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Copeland, P.; ter Haar, B.

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Chapter 9. The coordinated governance of EU social security policy – will there ever be enough?

by *Paul Copeland and Beryl ter Haar*

1. INTRODUCTION

The legislative and policy activities of the European Union concerning social security – in a broad sense – are characterised by coordination. On the one hand the EU coordinates the social security systems of the Member States in the context of the free movement of workers. By the use of regulations, the EU has adopted a set of rules to determine which social security system applies in order to prevent a moving worker either paying social security contributions twice or from falling between two systems and consequently being deprived of any form of social security. This type of coordination has no direct intention to harmonise or replace the social security systems and leaves it to the discretion of the Member States as to who is to be insured and under what conditions. However, although the EU does not intend to influence the content of the domestic social security rules of the Member States, these regulations do have some harmonising effects. This is in particular true for EU measures on equal treatment, in particular in relation to pay, eg, the *Defrenne* cases. Consequently, these private international law rules, their harmonising and the EU equal treatment rules and case-law, can be considered as ‘hard coordination’.

On the other hand the EU coordinates the social security policies and legislation of its Member States in the broader context of social cohesion, more specifically in the fight against poverty and social exclusion, including employment, social inclusion, health care and pensions. The main regulatory driver for these social security topics is the EU’s Open Method of Coordination (OMC). Rather than harmonising the policies and legislation of the Member States, the aim of the Open Method of Coordination is to coordinate policy efforts to achieve common goals, with the eventual indirect aim of converging national policies. To achieve this the Open Method of Coordination is characterised by policy guidance and guidance on outcomes and consists of a governance cycle that starts with the definition of common objectives, which are further elaborated in the policy guidelines and indicators. From this, EU priorities are set to further guide the Member States, as well as the setting of national targets to provide focus for policy reform. Member States periodically report about their national policies in country reports and the Commission and the Council review these reports in light of the priorities, policy guidelines and common objectives. Based on their findings the

Commission and the Council can issue recommendations to the Member States, thereby redirecting their priorities and adjusting the common objectives and guidelines to changing policy tendencies. The findings are also used to review the common objectives, policy guidelines and indicators, which effectively form the start of a new cycle of the Open Method of Coordination. In this respect the Open Method of Coordination is a rather dynamic governance tool. Throughout the cycle Member States, often guided by the Commission, engage in the exchange of best practices. As such the Open Method of Coordination aims to influence domestic policies and regulation of the Member States in two ways: first by normative guidance via the use of common objectives, policy guidelines, indicators, recommendations and European priorities; and second, by cognitive guidance via the exchange of best practices between the Member States.

Unlike the ‘hard coordination’ of the regulations whose influence on the Member States is traceable via the adjustments of national policies and regulations, establishing causality between the Open Method of Coordination and national policy change is difficult. There are several reasons for this, among them two in particular. Firstly, due to the voluntary nature of the Open Method of Coordination in social policy (no/little competence is transferred to the EU), the Member States remain responsible for the policy and legislative actions concerning their social issues. Secondly, when reporting about their activities in their country reports, Member States tend to emphasise what is in compliance with EU objectives and minimise or camouflage what is not.¹

As a relatively new mode of governance in the process of European integration the Open Method of Coordination has triggered a lively scholarly debate. Besides historical accounts on the genesis and rationale of the Open Method of Coordination,² and theoretical conceptualisations of it as a governance instrument,³ the rich literature about the Open

¹ C De la Porte and J Pochet (eds), *Building Social Europe through the Open Method of Co-ordination* (PIE-Peter Lang 2002) 14.

² See for an overview B ter Haar, *The Open Method of Coordination. An Analysis of its Meaning for the Development of a Social Europe* (Leiden University Press 2012) 7–9. See more particularly: J Goetschy, ‘The European Employment Strategy: Genesis and Development’ (1999) 5(2) *European Journal of Industrial Relations* 117–137; DM Trubek, P Cottrell and M Nance, “‘Soft Law’, ‘Hard Law’ and EU Integration”, in G De Búrca and J Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006) 65–94.

³ See for an overview BP ter Haar, *The Open Method of Coordination. An Analysis of its Meaning for the Development of a Social Europe* (University of Leiden 2012) 9–11; and more particularly G De Búrca and J Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006) 3; DM Trubek and JS Mosher, ‘New Governance, EU Employment Policy, and the European Social Model’, in J Zeitlin and DM Trubek (eds), *Governing Work and Welfare in a New Economy* (Oxford University Press 2003) 36; M Dawson, *New Governance and the Transformation of European Law. Coordinating EU Social Law and Policy* (Cambridge University Press 2011).

Method of Coordination includes numerous empirical case studies.⁴ These studies produce conflicting accounts of the effectiveness of the Open Method of Coordination. Some scholars have argued that the Open Method of Coordination fosters at best cherry picking and results in the gradual erosion of the programmes and policies that constitute a European social dimension. Moreover, it distracts from efforts to create a genuine social dimension via hard law measures that would counterbalance market-led integration. Others consider the Open Method of Coordination as an innovative breakthrough with superior capacity to solve some of the complex problems facing European society.⁵ The purpose of this contribution is not to resolve this dispute, rather its aim is to unravel EU coordinative and supportive initiatives, ie EU initiatives that are addressed to the Member States with the intention to influence their domestic policies and legislation in the wider field of social security. Moreover, the aim is to assess the potential integration capacity of these activities based on their legal dynamics. These legal dynamics include: formal aspects such as the competence of the EU to deal with these issues in general and the specific type of actions in particular, EU general concepts such as supremacy of EU law and direct effect, and the type of incentives created to enforce and stimulate compliance with EU initiatives.

To complete the analysis of EU activity in the wider field of social security these initiatives and their legal dynamics are reviewed in relation to each other. This part of the analysis builds on the theory of hybrid structures, which argues that similar to the national level, EU initiatives do not operate in a policy vacuum; indeed they interact with many different activities. Generally three forms of interaction can be distinguished: rival, complementary, and transformative. The type of interaction between the different initiatives influences their effectiveness as a governance tool. The analysis reveals that the EU is more active in the wider policy field of social security than is often presumed by legal scholars. Since the main focus of this contribution is on the Open Method of Coordination as soft coordination, this analysis allows us to assess the particular role of the Open Method of Coordination in relation to other (soft) governance initiatives, such as recommendations, resolutions, and European funds, and its role in furthering EU social security.

⁴ Among many others C De la Porte and J Pochet (eds), *Building Social Europe through the Open Method of Coordination* (PIE-Peter Lang 2003); J Zeitlin and J Pochet (eds), *The Open Method of Coordination in Action* (PIE Peter Lang 2005); M Büchs, *New Governance in European Social Policy: The Open Method of Coordination* (Palgrave Macmillan 2007); M Heidenreich and J Zeitlin (eds), *Changing European Employment and Welfare Regimes* (Routledge 2009).

⁵ See for a reflection of this debate DM Trubek and LG Trubek, *Hard and Soft Law in the Construction of Social Europe*, Paper prepared for presentation at SALTSA, OSE, UW Workshop on 'Opening the Open Method of Coordination' (European University Institute 2003).

The structure of this chapter is as follows. Section II provides a historical account of the development of EU activities in the wider policy field of social security. The section concludes with an inventory of the various initiatives that are generally applied by the EU in this field. Section III describes the analytical frameworks used to analyse the legal dynamics of these initiatives and their interactions. In Section IV the identified initiatives are analysed and the results are discussed in Section V. To conclude this contribution, the findings are critically assessed in the wider context of European integration, more particularly in the overarching policy context of Europe 2020 and the European Semester of which the soft coordination activities in the wider field of social security are part.

II. THE HISTORICAL DEVELOPMENT OF EU ACTIVITIES TO COMBAT POVERTY AND SOCIAL EXCLUSION

Legal studies regarding the European integration of social security predominantly focus on hard coordination. For other EU activities in the field of social security it is necessary to look for specific policy topics. When reviewing the development of the European social dimension this is unsurprising, since it is characterised by a patchwork of policy activities.⁶ Another distinctive feature of the social dimension is that the hard coordination of social security is one of the first actions in the process of European integration (Regulations 3 and 4 of 1958). However, the first broadly supportive European action dates back to 1975, namely a specific programme to combat poverty.⁷ Subsequent programmes to combat poverty have been adopted in following periods. The core governance mechanism in these programmes is to provide financial support for national policies that fall within the scope of the programme. Member States are not obliged to participate in these programmes. Non-participating Member States are not forced to comply by a judicial procedure or by shaming. However, these programmes are highly sensitive as illustrated by a case initiated by the UK, supported by Germany and Denmark, to annul a proposal of the Commission to adopt the fourth poverty programme. The Court of Justice ruled in favour of the UK, arguing that the Treaty of Maastricht lacked a legal basis for European action in the sphere of social exclusion policies,⁸ an omission that was restored with the Amsterdam Treaty reforms.

