimentation could certainly play an important part in that process of clarification of Member States' autonomy, for them "to develop their own approaches to labour law and social policy above the floor". (Ibid.) In this view, a hard law 'floor' is regarded imperative in helping "to renew the institutional architecture which has successfully supported the evolution of European labour law to this point". (Ibid.) Simultaneously, some leeway is required in identifying "new solutions of the kind needed to address the organisational and technological transformations affecting labour law". (Ibid.)

2.4 Towards a new governance paradigm as a cognitive framework in which to cultivate the EU's social dimension

The above accounts only represent a limited selection of the manifold proposals about strengthening the EU's social dimension through various forms of regulation in the light of recent developments. Still they are useful to demonstrate that it becomes increasingly difficult to talk purely either about one or the other, hard or soft legal techniques, in this context. Given the conditions on the ground, a return to *mere* hard law regulation is hardly feasible and it is even more questionable whether it is desirable in this context. What is more, not only has the OMC been acknowledged as a regulatory procedure that promotes convergence but also its potential as a 'tool of integration' in the social field has been highlighted (Ter Haar 2012). It has been especially lauded for being capable of encouraging policy development on social and employment questions through learning and experimentation (Lelie & Vanhercke 2013, De la Porte 2002).[7] Soft coordination is, therefore, considered a promising way of 'managing' the diversity of the soon-28 different labour law and welfare systems (cf. De Schutter 2005, Smismans 2005).

Nonetheless, also the proposals described above about complementing the soft law approach with mechanisms for the monitoring of fundamental rights have apparently not been 'pragmatic' enough. Although an OMC of fundamental rights may in principle be an appealing tool to 'mainstream' social Charter rights into EU policy-making and coordination (a demand formulated by De Witte 2005, 165), in practice this proposal has yet to be appropriated at the decision-making level. In 2006, the Network

7 Vanhercke and Lelie (2012, 43-44) highlight: "The crux of the matter is this: it is not the 'hardness' or the 'softness' of the OMC that matters, but its capacity to stimulate policy learning and benchmarking (through a rather refined set of tools) and especially creative appropriation and action by European, national and sub-national actors." For the, some of the challenges with a view to improving these processes lie in "implementing innovative peer review formats and dissemination practices, developing guidelines for the quality involvement of stakeholders".

soberly noted "with regret" that a mechanism of *a priori* monitoring with a view to protecting fundamental rights in the EU had not been established. It highlighted once more its vision that "such a mechanism would allow for a better informed exercise by the Union of its competences to act in the field of fundamental rights." (CFR-CDF 2006) Equally, the hopes for the FRA to be the official executioner of such a task by taking an active part in an OMC of fundamental (social) rights have not materialised. In truth, the material scope of competence of the FRA, which was officially established by a Council Regulation in 2007, is merely advisory and currently confined to nine areas[8], in which labour rights as such are not included.

Alternatively, the options presented above that can be said to advocate – at least to some extent – a return to hard law often link the call for a 'floor' of hard labour law with other mechanisms (soft law and/or procedures e.g. collective bargaining) to accommodate national regulatory diversity. These proposals can rely on support on the literature like Trubek & Trubek (2005) emphasising the role regulatory hybrid constellations have played in the construction of Social Europe. Looking at the (new) forms of regulation and governance in the economic field, which will be discussed in more detail, the conclusion that it is in hybridity where the future of European governance lies, almost suggests itself.

However, the solution is certainly not as simple as that and not as black and white as the previous contention may suggest, for it may be safe to say that the recent advances towards economic and fiscal union have been triggered by a set of extraordinary circumstances. The sense of urgency generated by the persistent sovereign debt crisis and the fear of spill-over, or even domino, effects within the Eurozone have undoubtedly had a favourable if not decisive influence on these legal and regulatory developments.[9] In order to adequately address also the social consequences of the on-going adaptation processes in national systems, further legal adaptation also at European level is needed. Despite the continued reliance on the OMC as a regulatory tool, this may not be enough to cope with the changes required. It is argued here that one important reason for this is not the fact that the OMC as a legal technique is *soft* (non-mandatory) but rather the fact that it is *intended to* be soft (cf. Vanhercke & Lelie 2013) – and nothing more[10]. This means that the mind-set behind the OMC as nurtured by the 'culture of EU governance'[11] is programmed to conceive it as an *alternative* to law, i.e. to hard law (European Commission 2001, 22; Kilpatrick 2006, 17).[12] Hence, arguably the OMC as a regulatory tool in the social field will not suffice, if genuine hybridity is to be the future of EU governance.

