

# **Explaining the Constitutionalization of EU Governance – the Case of European Employment Cooperation**

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## **Towards a Theory of the Constitutionalization of EU Governance**

'Multi-level governance' has become a catchword for the new political organization of Europe. Its main purpose has been to point out the existence and proliferation of networks between new emerging levels in European policy-making (Risse-Kappen, 1996). New concepts like multiperspectival (Ruggie, 1993), polycentric (von Bogdandy, 1993), multilayered (Waever, 1994), Condominio (Schmitter, 1996), multi-tier (Kohler-Koch, 1996a), 'multi-framework, multi-lateral, multi-purpose' (Wallace, 1999) and multi-locational (Wallace, 2000a) have been elaborated in order to specify the uniqueness of the new patterns. This has been a first step in trying to understand the transformation of political structures and new modes of governance resulting from European integration. The result is that we can today convincingly conclude *that* policy-makers are affected by a new network mode of governance in the European Union (Kohler-Koch & Eising, 1999). However, we still know relatively little about *how* the new complex patterns affect policy outcome (Richardson, 1996; Matlary, 1997; Börzel, 1997; Jönsson et al. 1998), and the organisation of actors within 'regimes' beyond the state (Armstrong & Bulmer, 1998). And we know practically nothing about how EU governance patterns can help us to *explain* the *constitutionalization* of the EU. By constitutionalization we mean the act or process of constituting the formal EU (c.f. Weiler, 1999, p. viii).

Explanations of the processes of constitutionalization have traditionally been based on a neofunctionalist perspective and focused on the 'single' level supranational answers to European integration (Marks et al., 1996; Majone, 1998; Sandholtz & Stone Sweet, 1998). The multi-level dimension has so far been evoked in normative calls for constitutional

reforms strengthening the capacity of 'multi-level problem-solving' in the EU (Scharpf, 1999). The causal effects of multi-level dynamics have also been lacking in studies of the Europeanization of national constitutions and institutions (Wessels & Rometsch, 1996; Hanf & Soetendorp, 1998; Harmsen, 1999).

One reason for the lack of explanatory ambition is that 'governance' has been used mainly as a descriptive term connoting all that takes place beyond the state. Neither has the unspecified concept of governance been able to catch the *variety* of governance principles that typically evolves in EU policy fields of a complex multi-level character. For instance, Kohler-Koch and Eising stresses that "the essence of governance just like that of government is to reach binding decisions" (1999, p. 14). The main institutional difference pointed to is that governance does not imply the existence of a single centre of government. We believe that a one-dimensional definition – the particular stressing of binding decisions in this case – risks to hide constitutionally significant characteristics and dynamics specific to a complex system of multi-level governance. The difference between national government and European governance is not only and not always the existence of a centre.

In this article it is held that *different governance principles generate different dynamics of constitutionalization*. One assumption is that the constitutional implications of EU governance by law (binding decisions) will most probably not be identical to the ones for governance by objectives, increasingly used in new areas of EU cooperation, as confirmed by the decision at the Lisbon summit in March 2000 to extend the 'open method of coordination' to a number of new policy areas.

By analysing the dynamics of European employment cooperation, this article aims to contribute to an explanation of the constitutionalization of EU governance. By specifying the governance concept in relation to an empirically well-founded policy area, the article illustrates how a complex system of multi-level governance changes the conditions for the future constitutionalization of the EU. We have chosen to examine the EU employment policy due to its complexity with a broad participation of actors on both local, national and European levels and its variety of governance instruments emerging from both intergovernmental and supranational methods.<sup>1</sup> European employment policy is also the first and prime example of the new *soft law* approach to EU policy-making.<sup>2</sup>

As pointed out by Wallace (2000b), there is not one single Community method in EU policy-making but several policy modes, one of which is policy coordination and benchmarking, as systematized in the open method of coordination. However, we wish to show that also this soft law approach contains several principles of governance. We identify 8: cohesion by exemption, governance by choice, governance by subsidiarity, governance by inclusion, governance by persuasion, governance by diffusion, governance by recurrence, and governance by anticipation (c.f. Streeck 1995; 1996). In the explanatory framework developed, competing modes and principles of governance are seen as generators of constitutional change.

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<sup>1</sup> Due to its character of multi-tiered system, European social policy is a well recognised area of complex decisionmaking arrangements (Leibfried & Pierson, 1995, p. 24-27).

<sup>2</sup> For descriptions and evaluations of the employment policy method, see also Goetschy, 1999; Jacobsson, 1999; Foden, 1999; Foden & Magnusson, 1999; Keller, 1999; Biagi, 2000; Goetschy, 2000; Mosher, 2000; Rhodes, 2000; and nr 4 of *Transfer* 1999.

Ernst Haas (1961) argued that supranational policymaking generates a dynamic process of constitutionalization and institutionalization characterized by shifting loyalties and expectations from the national to a new and larger center. This work shows how a complex system of multi-level policymaking generates a process in which characteristics, loyalties and competencies on the national level are *reconciled* with EU instruments and actions, but also *create tensions* and dilemmas between the two levels. A process which creates expectations on both levels and *complementary* national and European institutions, but also duplications and competence disputes that may generate further constitutional change.

### **The Evolution of Complex Governance Structures**

We will here give a review of the development of European social policy as a background to understanding the complexity of the policy instruments at present.

The ‘social dimension’ covers a broad range of policy areas: labour market policy and labour market relations, working conditions and social security for workers, regional policy and ‘social cohesion’, as well as social policy proper. Already the Treaty of Rome provided a legal base for cooperation on these matters (Art. 117-128.) Art. 118 attributes to the Commission the task to foster a close cooperation between the Member States in the social field, particularly on employment, labour law and working conditions, vocational training, social security, industrial safety and freedom of association and negotiation. Art. 119 adds the issue of equality between men and women by a clause on equal pay for equal work. However, the treaty did not entitle the Commission to present legislative proposals, only to ‘act in close contact with the Member States by making studies, delivering opinions and arranging consultations’, even though the Commission has tried to interpret its mandate flexibly (Cram, 1997).

