

The growing potential integration capacity of the acquis of the European Social Model

B. P. ter Haar

Abstract This paper engages in the discussion about the meaning of the open method of coordination (OMC) for the development of the European Social Model (ESM). It argues that, from a legal perspective, the OMC is a positive development rather than a threat for the ESM. To support this argument, the paper introduces an analytical model, based on suggestions of Dehousse and Weiler (1990), to assess the potential integration capacity of the acquis of the European Social Model (ESM) based on the legal dynamics of integration. From such the acquis of equal opportunity in employment and active labour market policies are assessed for their potential integration capacity. The analysis finds that over the course of time, the potential integration capacity of the respective acquis have become stronger since the introduction of the OMC. Therefore, the conclusion is that the utilisation of the OMC to govern these social policies is a positive process which has strengthened Europe's capacity to further develop the ESM.

Key-words European integration, legal dimension, open method of coordination, European Social Model, equal opportunities, employment, active labour market policies.

1. Introduction

The core focus of the European Community (EC) is the creation of a common market consisting of free movement of products (goods and services) and production factors (labour and capital). This economic integration would in time ensure the optimum allocation of resources throughout the Community, the optimum rate of economic growth and thus an optimum social system (Shanks 1977). Although this non-interventionist approach regarding social policy did not last long, the precedence of economic over social objectives is still apparent (Barnard 2006, 7-10). Besides the initial non-interventionist approach regarding social policy, its integration is also hindered by the fact that the member states are reluctant in attributing competence to the EC to govern this. Not in the least, because the welfare systems of the member states are characterised by diversity. Unlike in the situation of the common market where uniformity is standard, the diversity of the welfare states has forced the EC to be creative and flexible in developing its social policy (Barnard 2006, 75-83). The precedence of the Common Market over social policy and the diversity of the EU welfare states becomes palpable in the sort of measures the EC uses. More particular, the creation of the common market is mainly regulated by hard law measures such as regulations and directives, while the creation of the European social model (ESM) is mainly governed by soft law measures, such as resolutions and action programmes (Copeland and ter Haar forthcoming). Consequently, compared to the common market, the ESM is much more vulnerable to political change. That is, if there should be a lack of support for the ESM in the Commission or the governments of the member states, then the significance of the soft law and the normative impact of the ESM will be reduced, without any significant consequences in terms of judicial review which could maintain policy in the face of such changing political constellations (Copeland and ter Haar).

Given the foregoing, it is not surprisingly that the ESM is commented as being weak in integrating the member states national policies. It is also in this context that the emergence of the open method of coordination (OMC) as a new instrument to govern the complex and sensitive social policy subjects is controversially perceived. As Trubek and Mosher (2001) have analysed, some scholars see in the OMC an innovative breakthrough with superior capacity to solve the problems the EU faces in the field of social policy; while others consider the OMC as a development which threatens the ESM. According to them the move to the OMC is at best a waste of time and at worst a smokescreen behind which the welfare state might be dismantled. They fear that the move away from efforts to mandate uniform social and employment standards will contribute to the gradual erosion of the programs and policies that make up to the ESM. In other words, it will only weaken the ESM more.

This paper will argue that from a legal point of view the OMC does not weaken the ESM, rather it strengthens it. To substantiate this argument, this paper conducts an analyses for the integration capacity of the ESM, based on the legal dynamics of the European integration process. The legal dynamics of European integration are understood as the legal and institutional elements that condition both the magnitude and spatial scope of integration (Dehousse and Weiler 1990). In other words, whether the political or economic dynamics can be executed depends on the magnitude and spatial scope

provided by the dynamics of the legal and institutional elements involved with the integration process.

In order to conduct the analysis in a systematic manner, this paper introduces an analytical framework (§2). This framework comprises five legal dynamics known as key parameters which are: 1) the competence conferred to the European Community for (further) rule-making; 2) the integration technique used; 3) the decision making capacity of the involved actors; 4) the incidence or effect of the legal instrument on the national legal order; and 5) the way in which compliance with the legal instrument is ensured. Each of these parameters can manifest themselves in four dimensions, varying in four levels from strong integration capacity (level 1) to weak integration capacity (level 4). The more strong manifestations an integration instrument has, the stronger its overall integration capacity is and the more likely the instrument will actually integrate the Member States laws or policies. Vice versa, the more weak manifestations an instrument has, the lower the instruments overall intention to actually integrate the Member States laws and policies.

To keep the analysis within manageable proportions, it is done for the acquis of two policy fields that are generally accepted as part of the ESM: equal opportunities and employment (§3.1) and active labour market policies (§3.2). The method followed for this analysis is as follows. First the EU integration instruments that are used to further the integration of these policies are identified. Since the interest is in instruments that aim to influence, converge or harmonise the member states laws and policies, this selection is confined to instruments that at least address the member states. Such selection excludes the Commission's Green and White Papers, and resolutions from the Parliament.

Secondly, the instruments are ordered into four time periods, 1957/1963-1979; 1980-1989; 1990-1999; and 2000-2008. As such, it is possible to construct an image of the legal dimension of the respective subjects in the course of time (see figures 2 and 4). Thirdly, all selected instruments are analysed for their individual integration capacity. This means that in terms of a key-parameter it is analysed by how that legal dynamic of the European integration process has manifested itself in the respective instrument. Then the instruments are labelled according to the level of manifestation they resemble the most. Thus, instruments that have most of the manifestations of the legal dynamics in the lower half of the analytical framework are labelled as level 1 or level 2 instruments. Those instruments that have most of their manifestations in the middle or upper half of the analytical framework are labelled as level 2 or 3 and level 3 or 4 instruments.

Two results of this analysis (§4) are particularly interesting. Firstly, the analysis confirms that the ESM is mainly comprised by instruments with a weak integration capacity (level 3 and 4) and hardly involves instruments with a strong integration capacity (level 1 and 2). Secondly, the result of the analysis shows a move from mainly level four instruments, among which resolutions, recommendations and action programmes until the turn of the century, to a decrease of level four and an increase of the use of level three instruments as from the turn of the century. This increase of the use of level three instruments is to be attributed to the OMC which is assessed with an overall integration capacity of level 3.

Based on this empirical analysis of the acquis of these two policy fields, the conclusion of the paper (§5) is that due to the OMC the overall potential integration capacity of both acquis has become stronger. Thus, when the OMC is analysed based on

the legal dynamics of the EU integration process, it is not a development that threatens the ESM; rather it is a positive development, as it entails a stronger potential integration capacity than the instruments previously used to for the further development of the ESM.

2. Analytical framework to assess the potential integration capacity of EU integration instruments

To study the legal dynamics of European integration, Dehousse and Weiler (1990, 249-253) suggested a model with key-parameters, such as competence, decision making-capacity and effect on the legal order, that manifest themselves in several dimensions varying from weak integration to strong integration. In this paper the suggestion is further developed into a more comprehensive model with five key-parameters each with a four level dimension in which they manifest themselves. Before describing these five parameters and their manifestations (§2.2), it is necessary to outline the definitions and principles underpinning this framework (§2.1).

2.1 Definitions and principles underpinning the analytical framework

The aim of the analytical framework is to assess the potential integration capacity of EU secondary integration instruments used to develop the ESM. Central to this is the concept of 'integration'. This notion can have several meanings. In this analytical framework, integration is understood as 'a process of change in national institutional and policy practices that can be attributed to European integration' (Vink 2002, 1). More specifically, the expression 'integration' indicates a planned process to unite parts that were before autonomous. As such, 'integration' is not only about the harmonisation of the member states laws and policies, but also includes convergence of their laws and policies and all sorts of change that can be linked to EU influence.