Indeed, the actual protection of fundamental social rights by the EU, i.e. those other than 'market rights' (cf. Bernard 2003, 249) and those covered by the FRA, may indeed require more than the simple adoption of a fundamental rights narrative. While the FRA is said to have contributed to developing a "rights discourse" in the EU (Sokhi-Bulley 2011), from which the Union and its governance system seem to have benefitted (at least rhetorically), Smismans (2010) warns that "methodological free-riding" may not be enough. He metaphorically depicts the EU's fundamental rights narrative as a 'myth' in order to

8 The thematic areas of the FRA's activities are defined by a five-year Multi-annual Framework in broad reference to the different chapters of the CFREU. Currently (2013-2018) , these thematic areas in a nutshell relate to access to justice; victims of crime; information society, particularly respect for private life and protection of personal data; Roma integration; judicial cooperation, except in criminal matters; rights of the child; discrimination (based on the 17 grounds named in the CFREU); immigration and integration of migrants, visa and border control and asylum; and racism, xenophobia and related intolerance. Retrieved 17 April 2013 from http://fra.europa.eu/en/about-fra/what-we-do/areas-of-work.

9 The risk of 'collateral damage' has evidently not (yet) been serious enough to also produce any concrete results that represent genuine advances in reinforcement, not to talk of further integration, of Social Europe.

10 "They [national legislatures] can only be induced in adopting more virtuous behaviour, favouring reforms which are recommended by European institutions as the most suitable ones, within the given economic scenario." (Sciarra 2008, 3)

11 The "OMC was part of the cultural environment generated by the setting up of a European governance. The central idea was to promote consultation and dialogue and, at the same time, introduce a 'framework of co-regulation', whereby binding legislative actions would be combined with initiatives started by the most relevant actors concerned." (Sciarra 2008, 2)

12 See for example the European Commission's website information on Youth policies: "Focus on Open Method of Coordination – In many policy areas, EU Member States set their own national policies rather than having an EU-wide policy laid down in law. However, under the 'open method of coordination' (OMC) governments learn from each other by sharing information and comparing initiatives. This enables them to adopt best practice and coordinate their national policies." Retrieved 29 May 2013 from http://ec.europa.eu/youth/focus/open-method-of-coordination_en.htm

analyse to what extent the adoption of rights-language has not only served the Union rhetorically but has actually lead to "myth appropriation". Smismans defines myth appropriation (in reference to Cassirer, 1946; Tudor, 1972; Flood, 2002) as the adoption of a "shared belief of the foundational principles of a polity, referring to the past but spurring action in the political domain today". (2011, 46) He asserts that "success in the longer run depends on broader myth appropriation[13], coherence and competition with other narratives", while more research is required amongst others on the question of how to measure this 'success'. (Smismans 2010, 45, 62-64) Irrespective of this need for further analysis, borrowing Smismans' image of myth appropriation as a *process* may be helpful for us in discussing the strengthening of the social dimension of EU governance structures. That process might conceivably be construed as the need to provide and foster an adequate cognitive framework, namely a framework which we may think of both as the result but also the source of EU policy action in the field of employment (cf. Smismans 2005). Shaping such a cognitive framework would necessarily have to be based on the recognition that its purpose is multi-dimensional: It ought to be representative of the foundational, or for that matter constitutional, principles of the European polity; it would need to be reflexive in the sense of theorising the protection of fundamental rights in the particular supranational context of the EU; and, finally, it ought to be capable of functioning as a source of inspiration for future policy action, i.e. helping to identify where EU action would be necessary.

3. HYBRIDITY AS THE FOUNDATION OF 'EU EMPLOYMENT GOVERNANCE'

Taking hybridity as a point of departure for the development/amendment of regulatory tools under a new governance paradigm, i.e. cognitive framework, it is useful to briefly reflect on existing forms of hybrid regulation. In the governance apparatus for the coordination of (mainly, but not exclusively) economic and monetary policies, hybridity has been fully institutionalised. As a result, European economic governance has become *stricter* (Bekker 2013). The overall structure has experienced a major advance in integration of policy fields and regulatory methods.[14] This process has so much advanced that employment policy now forms an integral part of the European Semester on economic and fiscal policy coordination.[15] (cf. De Sadeleer 2012, 364; Bekker 2013, 17) Due to the fact that EU economic governance has become more and more linked to 'hard rules' on fiscal discipline, Bekker (2013, 2) voices unease about the arisen "ambiguity concerning what policy items fall within the scope of which coordination method".