⁶ See C Barnard, *EC Employment Law* (Oxford University Press 2006) 49; See also F Scharpf, 'The European Social Model: Coping with Challenges of Diversity' (2002) (40)4 *Journal of Common Market Studies* 645–670.

⁷ The first formal programme of the EU addressing poverty dates back to 1975: Council Decision concerning a programme of pilot schemes and studies to combat poverty [1975] OJ L199/34.

⁸ Case C-106/96 *United Kingdom v Commission* [1998] ECR I-2729, in particular paras 28–37.

Despite the lack of a proper legal basis in the Treaties there was a considerable amount of political activity at the EU level in the 1990s, which raised awareness of the need for the modernisation of social protection systems. In 1992 the Council adopted a recommendation on the convergence of social protection objectives and policies.⁹ This formulated a convergence strategy by which national social protection systems would be guided by principles laid down in the recommendation.¹⁰ The aim of the convergence strategy was to help states face common challenges including those arising from social exclusion and demographic change.¹¹ De la Porte and Pochet refer to this recommendation as a ‘premature version of the Open Method of Coordination’.¹²

Apparently aware of the sensitivity of poverty and social protection policies as an independent goal in themselves, the subject was framed in other policy fields. Hence, this resulted in two policy pathways to deal with these subjects. The first pathway concerns the poverty programmes that were framed in the field of human rights and EU citizenship, where relational issues of power, participation and integration into society were stressed.¹³ The second pathway concerns social protection policies, which became part of a concerted strategy within European Monetary Union (EMU) and in addition to the European Employment Strategy (EES).¹⁴ In particular the development of the postmodern activation paradigm enshrined in the European Employment Strategy explains why Member States could agree to ‘create and participate in a process coordinated at the European level for the area of social inclusion’.¹⁵

Preceded by the European Employment Strategy, the Lisbon Strategy reframed the governance structure into a general one and dubbed it the Open Method of Coordination. Since the modernisation of social protection systems was already on the EU political agenda in the 1990s, besides the Council Recommendation, the Commission adopted two

⁹ European Council, Recommendation 92/442/EEC on the convergence of social protection objectives and policies [1992] OJ L245/49.

¹⁰ K Armstrong, *Governing Social Inclusion. Europeanization through Policy Coordination* (Oxford University Press 2010) 31 and 65.

¹¹ *Ibid* 65.

¹² C De la Porte and J Pochet (eds), *Building Social Europe through the Open Method of Co-ordination* (PIE-Peter Lang 2002) 14.

¹³ G Room, *Beyond the Threshold: the Measurement and Analysis of Social Exclusion* (Policy Press 1995); and K Armstrong, *Governing Social Inclusion. Europeanization through Policy Coordination* (Oxford University Press 2010) 68.

¹⁴ *Ibid* 67–68.

¹⁵ C De la Porte, ‘Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?’ (2002) 8(2) *European Law Journal* 51. See also K Armstrong, *Governing Social Inclusion. Europeanization through Policy Coordination* (Oxford University Press 2010) 65–69.

communications,¹⁶ the inclusion of this in the Open Method of Coordination could have been a simple matter of endorsement of existing policies and ideas by the Council.¹⁷ This is one of the explanations as to why, after the introduction of the Open Method of Coordination in the Lisbon Strategy and the identification of social exclusion as one of the subjects it should be applied to, agreement could be reached in a remarkably short time after the adoption of the Lisbon Strategy.¹⁸

It took considerably more time for the Open Method of Coordination on health care and pensions to be launched, which were initially also part of the Council Recommendation and Commission Communications. However once in place all three forms of the social Open Method of Coordination were streamlined in 2005. The alleged advantage was that it would make the ‘social Open Method of Coordination’ more visible on the EU Agenda. Hence, the whole re-launch of the Lisbon Strategy in 2005 was to make clear the distinctive responsibility of the EU institutions for matters within the EU’s competence, and to render the Member States more accountable for their exercise of domestic policy competence. Nevertheless, the streamlining of the forms of the social Open Method of Coordination in 2005 was considered by some to be a relegation of their priorities within the EU’s governance architecture.

This strong division of competences is mirrored in the institutional embedding of social exclusion and social protection in the Treaty revisions. The governance structure of the European Employment Strategy is fixed in Article 148 of the Treaty on the Functioning of the European Union (TFEU) and a similar provision for the forms of the social Open Method of Coordination was discussed during the negotiations of the EU’s Constitutional Treaty. The idea was dropped as a result of political opposition and a belief that a formalised Open Method of Coordination provision would reduce the flexibility in the field. As a result, activities such as the policy coordination of social exclusion and social protection are merely acknowledged in the legal basis provisions in the Nice and Lisbon Treaties – now Article 153(2)(a) in the (TFEU).¹⁹ Consequently, the social Open Method of Coordination remains vulnerable to political change in priorities and political views.²⁰

¹⁶ These are the 1997 Commission Communication on *Modernizing and Improving Social Protection* ([1997] COM 102) and the Commission Communication on *A Concerted Strategy for Modernizing Social Protection* [1999] COM 347.

¹⁷ K Armstrong, *Governing Social Inclusion. Europeanization through Policy Coordination* (Oxford University Press 2010) 69.

¹⁸ *Ibid* 69–71.

¹⁹ *Ibid* 70.

²⁰ See B ter Haar and P Copeland, ‘What are the Future Prospects for the European Social Model? An Analysis of EU Equal Opportunities and Employment Policy’ (2010) 16(3) *European Law Journal* 273–291.

This vulnerability became apparent with the Europe 2020 Strategy, which was adopted in 2010 as the successor of the Lisbon Strategy. Two changes made this clear. The first change concerns the position of social policy in relation to economic and employment policy in the strategies. The Lisbon Strategy considered economic, employment and social reforms as mutually reinforcing policies, in which social policy was manifested as a ‘productive factor’ at the benefit of economic and employment reforms.²¹ With the re-launch of the Lisbon Strategy in 2005 the ‘Lisbon-triangle’ became a duo between growth and jobs, leaving social policy as a product of economic and employment reforms.²² The EU launched Europe 2020 under the heading of the slogan ‘smart, sustainable and inclusive growth’, aiming for an economy based on ‘knowledge and innovation’, which is ‘resource efficient’ and ‘greener’, and fosters ‘high employment’ and ‘social and territorial cohesion’.²³ Europe 2020, despite aiming to give EU social policy a higher profile, has had the opposite effect and further relegated its importance within the EU’s hierarchy of priorities, an impression that is easily reinforced by the second change: the governance structure of the strategy.

Armstrong interprets the change in governance structure between the Lisbon Strategy and Europe 2020 as a move from the governance of coordination to the coordination of governance.²⁴ Lisbon introduced the Open Method of Coordination as a new integration instrument in order for the European Council to gain the (political) lead over the Strategy. A good part of Lisbon was therefore about the Open Method of Coordination and the policy areas it should be applied to.²⁵ The re-launch of the Strategy in 2005 was the EU’s first attempt to streamline the different coordination processes. Effectively this meant that the cycles of the economic and employment Open Method of Coordinations were integrated²⁶ and, as already mentioned, that the forms of the social Open Method of Coordination – social

²¹ K Armstrong, ‘The Lisbon Agenda and Europe 2020: From the Governance of Coordination to the Coordination of Governance’, in P Copeland and D Papadimitriou (eds), *Evaluating the EU’s Lisbon Agenda* (Palgrave Macmillan 2012). See also M Daly, ‘EU Social Policy after Lisbon’ (2006) 44(3) *Journal of Common Market Studies* 461–481.

²² See European Commission, *Working together for growth and jobs. A new start for the Lisbon Strategy* [2005] COM 24; European Commission, *Consultation on action at EU level to promote the active inclusion of the people furthest from the labour market* [2006] COM 44 final.

²³ European Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth* [2010] COM 2020.

²⁴ K Armstrong, ‘The Lisbon Agenda and Europe 2020: From the Governance of Coordination to the Coordination of Governance’, in P Copeland and D Papadimitriou (eds), *Evaluating the EU’s Lisbon Agenda* (Palgrave Macmillan 2012).

²⁵ European Council, *Presidency Conclusions* (Lisbon 2000).