Also central to the framework is the concept of 'legal' in legal dynamics. This refers to the question: what is legal and when is the legal ambit exceeded? Such clarification is particularly important for defining the four levels of manifestations of the key-parameters. Underpinning the analytical framework is the concept of legalization as used in international relations (Abbott et al 2000). As such, the analytical framework not only covers EU hard law instruments, such as regulations, directives and decisions, but also legally non-binding instruments that have normative effect (Senden 2004, 111-113), also called soft law instruments, such as resolutions, recommendations, action programmes and the open method of coordination.

The underlying principle of this analytical framework is that the more strong manifestations an integration instrument has, the stronger its integration capacity is and therefore the more likely the instrument will actually integrate the laws and policies of the Member States. And vice versa, the more weak manifestations an instrument has, the lower is the instruments intention to actually integrate the Member States laws and policies. In short, "integration capacity" thus refers to the intention of the instrument to integrate, converge or influence the laws and policies of the Member States based on its legal dynamics. Hence, this intention is "potential" because as the introduction argues,

the complex process of European integration not only involves legal dynamics, but also political and economic. Whether the legal potential of an integration instrument – its magnitude and spatial scope – is applied to its fullest capacity thus depends on the political and economic dynamics that surrounds the integration process of the respective subject.

2.2. The analytical framework: key-parameters and manifestations

Based on the underpinning definitions and principles the following five key-parameters are classified: 1) the competence conferred to the European Community for (further) rule-making; 2) the integration technique used; 3) the decision making capacity of the involved actors; 4) the incidence or effect of the legal instrument on the national legal order; and 5) the means to ensure compliance. Each key-parameter has four different manifestations varying from weak integration capacity (manifestation level 4) to strong integration capacity (manifestation level 1). When putting all this together, the analytical framework as shown in Figure 1 is constructed.

Figure 1. Analytical framework

<div style="display: flex; flex-direction: column; align-items: center;"> <div style="margin-bottom: 10px;">weak integration</div> <div style="margin-bottom: 10px;">↓</div> <div>Strong integration</div> </div>	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

Competence

The first key-parameter, the attribution of competence for (further) rule-making, is basic to all other parameters, after all without the attribution of competence the EU would be unable to adopt any instrument to govern a subject. Traditionally, there are three kinds of competences conferred to the EC: exclusive, concurrent or shared, or none. Over time, with the development of more different ways of European cooperation, the division in competences has become more subtle. Overall, four manifestations can be distinguished:

exclusive competence; concurrent or shared competence; coordinative competence; and supportive competence (*cf* Barnard 2006, 63-65).

Exclusive competence is the strongest form of competence that can be attributed to the EU. This is the matter when only the EU may legislate or adopt legally binding acts regarding a specific subject. Member States may legislate or adopt legally binding acts only when it is required for the implementation of EU acts or if it is empowered by the EU. The latter is even irrespective of whether or not the EU has acted itself (Barnard 2006, 68; ECJ Case 41/67; ECJ Case 804/79). Concurrent or shared competence is less strong, because this form of competence does not exclude the Member States at all or at least in the first instance. In effect, with concurrent and shared competence Member States maintain their competence to adopt measures for as long as they are in accordance with the EU law or until the EU has adopted a measure which either exhaustively or partially pre-empts their activities (Hervey 1998, 44; Cremona 1999, 185). The extent to which the EU may pre-empt the activities of the Member States, depends on the outcome of the appliance of the principles of subsidiarity and proportionality (Kirchner 1997; Hervey 1998, 44).

Coordinative and supportive competences are the weakest forms of conferred competence, because they are both non-exclusive, complementary competences. Which means that the Member States remain fully competent regarding a specific policy area, albeit that their activities are limited, in the sense that they must conform to be EU law (Cremona 2000, 158-161). Coordinative competence seeks to coordinate national policies regarding the achievement of common objectives in certain policy areas, while supportive competence serves to complement or stimulate the development of national policies (Barents and Brinkhorst 2006, 463-465).

Integration technique

The second key-parameter, the integration technique, refers to the techniques used to unite national laws and policies that were previously autonomous. Based on the EC-Treaty and the doctrinal literature regarding European integration, the following techniques can be distinguished (ranked from strong integration to weak integration): total harmonisation; minimum harmonisation; coordination; and procedural obligations (Hartley 2007).

Total harmonisation is the strongest manifestation of this key-parameter, because it implies the adjustment of national law in order to meet the specific objectives laid down in the EU integration instrument. Moreover, in the case of total harmonisation the national laws are replaced by a single EU rule, leaving no room for Member State action or diversity (Dehousse and Weiler 1990, 250; Curtin 2006, 12). As such, total harmonisation is a very direct integration technique to integrate the laws and policies of the Member State. Although minimum harmonisation also aims at the approximation of national laws and policies, it is a weaker manifestation as it leaves some room for the Member States 'to maintain and often introduce more stringent regulatory standards [...] for the purpose of advancing a particular social or welfare interest', 'provided that such additional requirements are compatible with the Treaty' (Dougan 2000, 855; Curtin 2006, 13). As such, minimum harmonisation takes away certain disparities, but also creates

room for diversity. The disparities existing above the minimum requirements are compensated by the principle of mutual recognition. In short this means that Member States have to recognise the legislation of each other (Curtin 2006, 13; ECJ Case 120/78).

The integration techniques “coordination” and “procedural obligations” do not aim for harmonisation. The former aims to promote the integration process ‘by ensuring or encouraging coordination between national regulatory regimes’ (Hervey 1998, 37). In other words, coordination is the activity to attune national policies, which is guided on European level and conducted by the Member States. The consequence of this guidance is that the Member States have to regulate the respective policies in compliance with EU law. As such, the scope and type of actions Member States may undertake are not only limited but also tend to converge (Threlfall 2003, 125). The integration technique “procedural obligations”, such as the sole obligation for Member States to exchange information, is to be distinguished from “coordination” because it implies no limits at all to the Member States activities. Nonetheless, “procedural obligations” may converge the laws and policies of the Member States since it makes them aware of each others laws and policies. Some of those laws or policies may be of inspiration for new, or adjustment of existing, laws and policies.

Decision-making capacity

The third key-parameter, the decision-making capacity of the involved actors, follows from the nature of the EC-Treaty. The EC-Treaty is a framework Treaty which sets an overall design that requires more specific amplification (Weatherill 2007, 28). For this amplification the EC-Treaty not only attributes the competence to the EU institutions, it also provides the instruments to do so. However, these instruments can be used for legislative as well as administrative tasks of the European institutions (Schütze 2005). Whether the instrument is meant to be a legislative measure or an administrative measure can be determined by the decision-making capacity of the institutions involved. Based on the general tasks the EC-Treaty attributes to the institutions,¹ the following four decision-making capacities can be distinguished (ranked from strong integration to weak integration): EU-institutions acting as a law-maker; EU-institutions acting as an executive rule-maker; EU-institution, committee or agent acting in a specific function; and the (European) Council acting as moving spirit.

The capacity of the EU-institutions as law-maker is indicated as the strongest, because in this capacity the EU-institutions constitute amplifying legislative acts (*cf* Senden 2004, 35-37 and 41-55). There is a large variety of legislative procedures (Héritier 2003, 108; European Conventions Working Group IX 2002, 13-14), however all are generally based on three principles, also known as the Community Method. These principles are: 1) the Commission has an exclusive right to initiate proposals for new (or revised) legislation or policy; 2) only the Council, either as single legislator or as co-legislator with the European Parliament can give legal force to the Commissions proposal;

¹ See art. 189 j° 192 EC-Treaty for the European Parliament; art. 202 EC-Treaty for the Council; art. 211 EC-Treaty for the Commission; art. 220 EC-Treaty for the Court of Justice; and art. 246 for the Court of Auditors.

and 3) the Council cannot alter the Commissions proposal unless by unanimity (Barents and Brinkhorst 2006, 167-168).