The process of institutionalisation has indeed set in motion an expansive integrative force with the effect that specific policy items are now being 'administered' by different actors through different coordination methods and thus necessarily also approached from different policy perspectives. (Bekker 2013) Since these various yet overlapping coordination methods are located along different gradations on the continuum between hard and soft law, the overall effect of this integrative process seems yet to be that the 'perspectives' on employment and social policy are being subordinated to the imperatives of fiscal and economic policy. Consequently, institutionalised methods of hybrid regulation cycles are already a fact of

13 "The involvement of certain elite actors in myth-making and myth-mimicking is far from a guarantee that the myth is widely appropriated in civil society, and even less would provide polity support." (Smismans 2010, 60)

14 "Nevertheless, one has the impression of meandering through an English style park rather than a classic French garden. Indeed, one can only be struck by the heterogeneous nature of the texts setting out the new structure of governance, which is based on provisions forming part of international law (EFSF, ESM and TSCG), Treaty (Articles 121, 126 and 136 TFEU) and secondary law, hard law (the 'six-pack' and the forthcoming 'two-pack'), soft law (2020 Strategy and Euro Plus Pact), directives and regulations. Competences are not clear-cut: the 2020 Strategy and the Euro Plus Pact stand astride EU and national competences whereas the TSCG requirements reckon upon EU competences. Moreover, the scope of these measures varies. […] some rules are applicable to the 17 States with the Euro as their common currency, whilst others apply to the whole Union, and others still to 23 States..." (De Sadeleer 2012, 380)

15 De Sadeleer (2012, 381)raises doubts on whether the impact of this governance structure on the power relations among the EU institutions, and particularly the strengthened role of the European Commission in the fiscal surveillance process, are fully compatible with the principle of conferral.

life in EU governance albeit with social concerns being outpaced significantly by economic and fiscal integration.

However, this is not the end of the story. Forms of hybrid regulation are not merely reserved for the economic realm. In the field of employment, they are in fact already common practice (Sciarra 2008, Kilpatrick 2006, Trubek 2005). The analysis provided by Kilpatrick in this regard is particularly encouraging and will be discussed in more detail below. Yet, for a full understanding of Kilpatrick's account a short excursus on her respective starting point will be beneficial. In 2002, Scharpf launched the proposal to combine Framework Directives with the OMC in order to reinvigorate the European Social Model. He maintained that a differentiated approach would offer the MS important leeway to group themselves – for the purposes of social regulation and policy coordination – along the lines of similar welfare state-traditions. This could facilitate their endeavours of tailoring policy coordination to their respective needs and based on general principles laid down by Directive.[16] Framework Directives in their original form[17], of which there are two in the field of employment[18], set up regulatory frameworks that operate through the codification of general legal principles. Existing EU law, for instance, specifies the principles of prevention of occupational risks and the protection of safety and health but also the principle of equal treatment in the context of employment and occupation. Scharpf's proposal in principle corresponds well with the requirements set by the principles of subsidiarity and proportionality enshrined in the EU legal order (Article 5 TEU)[19] and the Commission's drive for better regulation (European Commission 2001, 20). However, the expansionist approach of the Court of Justice of the European Union (CJEU) towards general principles and most particularly the principle of equal treatment (Mol 2011, 134), as evidenced in the *Mangold* and *Kücükdeveci* rulings, may give reason to doubt Member States' willingness to commit to further codification of general principles regarding delicate employment and social issues. Further critique, then, comes from Kilpatrick (2006, 18), who points out that Scharpf correctly observed the complementarity between the OMC and employment legislation but that his proposal "overlooks the extent to which integration of governance tools constitutes *already*, in a very significant number of employment areas, *actual practice* [emphasis added NB]".

Hence, it is now worthwhile considering Kilpatrick's analysis in more detail. She argues that the integration of governance tools, as suggested by Scharpf, in the employment field has already advanced to such an extent as to represent a system of "EU employment governance". She characterises the main features of that system's as being:

> "(a) a dramatic expansion of the EU governance tool-kit; (b) hybridization of the objectives and internal structures of those EU governance tools; (c) a shift from responsibility for

16 This proposal has found positive resonance in the literature. For an overview and further elaboration see Klosse (2012, 192-193).

17 It is also possible to perceive the Directives adopted on basis of Article 155 TFEU, that is, those incorporating Framework Agreements by the European social partners into law as (a new type of) Framework Directives (cf. Sciarra 2008). Such Directives currently regulate part-time work, fixed-term contracts and parental leave at EU level. The innovation lies in their "combination of regulatory techniques". Apart from that, all three instruments are specifications of the principle of equal treatment. In case of the first two it concerns the prohibition of discrimination due to the existence of an atypical employment contract, while the latter translates the duty to promote equal opportunities and equal treatment between men and women into an individual right to parental leave.