²⁶ Member States had to submit their country reports on employment and the broad economic policy guidelines at the same time starting with the 2004 cycle. The Commission and Council reviewed these reports in conjunction with each other. See, among other communications, European Commission, *Streamlining the annual economic and employment policy coordination cycles* [2002] COM 487 final, and European Commission, *Strengthening the implementation of the European Employment Strategy* [2004] COM 239 final.

inclusion, health care and pensions – were integrated in a single separate governance framework.²⁷ In the words of Armstrong, the re-launch should be regarded as a step in the move to govern the coordination process, albeit in two parts: economic with employment on the one hand; and the forms of the social Open Method of Coordination on the other. Europe 2020 takes this one step further. All the common objectives are reformulated and integrated, targets on all four subjects (economic, employment, environment and social) are set, and all Open Method of Coordination cycles are further integrated into one single process, also known as the European Semester.²⁸ The new integrated policy guidelines include only one guideline dealing with the social topics.²⁹ Newly added by Europe 2020 are flagship initiatives around which the target activities are focused. One of the flagship initiatives is the Platform against Poverty and Social Exclusion. However, how the latter relates to the original Open Method of Coordination is unclear, other than that the overall intention of Europe 2020 is ‘coordinating and pooling the relevant governance instruments and tools at EU and national levels within the context of the flagship initiatives’.³⁰ The coordinated policy governance of Europe 2020 enables the EU to tackle issues in a broader context. The country-specific recommendations of 2012, for example, stress the need for reforms on issues such as: prolonging working lives and incentives to work; providing better (employment) opportunities for women and young people; improving the effectiveness of social transfers and assistance systems; and ensuring access to quality services.³¹ This was picked up by the Annual Growth Survey, which launched the 2013 European Semester.

This 2013 Semester also began with the adoption of the Social Investment Package.³² The aim of the Social Investment Package is to guide ‘Member States to modernise their welfare systems towards social investment throughout life.’³³ Institutionally it is clear that the Social Investment Package is embedded in the governance framework of Europe 2020 – the

²⁷ European Commission, *Strengthening the social dimension of the Lisbon Strategy: streamlining open coordination in the field of social protection* [2003] COM 261 final.

²⁸ K. Armstrong, ‘The Lisbon Agenda and Europe 2020: From the Governance of Coordination to the Coordination of Governance’, in P. Copeland and D. Papadimitriou (eds), *Evaluating the EU’s Lisbon Agenda* (Palgrave Macmillan 2012); European Commission, *Europe 2020 – a strategy for smart, sustainable and inclusive growth* [2010] COM 2020 final.

²⁹ Council Decision 2010/707/EU, [2010] OJ L308/46. See on this also B. ter Haar, *Open Method of Coordination. An Analysis of its Meaning for the Development of a Social Europe* (University of Leiden 2012) 73–77.

³⁰ Cf. K. Armstrong, ‘The Lisbon Agenda and Europe 2020: From the Governance of Coordination to the Coordination of Governance’, in P. Copeland and D. Papadimitriou (eds), *Evaluating the EU’s Lisbon Agenda* (Palgrave Macmillan 2012).

³¹ [2012] Com 83 final, 5.

³² European Commission, *Towards social investment for growth and cohesion – including implementing the European Social Fund 2014–2020* [2013] COM 83 final.

³³ *Ibid.*

European Semester. As a policy subject it is somewhat puzzling how the Social Investment Package relates to the other social issues of Europe 2020, in particular the flagship initiative Platform against Poverty and Social Exclusion. It would appear that it is part of the Platform, as it coordinates the different policies that have been pooled together in the Platform. It can be argued that the Social Investment Package provides a governance structure for the Platform since it pools together the subjects of the Platform and it coordinates the various governance initiatives applied to those subjects. Furthermore, the Social Investment Package explicitly emphasises that it is complementary to the Employment Package, the White Paper on Pensions, and the Youth Package.³⁴

The result is a complex governance regime with an integrated and coordinated governance structure, pooling together specific subjects in the field of social inclusion and social protection. Moreover, it coordinates and pools together several governance instruments, among which are the Open Method of Coordination, which governs Europe 2020 itself, the European Employment Strategy (in which the poverty and social exclusion guideline is integrated), and financial support via the European Social Fund, Resolutions, Decisions, etc. Table 9.1 gives a more detailed overview of the policy fields involved and the integration instruments used to govern these policies. Figure 9.1 provides a schematic of the policy regime on social inclusion and social protection. This regime also indicates how the policies are pooled together, which is an indication of how the related instruments can potentially interact.

Table 9.1: Overview of governance instruments for social inclusion and social protection

Policy Subject	Short Description	Instruments
Europe 2020	Ten-year strategy for smart, sustainable and inclusive growth	European Semester (Open Method of Coordination)
Social Investment Package	Long-term strategy to help overcome the financial and economic crisis and to strengthen the capacity of individuals. Coordinates seven policy fields and is complementary to the Employment Package, Youth Employment Package and the White Paper on Pensions	European Semester (Open Method of Coordination)
Active Inclusion	Policy field 1 of Social Investment Package Is about enabling citizens to participate fully in society. Covers three main issues: 1. Adequate income support and help to get a job 2. Inclusive labour markets 3. Access to quality services to help people participating in	Open Method of Coordination Social Inclusion/Protection European Employment Strategy European Social Fund

³⁴ <http://ec.europa.eu/social/main.jsp?catId=750&langId=en> (visited on 4 May 2014).

Policy Subject	Short Description	Instruments
	society, including getting back on the labour market	
Social Innovation	Policy field 2 of Social Investment Package Is about developing new ideas, services and models to better address social issues	Europe 2020 (esp. country-specific recommendations) European Social Fund PROGRESS Social Agenda
Investing in Children	Policy field 3 of Social Investment Package Aims to break the cycle of poverty by early interventions and preventive approaches Directly linked to: Youth in Action Youth Pact Indirectly linked to: European Employment Strategy	Europe 2020 (esp. country-specific recommendations) Several European funds: ESF, PROGRESS, FEAMD Recommendation (investing in children) Several forms of OMC (youth, employment)
Homelessness	Policy field 4 of Social Investment Package Defines challenges, but no policy measures. EU supportive action by funding Linked to: Poverty and Social exclusion	Several funds: ESF, FEAMD, European Regional Development Fund
Poverty and Social Exclusion	Policy field 5 of Social Investment Package Thematic focus of Europe 2020 in flagship initiative ‘Platform against Poverty and Social Inclusion’ Broad umbrella for wide variety of policies, with three main objectives: 1. To eradicate poverty and social exclusion 2. To guarantee adequate and sustainable pension systems 3. Accessible, high-quality and sustainable health care and long-term care	Europe 2020 (flagship initiative) Several forms of: European Employment Strategy (policy guideline 10) OMC social inclusion/protection Stakeholder network platform European ‘year’ in 2010 ESF (20% earmarked)
Active Ageing	Policy field 6 of Social Investment Package Is about helping people to stay in charge of their own lives for as long as possible as they age and, where possible, to contribute to the economy and society Includes ideas about intergenerational solidarity Indirectly linked to: European Employment Strategy Non-discrimination	Declaration European Council (guiding principles) European ‘year’ in 2012 Mainstreaming <i>OMC (European Employment Strategy)</i> <i>Directive (age-discrimination)</i>
Social Services of General Interest	Policy field 7 of Social Investment Package Is about improving quality of life and providing social protection Directly linked to (other) general objectives of the EU: Social cohesion High employment	Voluntary EU quality framework (in development – OMC) Funding via PROGRESS

Policy Subject	Short Description	Instruments
	<p>Social inclusion</p> <p>Economic growth</p> <p>Overlap with many other policy fields:</p> <p>social security; employment and training services; social housing; child care; long-term care; social assistance service</p>	

Figure 9.1: Governance regime for social inclusion and social protection

Altogether there is a significant level of activity at the European level, but what does this mean in terms of its ability to influence and change the policies and legislation of the Member States? As previously mentioned in the introduction, it is extremely difficult to prove causality between EU soft coordination (by the Open Method of Coordination) and policy changes at the national level. However, we can gain some insight into their ability to influence policy changes in the Member States by analysing their legal integration dynamics. A second issue is that the interaction of different policy instruments can potentially strengthen their effect (or in some cases undermine them), as the sum of their parts can be greater than the individual components. The following sections of this contribution are therefore concerned with an analysis of the legal dynamics of the integration instruments involved in the

governance of social inclusion and protection, their interaction, and the effect of their interactions.

III. LEGAL INTEGRATION DYNAMICS OF THE *ACQUIS COMMUNAUTAIRE* SOCIAL SECURITY

III.i. Analytical Model Legal Dynamics of EU Integration

European integration is a complex process driven by economic, political and legal dynamics.³⁵ To understand the legal dynamics of EU integration Dehousse and Weiler construct a model with key parameters for EU policy, which subdivides into different levels of integration capacity, varying from weak to strong.³⁶ This model has been updated and further developed by us.³⁷ The model is underpinned by the concepts of ‘integration’ and ‘legal’. The concept of ‘integration’ within this model is understood as ‘a process of change in national institutional and policy practices that can be attributed to European integration’.³⁸ Hence, it is about the harmonisation and convergence of domestic laws and policies of the Member States. The concept of ‘legal’ refers to the question: what is legal and when is the legal ambit exceeded? This clarification is of particular relevance for the definition of the four levels of integration capacity of the parameters. The interpretation of ‘legal’ underpinning our model is derived from an international relations understanding of legalisation.³⁹ As such, the model covers EU hard law instruments such as regulations, directives and decisions, and legally non-binding instruments that have a normative effect (also referred to as ‘soft law’),⁴⁰ such as resolutions, recommendations, action programmes and the Open Method of Coordination.