In most cases the legislative measures cannot fulfil administrative requirements and further executive amplification is needed. This is done by delegated or implementing acts, i.e. acts that ‘flesh out the detail or amend certain elements of a legislative act’ (Schütze 2005, 9). When European institutions adopt such acts, they act in their capacity as ‘executive rule-maker’. The EC-Treaty foresees in the adoption of these measures, since it provides the Council, acting either alone or together with the European Parliament, with the power to delegate this decision-making capacity by the legislative act that needs to be fleshed out. The Council can decide to reserve this right for itself or to delegate it to the Commission (Bergström 2005; Craig 1999, 46; ECJ Case 9/56; ECJ Case C-301/02). In terms of potential integration capacity, the capacity as executive rule-maker is of influence, since it is directly involved with the execution of the legislative measures. However, it is weaker than the law-making capacity, because it is subordinate to it: after all, they stem from the legislative measures (Lenaerts and Verhoeven 2000, 652; Schütze 2005, 8; ECJ Case 22/88).

Besides the law-making and executive rule-making capacities, the EU-institutions have several specific functions. Most of these functions are stipulated in specific policy-related treaty provisions. They vary from the establishment of a specific Committee by the Council or an executive Agency by the Commission (*e.g.* art. 144 EC-Treaty), to the adoption of budgetary decisions about the EC’s estimates (art. 272-276 EC-Treaty), the adoption of soft law measures (Hervey 1998, 52-53; Senden 2004, 55-56 and 118-119), and the adoption of political decisions, such as the communications of the Commission and the recommendations of the Council (Barents and Brinkhorst 2006, 200). Their integration capacity is rather weak, because some of them just affect the laws and policies of the Member States indirectly, for example the establishment of a committee to support the Commission in its work. Some others, which are directly aimed at the Member States, have a weak integration capacity, because they are merely political declarations of intentions, or guidelines about how national laws and policies should or could – and not shall and will – develop.

The weakest form of decision-making is found in the decisions of the European Council. Based on article 4 of the EU-Treaty: the European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof. In practice, this means that the European Council is the moving spirit behind the European integration process, because it sets the pace and shape of Community policy and establishes the parameters within which the other institutions operate (*cf* Craig and De Búrca 2008, 57-58; Weatherill 1995, 64-65). This form of decision making is thus more an internal affair of the EU, rather than an external affair directed at the Member States.

Effect on the national legal order

The last two parameters, the effect on the national legal order and the means to ensure compliance, concern the relationship between the legal instrument and the domestic law, in the sense of implementation, enforcement, impact and compliance (Snyder 1993). Both

parameters involve complex legal doctrines and principles. In short, the basic principle of this relationship is defined by the European Court of Justice (ECJ) as monistic, meaning that the EC-Treaty created its own legal order, which is an 'integral part' of the legal systems of the Member States (Craig and De Búrca 2008, 344-346). Moreover, the ECJ enunciated the primacy of EC law over national law (ECJ Case 26/62; ECJ Case 6/64; cf De Witte 1999, 177-183 and 189-193). Furthermore, the relationship is based on the doctrine of 'direct effect' of EC law, which, oversimplified, means that 'the provisions of binding EC law which are clear, precise, and unconditional enough to be considered justifiable can be invoked and relied on by individuals before national courts' (Craig and de Búrca 2008, 268; Prechal 2000).

When it comes to the effect on the national legal order, some EU measures have a very strong integration capacity, since they are directly effective and applicable. In practice, however, not all EU measures are supreme, nor are all of them directly effective and applicable. Some measures are, for instance, not 'sufficiently operational to be directly applied by a court in a certain situation'. It, therefore, needs further implementation by European or national legislative or executive actors (Timmermans 1979, 534; Craig and De Búrca 2008, 281-282). This is especially the case with instruments that use the technique of minimum harmonisation. These instruments only establish minimum requirements to achieve a certain objective, the choice of form and measure to fulfil these requirements are left to the discretion of the Member States (art. 249 EC-Treaty). Member States are given a certain period of time to transpose the instrument into national measures. Despite the transposition and the conditions for the applicability of the provisions of these instruments, they have a rather strong integration capacity, since a minimum standard of harmonisation is guaranteed. Moreover, when the instrument is not implemented during the transposition period, a self-executing provision has vertical direct effect, meaning that an individual can rely on it in a case against the state.

Not all the integration instruments are adopted by the institutions of the EU, some of them are concluded between the Member States themselves. They are to be counted as an integration instrument because they intend to achieve one of the objectives of the EU, or to complement the EU- and EC-Treaties, or have to do something with the membership of the EU (Senden 2004, 56-58; De Witte 2001). These agreements have no direct effect, unless the Member State adheres a monist system, like the Netherlands. Most Member States, however, have a dualist system, which means that, in order to be effective on the national legal order, such an agreement first needs to be transposed or incorporated into that legal order (Hartley 1999, 134-135). Besides the fact that these agreements do not automatically become part of the national legal orders, like the instruments of the EU institutions, they neither have a settled time period by which they have to be transposed. As a result of this dependence on the national legislator, these agreements have a basically weaker potential integration capacity.

Furthermore, the EU has at least two sorts of integration instruments that are only indirectly effective on the national legal orders. The first sort, is formed by the instruments that needs to be implemented in the national legal order. In the intervening period between adoption and implementation, these instruments are indirectly effective, in the sense that the national law needs to be interpreted in conformity with, or in the light of the unimplemented instrument, also known as the principle of harmonious

interpretation (art. 10 EC-Treaty; Craig and De Búrca 2008, 287-296). The second sort of instrument is formed by the wide variety of soft law instruments the EU institutions utilise to further European integration (Senden 2004, 118-120). These instruments are called soft law, because they are legally non-binding and not upheld by the ECJ. This means, that even though they are part of the national legal order, their imperative to affect the laws and policies of the Member States is weak. However, these instruments can also be indirectly effective, for instance, when they are taken into account for the harmonious interpretation of the national laws and policies (Senden 2004, 340-345).

The means to ensure compliance

The means to ensure compliance is, from a legal point of view, the strongest when it is ensured by the European Court of Justice (Abbott *et al* 2000, 415-416). Depending upon the effect of the instrument on the national legal order, this can either be undertaken by a direct action (infringement procedure) or an indirect action (preliminary ruling). The infringement procedure is the strongest form to ensure compliance by the ECJ because of the direct involvement of the ECJ regarding national measures. The infringement procedure holds an action against a Member State for failure to fulfil an obligation under the EC-Treaty (art. 226-228 EC-Treaty; Lasok and Millet 2004, 3-4 and 23-44). If the ECJ is of the opinion that the Member State has indeed infringed an obligation under the Treaty, it specifies what act or omission the source is of the infringement. For instance, an incorrect or inadequate implemented directive (ECJ Case C-428/04), a directive that is not implemented in time (ECJ Case C-53/88), or national legislation that is not in harmony with EC-law (ECJ Case C-318/05).²

The means to uphold EC law by a preliminary ruling of the ECJ is a bit weaker, because in this procedure the ECJ only rules about the interpretation of the EC law concerned and not about the invoked national law (art. 234 EC-Treaty). The aim of the preliminary ruling is to preserve the uniformity of EC law (ECJ Case C-166/73; Weatherill 1995, 107). This interpretation is of influence on the national legislation, because the referring court has to apply it in the case in which the reference is made (ECJ case C-320/88) as well as the appellate bodies in that case (Lasok and Millet 2004, 182).