18 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work; and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

19 "Moreover, the principles of subsidiarity and proportionality regulate not only the content, but also the form of Union intervention, so that directives should be preferred to regulations, and framework directives preferred above more detailed directives. [note 87:] Protocol (n° 30) on the application of the principles of subsidiarity and of proportionality, annexed to the EC Treaty by the Treaty of Amsterdam, para. 6: 'The form of Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. Directives as provided for in Article 189 of the Treaty, while binding upon each Member State to which they are addressed as to the result to be achieved, shall leave to the national authorities the choice of form and methods'." (De Schutter 2005, 323)

> certain employment governance tasks primarily resting with public institutions (executives, legislatures, courts, public administrations) to the design of more participatory governance spaces for the elaboration of EU employment norms." (Kilpatrick 2006, 1-2)

Kilpatrick (2006, 11) asserts that EU employment governance pursues four objectives, notably "worker protection; increasing the employment rate and lowering unemployment; including excluded groups in the labour market; and increasing the competitive efficiency of employing enterprises". The most prominent examples of this governance structure are, according to the author, the two Directives on atypical employment existing at the time[20], whose implementation has been matched with corresponding elements of the European Employment Strategy (EES) on part-time work and fixed-term contracts (Kilpatrick 2006, 18-19; Sciarra 2008). Not only does she (2006, 18) see the OMC as complementing the 'softer' hard law instruments such as the mentioned Directives on atypical employment. She also considers soft coordination techniques matching 'harder' legal measures concerning gender equality and the creation of equal opportunities or those on occupational health and safety. The OMC plays an important role within this governance structure because it allows for policy experimentation, for which traditional 'hard law' does not leave (much) room. (Kilpatrick 2006, 22) Finally, Kilpatrick (2006, 20-21) points out another important aspect defining the employment governance regime, notably the alignment between the various hard and soft legal instruments and relevant financial tools of the Union. She highlights that in particular the ESF has successively been tailored to the objectives of the EES. All these features lead her finally to qualify the body of "EU employment governance" as an "integrated regime". (Kilpatrick 2006, 18)[21] She alerts, however, to the fine balance on which this hybrid governance structure relies. It is essentially dependant on the choice of an "appropriate policy mix", since the failure or malfunctioning of one of its component parts may easily disrupt that balance. (Kilpatrick 2006, 23)

Kilpatrick herself qualified her critique on Scharpf's proposal "a strong version of the policy integration thesis" (Kilpatrick 2006, 22). Now seven years, a full-fledged global economic crisis and a still simmering EU sovereign debt crisis later such an original take on EU employment law and policy in the form of an integrated 'European Employment Governance' may be just what is needed for Social Europe.

4. STRENGTHENING THE EU'S SOCIAL DIMENSION: TOWARDS AN '*INTEGRATED* METHOD OF COORDINATION'

Returning to the question posed at the beginning of this paper, it is now possible to state that from the evaluation of the various proposals favouring either hard or soft law for the reinvigoration of Social Europe, forms of hybrid regulation have emerged as the most realistic, desirable and possibly politically feasible solutions. It has also become clear that the institutionalisation of hybridity as the dominant governance paradigm in the field of employment will be impracticable if soft law continues to be merely regarded as an 'either/or'-alternative to hard law. It is genuine hybridity, that is, the complementarity between hard and soft legal techniques, which should determine the mind-set for the amendment and expansion of the regulatory toolkit. Apart from this, it has also been demonstrated how employment and social concerns in the EU have become subordinated to a partial governance structure that shapes the integration process towards economic and fiscal union. This is, arguably, partly the result of a historical development but also the effect of a deliberate – yet, perhaps incomplete – interpretation of the Lisbon Treaty. This conclusion in particular incites the question whether the TFEU could offer any substantive basis for such a new governance paradigm. We know that the coordination of employment policies *in*

[20] The Agency Workers Directive was only adopted in 2008.

[21] "These proposals ignore what in my view is the most significant characteristic of the new EU employment governance: that it is already a self-consciously integrated regime where the OMC, ESF and employment law measures each play distinctive and overlapping roles in realising social justice and competitiveness objectives. From this perspective, one of the most central achievements of the EES is that it builds bridges between employment legislation (*imperium* measures) and the European Social Fund (*dominium* measures)." (Kilpatrick 2006, 18)

harmony with the Union's economic objectives does have an explicit Treaty base. But does the Treaty not also admit a different, or rather expanded, reading of the employment objective? After all, is employment not more than just the mere *number* of jobs generated?