Basically, economic growth was expected to provide for welfare without the need for a European distributive public policy. Unemployment was perceived to be solvable by improved worker mobility, and measures to facilitate this remained the main concern in the decades following. However, at the Paris summit of 1972, the Heads of State declared that economic expansion was not an end in itself but should lead to improved living and working conditions. Based on the Social Action Programme of 1974, the Commission took a number of initiatives for legislation. Between 1975 and 1980, 10 directives on ‘social policy’ were adopted: 3 on employment security in case of restructuring of companies; 3 on equal treatment of women and men at work; and 4 on health and safety at work (Streeck, 1993). However, by the 1980s, resistance from employers and some member governments, notably the British, had increased and the Commission failed to receive support for the rest of its proposals.

The main project in the mid-1980ies was the realization of the internal market. However, it was acknowledged that the internal market needed to be balanced by a ‘social dimension’. Accordingly, the Social Charter was endorsed at a European Council meeting in December 1989, but got the status of a non-binding declaration. Still, it could serve as “a reference point and a legitimizer for a stream of legislative proposals”

(Nugent, 1995, p. 606). On its basis, the Commission presented a plan of action with 47 concrete proposals, about half of which required binding regulation.<sup>3</sup>

In the mid-1980s, the 'social dialogue' was relaunched as an arena for exchanging views between labour and employers. A clause was inserted in the Single European Act (Art. 118B) that obligated the Commission to 'endeavour to develop the dialogue between management and labour at the European level which could, if the two sides consider it desirable, lead to relations based on agreement'. The Commission hoped to be able to replace the need for regulation by agreements. At a meeting at the Val Duchesse castle in 1985, Delors asked the social partners if they would agree to talk to each other, in return for which he would halt the flood of draft directives, the latter directed mainly to the employers.<sup>4</sup> His idea was that the social partners would negotiate binding agreements among themselves (Tyszkiewicz, 1999). The first years of dialogue, however, was a period of 'joint-opinion' among ETUC, UNICE and CEEP.

A leap forward for the 'social dialogue' was the Social Protocol, annexed to the Maastricht treaty following objections from Britain but eventually included in the Amsterdam treaty. It stated as goals for the Community to promote employment, improved living and working conditions, social security, dialogue between the parties of the labour market, development of human resources in order to make possible high employment rates and combat social exclusion. A major innovation of the Social Policy Agreement, annexed to the Social Protocol, was the key role assigned to social partners in the negotiation, agreement and implementation of EU social policy. It set out a framework for collective bargaining at the European level, granting the actors of the social dialogue the right to conclude European agreements. This was expected to facilitate the adoption of policy by the Council as well as the implementation process in the Member States.<sup>5</sup> Accordingly, European collective bargaining is now part of the policy-making procedure in the social field. So far, three cross-sectoral framework agreements have been signed (on parental leave, part-time work and fixed-term contracts) and a fourth is under negotiation (on temporary agency work). However, so far employers have proved willing to negotiate only under the threat of Community legislation.

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<sup>3</sup> The importance of the Social Charter is disputed. Streeck (1993) argues that besides the low juridical status, the content was weak. All controversial issues were excluded in the final version. Moreover, many of the proposals in the plan of action did not require binding legislation, and when they did, it concerned issues like health and safety and worker mobility rather than social security.

<sup>4</sup> The employers were not easily convinced to participate in the dialogue, fearing that this would lead to European-level negotiations. With unanimity required in the Council, the likelihood of Commission proposals to be passed into directives was perceived as little anyway. The ETUC, for its part, suspected that the social dialogue was used as a pretext by the Council and the Commission for their lack of action on social legislation. Still, for the labour interests, it was important to be able to meet the opposite party also at the European level. Qualified majority voting (QMV), as introduced by the SEA (Art. 118A) in the field of health and safety at work, opened for legislation and made the social dialogue more attractive to the employers. The prospects of expanded QMV in the Maastricht negotiations further increased their willingness.

<sup>5</sup> Art. 3 obliges the Commission to consult the social partners before making proposals in the social field. Art. 4 grants the social partners the right to negotiate an agreement before the Commission takes action. An agreement must be reached within 9 months, otherwise the initiative goes back to the Commission. The agreement reached can either be implemented in accordance with national practices of social partners or the social partners can draft jointly a proposal and seek Commission and Council support for it. The social partners can also take their own initiatives to negotiations.

The completion of the internal market coincided with recession and rising unemployment in Europe. In the 1990s, the social policy order shifted from attempting to construct social regulatory policies at the European level to reconfiguring labour markets and other arrangements to allow the European economy to compete in the world market (Ross, 1995). In 1993, the Commission presented its White Paper on “Growth, Competitiveness and Employment“ and a Green Paper on European social policy (CEC, 1993a, 1993b). The documents stressed that economic policy and social policy need to work together rather than to compete with one another, and linked also employment and social policy. In a White Paper in 1994, the Commission confirmed the need to change direction in employment policies to favour job creation and active measures rather than passive maintenance support. Also the importance of vocational training was stressed (CEC, 1994).

The European Council meeting in Essen in December 1994 established common objectives relating to employment. Member States committed themselves to promoting investments in vocational training; a more flexible work organization; a wage policy that favours job creation; to reduce indirect labour costs, particularly for non-qualified workers; improving the efficiency of employment policies by avoiding measures that negatively affect the availability for work (i.e. reducing or limiting employment benefits); and improving measures to assist groups that have been most affected by unemployment, such as long-term unemployed, women and young people. A system for supervising the employment policies was established, where the Member States were to make annual reports to the European Council as to their progress along these lines.

