MARTINUS NIJHOFF PUBLISHERS

Tilburg Law Review 17 (2012) 360–366

Tilburg Law Review

brill.com/tilr

The Impact of the Financial Crisis on EU Economic Governance: A Struggle between Hard and Soft Law and Expansion of the EU Competences?

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Abstract

The EU's crisis response of introducing stricter economic governance has broadened its scope of interference in national policies significantly. This triggers questions on the effectiveness and legitimacy of hard and soft governance in a multi-level setting. Based on two examples the article illustrates the changing role of law in a globalised world and the consequential tensions. It thus provides input to further explore the concept of global law.

Keywords

EU governance; industrial relations; economic governance

The EU is an example of supranational coordination using both hard and soft law methods to steer the coordination of employment and social policies of its member states. However, following the global economic crisis, the EU introduced a stricter regime of policy coordination, by introducing more hard law measures. The new measures are also increasingly mingling with matters of national competences. These new tendencies raise new questions not only about effective and legitimate coordination of economic and social policies, but also about issues of overlapping competences of the authorities within a multilevel system.

This article illustrates two domains of the new expanding tendencies: employment policies being increasingly affected with hard law by the Macroeconomic Imbalances Procedure and collective bargaining

DOI 10.1163/22112596-01702025

traditions becoming affected by the Euro Plus Pact, on the example of Slovakia. It shows how the EU's stricter economic governance creates an awkward balancing-act between uniform supranational ideas and diversified local practices and demands. By explaining these two examples the article aims at allocating possible tension areas within the EU and gives an input for further development of the concept of global law.

1. A Theoretical and Historical Perspective on Soft Law Governance

The emergence of various forms of new governance such as soft law have been analysed as a shift from traditional hierarchical command-and-control regulations.[1] From a sociological point of view, such a shift is necessary to meet the challenges of strongly diversified societies and growing interdependence of actors, which consequently requires more 'horizontal' and 'cooperative' regulations instead of uniform rules.[2] Soft law coordination meets the new demands of dealing with complex issues in complex societies, as it allows for setting joint targets while leaving the precise policy formation to the national level, thus also minding the autonomy of member states in areas such as employment and social policy. The effectiveness of soft law is often explained by mechanisms such as naming & shaming, diffusion through discourse, deliberation between actors, learning, sharing best practices and networking.[3]

The past decades show that global challenges were more than once a reason to seek the improvement of governance structures. In the 1980s, the structurally high unemployment rates across member states eventually

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[1] J. Lenoble, 'Open Method of Coordination and Theory of Reflexive Governance' in O. De Schutter and S. Deakin, *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (Bruylant 2005).

[2] ibid.

[3] For overview of these mechanisms and scholar debate on the nature of soft law policy coordination see: D.M. Trubek and L.G. Trubek, 'The OMC and the debate over "hard" and "soft" law' in J. Zeitlin, P. Pochet and L. Magnussen (eds.), *The Open Method of Co-ordination in Action: The European Employment Strategy and Social Inclusion Strategies* (P.I.E.-Peter Lang 2005); D.M Trubek, P.Cottrell and M. Nance, '"Soft Law," "Hard Law," and European Integration: Toward a Theory of Hybridity' (2005) *University of Wisconsin Legal Studies Research Paper* No. 1002; S. Smismans, 'From hamonization to co-ordination? EU law in the Lisbon governance architecture' (2011) 18 *Journal of European Public Policy* 504-524; J. Zeitlin, P. Pochet and L. Magnussen, *The Open Method of Coordination in Action: The European Employment and Social Inclusions Strategies* (PIE-Peter Lang 2005).

resulted in the development of the European Employment Strategy (EES), which used soft law coordination to steer national employment policies. In the late 1990s, globalisation, fast technological development and the ageing of society, further underlined the need for joint action in important employment and social policy dossiers. The so-called Lisbon Strategy was launched, aiming to convert the EU into the most competitive knowledge economy in the world by 2010.