³⁵ R Dehousse and JHH Weiler, ‘The Legal Dimension of Integration’, in W Wallace (ed) *The Dynamics of European Integration* (The Royal Institute of International Affairs 1990) 242–260.

³⁶ *Ibid*, 249–253.

³⁷ B ter Haar, *Open Method of Coordination. An Analysis of its Meaning for the Development of a Social Europe* (University of Leiden 2012) 86–95. This chapter is also published as B ter Haar, ‘The Growing Potential Integration Capacity of the European Social Model’, *European Integration online Papers* (Leiden 2009) Vol 13. Furthermore, this model has been applied in BP ter Haar and P Copeland, ‘What are the Future Prospects for the European Social Model? An Analysis of EU Equal Opportunities and Employment Policy’ (2010) 16(3) *European Law Journal* 273–291.

³⁸ MP Vink, ‘Negative and Positive Integration in European Immigration Policies’ *European Integration online Papers* (Leiden 2002).

³⁹ KW Abbott, RO Keohane, A Moravcsik, A-M Slaughter and D Snidal, ‘The Concept of Legalization’ [2000] *International Organization* 421–456; further elaborated by BP ter Haar, *Open Method of Coordination. An Analysis of its Meaning for the Development of a Social Europe* (Leiden 2012) 41–59.

⁴⁰ See on this more elaborately L Senden, *Soft Law in European Community Law* (Hart Publishing 2004). See for a more philosophical account J D’Aspremont, ‘Softness in International Law, A Self-Serving Quest for New Legal Materials’ (2008) (19)5 *European Journal of International Law* 1075–1093.

Based on these two underlying concepts the model is comprised of five parameters: (1) competence conferred to the European Union for (further) rule-making; (2) the integration technique used; (3) the decision-making capacity of the EU institutions adopting the instrument; (4) the incidence or effect of the instrument on the national legal order; and (5) the means to foster compliance with the normative part of the instrument. Each parameter is subdivided into four levels of integration capacity. Level 4 indicates a weak integration capacity and level 1 indicates a strong integration capacity. Integration capacity in this model refers to the extent to which the instrument under analysis is likely to integrate, converge or influence the laws and policies of the Member States. This means that when most of the parameters in an instrument are analysed as level 3 or 3, the extent to which the instrument is likely to integrate, converge or influence domestic laws and policies is weak. Conversely, when most of the parameters in an instrument are analysed as level 1 or 2, its integration capacity is considered to be strong. Figure 9.2 summarises the analytical model.⁴¹

Figure 9.2: Analytical model to analyse the legal integration capacity of EU instruments

Weak integration Strong integration	4	Supportive competence	Procedural obligations	Moving spirit	Indirectly effective	Persuasive pressure
	3	Coordinative competence	Coordination	Specific function	Ratification	Institutional Surveillance
	2	Shared competence	Minimum harmonisation	Executive rule-maker	Conditionally effective & applicable	ECJ: preliminary ruling
	1	Exclusive competence	Total harmonisation	Law-maker	Directly effective & applicable	ECJ: direct action
Manifestation level		1.	2.	3.	4.	5.
		Conferred competence	Integration technique	Decision-making capacity	Effect national legal order	Ensuring compliance

⁴¹ See for a more elaborate description of the analytical model BP ter Haar, *Open Method of Coordination. An Analysis of its Meaning for the Development of a Social Europe* (Leiden 2012) and B ter Haar, 'The Growing Potential Integration Capacity of the European Social Model', *European Integration online Papers* (Leiden 2009) vol. 13.

III.ii. Analysis of the Legal Dynamics of the *Acquis Communautaire* of Social Security

Section II described the historical development of EU integration in the field of social security and gave focus to social inclusion and social protection. The historical account reveals that with the exception of the coordinating regulations, most of the other instruments that embody the *acquis communautaire* of social security are soft law instruments. Since they have been pooled together by the Social Investment Package, the analysis of the legal dynamics of this field is limited to these instruments (see Table 9.1). This may not capture all of the instruments that are part of the *acquis*, yet since it is the core of the *acquis* the analysis of these instruments will be sufficiently representative of the whole *acquis*. The analysis is structured by type of instruments, thus the Open Method of Coordination, resolution, action programme, etc and by specific policy field. The first distinction is convenient, since instruments of the same type share similar qualifications on certain parameters, in particular integration technique, effects on the national legal order and ensuring compliance. The second distinction is needed since the policy field is influential in the qualification of the first and third parameters – conferred competence and decision-making capacity.

Since the interest of this analysis lies with the integration capacity of the EU instruments to integrate, converge or influence the laws and policies of the Member States, the analysis is limited to instruments that address Member States. This excludes, for instance, the Europe 2020 Strategy and the Social Investment Package, and also the Social Agenda and European ‘Year’. The first two are excluded since they address governance activities of the EU institutions by the establishment of a coordinative framework in which those activities are pooled together. As such, they merely address the Member States indirectly, namely via the activities they yoke together in their governance structure. This is influential on the integration capacity of those instruments, however this cannot be assessed by this analytical model but will be analysed in the next section on the hybrid structures between the instruments analysed in this section. The other instruments, the Social Agenda and European ‘Year’, are political instruments to raise attention for the subjects on political levels and not legal instruments that aim to integrate, converge or influence Member States’ laws and policies. Based on the inventory listed in Table 9.1, this leaves the following types of instrument: several forms of the Open Method of Coordination; funds; (country-specific) recommendations; declarations; directives; and frameworks.

III.ii.a. Legal integration capacity of the Open Method of Coordination

In total three forms of the Open Method of Coordination are involved in the Social Investment Package: the European Employment Strategy; the social forms of the Open Method of Coordination (inclusion, health care and pensions) and the youth Open Method of Coordination.

Competence

The first parameter deals with the type of competence conferred to the EU to deal with a certain subject. While in the pre-Lisbon Treaty era it was difficult to determine the exact type of competence that was conferred to the EU,⁴² this has become more straightforward since the introduction of the Lisbon Treaty. The TFEU has introduced a catalogue of competences in its first part – Articles 2–6 TFEU. Article 2 TFEU explains the different types of competences, and Articles 3–6 TFEU define which subjects fall within the different types of competences. To what extent a competence can be executed depends on the exact formulation of the legal basis provision also included in the TFEU.

Regarding employment Article 5(2) TFEU stipulates that the EU takes measures to coordinate the employment policy of the Member States. This is expanded in Title IX of the TFEU and Article 148 thereof. Article 148 TFEU is very specific in the governance structure for the measure the EU is allowed to adopt, namely that of the Open Method of Coordination. This is less clear for the forms of the social Open Method of Coordination. First of all the ‘competence catalogue’ holds two provisions addressing social issues. Article 4 TFEU attributes shared competence in the field of social policy ‘for aspects defined in this Treaty’ and Article 5(3) TFEU attributes coordinative competence to the EU to ‘take initiatives to ensure coordination of the social policies of the Member States’. To determine the exact competence for the issues covered by the forms of the social Open Method of Coordination, we have to look at the legal basis provision in the TFEU, which is Article 153. All three subjects are listed in subparagraph 1 of Article 153: social exclusion is sub j and health care and pensions fall within the scope of sub k (modernisation of social protection systems). Subparagraph 2 of Article 153 TFEU stipulates the different regulatory activities the EU can take regarding the subjects listed under subparagraph 1. One regulatory action is to adopt

⁴² See for this in general, L Senden, *Soft Law in European Community Law* (Hart Publishing 2004) 79–93; in relation to EU employment law, C Barnard, *EC Employment Law* (Oxford University Press 2006) 63–66; and in relation to the Open Method of Coordination, B ter Haar, *Open Method of Coordination* (Leiden 2012) 67–71.

minimum standard directives, which are typical instruments for shared competence. However, this action is limited to the subjects referred to in paragraph (1)a–i, excluding the subjects of the forms of the social Open Method of Coordination that are referred to in paragraph (1)j–k. This leaves only the second form of action, which is to ‘adopt measures designed to encourage cooperation between Member States’ (Article 153(2)(a) TFEU). Hence the competence to deal with the subjects of the forms of the social Open Method of Coordination is limited to coordination.

The competence to deal with youth policies is even more complex. In the ‘competence catalogue’ one reference is found to youth as a policy field, namely in Article 6(e) TFEU, which contributes a supporting and supplementing competence to the EU. However, when searching for legal basis provisions dealing with youth, two are found. The first is Article 47 TFEU, which is part of the free movement of people (part of the internal market). The competence of the EU concerning the internal market is that of shared competence, which is from a European point of view much stronger than supporting and supplementing, since it includes the option to adopt harmonising measures.⁴³ That the field of youth policy is not intended to result in harmonising actions of the EU can be deduced from the activity it describes: ‘Member States shall, within the framework of a joint programme, encourage the exchange of young workers’. This is very similar to the other legal basis provision dealing with youth, Article 165(2) TFEU, which reads as a fifth field of action ‘encouraging the development of youth exchanges and of exchanges of socio-educational instructors, and encouraging the participation of young people in democratic life in Europe’. At best both provisions provide the legal basis to adopt supporting and supplementing provisions.

