

# EU employment governance revisited

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# EU EMPLOYMENT GOVERNANCE REVISITED

Towards an innovative legal framework  
for employment regulation

Nina Büttgen



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# **EU EMPLOYMENT GOVERNANCE REVISITED:**

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**Towards an innovative legal framework for employment regulation**

DISSERTATION

to obtain the degree of Doctor at Maastricht University,  
on the authority of the Rector Magnificus, Prof.dr. Rianne M. Letschert  
in accordance with the decision of the Board of Deans,  
to be defended in public

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*To my grandparents,  
for their joy in crossing borders and their courage for welcoming change,*

*and*

*To my mother,  
for her unconditional love.*



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## Case law

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Case 75/63 Unger [1964] ECR 1977

Case 53/81 Levin [1982] ECR-1035

Case 66/85 Lawrie-Blum [1986] ECR-2121

Joined cases C-163, 165 and 250/94 Sanz de Lera [1995] ECR I-4821

Case C-463/00 Commission v Spain [2003] ECR I-4581

Case C-27/04 Commission / Council [2004] ECR I-6649

Case C-341/05 Laval un Partneri [2007] ECR 2007 I-11767

Case C-438/05 The International Transport Workers' Federation and The Finnish Seamen's Union [2007] ECR I-10779

Case C-307/05 Del Cerro Alonso [2007] ECR I-7109.

Case C-268/06 Impact [2008] ECR I-2483

Case C-346/06 Rüffert [2008] ECR I-1989

C-319/06 Commission vs Luxembourg [2008] ECR I-4323

Case C-157/11 Sibilio [2012] ECLI:EU:C:2012:148

Case C-370/12 Pringle [2012] ECLI:EU:C:2012:756

Case C-38/13 Nierodzik [2014] ECLI:EU:C:2014:152

Joined Cases C-22/13, C-61/13 to C-63/13 and C-418/13 Mascolo and others [2014] ECLI:EU:C:2014:2401

Case C-117/14 Poclava [2015] ECLI:EU:C:2015:60

Case C-533/13 AKT [2015] ECLI:EU:C:2015:173

Case C-62/14 Gauweiler [2015] ECLI:EU:C:2015:400;

Joined Cases C-8/15 P to C-10/15P Ledra Advertising [2016]) ECLI:EU:C:2016:701

BVerfG, Judgment of the Second Senate of 21 June 2016 - 2 BvR 2728/13 - paras. (1-220)





## Preface

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What a colourful journey it has been writing this book. As I left Brussels to embark on this research project (that had found me), little did I know about what it meant to set out for “destination unknown”. The city of Maastricht, my second home, provided the perfect bridge for this endeavour. Now this journey is finally reaching completion. But have I found my destination? From the innumerable – pleasant and painful – lessons this voyage has gifted me, the most important one would probably be that the journey is the destination.

I am glad that I can finally express my respect and gratitude to the people (and institutions) who have supported me on this journey, who have kindly shared their vision and inspired me through their company. Only through them has this journey become as enlightening as it has been.

To start off, I gratefully acknowledge the financial contribution of the Netherlands Organisation for Scientific Research (NWO) that made this research project possible in the first place.

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My gratitude further goes to the Levenbach Institute, where the social law departments of Dutch universities cooperate in promoting research and education in the field of social law. Not only has it welcomed me warmly into a scientific community that I had hitherto been unfamiliar with. But through its regular gatherings it has facilitated helpful exchange with fellow (PhD) researchers in social law.

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Back at base at the UM Law Faculty, the Maastricht Center for European Law (MCEL) and more recently the Center for European Research in Maastricht (CERiM) have offered supportive structures as have the Ius Commune Research School and the Maastricht Graduate School of Law. I would like to thank Prof. Dr. Hildegard Schneider for her kind foresight and facilitation in my (re-)joining the faculty in 2011. I have very much appreciated the initiative and personal encouragement of Prof. Dr. Elise Muir (within the MCEL framework) and enjoyed the regular exchanges with my fellow PhD colleagues, as well as with my colleagues from the Public Law Department. For always reliable and friendly (technical) support I am indebted to Eva, Noelle, Peggy, Henk, Roger, and Manuela. As I am to Licette for her kind assistance and expert advice which have helped me navigating through this final phase of the PhD trajectory.

Here, too, my thanks go to Graham Sedgley for the smooth and constructive language editing, to Jeannine Schmelzer for her invaluable kind and skilled assistance to the finalisation of the book cover, and to Ubbo Noordhof (and team) at Datawyse for the expert support for turning my manuscript into a book. All errors remain my own.

I have further learned and very much enjoyed how creative pastimes and wellness interludes are indispensable for continuous dedicated journeying. Therefore, I would like to thank Bart Verhagen (and the UM University Choir) for helping me finding my voice, and Romy Dolmans and her team (La Vie d'Or) for comfort and well-being. So, too, I am grateful to Annett van der Mühlen for sharing her passion, trust and patience; and to Dieter and Diana for sharing their beautiful green Eifel abode warranting peace and regeneration.

When the journey took me back to Brussels, it was the European Trade Union Institute (ETUI) that welcomed me for an intriguing research stay. I am particularly grateful to Isabelle Schömann and Stefan Clauwaert for sharing their rich experiences, trust and kind encouragements, and for introducing me to the the European trade union movement, the TTUR network and the NETLEX network. My deep gratitude also goes to Karen Meesen for her friendship and providing a safe haven in times of stormy waters.

Still, the best travel companions I have found in my dear colleagues and friends of the Social Law Department. Nicola, I will miss our chats and “Messi”ing around the room to free the head. Thank you for being a great teacher and, together with Wilfried, making Hasselt a less challenging and more pleasant teaching experience. Thank you, Miriam, for motivating discussions and sharing distant travels with a friend. Thank you, Marcus, for being who you are – always kind, reliable, helpful, full of useful information and up for a joke. Thank you, Rankie, Renate, Saskia M., and Suzanne, for cosy coffee breaks, good chats, advice and open ears.

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Finally, I wouldn’t be where I am today without my beloved family. To my grandparents and my mother, I have dedicated this book for I am lacking the words to express the extent of my gratitude to them. Thank you to all the Heuss Girls, but especially to my sister and my godmother, and the rest of the family for your love, constant support and believing in me.

No doubt I will further indulge in travelling even though this particular ship has found its harbour at last. For I would be lost if it hadn’t been for the love, patience and trust of my dearest and most precious travel companions, Bakha and Emma. You are my true inspiration, most critical challenger and eternal motivation. Without you I would never have been able to write this book – let alone, finish it.

Nina Büttgen  
Kreuzau, November 2017.



## Abbreviations

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AGS	Annual Growth Survey
ALMP	Active labour market policies
AMR	Alert Mechanism Report
BEPG	Broad Economic Policy Guidelines
BoP	Balance-of-Payment
CEEP	European Centre of Employers and Enterprises providing Public Services and Services of general interest
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CFSP	Common Foreign and Security Policy
COM	Communication of the European Commission
CRs	Country Reports
CSME	“Competitive social market economy” (Article 3 (3) TEU)
CSRs	Country-Specific Recommendations
EA	Euro area
EAGs	Euro Area Guidelines
EBA	European Banking Authority
ECB	European Central Bank
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECSC	European Coal and Steel Community
EDP	Excessive Deficit Procedure
EES	European Employment Strategy
EFSM	European Financial Stabilisation Mechanism
EFSF	European Financial Stability Facility
EFSI	European Fund for Strategic Investments
EIB	European Investment Bank
EIP	Excessive Imbalance Procedure
EMU	Economic and Monetary Union
EPP	Economic partnership programme
EPSCO	Employment, Social Policy, Health and Consumer Affairs Council configuration
ESCB	European System of Central Banks
ESF	European Social Fund
ESM	European Stability Mechanism
ESD	European Social Dialogue
ETUC	European Trade Union Confederation
EU	European Union
EUCO	European Council
GBI	Government by imperium

GBD	Government by dominium
GDP	Gross domestic product
GLF	Greek Loan Facility
HICP	Harmonised Index of Consumer Prices
IA	Impact assessment
IDR	In-Depth Review
IGC	Intergovernmental Conference
ILO	International Labour Organisation
JER	Joint Employment Report
IMF	International Monetary Fund
LLL	Life-long learning
MFF	Multi-Annual Financial Framework
MIP	Macro-Economic Imbalance Procedure
MoU	Memorandum of Understanding
MSE	European Social Model
MTO	Medium-term objective
NEEET	young people Not in Employment, Education or Training
NMG	New mode(s) of governance
NSPs	National Stability Programmes ( <i>for Member States whose currency is the Euro</i> )
NCPs	National Convergence Programmes ( <i>for non-EA Member States</i> )
POWED	Posting of Workers Enforcement Directive
OMC	Open method of coordination
QMV	Qualified majority voting
REFIT	Regulatory Fitness and Performance Programme
RQMV	Reverse qualified majority voting
RPPD	Revised Public Procurement Directive
RSB	Regulatory Scrutiny Board
SEC	Staff Document of the European Commission
SGP	Stability and Growth Pact
SMEs	Small and medium-sized enterprises
SSM	Single Supervisory Mechanism
SRM	Single Resolution Mechanism
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union
TSCG	Treaty on Stability, Coordination and Governance (“Fiscal Compact”)
UEAPME	European Association of Craft, Small and Medium-sized Enterprises

# 1. Introduction

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## 1.1. PROBLEM STATEMENT

Unemployment, especially long-term unemployment, is one of Europe's core problems because it 'is one of the main reasons for inequality and social exclusion'.<sup>1</sup> This recognition has accompanied the roadmap towards completing the European Economic and Monetary Union (EMU), which the Presidents of the five main European institutions (the European Commission, the European Council, the Euro Group, the European Central Bank (ECB), and the European Parliament) presented in June 2015. Therefore, they assert, 'Europe's ambition should be to earn a "social triple A" in employment and social performance'.<sup>2</sup>

That plea must be seen in the light of the fact that the European Union (EU) has experienced one of its worst crises following the global financial breakdown and the ensuing economic downturn. The EU has been eager to establish itself as a "crisis manager", struggling to keep up its global competitiveness and a sustainable "European Social Model" (MSE).<sup>3</sup> This endeavour, however, has turned into a difficult learning process. On the one hand, it has exposed the need for advancing the European integration process even further. On the other, it has incited diverse anti-European sentiments among growing proportions of the various national publics.<sup>4</sup> The crisis' social consequences – above all, soaring levels of (youth) unemployment and deteriorating working conditions – have cast doubts on the Union's social qualities, while economic and social systems had already been under pressure from rising uncertainty due to globalised markets, technological progress, demographic trends etc.

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1 European Commission, Completing Europe's Economic and Monetary Union - Report by: Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz (the so-called Five Presidents' Report, 22 June 2015) at 8.

<sup>2</sup> This demand formed a key element in completing the EMU, whose architecture the crisis had exposed as "unfinished" and only "partially" functioning. The Presidents motivated their claim not only by stressing the need to address the wide variations that characterised the employment and social situations across the EA but also as 'an economic necessity'. Labour markets had to be "efficient" by promoting a high level of employment and supporting economic adjustment (i.e. being 'able to absorb shocks without generating excessive unemployment') to 'contribute to the smooth functioning of EMU as well as to more inclusive societies.' Ibid.

<sup>3</sup> We will use the acronym for the European Social Model based on the French translation, *modèle social européen* (MSE) to distinguish it from the official acronym of the European Stability Mechanism (ESM), which has been instituted as part of the anti-crisis measures by the EU and the Member States during the Euro crisis (see Chapter 4).

<sup>4</sup> These sentiments are further fanned increasingly by national politicians trying to score political points at home by attacks on the EU and exploiting people's fears with right-wing populism. See, for instance, D. Boffey, Rising Euroscepticism 'poses existential threat to EU' (The Guardian, 3 March 2017) available at <https://www.theguardian.com/politics/2017/mar/03/brexit-has-put-other-leaders-off-wanting-to-leave-says-ec-vice-president>; and D. Connolly, After the US, far right says 2017 will be the year Europe wakes up (The Guardian, 21 January 2017) available at <https://www.theguardian.com/world/2017/jan/21/koblenz-far-right-european-political-leaders-meeting-brexit-donald-trump> (both last accessed 30 June 2017).



Indeed, creating more and better jobs is one of the main European goals to be achieved by 2020. This thesis aims to assess this broad ambition from a labour law perspective – that is, especially with regard to the EU’s capacity of upholding and promoting workers’ rights in Europe. Given the intermingling of law and policy in this area, a broad scope of analysis is required. Accordingly, we will conduct a socio-legal study of the state of affairs in European employment regulation and assess what it might hold for the future.

### 1.1.1. Definition and background

Before going into detail on the study’s set-up, it is first necessary to elucidate more the context of this undertaking and clarify what we mean by “employment regulation”. In the first place, it refers to labour law that has traditionally provided a rich toolbox to regulate employment relations. Labour law structures collective labour relations and governs individual contracts of employment. In second place, it is also important to recognise that ‘legislation concerning labor is, both at the European and domestic level, increasingly integrated into a broader cluster of employment policies’.<sup>5</sup>

In the following, we will further demarcate the research topic at some length by outlining three (interrelated) policy problems. The first problem concerns the so-called “crisis” in labour law relating to the growth in flexible forms of employment (A). The second concerns the rise in inequality, which reminds us of the important role that labour law has played in the development of European welfare states (B). The third concerns the problem of unemployment, which broadens the regulatory perspective by highlighting the role of the State in devising labour market measures as part of public policy to achieve macro-economic policy objectives (C). Discussing these problems will highlight the value of taking a comprehensive approach to the notion of “employment regulation”.

#### A) Labour law in “crisis”

Today, the degree of sophistication of national labour law systems seems historically unprecedented in many parts of Europe. An academic debate has nonetheless been going on positing that, notably, labour law’s personal scope of application is in *crisis*.<sup>6</sup> Entitlement to employment protection has traditionally been regulated in connection with the “standard” contract of employment. In principle, such a contract is concluded for an indeterminate period of time and requires the work to be performed, usually full-time, under the direct supervision of the employer (criterion of subordination). The question is whether this traditional model for employment protection is still viable.<sup>7</sup>

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<sup>5</sup> In reference to Freedland (1996) and others, see Lecomte (2011) at 6.

<sup>6</sup> E.g. Casale (2011); Pennings and Bosse (2011); and Waas (2010b).