4.1 Constitutional reading of the employment objective

As we have seen, in the framework of the European Semester "integrated coordination" has already become reality (European Commission 2012c). This notion refers to the integration of different policy fields, notably of fiscal, economic and employment policies, within the framework of Europe 2020 and, amongst others, by means of "integrated guidelines".[22] This full incorporation of employment policy coordination into the new European Economic Governance structure is actually just a climax of a development that is not new. It may be seen as the continuation of a purposive construal of the corresponding Treaty provisions relating to employment (Title XI TFEU). Article 146 (1) TFEU requires "consistency" in the formulation of the EES with the Broad Economic Policy Guidelines (BEPG) and thus *induces* an economic reading of this policy field. This drive for policy coherence in dealing with economic and employment issues has now been institutionalised in a formal governance structure, in which by law economic goals prevail – a fact seemingly necessitated by the Union's historical, institutional and constitutional design.[23] But what does this mean, an economic reading of employment? The quantitative measure of the employment rate refers to the number of 'new jobs generated'[24]. However, it becomes a questionable standard when confronted with hard evidence. In fact, the segmentation of the labour force into those with (insiders) and those with merely limited or without (outsiders) labour law protection and a corresponding increase in social inequalities are persistent and still growing problems (European Commission 2012a, 10; European Commission 2012b, 10). The achievement of an employment target, then, does not tell us anything about the type and/or the quality of employment created or about the social consequences of the 'standardisation' of precarious atypical contracts[25], the annualisation of working time and other measures of economic flexibilisation.[26] But how competitive can the Union be if its social base is being compromised?

Moreover, such a partial perspective on the coordination of employment policy does not do justice to the legal framework that has been ascertained by the Lisbon Treaty. Primary EU law, in fact, warrants for a (more) social reading of the employment objective. After all, back in the late 1990s the Treaty of Amsterdam pioneered by incorporating both fields, employment policy (now Title IX) *and* social policy (Title X). Since the last Treaty reform, the mutual relevance of these policy fields is not only reflected more plainly in the objectives of the EU (Article 3 TEU). Additionally, Article 9 TFEU imposes upon the Union a duty of mainstreaming, amongst others, "the requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, [and] the fight against social exclusion". This obligation with respect to achieving a high level of employment is re-emphasised in Title

22 In its Recommendation of 13 July 2010 on broad guidelines for the economic policies of the Member States and of the Union (2010/410/EU) the Council highlights that the guidelines for economic policies of the Member States and the Union are intrinsically linked to the guidelines for employment policies. This integration of policy coordination aims "to achieve the positive spill-over effects of coordinated structural reforms, and more consistent contribution from European policies to the Strategy's objectives, taking into account national starting positions". Recitals 13, 15 of COUNCIL RECOMMENDATION, European Commission, 'Communication on Europe 2020 - A strategy for smart, sustainable and inclusive growth. (Brussels, 2010, COM(2010) 2020 final) p. 27-28; see also Council Conclusions on Governance of the European Employment Strategy within the context of Europe 2020 and the European semester (2010, p. 2)

23 "Compatibility with European macroeconomic guidelines thus becomes – particularly in the early implementation of Title VIII – the only binding criterion within an adaptable notion of supranational coordination." (Sciarra 2008, 1)

24 Cf. *supra* note 2. To recall, by definition the Union's competitiveness depends on high levels of employment and productivity.

25 "Eurostat, the EU's statistical office, says 21.4% of part-time workers in the EU want longer hours and are underemployed. At 66%, Germany has the most part-time workers wanting more hours, followed by Spain at 55% and Latvia at 53%. There are 43 million part-time workers in the EU." EUOBSERVER, *Part-time workers 'underemployed'*. Retrieved 22 April 2013 from http://euobserver.com/tickers/119880

26 It also disguises the fact that many of the new jobs created are in effect subsidised (e.g. as reintegration measures). Irrespective of the question of the sustainability of such jobs in view of the EU's national deficit targets, such practices may also have a depreciating effect on wages and thus on the larger population.

IX, notably it is repeated in Article 147(2) TFEU. An equivalent repetition, though, of the mainstreaming obligation in Title X is lacking. This circumstance probably reflects the status quo in the distribution of competences. In the fields of economic and employment policy the Treaty provides for coordinating competence for the Union together with the MS (see Article 5(1) and (2) TFEU), whilst however for monetary policy the EU disposes of exclusive competence. Regarding social policy, the distribution of competences is more complex (Article 3(c) TFEU). Here, the Union does partly have competence for law-making which is shared with the MS (Articles 4(2)(b) and 153(2) TFEU), whereas its powers are partly limited to supporting MS activities through policy coordination (Articles 153(1) and 156 TFEU.

