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The meaning of the Open Method of Coordination for the development of a social Europe

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Introduction and plan

Originally the European Community was an economic supranational organization, constituted by the Treaty establishing European Economic Community in 1957. The development of the social aspects of the European Community was presumed to take place following the economic development. This appeared to be a misunderstanding. Therefore it was acknowledged that it was necessary to adopt a protocol for social policy to the Maastricht Treaty on the European Union (1992). The Maastricht Treaty reshaped and renamed the European Economic Treaty into the political Treaty establishing the European Community. By the Treaty of Amsterdam (1997) the protocol was implemented in the treaty itself and became a separate chapter (XI Social Policy). The Treaty of Amsterdam was also supplemented with a chapter on employability (chapter VIII) in which a new method was introduced for realizing the aims of the chapter: the European Employment Strategy. The subjects for social policy were expanded by the Treaty of Nice (December 2000), including social security. The necessity for the convergence of social security as a part of the further development of the Europe Community was also affirmed in the Lisbon Strategy (March 2000). Because of political sensitivities regarding some of the social policy subjects (among which social security) the traditional treaty-based Community Method was deemed unsuitable for realizing the aims of the Treaty and the Lisbon Strategy. Therefore in the Lisbon Strategy a new method was introduced based on the European Employment Strategy: the Open Method of Coordination. This method is presumed to be a (more) suitable instrument for realizing the aims and is assumed to play an important role by the development of a social Europe. The Open Method of Coordination is considered to be a more suitable instrument because – in contrast to the Community Method - it is a flexible means of working towards shared European objectives via guidelines, national plans, benchmarks and mutual learning, without legal compulsion but with peer pressure and the force of public opinion instead.

In order to determine whether the Open Method of Coordination is a (more) suitable instrument and whether it does play the assumed role this study focuses on the next issues: 1) a circumscription and analysis of the Open Method of Coordination and its place in the European and International legal order; and 2) an analysis of the effect of the Open Method of Coordination in relation to the traditional Community Method. Therefore this study consists of two parts:

1. a theoretical analysis of the legal status of the Open Method of Coordination;
2. an empirical analysis of the use and the effect of the Open Method of Coordination in practice, by comparative research in five Member States.

The context of the research will be social security. The notion ‘social security’ has several meanings and encloses different subjects. It is not meant for this research to define a conclusive definition of social security. Instead the focus will be on certain subjects that are generally considered to be subjects of social security or closely related to it. The leading conditions for the selection of these subjects are the use of the Open Method of Coordination and the sort of OCM. The next subjects are in consideration: employment, social inclusion, pensions and healthcare.

For the empirical analysis on the use and the effect of the Open Method of Coordination a comparative study will be done in six Member States of the European Community. These States should be representative for all the Member States, therefore the selection criteria are: size of the Member State, geographical position and the sort legal background they represent (Bismarck, Anglo-Saxon, Southern style, Communism). The next Member States are in consideration: the Netherlands; Germany; United Kingdom; Spain; Poland and the Czech Republic.

General consideration is also what sort of comparative study should (and can) this be: between subjects, sort of OCM and Member States that are a like or a comparison between opposites and differences? My preferences go to the latter.

All of this will be worked out in chapter two.

Ad 1. Theoretical analysis of the legal status of the Open Method of Coordination

The Open Method of Coordination is presumed to be a soft law instrument, since it has on first appearance the most characteristic elements generally attributed to soft law instruments. The qualification of the Open Method of Coordination as soft law instrument is not sufficient for understanding its legal status. This is due to the fact that the discussion about soft law is still afoot in the doctrine of international law and international relations. In order to analyse the legal status of the Open Method of Coordination, it is necessary to start with analysing the meaning of soft law in international law. This will be done in the third chapter. This analysis contains a description of the discussion in the doctrine of international law and will be divided into three parts:

part 1. what is meant by soft law, leading to a working definition and a framework for recognizing soft law (§3.2);

part 2. what is the role of soft law in international law, including a distinction between hard law, soft law and political agreements and the advantages and disadvantages of soft law compared to hard law (§3.3);

intermezzo: working definition (§3.4) based on the findings of the first two paragraphs and forming the basis for the next paragraph (§3.5);

part 3. what can be expected from soft law, an analysis of the effect of soft law and of the (juridical) enforcement of soft law (§3.5), also including the advantages and disadvantages of soft law compared to hard law.

In the introduction (§3.1) attention will be paid to the reasons for the development of soft law.