Integration technique

The integration technique of the European Employment Strategy is rather straightforward since it is the prototype of coordination of the policies of the Member States. The integration technique of the forms of the social Open Method of Coordination is more diffuse. All three of them intend to coordinate the policies of the Member States, however the Open Method of Coordination on social inclusion is more developed compared to health care and pensions. However, all of the social types of the Open Method of Coordination are more focused on measuring policy outcomes rather than a convergence of policies. Consequently, the focus of the social Open Method of Coordination lies more with the indicators than the policy

⁴³ See on this also D Curtin, ‘European Legal Integration: Paradise Lost?’, in D Curtin et al (eds), *European Integration and Law* (Intersentia 2006) 1–56.

guidelines. Nonetheless, the core integration action is the coordination of the policies of the Member States, and hence the integration technique is that of coordination. The youth Open Method of Coordination is again different from both the European Employment Strategy and the social Open Method of Coordination. The main regulatory instrument is a resolution that sets the framework for youth policies. The governance structure set by the resolution is comprised of common objectives, policy guiding principles, a three-year thematic focus (priority), knowledge building, information sharing and peer-learning activities. Together these governance mechanisms are identified as an Open Method of Coordination.⁴⁴

Nonetheless, the EU seems to have stretched its competence in this field with the adoption of the 2009 Framework Resolution, which is an Open Method of Coordination coordinating all governance actions in the wider field of youth policies.⁴⁵ A historical analysis of the evolution of EU youth policies has indicated that EU youth policy, including the Open Method of Coordination and its coordination of the governance actions in the nine specific fields of action, are the result of political processes in favour of youth and the Open Method of Coordination. On a closer look at the elements comprising the youth Open Method of Coordination there are two distinctive differences from the European Employment Strategy and the types of the social Open Method of Coordination: no obligation for Member States to submit country reports; and no indicators to measure the achievements of the Member States towards the common goals. This does not necessarily render the governance structure as not being an Open Method of Coordination; however, in view of the integration technique, what is left is the coordination of measures supporting the Member States to achieve the common goals. It is not the policies or policy outcomes of the Member States that are coordinated, hence it is the EU supporting measures that are coordinated. In this respect the conclusion is that the integration technique of the youth Open Method of Coordination is supportive.

Decision-making capacity

This parameter strongly relates to the first, the competence of the EU. In essence, the institutions of the EU making the decisions cannot go beyond the competence conferred upon them. Regarding the European Employment Strategy the decision-making capacities of the EU institutions are very clear. Article 148 TFEU, which outlines the governance structure for EU employment coordination, also defines which EU institutions can take what kind of

⁴⁴ http://europa.eu/legislation_summaries/education_training_youth/youth/ef0022_en.htm.

⁴⁵ BP ter Haar and P Copeland, *EU Youth Policy: A Waterfall of Softness* (Universiteit Leiden 2011) *Onderzoeksmemorandum HSZ*.

decisions. For each governance element – common objectives, guidelines and recommendations – another procedure is described. None of them follow one of the general EU procedures, for instance the law-making procedure or the social dialogue. Instead specific procedures are formulated. In our analytical model this qualifies as the EU institutions making decisions in a specific function, namely as coordinators of the employment policies of the Member States. This is similar for the youth Open Method of Coordination that is adopted in accordance with the specific procedure laid down in Article 165 TFEU.

The forms of the social Open Method of Coordination have a clear competence within Article 153(2)(a) TFEU, which requires the EU institutions to decide on measures by using the law-making procedure. The practice deviates considerably from this. For instance, the Open Method of Coordination on social inclusion has been launched without any clear measure deciding on its implementation. Instead, the clearest instrument in this respect is a Council Conclusion defining the common objectives, guidelines, indicators and obligations of the Member States to submit national reports and its three-year cycle.⁴⁶ The streamlining of the three forms of the social Open Method of Coordination in 2005 is also not decided on in a formal EU integration instrument, but done in a non-specific document of the Commission, which is not even a Communication. Even though the EU institutions have the option to act as lawmakers they have not done this. Due to the lack of a clear decision, at best the practice can be assessed as moving spirit, meaning that the EU institutions set the pace and shape of the policies by declarations of intentions and guidelines for further EU and national policy actions.⁴⁷

Effects on the national legal order

A common basic characteristic of the forms of Open Method of Coordination is that they are legally non-binding integration instruments. This means that participation by the Member States is voluntary and that the effect of the Open Method of Coordination on the national legal order is, per definition, indirect. Moreover, the aim of the Open Method of Coordination is to coordinate the policies of the Member States via policy guidelines and indicators. It is up to the Member States to decide how and to what extent they adjust their national policies and laws to the normative suggestions of the Open Method of Coordination. This is especially true for the forms of the social Open Method of Coordination and the youth Open Method of Coordination. With respect to the European Employment Strategy this seems to be less

⁴⁶ BP ter Haar, *Open Method of Coordination* (Leiden 2012) 72–73.

⁴⁷ *Ibid*, 91–92.

voluntary when it comes to the formal requirements, such as the submission of country reports.⁴⁸ Nonetheless, when it comes to the normative aspect of the European Employment Strategy this cannot be upheld; it is not up to the EU to decide which actions need to be undertaken at national level; this belongs to the competence of the Member States.

Ensuring compliance

Following on from the above, the means to ensure compliance are also limited. Maybe with the exception of the formal, procedural part of the European Employment Strategy, it is characteristic for the Open Method of Coordination to leave it up to the Member States to decide which actions need to be taken in order to achieve the common goals. Moreover, given the nature of the Open Method of Coordination – open, flexible norms that strive for convergence, but allow for difference – it is an impossible task for a court to judge whether a Member State has sufficiently fulfilled its obligations.⁴⁹

Instead the Open Method of Coordination relies on institutional surveillance by the Commission and the Council. Together they draw up reports about the general achievements of the Member States, which allows them to identify tendencies in policy directions and achievements. This creates a context in which outliers can be identified, i.e. Member States that either perform significantly better or worse. While taking into account the specific situation (for example the type of welfare state) and the problems individual Member States are facing, the reports set a comparative baseline on which the Council adopts country-specific recommendations. With these recommendations the Commission and Council redirect or support the priorities of the Member States. In order to monitor the extent to which the Member States take these recommendations into account, they are required to report progress in their national action plans. This form of institutional surveillance can also be indicated as normative surveillance.

III.ii.b. Legal integration capacity of the funds

The use of funds in the Social Investment Package is remarkable in the sense that six out of the seven policy fields of the Social Investment Package are financially underpinned by a

⁴⁸ *Ibid*, 77–78.

⁴⁹ See for an illustration of the problems a court may face, D Ashiagbor, ‘The European Employment Strategy and the Regulation of Part-time Work’, in S Sciarra, P Davies and M Freedland (eds), *Employment Policy and the Regulation of Part-time Work in the European Union. A Comparative Analysis* (Cambridge University Press 2004) 43–52.

fund.⁵⁰ Five out of these six fields are supported by the European Social Fund (ESF) and three out of these six policy fields are supported by two or more funds. Besides the ESF, the following funds are used: PROGRESS, the Fund For European Aid to the Most Deprived (FEAMD), and the European Regional Development Fund (ERDF). The aim of the funds is not to harmonise the legislation of the Member States, instead it is to financially support the Member States when they experiment with new policies and laws that are in line with the EU policy initiatives. Member States are not obliged to make use of the funds; they can apply for them when they are eligible. A Member State is eligible when it is conducting activities in line with the EU policy initiative connected to the fund. This is slightly different with the ESF, which allocates budgets to the Member States. The Member States have to decide on the policy priorities at national level with those priorities linking to the main objectives of the ESF.

The funds all have in common that they indirectly influence the policies and legislation of the Member States. Because the financial support received from a fund needs to be applied in a policy field promoted by the EU, it stimulates the Member State to undertake activities in line with the EU policy field and encourages them to experiment with different policies to achieve a certain objective. If the policy is unsuccessful it will not be continued, when it is successful it will be incorporated into the ordinary policies and laws of the Member States. Once the latter happens, the national policies and laws come closer to the EU objectives.

This indirect effect of the funds and the allocation of substantial amounts of money to certain policy objectives can result in Member States being wary about the establishment of the funding programmes. Moreover, the acceptance of a financial support programme in a particular policy field equals acknowledging EU competence in that field. From a political perspective this is not always desirable, hence the UK and Denmark began proceedings to annul the poverty action programme in 1996.⁵¹ Thus, although the funds themselves do not regulate policy fields, they have a regulatory effect in the sense that they influence the policy choices of Member States when the latter are undertaking activities that are financially supported by a fund. Consequently, the EU cannot apply funds in areas where its competence is not acknowledged. Because of the indirect effect of the funds on the policies, the required

⁵⁰ Only the policy field Active Ageing is not explicitly supported by any of the funds. However, it is indirectly, since active ageing is also part of the European Employment Strategy, which is financially supported by PROGRESS.