<sup>7</sup> The legal fiction of the “standard employment contract”, for instance, has long been cultivated in relation to the model of industrial production based on the full-time, life-time engagement of the “male breadwinner”. Cf. Jefferey (1998). Today, critical voices plead for an extension of the concept of work by the urgent recognition also of “reproductive work” (such as care activities etc), next to the productive conception of paid work. See, for instance, Standing (2011).

Forms of work are diversifying. Increasing numbers of workers are employed on the basis of contracts concluded for a determinate period of time, such as fixed-term contracts, zero hours or on-call contracts and contracts related to temporary agency work.<sup>8</sup> In addition, the proportion of workers on freelance contracts, i.e. contracts that leave it to the worker's discretion how the work is performed, has been growing considerably.<sup>9</sup> All in all, about a third of the Union's workforce is currently employed on the basis of „non-standard“ contracts, i.e. contracts that deviate in one way or another from the „standard“ employment contract.<sup>10</sup>

On the one hand, this development accommodates the desire of both employers and workers for more flexible work patterns. On the other hand, it also implies that a growing number of workers run the risk of missing out on the protective rights associated with the “standard” employment contract, such as entitlement to a statutory minimum wage, protection against unfair dismissal and entitlements to social security benefits, for example, related to illness, invalidity or unemployment. Especially women, young people, migrant workers, long-term unemployed or disabled people often need to accept “non-

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<sup>8</sup> The share of workers on temporary contracts rose from 17.7% in 2000 to 24.6% in 2008. European Commission, *Employment in Europe 2008* (Publications Office of the European Union (POEU), Luxembourg, October 2008) at 28. Temporary workers have been hit particularly hard by the crisis: ‘Empirical evidence supports the conclusion that the use of temporary contracts increased in most Member States during the crisis (between 2008 and 2013), and the rate of movement to permanent contracts deteriorated. At the same time, more temporary workers lost their jobs.’ European Commission, *Employment and Social Developments in Europe – Annual Review 2016* (POEU, Luxembourg, December 2016) at 100. As the creation of permanent employment has also picked up pace again since 2014, ‘[t]emporary employment now accounts for about 14% of total employment [with the] use of temporary contracts differ[ing] considerably across Member States. Poland [and] Spain record the highest proportion [above 20%], while Romania and the Baltic Member have the lowest [below 4%]. The number of employees with temporary contracts was higher in 2015 than in 2008 in almost all Member States (except Spain, Germany, Bulgaria and Lithuania).’ Ibid. at 26. In particular, temporary agency work has seen strong growth trends before the crisis - especially in the larger economies, such as France, Germany, the UK and the Netherlands. It was hit particularly hard by the downturn but has also been associated with aiding the recovery in workplace activity, once economic activity in Europe started to recover. European Commission, *Employment in Europe 2010* (POEU, Luxembourg, October 2010) at 23.

<sup>9</sup> In many cases, these workers operate as self-employed persons on their own account without employees. The number of those operating in this way is particularly increasing in some sectors and countries in the EU. Such developments are usually driven by structural changes, such as the “platformisation” of the economy, whereby labour markets are affected by the increasing mobility of and advances in information technologies. European Commission (2016) at 164. ‘While self-employment accounted for about 15% of total employment in 2015, there was a wide range of self-employment rates across EU Member States, ranging from just below 5% in Sweden to more than 30% in Greece.’ Ibid. at 27.

<sup>10</sup> Eurostat, *Statistics Explained - Employment statistics*, Data from November 2016: [http://ec.europa.eu/eurostat/statistics-explained/index.php/Employment\\_statistics#Part-time\\_and\\_fixed-term\\_contracts](http://ec.europa.eu/eurostat/statistics-explained/index.php/Employment_statistics#Part-time_and_fixed-term_contracts); and Eurostat, *Statistics Explained - Labour market and Labour force survey (LFS) statistics*. Data extracted in June 2016: [http://ec.europa.eu/eurostat/statistics-explained/index.php/Labour\\_market\\_and\\_Labour\\_force\\_survey\\_\(LFS\)\\_statistics#Self-employed](http://ec.europa.eu/eurostat/statistics-explained/index.php/Labour_market_and_Labour_force_survey_(LFS)_statistics#Self-employed) (accessed 29 January 2017).

standard” employment contracts to enter the labour market.<sup>11</sup> Hence, they may have to settle for a precarious employment position since the protective entitlements associated with the “standard” employment contract do either not apply or may be significantly reduced.<sup>12</sup>

In short, an increasing variety of “non-standard” contractual arrangements now form an inherent part of Europe’s employment landscape. While studies have identified common trends in the changing laws on the employment relationship among Member States, overall the predominantly national solutions appear rather piecemeal with respect to ensuring equitable protection.<sup>13</sup>

Against this background, we note that inequalities have been on the rise in Europe (and worldwide) for considerable time.<sup>14</sup> Especially, the surge in income inequalities has been associated with the rise of temporary and part-time employment.<sup>15</sup> This provokes the question how labour law – or, in broader terms, employment regulation – can re-invent itself and offer new remedies against growing inequality and its negative consequences.

## B) Labour law as a key component in the development of European welfare states

Historically, labour law has played a central role in (re-)building Europe’s post-war democracies.<sup>16</sup> It has been integral to the development of the Member States’ different welfare state models, and has thus always fulfilled crucial redistributive functions addressing social inequalities.<sup>17</sup>

This claim can be clarified by looking at the two different conceptions of the notion of “labour standards”, as defended by Deakin and Wilkinson (1994).<sup>18</sup> The first conception relates to labour law’s traditional role in offsetting the uneven distribution of power between workers and employers. This view is conducive to understanding labour

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<sup>11</sup> For instance, a strong age bias characterises the incidence of fixed-term contracts – the latter falls with increased age. In Germany, Spain, France, Croatia, Poland, Portugal and Slovenia, more than half of young persons in employment worked under temporary contracts in 2015. By contrast, very few (less than 15 %) did so in Bulgaria, Estonia, Latvia and the United Kingdom. See Eurostat, Temporary contracts as a proportion of total employment, by age and sex, persons 15-64, 2015, annual data, per cent.

[http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Temporary\\_contracts\\_as\\_a\\_proportion\\_of\\_total\\_employment\\_by\\_age\\_and\\_sex\\_persons\\_15-64\\_2015\\_annual\\_data\\_per\\_cent.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Temporary_contracts_as_a_proportion_of_total_employment_by_age_and_sex_persons_15-64_2015_annual_data_per_cent.png) (accessed 29 January 2017).

<sup>12</sup> See for further details: Burchill, Deakin and Honey (1999) and Deakin (2005).

<sup>13</sup> Cf. Countouris (2007).

<sup>14</sup> L. Elliott, World’s eight richest people have same wealth as poorest 50% (The Guardian, Monday 16 January 2017) <https://www.theguardian.com/global-development/2017/jan/16/worlds-eight-richest-people-have-same-wealth-as-poorest-50> (accessed 17 January 2017). As the latest report in a series covering the persistent rise in inequality, see OECD, *In It Together: Why Less Inequality Benefits All* (OECD, Paris, 2015).

<sup>15</sup> OECD (2015) at 136 *sequ.*

<sup>16</sup> Cf. Esping-Andersen (1990).

<sup>17</sup> From a historical perspective, the elimination of discrimination between different social groups (e.g. on the grounds of sex, race etc) is in fact a rather recent addition to the body of labour law. See Hepple (2009).

<sup>18</sup> In reference to Sengenberger (1994), see Deakin and Wilkinson (1994) at 290-291.

standards as the *objects* of regulation – that is, as the actual conditions of employment, i.e. ‘the quality of work and well-being of workers at a particular location and point in time’.<sup>19</sup> By regulating terms of employment, the law has been pursuing the goal of compensating the *inequality in bargaining power* between employing organisation and employee.<sup>20</sup> This “received wisdom” of labour lawyers, in fact, represents ‘an attempt to infuse law into a relation of command and subordination’ in order to secure a more just working relationship for the worker.<sup>21</sup>

In this context, it is also important to highlight that – according to the native sense of the phrase – “employment protection” refers to those rules protecting workers from the arbitrary termination of the employment relationship.<sup>22</sup> The law’s capacity of delimiting the authority of employing organisations to dismiss their employees (notably, by equipping workers with rights to notice periods, severance pay, consultation, and the like) provides a very central aspect in the compensation of power inequalities. The notion of employment protection necessarily has to be re-qualified in the case of those non-standard contracts that predetermine the legal expiration of the employment relationship.<sup>23</sup>

The second more prescriptive understanding conceives “labour standards” as *legal rights* (e.g. the right to form associations or the right to bargain collectively) and *normative standards* (e.g. minimum wages, maximum working time, etc.).<sup>24</sup> This standard-setting through labour regulation is based on the fact that in the employment context, “no legal relationship exists that does not have both an economic and a social dimension”.<sup>25</sup> In this respect, we consider that labour law – in combination with other forms of regulation – has been playing a crucial role in mitigating *inequality at a societal level* by contributing to the redistribution of income. Here, the law’s close connection with the process of collective bargaining between management and labour (especially, regarding wage determination and

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<sup>19</sup> Ibid. at 290.

<sup>20</sup> ‘Labour law is traditionally seen as a response to inequality in labour relations. This inequality has a double bind: inequality is of an actual as well as of a legal nature. Actual inequality refers to the assumption of market inequality or, put otherwise, the inequality in bargaining power of employees and employers in the negotiation and establishment of working conditions. Legal inequality refers to legal dependence, i.e. the fact that an employee, on the basis of an agreement freely entered into, is legally subordinated to the authority of the employer.’ Hendrickx (2012) at 120. See also Weiss (2011) at 44.

<sup>21</sup> Davies and Freedland (1983) at 18. This wisdom is based on a normative setting of a market order and, hence, closely connected to the moral imperative of ‘labour is not a commodity’. See Langille (2011) at 105-107.

<sup>22</sup> Cf. Freedland (2003).

<sup>23</sup> Such as in the case of fixed-term contracts, temporary agency work or project work. Here, limits imposed by the law are generally intended to ensure the exceptional – i.e. temporary – nature and, hence, aim to prevent abuse through an excessive succession of contracts. Notably, advocates of “reflexive law” defend the necessity of such limits to ensure that the legal protection against dismissal for permanent contracts remains meaningful. Cf. Schömann, Rogowski and Kruppe (1998).

<sup>24</sup> The category of normative standards can be further subdivided into substantive rules (e.g. rules of conduct) and procedural standards (e.g. dispute resolution). Deakin and Wilkinson (1994) at 290.

<sup>25</sup> Quoting Supiot (2002), see Lecomte (2011) at 4.

the framework of working time regulation)<sup>26</sup> and its critical links with tax legislation (notably, income taxes) and social security schemes are of relevance.<sup>27</sup>

Based on these redistributive qualities, labour law is understood as a democratic necessity, which builds on the principle that “labour is *not* a commodity”.<sup>28</sup> Hendrickx (2012) underlines: ‘If one would question the reason why we need labour law, the answer should be that it represents and promotes fundamental values, such as human dignity and social justice.’<sup>29</sup> In order to realise these values, it is characteristic for labour law to deploy different forms of regulation. It usually combines two different rationales (usually, some form of hierarchy, prescribing rules by command, and of self-regulation, based on the recognised autonomy of collective bargaining) in designing substantive and procedural regulation.<sup>30</sup>

### C) Employment regulation and the market economy

Finally, it is necessary, as Lecomte (2011) pleads, to “shift” the conceptual focus regarding the object of regulation towards the broader notion of “employment”. He underlines that ‘the legal discipline whose object is labor’ in the conventional sense is confined to the relations between management and labour.<sup>31</sup> This bilateral view of labour law is actually tied to a pluralistic understanding in which ‘law can also exist autonomously, non-state based’.<sup>32</sup> But the fact that the State actually exercises important functions with regard to employment relations also needs to be recognised. Three reasons, in particular, support this broader view.

First, an “employment law approach” has the important advantage that it ‘allows to unveil the *trilateral* dimension of the employment relations as well as to question both their respective roles (management, labor and public authorities) and the singular interactions between them’ [emphasis added, NB].<sup>33</sup> In effect, such an approach accommodates more easily the three functions that the State fulfils in the employment context: as regulator, public sector employer, and policy-maker.<sup>34</sup>

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<sup>26</sup> S. Halimi, *Post-union Inequality* (Le Monde Diplomatique, English ed, April 2015).

<sup>27</sup> Fritz and Koch (2013) at 4.

<sup>28</sup> On the origins of this dictum and the ILO Declaration of Philadelphia, see Hendrickx (2012) at 110-112.

<sup>29</sup> Hendrickx (2012) at 129.

<sup>30</sup> Langille (2005) exemplifies this characteristic by presenting the view: ‘The ethic of substantive labour law is *strict paternalism* and the results are standards imposed upon the parties whether they like it or not. The ethic of procedural labour law is *freedom of contract and self-determination* – what people call industrial democracy – and its results are basic rights, which, it is believed, lead to better, but self-determined, outcomes.’ In reference to Langille (2011), see Hendrickx (2012) at 121. In the first case, substantive entitlements include maximum hours, vacations, minimum wages, health and safety regulations, and so on. In the second, procedural protection: in short, protecting rights to a fair bargaining process.

<sup>31</sup> Lecomte (2011) at 6.

<sup>32</sup> Hendrickx (2012) at 121.

<sup>33</sup> ‘An employment law approach finally permits exploration of other legal fields (public or economic law, to name but two) typically set aside by the bilateral dimension of labor law.’ Lecomte (2011) at 7.

<sup>34</sup> Ibid. at 6.

Second, the notion of “employment” captures more easily the conceptual ambiguity that underpins the regulation of paid working relationships.<sup>35</sup> Indeed, it captures the tension inherent to this body of regulation that embodies, on the one hand, the principle of “labour is not a commodity” and, on the other, the recognition that wage labour provides a central production factor in a market economy. It thus permits the exploration of adjacent legal fields.<sup>36</sup>

This tension, furthermore, highlights that the employment relationship represents the ‘core institution of the labour *market*’ [emphasis added, NB].<sup>37</sup> From a pure market perspective, “employment” denotes an *exchange relationship* (labour against wages) whose legal expression is the contract of employment.<sup>38</sup> In such reductive understanding, labour does in fact represent a “commodity”.<sup>39</sup> This may surely bear certain witness to economic objectivity. However, from a legal point of view, such “crude fiction”<sup>40</sup> does not suffice as the conceptual basis for regulation. It severs the product from its creator – both of which are inextricably linked in the employment relationship.