As will be developed later, the Amsterdam Treaty codified a procedure for the coordination of employment policies. The Council is to decide yearly on employment guidelines, in turn to be implemented nationally and implementation to be reported back to the Commission and the Council. The Council was also given the authority to issue recommendations to individual Member States not living up to the joint commitments. The first Employment Guidelines were decided upon at the extraordinary summit in Luxembourg in November 1997. The guidelines were based on four 'pillars', which have been kept thereafter: improving *employability*, developing *entrepreneurship*, encouraging *adaptability* and strengthening the policies for *equal opportunities*. According to the Council Resolution, the implementation of the strategy called for “the combined efforts of all concerned: Member States, regions, social partners, and Community institutions“. The first round of National Action Plans took place in 1998.

The employment strategy must be understood against the background of EMU. For several governments, it was a way to justify EMU. Moreover, the model for coordination of employment policies bear similarities with the system for multilateral review of economic policies, aiming at economic convergence. However, in contrast to this, coordination of employment policies does not rest on binding decisions. Moreover, according to the Amsterdam treaty, the employment guidelines must be consistent with the broad economic policy guidelines. However, the priority of the economic guidelines over the employment guidelines has been called into question by, among others, the trade unions, who interpret the consistency requirement as simply a need to coordinate the two processes. Both processes are treaty-based, they argue (author’s interview).<sup>6</sup> In

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<sup>6</sup> The employment cooperation has showed that a treaty basis strengthens cooperation considerably. Before the Amsterdam Treaty, in the looser 'Essen process' 1995-97, cooperation was not as successful as

order to improve coordination and consistency, the Lisbon summit stated that other council formations shall contribute to the preparation by the Ecofin of the broad economic policy guidelines.

The post-Amsterdam development has meant a broadening of the employment approach to cover several inter-related efforts under the framework of a 'European Employment Pact'. The pact is conceived of as a three inter-related processes: The *Luxembourg process* following the Employment Chapter in the Amsterdam treaty and the Luxembourg summit, i.e. the employment guideline procedure; The *Cardiff process* which aims at improving the functioning of the internal market by structural reforms of the product, service and capital markets; and the *Cologne process* which is a macro-economic dialogue aiming at coordinating wage developments and economic and monetary policies among the member states. The macro-economic dialogue includes the European social partners and the European Central Bank as well as representatives of the member governments and the Commission.<sup>7</sup> The Lisbon summit called for a better coordination between the three processes.

Thus, the post-Amsterdam development has meant a linking of employment policy to related policy areas. The overall labour market project includes bringing issues on education and vocational training, social security systems, employment policy, competition and tax policy closer together. The project of modernising social security systems in Europe runs parallel with the modernisation of labour markets. This includes making social security benefits and tax systems more 'employment promoting'. The Commission has launched a discussion on modernising social protection systems (CEC 1993b, CEC 1997a, CEC 1999a). In 1999, the Commission called for "a concerted strategy for modernising social protection" (CEC 1999c). Social protection was proposed "a matter of common concern", requiring a "common political vision", even if not common organising and financing. In Autumn 1999, the Council decided to establish a cooperation practice on social protection. An interimistic group of high-level officials was set up for the exchange of information about the various social protection systems, which in 2000 has been developed into a Social Protection Committee. The Lisbon summit decided to use the open method of coordination for social exclusion, while for social protection cooperation was confined to 'exchanging experiences and best practices on the basis of improved information networks', since there was perceived to be a clearer treaty base for cooperation on issues of social exclusion. Thus, the Commission's strategy includes making and utilising *linkages* between policy areas.<sup>8</sup>

The new employment approach has so far mainly meant the setting up of *procedures*, in turn intended to contribute to substantive policy change incrementally. Decision-making capacity on *substantive policy* does not rest on the European fora but on the national ones. Substantive content is instead expected to follow from participation in the process, i.e. by an informal harmonization of views among the participants. Procedures function as to focus attention and guide expectations (c.f. Haas); the very

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the last three years. For instance, the reactions from some member governments to the recommendations in 1999 shows that they take this seriously.

<sup>7</sup> Each party in the dialogue is to retain the authority over their respective fields. What was called for was "a form of concertation, where every actor takes their responsibility for engaging in dialogue with the others" (Allan Larsson, speech, Social Dialogue Committee, 1 February 1999).

<sup>8</sup> Also other actors can strategically link policy areas to each other. For the ETUC, "the fight against unemployment is not a matter for social policy alone, but also for fiscal and macro-economic policy" (ETUC 1998).

existence of procedures may for instance imply changed priorities and agendas at national ministries. Catch-words in the system of governance developing are *co-ordination, convergence, concertation, dialogue*.

This short historical review shows the variety of instruments that have been developed in the social field, and thus the multi-faceted face of European governance today. The 'normal' Community method (governing by directives) has, in some areas, been exchanged for multi-level partnerships, voluntary agreements and dialogue, or to 'soft law' but with new and more systematic monitoring procedures.

Falkner's account of the changes of EU governance in social policy in the 1990s points to: 1) the changed belief system about appropriate principles of action (shared responsibility between the European and national levels according to horizontal and vertical subsidiarity principles), 2) the changed actor constellations (whereby privileged interest groups were incorporated into EC decision-making on public policy, 3) the changed decision-making routines, and 4) the changed boundaries drawn (territorial exclusion of the UK for a period, functional exclusion of various aspects of social policy) (Falkner, 1999). This catches well the developments of the Social Protocol and the Social Agreement. Indeed, the inclusion of social partners and reliance on partnerships at the European as well as nationally and sub-nationally is a key aspect of the multi-level and multi-actors governance in the social field. The same is true of the complementarity of European and national institutions. However, the employment policy procedure adds complexity to this picture of European social policy in the 1990s. The new, complex system of governance will be analyzed more in detail below.