The original meaning, role and expectations of soft law in international law will form the basis for the analysis of the position of soft law in the legal order of the European Community (chapter four). The European Union is formed by three pillars: the European Communities; common foreign and security policy; and cooperation in justice and home affairs. Social policy, and therefore the subject of social security, belongs to the first pillar, the European Community. A special character of the European Community is that the treaty constituting the European Community grants the institutions of the European Community supranational powers on some of the subjects. Regarding social policy the European Community and the Member States have a shared competence on adopting measures (hard and soft) for the harmonisation and convergence of the social policy subjects (article 137 EC-Treaty). The shared competence can lead to measures governed either by the European legal order when adopted by the institutions of the European Community (the Community method) or by the national legal order when adopted by the member state individually. In paragraph 4.2 the position of the soft measures governed by the European legal order will be examined. Beside the possibilities named in article 137 of the EC-Treaty for adopting measures on Community level the Lisbon Strategy introduced a third possibility: the Open Method of Coordination. This method has two main characteristics which makes it different from the Community method: the method itself is soft and the competence for adopting measures remains with the Member States unless they decide otherwise. The involvement of the European institutions by the use of the Open Method of Coordination differs from the European Economic Strategy, since it is limited to only a (practical) supportive role by the European Commission. Because of the limited involvement of the European institutions I presume the Open Method of

Coordination is an intergovernmental instrument. Whether this presumption is right and by what law the Open Method of Coordination is therefore governed will elaborately be examined in paragraph 4.3.

In chapter five the Open Method of Coordination will be further examined by the same questions as soft law in international has been examined in the third chapter. Like the third chapter the analysis of the (theoretical) meaning of the Open Method of Coordination will consist of three parts:

- part 1. what is meant by the open method of coordination;
- part 2. what is the role of the open method of coordination, including a comparison with the role of the Community method and the advantages and disadvantages of the Open Method of Coordination compared to the Community method;
(both paragraphs again leading to a working definition)
- part 3. what might be expected of the open method of coordination, meaning a twofold analysis to the effect of the Open Method of Coordination and the (juridical) enforcement of the open method of coordination, including a comparison of the advantages and disadvantages of the Open Method of Coordination compared to the Community method.

The findings of this theoretical examination will lead to an analysis of the legal status of the Open Method of Coordination (concluding paragraph) and form the basis for the second part of this research, the empirical analysis of the Open Method of Coordination.

Intermezzo

There is a lot of writing about the Open Method of Coordination based on theories of how the Open Method of Coordination should work, what role it should fulfil and what its advantages and disadvantages regarding the Community method should be. There is however not much empirical examination to the working, its factual role and the proven advantages and disadvantages. This lack of empirical analysis is not surprisingly since the method was introduced just recently (march 2000) and it needs some time before sufficient practice has been build up. With the start of this research, May 2006, till the end of this research September 2010 there should be sufficient practice for such an empirical examination.

Ad 2. Empirical analysis of the use and the effect of the open method of coordination

The following chapters will be devoted to the empirical analysis based on a comparative study on the use and the effectiveness of the Open Method of Coordination by the selected subjects and in the selected Member States. In accordance with the theoretical analysis of the Open Method of Coordination the comparative empirical analysis exists of three parts:

- part 1 how is the Open Method of Coordination used, for example involvement Member States, involvement social partners, methods used per subject such as exchange of best practices, establishing guidelines, use of action plans, etc.;
- part 2 what role does the method fulfil in practice, for example dissolving deadlock;
- part 3 what effect does the method have and how soft is the method regarding juridical enforcement, for example the influence of the method on national lawmaking, effects by learning, effects of naming and shaming, convergence of national policies, enforcement by national law, etc.

The basis for this study will be formed by the theoretical findings about the Open Method of Coordination. Each chapter will be devoted to a subject for whom the three parts described above will be studied per selected Member State.

In the following chapter the Open Method of Coordination will be analysed on the basis of the findings of the empirical studies in the foregoing chapters. The findings of this empirical analysis will be compared to the theoretical definition and differences or inconsistencies will be pointed out, analysed and for as far as possible explained.

Conclusions

Supported on the theoretical and empirical analysis of the Open Method of Coordination the meaning of the Open Method of Coordination by the development of a social Europe will be defined. Based on the empirical analysis recommendations will be made for the further use of the Open Method of Coordination by the development of a social Europe.

Provisional planning and chapters

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