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**New Discourses in Labour Law**  
**Part-time Work and the Paradigm of Flexibility**

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# **New Discourses in Labour Law**

## **Part-time Work and the Paradigm of Flexibility**

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### ***1. The centrality of comparative labour law in the Open Method of Co-ordination***

In deciding to undergo a collective research on the regulation of part-time work, the authors of the present book agreed on a few methodological allegations.

One had to do with the urgency to revisit a long-lasting comparative tradition in European labour law and to do so in the new perspective of an ongoing process of integration in the European Union. Implicit in this choice was the equally strong urgency to confirm the centrality of a legal discipline – labour law – in the current debate on the European Employment Strategy (EES) and on the many concurring ways to implement it.

The need to uncover a disciplinary point of view just at the time when EU institutions are cultivating a culture of co-ordination of all existing processes of integration – economic, structural and to some extent social – is due to the deeply rooted conviction that there is – and should continue to be - a specificity of legal analysis in this particular field.

In ascertaining the contribution of comparative law to labour law, Gerard Lyon-Caen wrote at the end of the sixties that labour law ‘was born comparative’, because it aimed at providing answers to similar needs and aspirations inherent in the industrialised world. Solutions found in different legal systems were ‘spontaneously analogous’ at least as far as their purposes were concerned. Furthermore, in both civil law and common law systems, labour law aimed at gaining autonomy from general principles enshrined in other legal disciplines and did so irrespective of the different legal families to which it belonged.<sup>1</sup>

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- This Working Paper reproduces the introductory chapter of the book *‘Employment Policy and the Regulation of Part-time Work in the EU: a Comparative analysis’* edited by S. Sciarra, P. Davies and M. Freedland, CUP, forthcoming. The book is the outcome of a research project co-ordinated by the present writer and financed by the Research Council of the EUI. The book is divided in two parts, the first one centred on European law developments, as well as on the comparative legal methodology adopted, the second one organised around seven country studies (France, Germany, Italy, The Netherlands, Spain, Sweden, UK). References to other chapters of the book have been intentionally left in

Over the years such a disciplinary pride strengthened its rational, as well as its passionate grounds. Contemporary research dealing with countries of the European Union reveals the overall continuity of labour law institutions and their capacity to spread well across the boundaries of the discipline. This is so because labour law embraces in its legislative and academic tradition more than one field. It covers individual contracts of employment as well as collective labour law and links with the vast and fascinating territory of social security. In all these areas collective actors are present and capable of contributing both in the law-making process and in autonomous processes of norm-setting.<sup>2</sup>

While all these fields remain predominantly national, they are also closely intertwined with European law. It appeared very clearly to the authors of this book that a method which would blend national diversities into an indistinct process of europeanisation could lead to weak results and – what is most to be avoided – to imperfect generalisations. We argue, on the contrary, that concrete choices made by national parliaments deserve to be fully evaluated and framed in a national historical context. The role of employers’ associations and of trade unions also must be kept in the picture.

The proposition underlying this project is that the adoption of a comparative method facilitates the understanding of national labour law traditions in their entirety, namely a combination of individual and collective sources, a mixture of protective and supportive legislation, a system of norms more or less adaptable to external changes.

Legal comparison may also help to reveal the tension – if there is one – between national and supranational law-making. The inclusion in the spectrum of comparison of collective actors and national tripartite or bipartite institutions dealing with labour matters sets in place the controversial question of how to balance legal and voluntary sources in the regulation of part-time work.

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foot-notes and in the text, to signal how the overall analysis develops. The book is the final result of close joint work of the whole research group, developed in meetings held in the Law Department of the EUI. Each author was, however, made responsible for his or her contribution. I want to underline the inter-generation composition of the research group active around this project, well documented in the list of contributors to the book. This is a tribute to - and at the same time an acknowledgement of- the extraordinary intellectual climate generated by labour law researchers, in the years of my stay in the Law Department. I am grateful to Paul Davies and Mark Freedland for comments on earlier drafts of this paper. I am also grateful to Sarah-Jane King, researcher in the Law Department of the EUI for her efficient help in checking some bibliographical references. For those and for ideas expressed in this paper I am the sole responsible.

<sup>1</sup> G. Lyon-Caen, *Les Apports du Droit Comparé au Droit du Travail*, in a special book issued by the *Revue International de Droit Comparé, Un Siècle de Droit comparé en France (1869-1969)* (Paris, 1969), p. 315-316.

<sup>2</sup> This point, always at the heart of Lord Wedderburn’s comparative analysis, is confirmed in Lord Wedderburn, ‘Common law, labour law, global law’, in B. Hepple (ed.), *Social and Labour Rights in a Global Context* (Cambridge, 2002), p.19 et seq.

One further reason stands in favour of a comparative legal method, which would draw attention on labour law and on its centrality in current discussions on new regulatory approaches.

In the early nineties, when Jacques Delors was still one of the main advocates for the enhancement of growth and the lowering of unemployment rates in Europe, labour market reforms – and among those the regulation of part-time work – became central to the co-ordination of macroeconomic policies and employment policies. In the Council held at Essen in 1994<sup>3</sup> a complex evolution of employment policies began and was further developed in subsequent Council meetings. The criteria agreed upon at Essen represent the precondition of what then developed into a more elaborate plan of action.

The launch at Lisbon of the European employment strategy and the subsequent emphasis put on the Open Method of Co-ordination (OMC) as a way to implement employment policies<sup>4</sup> has activated a series of new regulatory techniques, useful to understanding changes that have occurred in labour markets and to fostering more advanced ones.

Structural indicators, the result of long and detailed research undergone by the Commission in consultation with Eurostat and the Member States' statistical offices,<sup>5</sup> are meant to favour the measurement and the evaluation of both institutional and economic performances pursued by Member States through active employment policies or through structural and legislative reforms.

Attempts have been made to combine quantitative and qualitative analysis of all 15 Member States' National Action Plans (NAP) submitted within the Employment Strategy, on the understanding that such an exercise could only capture the 'declared employment strategies' at that given moment in history and not reflect the overall national policies in their evolving patterns.<sup>6</sup> The

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<sup>3</sup> This Council meeting, held on December 9-10, 1994, was the last one attended by J. Delors as President of the European Commission. It is interesting to observe the continuity between the Delors White Paper, *Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21<sup>st</sup> Century*, COM (93) 700 final, 5 December 1993, and the Essen criteria, aimed at facilitating reforms of the labour market and combating unemployment.

<sup>4</sup> Presidency Conclusions, Lisbon European Council, 23-24 March 2000.

<sup>5</sup> See, for instance, Communication from the Commission, *Realising the European Union's Potential: Consolidating and Extending the Lisbon Strategy*, COM (2001) 79 final, Brussels, 7 February 2001, Volumes I and II. This contribution to the Spring European Council held in Stockholm in March 2001 is a good example of the steps forward taken after Lisbon, in order to link employment growth to specific targets. Volume II collects general economic background indicators, data on employment presented with different breakdowns, data on innovation and research, as well as economic reform and social cohesion.

The early policy of the Commission can be read in its *Communication on Community Policies in Support of Employment*, COM (1999) 167 final, Brussels, 13 April 1999.

<sup>6</sup> A 'cluster analysis' of the 1999 NAPs is proposed by P.K. Madsen and P. M. Munch-Madsen, 'European Employment Policy and National Policy Regimes', in D. Mayes, J. Berghman, R. Salais (eds), *Social Exclusion and European Policy* (Cheltenham 2001) p. 255 et seq. and in particular p. 261.

results achieved by such sophisticated statistical approaches prove that there exists a variety of national responses and that it is artificial to constrain them within ideal-typical employment regimes.

In extending OMC to social inclusion,<sup>7</sup> objectives have been incorporated in social indicators. This has empowered the Commission to set the social agenda and to move it forward, with the technical support of a sub-group on social indicators established within the Social Protection committee (set up according to art.144 Nice Treaty). The outcome of this analysis now forms the basis of EU policy-making and is evaluated very positively in scholarly analysis, although comparisons between the first set of NAPs reveal great disparities.<sup>8</sup>

National policy-making remains a variable which cannot be entirely predicted. The aim of co-ordination comes forth as a support for national actors, but does not clearly stand as a sanction against reluctant or imprecise responses of the Member States, by virtue of the subsidiarity principle. Co-ordination also relies on comparable data, collected with similar techniques such as standardized questionnaire administered to representative samples in each country.<sup>9</sup>

Indicators have been linked to benchmarking, another technique of measurement and evaluation brought about by the OMC and then developed into a widespread practice for the enforcement of employment policies. They both reveal the necessity to ‘compare the situation spatially, between Member States, and temporally, through time’.<sup>10</sup> Benchmarking, in particular, applies to situations in which national actors are eager to learn and, if necessary, compete in order to reach a common objective. They often choose to do so because a European frame of reference helps them to push forward national reforms, without having to find agreement on all detailed provisions.<sup>11</sup>

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<sup>7</sup> Presidency Conclusions, Lisbon European Council, 23-24 March 2000, para. 32.