Other means to ensure compliance are institutional or multilateral surveillance and persuasive pressure. The former, institutional surveillance, refers to compliance being ensured by one or more of the EU institutions - other than the Court of Justice. Besides the EU institutions multilateral surveillance involves the Member States. The legal basis for surveillance is not arranged in a general provision of the EC-Treaty, hence it is arranged in several specific policy provisions (*e.g.* art. 88, 95, 99 and 128 EC-Treaty). The result of institutional and multilateral surveillance is that the Member States have to give account of their activities regarding those specific subjects. The latter, persuasive pressure, is a method by which compliance is used for instruments that are either too vague or imprecise to be upheld by the ECJ or are soft law. Mechanisms used to create persuasive pressure are for example, monitoring, peer reviews, benchmarks, recommendations and public “naming, shaming and blaming” (Trubek and Trubek 2005,

² Mark that the ECJ can only specify the act or omission that constitutes the failure, it cannot annul the national law concerned. *Cf* Lasok and Millet 2004, 41.

90-95). The underlying idea of these mechanisms is that Member States will comply with soft law in order to avoid negative criticism (idem, 91; Brown Weiss 2000, 548). Although these two means to ensure compliance are rather weak in terms of potential integration capacity considered from a legal point of view, nevertheless, they are not necessarily less effective (Shelton 2000).

3. Assessment of the legal dimension of integration of the acquis of the ESM

The next step in determining from a legal point of view, whether or not the OMC is a positive evolvment for the further development ESM, is to assess the potential integration capacity of all of the integration instruments that have been used and are still used or in force, to further this development. This paper is confined to the assessment of the legal dimension of integration of the acquis of two social policy subjects: equal opportunities and employment (§3.1); and active labour market policies (§3.2). As mentioned in the introduction, the assessment is conducted in three steps: firstly, the respective acquis are identified; secondly, the identified and selected instruments are ordered in time; and thirdly, they are assessed by the framework and labelled by their overall level of integration capacity, varying from level 1, a strong integration capacity, to level 4, a weak integration capacity.

3.1 Legal dimension of the acquis of equal opportunities and employment

Identification of the acquis of equal opportunities and employment

The identification of the acquis equal opportunities and employment is somewhat troublesome. It is not enough to select only those instruments that at least address the Member States. A selection based on the material content of the instruments is also required. Firstly, because equal opportunities and employment are governed by many instruments that address them separately as well as together. For this paper the concern is with the latter instruments; thus those instruments that govern equal opportunity in relation to employment and vice versa.

Secondly, there are many instruments that govern these policies directly as well as indirectly. For instance, the 1974 social action programme (OJ [1974] C13/1) holds several provisions that directly govern the principle of equal opportunities and employment. The Council's call 'to seek solutions to the employment problems confronting certain more vulnerable categories of persons (the young and the aged)' is just one example. On the other hand the 1975 Directive on the principle of equal pay (OJ [1975] L45/19) at first glance, has little to do with the principle of equal opportunities and employment, other than that it is about equal treatment of men and women when it comes to pay for the same or equal work. However, there are several instruments that claim that this Directive plays 'a dynamic role in improving the situation of women' (COM (81) 758). These kind of equal treatment measures equalise the opportunities of women, since they do not directly affect the position of the men. They equalise the

opportunities of women, because they ‘counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures’ (Council recommendation 1984), and ‘the disadvantage faced by men with regard to participating in family life’ (Mixed council resolution 2000a).

Other instruments that at first glance appear to have little connection with equal opportunities and employment are those that give material effect to this principle. The mixed resolution on the social inclusion of young people (Mixed council resolution 2000b), for example, does neither mention equal opportunities nor employment; however, the activities that are called for qualify as positive actions in order to create a situation of equal opportunities for young people to take an active part in social, political, cultural and economic life.

All of the above instruments are selected as part of the acquis of equal opportunities and employment. In total 84 instruments have been selected (see Figure 2). This selection includes directives, collective agreements, decisions, action programmes, mixed and Council resolutions, Council and Commission recommendations, and two charters. Furthermore, the selection includes the EES and the OMC Social Protection and Social Inclusion (further: OMC SP/SI).

The assessment of the acquis equal opportunities and employment

Most of the instruments of the acquis equal opportunities and employment clearly fit into one level, but there are several instruments that fall between two levels. This was particularly the case with the more recent action programmes. The action programmes adopted in the 1970s, 1980s and early 1990s aim to provide a basis for the development of future EU law and policy (Senden 2004, 128-132), as such they are assessed as level 4 instruments. The action programmes adopted since the mid 1990s are considerably different. On the one hand they constitute suggestions for activities to be undertaken by the Member States, while on the other hand they create procedural obligations on how to invoke the funding rules. The first part of the action programmes the suggestions for activities are merely indirectly effective on the national legal orders of the Member States and cannot be invoked before the ECJ. Together with the assessment of the other key-parameters, this would result in an assessment of the weakest manifestation of the last two key-parameters, and an overall assessment indicating that it is a level 4 instrument. However, the second part of these action programmes, the procedural obligations regarding the funding rules, are directly effective and can be enforced with direct action by the ECJ. This would result in an assessment of the last two parameters on the strongest manifestation level, level 1, and an overall assessment of a level 2 instrument. In the latter situation the instrument would thus have a significantly stronger potential integration capacity than in the former (see Table 1). Since the latter part of these action programmes is not aimed at integrating the national laws and policies of the Member States and the former part of the action programmes is, these action programmes are assessed on their first part, and finally indicated as level 4 instruments.

Table 1. Assessment of the action programmes

Supportive	Procedural obligation	Moving spirit	Indirectly	Persuasive pressure	4
Coordinative	Coordination	Specific function	Ratification	Institutional surveillance	3
Shared	Min. harm.	Executive rule-maker	Conditionally effect. & appl.	ECJ: prelim. ruling	2
Exclusive	Total harm.	Law-maker	Directly effect. & appl.	ECJ: direct action	1
Conferred competence	Integration technique	Decision-making capacity	Effect on national legal order	Ensure compliance	Level

Action programme assessed on its second part: rules for funding of the activities
Action programme assessed on its first part: suggestions for activities

Overall, the assessment of the acquis equal opportunities and employment has resulted in the legal dimension as shown in figure 3.³

3.2 Legal dimension of the acquis of active labour market policies

Identification of the acquis of active labour market policies

The EU promotes seven active labour market policies (ALMPs), namely: 1) vocational training; 2) the improvement of and the improvement of the access to public employment services; 3) job-creation; 4) wage subsidies; 5) employment subsidies; 6) access and entitlements to benefit systems; and 7) earned income tax. Unlike the EU integration instruments used to further the integration of equal opportunities and employment, EU integration instruments that promote ALMPs were not so easy to identify. This is due to the fact that, except for vocational training, they have no explicit legal base in the EC-Treaty. Consequently, there are also no instruments adopted with explicit reference in their title to these subjects. For instance, an instrument titled “employment services” or “wage subsidies”, cannot to be found, instead the promotion of such policies is found in instruments entitled “action to assist the long term unemployed”. Therefore, the identification of EU integration instruments governing ALMPs is based on the material content of instruments that, according to their title, were most likely to contain ALMPs. Furthermore selection took place through references made in the preamble of the instruments that could be identified by its title. For instance the 1990 Council resolution on action to assist the long term unemployed (OJ [1990] C157/4), refers to three other

³ An overview of the identified instruments and their individual assessment will be made available by the author on request.

integration instruments that are adopted during the 1980s. Based on this method, a total of 69 instruments is identified (see Figure 4).⁴

The assessment of the acquis of the active labour market policies

Part of the selected instruments are also the action programmes described above. For the assessment of the acquis of the ALMPs, the action programmes have been treated in the same way as they were for the assessment of the acquis equal opportunities and employment.