⁵¹ Case C-106/96 *United Kingdom v Commission (Social Exclusion)* [1998] ECR I-2729. See on this also Section II of this chapter.

level is that of supportive, since it is up to the Member States to decide to apply for financial support and, when they do so, to define the extent of their policy actions.

When a Member State has opted for financial support by a fund, it is obliged to report on how the money is spent and the results of the activities undertaken. In particular, the financial reporting can be very strict.⁵² The monitoring of compliance is strict when it comes to the formal application rules and accounting reports on how the money is spent. Regarding the latter the Courts of the European Union have ruled on many occasions. Often the financial support is suspended or reduced because of budgetary irregularities or failing management.⁵³ This gives the impression that the capacity of the funds to ensure compliance is very strong (judicial review), however, the aim of this analysis is to assess the legal capacity of the funds to integrate the policies and laws of the Member States. In this respect funds are not that strong. In general the rules on the funds⁵⁴ can be read as the policy activities being subject to institutional surveillance. Member States have to report annually about the impact of the funds on achieving the objectives of the programmes⁵⁵ and these are evaluated by the Commission. The outcome of the evaluation is discussed with the Member State and, where necessary, the Commission can issue recommendations to the Member States to adjust their priorities and programmes in order to improve the policy impact of the funds.

III.ii.c. Legal integration capacity of the voluntary guiding instruments

Under the heading of different names, among which are Commission recommendations and the declarations of the European Council and the Voluntary EU Quality framework, the EU guides policy activities of the Member States in four of the policy fields of the Social Investment Package. These instruments all have in common that they are adopted in the fields where the competence of the EU is not explicitly named in the TFEU. Active inclusion is, for instance, part of the EU's efforts to combat social exclusion and the modernisation of social protection systems, respectively regulated in Article 153(1)(j) and (k) TFEU. Another example is active ageing, which as an independent policy field and has no legal base in the Treaty. However, it is also part of the employment guidelines, which are based on Article

⁵² See for an impression of the rules and regulations related to the ESF <http://ec.europa.eu/esf/main.jsp?catId=33&langId=en> (visited 2 September 2014).

⁵³ Eg, Cases T-264/10 and T-266/10 *Kingdom of Spain v Commission* nyr; and Case T-549/08 *Grand Duchy of Luxembourg v European Commission* [2010] ECR I-2477.

⁵⁴ Eg Regulation (EU) No 1303/2013 laying down common provisions on several funds, including the ERDF and the ESF, [2013] OJ L347/320.

⁵⁵ See on this, eg, Articles 54 and 110 of Regulation (EU) No 1303/2013 laying down common provisions on several funds, including the ERDF and the ESF [2013] OJ L347/320.

148(2) TFEU.⁵⁶ As such these guiding principles could be considered as tertiary EU law providing further interpretation of EU secondary law, i.e. employment guideline 7 of the European Employment Strategy. The policy subjects they can connect to are all fields in which the EU has coordinative competence.

The regulatory technique falls between procedural obligations (the collecting of information, exchange of practices) and that of coordination (setting of common objectives and policy guidelines). They are clearly distinctive from the coordination as provided by the Open Method of Coordination, since they lack the governance structure. For instance, the performance of Member States is not measured by indicators or monitored by country reports that are reviewed by the Commission and Council. These initiatives are not adopted by EU legislators (the European Parliament and/or Council), instead they are adopted by the Commission (e.g. voluntary EU quality framework) and the European Council (declaration on guiding principles on active ageing). The aim of these instruments is to stimulate the Member States to prioritise these subjects in their national policies. As such it can be concluded that the Commission and the European Council function in their capacity as moving spirits.

These instruments have an indirect effect on the policies and legislation of the Member States. At best they have the effect that the issues are prioritised by the Member States, however the extent to which the Member States undertake the actions proposed by these instruments is at their discretion. These instruments themselves hold no monitoring or compliance mechanisms. Instead they try to persuade the Member States to comply by offering support, by gathering information, by technical assistance and by financial support via one or several funds. The latter can be very persuasive, since money itself is a strong incentive and, as analysed in the previous section, the use of EU funding can have a significant impact on the policy objectives supported by it.

III.iii. The Legal Integration Capacity of the *Acquis Communautaire* for Social Security

The overall impression from the above analysis of the legal integration capacity of the instruments of the *acquis communautaire* in the area of social security is that it is relatively weak, since most of the parameters manifest themselves in the upper part of the analytical model. There are two things that stand out in the above analysis though. The integration technique they all use is that of coordination and the effect on the national legal order of the instruments is indirect. This applies to all instruments, including the hard coordination

⁵⁶ Council Decision of 21 October 2010 on guidelines for the employment policies of the Member States [2010] OJ L308/46, guideline 7.

regulation, with the exception of the equal treatment instruments, which are based on the integration technique of ‘minimum harmonisation’ and have a direct effect on the national legal orders.⁵⁷

This *acquis* appears to be imbued with an awareness of common problems in the wider field of social security, with the EU considered to be the most appropriate level to address these problems, in particular by setting the common objectives and policy guidelines to achieve those objectives. In fact, what the EU appears to have created with the Social Investment Package is a laboratory for policy experimentation to find out what will work best to face the common problems Member States encounter in the wider field of social security. Member States are persuaded to participate by the funds that are made available in this field. Once a Member State opts for this funding, its activities are seriously scrutinised by the Commission. By evaluating the funded activities against the background of the policy guidelines and common objectives, the Commission is able to identify what works and what does not. This knowledge can be exchanged between the Member States and used to further develop the policy guidelines. The latter is of particular interest for the policy fields of the Social Investment Package that are directly related to the European Employment Strategy (active inclusion and indirectly active ageing) and Europe 2020 (investing in children and poverty and social exclusion).

IV. HYBRID STRUCTURES WITHIN THE SOCIAL INVESTMENT PACKAGE AND BETWEEN THE SOCIAL INVESTMENT PACKAGE AND THE ECONOMIC DIMENSION OF EUROPE 2020

In this section we will analyse the interaction of the instruments that are used to govern the seven policy fields of the Social Investment Package. Such analysis is interesting since the type of interaction is influential on the integration capacity of the *acquis* as a whole. For this analysis we build on the theory of hybrid structures, which acknowledges the coexistence of different integration instruments in one policy field. Moreover, it argues that the manner in which those coexisting instruments interact is influential on the integration capacity of the *acquis* of the policy field. Instruments that, for instance, strive for dominance over each other are likely to weaken each other’s integration capacities. Such interaction is indicated as

⁵⁷ See more in more detail on equal treatment and opportunities, BP ter Haar and P Copeland, ‘What are the Future Prospects for the European Social Model? An Analysis of EU Equal Opportunities and Employment Policy’ (2010) 16(3) *European Law Journal* 273–291.

rivalry. On the other hand instruments that merge their techniques for the same cause, for example to break the cycle of poverty in order to improve the situation of children, are likely to strengthen each other's integration capacities. Without this merger it will be much harder, if not impossible, to achieve the goal. This interaction is indicated as transformative. If instruments are neither rivalry nor transformative they are complementary to each other. When this is unconscious it is unlikely to have any impact on the integration capacity; they are simply not conflicting with each other. When this is consciously designed they are likely to have a positive impact on each other's strengths, however they are still operating independently from each other. Their interaction is not an essential requirement to achieve the goal, but it is also not meaningless.

That the policy fields within the Social Investment Package are related and overlap has already been analysed in Section II and has been worked out in Figure 9.1. In this section we focus on the relationship between the instruments that are used to govern those policy fields. After all it is these instruments that are designed to influence the policies and legislation of the Member States. Since the interest of this contribution lies with the Open Method of Coordination as one of the main drivers of the coordination of social security, our analysis takes the different Open Method of Coordination as a starting point. First we will analyse how the different forms of the Open Method of Coordination (the European Employment Strategy, the social Open Method of Coordination and the youth Open Method of Coordination) that are part of the *acquis* of the Social Investment Package are related to each other. Secondly, we will analyse how the funds are related to these forms of Open Method of Coordination; and thirdly, how the other voluntary guiding instruments are related to the Open Method of Coordination. We conclude with an overall analysis.

IV.i. Analysis of the Hybrid Structure between the Different Forms of the Open Method of Coordination

The Social Investment Package itself is part of Europe 2020, whose governance structure with the European Semester is an Open Method of Coordination. This Open Method of Coordination sets out the main objectives, among which is inclusive growth. To achieve this objective, policy guidelines are adopted in the field of employment. In addition flagship initiatives are introduced, among which is the Platform against Poverty and Social Exclusion. It is in this overarching governance structure, and in particular that of the Platform, that the next governance layer is adopted through the overarching programme of the Social

Investment Package.⁵⁸ All policy fields of the Social Investment Package make use of one or more forms of the Open Method of Coordination, if not directly, then indirectly. The fields of active inclusion, social innovation, poverty and social inclusion are directly linked to the social Open Method of Coordination. The field of homelessness is indirectly linked to the social Open Method of Coordination. Active inclusion is also directly related to the European Employment Strategy, whereas investing in children, active ageing, and social services of general interest are indirectly related to the European Employment Strategy. Investing in children is directly linked to the Youth Pact, which is part of the youth Open Method of Coordination.