Still, market *ordering* may be a legitimate concern in the regulation of the employment relations, whereby the market provides a potent mechanism for resource allocation.<sup>41</sup> Thereby, it is particularly important to be aware of one’s *conception* of the “market” because this conditions how we view the role of regulation and the State.<sup>42</sup> “Free market” orthodoxy prioritises regulatory choices that ensure free competition and the mobility of resources, envisaging merely a minimal or “caretaker” role for the State. At the same time, it carries the risk that market reasoning may easily disguise the fact that the regulation of employment relations involves essential socio-political choices,<sup>43</sup> requiring democratic legitimation.<sup>44</sup> Institutionalist approaches, instead, seem more sensitive<sup>45</sup> to the notion that the regulation of employment relations is, next to protecting the worker, about the balancing of interests – implying ‘a joint concern for production and distribution’.<sup>46</sup>

The third reason for adopting an “employment regulation”-perspective is that it is broad enough to endorse the crucial role that the *level of employment* plays in macro-economic policy-making. According to the International Labour Organisation (ILO), “employment policy” should ensure that: (a) there is work for all who are available for and seeking work; (b) such work is as productive as possible; (c) there is freedom of choice of employment

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<sup>35</sup> Büttgen (2013).

<sup>36</sup> Lecomte (2011) at 7.

<sup>37</sup> Deakin and Wilkinson (2005) at 2.

<sup>38</sup> Ibid.

<sup>39</sup> Cf. Hendrickx (2012) at 112-114.

<sup>40</sup> Polanyi (1944) 75-76.

<sup>41</sup> Cf. Hendrickx (2012) at 122.

<sup>42</sup> Hepple (2011), for instance, characterises labour legislation as ‘the outcome of struggle between different social groups, and of competing ideologies’. Hepple (2011) at 42.

<sup>43</sup> ‘A self-regulating market demands nothing less than the institutional separation of society into an economic and political sphere.’ Polanyi (1944) 74.

<sup>44</sup> Cf. Chalmers (2012).

<sup>45</sup> Cf. Deakin and Reed (2000).

<sup>46</sup> Lecomte (2011) at 7.

and the fullest opportunity for each worker to qualify for, and to use his skills and endowments in, a job for which he is well suited, irrespective of race, colour, sex, religion, political opinion, national extraction or social origin'.<sup>47</sup> While the ideal of "full employment" has long passed its prime,<sup>48</sup> the persistence of the problem of unemployment continues to highlight that the State has an important role to play in devising employment policies as part of public policy.<sup>49</sup>

That problem can furthermore be approached from a legal perspective as well. Here, it raises the question of to what extent the State has the obligation to ensure the "right to work" for its citizens. Such an obligation is, in fact, rather understood as a programmatic duty in promoting employment through well-designed policies than actually imposing a judicially enforceable individual entitlement.<sup>50</sup> Furthermore, the right to work is closely connected to the right to social security – notably, unemployment benefits – in the sense that the latter functions 'as a pre-condition for the right to freely chosen work' to become realisable.<sup>51</sup>

In short, the preceding considerations show that any attempt at regulating employment relations (whether individual or collective) is confronted with the fact that 'the economic and social spheres are inter-penetrated'.<sup>52</sup> Therefore, by using the *broad notion of "employment regulation"* we will account for the fact that both employment law and policy represent accepted means of regulating employment relations in a market economy. This notion equally accommodates the recognition that public regulation may obtain and combine insights from different disciplines – which underlines the necessity of scrutinising particular policy choices carefully in terms of their underlying assumptions, goals pursued and means chosen.<sup>53</sup>

Given all these different dimensions, and as illustrated in the next section, "employment law" is a central component of EU employment regulation. Meanwhile, important qualitative differences exist in the extent of legal regulation of the employment relationship between the national and the European level. To reflect these differences, we

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<sup>47</sup> Article 1 (2) of the ILO Employment Policy Convention, 1964 (No. 122).

<sup>48</sup> Arthurs (2010) comments that 'the rise of market fundamentalism and the taxpayers' revolt have made it impossible for governments to make good on the constitutional promise, once implicit in the Keynesian welfare state, to keep workers in work, or buffer them against the consequences of unemployment'. Arthurs (2010) at 404

<sup>49</sup> Cf Str  th (2000).

<sup>50</sup> 'Economic and social rights instruments usually contain a right to work. This is true of the UN Universal Declaration (Art. 23(1)), the ICESCR (Art. 6) and the [European Social Charter (ESC)] 1961 (Art. 1). Although this may sound like the most important labour law right there could possibly be, it is in fact directed at the government's economic and education policies rather than at employers. Thus, Article 1 of the ESC 1961 requires signatories to promote full employment and to provide vocational guidance and training.' Davies (2010) at 44-45.

<sup>51</sup> As national systems are facing growing pressure on welfare benefits, it is however questionable to what extent this principle of freely chosen work remains genuinely meaningful. Cf. Gundt (2013).

<sup>52</sup> Lecomte (2011) at 4.

<sup>53</sup> Cf. Hendrickx (2012).

will continue using the more traditional term “labour law” to highlight the more sophisticated body of law regulating employment relations at national level.<sup>54</sup>

Overall, the discussion above reveals that taking a broad approach has the advantage of addressing the three related challenges that employment regulation is facing today. The *first* challenge is to address the legal problems of ensuring protective labour law-coverage for the majority of working people engaged in subordinate employment in the face of growing market flexibility. The *second* challenge relates to how employment regulation can re-invent itself and offer new remedies against growing inequality and its negative consequences. The *third* regards the question what role public interventions can play to remedy the problem of unemployment.

### 1.1.2. “European employment governance” – an integrative view

We certainly do not purport to have the answers to these problems. Still, we aim to contribute to the discussion about what the EU can do to address these challenges to employment regulation. In Europe, competence for the regulation of employment predominantly rests with the Member States. Yet, the Union, too, has a considerable role to play given the fact that its influence has been growing.

Prior to 1992, there was merely some European legislation that dealt with employment-related issues by setting minimum requirements. Although these provided some basic social standards, this type of employment regulation was mainly intended to ensure the proper functioning of the common market. In particular, employment policy has traditionally been a purely national concern. Importantly, this was at a time when the Member States’ economies were governed by individual national currencies and adjustable exchange rates.<sup>55</sup>

With the creation of the Economic and Monetary Union (EMU), however, employment regulation has gained in importance in EU policy-making. In the context of developing a single currency, partial harmonisation through EU employment directives has continued in the light of new Treaty-based social policy objectives (at least, up to a certain point) and also employment policy has been elevated to the EU agenda.<sup>56</sup> The Europeanisation of employment regulation has, in effect, been accompanied by the growing emergence of new instruments of steering and increasing variety in regulatory techniques. The most prominent example of this trend is the European Employment Strategy (EES) and its central mechanism, the open method of coordination (OMC) that mainly relies on common guidelines, peer review and policy recommendations as steering instruments.

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<sup>54</sup> Notably, recognising the sophistication and variety of collective labour law arrangements that underpin the widely different industrial relations systems in the Member States.

<sup>55</sup> In that context, national governments had a whole collection of tools at their disposal (e.g. currency devaluation and structural stabilisers) with which to pursue the goals of creating employment and fighting unemployment. Armingeon and Baccaro (2012) at 263-269.

<sup>56</sup> See Chapters 4 and 6.



Against this backdrop, we aim to provide an overview of the state of affairs in European employment regulation today. This aim is based on the recognition that the EU has an increasingly diverse range of instruments at its disposal in order to influence employment regulation. The challenge is to make sense of this diversity and to better understand the different ways in which European employment regulation influences the national level.

Claire Kilpatrick, who coined the term “EU employment governance” as a broad, inclusive notion, offers a helpful approach in this respect. In 2006, she observed that in the EU context, several “governance tools” concerning employment matters were actually interacting towards the achievement of broad common objectives.<sup>57</sup> We will outline this rather progressive account in more detail below, since it has provided important inspiration to the development of the subsequent argument.

#### A) The main features of EU employment governance *anno* 2005

Kilpatrick proposes that the EU’s collection of regulatory instruments related to employment matters could actually be regarded as a coherent whole. To be more precise, she conceives the on-going interaction between EU employment laws, “soft” legal instruments of European employment policy coordination and targeted supra-national financial support as an “*integrated regime*” of EU employment governance. This broad notion contrasts with the conventional understanding at the time that equated EU employment governance merely with the policy coordination based on non-binding instruments (i.e. the EES). Kilpatrick names the following as the main characteristics of that new governance regime:

- ‘(a) a dramatic expansion of the EU governance tool-kit;
- (b) hybridization of the objectives and internal structures of those EU governance tools; [and]
- (c) a shift from responsibility for certain employment governance tasks primarily resting with public institutions (executives, legislatures, courts, public administrations) to the design of more participatory governance spaces for the elaboration of EU employment norms.’<sup>58</sup>

For the sake of argument, we will refer to her account as the “integrated regime”-thesis on EU employment governance.

#### *EU employment governance - an innovation?*

Kilpatrick’s integrative approach contributes to the literature on New Governance.<sup>59</sup> Accordingly, she explains first what is new – and, what not – about this regime.

She accepts EU employment governance as the product of a ‘radical transformation’ that occurred within a decade.<sup>60</sup> However, the ‘newness’ of this governance

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<sup>57</sup> Kilpatrick (2006).

<sup>58</sup> Kilpatrick (2006) at 121.

<sup>59</sup> Scott and De Búrca (2006).

regime was not so much substantive, not even in the use of “soft law”.<sup>61</sup> She recalls that ‘States have always had employment (or labour market) policies aimed at activities such as vocational training and retraining, job-matching and income replacement in periods of unemployment, under-employment, incapacity or old age.’<sup>62</sup> Similarly, continuity can be seen in the ‘constitutionalisation of social rights’, now anchored in the Charter of Fundamental Rights of the EU (CFREU), as part of a long series of attempts at legitimating European market integration.<sup>63</sup>

Kilpatrick highlights that it was especially the *level* of decision-making and pooling of governance tools – i.e. at the European level – that presented a novel approach to the regulation of employment matters.<sup>64</sup> What, in her view, is truly innovative about EU employment governance is that through greater integration across policy fields a ‘noticeable re-orientation of the objectives of employment governance [...] led to a refashioning of the tools of employment governance’.<sup>65</sup>

#### *The objectives and tools of EU employment governance*

Based on that recognition, Kilpatrick ascribes four ‘hybridised’ objectives to EU employment governance – namely, (1) ‘worker protection; (2) increasing the employment rate and lowering unemployment; (3) including excluded groups in the labour market; and (4) increasing the competitive efficiency of employing enterprises’.<sup>66</sup> Importantly, these objectives have to be seen in the light of ‘a new more integrated and expanded competitiveness-social justice paradigm’.<sup>67</sup> At the instrumental level, she observes ‘a general reconfiguration of employment policy and employment legislation’.<sup>68</sup> In effect, with the hybridisation of the objectives of EU employment governance, the range of relevant governance tools has become both more expanded and more integrated.

The various tools constitutive of the employment governance regime are described as follows. The most prominent examples of this governance structure, according to Kilpatrick, are the two Directives on atypical employment existing at the time.<sup>69</sup> Their implementation has been matched with corresponding elements of the EES

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<sup>60</sup> Kilpatrick (2006) at 122.

<sup>61</sup> ‘Neither the ESF nor the OMC constitutes a hard law opportunity manqué. In these instances, soft law is shorthand for “different from law (in its classical conception)”, not “less than law”.’ Ibid. at 127.

<sup>62</sup> Ibid. at 124.

<sup>63</sup> Ibid. at 125.

<sup>64</sup> Ibid. at 124.

<sup>65</sup> Kilpatrick (2006), at 128.

<sup>66</sup> Ibid. at 127. Kilpatrick explains: ‘In the “old governance” EU, there was little integration of policy objectives across governance tools. Instead disparate interventions occurred in the areas of social policy | 16 | (primarily through legislation, plans for legislation and social rights documents) and employment policy (primarily through the European Social Fund).’ Ibid. at 130.

<sup>67</sup> Ibid. at 129.

<sup>68</sup> Ibid.

<sup>69</sup> The Agency Workers Directive was only adopted in 2008.

on part-time work and fixed-term contracts.<sup>70</sup> Not only does she see employment policy coordination, i.e. the OMC, as complementing the ‘softer’ “hard law” instruments such as the Directives mentioned above on atypical employment.<sup>71</sup> She also considers relevant the coordination tools based on “soft law” that match ‘harder’ legal measures concerning gender equality and the creation of equal opportunities as well as those on occupational health and safety.<sup>72</sup> Accordingly, the policy coordination of the EES plays an important role within this governance structure because it allows for policy experimentation, for which traditional legal means do not seem to leave (much) room.

In addition, Kilpatrick asserts relevant financial tools of the Union (e.g. the structural funds) as a third – yet, not less important – constituent of the EU employment governance regime. She highlights how in particular the European Social Fund (ESF) has successively been tailored to the objectives of the EES.<sup>73</sup> Indeed, she regards these European financial means as a crucial complement because they are based on a different regulatory rationale:

‘From this perspective, one of the most central achievements of the EES is that it builds bridges between employment legislation (imperium measures) and the European Social Fund (dominium measures).’<sup>74</sup>

Nevertheless, the focus remains very much on the EES as a “bridging” tool that is key to the alignment and integration between the various governance instruments. In effect, altogether this offers a ‘new hybrid environment, [in which] EU legislation can act as a seed or an anchor for a wider range of linked policy initiatives’.<sup>75</sup>

#### *Participatory governance spaces*

A final crucial characteristic of European employment governance is what Kilpatrick refers to as ‘peopled governance spaces for norm-elaboration and revision’.<sup>76</sup> She explains how, next to being shaped by the increased interaction between the various governance tools, the new hybrid environment of employment governance also hosts ‘governance spaces’ characterised by the increased involvement and interaction between public and private actors.<sup>77</sup>

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<sup>70</sup> Ibid. at 132. For the example of part-time work, a thorough analysis on the dynamic relationship between law and policy, see Sciarra, Davies and Freedland (2004).

<sup>71</sup> Ibid. at 132.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid. at 133.

<sup>74</sup> Ibid. at 131.

<sup>75</sup> Ibid. at 133.

<sup>76</sup> Ibid. at 134.

<sup>77</sup> Notably, the range of actors referring to ‘the executive, the legislature, parliaments, public administrations at all levels, agencies and courts’ in the public sphere, and ‘unions, employers, groups of workers or their elected representatives and other civil society associations’ in the private sphere. Ibid. at 135.