<sup>8</sup> This is reported by T. Atkinson, ‘Social Inclusion and the European Union’, (2002) 40 *Journal of Common Market Studies* 625 at pp. 628-629. Social indicators proposed by the sub-group are: financial poverty, income inequality, regional variation in employment rates, long-term unemployment, joblessness, low educational qualifications, low life expectancy and poor health. See also T. Atkinson, B. Cantillon, E. Marlier and B. Nolan, *Social Indicators: the EU and Social Inclusion* (Oxford, 2002), research produced by successful collaboration between academics and policy-makers sponsored by the Belgian Presidency in 2001.

<sup>9</sup> T. Atkinson, ‘Social Inclusion...’, *ibidem*, at p. 631 refers to the work undertaken by the European Community Household Panel, which should be replaced in 2003 by a new instrument for the preparation of statistics on income and social exclusion.

<sup>10</sup> C. de la Porte, ‘Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?’, (2002) 8 *European Law Journal* 38 at p. 41. The author distinguishes between different levels of indicators, some influenced by the European statistical database, some mixed, some purely national. She also describes the selected national experts as high-level civil servants, who prepare the ground for Council decisions. Final orientations are political and driven by bureaucratic elites.

<sup>11</sup> C. de la Porte, ‘Is the Open Method of Coordination Appropriate...’ *ibidem*, p. 43.

The principle of subsidiarity, which supports the overall structure of OMC, also applies inside each state, among different levels of government administration and among sub-national authorities, such as regions and municipalities. Each administration finds its own internal organization to guarantee compliance, at times introducing indicators from higher to lower levels and therefore expanding the spectrum of comparison.<sup>12</sup>

There are no specific rules to manage this constantly spreading network of institutions and sub-institutions. National experience shows that *ad hoc* committees created for the enforcement of a specific NAP end up having a very limited impact on the state administration, if there is no stable structure to refer to. Even a high turnover of experts produces limited results in preparing the so-called ‘Implementation Report’ to be annexed to NAPs, whereas the setting up of a centralised ‘Monitoring Group’ has facilitated the collection of homogeneous data on employment policies at decentralised levels of the administration.<sup>13</sup>

The study on the UK reveals how different branches of the government have been involved in the implementation of the Part-Time Directive, while also ascertaining compliance with EU employment policies.<sup>14</sup> This example too seems to confirm the uneasiness of national administrations to deal straightforwardly with European sources, either because of a lacking practice or, at times, owing to an intentional manipulation of both hard and soft law indications, so that the national priority may prevail.

The Commission itself admits that, despite the attempt to bring together national impact evaluation studies under a ‘standardised structure, with a range of thematic questions covering policy reforms, performance and impact’, it proved difficult to constrain Member States’ responses and to force them within a pre-defined scheme.<sup>15</sup> It is also true, as once more the Commission points out, that a positive evaluation of OMC cannot be proposed in a vacuum, neither be

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<sup>12</sup> The Italian example of a ‘Master Plan’, elaborated in 2000 by the Labour Ministry in collaboration with ISFOL, a research institute for the development of training, shows how qualitative and quantitative indicators have been offered to local authorities as a basis on which to improve the reform of placement offices, following the negative evaluation of the Commission on Italian NAPs for 2000 and 2001. This is reported in M. Ferrera and E. Gualmini, *La strategia europea sull’occupazione e la governance domestica del mercato del lavoro: verso nuovi assetti organizzativi e decisionali*, a paper prepared for ISFOL within the project *Impact evaluation of the European Employment Strategy* edited by C. Dell’Aringa and published in the ISFOL papers, Rome May 2002.

<sup>13</sup> M. Ferrera and E. Gualmini, ‘*La strategia europea...*’, *ibidem*, p. 6 et seq.

<sup>14</sup> See further the country study by C. Kilpatrick and M. Freedland, “‘Regno Unito’ in La Regolamentazione del Part-time in Europa’, (2000) *Giornale di Diritto del Lavoro e di Relazioni Industriali*, p. 655 et seq.

<sup>15</sup> Communication from the Commission to the Council, the European Parliament, the ESC and the Committee of the Regions, *Taking Stock of Five Years of the European Employment Strategy*, COM (2002) 416 final, Brussels 17.7.2002, p. 22.

separated by the understanding of a broader economic context, whereby some economic improvements were achieved. A shift is proposed in focusing national policies ‘away from managing unemployment, towards managing employment growth’.<sup>16</sup>

This observation highlights one further point: disparities in economic performances may not mechanically affect the evaluation of legal reforms. The latter must still be regarded as specific results of national legislative choices, albeit within the context of a Europe-wide co-ordinated economic policy.<sup>17</sup>

There are – as one can see - several reasons to write ‘Lisbon’ in capital letters in the history of European Council meetings. In that occasion the urgency to make all EU processes functional to one another and to foster their co-ordination was transformed from a platitude into an important innovation. The Portuguese indication was, in fact, simple and pragmatic: refraining from adding a new process meant to concentrate in the co-ordination of the existing ones.

The Commission now welcomes ‘synchronisation’ within the overall process of implementation of the Lisbon agenda, but also wishes that economic and employment objectives be considered autonomously. In this rather subtle perspective we must interpret the Commission’s recent commitment to simplify employment guidelines and to focus more on implementation mechanisms.<sup>18</sup>

The impression we get from looking at the ways in which national administrations have internalised the indications coming from European institutions and adapted them to the evaluation of their own domestic policies is that procedures are left intentionally undefined and that the choice is to proceed by trial and error.<sup>19</sup>

The still experimental nature of both national and European procedures is giving rise to a new comparative method, extraneous to legal comparison. Documents and information exchanged while practising the OMC provide invaluable help in detecting phenomena which then become the object of legal regulation. Labour lawyers’ uneasiness – almost too shameful to admit – has to do with an inborn fear that the language of statistics and economics may obscure the language of legal institutions.

Such a fear is not a new one. A solid methodology in comparative labour law was developed in order to explain the commitment of national lawyers in

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<sup>16</sup> Communication from the Commission, *Taking Stock...*, *ibidem*, p. 2.

<sup>17</sup> An analysis of Member States’ willingness to implement the most important social policy Directives and yet to let the national priorities prevail is provided by O. Treib, *EU Governance, Misfit and the Partisan Logic of Domestic Adaptation*, at [www.mpi-fg-koeln.mpg.de/socialeurope](http://www.mpi-fg-koeln.mpg.de/socialeurope)

<sup>18</sup> Communication from the Commission, *Taking Stock...*, *supra* note 15, respectively at pp. 21 and 19.

<sup>19</sup> Findings in the country studies on the UK and Italy seem to be going clearly into this direction.



maintaining economic policy considerations separate from legal ones and avoiding too contingent an analysis of legal institutions. ‘Functional’ comparison implies information on political and social institutions and appreciation of the role played by collective actors. A ‘structuralist’ approach – like the one suggested – gives priority to comparing the means and the goals, and concentrates on the functioning of a specific social policy.<sup>20</sup>

We argue, in drawing conclusions from this project, that comparative legal analysis can most usefully enrich the study and evaluation of economic and structural trends. We also maintain that the pressure to establish well-developed – and yet not too rigid - schemes of comparison is particularly healthy when dealing with labour market regulations and with welfare state responses to high unemployment.

Research carried on in neighbouring fields confirms that a variety of circumstances must be considered in order to establish a valid comparative framework. Part-time patterns are affected by different components, such as household, firms’ behaviour and the state.<sup>21</sup> The state, in particular, attracts the attention of researchers dealing with ‘societal employment systems’<sup>22</sup> attentive to the evaluation of social and cultural values when drawing up comparative schemes of analysis.

In a broader context of research on welfare regimes, states occupy a pivotal role in transferring income and in supporting family networks. These circumstances may change the nature of unemployment and consequently influence the selection of comparable data.<sup>23</sup> It is crucial that the family as an institution be considered central to the understanding of labour market reforms. Even the analysis of data on family instability reveals valuable comparative patterns and prompts policy recommendations as regards measures to be

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<sup>20</sup> G. Lyon-Caen, *Les Apports du Droit Comparé...*, *supra* note 1, pp. 316-317, with interesting references to French comparative studies not very often acknowledged in comparative literature.

<sup>21</sup> J. O’Reilly and C. Fagan, ‘Conceptualising part-time work’, in J. O’Reilly and C. Fagan, *Part-time prospects. An International Comparison of Part-time Work in Europe, North America and the Pacific Rim* (London, 1998), p. 13 show how theories on the segmentation of labour markets have gradually developed into more sophisticated approaches, taking into account cultural values and cross-national differences.

<sup>22</sup> M. Maurice, ‘Convergence and/or Societal Effect for the Europe of the Future’, in P. Cressey and B. Jones (eds), *Work and Employment in Europe* (London, 1995) p. 28 et. seq.