Although in the end, the Lisbon Strategy failed to reach most of its goals, the EU implemented a follow-up strategy called Europe 2020. The development of the new strategy coincided with the outbreak of the world-wide economic and financial crisis, the severity of which was again a large reason for the EU to seek for joint answers to joint challenges. The EU saw its unemployment rate growing from 7.1% in 2008 to 9.7% in 2011 and youth unemployment exploded in some countries, for instance reaching almost 50% in Spain.[4] Also, the struggle with depths and deficits in some member states impacted the EU's economy as a whole, especially where it concerned Eurozone countries such as Greece and Spain.

2. Response to the Crisis: Stricter Economic Governance

This time around the EU wanted to improve the governance structures by both improving the soft law structure and by introducing more hard law elements. One example is the introduction of the macroeconomic imbalances surveillance in 2011, as part of the Six-Pack legislation. The macroeconomic imbalances surveillance aims at preventing and correcting macroeconomic imbalances in its member states,[5] and accordingly introduces preventive and corrective measures, to make sure that member states keep or regain a sound economic climate. This in the first place involves a scoreboard of indicators acting as an alert system in case of perceived imbalances.

After a scoreboard alert, an independent and in-depth country review will be undertaken. The country review may include employment issues,

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[4] European Commission, Eurostat data, 'Unemployment statistics until June 2012', at <http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Unemployment_statistics.> accessed 03 August 2012.

[5] Europa, 'EU Economic governance: a major step forwards' MEMO/11/364, 31 May 2011. Regulation (EU) 1176/2011 of the European Parliament and of the Council on the prevention and correction of macroeconomic imbalances (2011) OJ L306/25.

for instance, taking account of the employment recommendations issued in the scope of the EES (Art. 148 TFEU). The in-depth review may lead to more precise country-specific recommendations, for instance addressing corrective action to counter the excessive imbalance and giving deadlines.

By entering this stage, the member state is in the excessive imbalances procedure (EIP). The member state has to make a plan of action to correct the imbalances. This corrective action plan should also include the economic and social impact of the policy actions.[6] Should the Council approve of the corrective action plan of the member state, it will list recommendations of specific actions and deadlines; otherwise, it can ask the member state to submit a new plan. When assessing the progress of the member states, the Council may adopt a decision establishing non-compliance in combination with recommendations and new deadlines for corrective actions.

For Eurozone countries, the EIP is accompanied with an enforcement mechanism consisting of an interest-bearing deposit,[7] which can be imposed after a member state has failed once to comply with the recommended corrective action. If the member state fails to take corrective action a second time, this interest-bearing deposit can be converted into a fine of up to 0.1% of GDP. Moreover, a sanction can be issued for twice failing to submit a sufficient corrective action plan.

The example shows that stricter economic governance procedures may include employment issues, which by the virtue of EIP become increasingly affected by hard law. The Council seems to be aware of the potential sensitivity of having influence in issues of national sovereignty. It therefore states that while taking preventative actions, it shall fully observe the autonomy of the social partners and their right to collective bargaining and action as anchored in Art. 152 TFEU and Art. 28 of the Charter of Fundamental Rights of the EU. It thus states that it will not affect the right to negotiate, conclude collective agreements or to take collective action.[8]

ETUC nevertheless fears that the Commission seeks new ways to intervene in areas such as collective bargaining and labour market institutions.[9]

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[6] ibid, Regulation (EU) 1176/2011, Article 8.

[7] Regulation (EU) 1174/2011 of the European Parliament and of the Council on enforcement measures to correct excessive macroeconomic imbalances in the euro area (2011) OJ L306/8, Article 3.

[8] See Regulation 1176/2011, Article 1 and Article 5 (n 5).

[9] European Trade Union Confederation, 'Resolution on Economic and Social Governance' Brussels, 13-14 October 2010, at <http://www.etuc.org/a/7769> accessed 03 August 2012.

The EU however explains and justifies the need for integration of policy fields as follows:

> Better EU employment governance and coordination has become essential for at least two reasons. First, labour market participation, unemployment and labour cost play a role in macroeconomic stability, and are taken into consideration in the new regulation on the prevention and correction of macroeconomic imbalances. Second, the crisis has further revealed the interdependence of EU economies and labour markets, underscoring the need to accompany the new economic governance with strengthened coordination of employment and social policies in line with the European Employment Strategy provided for by the Treaty.[10]

It thus seems that hard law coordination has started entering the soft law governance cycle of employment and social policies. This begs important questions concerning the legitimacy of the EU in doing so. The next section develops the second example of the tension between the new EU initiatives and local implementation by exploring the collective bargaining traditions in Slovakia.