She shows how 'legislation, the ESF and the OMC link public and private actors in distinctive ways'.<sup>78</sup> The transformation towards EU employment governance, according to Kilpatrick, has involved a conceptual 'shift' regarding the involved actors, namely among those who 'create and interpret norms relative to' the broader notion of employment governance (such as 'legal standards, expenditure activities, or labour market management').<sup>79</sup> In effect, linkages between public and private actors have intensified. The realisation of the hybridised 'employment objectives that combine in new ways competitiveness and social justice' requires the involvement of both public and private actors in the 'elaboration, implementation, adjustment, review and comparison' of norms.<sup>80</sup>

In brief, by outlining the key characteristics of the EU employment governance regime Kilpatrick substantiates her thesis about the 'limited newness' of European employment regulation and clears out potential misapprehensions about a shift from "hard" to "soft" law in employment regulation.<sup>81</sup> Her original approach to considering 'the full range of EU employment governance tools and the objectives they are called upon to pursue' highlights the inter-connection between various regulatory instruments.<sup>82</sup>

We consider this "integrated regime"-thesis a stimulating perspective with significant explanatory value in the context of this study. It helps us to recognise and account for the extant overlap in contemporary European employment governance where the achievement of common policy objectives is entrusted simultaneously to different actors and means of regulation covering different aspects of employment. Notably, it embraces the diversification of regulatory instruments and processes in shaping contemporary EU governance and illuminates their interaction.

#### B) The conceptual basis of Kilpatrick's "integrated regime"-thesis

Two more clarifications about Kilpatrick's "integrated regime"-thesis are in order. On the one hand, her inclusive view on EU employment governance represents a reaction to Fritz Scharpf's eminent critique on the MSE. On the other hand, her discussion of the different forms of employment regulation at EU level serves to better understand the relationship between the theoretical approaches assembled under the schools of New Governance and EU Constitutionalism.

##### *The EU's constitutional asymmetry*

Scharpf (2002) elaborates a fundamental concern about European regulatory activity with regard to employment and social matters in terms of a constitutional "asymmetry" that underpins the EU system.<sup>83</sup> He asserts the long-term survival of the MSE was being put at

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<sup>78</sup> Ibid. at 142.

<sup>79</sup> Ibid. at 135.

<sup>80</sup> Ibid.

<sup>81</sup> To be further discussed below and in Chapter 2.

<sup>82</sup> Kilpatrick (2006) at 151.

<sup>83</sup> Scharpf (2002) at 665-666.

risk by that asymmetry, which had been developing in favour of ‘economic-integration functions’ over ‘social-protection’ ones.<sup>84</sup>

Scharpf underlines that the Europeanisation of economic policies has been constitutionally anchored in the Treaties already from the start of European integration. As the European Court of Justice assumed a pro-active role in driving the European integration process, its creative use of these legal resources has been instrumental in the process of further constitutionalisation.<sup>85</sup> The Maastricht Treaty represented a milestone in strengthening this “European Economic Constitution” even further.<sup>86</sup> It put the European Community on a workable timetable towards the EMU. It, too, served as a basis for the advancement of common goals and guidelines, developing a range of coordination processes intended to guide the adaptation of the Member States. These efforts have been tailored to the government of a single currency, the Euro, and the achievement of a Single Market.

Scharpf questions the long-term survival of the MSE by asserting that the Union’s ‘social-protection integration functions’ have fallen “victim” to this “decoupling” at EU-level.<sup>87</sup> He argues that an equalisation of these functions at the constitutional level ‘could be achieved either through European social programmes or through the harmonisation of national social-protection systems’.<sup>88</sup> But the ‘dilemma’, in Scharpf’s view, is that this asymmetry and the decision-making constraints at Union level stemmed from the great diversity of national systems and hence barred any ‘common European solutions’ in the field of social protection.<sup>89</sup>

Nevertheless, he recognises ‘that in the present state of economic integration, the aspirations of “Social Europe” can no longer be realized through purely national solutions’.<sup>90</sup> He therefore concludes by proposing a ‘combination of governing modes [to] increase the effectiveness of [...] Social Europe’.<sup>91</sup> He advocates combining ‘differentiated framework directives’ with the OMC,<sup>92</sup> whereby the differentiation would imply ‘adopt[ing]

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<sup>84</sup> Scharpf (2002) at 652.

<sup>85</sup> See Weiler (1982); and Weiler (1991).

<sup>86</sup> Joerges (2012) explains how German Ordoliberal Theory conceptually accounted for Europe’s economic constitution: ‘According to this school of thought, the legitimacy of the European project was to rest to a major extent on the legal ordering of the economy: the economic freedoms of the EEC Treaty, a system of undistorted competition, and an economic policy ‘complying with justiciable criteria’ were the cornerstones of this order; they were to orient the communitarization process in a way that Europe would be legitimated by – and reduced to – an economic *ordo* whose validity did not depend on democratic credentials, let alone the transformation of Europe into a federal state.’ In reference to Mestmäcker (1973), Joerges (2012) at 3.

<sup>87</sup> Scharpf (2002) at 652.

<sup>88</sup> Ibid.

<sup>89</sup> Indeed, Scharpf seems to see little merit in the EU-wide harmonisation of social protection schemes as long as EU “hard law” in the fields of employment and social-protection policy did not go beyond minimum standards. He equally notes the incapability of the OMC to produce European social standards. Ibid. at 660-662.

<sup>90</sup> Ibid. at 665.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid. at 664.

substantively differing directives for different groups of Member States' clustered along similar welfare traditions.<sup>93</sup>

Next to the broad endorsement received by Scharpf's analysis in the literature,<sup>94</sup> Kilpatrick claims that (by 2005) the integration of the various governance tools in the employment field had actually advanced to such an extent as to represent already a coherent system of EU employment governance. As explained above, the European governance toolkit to regulate employment matters had been both considerably expanded and re-configured into an "integrated regime". Hence, her argument presupposed a significant degree of interaction between the individual tools that seemed to offer new potential for Social Europe:<sup>95</sup>

"These proposals ignore what in my view is the most significant characteristic of the new EU employment governance: that it is already a self-consciously integrated regime where the OMC, ESF and employment law measures each play distinctive and overlapping roles in realising social justice and competitiveness objectives."<sup>96</sup>

There is a fine balance, however, Kilpatrick alerts, on which this hybridised governance structure must rely. It depends essentially on the choice of an 'appropriate policy mix', since it is acknowledged that the failure or malfunctioning of one of its component parts may easily disrupt that balance.<sup>97</sup>

#### *New Governance and EU Constitutionalism*

Finally, it is important to recognise that Kilpatrick characterises her rather progressive proposal as 'a strong version of the policy integration thesis'.<sup>98</sup> Her main aim is to encourage a debate on how the interplay of the identified 'constitutional tools' of governance could be enhanced.<sup>99</sup> She therefore discusses, in the second part of her essay, the bearings that different variants of Constitutionalism may have on European employment governance.

More specifically, Kilpatrick examines further what role the European 'governance tools' for employment regulation play in constitutional theorisations of the EU

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<sup>93</sup> Ibid. at 663. Relying on the wording of Article 288 TFEU (binding 'upon each Member State to which it is addressed'; former Article 249 (3) TEC), Scharpf proposes that Member States could organise in groups along the lines of different welfare state traditions (e.g. the Scandinavian model, the Bismarck model etc.) to facilitate consensus on setting general rules by directive binding only the members of a group respectively.

<sup>94</sup> For a recent example and an overview of references, see Klosse (2012).

<sup>95</sup> She bases that conception on the observation that the 'integration of governance tools constitutes already, in a very significant number of employment areas, *actual practice*' [emphasis added, NB]. Kilpatrick (2006) at 131. At the same time, 'more heavily populated' governance spaces now form 'an important and transversal characteristic of EU employment governance'. Ibid. at 142.

<sup>96</sup> Kilpatrick (2006) at 131.

<sup>97</sup> Kilpatrick (2006) at 134.

<sup>98</sup> Ibid. at 134.

<sup>99</sup> Ibid. at 151.

legal order.<sup>100</sup> That examination, however, does not seem to yield fully satisfactory revelations:

‘One of the most difficult, but also stimulating, problems I faced when writing this chapter was that, in considering the relationship between new governance and constitutionalism, the “new governance” path can seem to lead down one constitutionalism path only: that of processual constitutionalism. Although this is a deeply interesting path, it did not seem fully to capture the range of ways in which employment governance was important to debates on EU constitutionalism.’<sup>101</sup>

This acknowledgement points to difficulties in the relationship between New Governance and EU Constitutionalism, which thus served as a conceptual basis for the development of Kilpatrick’s “integrated regime”-thesis on EU employment governance. We will investigate these difficulties in more detail in the next chapter.

## 1.2. RESEARCH QUESTIONS

As noted above, employment regulation is facing a number of serious challenges today. It is not hard to see a correlation in the rise of atypical contractual agreements, growing unemployment and inequality, on the one hand, and the increasing globalisation and Europeanisation of national economies, on the other. Based on the preceding deliberations regarding labour law’s historical role in balancing social inequalities, the question arises as to what contribution the EU can make with regard to safeguarding and promoting workers’ rights. Surely, probing this specific capacity of the Union may be an audacious question in times of rising Eurosceptic populism. Yet, precisely the transnational dimension of the outlined problems underlines the necessity of critical debate and exploring common solutions.

Kilpatrick’s inclusive notion of EU employment governance emphasises the fact that the EU has an increasingly diverse set of regulatory instruments at its disposal with which it influences employment regulation. She re-conceives various governance tools as constituting a “toolkit” that in an integrated manner operationalises the hybridised EU employment objectives. Implicitly, she thus also makes an assumption about the effectiveness of these tools and objectives which she explicitly associates with an overarching “competitiveness-social justice”-paradigm.

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<sup>100</sup> She examines the relations between new EU employment governance and different types of EU Constitutionalism, including two different variants of “transformative constitutionalism” (i.e. “state of nation-states” constitutionalism and processual constitutionalism) and inter-governmental constitutionalism.

<sup>101</sup> Kilpatrick (2006) at 151. She highlights: ‘Processual constitutionalists are not simply making the point that “constitutional” practices should be more expansively defined so as to go all the way down from formal constitutional documents to micro-processes of governance. Their point is that constitutional practices are in fact primarily located and produced in these micro-processes of governance rather than in formal constitutional texts.’ Ibid. at 146.

This (at the time) rather progressive account encourages reviewing how EU employment governance has developed over the past decade. Such analysis should help us gain a better understanding of the existing diversity of EU employment instruments and, especially, how they interact. We thus aim to assess both the development of EU employment governance to the present day and its implications for labour law in Europe.

It is therefore necessary to highlight that this last decade has, above all, been typified by drastic experiences of financial, economic and monetary crises. These have put the EU system to a very serious test and exposed important deficiencies. In response to these crises, the EU governance system has been subjected to far-reaching changes. In the light of these developments, two main research questions will guide the subsequent analysis:

1. Can EU employment governance still be regarded as an integrated regime today?
2. To what extent is the EU (still) meeting its employment objectives through the hybrid interaction of different governance instruments?

Kilpatrick's insights into the 'hybridisation' of EU-level objectives and instruments governing employment matters provide a constructive basis in order to revisit the idea of a European employment governance *regime* in the light of contemporary circumstances. Here, it is important to emphasise that the ensuing analysis is intended to be both explanatory and normative in nature. While we aim to explain how EU employment governance has developed throughout the past decade, we also seek to evaluate the EU's capacity to uphold and promote workers' rights in Europe. Accordingly, the research questions formulated above invite a thorough reflection on the state of EU employment governance today based on which the needs for improvement from a labour law-perspective may be identified. Therefore, a theoretical framework is required that enables us to analyse regime formation and change.

### 1.3. METHODOLOGY: A SOCIO-LEGAL STUDY ON EU EMPLOYMENT GOVERNANCE

When articulating her inclusive conception of EU employment governance, Kilpatrick uses the "regime"-notion deliberately from a legal perspective. Yet, it is important to note that "regime" theory has its roots primarily in the social sciences – notably, international relations theory. To better understand and assess the workings of EU hybrid regulation (such as that occurring in EU employment governance), we aim to espouse a legal approach with the methodological insights from the social sciences. Whereas the latter will help to better understand and explain the complex institutional dynamics at European level, the legal perspective remains vital to construct and advance a normative argument.



Below we will point out the reasons for adopting an interdisciplinary approach to the study of EU employment governance.<sup>102</sup>

### 1.3.1. Combining neo-institutionalist and legal insights

In EU studies, the so-called New Institutionalisms provide the dominant approaches to understanding the role and impact of institutions.<sup>103</sup> In very simplified terms, these can roughly be grouped into two camps, a rationalist and a constructivist one. The two distinguish themselves in the way that they conceptualise actors and institutions. They notably depart from different basic assumptions about what drives actors' behaviour and processes of institutionalisation.<sup>104</sup> Rationalist approaches draw considerably on economic theory and hence focus on rational calculations and the strategic pursuit of self-interest. Constructivist approaches, in contrast, are more influenced by sociology and therefore more concerned with factors of social learning as explanatory variables.

Trubek *et al.* (2006) highlight that 'the so-called rationalist-constructivist divide has been overstated and that the two approaches are in fact more compatible than not'.<sup>105</sup> The fact that the different institutionalist schools study the relation between actors and institutions based on divergent assumptions and using different approaches, does not necessarily exclude their compatibility. Especially in a globalised world like ours, the understanding of complex phenomena may indeed benefit from different logics of explanation.<sup>106</sup>

In fact, questioning the basic assumptions that underpin different modes of explanation will be helpful for working out the subtleties of the varied influence that the EU exerts on employment regulation today. By focusing on the interaction of instruments towards the achievement of common objectives, this study will examine the institutionalisation of hybrid regulatory processes at European level. Insights from the social sciences will thereby be helpful to identify the manifold influences that EU regulation exerts in the employment field, including through non-binding legal instruments. Meanwhile the legal perspective will provide the basis for evaluating these influences.

Accordingly, we will defend a broad conception of both EU governance and law.<sup>107</sup> To understand how the various instruments influence actors' behaviour, it is not

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<sup>102</sup> For the sake of clarification, Chapter 2 will provide more theoretical background on the so-called "governance turn" in European studies and reflect on the implications for the legal discipline of these developments. These general considerations will prepare the ground for a more detailed conceptual analysis in Chapter 3, through which we will construct the analytical framework. See Section 1.4.