<sup>23</sup> See D. Gallie and S. Paugam (eds), *Welfare Regimes and the Experience of Unemployment in Europe* (Oxford, 2000). This research project was centred mainly on ‘the effort to achieve a high level of comparability of data’, as we learn from the editors in the introductory chapter ‘The Experience of Unemployment in Europe: the Debate’, p. 1. See also G. Esping-Andersen, ‘Comments’, in G. Bertola, T. Boeri and G. Nicoletti (eds), *Welfare and Employment in a United Europe* (Cambridge, Mass., 2001), p. 127 et seq., criticising the approach taken by the editors of the book, which ignores the role of families in proposing European reforms for social inclusion.

addressed towards unemployed people. A social policy leading to ‘de-familialization’ or detachment from the family puts more weight on the state for the provision of services which are, otherwise, assigned to families.<sup>24</sup> The study of unemployed individuals in their household context, undergone in comparative terms<sup>25</sup>, is relevant too for understanding the features of unemployment, so different across European countries and so central for the comprehension of other labour market interventions.

Indirectly, results of such studies are very important for labour lawyers dealing with measures to create new employment. Family support may very well channel the choice of unemployed people towards non-standard forms of work and make that choice a more permanent one, especially when earnings are very low or non-continuous.

On a methodological note, comparative research undergone within disciplinary areas somehow related to labour law shows the emergence of diversities between countries and even within groups of countries held together by common geographic or historical traditions.<sup>26</sup> Different ‘styles’ of welfare state approaches facilitate the search for specific measures and help avoiding deregulation of the labour market as the only remedy against unemployment.<sup>27</sup>

This explains the urgency, underlined in this book, to enrich legal comparison with a whole variety of institutional variables and to pay attention to all actors involved in the complex redefinition of national competence, when promoting domestic legislation and complying with European law.

When we look at the European institutional context, we notice that analysis pursued by European institutions in reviewing national employment plans (art.128 TEC) or in assessing national economic policies (art. 99 TEC) appears inherently different from a comparative legal approach. Whereas the latter moves from the understanding of the ways in which legal and social institutions interact in a given system of norms, the former concentrates on objectives and results.

The rhetoric of the European institutions – monitoring, reviewing, evaluating, recommending – and the responses of Member States – drawing up programmes, showing compliance, proving efficiency and promising future improved accomplishment – enrich a political discourse which finds in the coordination of policies the ultimate goal. We want to ascertain, while drawing

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<sup>24</sup> D. Gallie and S. Paugam, ‘The Experience of Unemployment...’ *ibidem*, p. 14 et. seq.

<sup>25</sup> I. Bison and G. Esping-Andersen, ‘Unemployment, Welfare Regime, and Income Packaging’, in D. Gallie and S. Paugam, *Welfare Regimes...*, *supra* note 23, p. 69 et seq. and pp. 84-85, where they deal with the issue of young unemployed receiving family support, as opposed to affording the costs of labour mobility.

<sup>26</sup> F. Maier, ‘Institutional Regimes of Part-time Working’, in G. Schmid (ed.), *Labor Market Institutions in Europe* (New York, 1994), p. 151 et. seq.

<sup>27</sup> Structural differences are highlighted by F. Scharpf, ‘The European Social Model: Coping with the Challenges of Diversity’, (2002) 40 *Journal of Common Market Studies* 645, at p. 651.

conclusions from this project, whether this net of soft rules hides a hierarchy of values and whether the apparent circularity of information conceals instead an asymmetric decision-making system, whereby priorities are often set at the top, rather than being jointly co-ordinated.

To verify whether this element of the EES is not a negative outcome, but mirrors the search for a new arrangement of legal powers and competence within the EU social field, we need to explore further the potentials of OMC.

The above-mentioned political discourse is inextricably linked to a soft regulatory technique, which is gaining ground and spreading to other fields: social inclusion, pensions.<sup>28</sup> Even policies on immigration seem suitable for OMC and for the drawing up of NAPs;<sup>29</sup> these policies should be strengthened by the now envisaged possibility to extend to third-country nationals the right to export their social security rights from one Member State to another when moving within the EU.<sup>30</sup>

While OMC proves the willingness to go ahead in crucial matters, overcoming vetoes and inertia in decision-making, it may also lead to a new form of governance, ultimately transferring competence to the EU.<sup>31</sup> Notwithstanding possible future implications,<sup>32</sup> OMC constitutes at this stage of

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<sup>28</sup> On the application of OMC to social protection and social inclusion, see Presidency Conclusions, Lisbon European Council, 23-24 March 2000, para. 32, and Presidency Conclusions, Nice European Council, 7-9 December 2000, para. 20; on the application of OMC to pensions, see Presidency Conclusions, Nice European Council, 7-9 December 2000, para. 23 and Presidency Conclusions, Stockholm European Council, 23-24 March 2001, para. 32. See also C. de la Porte and P. Pochet, *Building Social Europe through the Open Method of Co-ordination* (Brussels, 2002), and F. Scharpf, 'The European Social Model...', *supra* note 27, p. 655, interpreting the choice to expand OMC to pensions reforms as a spill-over from monetary union and an attempt to avoid imposition from ECOFIN and the Economic Policy Committee.

<sup>29</sup> *Communication from the Commission to the Council and the European Parliament on an Open Method of Coordination for the Community Immigration Policy*, Brussels 11.7.2001 COM (2001) 387 final.

<sup>30</sup> Under the Spanish Presidency in June 2002 a political agreement was reached to reform Regulation 1408/71, not only to revise its scope, but also to establish better co-ordination of the principles governing social security. See in general A. Numhauser-Henning, 'Freedom of Movement and Transfer of Social Security Rights', in *Labour Law Congress 2000, Reports*, VII European Regional Congress ISLLSS, Stockholm, September 2002, p. 177 et seq.

<sup>31</sup> See the arguments developed by D. Hodson and I. Maher, 'The Open Method as a New Mode of Governance: the Case of Soft Economic Policy Co-ordination', (2001) 39 *Journal of Common Market Studies* 719 and by H. Wallace, 'The Institutional Setting', in H. Wallace and W. Wallace (eds), *Policy-making in the European Union*, (4th edn, Oxford, 2000), p. 3 et seq.

<sup>32</sup> The Recommendation of Working Group V of the Convention (the working group on simplification), is that OMC should be considered 'as a soft instrument or method'. See CONV 375/1/02, REV 1, WGV 14, at p. 7. Another Recommendation of the same working group, at p. 10, is that 'an explicit text stating that all powers not conferred on the Union by the Treaty remain with the Member States should be inserted into a future Treaty'.

European integration a sign of vitality and of innovation not to be underestimated. If we look at the agenda of possible institutional developments in the social field, we find that the accent has been put on relevant pragmatic results to be accomplished through OMC: by setting common objectives, the abstract – and by now weakened – notion of the ‘European social model’ is nourished with new energy coming from a much larger group of stakeholders.<sup>33</sup>

The acknowledgment of diversities in welfare state regimes, reflecting ‘legitimate differences of social philosophies and normative aspirations’,<sup>34</sup> makes OMC the ultimate and only response for keeping at national level significant options on social policy reforms. On the other hand, legislative initiatives at national level may be constrained by financial limitations, be they the outcome of economic policy co-ordination at European level or the result of national budgetary laws. OMC – and employment policies in particular – may thus run the risk to be weakened in the implementation phase, because of the absence of supportive measures laid down at the centre, with the aim to bind national expenses to certain policy options.

The Commission is, in fact, auto-critically suggesting that consistency of employment strategies with other European processes should be better ensured. Furthermore, in simplifying employment guidelines attention should also be paid to ways of involving national parliaments in the preparation of NAPs, so that financial provisions can also be made.<sup>35</sup> ‘Streamlining’ is a new key word, indicating the Commission’s intention to bring economic and employment ‘cycles’ as close as possible and to strengthen the medium-term implementation phases, rather than elaborate new guidelines.<sup>36</sup>

Within the framework of this rich and still uncovered institutional debate and pointing to the relevance of related labour law developments, this project locates one specific example – the regulation of part-time work – within OMC, drawing attention on the fact that the multidisciplinary environment in which all the actions spreading from such a technique take place may cause the dispersion of specific legal discourses. The risk may be that, instead of following a

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<sup>33</sup> F. Vandenbroucke, Belgian Minister of social affairs and pensions, who combines academic expertise (as Professor of Comparative Social Policy at KU Leuven) with political determination, has been very active on these matters. See in particular: *The EU and Social Protection: What Should the European Convention Propose?*, paper presented at the Max Planck Institute for the Study of Societies, Köln, 17 June 2002, p. 9 of the typescript and in general [www.vandenbroucke.com](http://www.vandenbroucke.com). He has also been heard by Working Group XI ‘Social Europe’ of the European Convention in the Expert Hearing of 21 January 2003.

<sup>34</sup> F. Scharpf, ‘The European Social Model...’, *supra* note 27, p. 663.

<sup>35</sup> Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, *The Future of the European Employment Strategy. A Strategy for full employment and better jobs for all*, Brussels 14.1.2003, COM (2003) 6 final.