Nonetheless, the objective of promoting employment evidently attains a social dimension through Article 151 TFEU that complements it with the objective of "improved living and working conditions" (ILWC). Simultaneously, the goals of high employment and ILWC are to be *thought of* (i.e. "having in mind") in the light of fundamental social rights as formulated in the ESC 1961 and the 1989 Community Charter. Irrespective of the competence question, then, it is actually the Treaty-framework that imposes a broader conception of "employment". It becomes clear that despite having its separate title in the Treaty, it is neither a stand-alone or isolated policy field, nor is it merely submerged as a subtopic of economic policy, even though the prevalence of provisions on economic and monetary union may seem to suggest as much. The combined reading of Article 151 and 153 TFEU effectively forms the connection between policy and law. Most convincing may hence be an organic view in which the policy concept of employment unites the rather quantitative economic goal (i.e. the aim of a job-rich economy) as well as the socio-legal goal that the quality of employment should reflect and ascertain ILWC.

This view encourages us to take a closer look at Article 151 and the context it formulates for social policy-making. First, it provides that in order to achieve the two aims EU and MS activities should enable harmonisation that avoids a levelling-down of social standards (i.e. "while improvement is being maintained"). They should enable "proper social protection". The word "proper", however, is not a legal term and thus lacks clarity as to the standard it requires. They should also enable social dialogue, and human resource development tailored to meet sustainable high levels of employment and fighting social exclusion. The compound structure and open wording of the first sentence of Article 151 ("so as to make possible") seems to permit interpreting the demands put on the European and national policies in the social field as either means or ends. The second sentence instead describes more clearly the means to achieve the social policy goals. Namely, in the execution of their activities the EU and MS have to embrace both the diversity of national regulation "in particular in the field of contractual relations" and "the need to maintain the competitiveness[27] of the Union economy".

Finally, Article 151 concludes with a premise. The last sentence highlights the fact that the EU legal framework for social policy is based on the belief that "the functioning of the internal market" will support the "harmonisation of social systems". It also mentions "a development" that "will ensue from the functioning of the internal market". It is, however, not entirely clear what the word "development" refers to, it can be interpreted in different ways. If conceived broadly, it may refer to the entire preceding provision and thus to the ends and means that are to be achieved by social policy-making. Interpreting it more narrowly, the mention of "a development" may refer back specifically to the end of the first sentence, notably "the development of human resources with a view to lasting high employment and the combating of exclusion". In fact, the composition of the last sentence as a whole seems to support the broader interpretation because its second part provides more generally that the development will ensue "also from the procedures provided for in the Treaties".[28] The sentence eventually closes with another

27 The EU has published a Commission Staff Working Document called the European Competitiveness Report every year since 1997.

28 When considering the development of human resources that meet the requirements of a job-rich economy and ensure social inclusion, it should be noted that in the field of vocational training the Union has merely supplementary and supporting competences (see Article 166 TFEU). Nevertheless, Article 153 (1)(h) and (2)(b) do open the possibility of adopting, by ordinary legislative procedure, EU legislation concerning "the integration of persons excluded from the labour market, without prejudice to

premise notably that the development will also ensue "from the approximation of provisions laid down by law, regulation or administrative action".

So what does Article 151 TFEU tell us? It seems to refer back to the original consensus built into the Rome Treaty, according to which ILWC would automatically follow from European economic integration. (De Schutter 2005, 284) This consensus thus presupposed a causal relation between economic integration, the raising of social standards and the improvement of living conditions. The understanding of the functioning of the market anno Lisbon is, of course, broader but the belief in a causal relation has not been abandoned altogether. It can still be detected to some extent in the phrase that the functioning of the internal market "will favour the harmonisation of social systems". Nevertheless, the wording and choice of language ("will ensue from") suggest a more dynamic, relational connection between the Internal Market and social policy. The provision may thus be understood as nurturing a reflexive conception of European labour law and social law that is to take shape with the progress of the European integration process. Article 151 foresees the development of the Union towards the objectives of a high level of employment and ILWC within the conditions set by the first and second sentences. According to the Treaty text, this development includes the harmonisation of social systems and is expected to arise from more than the mere functioning of the market. It should as well result from the approximation of legal, regulatory or administrative provisions[29] and from the procedures provided by the Treaty, whereby the involvement of the social partners in social policy-making in line with Articles 154 and 155 or the use of the OMC relating to Article 153(2)(a) come to mind.[30] In effect, we can summarise that we can read Article 151 as recognising an *enabling* role for the Union and the MS as well as for the Union legal framework in the achievement of the social policy objectives.

Consequently, we can conclude that the open wording of this provision and the limitation of Union competences under Title X seem to embrace the use of hard law and soft law techniques. The Treaty, therefore, warrants a broad reading of the employment objective, which means that policy-making and -development in the EU and its MS does not only have to pursue the economic target of a high employment rate. But they should also ensure the realisation of the socio-legal dimension of employment, namely ILWC. It is thus also the Treaty that already provides the substantive basis for the cognitive framework, which encompasses the organic connection between law and policy and which is to operate through hybrid regulation.