<sup>103</sup> See, for instance, Checkel (1999).

<sup>104</sup> Trubek, Cottrell and Nance (2006) at 72.

<sup>105</sup> In reference to Hellmann (2003), see *ibid.* at 92.

<sup>106</sup> Such "synthetic approaches" that recognise this complementarity may therefore be likely to enhance explanations by accounting for different phenomena in different contexts. This is illustrated in a study by Checkel (2001) which 'shows the inter-relationship of rationalist and constructivist accounts by demonstrating that certain institutional contexts are more likely to facilitate argumentative persuasion and social learning. This, in turn, can lead to the reconstitution of interests thus changing rational calculations and fostering compliance'. Trubek *et al.* (2006) at 92.

<sup>107</sup> See Chapter 3.

sufficient to regard law only in a rationalistic fashion – i.e. ‘as a tool for *constraining* the behaviour of actors with fixed preferences’.<sup>108</sup> We must equally be open for the constitutive power of law to function ‘as a *transformative* tool capable of changing the behaviour of actors by altering their identity’.<sup>109</sup> This is based on the recognition that law possesses an inherent normative power that pre-conditions actors’ behaviour.<sup>110</sup>

As a socio-legal study, this thesis thus aims to add value in two ways. First, it draws attention to the fact that EU governance arrangements regarding employment regulation (even though they may have lost their “novelty”-appeal) are still very much alive. While, the employment field has provided fruitful examples for the study of New Governance in the past,<sup>111</sup> more recently, attention seems to have been diverted towards exploring other issue areas.<sup>112</sup> Still, we argue that due to their advanced degree of diversification, a thorough study of the means of EU employment governance and, especially, their interaction among themselves and with other fields, represents a valuable contribution to the “governance” literature because it allows us to discuss further the notion of “hybridity” in the light of current circumstances.<sup>113</sup>

Second, we believe that this thesis will contribute also to the legal literature. Examples of how EU governance has served as a study object for theory development in European employment law may have been less frequent, but no less stimulating.<sup>114</sup> We argue that considering the fundamental challenges that labour law is facing today – and, especially, the increasingly globalised nature of economic activity, individual States are not likely to be equipped adequately to provide appropriate regulatory responses on their own. Instead, the EU – given the advanced stage of its development – ought to have a certain responsibility to address them with common solutions.

More importantly, taking a purely legal approach to this topic would quickly exhaust the options for making normative proposals. The Union’s current political constellation provides very little room for discussing (let alone, implementing) new legislation or Treaty change regarding social issues. Therefore, the socio-legal set-up of this study is ultimately intended to help consideration of politically feasible solutions that are compatible with a legal approach to ensure the continued safeguarding of workers’ rights in Europe.

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<sup>108</sup> Trubek, Cottrell and Nance (2006) at 70.

<sup>109</sup> Ibid. at 70. They explain that the ‘constructivist perspective emphasises law as “a broad social phenomenon deeply embedded in the practices, beliefs, and traditions of societies, and shaped by interaction among societies”’. In reference to Finnemore and Toope (2001), *ibid.*

<sup>110</sup> Cf. Joerges (1996) at 107.

<sup>111</sup> See Chapter 2.

<sup>112</sup> E.g. Armstrong (2013b); or Copeland and B. ter Haar (2015).

<sup>113</sup> See Chapter 3.

<sup>114</sup> For instance, Sciarra, Davies and Freedland (2004); Szyszack (2003), Ashiagbor (2005).

### 1.3.2. A qualitative discourse analysis

It is still important to note that particularly constructivist insights have inspired analytical approaches that combine legal and neo-institutionalist insights.<sup>115</sup> Valuable support can therefore be drawn from the constructivist project that has emerged in EU studies. Constructivist research on the EU focuses on studying the nature of change prompted by the European integration process as a process of constituting a new polity. Typical subjects of constructivist research are ‘the origin and reconstruction of identities, the impact of rules and norms, and the role of language and of political discourses’.<sup>116</sup>

Given their sociological roots, constructive approaches are thus predisposed for studying the role of ideas in EU policy. The school of *Discursive Institutionalism* is particularly appealing for the study of *policy processes*.<sup>117</sup> This school of neo-institutionalism is in principle not confined to the constructivist camp.<sup>118</sup> Yet, precisely in its sociological “guise”, it offers a useful methodological toolkit for analysing EU discourse.

The concept of “discourse” – in the constructivist understanding – has two meanings. Discourse represents a *practice* (i.e. the means of conveying meaning through conceptual articulations, rhetorical speech) but also a *structure* (i.e. through symbols, frames, and narratives).<sup>119</sup> Discourses (as practices) turn into institutions (meaning structures) when the set of rules by which they are governed have become authorised and sanctioned.<sup>120</sup> Importantly, these institutions provide actors with an understanding of their interests and identities. The interaction between agents and structures is consequently mutually constitutive: ‘agents produce and reproduce institutions’ by maintaining or deviating from the existing discursive structures.<sup>121</sup> These interpretations are useful inasmuch as the

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<sup>115</sup> De Schutter and Deakin (2005); Armstrong (2010).

<sup>116</sup> Christiansen, Jørgensen and Wiener (2001) at 12.

<sup>117</sup> ‘What makes discursive institutionalism particularly useful in studies of policy processes is that it stresses the mutual constitutiveness of agents and structures. It points namely to the dynamic interdependence between agents (as sources of experimentation and hence of new ideas), discourses (as the mechanisms for production of meaning), and institutions (as reflections of the dominant meaning structures at a given moment of time).’ Radulova (2011) at 36.

<sup>118</sup> Schmidt (2001, 2010); and Schmidt and Radaelli (2004).

<sup>119</sup> Discursive social studies build on ‘the assumption that to be able to comprehend social phenomena and their development (e.g. institution-building, evolution of policy-making), the processes of inter subjective production of meaning should be examined i.e. the processes of social interaction and meaning exchange – the practice of discourse. In turn, this will provide an understanding of the discursive structure and its evolution.’ Radulova (2011) at 34.

<sup>120</sup> Discursive Institutionalism is based on ‘the assumption that a certain assembly of ideas articulated in the public space over time turns into a rule-based system of concepts and categories’. Radulova explains: ‘These “systems of meaning that order the production of conceptions and interpretations of the social world in a particular context” (Kjær and Pedersen 2001: 220) are denoted as public discourses.’ Ibid. at 35.

<sup>121</sup> ‘Accordingly, political change appears (1) as new ideas are turned into discourse and (2) as discourse is turned into an institution (through the mobilisation (and restructuring) of discourse coalitions. [...] the process of ideas being turned into discourse is one of articulation, and the process of discourse being turned into institutions is one of institutionalization.’ In reference to Lynggaard (2007, 294-295) Radulova (2011) at 35.

subsequent analysis will focus on EU policy discourses as mechanisms for the production of meaning.<sup>122</sup>

On that view, the benefit of adopting an institutionalist framework for the study of the Europeanization of employment governance lies in giving ‘an integrated account of the role of actors and organisational structures, of processes, of substantive rules, discourses, frames and paradigms and their interaction over time’.<sup>123</sup> It offers methodological aids for taking a critical approach to the EU’s policy actions and assessing their implications for the law.<sup>124</sup>

#### 1.4. STRUCTURE OF THE BOOK

The study addresses the development of EU employment governance until today, i.e. a good decade after Kilpatrick’s proposal for an integrative view. The main aim is to assess the multiple ways in which the EU influences national labour law systems and, in particular, the EU’s capacity of upholding and promoting workers’ rights in Europe. The “integrated regime”-thesis thereby serves as a rhetorical aid that will help translate the two main research questions into an analytical framework.

We have proposed above that a *presumption of effectiveness* can be deduced from Kilpatrick’s “integrated regime”-thesis on EU employment governance. This means, the characterisation of EU employment governance as an “integrated regime” builds on the assumption that the mutual interaction between the various dedicated governance instruments effectively contributes to the achievement of the EU employment objectives that emanate from the overarching “competitiveness-social justice”-paradigm. That is why the second research question directly follows from the first: while the discussion of regime dynamics in EU governance may be a rather abstract endeavour, it boils down to assessing whether EU employment governance is (still) effective today in meeting contemporary employment goals. The argument will proceed in several steps whereby in the beginning of each chapter, we will state the particular research question the chapter is aiming to address and place it into the context of the overall line of reasoning.

Having underlined above the advantages of taking an interdisciplinary approach to the study of EU employment governance, Chapter 2 will provide more theoretical background in order to grasp the intricacies that have shaped the relationship between the two schools of New Governance and EU Constitutionalism.

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<sup>122</sup> Diez (2001) elaborates: ‘The contest about concepts is thus a central political struggle (, not only between individuals and groups defending one meaning against another, but also between different ways of constructing “the world” through different sets of languages. The different languages are not employed by actors in a sovereign way. It is the discursive web surrounding each articulation that makes the latter possible, on the one hand (otherwise, it would be meaningless), while the web itself, on the other hand, relies on its reproduction through these articulations.’ In reference to Connolly (1983, at 30), see Diez (2001) at 90.

<sup>123</sup> Cf. Armstrong (2010) at 13.

<sup>124</sup> After all, ‘legal language, like any other language usage, is a social practice and [...] its texts will necessarily bear the imprint of such practice or organisational background’. Goodrich (1984) at 5.

Then, building on Kilpatrick's own recognition of the troubled relationship between the two, we will attempt in Chapter 3 to overcome these conceptual difficulties by re-focusing the problem on the law-governance relationship. This will provide the basis for developing a "framework approach" to the study of EU governance. On that view, the development of EU employment governance will be regarded as part of the broader "architecture" of EU socio-economic governance. That will allow us to recast the "integrated regime"-thesis into a working hypothesis for analysing *what* influences the formation of regimes in the EU context and assessing European *governance capacity* with respect to specific EU objectives. In that way, we will build a conceptual framework to conduct a multi-layered analysis that can answer the main research questions.

In Chapters 4 and 5, we will analyse the broader *context*, outlining how the EU governance architecture has developed. Chapter 4 will focus on the *structural dimension* of that architecture, examining how the EU is configuring its normative aspirations concerning socio-economic governance. Chapter 5 will turn to the *process dimension* of that architecture, analysing how the EU has deliberately cultivated the technique of "integrated coordination" to advance its policy aspirations. Importantly, we will study in particular how – on both levels, structural and procedural – the EU crisis management has affected the broader governance architecture. This will elucidate how, as we argue, the European anti-crisis reforms have led to the creation of a new integrated regime of "EU Economic Governance".

On that basis, Chapters 6 and 7 will analyse whether we can (nonetheless) still regard EU employment governance as an integrated regime today. Chapter 6 will focus on the Union's specific policy aspirations regarding employment regulation. We will describe the source of the hybridised nature of the European employment objectives, considering how the connective narrative of the MSE has been giving purpose to the EU's aspirations regarding employment regulation.

These more theoretical reflections will then provide a basis for fathoming in Chapter 7 the different ways through which the EU influences employment regulation today. Notably, we will examine what implications those developments in the broader EU governance architecture, which were analysed in the previous chapters, have had for European employment governance. Thereby, we will also assess to what extent the EU's dedicated governance instruments (still) contribute effectively to the European employment objectives.

The concluding Chapter 8 then aims to evaluate the Union's governance capacity in the area of employment regulation. It will critically reflect on the question of how much policy space there is today at European level for governance solutions that promote worker protection. Based on the insights of the preceding analysis, we will conclude by discussing how it is possible to strengthen EU employment governance in a way that can create conditions more favourable to discussing and regulating issues of worker protection at EU-level, despite the existing political difficulties.

## Chapter 2: Theoretical background

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### 2.1. INTRODUCTION

This thesis studies the development of EU employment governance and aims to assess its implications for labour law in Europe today. It builds on the inclusive notion of “EU employment governance”, as coined by Kilpatrick (2006), which highlights that the EU has at its disposal an increasingly diverse set of interacting instruments with which it influences employment regulation. She considers EU employment governance deliberately from a legal perspective. Yet, her integrative conception builds on the “regime”-notion that is a term more familiar from the social sciences. Although that concept plays a central role providing “hybrid, poly-centred governance regime”, the notion’s meaning is rather taken for granted.<sup>125</sup>

We have submitted in Chapter 1 that Kilpatrick’s “integrated regime”-thesis has considerable explanatory value but still requires further development for normative use. This insufficiency, in fact, relates to two conceptual shortcomings that arise now from taking an evolutionary interest in EU employment governance. On the one hand, the conceptual basis of Kilpatrick’s proposal – i.e. the inter-relationship between New Governance and EU Constitutionalism – points to some fundamental difficulties in connecting these two approaches through joint theorization. On the other, the analysis of our main research questions pre-supposes a theoretical framework that enables us to fathom processes of regime formation and change.

On that basis, this chapter will serve two purposes. First, it seeks to elucidate the intricacies that have shaped the relationship between the two schools of New Governance and EU Constitutionalism. In Section 2.2., we will start by outlining the increasing differentiation among the instruments of EU regulation, generally, and the ways in which scholarship has responded to these developments. We will discuss how the latter has grappled with the uneasy co-existence of the Union’s legal order and the growing diversity in EU governance instruments (Section 2.3.). The range of conceptual approaches assembled under the two schools of New Governance and EU Constitutionalism is, in fact, illustrative of this struggle. Notably, the attempt of reconciling these two perspectives reveals significant limitations when adopting a binary approach to the law-governance relationship (Section 2.4.). These broader reflections are meant to help, in Chapter 3, to overcome the mentioned difficulties and arrive at a more constructive conceptual basis for the subsequent enquiry.

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<sup>125</sup> From Kilpatrick’s own characterisations, we can merely deduce a vague notion based on rather abstract terms. As explained in Chapter 1, a common set of hybridised objectives together with a greatly expanded and interactive EU governance tool-kit and the presence of participatory governance spaces for the elaboration of EU employment norms comprise the main features of the integrated regime. Kilpatrick bases this characterisation of EU employment governance on the observation that ‘all governance tools are aimed at the effective and legitimate delivery of the same broadly defined set of goals’. Kilpatrick (2006) at 131.

Second, in Section 2.5., we will elaborate the concept of a “governance regime” in more detail. In order to be able to assess whether EU employment governance still represents an integrated regime today, we need to determine in the abstract some general characteristics of regimes as a basis for studying how they form and how they change. Based on a brief review of the literature on regime theory, we will then identify the main components of a governance regime and determine different types of regime change.