Other instruments that were rather difficult to assess are the Council resolutions from the 1980s. Some of them were clearly level four instruments, while three of them have remarkable resemblance with the EES and OMC SP/SI (level three instruments), except for the manner in which compliance is ensured. These instruments seem to arrange an embryonic form of institutional surveillance. For instance, in the 1984 Resolution on action to combat long-term employment (OJ [1985] C2/3), the Council requests the Commission to not only to undertake several supplementary activities and to further develop Community activities, but also to inform the Council every two years about the progress made in the implementation of these actions. In its 1986 Resolution on an action programme on employment growth (OJ [1986] C340/2), the Council invites the Commission to assist with the rapid dissemination of information and best practices throughout the Community, to promote coordinated activities, to make analysis and to write a summary report every six months on the implementation of the programme and on future developments. All in all, these resolutions clearly show an embryonic state of institutional surveillance. Therefore, these resolutions are on the last key-parameter “ensuring compliance” and are assessed as manifesting institutional surveillance, which has resulted in an overall assessment of these resolutions as a level 3 instrument.

The assessment of all the integration instruments used to govern ALMPs results in the legal dimension as shown in Figure 5.

⁴ An overview of the identified instruments and their individual assessment will be made available by the author on request.

Figure 2. Acquis equal opportunities and employment arranged in four time-periods

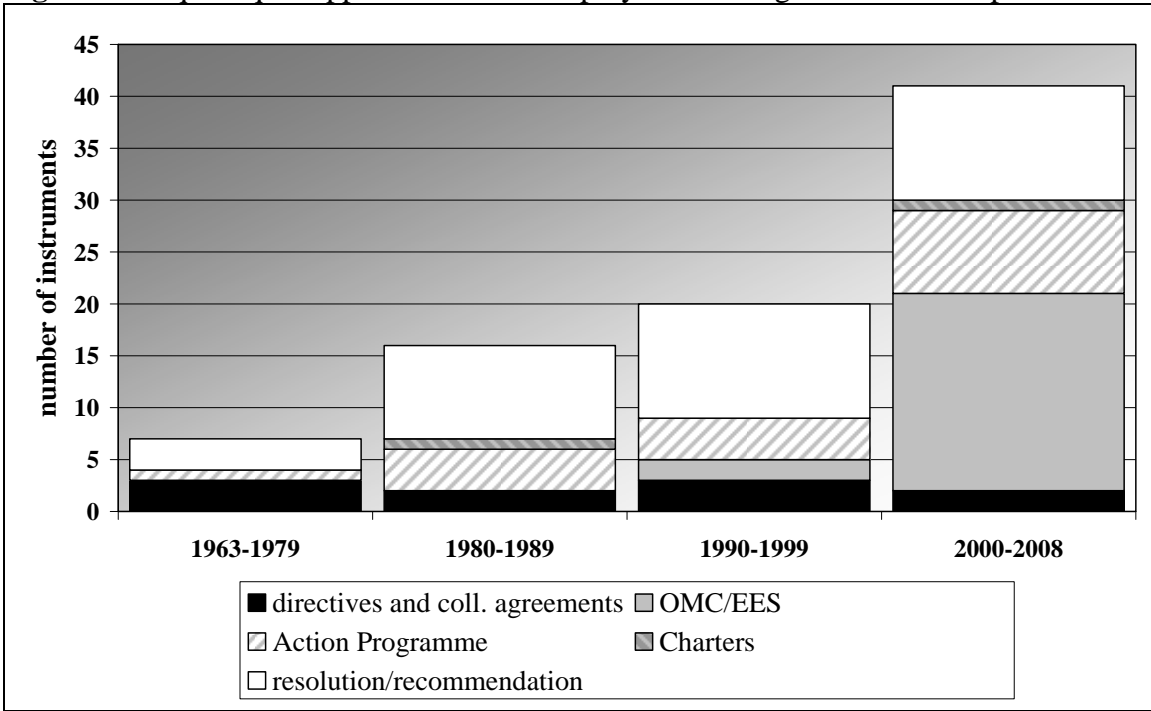


Figure 3. Legal dimension of the acquis of equal opportunities and employment policy