4.2 Formalisation of European Employment Governance including a 'new' regulatory instrument

The constitutional reading of the employment objective in the EU Treaty now allows us to develop further the integrated view suggested by Kilpatrick on European Employment Governance. It is, therefore, necessary to recall that in order to transcend a mere recognition of the status quo (e.g. the functional complementarity between EU employment legislation and soft law techniques), we have to move beyond the view of soft law as merely functioning as an 'either/or'-alternative to hard law. With regulatory hybridity for long being a reality in the economic policy field, it is time to formally recognise and deliberately utilise hard and soft law regulation as cohesive and mutually reinforcing tools of integration to strengthen the Union's social dimension. This institutionalisation of the EU Employment

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Article 166" in order to achieve the objectives of Article 151. The Union may also encourage cooperation between MS with a view to combating social exclusion (Article 153 (1)(j) and (2)(a)).

29 This, however, risks being a circular argument, since the first and last sentences read together seem to demand that harmonisation is to result from the approximation of laws. It makes sense only, if the first is seen as a state or an end as such (not a process), while the second refers to the means or process needed to reach that end.

30 The elements of the first sentence of Article 151, notably "make possible their harmonisation while the improvement is being maintained, proper social protection, […] the development of human resources", seem to find resonance in the Union's employment guidelines. Since October 2010 these are: (7) Increasing labour market participation of women and men, reducing structural unemployment and promoting job quality, (8) Developing a skilled workforce responding to labour market needs and promoting lifelong learning, (9) Improving the quality and performance of education and training systems at all levels and increasing participation in tertiary or equivalent education, and (10) Promoting social inclusion and combating poverty (Council Decision 2010/707/EU of 21 October 2010 on guidelines for the employment policies of the Member States)

Governance structure may be legally just a small step[31]; it would yet be a significant one necessary to foster a broad, Treaty-based conception of the employment objective. The retention of existing terminology would provide for continuity and thus legitimacy, while officially adopting the 'old' terminology into a new Treaty-based governance paradigm would certainly have substantial symbolic significance. At the same time, the new feature, the broader understanding of employment that embraces the quantitative goal of a high level of employment and the qualitative social goal according to which the nature of employment is to ensure ILWC, could open the door for policy innovation. It could thus for example provide impetus for a new EU social action programme, which would be put on par with the European Economic Governance and integral to the European Semester but also provide room for new legislative initiatives or amendments of existing legal instruments.

Such a new policy paradigm may be more easily fostered if supported by a new regulatory instrument, notably through the installation of a truly *hybrid* Method of Coordination, for instance, carrying the name 'Integrated Method of Coordination (IMC)'. The IMC would build on the strength of the complementarity between hard base rules and soft policy coordination. Substantively, it would only require relatively small amendments to existing legal practices, while its innovation in terms of governance jargon could help shape a cognitive framework conducive to a more balanced integration process.

This name is proposed because this new governance mechanism should be *integrating* in several ways. On the one hand, it ought to reflect the aim of a more balanced integration process, which adequately pays tribute to social concerns as well as to economic interests. In addition, it would fulfil a functional role in genuinely combining hard and soft law approaches. On the other hand, to further its appeal for practical application, the method should have a 'catchphrase character' that can match that of the OMC. This way it would not remain a mere complement to existing regulatory structures but extend the 'integrative cognitive framework' (cf. Smismans 2005, 220) and add value to it as a component of equal worth.[32]

Furthermore, it is useful to recall that the recently reinforced European Economic Governance contains a policy mix which operates through the constant interplay of hard and soft legal techniques. We have seen above that this process is being referred to as "integrated coordination". Within the IMC, the notion of regulatory integration would be broader. Firstly, the understanding of integrated policy fields as represented in the European Semester would have to be adjusted to the broader conception of the employment objective, as described above. This could for example be done by infusing/aligning the various, mainly statistical indicators used for benchmarking, particularly those with an employment/social component with existing legal standards.[33] Secondly, setting up the IMC would also comprise the integration of regulatory methods. This would imply the institutionalisation of a hybrid governance structure with a contiguous application of hard and soft legal techniques.