## 2.2. UNDERSTANDING THE EUROPEANISATION OF EMPLOYMENT REGULATION

Today, governments are confronted with increasingly complex societal problems, not least through the rise of notorious uncertainty and the demise of traditional borders. Globalisation has unsettled the unity of the nation-state. Fundamental changes have included the emergence of ‘new forms of the flexible modelling of market relations within organisations, and [increased] exchange among variously heterarchical forms of cooperation’.<sup>126</sup> The resulting new forms of governing and multilevel decision-making have been captured by the idea of “governance”. After a short overview of this trend of regulatory differentiation, we will review how academic literature has tried to account for this phenomenon.

### 2.2.1. Growing differentiation among the instruments and techniques of regulation

Traditionally, socio-political organisation of the nation-state has been associated with governing by hierarchy.<sup>127</sup> The influences of globalization and Europeanisation processes, however, have exposed a *transformation* in the way that socio-economic structures and processes are ordered at national level: “The modern state has in fact become more “cooperative”, networks have proliferated, and European integration is a new phenomenon.”<sup>128</sup> They have put the classical regulatory model – structured around the core elements of democratic legislation, administrative implementation, judicial enforcement and dispute resolution – under stress.<sup>129</sup>

Accordingly, the proliferation of new forms of “governance” has been spurred ‘as public policymakers – at local, national, international and transnational levels – [have sought] to maintain social and economic order’.<sup>130</sup> The form of public intervention has changed

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<sup>126</sup> Ladeur (1997) at 44. Rather than merely a simple territorial enlargement of a unitary economic and legal space and political order, Ladeur highlights, ‘the process [of globalization] very crudely so termed is associated with further decentralization of the overall political system, and in particular of the economic system, and thus with a weakening of the importance of territorial units’. Ibid.

<sup>127</sup> The nation-state represents a historical product that coincides with a ‘hierarchical model of unity and “law-governedness”’. Ibid. at 54.

<sup>128</sup> Mayntz (1998) at 25.

<sup>129</sup> ‘The production of decisional knowledge required to cope with highly complex economic problems – that is, those characterised by uncertainty of various kinds – can no longer be generated spontaneously by testing and gaining experience through competition alone. [...] It is no longer possible to make a clear distinction between private and public contributions to the management of highly unstructured problems.’ Ladeur (1997) at 45.

<sup>130</sup> Armstrong (2013b) at 5.

owing to processes of decentralisation and the increasing relevance of systems of deliberation. Systems of societal self-regulation and of transnational policy networks have emerged that blur traditional dichotomies as between the public and the private, or the national and the international, accompanying rolling changes in economic organisation.

The EU can be regarded as both an effect and a cause in relation to these developments. On the one hand, European integration has been the *outcome* of targeted international cooperation in search of solutions for collective action problems (initially, focused on trade cooperation as a basis for peace). This cooperation became increasingly trans-nationalised involving a growing variety of (non-governmental) actors, as EU activities extended increasingly into more and more subject areas.<sup>131</sup>

On the other, the proliferation of European regulation and the gradual consolidation of an autonomous EU legal order increasingly prompted the *adaptation* of national systems. According to Mayntz (2009), by soliciting the transfer of domestic policy competences to the supra-national level, the process of EU integration has led to ‘a genuine loss – of control capacity for national governments’.<sup>132</sup>

As the EU’s influence has gradually grown, also the common expectations regarding the capacities of the European institutions have increased. In the late 1990s, for instance, the EU faced a “deep-seated” institutional crisis. The demise of the Santer Commission in 1999 highlighted demands for institutional renewal.<sup>133</sup> It has been argued that the Commission’s ‘very institutional survival depended on a package of reforms, in which [its] activities were opened-up to greater external scrutiny’.<sup>134</sup> This provided important stimulus for change regarding the means and ways of promoting European integration.

Consequently, as the Union’s objectives have been gradually expanded, especially with progressing economic and monetary integration, the pool of means and methods at the Union’s disposal to implement those growing ambitions has grown. The institutionalisation of the European Social Dialogue (ESD), the Comitology procedure and the OMC represent the more prominent manifestations of this trend. Yet, these certainly do not exhaust the range of evolving techniques.<sup>135</sup> The role of non-binding steering instruments such as

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<sup>131</sup> Polity building in the EU has hence also been described as instituting a heterarchical system of social order in the context of territorial dispersion. Ladeur (1997) at 54.

<sup>132</sup> In reference to Scharpf (1997), Mayntz (1998) at 18. With respect to the rise of forms of self-regulation, however, Mayntz cautions against overstating a loss of state control. She emphasises in this regard: ‘Societal self-regulation takes place, after all, within an institutional framework that is underwritten by the state. [...] Thus, hierarchical control and societal self-regulation are not mutually exclusive. They are different ordering principles which are very often combined, and their combination, self-regulation “in the shadow of hierarchy”, can be more effective than either of the “pure” governance forms.’ Ibid. at 20.

<sup>133</sup> The European Parliament’s sudden discharge of the Santer Commission in 1999 related to serious concerns about the Commission’s handling of a major public health emergency (i.e. the BSE crisis in the late 1990s).

<sup>134</sup> Dawson (2011b) at 210.

<sup>135</sup> The institutionalisation of coordination processes for the monitoring of economic and employment policies that progressed from the mid-1990s represented an intentional departure from traditional harmonisation. At the turn of the millennium these processes were embedded within a



Communications, guidelines, codes and declarations etc. – commonly referred to as “soft law” – has therefore been increasing.<sup>136</sup> At the same time, the processes of norm production and norm implementation have become blended, as there has been a growing reliance on methods of self-regulation, co-regulation, and coordination.<sup>137</sup> In fact, policy-makers have often turned to the private sector for both – its potential of conferring legitimacy as an alternative channel of rule-making and implementation,<sup>138</sup> and using it as inspiration on instrumental design.<sup>139</sup>

### 2.2.2. The “governance turn”

As the progress of European integration has thus increasingly ‘blurred the distinction between domestic politics and international relations’, Jachtenfuchs (2001) highlights that scholarship has felt the need to respond by more nuanced demarcation.<sup>140</sup> EU integration studies were initially mainly concerned with the progress of international cooperation in (European) regional integration. The focus was on conceptualizing and investigating the process of European integration, concentrating on the transfer of national sovereignty to supra-national institutions.<sup>141</sup> The advancement of the European project increasingly challenged the established division of labour in political science because it ‘brought into question the assumption of the internally and externally sovereign nation-state’.<sup>142</sup>

The so-called “governance turn” in European studies, then, coincided with the impetus injected by the Single European Act into the stagnating European integration process and the corresponding policy initiatives that culminated in the birth of the European Union in 1992.<sup>143</sup> In the literature, for one, this stimulus revived questions of classical integration theory – in the form of modern inter-governmentalism and neo-functionalism – aimed at explaining the creation of a European polity. From a governance perspective, in turn, the polity-idea was now taken for granted and provided the point of departure.<sup>144</sup> Here,

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broader strategic framework, the Lisbon Agenda, and the OMC was born and extended to monitoring other matters of social policy (such as, poverty reduction and social inclusion).

<sup>136</sup> This will be further elaborated in Chapter 3.

<sup>137</sup> Armstrong (2013).

<sup>138</sup> EU governance has been characterised by the rise of “regulatory politics” and the spread of public-private policy networks. Kohler-Koch and Rittberger (2006) at 33.

<sup>139</sup> For instance, the tool of benchmarking – a central element of European policy coordination – has been an invention of the private sector that originated in corporate management practice. See Lobel (2004) at 286 Ashiagbor (2005) at 200-208; and Velluti (2013) at 10.

<sup>140</sup> Jachtenfuchs (2001) at 249.

<sup>141</sup> Cf. Wiener and Diez (2009).

<sup>142</sup> Hitherto, specialization in comparative politics and policy analysis, on the one hand, and international relations, on the other, had been founded in the “as if”-assumption on the separation of States’ external and internal affairs. Jachtenfuchs (2001) at 249.

<sup>143</sup> Kohler-Koch and Rittberger (2006) at 32.

<sup>144</sup> Departing from the existence of the European polity, three major strands developed in integration studies: ‘the Europeanisation of policies and politics; the rise of regulatory policy-making; and [later] the emergence of a new mode of governance’. Jachtenfuchs (2001) at 249.

the research focus shifted towards ‘the impact of the Euro-polity on national and European policies and politics.’<sup>145</sup>

Peters and Pierre (2009) explain that accounts which focus on “governance” in EU studies generally maintain a functional rationale:

‘The basic logic of the governance concept, therefore, is that an effective society requires some set of mechanisms for identifying common problems, deciding upon goals, and then designing and implementing the means to achieve those purposes.’<sup>146</sup>

The governance notion is characterised by conceptual vagueness, which has allowed for multi-faceted application in diverse contexts.<sup>147</sup> Therefore, it seems useful to conceive “governance” broadly ‘as an extremely complex process involving multiple actors pursuing a wide range of individual and organisational goals, as well as pursuing the collective goals of the society’.<sup>148</sup> This conception indicates the multi-dimensionality of the phenomenon and is therefore considered adequate as a basis for the subsequent discussion.

### 2.2.3. Studying the EU polity and its capacity for employment regulation

It is worth clarifying that in relation to governance, the EU can be approached from a number of perspectives. As indicated above, it cannot only be seen as a ‘cause of changes to domestic governance’ but also as an *effect* of the transformation of the nation-state.<sup>149</sup> In fact, both phenomena have been captured by the multi-faceted notion of *Europeanisation*.<sup>150</sup> When understood as a “cause”, Europeanisation refers to a process of *domestic adaptation* triggered by EU governance.<sup>151</sup> When EU governance is understood as “effect”,<sup>152</sup> it is essentially

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<sup>145</sup> Ibid. at 250. It was in this context that questions of EU “government” and governance – policy-making and co-ordination – began to challenge “European integration” as the first and foremost focus of scholarly research in EU studies.’ Kohler-Koch and Rittberger (2006) at 32.

<sup>146</sup> Peters and Pierre (2009) at 91-92.

<sup>147</sup> Kohler-Koch and Rittberger (2006) at 28-29.

<sup>148</sup> Peters and Pierre (2009) at 92. See, for example, the following definition: ‘In conclusion, at a relatively high level of abstraction, governance can be defined as a co-production mode of decision-making among different actors, while the type of actors involved, the extent of involvement of public authorities and of partners, the outcome of the production, the decision procedures, as well as the institutional context and the type and role of sanctions all vary and define different kinds of governance mode.’ Bartolini (2011) at 11-12.

<sup>149</sup> K. Armstrong (2010) at 8.

<sup>150</sup> According to Olsen (2002), one can distinguish five forms of Europeanisation. Next to institution-building and national adaption, he identifies the Union’s efforts to consolidate its territorial space through enlargement and to export forms of political organisation by fostering external partnership, particularly with its Eastern neighbours. All four, Olsen argues, feed into an all-encompassing process of *political unification*. Ibid.

<sup>151</sup> This means EU governance posits as a driver of national adjustment. It requires domestic systems to adapt to the fragmentation of authority and the pluralisation of sites of governance in order to address new kinds of problems arising in a globalised world.

<sup>152</sup> In other words, the EU governance system represents a highly advanced degree of transnational cooperation that has become institutionalised in response to the reduced governing and problem-solving capacity at state level.

conceptualised as a process of *institution-building* to create collective action capacity at European level. Here, we regard EU governance as a central process that further shapes the formation of the supra-national polity. As that view turns the EU into a *subject* of governance, it can be conceived and studied ‘as an evolving system of governance in its own right’.<sup>153</sup>

These explanations help to categorise our own study of EU governance. Our aim is to study the impact of EU governance on employment regulation. This is based on the recognition that nowadays European regulation exerts manifold influences in the employment field. By analysing these, we are trying to better understand in which ways the EU exerts influence and what implications this has particularly for the protection of workers’ rights in the EU. This means, we will study EU governance as an evolving system in its own right. Thereby, we will consider in more detail the processes of *institution-building*, since the Europeanisation of employment regulation concerns policy domains that have long been reserved to national decision-making. Accordingly, we understand the institutionalisation of new governance arrangements or reconfiguration of existing ones as contributing to the broader development of polity-formation at European level. We recognise that the Union provides a *post-national* context in which the law-governance relationship takes shape.<sup>154</sup>

Although the conception of the EU as a polity provides our conceptual point of departure, we certainly do not regard the nation-state as “dead”.<sup>155</sup> As explained above, we recognise how in the face of economic globalisation, European integration and other impulses, the structures of political authority and regulatory prerogatives have been changing. Analysing the processes of domestic adaptation (i.e. those in response to EU influences), however, is beyond the scope of this study.<sup>156</sup> This is because EU governance has today achieved such a degree of complexity that it is worthwhile focusing on the diversified instruments and hybridised processes located at European level alone and trying to comprehend their legal effects. Still, the insights gained from this study of EU employment governance may provide a fruitful basis for future research into domestic effects.<sup>157</sup>

### 2.3. IMPLICATIONS FOR THE CONCEPT OF LAW

While the European integration process has been exerting great appeal as a study object on political scientists and lawyers alike,<sup>158</sup> the study of “governance” has traditionally been the

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<sup>153</sup> Cf. Armstrong (2010) at 8.

<sup>154</sup> On the necessity of such recognition, see Dawson (2013). See also Section 2.4.1. below.

<sup>155</sup> If anything, the recent UK referendum on the country’s exit from the EU reaffirms once more how nationalism is very much alive. Hence, rather on the contrary, the idea that some sovereignty is retained at Member State level is integral to the EU system of multilevel governance and the idea of subsidiarity among its main ordering principles. Cf. Büttgen (2013); see also Aalberts (2004).

<sup>156</sup> Nonetheless, insights from that branch of the Europeanisation literature will still be helpful to fine-tune – where appropriate – the design of the subsequent analysis. See, for instance, Chapter 5.

<sup>157</sup> See Chapter 8.

<sup>158</sup> Cf. Joerges (1996).

focus of social scientists.<sup>159</sup> Especially, the evolution of political theory reflected the processes of change, through successive modification of the theory of political governance.<sup>160</sup> In order to understand better what “governance” at European level means, it is useful to review briefly, how social science scholarship has adapted this idea to the EU context.