The social Open Method of Coordination and the European Employment Strategy are related in the sense that the last policy guideline of the employment guidelines is in fact the poverty guideline of the social Open Method of Coordination. Furthermore, they have overlapping objectives, such as the active inclusion of the unemployed by use of active labour market policies, public employment services and lifelong learning strategies. They are different though in their general focus. The focus of the European Employment Strategy is on the labour market and how to improve this by growth (entrepreneurship and flexible employment relations) and better jobs (employment security and life-cycle sensitive working conditions, including active ageing). The focus of the forms of the social Open Method of Coordination is on European citizens who live in deprived situations, and as such covers society as a whole and not only the labour market. Because of these different focuses the European Employment Strategy and forms of the social Open Method of Coordination are not rival. However, they are also not merging into a transformative hybrid and are therefore complementary to each other. This complementarity started unconsciously, since their developments were completely separate. The development of the forms of the social Open Method of Coordination is partly situated in the development of human rights and EU citizenship.⁵⁹ The European Employment Strategy is developed in the context of the economic and financial integration of the EU as set out in the Commission's White Paper, *Growth, Competitiveness, Employment*.⁶⁰ Since the Lisbon Strategy in 2000 the European Employment

⁵⁸ See for this also Figure 9.1 in Section II of this chapter.

⁵⁹ K Armstrong, 'Tackling Social Exclusion Through Open Method of Coordination: Reshaping the Boundaries of European Governance', in T Börzel and R Cichowski (eds), *The State of the European Union* (Oxford University Press 2003); AF Urritia and NP Beltrán, 'European Employment Strategy and European Social Inclusion Policy: Employment as a Means of Social Inclusion in an International Human Rights Perspective', in R Blanpain (ed), *Employment Policies and Multilevel Governance* (Kluwer Law International 2009) 65–104.

⁶⁰ European Commission, White Paper, *Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century* [1993] COM 700. See on the development of the European Employment Strategy also B Riel and A Metten, *De keuzes van Maastricht. De hobbelige weg naar de EMU* (Van Gorcum 2000); and

Strategy and forms of the social Open Method of Coordination have been brought under the same policy framework and this has continued under Europe 2020.⁶¹ With the introduction of the Social Investment Package it can be argued that the overlapping elements between the European Employment Strategy and the forms of the social Open Method of Coordination have been yoked together even more consciously. Being more conscious of the overlapping goals and distinctive approaches to achieve those goals, these two forms of the Open Method of Coordination are likely to enforce each other's strengths.

The youth Open Method of Coordination is yoked into the Social Investment Package by the policy field of investing in children. The youth Open Method of Coordination itself includes nine policy fields (which are called 'action fields') with a panoply of EU integration instruments governing those fields.⁶² The youth Open Method of Coordination is adopted by a framework resolution.⁶³ This resolution is well aware of other integration instruments dealing with youth issues or that should deal with youth issues. These include the European Employment Strategy and the social Open Method of Coordination. The link to these types of Open Method of Coordination is made in two ways: first, directly through the specific action fields of employment and entrepreneurship, and social inclusion; and second, by initiatives to mainstream youth issues in both types of Open Method of Coordination. Because the European Employment Strategy and the social Open Method of Coordination do not explicitly mention the youth Open Method of Coordination, this relation appears to be in one direction only. As such the hybridity appears weaker than that between the European Employment Strategy and the social Open Method of Coordination, however, it is certainly not rival. There is conscious complementarity from the youth Open Method of Coordination to the European Employment Strategy and the forms of social Open Method of Coordination, whereas this complementarity seems to be unconscious from the European Employment Strategy and the forms of the social Open Method of Coordination to the youth Open Method of Coordination. In terms of the integration effect it is likely that the youth Open Method of Coordination has a positive effect on the European Employment Strategy and the social Open Method of Coordination. It is less likely that the European Employment Strategy and the forms of the

more specifically on the European Employment Strategy, J Goetschy, 'The European Employment Strategy: Genesis and Development' (1999) (52) *European Journal of Industrial Relations* 117–137.

⁶¹ See on this also Section II.

⁶² B ter Haar and P Copeland, 'The Increment Integration of EU Youth Policy via Soft Law and Open Methods of Coordination', in B ter Haar, *Open Method of Coordination* (University of Leiden 2012) 125–146 (chapter 7).

⁶³ European Council, *Resolution on a renewed framework for European cooperation in the youth field (2010–2018)* [2009] OJ 2009 C311/1.

social Open Method of Coordination have a positive effect on the integration capacity of the youth Open Method of Coordination, but they will also not downplay it.

IV.ii. Analysis of the Hybrid Structure between the Open Method of Coordination and the Funds

Two of the four funds that are part of the *acquis communautaire* of the Social Investment Package also underpin the European Employment Strategy and the forms of the social Open Method of Coordination. The ESF⁶⁴ does this in a general manner since it is ‘Europe’s main instrument for supporting jobs, helping people get better jobs and ensuring fairer job opportunities for all EU citizens’.⁶⁵ PROGRESS underpins Europe 2020 and with that five areas in particular, among which are employment, social inclusion and social protection. FEAMD supports actions of the Member States to provide material assistance to the most deprived. This includes materials like food, clothing and other essential items for personal use.⁶⁶ The website of the Commission stresses that this material assistance needs to go hand in hand with social inclusion measures. This is an indication of a merger between the forms of the social Open Method of Coordination and FEAMD. Without each other they will not be able to achieve their common goal: to lift people out of poverty and social exclusion. In Regulation 1080/2006, the objective of the ERDF is defined as ‘to help reinforce economic and social cohesion by redressing regional imbalances’.⁶⁷ It connects to the European Employment Strategy since it contributes to investments that contribute to creating sustainable jobs and to the forms of the social Open Method of Coordination since it also focuses on investment in health and social infrastructures.

The funds are also related to the voluntary guiding instruments. For example in the field of homelessness only challenges have been defined, however several funds (ESF, FEAMD, ERDF) are used to support actions that face these challenges. With the monitoring and evaluation mechanism of the funds,⁶⁸ lessons can be drawn as to which actions are effective and which are not. Hence, it contributes to the development of defining policy guidelines in the field as well as adjustments or further guidelines within the Open Method of

⁶⁴ About 20% of this fund is earmarked to be used for the support of actions related to the social Open Method of Coordination: <http://ec.europa.eu/social/main.jsp?catId=961&langId=en> (visited 4 September 2014).

⁶⁵ <http://ec.europa.eu/esf/main.jsp?catId=35&langId=en> (visited 4 September 2014).

⁶⁶ <http://ec.europa.eu/social/main.jsp?catId=1089&langId=en> (visited 4 September 2014).

⁶⁷ Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999, [2006] OJ L210/1.

⁶⁸ See Section III.ii of this chapter.

Coordination that also deal with this issue, in particular the social Open Method of Coordination.

IV.iii. Analysis of the Hybrid Structure between the Open Method of Coordination and Voluntary Guiding Instruments

Of the voluntary guiding instruments there are three of particular interest for this analysis, since these are the only ones not directly part of an Open Method of Coordination. The first one is the recommendation on investing in children.⁶⁹ In its preamble and by using similar policy guidelines the recommendation makes strong references to the social Open Method of Coordination. For instance, the first of three pillars on which the integrated strategy on investing in children is based is to support parents in the labour market. The underlying idea of this is that employment is the best way out of poverty. If the parents get out of poverty, through work, there is a good chance that a child's cycle of poverty gets broken. This is the same approach as the social Open Method of Coordination and has been promoted by the Open Method of Coordination on social inclusion since the mid-2000s.⁷⁰

The connection between the guiding principles on active ageing and the Open Method of Coordination goes one step further. Besides using similar policy objectives as found in the European Employment Strategy and the social Open Method of Coordination, there is also an institutional connection between the guiding principles and the Open Method of Coordination. The Social Protection Committee (established to support the implementation of the social Open Method of Coordination) and the Employment Committee (established to support the implementation of the European Employment Strategy) are both involved in the elaboration of the guiding principles. Although there is no fund connected to the guiding principles, this is indirect via the European Employment Strategy and the social Open Method of Coordination.

The final instrument that it is important to mention in this context is the Commission Communication on services of general interest.⁷¹ This Communication sets out a new policy framework with guidelines developed in the context of the Lisbon Strategy and its economic and social sides. The social elements in these guidelines, again, mirror the policy suggestions of the European Employment Strategy and the social Open Method of Coordination on these issues. It is supported by PROGRESS, which also underpins the European Employment

⁶⁹ Commission Recommendation of 20 February 2013 *Investing in children: breaking the cycle of disadvantage* [2012] OJ L59/5.