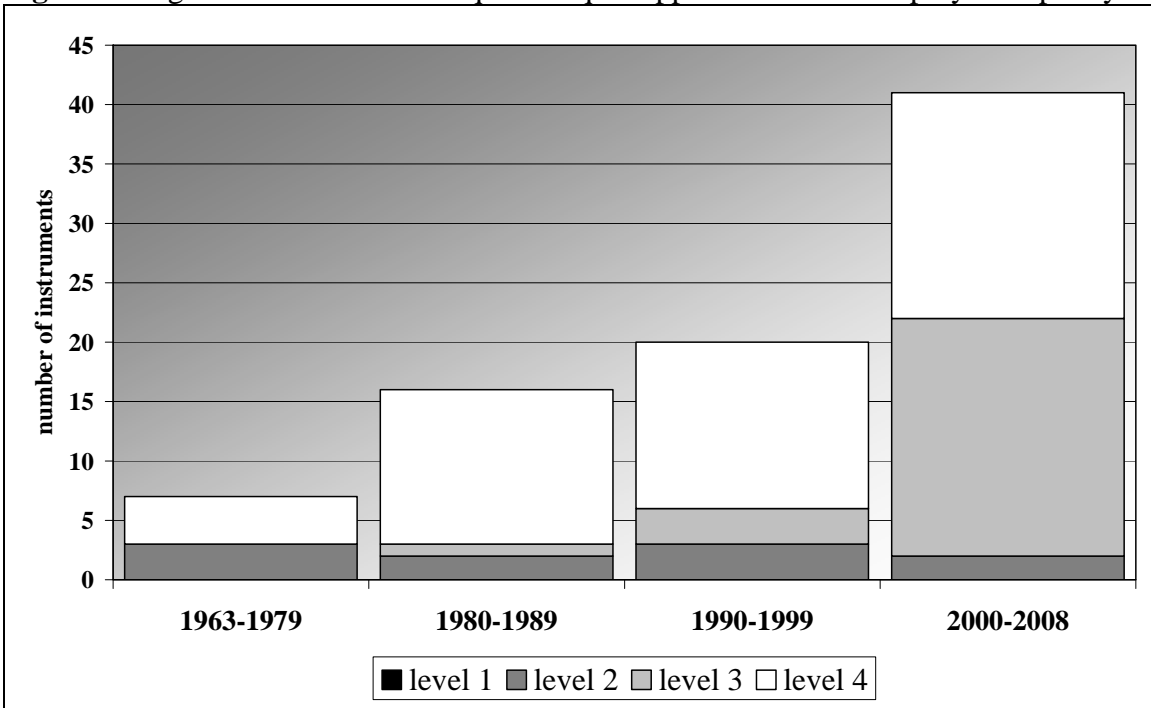


Figure 4. Acquis ALMPs arranged in four time-periods

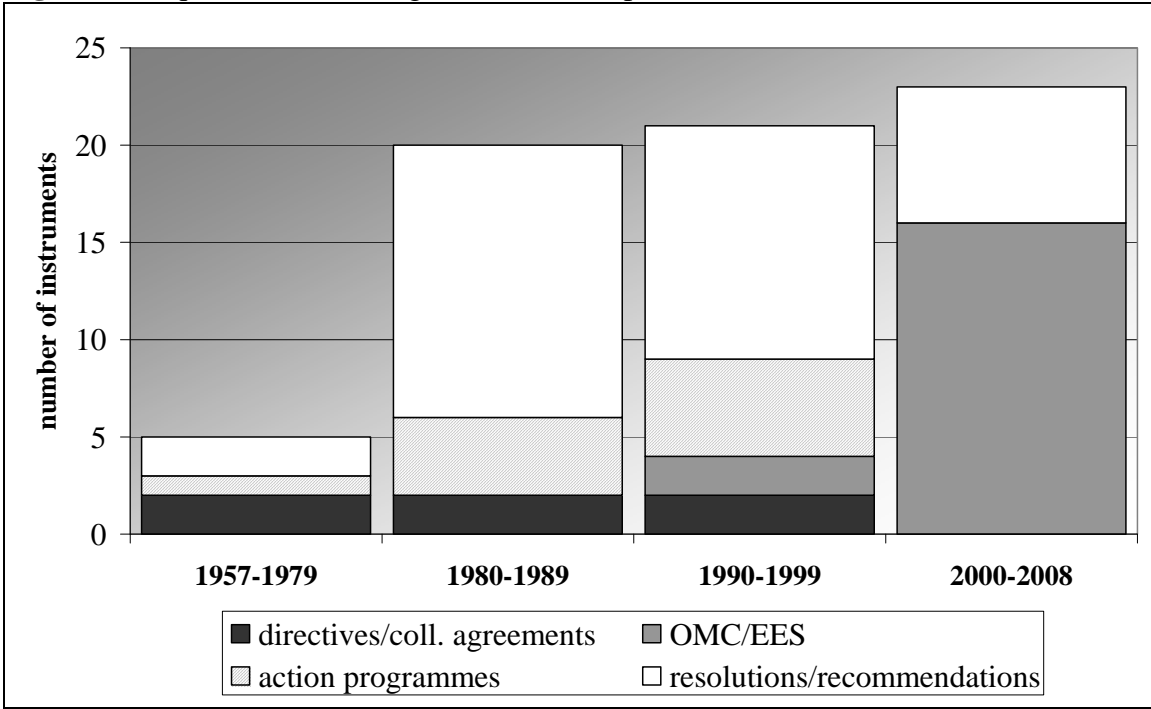
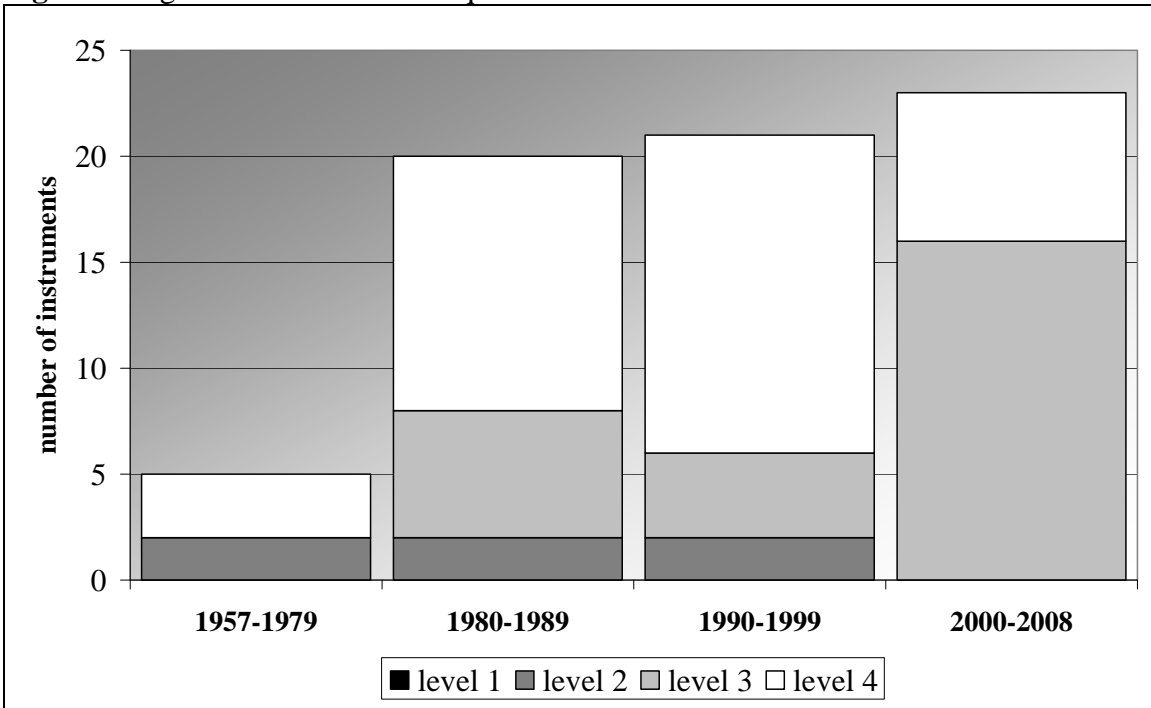


Figure 5. Legal dimension of the acquis of ALMPs



4. Analysis of the policy fields equal opportunities and employment and ALMPs

Analysis of the acquis of the policy fields

A large part of the acquis of these policy fields overlap. This is not coincidentally, since many of the activities suggested to improve the opportunities of specific groups, such as women, youth, elderly and disabled persons regarding employment are ALMPs, and vice versa, many measures promoting the use of ALMPs, require specific attention for special groups. Thus, the 1984 Council recommendation on the promotion of positive action for women (OJ [1984] L331/34), for example, recommends the Member States to ensure that positive action includes, among other things and as far as possible, active labour market policies such as (better access to) vocational training and public employment services, that are better attuned to the needs of women. Another example is the 1986 Council resolution concerning the action programme on employment growth (OJ [1986] C340/2), which requires specific attention for the position of women and disabled persons regarding the application of specific ALMPs, such as vocational training and access to and functioning of, public employment services.

Consequently, both acquis have a large resemblance of the sort of instruments that are part of the acquis and their legal dimension. Regarding the acquis of both policy fields, the identification of instruments has resulted in an acquis that almost completely consists of the so called soft law integration instruments including resolutions, recommendations and action programmes (see figures 2 and 4). The use of directives and collective agreements, which are hard law instruments, is very modest in both policy fields with the adoption of just two or three of the hard law instruments in each time period and there has been none for ALMPs during the last period (2000-2008).

By far the most popular instruments are the resolution and the recommendation. During the first three time-periods (1957/1963-1979; 1980-1989; and 1990-1999) they count in both policy fields for at least 50% of all the instruments adopted in those periods. It is only in the last period (2000-2008) that their popularity declines to merely 25% of the total number of instruments adopted in that period. The identification of the acquis further shows that the action programme is also a frequently used instrument during all the periods. This is particularly the case regarding equal opportunities and employment where it even gained popularity during the last period. Like the resolutions and recommendations, the action programmes are generally considered as soft law.

The last period (2000-2008) shows the upsurge of the OMC as means to govern the integration of these two policy fields. In the field of equal opportunities and employment, the OMC counts for almost 50% of the instruments used to further integration and in the field of ALMPs the OMC counts for almost 75%. It should be noted though, that the EES, which is part of both policy fields, counts as a sort of double, since two of its instruments, the guidelines and recommendations, are identified as part of the acquis. Furthermore, it can be noticed that, since this is the only time-period in which the number of resolutions and recommendations remains the same (equal opportunities and employment) and even declines (ALMPs), it seems that the OMC has replaced – a part of – those instruments.

The conclusion of this analysis is thus that the acquis of both the policy fields consist almost completely of soft law instruments. During the first three periods their acquis was mainly comprised by resolutions, recommendations and action programmes, while during the last period the acquis of these policy fields is complemented by the OMC SP/SI and EES, which seems to have (partly) replaced some of the instruments previously used.

Analysis of the legal dimension of acquis of the policy fields

Since the acquis of both the policy fields is mainly comprised by soft law instruments, *i.e.* resolutions, recommendations, action programmes and OMCs, it is to be expected that the legal dimension of these policy fields is rather weak in terms of potential integration capacity. This is also confirmed by the assessment results as shown in Figures 3 and 5.

Overall the legal dimension of the acquis of these policy fields comprises only a few level 2 integration instruments, these are the directives and collective agreements. Conversely, the main body of the legal dimension is comprised by level 4 instruments. This is due to the fact that the acquis of these policy fields mainly consists of resolutions, recommendations and action programmes. Instruments that all have most of their manifestations in the upper part of the analytical framework, where - in terms of potential integration capacity - the weakest manifestations are situated. In accordance with the acquis, the legal dimension during the first three periods (1957/1963-1979; 1980-1989; 1990-1999) exists of 50% to 67% of level 4 instruments.