One way of doing this may be through creating and fostering *express* linkages between employment legislation under Article 153 TFEU and the coordination of policies formulated in the spirit of the broad employment objective. That may facilitate deliberative coordination processes in which policymakers can easily refer back to the relevant legislative instruments. For the creation of such linkages, it may be worthwhile to consider the refinement of existing legal tools that embody a reflexive or

31 However, politically it may be a somewhat bigger job. One might think of any process like the one that brought the OMC to life. (The item will have to be moved up the political agenda; allies will have to be found and majorities to be formed; elaboration, accommodation and amendment, and eventually promulgation through official policy documents will be inevitable; there will have to be summits, parliamentary deliberations, committee meetings, Commission recommendations, Council conclusions…)
32 The OMC would continue to function in those policy fields outside the employment context and thus mostly outside the sphere of EU competence, such as combating poverty and social exclusion, education and healthcare.
33 Cf. Sciarra 2008. The attempt to mainstream social rights standards into EU policy coordination could be informed through and learn from studies conducted concerning the Commission's integrated impact assessments. From these would for example emerge the demand that particular attention would be required to avoid the risk of a 'ticking boxes'-mentality among officials, responsible for policy evaluation yet unacquainted with human rights law. (Toner, 2006)

evolutionary approach.[34] Non-regression clauses and social progress clauses[35], for instance, have often been included in European employment legislation but their legal effect is still of rather uncertain scope. (Peers 2010) Other examples of such evolutionary provisions would be the one creating opportunities for part-time work (clause 5 of Directive 97/81/EC), or Article 4(2) in the Agency Work Directive requiring the review of restrictions on agency work that may not be justified. These provisions create stimuli for legislative, administrative and collaborative (e.g. with the social partners) action in rather general terms, whether they aim at review or facilitative measures. Their effect might be enhanced by incorporating a direct textual reference to the relevant coordination processes (that will operate on the basis of, if necessary, adapted indicators) to actively promote "policy development"[36] through peer review and policy learning. All in all, then, under this new governance paradigm of European Employment Governance the key components constituting the IMC would be substantive law and the more procedural tools of policy coordination. Measures adopted to achieve the broadened, or in that case *integrated*, employment objective will have to balance the potentially deregulatory incentives contained in those review and facilitative provisions mentioned above to avoid a disruptive levelling down of social standards. This may eventually also depend on the CJEU whether or not it would be willing to give a purposive meaning to the non-regression clauses contained in the Directives.

Hard surveillance mechanisms backed by sanctions as in the realm of economic and fiscal policy coordination, most of which have by now been adopted through EU Regulations[37], may be politically unfeasible and at the same time undesirable in the social field if merely imposing one-size-fits-all solutions. The enhancement of reflexive legal tools in employment legislation may arguably render the floor of rights, which EU employment Directives generally purport to establish (Deakin & Rogowski 2012, 23-24), more visible and effective as a hard minimum, from which legal standards could be developed for monitoring and evaluation processes (possibly also through a kind of feedback process with the Court's case law). Finally, this approach of aligning Directives and coordination techniques within the framework of the IMC may be a more practical alternative than the differentiated Framework Directives proposed by Scharpf, which due to the inclusion of general principles may be at the very least politically challenging, and in the worst case entirely out of reach.

With the broadened employment objective in mind, the IMC would thus provide room for policy experimentation with a view to improved living and working conditions beyond the minimum.[38] In other words, it might open windows for policy development that is more clearly steered towards social progress and sustainable competitiveness by counteracting deregulatory forces driving MS towards a race to the bottom. In conclusion, the IMC may be a way to coin a new 'legally embedded' and more balanced regulatory paradigm for European integration.

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34 "From an early stage, EU-level measures were designed to stimulate a learning process at member state level. A number of legal techniques were developed to this end. Social progress clauses envisaged the standards set out in directives as minima, below which member states could not go, but which they could improve on. Non-regression clauses stipulated that the implementation of directives at member state level should not be the occasion for a weakening of worker protection, even if the minimum set by the relevant EU measure was below the level already guaranteed by the domestic laws of the state in question." (Deakin & Rogowski 2011, 235)

35 Contained for example in the provisions on implementation in Clause 6 of Directive 97/81/EC, Clause 8 of Directive 99/70/EC and among the minimum provisions in Article 9 of Directive 2008/104/EC.

36 "While the OMC can be used as a source of peer pressure and a forum for sharing good practice, evidence suggests that in fact most Member States have used OMCs as a reporting device rather than one of policy development." (European Commission 2010b, 21)

37 E.g. the Macro-economic Imbalance Procedure (MIP) or the Economic Deficit Procedure (EDP) as part of the Six-Pack and Two-Pack legislative packages that have shaped the EU economic and fiscal governance framework.

38 It may thus be a response to worries related to a 'floor of rights'-approach, which might prompt the EU "to abandon the ambition to go further than a very minimal form of protection for its workers". (Heerma van Voss & Ter Haar 2012, 216)

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