<sup>36</sup> Communication from the Commission on Streamlining the Annual Economic and Employment Policy Co-ordination Cycles, COM (2002) 487 final, 3.9.2002.

coherent pattern of legal evolution, through reforms which build on previous and consolidated principles, legislatures are asked to adapt uncritically to supranational strategies and to do so via national legislation, ignoring national traditions and not acknowledging the role of domestic institutions.<sup>37</sup>

Measures to enhance sound money and sound finance, as well as moderation in wage setting, have often been required – and still are considered – as essential ingredients of national best performances. A combination of such measures, first a precondition for the adoption of a single currency, then a condition for enhancing stability within EMU, has been at the centre of legislative maneuvers originated by governments of very different political orientations.<sup>38</sup> We claim that, by taking into specific account national peculiarities and different styles of legal regulation, an abstract European social model may be filled with incisive contents.

In circumstances of high unemployment, this soft invasion of national prerogatives, combined with the pressure to meet contingent deadlines, may create a situation of clash with national values and an interference in setting domestic economic and social priorities. When active employment policies are required to meet the percentages of increases in employment rates, following the indications coming from Council conclusions, it remains to be specified at national level that new jobs should not be created under deregulatory regimes and should not infringe fundamental rights. Setting up indicators on work quality – as happened in the 2002 employment guidelines<sup>39</sup> - has different implications from binding Member States to the respect of legal standards not to be waived and to be ranked at the top in a hierarchy of legal sources.<sup>40</sup>

We underline in our work the distinctive features of regulatory techniques which, in the current state of evolution of European and national labour law, frequently interact with one another. In our own analysis we envisage governance by guidelines as a technique which is not inconsistent with developing a labour law perspective fully respectful of national constitutional traditions. We also claim that the combination of both levels of legal intervention helps to reinforce the inclusion of a coherent system of rights in the new constitutional architecture of Europe.

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<sup>37</sup> See Chapter by D. Ashiagbor in S. Sciarra, P. Davies, M. Freedland, *supra* Introductory Comment.

<sup>38</sup> D. Cameron, 'Unemployment, Job Creation and Economic and Monetary Union', in N. Bermeo (ed.), *Unemployment in the New Europe* (Cambridge, 2001), p. 7 et seq.

<sup>39</sup> Council Decision 2002/177/EC of 18 February 2002 on guidelines for Member States' employment policies for the year 2002, OJ 2002 No. L60, 1 March 2002, p. 60. The increase in the number of indicators is emphasised by C. de la Porte, 'Digest' (2002) 12 *Journal of European Social Policy* 159.

<sup>40</sup> See Chapter by D. Ashiagbor in S. Sciarra, P. Davies, M. Freedland, *supra* Introductory Comment.

This is the crucial intersection at which soft regulatory techniques meet a core of constitutional rights, some of which have been revisited and made even more visible through the Nice Charter of Fundamental Rights.<sup>41</sup> Through this wide angle of observation which has been kept throughout the present project – namely the close consideration of soft guidelines within a system of constitutional rights – we wish to support the evidence that even in future scenarios of law-making such a combination may become the emblem of modern supranational labour law.

## ***2. Innovation and continuity in labour law: why a comparative analysis on part-time work, and how to structure legal comparison***

In the previous section we have argued in favour of adopting a comparative legal perspective when dealing with different regulatory techniques emerging from different European processes. In particular, a non-prejudiced observation of OMC from the angle of labour law and a clear understanding of its interconnections with macroeconomic policies is essential in reassessing national priorities, while pursuing supranational objectives.

With the intention to capture motivations behind national legislative choices and to understand whether they were or were not conditioned by European law and policies, a series of country studies, rather than a horizontal analysis of part-time regulation, is offered in the following chapters.

The selection of countries included in this project is a function of the opportunity we had to organize national studies reflecting a deep and well-structured analysis of the legal systems concerned. However, we do suggest that a contingent choice developed into a particularly interesting gathering of diverse national approaches, each of them attentive to bringing forward peculiarities which also explain the option of the legislature.

An in-depth observation of national regulations on part-time work brings about a confirmation of the theoretical assumptions presented in the previous section. Comparative analysis confirms that convergent and divergent patterns of regulation are compatible with OMC and indeed add significant information to the overall assessment of regulatory techniques in the social field. After observing how complex and varied the gestation of legislation was in all the countries included in this study, we can argue that the recurring mention of part-time work in at least three pillars of the employment guidelines – with the exception of entrepreneurship – shows the attention OMC paid to existing models, rather than attempting to foster new ways of introducing flexibility.

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<sup>41</sup> OJ 2000 C 364/1, 18 December 2000. See M. Weiss, The Politics of the EU Charter of Fundamental Rights, in B. Hepple (ed.), *Social and Labour Rights...*, *supra* note 2, p. 73 et. seq.

For this reason part-time work is shown in the present project as an example of innovation and continuity in labour law. Innovation meant for most European legal systems coming to terms with the existence of new working time arrangements and new facets in contracts of employment. Continuity was pursued inasmuch as traditional labour law guarantees were adapted to new forms of work. Comparative research - we argue from the experience drawn from this study - facilitates the understanding of ongoing processes of transformation within labour markets and establishes a well-balanced point of view on future scenarios.

The chapter by Davies and Freedland provides a cross-country evaluation of national regulations and proposes interesting ways to interpret objectives, approaches and techniques, placing the comparative analysis at a crossroad of national and supranational legal initiatives. One of the suggestions is that, when looking at the historical evolution of the subject-matter in each national system, only a limited impact of EU regulation on part-time comes into view.<sup>42</sup> This finding deserves to be fully acknowledged and explained.

Part-time work stands at the intersection of European soft and hard law measures. It is dealt with in a Council Directive<sup>43</sup> originated and - what is most interesting to observe for the purposes of this project – implemented in the climate generated by the European employment strategy. Whereas the Directive in itself may prove not to be the right legal instrument for forcing national actors to create new jobs, it nevertheless provides an incentive to do so, establishing the principle of non-discrimination as a solid marker.<sup>44</sup> As much as the inclusion of this fundamental principle in the Directive constitutes a significant step forward in the recent evolution of European social law, it may remain the only aftermath of a reduced and narrower activity in law-making.

Labour law reforms may have a very different influence on employment policies, according to a more or less accentuated predisposition of governments to bring about significant changes in the reduction of unemployment and/or in the creation of new employment. Some reforms may prove easier to co-ordinate at a supranational level, some others less so, because of very resistant symbolic values counterbalancing the need to change and adapt to a new legal environment.

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<sup>42</sup> See further section 3. See also ETUI, *Survey on the Implementation of the Part-time Work Directive/Agreement*, Report 73 co-ordinated by S. Clauwaert, Brussels 2002. The impact of the directive is deemed 'minor', with the possible exception of candidate countries, p.12.

<sup>43</sup> Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ 1998 No. L 14, 20 January 1998, p. 9.

<sup>44</sup> Clause 4: Principle of non-discrimination 'In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.'

Comparative research on reforms affecting European labour markets shows how ‘selective changes that do not completely overturn the existing social contract’ have prevailed when, from the mid-seventies onwards, deregulation of the labour market has been presented as the answer to high unemployment.<sup>45</sup> Differences across countries of the EU had as a consequence the fragmentation of social policy interventions and highlighted co-ordination as the only technique pointing to a way forward.<sup>46</sup>

We largely confirm such allegations, adding to them a more labour law focused analysis, albeit on one single example of possible reforms. Over the years, part-time work has been perceived by most observers and policy-makers as an indispensable device in the hands of national legislatures, in order to create new jobs and to respond to companies’ demands for increased flexibility. We start from this assumption, fully aware of the fact that it cannot be passively embraced.<sup>47</sup> It is by trying to link it with the evaluation of European employment policies and by assessing the impact they have on national choices that we isolate, whenever possible, a distinctive feature of part-time regulations among the many other labour market reforms.

Country studies reveal that in some cases part-time regulation has been driven by a spontaneous process, such as the return of married women to the labour market.<sup>48</sup> It is noteworthy that those who described the early emergence of the ‘Dutch miracle’ also underlined the increase of part-time as a ‘fortuitous’ development, not planned by policy-makers, but happening in real life.<sup>49</sup> In Germany the increase of income for working mothers evolves almost exclusively from an increase in part-time work; in Spain the proportion of female part-timers increased of almost 6% in a decade; in the UK women

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<sup>45</sup> M. Samek Lodovici, ‘The Dynamics of Labour Market Reform in European Countries’, in G. Esping-Andersen and M. Regini (eds), *Why Deregulate Labour Markets?* (Oxford, 2000), p. 52 et seq.

<sup>46</sup> M. Samek Lodovici, ‘The Dynamics...’, *ibidem*, p. 54; see also D. Ashiagbor, ‘EMU and the Shift in the European Labour Law Agenda: from “Social Policy” to “Employment Policy”’, (2001) 7 *European Law Journal* 311 at p. 314.

<sup>47</sup> A detailed survey on the expansion of part-time work in recent years in the EU is in M. Smith, C. Fagan and J. Rubery, ‘Where and Why is Part-time Work Growing in Europe?’, in J. O’Reilly and C. Fagan, *Part-time prospects. An International Comparison of Part-time Work in Europe, North America and the Pacific Rim* (London, 1998), p. 35 et seq.

<sup>48</sup> See further the Dutch country study. This phenomenon was observed in almost all OECD countries in the eighties, as reported by M. Smith, C. Fagan and J. Rubery, ‘Where and Why...’, *ibidem*, p. 35 et seq. See the country study by R. Eklund underlining how in Sweden too the increase of part-time jobs runs parallel to the rising number of women entering the labour market. It is to be noted that part-time work is often the only choice for such new-entrants in active employment.