The last period (2000-2008) shows a different legal dimension. One that mainly exists of level 3 instruments, *i.e.* 50% to 75%. This is the result of the introduction of the OMC, which is assessed as a level three instrument and is an instrument that in terms of potential integration capacity is stronger than the resolutions, recommendations and action programmes. In this sense the introduction of the OMC has resulted in a growing potential integration capacity of the acquis of these policy fields.

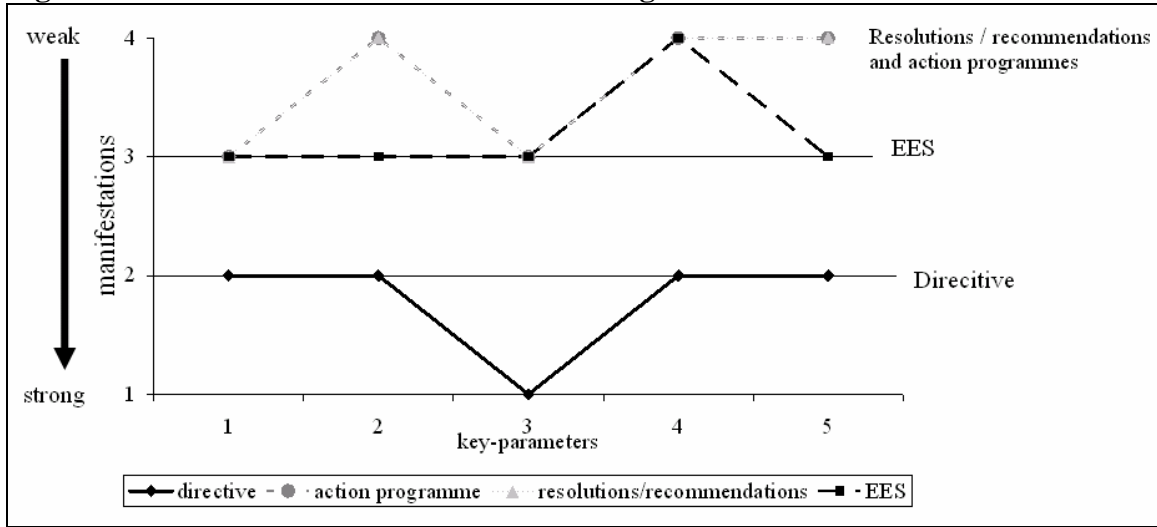
5. Conclusions

Central to this paper is the capacity of the EC to integrate the laws and policies of the member states with respect to social issues, such as equal opportunities and employment, based on its legal dynamics. In this paper it remains undisputed that compared to the common market, the ESM is less successful in doing so. This is not only due to the fact that the core focus of the EC is and always has been on the creation of a common market, but it is also due to the different welfare systems of the member states which are to be respected by the EC. Consequently, social policies are complex and sensitive subjects which makes it hard to create uniform standards. Instead efforts are undertaken to govern these policies by more flexible tools which strive for convergence while allowing diversity (Pochet 2005, 39-45). Thus, instead of using hard law measures such as regulations and directives to approximate the laws and policies of the member states, the EC applies mainly soft law measures such as resolutions, recommendations, action programmes and since 2000 the OMC. As shown in paragraph 3 of this paper, the acquis

of equal opportunities in employment and the acquis of active labour market policies are comprised by approximately 80-90% soft law and merely 20-10% of hard law measures.

As such, the introduction of the OMC, being also soft law, is a negative development, as it adds one more soft law measure that detracts from the efforts to agree on hard law measures, in particular minimum standard directives and collective agreements. However, when all selected instruments are assessed for their potential integration capacity based on the legal dynamics of the European integration process a more optimistic image arises. Although, the OMC is also a soft law instrument, its overall potential integration capacity is stronger than that of the other soft law instruments, in particular the resolutions, recommendations and action programmes (see figure 6). While the resolutions, recommendations and action programmes are in general assessed as level four instruments, the EES (and OMC SI/SP as well) is assessed as a level three instrument.

Figure 6. assessment of several instruments in general



It remains a fact though that the acquis of the ESM is mainly comprised of soft law instruments with a weak integration capacity of level 3 and 4, based on the legal dynamics of the European integration process. However, the OMC as applied in the field of social policies, has raised the overall integration capacity of at least two of the policy fields within the ESM. From this point of view, substantial arguments can be made that the OMC has strengthened the ESM. Whether it is also an innovative breakthrough with superior capacity to solve the problems the EU faces in the field of social policies cannot be concluded from this analysis. This also depends on the political dynamics of the European integration process, such as the willingness of the involved actors among the institutions of the EU, the social partners and the member states to apply the OMC to its fullest potential. Based on the numerous researches in this respect, there seems currently to be a lack of such a willingness (Copeland and ter Haar; Zeitlin and Pochet, with Magnussen 2005). When such willingness is there, the OMC might not only be a positive development in terms of integration capacity based on the legal dimensions of European integration, but also in politically solving certain problems in the field of social policy.

ECJ Case law

- ECJ Case 9/56 *Meroni v High Authority* [1958] ECR 133.
ECJ Case 26/62 *Van Gend en Loos* [1963] ECR 1.
ECJ Case 6/64 *Costa v E.N.E.L* [1964] ECR 585.
ECJ Case 41/67 *Donkerwolke and Schou v Procureur de la République* [1976] ECR 1921.
ECJ Case 166/73 *Rheinmühlen-Düsseldorf* [1974] ECR 33.
ECJ Case 120/78 *Cassis de Dijon*, [1979] ECR 649.
ECJ Case 804/79 *Commission v United Kingdom* [1981] ECR 1045.
ECJ Case 22/88 *Vreughdenhill and Others* [1989] ECR 2049.
ECJ Case C-53/88 *Commission v Greece* [1990] ECR I-3917.
ECJ case C-320/88 *Staatssecretaris van Financiën v Shipping and Forwarding Enterprise Safe* [1990] ECR I-285
ECJ Case C-301/02 *Salvatore Tralli v European Central Bank* [2005] ECR I-4071.
ECJ Case C-428/04 *Commission v Austria* [2006] ECR I-3325.
ECJ Case C-318/05 *Commission v Germany* [2007] ECR I-6957.

References

- Abbott, K.W. *et al* (2000) 'The Concept of Legalization', 54(3) *International Organization*, 401-419.
- Barents, R. en Brinkhorst, L.J. (2006), *Grondlijnen van Europees Recht*. Deventer: Kluwer (12th ed.).
- Barnard, C. (2006), *EC Employment Law* Oxford: Oxford University Press (3rd ed.).
- Bergström, C.F. (2005), *Comitology: delegation of powers in the European Union and the Committee-system*. Oxford: Oxford University Press.
- Brown Weiss, E. (2000), 'Conclusions: Understanding Compliance with Soft Law', in D. Shelton (ed.), *Commitment and Compliance: the role of non-binding norms in the international legal system*, Oxford: Oxford University Press, 535-553.
- Copeland, P. and ter Haar, B.P. (forthcoming) 'What are the Future Prospects of the European Social Model? An Analysis of EU Equal Opportunities and Employment Policy', *European Law Journal*.
- Council Decision 63/266/EEC (1963) laying down general principles for implementing a common vocational training policy OJ [1963] 36/1338.
- Council Resolution (1974) concerning a social action programme OJ [1974] C13/1.
- Council Directive 75/117/EEC (1975) on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women OJ [1975] L45/19.
- Council Recommendation 84/635/EEC (1984) on the promotion of positive action for women OJ [1984] L331/34.
- Council Resolution (1984) on action to combat long-term unemployment OJ [1985] C2/3.
- Council Resolution (1986) on an action programme on employment growth OJ [1986] C340/2.