⁷⁰ Eg Commission and Council, *Joint Report on Social Protection and Social Inclusion* (European Commission, 2007) 52–53 on tackling child poverty.

⁷¹ European Commission, *Communication on Services of general interest, including social services of general interest: a new European commitment* [2007] COM 725.

Strategy and the social Open Method of Coordination and where activities are supported that overlap, experiences can feed back into one form of the Open Method of Coordination.

IV.iv. Analysis of the Hybrid Structure between Forms of the Social Open Method of Coordination and EU Economic Governance

One final aspect to consider with respect to hybridity and the social *acquis communautaire* is how the latter relates to the reforms surrounding the EU's economic governance. In other words, developments within the social dimension do not operate in isolation from the broader macro-economic developments of the EU. The Eurozone crisis has initiated significant changes to the EU's macro-economic policy and its coordination. While the governance of the European Employment Strategy was incorporated into the re-launched Lisbon Strategy with the other forms of the social Open Method of Coordination operating on the margins of the process, Europe 2020 is significantly different. On a first level, forms of the social Open Method of Coordination have been incorporated into the mainstream governance process (under the banner of the poverty and social exclusion target of Europe 2020) which thereby attempts to strengthen the links between the policy areas and the European Employment Strategy. In this respect country-specific recommendations can and have been issued in the area of poverty and social exclusion, albeit they are strongly linked to developments within the European Employment Strategy. On a second level the governance process of Europe 2020 specifically aims to strengthen the links between macro-economic policy and developments within the employment and social situations of the Member States. It is worth briefly explaining some of the main policy changes relating to this issue.

As part of the Europe 2020 Strategy, the European Semester commences with the Commission's new Annual Growth Survey, which outlines the EU's economic priorities for the following 12 months. On this foundation, governments formulate and submit their medium-term budgetary and economic strategies for peer review prior to national parliamentary approval. This is achieved through the 'simultaneous' but 'separate' reporting and evaluation of Europe 2020 with the EU's fiscal framework, the Stability and Growth Pact (SGP). Despite drawing on separate legal provisions, the coordination of the Europe 2020 National Reform Programmes (NRPs) and the Stability and Convergence Programmes (SCPs) of the SGP aim to strengthen the linkages and relationship between the fiscal situation within the Member States, the broader macro-economy, and selected Europe 2020 thematic issues (such as micro-economic and employment/social areas). During the formulation of both the NRPs and the SCPs, governments engage in bilateral negotiations with the Commission to

ensure that they remain ‘on track’ with respect to the budgetary and macro-economic situation.

The adoption of Europe 2020 dovetailed with preparations to strengthen the SGP. To finalise the governance arrangements around the European Semester, in September 2010 the European Commission proposed the strengthening of the SGP and new economic governance in the form of the ‘Six-Pack’. This involved a set of six legislative acts – five regulations and one directive – intended to make governance more rigorous within the EU.⁷² The Six-Pack was approved by both the European Council and the Parliament at the end of 2011 with the aim of reducing public deficits and addressing macro-economic imbalances.

The EU’s new governance architecture therefore emphasises fiscal and budgetary discipline as the EU’s number one priority. If Member States are in breach of the SGP and running ‘excessive’ budget deficits or debt, they will be required to reduce these levels until they fall within the benchmarks. Since social expenditures of the Member States are a substantive part of their budgets, country-specific recommendations within the macro-economic pillar of the EU’s new economic governance are therefore able to impact on the forms of the social Open Method of Coordination by limiting government spending. This new form of hybridity between economic policy on the one hand and social policy on the other therefore aims at a broader system of governance, which impacts upon the social policies of the Member States.

IV.v. Overall Analysis of the Hybrid Structure of the *Acquis Communautaire* Social Investment Package

With the exception of two instruments, the forms of the social Open Method of Coordination and FEAMD, which form a transformative hybridity, all other instruments are complementary to each other. This complementarity is the strongest between the European Employment Strategy and forms of the social Open Method of Coordination, and between the European Employment Strategy and the forms of the social Open Method of Coordination on the one hand, and the funds on the other. The voluntary guiding instruments also interact with the European Employment Strategy and the forms of the social Open Method of Coordination. They do so either by referring to them (instrumental level) or on the level of content via overlapping objectives and policy guidelines. The Open Method of Coordination, however, does not refer to these voluntary guidelines. For two of them this is understandable since they are recent, but this is different for the Communication on services of general interest.

⁷² C Degryse, *The New European Economic Governance* (European Trade Union Institute 2012) no 14.

Apparently, other instruments are able to connect with different instruments such as the Open Method of Coordination, whereas this is harder the other way around. This could partly be explained by the fact that the Open Method of Coordination itself is a type of strategy setting out a full policy programme including common objectives and policy guidelines. As such it functions as a magnet attracting more elaborated policies tapping in on parts of its objectives and policy guidelines.

The funds appear to strengthen the interaction between the Open Method of Coordination and the voluntary guiding instruments by supporting the same policy activities. Although this appears not to be the result of a conscious design, it is a form of complementarity, which plays to the strengths of these instruments. Via the monitoring and evaluation mechanisms of the funds, both instruments can benefit from the lessons learned from the practices supported by the funds. Metaphorically speaking the funds could be considered as the oil between the Open Method of Coordination and the voluntary guiding instruments, making their interaction work more smoothly.

When considering hybridity in the wider context of the European integration process in general and that of Europe 2020, this may be less harmonious. With Europe 2020 a hybrid system is created between the EU's economic and social objectives, with economic policy under the banner of budgetary and fiscal discipline being the dominant priority. Consequently, social issues are addressed from two different perspectives within Europe 2020 which are potentially conflicting. Firstly, social issues are addressed in respect of budget deficits, which often put pressure on social expenditures as being a substantial part of the budget, involving social security benefits and investments to improve the situation of the most deprived persons. Secondly, investments are promoted within the social policy track purely, of which the Social Investment Package is the most prominent. With the dominance of the economic policy and its considerably stronger governance structure in the SGP (harmonising regulations and a directive in the Six-Pack, which have a direct effect on the national legal orders), the social policies are subordinated to economic policies in two ways: by priority and by governance structure.⁷³

V. CONCLUSIONS

We began our analysis with a historical account of the development of 'soft coordination' in the field of social security. This revealed that the field is widely developed, albeit indirectly

⁷³ P Copeland and M Daly, 'Poverty and Social Policy in Europe 2020: Ungoverned and Ungovernable' (2014) 42(3) *Policy and Politics* 351–365.

with reference to the social security of social protection. This has developed via two pathways: the first in the frame of human rights and EU citizenship; and the second in the frame of the postmodern activation paradigm of the European Employment Strategy. This indirect approach to the area has witnessed the development of a policy coordination agenda on poverty and the combating of social exclusion, initially under the Lisbon Strategy, and then continued by its successor: Europe 2020. With a considerably weak legal basis in the EU Treaties, the forms of the social Open Method of Coordination on poverty and social exclusion, health care and pensions have remained vulnerable to political change in priorities and political views.

Having an oversight of the subjects and EU initiatives to promote these subjects, we were able to identify the instruments that are mostly used to govern the area. These include several forms of the Open Method of Coordination, EU funds, recommendations and declarations defining problems, and establishing policy guidelines to deal with those issues. Our analysis of the potential legal integration dynamics confirmed the weak legal status of these instruments. This indicates that although there is considerable activity in the field, none of it is likely to have the effect of harmonising the Member States' policies in the area of social security issues. However, when considering the initiatives in hybridity to each other, this conclusion may have to be reconsidered. The manner in which the different policy fields and governance initiatives are related to each other is rather coherent and consistent, making the subjects more tangible. Furthermore, by using the Open Method of Coordination as the main form of governance of the Social Investment Package as well as its wider context in Europe 2020, other initiatives, in particular the funds and initiatives that set guidelines, are coordinated.

Thus soft coordination by means of the Open Method of Coordination can be considered as a positive contribution since it is able to create coherence and consistency on two levels – by subjects and by governance. However, when this is reviewed in the wider context of Europe 2020 as we have done in the third and fourth sections, this appears less promising than it looks. In the broader context of Europe 2020 the EU's economic and fiscal governance in the SGP and by the 'Six-Pack', is dominant. Between the economic objectives and the social objectives there is an almost inherent conflict of interest. Whereas the economic objectives are strongly focused on the budget deficits of the Member States, they affect the social objectives since they comprise a substantial part of the budget. When budgets need to be cut to meet the deficit standards, this affects the social expenditures that are part of, for instance, the Social Investment Package. Consequently, the governance of soft coordination in

the field of social security is subordinate to the stronger and more dominant logic of economic integration. In order for social security interests to be protected and promoted, in particular from the point of view of human rights, stronger coordination is needed: either by its own agenda, or more feasibly, by equal coordination of the economic and social objectives of Europe 2020.

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