<sup>49</sup> J. Visser and A. Hemerijck, ‘A Dutch Miracle’. *Job Growth, Welfare Reform and Corporatism in the Netherlands* (Amsterdam, 1997).



constitute 81% of part-timers in line with a long-lasting gendered public policy option.<sup>50</sup>

It is also challenging to look at the results of comparative research on social exclusion and find that in the Dutch case the emphasis put on employment creation and active labour market policies also gave rise to a wider gap between the rich and the poor and to the creation of a visible dichotomy between insiders and outsiders.<sup>51</sup> Furthermore, as the Dutch country study included in this project indicates, a part-time economy is not a 'paradise', essentially because company culture shows resistance to profound changes.<sup>52</sup> All other country studies confirm that, even when there has not been a clear deregulatory mark in labour law reforms, part-timers are very often confined to jobs with lower pay and more limited career perspectives.

This confirms that 'miraculous' solutions are often echoed by reformers who seek merely hypothetical alternatives, far away from what has been or can be achieved in a given legal system. Legal comparison can in such cases be easily 'misused', inasmuch as one single segment of an overall system of norms is extrapolated and offered as valid in itself, instead of being placed within a broader institutional context.<sup>53</sup>

The method followed in the country studies included in this project is predominantly legal. Figures on the expansion of part-time work are provided with no presumption to explain the complexity of statistical trends in this field, but simply to complement the evaluation of legal regulation and site it in a given social context. Neither we attempt to address part-time as 'a universal modification to the existing sexual division of labour'<sup>54</sup>, although in most country studies we see the results of this well-known phenomenon.

The focal point of the present project must be found in the evolution of legislation in the nineties. The indication, however, that country studies should refer back to the eighties and include information on developments in those years is justified by the fact that at that time most European labour law systems

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<sup>50</sup> See references in respective chapters.

<sup>51</sup> D. G. Mayes, Introduction, in D. Mayes, J. Berghman and R. Salais, *Social Exclusion and European Policy* (Cheltenham 2001), p. 14. M. Smith, C. Fagan and J. Rubery, 'Where and Why...', *supra* note 47, observe at p. 51 that 'the expansion of part-time work has not produced an even outcome across countries or sectors', although in most cases part-timers are concentrated in low-paid and low-status occupations.

<sup>52</sup> See further the Dutch country study.

<sup>53</sup> This has frequently been the case in Italy, under the pressure of the centre-right government. See further on the country study by A. Lo Faro, suggesting that only a 'negative' choice is offered to unemployed people, forcing them to accept part-time work, rather than making it compatible with other commitments.

<sup>54</sup> C. Fagan and J. O' Reilly, 'Conceptualising Part-Time Work, The value of an integrated comparative perspective', in O'Reilly and Fagan, *Part-time Prospects...*, *supra* note 47, p. 1. This comparative research convincingly shows differences between countries and over the life cycles of women and men.

had to come to terms with the non-legal notion of ‘flexibility’ and incorporate it in a legal discourse. Since all countries included in this project have a distinctive and very pertinent collective heritage, we tried to assess the role played by employers’ associations and trade unions in collective bargaining or in negotiating legislation on part-time.<sup>55</sup>

In putting an emphasis on trade unions and collective bargaining we point to the ambivalence that such institutions may have towards the introduction of more flexible forms of work. In doing so, once more we run parallel to comparative research on labour market deregulation.<sup>56</sup> Trade unions, like families, are capable to mitigate the impact of reforms which seem to impoverish labour conditions by showing that if there is a loss, it is temporary and will, in the long run, be transformed in a gain.<sup>57</sup>

Current discussion on the expansion of OMC to sensitive areas of social policies encourages the recourse to comparative research in order to reveal further potentials of the employment strategies, linked to labour market and welfare states reforms. We claim that, for the furthering of these perspectives, part-time work is a meaningful example of how to foster reforms in social security<sup>58</sup> and to approach and favour the reconciliation of family and working life.<sup>59</sup>

Most outcomes of the present study can be read and evaluated in conjunction with recent policy indications offered by the Commission, reflecting upon the first five years of the EES. The Commission states its intention to establish a new ‘focus on priorities’ in order to confirm a valid and updated role for employment guidelines. It is indicative that flexibility, in terms of ‘availability of different contractual or working time arrangements’, while still appearing among the measures to be pursued, is now more strictly associated with ‘transitions between different forms of work’, as well as with access to training and to better health and safety conditions.<sup>60</sup>

These new policy indications open up a space for a wider interpretation of part-time regulation and of its role among other ‘flexible’ forms of work. Future employment guidelines seem to disentangle this important component of labour law reforms from the urgency to create new jobs. The emphasis is now – even more than before – on adaptability and on measures which can corroborate the

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<sup>55</sup> The ‘Alliance for Work’ started in Germany at the end of the nineties is an example of concerted action among trade unions, employers’ associations and government. The dynamic role played by the social partners is underlined also in the Spanish and Italian country studies.

<sup>56</sup> G. Esping-Andersen and M. Regini, *Why Deregulate...*, *supra* note 45.

<sup>57</sup> G. Esping-Andersen and M. Regini, ‘Introduction’, in G. Esping-Andersen and M. Regini, *Why Deregulate...*, *ibidem*, pp. 5-6.

<sup>58</sup> See in particular the country study on Germany by M. Fuchs.

<sup>59</sup> France and Germany offer good examples of part-time regulations going in such a direction.

<sup>60</sup> Communication from the Commission, *The future of the European Employment Strategy...*, *supra* note 35, p. 14.

individual employee's choice to seek specific support for his or her working life in a long-term perspective. The Commission seems aware of this trend and indicates health and safety as well as training among the elective fields of action in order to pursue a 'balance between flexibility and security'.<sup>61</sup>

Labour law would be at its best if future employment policies were to indicate stronger connections with such core areas of individual rights and if they were to find mechanisms to better enforce such rights. The intersection between soft and hard law measures could once more delineate a challenge to be met by national legal systems within a range of binding principles. Comparative labour law too would continue to be a useful resource, since it would draw attention on the evaluation of concrete results and to the role of national institutions in fostering convergence towards European targets.

In Chapter Two Davies and Freedland suggest, within a comparative scheme of analysis, that 'reflexiveness' of national legislation on part-time work, both into the Part-Time Work Directive and the EU Employment Strategy, is one of the most interesting outcomes of our study. This metaphorical image confirms that there is a good degree of communication – as in a game of reflecting mirrors – between national and supranational systems of law and that decision-making shapes itself in a circular rather than vertical form. This is mainly due to the European 'soft law' context in which most exchanges take place, as it will be further argued below.<sup>62</sup>

Reflexive exchanges of this kind lead us to a discovery which is also a confirmation of one of our working premises. The word 'atypical' – applied to non-standard forms of work and to part-time among those – can safely be deleted from the dictionary of contemporary labour law. Such an expression also proves to be wrong when looked at through the lens of comparative labour law: the dominant current feature of part-time work is now to be found in its normality. This is not to say that research for enhancing better legal mechanisms to entitle non-standard workers to specific rights should stop. The analysis of the Part-Time Work Directive indicates that existing European law could be further clarified in its scope, in line with the expanding role played by European anti-discrimination law and in connection with simplified – and therefore more focused – employment guidelines.

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<sup>61</sup> Communication from the Commission, *Taking Stock of Five Years...*, *supra* note 15, p. 14.

<sup>62</sup> See section 4.

### *3. A brief history of the Directive on part-time work*

The Directive on part-time work<sup>63</sup> has its own interesting – and at times revealing – background. To propose a short historical *excursus* of the various phases undergone by such a piece of legislation may serve a double purpose.

In the first place, the history of the Directive may better clarify the novelty of the most recent approach embraced by the Commission in dealing with employment relationships different from permanent contracts. Three contentious proposals were put forward in 1990, as part of the action programme following the 1989 Charter of Fundamental Social Rights.<sup>64</sup> When looked at from a distance, this ambitious and only partially successful attempt proves how complex it is bringing different categories of non-standard workers under a unitary set of legal measures.<sup>65</sup> The Part-Time Work Directive marks a new start in dealing with only one category of such workers and in doing so by providing the guarantee of minimum standards.

In the second place, going through the various phases of negotiation preceding the adoption of the Directive, one can appreciate the links established with the contemporary and challenging debate on supranational and national employment policies. Whereas the latter are mainly dealt with through sophisticated soft law mechanisms, new emerging patterns of European social law are built around weighty fundamental rights. The principle of non-discrimination becomes the cornerstone of a new phase in European social policies.

The first phase of consultation launched by the Commission in 1995<sup>66</sup> could not hide some initial uncertainties as to the aims and purposes of the initiative. Commissioner Flynn ambiguously moved from the urgency to provide ‘flexi-time and safety for workers’ – particularly part-time and temporary workers – to

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<sup>63</sup> Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.