3. Decentralisation Pressures and the Case of Slovakia

After the crisis, reaction of world-wide stock exchanges and the budget deficit problems, some EU countries signed the Euro Plus Pact. This Pact, which uses soft law coordination, introduced measures which may have implications for the national systems of collective bargaining, by openly advocating decentralisation of industrial relations,[11] i.e. putting the emphasis of collective bargaining to lower, company level. While the economic rationale for decentralisation is justified by the needs of the companies to cope with economic difficulties more easily, several non-economic arguments raise doubts.

Firstly, from a general perspective, the interference of the EU with the national collective bargaining matters is problematic, since these matters have always been decided upon at the national level and the national social partners are protected by the principle of autonomy. Secondly, the EU does not explain and define in more substantive terms the notion

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[10] European Commission, 'Communication from the Commission - Towards a job-rich recovery' COM (2012) 173 final, 18 April 2012; 20.

[11] European Council, 'Conclusions of European Council 24/25 March 2011' EUCO 10/1/11, Brussels, 20 April 2011.

of decentralisation, leaving its interpretation unclear. The interpretation is difficult given the variety of degrees, modes and legal regulation of decentralisation in all 27 member states.

In addition, it is also questionable whether further decentralisation is eventually possible for the countries which have already fairly decentralised collective bargaining. Putting the emphasis to lower bargaining levels is a particular issue for those countries which do not have strong structures at higher levels (sectoral or cross-sectoral), as it is the case in the majority of the countries in Central and Eastern Europe. Namely, from the legal point of view, the collective bargaining at the higher levels represents an important safeguard against uncontrolled decentralisation because of setting the rules and points of departure for further negotiations at lower levels. Also, the decentralisation which is not controlled by the virtue of sectoral or cross-sectoral collective agreements provides trade unions with fewer powers to control the state of the labour rights.

An example of the country where, for instance, further decentralisation of collective bargaining would not be possible, without hampering the state of labour rights, is Slovakia. In this country, collective bargaining takes place predominantly at the company level and not all sectors have collective agreements. The organisation of social partners is the weakest at the company level, where the trade union presence is weak, especially in small companies with smaller number of employees.

Slovakia is one of the acceding countries, in which the European Commission has been promoting capacity-building of social partners in the past decade. However, during the period of the economic crisis, the several labour law amendments which were introduced in Slovakia further deteriorated the bargaining position of trade unions. To illustrate, the representation of workers in companies has been made legally difficult by imposing the stricter rules on representativeness. Also, no sectoral agreement has been extended to cover employees in the entire sector since 2009, which is a legal possibility otherwise regularly practiced in the majority of EU-27. The reason for the absence of the extensions is the modification of the legal rules which set the conditions hardly applicable in practice.

These developments implicate that further decentralisation of collective bargaining, without simultaneous increase of trade unions' capacities at all bargaining levels, could deteriorate the state of labour standards in Slovakia. Unfortunately, this concern was not perceived by the EU when prescribing decentralisation, which may have negative consequences for the workers' standards in the countries with similar collective bargaining issues as this country.

4. Conclusion

The EU's soft law governance methods fit the theoretical assumption that the most effective governance method should set EU level targets in response to joint actions while leaving ample room for member states to work out tailor-made policies. The effectiveness of soft law methods of governance is nevertheless coloured by various tensions, as it, for instance, does not always obtain the desired result. As a response to the global crisis, the EU developed stricter economic governance with more hard law aspects. The two examples in this article illustrate that these initiatives partly act in contradiction with the theoretical notions of soft law steering, as they may prescribe to member states how to act in too much detail.

Via the backdoor of economic governance the EU moreover enters domains of national sovereignty, such as unemployment, labour cost and wage bargaining. The EU pressure for collective bargaining decentralisation for instance triggers the re-definition of the relationship between national and EU-sphere of competences. This raises questions concerning legitimacy and effectiveness of these new EU initiatives. Can the EU indeed impose employment policies on member states? And is this the most effective way of intervention? Or does the EU need to take better into account the specific situation in member states, as the Slovakian example shows?