### **The High Politics of EU Governance**

The answers at the highest political level to the increasing complexity of EU governance are of great significance for the constitutionalization process. These have been reflected i.a. in discussions of the application of the subsidiarity principle in the EU (e.g. European Council, June 1998). Faced with the complexity of the many modes and principles of governance, created for instance in the field of employment policy, policy-makers are searching for new formal solutions.

Europe's future direction should, according to President Chirac and former Bundeskanzler Kohl, 'be described in terms of closeness to the citizens, the rule of law, greater transparency and a broader concretization of subsidiarity' (Chirac & Kohl, 1998). EU decisions should in the future more often take the form of *guidelines* that allow Member States freer rein in their implementation. Kohl and Chirac pointed particularly to the employment sector, where there is a need for a 'clearer catalogue of competencies containing subsidiarity and national responsibility coupled with European cooperation'.

The difficulties of establishing a clear-cut sustainable division of competence between the two levels have inspired primarily Great Britain and Sweden to speak about the possibility of a *third way* between a more supranational, centralized EU, and, intergovernmental cooperation characterized by re-nationalization. At the beginning of 1998, Blair coined the phrase 'a Third Way for Europe', which aimed at combining labour market flexibility and social justice (Blair, 1998a). Peter Mandelson, former UK Minister of Trade, related 'the third way' thinking to the institutions of the EU by

advocating a 'hybrid' of the intergovernmental and the supranational in order to prevent a development towards 'a European superstate' (Mandelson, 1998). Under the heading 'Political benchmarking in Europe', Prime Ministers Blair and Schröder within the framework of a joint declaration on 'The Third Way', formulated the problem in the following:

People will support further steps towards integration where there is real value-added and they can be clearly justified – such as action to combat crime and destruction of the environment as well as the promotion of common goals in social and employment policy. (Blair & Schröder, 1999, p. 11)

Sweden has proposed the Employment Title of the Amsterdam Treaty as a potential model - 'a third way' - for the development of the Union's future cooperation. In this, the former Swedish Foreign Minister argued, the advantages of both supranational and intergovernmental cooperation methods are combined, while ultimate control remains with national parliaments: The new approach lies in the fact that the Title makes the employment policy a 'common concern' for the Member States where the Union decides about 'common objectives', but where the implementation of policies is a national task (Hjelm-Wallén, 1998). The Swedish government has proposed this method also for the areas of consumer protection and equality between the sexes (Persson, 1998).<sup>9</sup> As mentioned, the Lisbon summit decided that a 'new open method of coordination', inspired by the Employment Title, should be applied in the promotion of employment, economic reform and social cohesion as part of a knowledge-based economy (European Council, 23-24 March, 2000).

The political construction of Europe is a unique experience. Its success has been dependent on the ability to combine coherence with respect for diversity and efficiency with democratic legitimacy. This entails using different political methods depending on policies and the various institutional processes. For good reasons, various methods have today been worked out which are placed somewhere between pure integration and straightforward cooperation (Council of the European Union, 2000)

There had been a complementary approach before in other EU policy areas (culture, public health). However, the Employment Title has been considered a more significant 'test case' in that it aims to enable legitimate and more effective cooperation within such politically sensitive fields as those of direct relevance to welfare policy.

The 'high-politics' of multi-level governance in terms of subsidiarity can be seen as an answer to a blurring of competence borders in the complex multi-level game. The purpose of the solutions pointed to in the debate is to present a framework that *reconciles* national and European institutions, which are already heavily intertwined due to practical exigencies in fulfilling Treaty sanctioned functions. That is, to find an institutional framework in a situation where power and jurisdiction *de facto* are shared, not divided, between the Union and the Member States.

The political dynamics of multi-level governance seem to differ from the earlier supranational one of shifting powers and loyalties from the national level to the center.

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<sup>9</sup> The Commission believes the 'employment method' might be possible to apply also in the fields of working environment, health, environment and consumer protection, and information technology. In these other fields, the method might be made more effective with *different timetables* of joint reporting and control. In the employment field, the guidelines and joint reports have followed the rhythms of the broad economic guidelines. In other fields, different time horizons might be preferable (author's interview with Allan Larsson, May 1999)



The policy-making of EU employment cooperation generates a process of constitutionalization characterized by a *division* of loyalties and expectations between the national and European level. The aim of the EU frameworks for voluntary agreements and actions is to make national and European institutions compatible and mutually reinforcing, rather than exclusive.

### **Treaty Innovations for Multi-Level Relations**

The recent Treaty innovations are of course of great significance for the long term constitutionalization process. The Employment Title in the Amsterdam Treaty established employment policy as 'a joint responsibility' of the Member States. It can be seen as enshrining a new approach to cooperation by providing an institutional framework for mutually reinforcing measures at both EU and Member State level. The new section on employment emphasises that 'the Member States and the Community shall work towards developing a coordinated strategy for employment'. It also says that 'the objective of a high level of employment shall be taken into consideration in the formulation and implementation of Community policies and activities'. Accordingly, attention must be paid in the future to employment policy within all the EU's fields of competence.

The Treaty laid down a procedure for the coordination of employment policies. The Commission has been given an important role as an initiating body. On the proposal of the Commission, the Council shall act on a qualified majority to adopt 'guidelines' which should be observed by the Member States when implementing their employment policies. On the Commission's recommendation, the Council can, also with QMV, issue recommendations to individual Member States concerning their employment measures. The annual report on the employment situation and employment measures within the EU, which is drawn up on the basis of the Commission's own analyses and the 'National Action Plans' (NAP) of the Member States, is a *joint report by the Commission and the Council*. The report serves as a basis for the Commission's proposals for guidelines as well as for recommendations to individual Member States.