<sup>64</sup> COM (90) 228 final, OJ 1990 No. C224, 8 September 1990. Only the third proposal succeeded (in amended form: COM (90) 533 final, OJ 1990 No. C305, 5 December 1990). See Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship, OJ 1991 No. L206, 29 July 1991, p.19. See R. Eklund, ‘The Chewing-Gum Directive’ – part-time work in the European Community, *Särtryck ur Festskrift till Hans Stark*, (2001) for a useful discussion on the early debate in the eighties with regard to proposals for part-time directives and for a characteristic Swedish perspective.

<sup>65</sup> See M. Jeffrey, ‘Not really going to work? Of the directive on part-time work, ‘atypical work’ and attempts to regulate it’ (1998) 27 *Industrial Law Journal* 193 and ‘The Commission’s proposals on “atypical work”: back to the drawing-board... again’ (1995) 24 *Industrial Law Journal* 296; and Council Directive 91/383/EEC, *ibidem*.

<sup>66</sup> Consultation was conducted under art. 3 (2) of what was then the Agreement on social policy annexed to the Social Protocol.

the intention to ‘do everything possible to encourage the creation of jobs’.<sup>67</sup> Whereas the former objective somehow reflected the limits of the legal basis in the regime prompted by the Single European Act – qualified majority voting limited to legislation related to workers’ health and safety – the latter looks ahead towards new and broader objectives, attempting to find plausible solutions to increased unemployment.

In the attempt to set the Part-Time Directive within a broader institutional framework, two subsequent important events must be recalled.

The Council held at Essen<sup>68</sup> addressed the need to promote employment and equal opportunities, while increasing flexibility in the organization of work. The Essen criteria were later recognised as a landmark in the history of European employment strategies, inasmuch as they offered a complete formula to enhance the effectiveness of labour market policies, while taking into account the special needs of groups hard-hit by unemployment.

Furthermore, Title VIII on Employment was included in the Amsterdam Treaty. From then onwards the engine of the ‘coordinated strategy’ (art. 125 TEC) started and slowly developed into what can now be described as a virtual circle. Council’s guidelines have, ever since, been issued each year to Member States; they have been followed by National Action Plans (NAPs), annually monitored in a joint report issued by the Council and the Commission (arts. 126-128).<sup>69</sup> The objective of ‘a high level of employment’ (art. 2 TEU and art. 2 TEC) thus started to be formally pursued by European institutions and Member States.

One of the comparative outcomes we underline is that there is a sense of ambiguity in interpreting national responses to the Employment Guidelines as compliance with European soft law. The scene is further complicated by the fact that national law transposing the Part-Time Directive may or may not be considered in compliance with the soft law mechanisms brought about by the OMC from the Lisbon Council onwards.

If we go back to the beginning of 1997, during a fourth session of negotiations between the Commission and the social partners, we discover that the latter still had divergent approaches to part-time. Whereas UNICE seemed worried to sign a second framework agreement, so different from the one on parental leave<sup>70</sup>, because it captured ‘the very logic of regulating the labour

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<sup>67</sup> Agence Europe 27.9.95.

<sup>68</sup> *Supra* note 3.

<sup>69</sup> See Chapter by D. Ashiagbor in S. Sciarra, P. Davies, M. Freedland, *supra* Introductory Comment, for an analysis of the legal status of NAPs and the role of part-time legislation within the Employment Strategy.

<sup>70</sup> Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ 1996 No. L145, 19 June 1996, p. 4. This was the first Directive incorporating a framework agreement, under the procedures set in the Protocol on social policy, annexed to the Maastricht Treaty.

market’, ETUC pushed for further improvement of social protection, in order to make part-time jobs more attractive.<sup>71</sup>

Only at the end of 1997, soon after an extraordinary summit on employment held at Luxembourg<sup>72</sup> in which agreement was reached on the enforcement of the Essen criteria, the prospect for the Directive became clearer. The extraordinary reasons behind such a Council meeting were due to the urgency to adopt measures to combat unemployment and to do so even before the formal ratification of the Amsterdam Treaty. It is not hard to imagine that a lot of emphasis would be put on part-time legislation, in accordance with a widely shared impulse to encourage flexibility in employment relationships.

Commissioner Flynn still had to insist, at the request of the President of the Council, that the principle of non-discrimination between part-time and full-time work be inserted in the agreement reached by the social partners in June 1997, so that it could be included with no modifications in the Directive. Having overcome this last and by no mean secondary difficulty, the Directive saw the light of day in December 1997.<sup>73</sup> The time given to Member States to comply with its requirements – by January 2000 – also happened to be a most formative time for the consolidation of good practices in employment policies at national level. It was also the time in which the two different effects sought by the Directive, namely the enforcement of a ‘minimum set of fundamental rights’ and the introduction of flexible ways to organise work<sup>74</sup>, were meant to blend together in a new mixture of regulatory techniques.

The Framework Agreement signed by the social partners, then annexed to the Directive, captures this double necessity to ‘contribute’ to the European strategy on employment and to combat discrimination against part-time workers. The Agreement assimilates the idea that there is a positive connection between the increase of jobs and the introduction of non- standard forms of employment, so much so that the signatories to it announce that they will be dealing in the future ‘with other forms of flexible work’. More specifically, the Directive refers to the Essen European Council and to the ‘view to increase the

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<sup>71</sup> Agence Europe 24.1.1997.

<sup>72</sup> Held on November 20-21 1997. See Presidency Conclusions, Extraordinary European Council Meeting on Employment, Luxembourg, 20-21 November 1997, Bull. EU 11-1997, at 7-13 for the approval of a set of employment guidelines for 1998. Comments on the overall significance of decisions adopted in this Council meeting are in D. Cameron, ‘Unemployment...’, *supra* note 38, especially at pp. 44-47.

<sup>73</sup> Recital n. 23 of the Preamble to the Directive contains a reference to the Community Charter of fundamental social rights of workers and to the broad principle of non-discrimination based on sex, colour, race, opinion and creed. The Directive only deals with the principle of non-discrimination between part-time and full-time workers. See a critical remark on this missed opportunity in M. Bell, *Anti-discrimination Law and the European Union* (Oxford, 2002), p. 97.

<sup>74</sup> This is the language used by the Commission in its explanatory memorandum to the part-time work directive, COM (1997) 392, Brussels, 23 July 1997.

employment-intensiveness of growth, in particular by a more flexible organization of work'.<sup>75</sup>

These well-clarified objectives are the prelude to a body of norms characterised by a minimalist approach. The possibility to exclude casual workers from the scope of the Directive is left open to Member States, after consulting the social partners. The notion of a comparable full-time worker is introduced as a mean for the definition of a part-timer.<sup>76</sup> The principle of non-discrimination is laid down in its simplicity and yet in its very powerful implications, namely the ban of a less favourable treatment, unless justified on objective grounds, and the recourse, whenever possible, to the principle of *pro rata temporis*.

The principle of non-discrimination becomes, in this way, a justiciable right, when read in conjunction with the notion of a comparable full-time worker within the same establishment or, when such a worker does not exist, with reference to collective agreements or other national legal sources. These are both traditional points of reference in national legislative traditions, when it comes to indicating the space within which individual rights are generated and protected. The presence of such criteria in the Directive is by no means to be undervalued, because they aim at assimilating all forms of work under the same regulatory framework, thus intending to overcome the notion of atypical work.<sup>77</sup>

Other clauses of the Agreement, namely the progressive elimination of discriminatory requirements for access to particular conditions of employment and of other obstacles limiting opportunities for part-time work, are of more dubious interpretation, as far as the guarantee of individual rights is concerned.<sup>78</sup> Such clauses should put an obligation on Member States to act for the removal

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<sup>75</sup> Recital n. 5 of the Preamble. More generally see S. Deakin and H. Reed, *The Contested Meaning of Labour Market Flexibility: Economic Theory and the Discourse of European Integration*, in J. Shaw (ed), *Social Law and Policy in an Evolving European Union* (Oxford 2000), pp. 74-75.

<sup>76</sup> Similar descriptions of a part-time worker and comparable full-time worker are in art. 1 of the ILO Part-time Work Convention C175, adopted on 24 June 1994. To date, this Convention has been ratified by 9 countries: Cyprus, Finland, Guyana, Italy, Luxembourg, Mauritius, the Netherlands, Slovenia and Sweden (source: [www.ilo.org](http://www.ilo.org)). See also ILO Part-Time Work Recommendation R182, adopted on 24 June 1994, art. 2.

<sup>77</sup> This is suggested throughout the Dutch country study.