- Council Resolution (1990) on action to assist the long-term unemployed OJ [1990] C157/4.
- Council and the Ministers for Employment and Social Policy meeting within the council (2000a), resolution on the balanced participation of women and men in family and working life OJ [2000] C218/5.
- Council and of the Representatives of the Governments of the Member States meeting within the council (2000b), resolution on the social inclusion of young people OJ [2000] C374/4.
- Craig, P. (1999), 'The Nature of the Community', in Craig, P. and De Búrca, G. (eds.), *The evolution of EU Law*. Oxford: Oxford University Press, 42-50.
- Craig, P. and De Búrca, G. (2008), *EU law: text, cases and materials*. Oxford: Oxford University Press (4th ed.).
- Cremona, M. (1999), 'External Relations and External Competence', in Craig, P. and De Búrca, G. (eds.; 1999), *The evolution of EU Law*, Oxford: Oxford University Press, 152-158.
- Curtin, D.M. (2006), 'European Legal Integration: Paradise Lost?', in *European Integration and Law*, Antwerp: Intersentia, 1-56.
- Dehousse, R. and J.H.H. Weiler (1990), 'The Legal Dimension of Integration', in W. Wallace (ed.), *The Dynamics of European Integration*, London: The Royal Institute of International Affairs, 242-260.
- Dougan, M. (2000), 'Minimum Harmonisation and the internal market', 37 *Common Market Law Review*, 853-885
- European Commission (1981), Communication *A new Community action programme on the promotion of equal opportunities for women 1982-1985* (first mid term AP) COM (81) 758, EC Bulletin Suppl 1/82.
- European Convention Working Group IX on Simplification (2002), *Final report*, CONV 424/02, available on: <http://register.consilium.eu.int/pdf/en/02/cv00/00424en2.pdf> - accessed on 3 November 2008.
- Hartley, T.C. (1999), *Constitutional Problems of the European Union*. Oxford: Hart Publishing.
- Hartley, T.C. (2007), *The Foundations of European Community Law*. Oxford: Oxford University Press.
- Héritier, A. (2003) 'New Modes of Governance in Europe: Increasing Political Capacity and Policy effectiveness?' in T. Börzel and R. Cichowski (eds.), *The State of the European Union*. 6 Oxford: Oxford University Press, 105-126.
- Hervey, T. (1998), *European social law and policy*. London: Longman.
- Kirchner, C. (1997), 'Competence Catalogues and the Principle of Subsidiarity in a European Constitution', 8 *Constitutional Political Economy*, 71-87.
- Lasok, K.P.E., and T. Millett (2004), *Judicial Control in the EU: procedures and principles*, Richmond: Richmond Law & Tax Ltd.
- Lenaerts, K. and A. Verhoeven (2000), 'Towards a Legal framework for Executive Rule-making in the EU? The Contribution of the New Comitology Decision', 37 *Common Market Law Review*, 645-686.
- Pochet, Ph. (2005), 'The Open Method of Co-ordination and the Construction of Social Europe. A Historical Perspective', in Zeitlin, J. and Pochet, Ph., with Magnussen, L., *The Open Method of Co-ordination in Action*. Brussels: P.I.E.-Peter Lang S.A., 37-82.

- Prechal, S. (2000) 'Does direct effect still matter?' 37(5) *Common Market Law Review*, 1047-1069.
- Shanks (1977) 'Introductory Article: The Social Policy of the European Community' 14 *CMLRev.*, 14.
- Schütze, R. (2005), 'Sharpening the Separation of Powers through a Hierarchy of Norms? Reflections on the Draft Constitutional Treaty's regime for legislative and executive law-making', 2005/W/01 *EIPA Working Paper*.
- Senden, L. (2004), *Soft Law in European Community Law*, Oxford: Hart Publishing.
- Shelton, D. (ed.) (2000), *Commitment and Compliance: the role of non-binding norms in the international legal system*. Oxford: Oxford University Press.
- Snyder, F. (1993) 'The effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', 56(1) *The Modern Law Review*, 19-54.
- Threlfall, M. (2003), 'European social integration: harmonization, convergence and single social areas', 13(2) *Journal of European Social Policy*, 121-139.
- Timmermans, C.W.A. (1979), 'Directives: Their effect within the national legal systems', *Common Market Law Review*, 533-555.
- Trubek, D.M. and J.S. Mosher (2001), 'New Governance, EU Employment Policy, and the European Social Model', 6/01 *Jean Monnet Working Paper*, 1.
- Trubek, D.M. and Trubek, L. (2005), 'The Open Method of Co-ordination and the Debate over "Hard" and "Soft" Law', in Zeitlin, J. and Pochet, Ph., with Magnussen, L., *The Open Method of Co-ordination in Action*. Brussels: P.I.E.-Peter Lang S.A., 83-103.
- Vink, M.P. (2002), 'Negative and Positive Integration in European Immigration Policies', 6(13) *European Integration online Papers*.
- Weatherill, S. (1995), *Law and integration in the European Union*, Oxford: Clarendon Press.
- Weatherill, S. (2007), *Cases and Materials on EU Law* Oxford: Oxford University Press (8th ed.).
- Witte, de B. (1999) 'The nature of the Legal Order' in Craig and De Búrca (eds.), *The Evolution of EU Law*. Oxford: Oxford University Press, 177-214.
- Witte, de B. (2001), 'Internationale verdragen tussen lidstaten van de Europese Unie', in R. A. Wessel en B. de Witte, *De plaats van de Europese Unie in het veranderende bestel van de volkenrechtelijke organisatie*, T.M.C. Asser, Mededeling van de NVIR 123, 79-131.
- Zeitlin, J. and Pochet, Ph., with Magnussen, L. (2005) *The Open Method of Co-ordination in Action*. Brussels: P.I.E.-Peter Lang S.A.

Information about the Author

Beryl Philine ter Haar, LL.M, is since May 2006 PhD candidate at the faculty of law of the University of Leiden, Netherlands. The subject of the PhD-thesis is the meaning of the open method of coordination for the development of a social Europe. This research is conducted from a legal perspective and addresses issues such as the legal status of the OMC, its position in the European legal order, and its relation to and with other European integration instruments used to further European integration. The material emphasis in this thesis is on subjects related to social security, among which pensions, equal opportunity and employment, and active labour market policies. This thesis is part of a larger project on “Social Security Reform”

(<http://www.law.leidenuniv.nl/org/fisceco/economie/hervormingsz.jsp>).

Publications

- B.P. ter Haar (2008), ‘Open Methods of Coordination: a new stepping stone in the international and European legal order’, *77:3 Nordic Journal of International Law*, 235-251.
- B.P. ter Haar (2008), ‘Scholing en Europees beleid: een levenlang leren voor werk’, in G.J.J. Heerma van Voss (red.), *Scholing in het sociaal recht*. (Reeks Monografieën Sociaal Recht) Deventer: Kluwer, 43-65.
- B.P. ter Haar (2008), ‘The true raison d’être of the open method of coordination’, *Research Memorandum Hervorming Sociale Zekerheid*, Leiden: Universiteit Leiden, 2008.03.
- P. Copeland and B.P. ter Haar (forthcoming), ‘What are the Future Prospects of the European Social Model? An Analysis of EU Equal Opportunities and Employment Policy’, *European Law Journal*.

Addresses

Leiden University, Faculty of Law
PO Box 9520, 2300 RA Leiden
The Netherlands

Telephone: 0031 71 5274879

Email: b.p.ter.haar@law.leidenuniv.nl

Personal homepage (only in Dutch)

http://www.law.leidenuniv.nl/org/publiekrecht/sociaalrecht/bp_ter_haar.jsp