The complementary approach has been codified in, for instance, 'The Resolution on Growth and Employment' (adopted in June 1997 as a pretext of the first guidelines), which states that 'the European Union should complement national measures by systematically examining all relevant existing Community policies ... to ensure that they are geared towards job-creation and economic growth...'. Moreover, the Council can if necessary, in accordance with Article 189b, adopt stimulation measures to encourage the exchange of information between Member States and support their work in the field of employment. The declared rationale behind the complementary approach is that the Member States are now so closely linked that one Member State's mistake in terms of employment policy will have an impact on the others. The employment measures that an individual Member State takes (or fails to take) are no longer merely a national issue but one of common concern. Accordingly, the new approach means that while authority over labour market policy remains with the national parliaments, the treaty makes it legitimate for the Commission to play an active role in the process as well as for Member States to have opinions on each other's labour market policies. The Court is not included in the process and the European Parliament so far has a down played role to play. Taken together, this is a new combination of subsidiarity and

European action. It is likely to create a partly different political dynamic than the cooperation in the traditional EC areas as well as the first and second pillar policy-making, both among the EU institutions and domestically.

There are in the Title and its practical implications several elements pointing towards a new distribution of powers between the EU and the Member States. *Firstly*, the production of a 'joint report' as the basis of EU action is a new way of distributing powers between the EU and the Member States in the preparatory phases of EU action. The aim is to incorporate at an early stage an understanding of the national conditions and thereby raise the awareness of the possible implications of EU measures. *Secondly*, 'guidelines' do not claim general applicability, as EC directives do. Moreover, the directive prescribes an exact date for the national implementation of it. For the putting into effect of the guideline, the Member States themselves set deadlines within the framework of the 'NAP's. *Thirdly*, guidelines are not amenable to judgements by the European Court of Justice. Instead, the power of peer-pressure, moral, political and market sanctions is thought to commit Member States to follow the guidelines. *Fourthly*, even if recommendations to individual Member States were issued in 1999, the major coordination mechanism seems to be the praxis of informal 'agreements' between the Commission and the concerned Member State, prescribing what could and should be changed in the National Action Plan of nextcoming year. Thus, a kind of 'social policy diplomacy', drawing on both formal and informal relations, is developing. The Commission considers a gradual building up of confidence between the Commission and the Member States as very important at this stage (author's interview with Allan Larsson, May 1999). However, there is a difficult balance to strike between the strengthening of confidence and not losing the Member States' feeling of an obligation to fulfil the guidelines. *Fifthly*, a new type of committee has been established: the Employment committee, in which both the national ministries and the Commission are represented. One of the purposes of this committee is that questions of common concern can be discussed in a setting where the public opinion of the Member States can play an important role.<sup>10</sup>

## The Differentiation of Governance

Have the employment cooperation and its multi-level processes really resulted in new constitutionalization dynamics? The institutions undoubtedly look very familiar to traditional EU cooperation. However, at a closer look and with more sophisticated analytical tools, in the form of a more differentiated governance concept, we are able to see that the seemingly 'intergovernmental' cooperative machinery is made up of new pieces that have the potential for considerable cumulative effects, some of which may be un-intended, on the institutional patchwork of the Union. We will here outline a more complex view of the governance principles currently involved.

We will follow Streeck (1995; 1996) in characterizing the emerging social policy as 'voluntarist'.<sup>11</sup> It is a governance by objectives and norms rather than governance by

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<sup>10</sup> Also unique is the fact that two councils are involved on the same issue, both the Ecofin and the Labour and Social Affairs Council.

<sup>11</sup> Cf Streeck: "what really distinguishes the emerging European from traditional national social policy is its low capacity to impose binding obligations on market participants, and the high degree to which it

law (c.f. Majone, 1997). However, in contrast to Streeck, we do not assume that this type of soft regulation is necessarily less effective in terms of concrete results compared to legal regulation, in this sensitive field of welfare policy where legal harmonisation is politically controversial and difficult to achieve due to the diversity of social security systems. Moreover, studies of diffusion of ideas and policy transfer and imitation in transnational networks, such as those related to OECD, show that this does impact state policies also in the absence of binding commitments (e.g. Sahlin-Andersson 1996; Mörth 1997).

Governance by objectives, understood as an over-arching mode of governance (governance by law being another), still opens up for a variation of governance principles. We will in the following outline 8 principles of governance in the new employment policy (c.f. Streeck 1995, 1996): 1) cohesion by exemption, 2) governance by choice, 3) governance by subsidiarity, 4) governance by inclusion, 5) governance by persuasion, 6) governance by diffusion, 7) governance by recurrence, and 8) governance by anticipation.

*Cohesion by exemption* refers to the allowance for countries to exit in cases they find politically unacceptable. The British opt-out of the Social Protocol is a classical example, as are the Danish and British opt-outs of the final stages of EMU. Employment policy is built on retained national sovereignty, which in principle allows a country to opt out at any time. A related aspect is the *governance by choice*, i.e. to offer actors, national governments or market participants, menus of alternatives from which to choose, such as alternative ways of compliance (c.f. Streeck, 1995; 1996).

By *governance by subsidiarity* is meant to give precedence to national practices and contractual agreements between market participants (territorial or functional subsidiarity). An example of functional subsidiarity is the Social Protocol, which grants the social partners the right to negotiate European agreements. As to territorial subsidiarity, authority over employment policy remains nationally. National contexts and systems are also given more regard in implementing employment guidelines than in the case of directives. That guide-lines are not legally binding means that the Commission has to develop other instruments to ensure implementation, such as the Member State submission of yearly implementation reports, the working-out of comparable statistics and policy indicators, and involving local authorities in implementation (c.f. CEC, 1999a).

The European Employment Policy illustrates a new type of interplay between different levels of governance, including also actors at the sub-national levels (c.f. Marks, 1993). The European Social Fund is regarded as the key financial instrument available at the European level for 'modernising' labour markets and education systems, and there is to be a synergy between the ESF and the implementation of the NAPs. Thus, sub-national actors are instrumental in implementing the European employment policy. Local actors seek funding for local projects. In order to receive funding, the different parties have to co-operate in partly new fashions, and the projects proposed be innovative, potentially leading to new dynamics. Moreover, various regional and local public authorities and social partners are involved in decision-making about the payments. However, so far there has been a dissatisfaction from the local and regional authorities as to their

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depends on various kinds of voluntarism" (1996, p. 77). In Streeck's view, the soft 'neovoluntarist' regulation is biased towards business interests (1995, p. 341).

participation in designing employment policy together with the national states and their institutions and European level partners (CEMR, 2000).