### 2.3.1. Developing the idea of New Governance

Following the governance turn, academic interest increasingly focused attention on the process of policy formulation and implementation in the EU. Notably, under the label of “New Governance” the aim was ‘to map and taxonomize the range of modes and instruments of EU governance, while reflecting upon the scope conditions for their emergence and successful operation when applied to a range of policy problems’.<sup>161</sup>

The continuing differentiation of regulatory means and methods at Union level also gave new impetus to the long-standing discussion of the tension between inter-governmentalism and supra-nationalism inherent to processes of Europeanisation.<sup>162</sup> Kohler-Koch and Rittberger (2006), in effect, observe that at the institutional level, the introduction of new instruments ‘was a reaction to the imminent risk of deadlock in Community decision-making’.<sup>163</sup> The “softness” of means has been promoted deliberately as a core characteristic, owing to which new forms of governance had the capacity to ensure a continuing – albeit transforming – role for the European Commission in directing European integration.<sup>164</sup> In its 2001 White Paper on European Governance, the EU Executive was eager to underline that such new tools were not intended to replace traditional instruments of harmonisation but merely to complement them where Union competence was limited.<sup>165</sup> For the Member States, too, the soft instruments offered advantages. They could provide ‘[q]uick fixes to immediate social and economic problems, such as encouraging active labour market policies, [that] could be developed and agreed upon, without governments being bound to long-term commitments that might quickly turn domestically unpopular’.<sup>166</sup>

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<sup>159</sup> Social science scholarship has had to account for the ‘overlap amongst the various national, supra-national and transnational components of the integration of systems of law, politics and economics, seen as non-personal communication networks’. Ladeur (1997) at 43.

<sup>160</sup> The theory of political governance developed from the idea of political ‘steering’, over indicating ‘a new mode of governing’ to denoting ‘the different modes of coordinating individual actions, or basic forms of social order’. Mayntz (1998) at 13-14.

<sup>161</sup> Armstrong (2013) at 5.

<sup>162</sup> Ashiagbor (2005).

<sup>163</sup> Kohler-Koch and Rittberger (2006) at 36.

<sup>164</sup> Dawson observes critically: “New governance” thus allowed EU leaders to engage in an attractive game of “double-bluff” in which EU officials could pretend they were decentralising power, whilst retaining a central policy-making role, and national governments could create pan-European responses to common challenges while making out that they were not significantly “Europeanising” national policy at all.’ In reference to Büchs (2008), see Dawson (2011b) at 210.

<sup>165</sup> European Commission, *European Governance – A White Paper* (COM(2001) 428 final, (2001/C 287/01), Brussels, 2001).

<sup>166</sup> Dawson (2011b) at 211.

Accordingly, the initial focus of the literature on New Governance was on distinguishing these “new” methods of governance from traditional forms of regulation in order to determine what was novel about them.<sup>167</sup> A popular approach has therefore been to apply a minimal definition by means of opposites. This deliberately distinguishes the governance-idea from “government” as well as from pure forms of self-regulation, compulsory methods of rule-making and processes of institutionalisation.<sup>168</sup>

### 2.3.2. The challenge for legal theorisation

Importantly, the field of New Governance provided a useful frame of reference within which also the legal discipline could launch a more systematic enquiry into the role of “soft” regulatory arrangements.<sup>169</sup> In particular, the Europeanisation of employment regulation presented a resourceful theme. It has provided a wealth of information for legal case studies and theory development of New Governance.<sup>170</sup>

Lawyers’ attention has, for instance, embraced the role of such new regulatory processes like the ESD and the OMC at EU level.<sup>171</sup> In procedural terms, these processes signalled a departure from a traditional ideal-type of regulation with the production of binding norms in the hands of the legislature, norm implementation organised by the executive, and the judiciary being responsible for the interpretation and enforcement of norms. The institutionalisation of the ESD, for instance, accorded recognition to private actors in the processes of public rule-making at the European level. Coordination, instead, relied on national reporting with regard to domestic policy action taken to implement commonly agreed guidelines and coordinated among a broad set of actors.<sup>172</sup>

#### A) Three “waves” of theory development

Dawson (2011b) provides an illustrative account of how the literature on New Governance has evolved in “three waves”. As indicated above, the early attempts at theorisation conceived as opposed to “traditional” law has been characterised by what De Búrca and Walker denote as the ‘separation orientation’.<sup>173</sup> Dawson highlights that this *first wave* ‘was vital in order to tell us what new governance really was, or what drew its disparate processes together’.<sup>174</sup> Indeed, one of the major conceptual challenges at this stage has been how to

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<sup>167</sup> Cf. De La Porte and Pochet (2002).

<sup>168</sup> Bartolini (2011) at 7-11.

<sup>169</sup> In 1994, Francis Snyder had already provided an authoritative analysis of the contribution of non-binding instruments to the effectiveness of European regulation. Snyder (1994).

<sup>170</sup> See, for instance, Trubek and Mosher (2003).

<sup>171</sup> In fact, the evolution of EU regulatory techniques captured the interest of labour lawyers in particular, as they thought to assess how such new processes interacted with and impacted on traditional forms of regulation. See, for example, Sciarra, Davies and Freedland (2004); see also Ashiagbor (2005).

<sup>172</sup> In order to measure progress towards common objectives, the technique of benchmarking was introduced to compare national reforms against a European frame of reference. This will be discussed in detail in Chapter 5.

<sup>173</sup> Walker and De Búrca (2007) at 521-522.

<sup>174</sup> Dawson (2011b) at 213.

accommodate the differentiation and pluralisation of EU governance within legal discourse.<sup>175</sup> Dawson pinpoints the core problem as follows:

‘We have legal effects (governance) but not legal responsibility (a set of rules or actors that can be checked to see if, in fact, the correct plan of action is being carried out). While this displacement of a guiding authority deprives governance of much of the clarity and security of the law, it also provides advantages of its own.’<sup>176</sup>

Hence, in the beginning, the focus often lay on determining the general characteristics of New Governance,<sup>177</sup> which was conducive to thinking in dichotomies. This is already apparent in the term of “New Governance” itself, implying comparison with an archetypal “old” style of governance or “government”. That was problematic, because it risked producing overly stylised accounts.<sup>178</sup> Dawson warns that such a “binary approach” essentially ‘blinded early scholarship to the depth of interaction and continuity between its processes’.<sup>179</sup>

The attempt to overcome this proposition of separation between law and governance signalled the emergence of what Dawson refers to as the *second wave* that viewed law and governance as ‘merged into’ each other rather than disparate phenomena.<sup>180</sup> This conceptual amalgamation built on enquiries that started to open up the conception of law itself: ‘like national law, EU law had to be understood as an inherently unstable medium, capable of responding to changes in its surrounding environment’.<sup>181</sup> New Governance was no longer ‘seen as external to law but as part of law’s transformation in a new post-national context’.<sup>182</sup> Thereby, New Governance scholarship – and, in particular, the experimentalist school<sup>183</sup> – took a turn towards the ‘absorption orientation’ considering governance as ‘something that in principle may be fully incorporated within our understanding of law’.<sup>184</sup> This, however, was coupled with a ‘capacity to over-reach itself, both descriptively and normatively’, which Dawson highlights as ‘the primary problem of the “second wave”’.<sup>185</sup>

In order to proceed to the next stage, he adds, it was necessary to discard both the separation and absorption theses when conceiving the law-governance relationship. The emergence of the *third wave* builds on the view that conceives of this relationship as ‘distinct

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<sup>175</sup> Cf. Armstrong (2013) at 25-27.

<sup>176</sup> Dawson (2011b) at 210.

<sup>177</sup> Scott and Trubek, notably, summarise these general properties as including ‘participation and power-sharing’, ‘multi-level integration’, ‘diversity and decentralization’, ‘deliberation’, ‘flexibility and revisability of norms’, and ‘experimentation and knowledge-creation’. Scott and Trubek (2002) at 5-6.

<sup>178</sup> This, too, will be discussed in more detail in Chapter 3.

<sup>179</sup> Dawson (2011b) at 213. In fact, there seemed to be a certain ‘lack of understanding and consensus over what “new governance” really means’. In reference to Möllers (2006), see *ibid.* at 209. See also Velluti (2013) at 17.

<sup>180</sup> Dawson (2011b) at 214-215.

<sup>181</sup> *Ibid.* at 213-214.

<sup>182</sup> *Ibid.*

<sup>183</sup> E.g. Sabel and Zeitlin (2008) 271–327.

<sup>184</sup> Walker and de Búrca (2007) at 522.

<sup>185</sup> Dawson (2011b) at 215.

yet complementary'.<sup>186</sup> Dawson considers this stage rather promising, offering new opportunities of theorisation by 'focusing on a renewed interaction between new governance procedures and "traditional" forms of EU law'.<sup>187</sup>

#### B) The binary approach to conceptualising the law-governance relationship

In sum, New Governance starts from the assumption that the means and structures of societal ordering have been changing. This body of literature convenes accounts that capture the ways and products of this transformation (often also associated with the transformation of the nation-state). The proliferation of different modes and instruments of governance at EU-level brings to light the peculiarities of the Union system and its integration process, such as its multi-level and multi-speed nature and its multi-polar decision-making structures.

A key characteristic of this school of thought is its inherent tendency of conceiving the relationship between law and governance in oppositional terms. This binary approach is particularly reflected in the presumption of the "softness" of new forms of governance, which has been the focus of both proponents' and critics' attention – including lawyers'. So for a large part, New Governance theorisation has concentrated on establishing how instruments and processes of governance are distinct from traditional legal regulation.<sup>188</sup> Such binary conception has resulted in 'a distancing of new governance both from the Community Method and potentially from law itself'.<sup>189</sup> In effect, it has produced a preference for framing these discussions in terms of dichotomous attributes (e.g. distinguishing between "old" and "new" governance or between "hard" and "soft" law).

In fact, Walker (2006) expounds the problem that the binary approach 'comes very close to defining new governance as the antithesis of legal ordering as commonly conceived, and so, by inference, of constitutional ordering as the most fundamental level of legal discourse'.<sup>190</sup>

## 2.4. THEORIZING ENCOUNTERS BETWEEN EU CONSTITUTIONALISM AND NEW GOVERNANCE

The preceding review shows the attempts of the legal discipline to come to terms with the notion of New Governance. It reveals that a crucial challenge lies in the existence of pre-conceived ideas about law and its role as an institution of social ordering. Against this backdrop, it is also necessary to review briefly what role constitutionalist approaches have

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<sup>186</sup> Ibid.

<sup>187</sup> Dawson perceives a particular promise in the fact that the 'complementarity of new governance and law, therefore, may not only provide new governance, but also law itself with important decision-making tools'. Ibid. at 217, 224.

<sup>188</sup> Here the focus often lay on determining the general characteristics of New Governance, e.g. including 'participation and power-sharing', 'multi-level integration', 'diversity and decentralization', 'deliberation', 'flexibility and revisability of norms', and 'experimentation and knowledge-creation'. Scott and Trubek (2002) at 5-6.

<sup>189</sup> Armstrong (2013) at 25.

<sup>190</sup> Walker (2006) at 22.

played in the EU context. Then, we will discuss how the troubled relationship between New Governance and EU Constitutionalism is actually reflecting the uneasy co-existence of the Union legal order and the growing diversity in European regulatory tools and techniques.

#### 2.4.1. The post national challenge of EU Constitutionalism

Since its inception, a core question of European integration has been what its legal nature is.<sup>191</sup> Among many competing explanations and attempts at theorisation, the “constitutional narrative” came out as the ‘master narrative’.<sup>192</sup> Since the 1980s, constitutional language has significantly dominated the social construction of the EU’s multi-level legal order.<sup>193</sup>

With the turn of the millennium, as the EU started to mature as a polity, the practices of integration however started to reveal an increasing discrepancy between theory and practice.<sup>194</sup> This became manifest, in 2005, in the failure of the EU’s own Constitutional Treaty to pass the ratification stage. While this failure certainly meant a serious setback for the advocates of nominal Constitutionalism, it did not however abandon the conception of the Union as a self-standing constitutional order.<sup>195</sup>

A key characteristic of constitutionalist approaches is their being preoccupied with the delimitation of regulatory competences and the legal structuring of economic and social relations.<sup>196</sup> They are mainly concerned with mechanisms that ensure the structure and legitimacy of government and the accountability of public actors to safeguard democratic order. While this description amounts to a very broad simplification, it roughly depicts the functions of Constitutionalism as occurring both at national and at European level.

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<sup>191</sup> This fundamental question represents ‘a query about what integration stands for (the descriptive dimension), how it is to be explained and construed (the explanatory dimension) and eventually what it should stand for (the normative dimension).’ Avbelj (2008) at 1.

<sup>192</sup> Ibid.

<sup>193</sup> Cf. Weiler (1982, 1991).

<sup>194</sup> ‘The constitutional language has been used widely and fairly indiscriminately. Its tag has been attached to numerous elements of the European integration, ranging from the Treaty as a constitutional charter to the constitution of external relations and even to the constitutionalism of comitology. It has become almost *en vogue* to use constitutional terms. However, at the same time and while this EU constitutional adobe lasted, that is in the very heyday of the EU constitutional narrative, the practices of integration, just recall the failed documentary constitutionalization episode, refused to follow the dominant constitutional suite.’ Avbelj (2008) at 2.

<sup>195</sup> In fact, conceptualisations of the Union’s constitutional order now tend to highlight its more dynamic qualities and the multifariousness of constitutionalist approaches to account for the multilevel system of the EU. See, for instance, *ibid.*

<sup>196</sup> Walker describes Constitutionalism as a ‘form of social technology’ that operates based on ‘normative’, ‘epistemic’, and ‘motivational’ assumptions. He depicts the socio-technological interplay between these aspirations as the ‘staple puzzle’ of Constitutionalism. The normative dimension refers to ‘the basic aims of the constitution’ (notably incorporating ‘versions of good society’). Epistemic assumptions denote ‘the understanding of the key generative mechanisms – or, self-understanding – of the political society in question’. Last but not least, motivational aspirations embrace ‘the capacity of the Constitution to encourage human agents to activate these generative mechanisms and to provide them with institutions which enable them to do so in a way that is consistent with the Constitution’s normative aspirations’. Walker (2006) at 17.