<sup>78</sup> The 1994 ILO Convention, *supra* note 76, indicates in detail measures to be taken 'to ensure that part-time workers receive the same protection as that accorded to comparable full-time workers' (art. 4 et seq.). It is also specified in art. 7 which 'equivalent' conditions must be guaranteed to part-timers, namely maternity protection, termination of employment, paid annual leave and paid public holidays, and sick leave. Criticism was raised by the European Parliament to the Commission, because the Directive incorporating the agreement did not include questions – such as social security – dealt with in the ILO Convention. See reference to this exchange of views in ETUI, *Survey on the implementation of the part-time work directive/agreement in the EU Member States and selected applicant countries*, Report 73, Brussels 2002, p. 6.

of discriminatory laws and practices, both on their own initiative, in order to comply with European law, and following individual complaints. However, there remains a gray area between the enforcement of non-discrimination principles and the right to have access to part-time jobs, as a way of enforcing employment policies free of discriminatory practices.<sup>79</sup>

In order to ban these practices, clause 5 (a) and (b) indicates that Member States and the social partners, in their respective sphere of competence, should 'identify and review' obstacles which are likely to limit opportunities for part-timers. The non-binding nature of this command creates uncertainties as regards a clear definition of a right to access to employment free of discrimination.<sup>80</sup>

This is a clear example of the interesting but still unclear combination of regulatory techniques brought about by the Directive in question. Its hard law principles are inextricably encapsulated in the soft law environment of employment policies and of wider European policies surrounding them. It is on the latter that the next section will concentrate.

#### ***4. Labour market regulations in the European context.***

##### ***A soft law environment***

In order to be even further aware of the potentialities intrinsic to the European employment strategy, it is useful to relate them to a series of recent documents which endeavor the creation of a soft law environment. It can be maintained that such an environment facilitates the spread of good practices and creates the preconditions for mutual monitoring across Member States and for reviewing mechanisms to be further improved from the centre to the periphery.

The theoretical assumption is that employment policies, as they have developed in recent years in the EU are a successful example of 'integration through co-ordination'.<sup>81</sup> Increased flexibility of the labour market is one of the expected outcomes of such a dynamic strategy, inasmuch as it fosters the creation of new jobs.

Co-ordination is facilitated by a subtle and yet resistant network of policies mostly coming from the Commission. All new processes of co-ordination in

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<sup>79</sup> The same conclusions are drawn in ETUI, *Survey on the implementation...*, *ibidem*, p. 13; country studies reveal that partial implementation of the Directive is due to the fact that Member States do not consider certain provisions legally binding.

<sup>80</sup> Criticism is expressed by Freedland and Kilpatrick in the UK country study, both for the formulation of the Directive and for the 'soft' national response consisting in a 'Compliance guidance' for the implementation of the Directive, *supra* note 14.

<sup>81</sup> This is what I have argued, soon after the Lisbon Council, in S. Sciarra, 'Integration through Coordination: the Employment Title in the Amsterdam Treaty', (2000) 6 *Columbia Journal of European Law* 209.



related fields, particularly the programme on social inclusion, should progressively become functional to each other.

Such signals are important for most actors involved in law-making, both at national and supranational level. They are also meant to shape and in a way redefine the function of the social dialogue.

#### **4.1 The White Paper on Governance**

One of the leading ideas running through the White Paper on Governance<sup>82</sup> is the creation of a ‘reinforced culture of consultation and dialogue’, which should be addressed to the European institutions and should better include national parliaments. The suggestion is that, in order to avoid excessive rigidity in the adoption of policies and yet acquire objective and widespread opinions, a ‘code of conduct that sets minimum standards’ should be provided, with a view to improving the representativity of civil society organisations.<sup>83</sup>

The Commission provides a follow-up to these early orientations in a Communication.<sup>84</sup> A point of interest for the present discussion is the more proactive role that should be assigned to the Economic and Social Committee and the Committee of the Regions. Protocols on cooperation with such bodies, signed in 2001 by the Commission, make them stronger intermediaries with civil society and the regional level.<sup>85</sup>

The image of a double network can be suggested, whereby the establishment of a more formalised link between institutions should lead to a capillary intersection with civil society. The local and regional ends of this network indicate that criteria of representativity should include the geographical dislocation of organisations.

Another way to ascertain the spread of representation – and consequently of democratic deliberative structures - is the issuing of guidelines on the use of expertise.<sup>86</sup> This again may seem only remotely relevant for the present discussion, but it is not, if one thinks of the many issues that need to be clarified through scientific assessment in the field of employment, labour market reforms and the reform of welfare states. The discussion on social indicators, referred to earlier on<sup>87</sup> clearly confirms that experts are already active in all relevant fields.

This is an example of exercising influence on policy-makers through consensual institutions and by recourse to dialogue, rather than by imposition

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<sup>82</sup> European Commission, *European Governance - A White Paper*, COM (2001) 428 final, Brussels, 25 July 200, OJ 2001 C287, 12 October 2001, p. 1.

<sup>83</sup> COM (2001) 428 final, at pp. 16-17.

<sup>84</sup> Communication from the Commission, *Towards a reinforced culture of consultation and dialogue. Proposal for general principles and minimum standards for consultation of interested parties by the Commission*, COM (2002) 277 final, Brussels, 5 June 2002.

<sup>85</sup> COM (2002) 277 final, at pp. 6-7.

<sup>86</sup> COM (2002) 277 final, at p. 10.

<sup>87</sup> See section 1.

and coercion.<sup>88</sup> In the delicate field of labour and social law, expertise should reflect different options and propose explicitly what the ultimate expected goal ought to be. It is, on the contrary, frequently the case that the economic model to be pursued remains ‘implicit’.<sup>89</sup> Experts deal with it in a very abstract way, without attempting to elaborate comparative criteria around concrete examples.

In this search for legitimacy, traditional ways of establishing democratic representation are lost.<sup>90</sup> This should not necessarily be considered a negative outcome, if it gives impulse to the search for new modes of organising collective interests within trade unions or through other civil society organisations. The lack of criteria to ascertain that such collective actors are representative and democratic constitutes a challenge to both supranational and national labour law, to the point of questioning the centrality of this discipline. A most original process of supranational integration across different legal and economic systems is taking place day after day and innovative solutions slowly merge into a public sphere, where different actors at different times take the lead.

What we see emerging from the box of regulatory techniques is a mixture of hard and soft law measures, a combination of objectives to be reached and means to pursue them. The breaking up of hierarchies inside legal sources generates separate domains of norms, some of which may overlap, while some others may be complementary to each other and run parallel to a principal legal command.

As a reaction to this earthquake, we witness the creation of both vertical and horizontal co-operation: European institutions instruct other actors with a top-down approach and expect that directions be horizontally implemented, at local and regional level and more generally within civil society.

## 4.2 The Laeken Declaration

In the Laeken Declaration on the Future of the European Union<sup>91</sup> issues of openness, transparency and efficiency are put forward to the Convention responsible for institutional reforms. The mandate is very broad and yet very specific on certain points, some of which are relevant for the present analysis.

Among other priorities set for the Convention, it is indicated that in order to obtain ‘concrete results in terms of more jobs’ it will be necessary to reform the

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<sup>88</sup> C. Radaelli, ‘The ‘representation’ of expertise in the European Union’, forthcoming in S. Saurugger (ed.), *La représentation dans l’Union Européenne* (Paris, 2003).

<sup>89</sup> T. Atkinson, ‘Social Inclusion...’, *supra* note 8, at pp. 633, 635.

<sup>90</sup> See the critique expressed by C. Scott, ‘The Governance of the European Union: the Potential for Multi-Level Control’, (2002) 8 *European Law Journal* 59, arguing in favour of alternative ways to exercise efficient governance. The Commission is encouraging ‘parliamentary involvement’ in the discussion on NAPs in the Communication from the Commission, *The Future of European Employment Strategy...*, *supra* note 35, p. 18.

<sup>91</sup> Presidency Conclusions, Laeken European Council, 14-15 December 2001, Annex 1, in particular pp. 21-22.

existing system. On the one hand the issue of competence is raised, having to do with better transparency in the distinction between exclusive, shared and Member States' competence. On the other hand, looking at the issue of simplification, it is suggested that existing instruments need to come under scrutiny, in order to better achieve policy objectives.

A reorganization of competence in the specific field of labour law and labour market regulation, beyond the existing situation, brings about an overall reformist agenda that should soon be disclosed. If this occurs a discussion on different options based on national preferences - and at times trapped in contingent ideologies - should not be avoided. This may originate comparisons between levels of legal standards, in order to establish whether existing national laws may be weakened as a consequence of the implementation of European measures, be they formal legal acts or guidelines.<sup>92</sup> It may also cause a discussion on financial resources to be used in order to reach the final objectives.<sup>93</sup>

It is not without meaning that employment policies dealing with labour market regulations have been recurrently associated with a non-legal notion such as flexibility.<sup>94</sup> The variety of deregulatory options available to reformers is very wide and implies a choice of means as well as of actors able to implement them. As pointed out above in discussing the role of expertise, the contours of a coherent economic model should be drawn, in order to fully understand which constraints are necessary and for what purpose.

Defenders of fundamental social rights have argued that the process of constitutionalization should not be threatened by the implementation of legislation on flexibility.<sup>95</sup> The suggested distinction between employment law and employment policy and the specification that the latter should be considered outside social policies make the constitutional dimension even more important.<sup>96</sup> The fear that employment policy may follow a direction separate from the one indicated in broader institutional reforms is based on the observation of an

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<sup>92</sup> References in particular in the Italian country study.

<sup>93</sup> S. Ball, 'The European Employment Strategy: The Will but not the Way?' (2001) 30 *Industrial Law Journal* 353; see also previous references to F. Vandebroucke's work, *supra* note 33.