Related to subsidiarity is what we call *governance by inclusion*, i.e. the strategy to include concerned actors in the employment policy framework, as illustrated by the local and regional networks and partnerships as well as the recent macro-economic dialogue and the social dialogue already in place. Inclusion means providing channels for 'voice' rather than 'exit' (c.f. Visser, 1999). However, it is also a way to 'bind up' potential opponents. It is still an open question whether the inclusion of social partners in dialogue fora at the European level means to strengthen social partner participation or whether it is a way to 'pacify' the trade unions nationally by shifting their involvements to the European level.

Above all, the European employment policy relies on *governance by persuasion*. The effects of non-binding recommendations are to be ensured by peer pressure (e.g. by a peer review system by which member states evaluate each others' NAPs) or by public opinion pressure, fuelled by increased transparency and dissemination of national employment-related results, which may set in motion domestic processes. Allan Larsson, former Director General of DGV, visited every country in turn to discuss their NAPs and the implementation. Also part of the governance by persuasion is the reliance on expert opinion to back up the proposals. The establishment of fora for dialogue, most recently the macro-economic dialogue, is also intended to contribute to common problem perceptions and descriptions by means of argumentation and persuasion.

Closely related to the persuasive features is that of policy diffusion. *Governance by diffusion* means attempts to increase the homogeneity of national regimes through comparisons with others, by improved transparency and comparability of targets and indicators. Benchmarking, thus, is the key diffusion mechanism in employment policy. Drawing on the NAPs, the Commission identifies and disseminates 'best practices'. The attempt to find 'objective criteria' for this as well as comparable statistics are part of the building of a common knowledge base not available at the national level. The standardisation and compilation of knowledge serves as a base for Community action, i.e. the production of 'European' knowledge can be used to legitimize 'European' solutions (c.f. Sutton & Nylander, 1999). Commonly agreed definitions are in fact a form of centralisation (Ekengren, 1998b, p. 66). The Commission here functions as an 'editor' of knowledge and ideas into standards (c.f. Sahlin-Andersson, 1996), thereby exerting an indirect influence on policy content. Recently, the Commission has stressed the need for common indicators also in the areas of education, entrepreneurship, taxation, adaptability and equal opportunities (CEC, 1999d), which is in line with the ambition to integrate these areas with the employment policy.

Compared to the 'recommendation policy' of OECD, a close and all-encompassing cooperation like the EU is likely to provide stronger political pressure to conformity. As pointed out by Kohler-Koch (1996b, p. 363), under the conditions of institutionalised cooperation, behavioural norms tend to become binding. Moreover, compared to OECD as well as the reliance on soft law in earlier phases of European social policy, the current employment procedure includes a more systematic system of monitoring and a stronger role for the Commission. By *governance by recurrence* we wish to point to the role of repetition and pace, as well as the use of strict procedures and dead-lines, in this system of monitoring. The yearly drafting of guidelines and later submission of NAPs means

that national administrations continuously work with employment issues with the “European spectacles“ on: working on guidelines, action plans, implementation reports, responses to evaluations by the Commission etc. This round, taking place yearly, provides occasion for regular input from the Commission and other key actors. (C.f. Goetschy 2000 on the importance of the employment strategy being an iterative process). Ekengren (1998a) has pointed out the importance of the use of dead-lines and common agendas in the European system of co-ordination and governance, his major claim being that temporal horizons tend to change with this practice. National civil servants experience that they are confronted with deadlines they cannot control, an experience of external direction, and that there is less time for preparation. Adaptation becomes the main strategy for coping. Thus, the standardising effects of this policy procedure, however ‘voluntarist’, may be considerable. The recurrence also opens for the *governance by anticipation*, i.e. mechanisms of ‘early warning’ which allow actors to anticipate the expectations and moves of others and act upon that. The exchanges in the Employment Committee on guidelines, NAPs and recommendations are a case in point.

In sum, we have pointed to some key principles of governance at work in the multi-level system of governance in employment policy. We will now move on to discuss constitutional dynamics of this.

### **Competing Modes of Governance as Generator of Constitutional Change**

Constitutionally significant tensions between different modes and principles of governance are becoming apparent as the EU employment policy is implemented. Drawing on a case-study of Sweden, we will here point to some early tensions that may generate a constitutionalization of the multi-level processes in that they create a need to ease these tensions.

A. The early clashes between European and national policy objectives and instruments are the first examples of a clash between ‘governance by law’ and ‘governance by objectives’. One of the most significant legal questions concerns whether the national employment measures for the fulfilment of EU employment guidelines are compatible with EC law. One issue already discussed concerns how Article 92 of the EC Treaty, governing the rules for state aids, should be interpreted in relation to some Member States’ system of ‘job rotation’, which involves state aid to private companies by paying the costs of temporary recruitment to cover for staff undergoing training. The aid is in the Swedish case taking the form of a reduction in social taxes and education costs for the companies concerned. Moreover, the Swedish government is pursuing a policy of temporary special reduction in the pay-roll fees for engagement of long term unemployed people. The Swedish argument (resembling the concerns of other member countries with a similar policy) for maintaining these measures is that they are used primarily as a way of helping the target group of the long-term unemployed (author’s interview). The reasoning of the Swedish government reflects the principles of subsidiarity and governance by choice: it is up to the national authorities to interpret the guide-lines and choose implementation method. However, traditionally, the Commission has not accepted a situation in which aid is received only by certain companies, given that this risks distorting competition. The Commission has declared that it can accept the Swedish measures under the condition that they are not applicable to particularly competition sensitive sectors such as agricultural-, fishing-, steel-,