<sup>94</sup> The centrality of labour market flexibility in designing the success of EMU has been underlined by commentators early on in the debate. See A. Scott, 'The Macro-economic Context of the Euro', in P. Beaumont and N. Walker (eds), *Legal Framework of the Single European Currency* (Oxford, 1999), p. 54 et seq.

<sup>95</sup> An excellent discussion of this point, from a range of international and comparative perspectives, is presented in Hepple (ed), *Social and Labour Rights...*, *supra* note 2. See also U. Mückenberger (ed.), *Manifesto for a Social Europe* (Brussels, 2001).

<sup>96</sup> M. Freedland, 'Employment Policy', in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds), *European Community Labour Law: Principles and Perspectives*, Liber Amicorum Lord Wedderburn, (Oxford, 1996).

existing disproportion between targets set by macroeconomic policies and by all related policies dealing with labour market reforms.

The language adopted in writing macroeconomic guidelines is indicative of certain options. To ‘invigorate labour markets’<sup>97</sup>, wage moderation and a greater recourse to temporary and part-time contracts are correct choices, in accordance with the goals set at Lisbon and Stockholm, in achieving a more employment-intensive growth. Unfortunately - the Commission points out – ‘the pace of labour market reforms seems to have slowed down in 2001’ and particular measures are forcefully indicated to Member States, among which reference is made to more flexible work organisation, in dialogue with the social partners.<sup>98</sup>

One may find the phrasing of the guidelines rhetorical and not too imaginative. The objective and thorough analysis reflected in this soft law instrument seems to leave aside the specificity of each national context, which only reappears in the country-specific economic policy guidelines, placed in the second part of the Recommendation and characterized by a more detailed set of indications.

Objectivity in guidelines is ascertained in view of the final expected goal, which is a common one. Art. 99 TEC sheds light on national economic policies as ‘a matter of common concern’, thus absorbing into the objective of ‘open market economy with free competition’ all the peculiarities of national choices and priorities. Abstraction in the delivery of expertise is also a sign of objectivity, although at times this exercise seems to depart from real life.

The fear that legal discourses may remain at the margins of such descriptive analysis and lose their normative contents must be put into perspective. The results of this research show, on the contrary, that legislation, even when urged by European targets, still maintains its internal coherence. Comparative legal analysis helps in understanding national differences and in making them a resource of European law, rather than a deficiency.

### **4.3 The High Level Group on Industrial Relations**

The European system of industrial relations has been the object of in-depth analysis in a Report drawn up by experts in the field.<sup>99</sup> The mandate to this group came from the Lisbon Council and in fact the spirit of the whole document reflects the main innovative points emerged from the Portuguese Presidency in the Spring of 2000. References to this report help to understand

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<sup>97</sup> Commission Recommendation for the 2002 Broad Guidelines of the Economic Policies of the Member States and the Community, COM (2002) 191 final, Brussels, 24 April 2002, point 3.3 at p. 14.

<sup>98</sup> COM (2002) 191 final, at p.14 and p.16.

<sup>99</sup> European Commission, Directorate-General for Employment and Social Affairs, *Report of the High Level Group on Industrial Relations and Change in the European Union* (Luxembourg, 2002).

the climate in which what I have described as the paradigm of flexibility is expected to develop.

Furthermore, this report is thoroughly complementary to the other policy documents commented on above. It encourages the sort of outcomes sketched in the *White Paper on Governance*, by proving that national industrial relations systems are inhabited by consensus- building institutions. These play a positive role, to be accomplished even further, leaving aside forms of social protest which would shape emerging interests through conflict, as happened in the past in many national traditions.

The aim, when we move from domestic to supranational goals, is to increase the overall efficiency of the European system and to do so with a ‘new instrument’, the one emerged at Lisbon from the co-ordination of the existing processes of Cologne, Cardiff and Luxembourg.

Social partners are encouraged by the experts to simulate the Lisbon strategy, building on ‘their own experience of the open-method of co-ordination’, in particular through the promotion of a network of national institutions that will follow up best practices.<sup>100</sup> Even benchmarking the quality of industrial relations, by developing appropriate indicators, is suggested, with a view to the establishment of techniques very similar to the ones adopted in employment policies.

Messages of expertise are spread quickly across institutions. In the context of an overall evaluation of the first five years of employment policies, the Commission soon articulates its own suggestion to the social partners, encouraging an ‘open method of co-ordination to develop relationships with their national counterparts’, in view of ‘improving governance and partnership’.<sup>101</sup>

In their policy documents experts and institutions portray future scenarios which are vital and open to changes. They do not take into account the eventuality of social conflict, neither they evaluate the problem of legitimacy in strict correlation with the interests to be protected. When moved to this supranational level of policy-making collective interests – a crucial concept in the European labour law tradition – become so diffused and broad as to be almost non-definable and certainly difficult to be interpreted within a traditional scheme of representation. The mandate given to social actors is described as functional to the objectives set at the centre, rather than being the result of a bottom-up process, leading to a new request to be represented.<sup>102</sup>

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<sup>100</sup> *Ibidem*, p. 37.

<sup>101</sup> Communication from the Commission, *Taking Stock of Five Years...*, *supra* note 15, p. 20. See also Council Decision 2002/177/EC of 18 February 2002, *supra* note 39, which repeatedly mentions the need to further develop the role of the social partners in both the promotion and the implementation of reforms aimed at the creation of new jobs.

<sup>102</sup> The role of the social partners is analysed by C. Barnard, ‘The Social Partners and the Governance Agenda’ (2002) 8 *European Law Journal* 80.

Trade unions, however, demonstrate their own capacity to follow autonomously agreed patterns of co-ordination, especially in dealing with matters, such as wages, which have been traditionally within the area of their competence. It is worth mentioning that ETUC sets its own strategies in issuing recommendations on wage bargaining guidelines, in order to indicate optimal wage rise at national level. It is even more interesting to discover that in 2001 national actors engaged in negotiations kept their demands very close to the guidelines, with no significant loss of purchasing. Thus, meeting the intention of the guidelines through monitoring and advising, a result of convergence is reached.<sup>103</sup>

The message emerging from this Report signals ways of correcting asymmetries among groups which are rather distant from most regulatory techniques adopted in national labour law regimes. We claim in this project that national social partners still play a significant role in enhancing labour market reforms and we also assign importance to the issue of democratic legitimacy, when setting the scene of collective representation for the protection of collective rights. At this regard, there is still a missing reference in European sources, namely the recognition of a positive right to form and join associations, partially counterbalanced by the mention of such a right in the Nice Charter.

## ***5. Conclusions***

The regulation of part-time work offers an example of labour law reforms rooted in national legal systems and also linked to European objectives. It constitutes a solid ground on which to launch comparative labour law in a renovated and incisive fashion, taking into account many facets of the EES, which still appear unexplored. We have argued in favour of establishing a labour law point of view, both to counterbalance an analysis based on economic and structural trends and to ascertain that legal institutions be included in the spectrum of comparative research.

The net of soft rules arranged within the EES mirrors a wider European soft law context. Labour lawyers are very curious and vigilant commentators of such rules, in line with a tradition of pluralism in legal sources. Mutual learning processes set in motion by the EES seem to overturn a traditional hierarchy of sources in favour of a circular exchange of information. We argue that national priorities must continue to be visible in this new institutional order and that

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<sup>103</sup> G. Fajertag (ed.), *Collective Bargaining in Europe* (Brussels, 2002), p. 27 et seq. The so-called Doorn group has been active since 1997 to avoid wage competition in unions active in Germany, Belgium, the Netherlands and Luxembourg, in order to increase employment and purchasing power. Its 6th conference was held on 11 October 2002 in Aardenburg, the Netherlands; a copy of the 2002 declaration is on file with the author. Reports of the activities of the Doorn group can be found at [www.etuc.org/etui/CBeurope/euractiv](http://www.etuc.org/etui/CBeurope/euractiv)

respect for fundamental social rights must inspire legal reforms enacted in compliance with employment policies.

The analysis of the Part-Time Work Directive has also been central in this project. We have repeatedly underlined that the combination of hard and soft law mechanisms have created a double burden on Member States, very often leaving space for non-conventional solutions. Even so, part-time work does not in itself provide the answer to the still open question of how to create more and better jobs.

The Commission's recent attention towards 'synchronisation' of the different European processes and 'streamlining' of the same has been signalled as a policy orientation not irrelevant to the present analysis, particularly in the light of the subtle, if not contradictory, indication given by the Commission that the economic and the employment spheres should be left autonomous.

The task of comparative labour law is further enhanced by the present situation. The study of labour market institutions brings forward very clearly the fact that autonomy of the economic sphere may lead to unbalance within the range of policies to be pursued. Furthermore, autonomy of employment policies may mean very little, if no economic support is provided to decision-makers. A possible stronger emphasis on measures to favour adaptability, when pursuing employment policies, alerts once more the interest of labour lawyers in ascertaining that fundamental rights should be guaranteed in the various stages of an active working life and favour mobility between jobs. The paradigm of flexibility could become more relevant for labour law and would represent not an aim in itself, but a frame of reference for the articulation of individual and collective rights.