synthetic fibre-, car and shipbuilding industries. And - in line with its general policy - that they are not targeted only to certain companies within the same category of industry. With regard to the temporary special reduction in the pay-roll fees, the Commission has requested the Swedish government to end its, as the Commission perceives it, 'unconditional aid' to companies for shorter term employment (Ekengren, 1998b). The extent to which changes of policy will have to take place is currently under discussion by the Swedish Government and the Commission. It is in some of the concerned Member States hoped that the implementation of the Resolution on Growth and Employment, and the Amsterdam Treaty, will shed a different light on the interpretation of Article 92 and that targeted employment-policy measures will eventually come to be approved by the EU. However, the cost of initiating this kind of discussions, which are often long and complicated, is generally believed to be high for Member States in terms of 'sending the wrong signals to other Member States' in the area of EC competition policy (Ekengren, 1998b). Given that the EU employment guidelines have put emphasis on programmes for education and competence, the area for future judgement might for example be national aid to companies for staff training.

Both the Commission and the Member States recognise the great risk of the tendency to cite the Employment Title and employment consequences as grounds for retaining national aid or protective measures (author's interview). Without the formulation of more clear rules for the employment policy on the Union level, aimed at balancing Internal Market requirements and legitimate national measures, the Commission's discussions with individual Member States might be very complicated and long and threaten to undermine the preconditions for the Internal Market and EC competition policy. There is today a discussion within the Commission, primarily between the DG for Employment and Social Affairs and that of Competition concerning priorities and the Commission's overall view of the balance between Internal Market and employment objectives (Ekengren, 1998b).

B. Some differences in the political interpretation of the employment objectives can be seen as expressions of competing governance principles. In the domestic debate on taxation in 1998, the Swedish government took the 'governance by choice' principle as its departure, while the Conservative Party rather departed from the principles governance by law and governance by persuasion. The Swedish Social Democratic government presented an elaborated argumentation for not lowering its overall tax burden on labour and non-wage costs in line with the EU guidelines. It did not agree with the Commission that this measure would make the taxation system more 'employment friendly' (Dagens Nyheter, 30 July 1998). The government's 'non-implementation' of the guideline rendered severe critique from the opposition parties in Sweden (Bildt, 1998; Tobisson, 1998). The Commission on its side has rather relied on the governance by diffusion, inclusion, recurrence and moral obligation. The recommendation to lower taxation reappeared in the guidelines for 1999 and 2000 as well as in the Council recommendations directed to Sweden in 1999 and 2000. To what extent does this domestic debate about the EU employment guidelines show the dynamics of political pressure behind EU coordination of welfare state policies generally?

C. When it comes to policy outcomes, the distinction between governance by law and other regulatory mechanisms may be less important; governance by diffusion and anticipation may in certain areas be as effective as governance by law. For instance, the Swedish Government, well aware that a Council recommendation on the need for

decreased taxation on labour was being prepared, chose to announce its ambition to decrease taxation in advance and by its own initiative. This is an example of governance by anticipation in order to avoid the politically more costly governance by persuasion. However, anticipation is not done publicly, but is so to say 'invisibly' for the public. May this create tensions in turn requiring some constitutional feed-back mechanisms?

Where might the cumulative effects in the form of competing modes and principles of governance take us constitutionally? What constitutional development can be expected to ease the tensions and dilemmas they give rise to? Do tensions between governance by law and governance by objective require more strictly regulated relations between the levels - a federalization of the process? Binding law in the employment cooperation? Or can a solution be achieved by means of other new constitutional forms? How is governance by choice and anticipation to be looked upon in a constitutional perspective? Will the increased de facto power of the Commission that these types of governance imply eventually be reflected constitutionally?

### **Future Multi-Level Constitutions?**

So far we have displayed the dynamics which we believe are central to the *process* of the constitutionalization of EU multi-level governance. It is of course difficult to predict the more concrete future constitutional outcomes. One may however formulate some preliminary hypotheses about the future constitutionalization of multi-level policy-making on the ground of the tensions, dilemmas and duplications that have been made visible by a differentiated governance concept. As has always been the case in EU history, the constitutional objective will eventually be to codify and regulate the relations between the Union and the Member States that have developed in practice during the cooperation.

One point of departure could be that the tensions within the mainly voluntarist system of EU employment policy will have to be regulated constitutionally differently from the existent EU. The constitutional arrangements should for example be able to encompass and facilitate the EU coordination of employment policy by offering various EU instruments compatible with Member State competencies. They should provide for a judicial framework able to regulate and balance the fundamental competence claims of the Union and the Member States that are the result of EU cooperation in policies pertaining to employment. Two lines of thinking can at this stage serve as points of departure for the further discussion of the constitutionalization of EU multi-level governance.

A. One suggestion is that a better balance could be achieved within the framework of what Scharpf (1996) calls a 'bi-polar' EU constitution. This could set out the objectives and powers not only of the EU level but also of the Member States. Individual Member States would themselves be given scope to specify a certain number of legally-protected 'key areas' within which they retained primary responsibility. Under this principle, it would be made clear that EC jurisdiction did not enjoy 'automatic' priority over national rules within those fields comprised by the Member State competence. In cases where Member States wish for common measures in an area that comes within 'national competence', the rule could be that this cooperation should take intergovernmental form (through such devices as benchmarking). How would EU employment

cooperation fit into this scheme? Would a stricter division between EU and Member State competencies allow for more binding EU decisions in the field of employment? Would that in turn put at risk the positive dynamics of the today mainly voluntarist system?

The goal of a 'bi-polar' EU constitution would be to create better mutual respect and understanding between the EU and Member State level on issues where clashes of competence could arise. In specific terms, this could mean that the EU, to a greater extent than at present, would take account of the potential consequences that EC legislation might have for the fields in which the Member State is competent. Such a system could resemble the German constitution, in which the 'core competence' of the Länder covers culture, education and training, and the mass media - and where the boundaries between the respective competencies of the Federal and Länder governments have not been precisely defined. Potential competence disputes are avoided thanks to the principle of 'bundesfreundliches Verhalten', whereby each of the two levels are obliged to strive as far as possible to avoid any unnecessary interference in each other's constitutional prerogatives (Scharpf, 1996b, pp. 361-373). For this system to work, a powerful central authority (such as the German Constitutional Court) is required to achieve a balance between the competence claims of the two levels. For this purpose, Weiler has suggested the establishment of a European Constitutional Council, including the President of the European Court of Justice and members of the constitutional courts or their equivalents in the Member States (Weiler, 1999, pp. 353-54).

B. Another constitutional solutions that could meet the needs of multi-level governance would be a development of today's three pillar construction of the EU. A construction that has refined the conditions of the practical implementation of the subsidiarity principle from the listing of competencies at just two 'subordinated and superior levels' to area specific parallel pillars. Within each of the three pillars it has been possible to strike a unique balance with regard to competencies and the degree of exclusiveness and complementarity of EU and Member State institutions. In contrast to a subsidiarity that is thought of in terms of mainly mutually exclusive levels, as within the EC pillar, the aim of the second and third pillar has mainly been one of preserving national sovereignty in EU coordination.

The aim of a possible *fourth* EU pillar would be to open up for an institutional choice that could be described, not in terms of more or less supranationality, but as 'extranationality' and 'parallel instruments'. The main concern would, as within today's employment cooperation, not be that of preserving national sovereignty in the shaping of the coordination deemed necessary on the Union level, but to complement it by EU action. A fourth pillar construction might also be able to handle the participation of other legitimate interests, like the social partners.

The fourth pillar could constitute the ground for the further elaboration of the approach of pragmatic sector specific coordination - *active subsidiarity* - in the field of EU social and employment policy. It could emphasize that EU 'parallel' instruments (benchmarking, guidelines, codes of conduct, common indicators, statistics etc.) can be engaged on all levels of Member State cooperation and coordination and in different forms. Pinder's idea was that the 'extranational' pillar of EU quickly could be turned into common action, would the Member States at a certain point conclude that its parallel instruments meet their needs for common action (Pinder, 1981).



*EU governance by objectives* would leave open exactly how and on what level the EU objective should and could be achieved. It will be decided in a *dialogue*, a *process*, possibly inspired by the procedures created in the employment cooperation. In order to function, the method has been shown to depend on broad participation of society throughout the whole process. Would the Union have the resources needed for the functioning of active subsidiarity? Would a fourth pillar be able to avoid the tensions between the different modes of governance pin-pointed in this work? Figure one can illustrate the thought of a four-pillar Union.

The four-pillar Union: See appendix 1 (p. 26).

The possible creation of a 'fourth pillar', prescribing the role of national instruments and competencies in the fulfilment of EU objectives, opens up for a new set of questions concerning how each of the four pillars and their relationship should be strengthened in order to combine the market integration of EC, national traditions and policies, and the strengthening of democracy. Central to a possible fourth pillar and extranational methods would be the *informal harmonization* of Member States' views, norms and ideological outlooks. The Commission's work of redefining the European economy in terms of 'common concerns and problems' and its active pressure on Member States to review their traditional social and employment policy, will play a pivotal role. But also long-term transnational party cooperation and a broad public discussion are probably required. What is going to be considered as 'common concerns', 'legitimate and efficient employment measures'?

This article has argued that the sharing of experiences and the power of peer-, market- and public opinion pressure on Member States to accept new definitions and policies no longer can be ignored in explanations of constitutionalisation. While national authority is retained, the standardizing effects of this policy process may still be considerable, some of which may be unintended. We have in this article argued that this type of voluntary cooperation has its own constitutional dynamics and that also the use of soft law may have constitutional consequences.

### **Towards an Explanation of EU Government Parallel to – rather than beyond - the Nation-State?**

Both the federalists and the neo-functionalists saw the result of European integration as something distinct from the nation-state. The informal process of shifting expectations and loyalties 'upwards' explained the creation of supranational institutions or federal government *above* the national state, and the eventual replacement of the same. The EU governance literature challenged this reasoning by revealing that the most significant informal processes seemed to emerge *beyond* the state, without indicating any direction with regard to their constitutionalization.

This article aimed to analyze the constituting of the formal EU in an area of EU governance. It has provided a framework for an explanation of how the formal EU

beyond – not above – the nation-state may take shape. One question for future research is whether and to what extent the formal EU beyond the state should be understood as EU *government* beyond the state?

Armstrong draws the conclusion that already EU governance – as an expression of a new manner of government – "is government *beyond* the state, both in terms of the exercise of power beyond the traditional state structures and beyond the 'nation' state" (Armstrong, forthcoming, p. 746). In this article, we have refined the conceptualisation for the future analysis of whether we are dealing with 'government' by making a distinction between EU governance and the formal EU. We have tentatively presented a framework that aims to explain how the formal parts of the EU ('EU government') – the top of the governance iceberg to use Armstrong's term (op.cit, p. 771) - emerge out of complex EU governance. However, this seems to take place neither above nor beyond, but *in parallel* to the nation-state. The formal EU is shaped less in the form of a supra-national (federal) level. Its contours are more resembling a possible 'fourth' EU pillar, that could be conceived of as an 'extranational' pillar, not distinct from but intertwined and mutually interdependent with the nation-state. A pillar that is not an institutional result of shifting needs and loyalties to the European level, as the neo-functionalists predicted, but a means to reconcile, and avoid duplications between, EU and member state organs, ease legal tensions, bridge conflicting views of social partners etc. All of which having their origin in competing modes and principles of governance.

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Appendix 1.

# The Future European Union?