Walker outlines how the development of European Constitutionalism has been characterized by particularly four themes – namely, nominalism, textualism, hierarchy and self-containment.<sup>197</sup> All four, he underlines, reveal to greater or lesser extent the mark of the constitutionalist State tradition. In effect, the different features expose the constitutionalist theorization as being generally inclined towards establishing ‘a discrete political order which best regulates itself in accordance with a unitary framework of authority’.<sup>198</sup>

This tendency however fits rather uncomfortably in accounts on the EU’s constitutional order. Shaw and Wiener (1999) point out that there is a ‘tension between the formal and the abstract in EU constitutionalism’, which reveals ‘the continuing paradoxical relationship between a non-state polity and a touch of stateness presented often implicitly in analyses of this polity’.<sup>199</sup> This means, in essence, constitutionalist approaches struggle to capture fully the intricacies of the contemporary EU system. Shaw (2001) explains the cause for this inherent struggle, as follows:

‘Constitutionalism in its modern guise cannot on its own provide the answers, and leaves untouched the key questions because it is impossible to make in the EU context many of the assumptions about notions of political community which implicitly drive much liberal and communitarian political theory. The challenge for the EU is that of capturing the essence of post nationalism, and combining it with understanding the process of building a new kind of polity which is based on the existing diversity of the Member States. This is the challenge of building a link between integration and constitutionalism.’<sup>200</sup>

In view of this thesis’ primary focus on EU employment governance, we should also mention that constitutional theory has also long been playing a role in labour law. For example, there has been recent interest in reviving long-standing ideas about the constitutional embedding of labour relations and re-applying them in contemporary contexts.<sup>201</sup> For the European level in particular, also Kilpatrick has pinpointed the importance of the “constitutionalisation” of fundamental social rights.<sup>202</sup> The Union by now possesses its own catalogue of fundamental rights, the CFREU, the adoption of which – despite all its controversy – has been considered a landmark achievement.

#### **2.4.2. A strained relationship based in a fundamental paradox**

Based on the above characterisations, we will now deliberate further, how the debate on the relationship between New Governance and EU Constitutionalism epitomises the question of accommodating the “governance” idea within legal discourse.<sup>203</sup> This relationship, in fact,

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<sup>197</sup> Ibid. at 16-21.

<sup>198</sup> Ibid. at 21.

<sup>199</sup> Shaw and Wiener (2000) at 23.

<sup>200</sup> Shaw (2001) at 73.

<sup>201</sup> See van Peijpe (1993), see also Dukes (2011).

<sup>202</sup> Kilpatrick (2006) at 125.

<sup>203</sup> This emerged as a central theme from the somewhat awkward concurrence of the pro-active expansion of the OMC and the debates emanating from the Convention on the Future of Europe (2002-2003). Cf. de Búrca (2003).

circumscribes conceptual attempts of ‘connecting changing patterns of governance to contemporary debates about European constitutionalism and democracy.’<sup>204</sup>

#### A) The difficulties in jointly theorising New Governance and EU Constitutionalism

These efforts, however, have been typified by a serious tension, which different scholars have picked up on. We have already seen above how the attempt of accommodating employment governance instruments within constitutionalist accounts of the EU legal order leaves Kilpatrick somewhat disillusioned. This disenchantment is grounded in the latter’s failure to take fully account of the relevance of the former. Also, de Búrca (2003) ponders the question of how the problems of New Governance<sup>205</sup> might be addressed based on a renewal of the European constitutional model.<sup>206</sup> Emphasizing how both schools have their short-comings, she proposes that – at least, in theory – constitutional renewal could facilitate mutual complementarity for both schools’ respective promise of providing what the other is not. Nonetheless, the actual experience of the European Convention to deliberate on the Constitutional Treaty mainly produced disappointing results in that respect.<sup>207</sup> Armstrong (2008), in turn, considers it necessary to conceive of New Governance instruments as occupying an ‘unsettled constitutional space characterized by a range of potential encounters between Constitutionalism and New Governance’.<sup>208</sup> He showcases some encounters that exhibit “transformative” potential if the two schools’ relationship is considered reciprocal.<sup>209</sup> Still, ultimately he, too, recognizes certain limitations to the adaptability of the EU’s fundamental legal order inherent to the logic of constitutionalisation.<sup>210</sup>

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<sup>204</sup> Armstrong and Kilpatrick (2007) at 658.

<sup>205</sup> At the example of the OMC, de Búrca highlights three problems of the emerging forms of New Governance: “The problems concern first, the risk that built into the very edifice of the OMC is a subordination of social policy priorities to the imperatives of economic policy coordination; secondly, the role of rights within the OMC, and thirdly the genuineness of the commitment to participation and transparency.” Each of these she discusses ‘with some reflections on how elements of a renewed model of European constitutionalism might offer ways forward in addressing these’. de Búrca (2003) at 22.

<sup>206</sup> De Búrca also stresses how the prevailing model of EU Constitutionalism is in need of “renewal”: ‘An optimistic reading of some recent developments would suggest that the traditional model of EU constitutionalism depicted earlier with its emphasis on entrenched economic rights, limited powers, and formal organs of government is gradually being challenged by demands for and the emergence of a form of post-national constitutionalism which is founded on the notions of participation, equality and self-government.’ De Búrca (2003) at 21.

<sup>207</sup> ‘The emphasis on the need to delimit and clarify the respective competences of the EU and the Member States, and to underscore and safeguard the traditional Community legislative methods, militated in the end against an open embrace within the new constitutional treaty of the OMC.’ De Búrca 31.

<sup>208</sup> Armstrong (2008) at 425.

<sup>209</sup> He illustrates this at the example of ‘three constitutional frames – competence, subsidiarity and fundamental rights – and their relationship to the emergent OMC’. Ibid. at 417. He illustrates how Constitutionalism can provide a critical ‘lens’ through which EU governance arrangements, in this case ‘the Lisbon governance architecture’, can be analysed. See, for example, ibid. at 419, 421.

<sup>210</sup> He concludes by utilising an expedient metaphor advanced by Weiler (1997) regarding EU Constitutionalism as the Union’s ‘operating system’ underlying and shaping the governance ‘programmes’: ‘In part this [operating] system adapts to the emergence of New Governance and yet

The apprehension that characterises all these attempts at joint theorisation of EU Constitutionalism and New Governance can be explained as follows. Walker (2006) ascribes the source of these difficulties to some deep-seated legacies that underpin both schools.

Constitutionalist approaches seem to struggle with freeing themselves from thinking and language that have become cultivated within the mental framework of the constitutional nation-state. As constitutional ideas have been fostered generally in reference to a unitary framework of authority, Constitutionalism is bound to struggle with paradox when applied to the supranational setting of the EU multilevel system with a multifocal framework of authority. In contrast, New Governance appears mainly driven by the desire to theorise the deliberate departure from that same unitary form of political organisation. It seems ‘engaged in an apparent trade-off between effectiveness and legitimacy’.<sup>211</sup> Any attempt at joint theorisation is therefore prone to conceptual friction caused by the constitutionalist legacy of the statist tradition and the inherent binary logic that characterises New Governance.

This is problematic because, in practice, insights from both schools of thought will be useful to make sense of the complex workings of the EU system and theorise about possible improvements.<sup>212</sup> On the one hand, law has been and still is playing a central role in the process of European integration (as do sovereign states).<sup>213</sup> On the other, the “governance” paradigm appears very resourceful when it comes to accounting for the increasing variety of regulatory tools and the spread of authority among multiple decision-making sites – carrying a promise of being able to enhance the EU’s rather meagre democratic credentials.

#### B) The uneasy co-existence of the Union legal order and EU governance

Nevertheless, the risk remains that any conceptualization combining arguments from both camps would struggle at some point with one of these legacies.<sup>214</sup> Therefore, it is necessary

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at the same time, it remains largely pre-occupied with constitutionalising governance through the legislative process.’ Ibid. at 426.

<sup>211</sup> The institutionalisation of NMGs has been characterised by the aim of ‘forging a middle path between inter-governmental control and EU action, [...] with the need for rapid policy solutions seemingly placed above the traditional exercise in negotiating and balancing national and European constituencies so central to legislative procedures in the past.’ Dawson (2011b) at 211.

<sup>212</sup> De Burca (2003) highlights the need for renewal concerning the ‘traditional model of EU constitutionalism, premised on a functionally limited system based on entrenched market-liberalisation norms and administered by a set of formal EU institutions’, while she recognises ‘the existence of a dense and complex system of multi-level governance spreading into all fields of policy’ raises questions about legitimacy and accountability regarding norm formulation and implementation.

<sup>213</sup> Dawson (2013) highlights law’s crucial functions as ‘object’ and ‘agent’ of European integration – as, for instance, captured by Weiler’s infamous “integration through law”-paradigm. Dawson (2013) at 221-241. This has produced a self-standing legal order founded on the EU Treaties as a constitutional basis and the continuing relevance of legislation and judicial enforcement. Cf. Dehousse (2011); see also Aalberts (2004).

<sup>214</sup> This is further reflected in concerns about an increasing misalignment between the Union’s constitutional order, as cast within the confines of the Lisbon Treaty, and its governance architecture,

to recognise that the true source of the problem lies somewhere else. Velluti (2013) intimates that a fundamental paradox lies at the heart of the EU system:

‘New Governance well-illustrates the paradoxical nature of the EU’s constitutional system: a fundamental tension between EU constitutionalism based on limited EU powers, clarity in the division of competences between States and the EU, on the one hand and the reality of a highly reflexive and pragmatic form of governance entailing the expansion of EU activity into virtually all policy fields (which critics define as “creeping competences” or “Europeanization by stealth”), a profound degree of competence and power sharing between levels and sites of decision-making on the other.’<sup>215</sup>

Consequently, hybrid approaches – as the one proposed by Kilpatrick – offer a certain promise of jointly accommodating the seemingly diverging demands of the Union’s constitutional order and the evolving EU governance framework. Still, here also special caution is required regarding the underlying assumptions.

On that basis, in the next chapter we will turn our attention to the question of how we can overcome the fundamental difficulties that typify the New Governance-EU Constitutionalism relationship. We require a (more) constructive basis to examine how EU employment governance has developed as a “governance regime” and to assess its effectiveness in meeting contemporary employment objectives. By refocusing the problem, we will plead for a more nuanced conception of the law-governance relationship that appreciates the peculiar post-national context in which this relationship takes shape. This will serve as a basis for developing further the notion of hybridity.

## 2.5. STUDYING “REGIME INTEGRATION”

Moreover, our research questions also presuppose a theoretical framework for analysing processes of regime formation and change. For that purpose, the concept of a “governance regime”, as employed by Kilpatrick to characterise EU employment governance in 2005, requires further consideration.

Following Kilpatrick, an integrated governance regime apparently provides some sort of encompassing frame, which embraces an interactive mix of instruments and poly-centred decision-making, both tailored to the effective pursuit of hybrid objectives. In effect, her regime-concept provides a modular simplification for complex overlapping processes. It helps to highlight the specific roles of the various EU governance instruments in regulating aspects of employment against a common frame of reference and to pinpoint their interrelation tailored to the governance of that specific issue-area.<sup>216</sup> Whilst thus propagating

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as shaped by the successive multi-annual growth strategies (see Chapter 3). Cf. Copeland and Papadimitriou (2012).

<sup>215</sup> Velluti (2013) at 11.

<sup>216</sup> She accords especially the EU coordination processes (OMC) a significant role in contributing to the integration of the regime in the light of an overarching “progressive social justice-competitiveness”-paradigm. ‘From this perspective, one of the most central achievements of the EES

an inclusive view of EU employment governance, Kilpatrick's argument remains rather vague however as to how this integrated regime has come about. Nevertheless, it puts forward an implicit presumption that the existence of an integrated governance regime admits inferences about the effectiveness of European regulation in a specific policy field.<sup>217</sup>

On that basis, we aim to assess whether EU employment governance still represents an integrated regime today, to what extent it has changed and whether it is still effective. To be able to answer these questions, the concept of a "governance regime" must be elaborated in more detail. We need to determine in the abstract some general characteristics of regimes to acquire an understanding of regime formation and how they change. Based on a brief review of the literature on regime theory, we will then identify the main components of a governance regime and determine different types of regime change.

### 2.5.1. The concept of a "governance regime"

The term "regime" has enjoyed popularity in different fields of scholarship for considerable time. A preferred application of the concept is to capture "variety" in systems of governance, in several fields.<sup>218</sup>

In the field of international relations, the regime-concept especially gained first prominence from the early 1980s. Krasner (1983) provided an authoritative account moving beyond theorisations on the role and impact of international organisation.<sup>219</sup> He analyses regimes as "intervening variables".<sup>220</sup> His aim was to examine whether regimes made any difference in the practice of international cooperation.<sup>221</sup> The main arguments of this influential account can be summarised as follows.

Krasner assesses to what extent international regimes could be regarded as having an (independent) impact on the relations between States.<sup>222</sup> Consequently, he offers an authoritative definition of international regimes:

'Regimes can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations. *Principles* are beliefs of fact, causation, and rectitude. *Norms* are standards of behaviour defined in terms of rights and obligations. *Rules* are specific prescriptions or proscriptions for action. *Decision-making procedures* are

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is that it builds bridges between employment legislation (imperium measures) and the European Social Fund (dominium measures).' Kilpatrick (2006) at 131.

<sup>217</sup> This will be discussed in more detail in Chapter 3.

<sup>218</sup> See for a useful overview, Hood, Rothstein and Baldwin (2001) at 10-11.

<sup>219</sup> Krasner (1983).

<sup>220</sup> Ruggie (1998) at 88.

<sup>221</sup> In this regard, he identified three perspectives (referred to as the "conventional structural", "modified structural" and the "Grotian" orientation). Krasner (1983) at 10.

<sup>222</sup> Amongst others, Krasner reviews a set of basic causal variables such as 'egoistic self-interest, political power, norms and principles, habit and custom, and knowledge' that have been used to explain the creation and development of regimes. Ibid. at 11-20.

prevailing practices for making and implementing collective choice.’ [emphasis added, NB]<sup>223</sup>

International regimes are thus characterised by four components (principles, norms, rules, and decision-making procedures). According to Krasner, the “coherence” between these components determines the relative strength of a particular regime. Instead, inconsistency between these elements may signal weakness in – or even, the demise of – the regime.<sup>224</sup>

Furthermore, a certain hierarchy distinguishes these four regime components. This becomes evident when taking a closer look at the dynamics of *regime change*. Krasner states:

‘A fundamental distinction must be made between principles and norms on the one hand, and rules and procedures on the other. Principles and norms provide the basic defining characteristics of a regime. There may be many rules and decision-making procedures that are consistent with the same principles and norms.’<sup>225</sup>

Based on this distinction, the modification of rules and decision-making procedures represents changes *within* a regime – ‘provided that principles and norms are unaltered’.<sup>226</sup> In effect, the rules may change but the underlying basic norms stay the same. In contrast, alterations in principles and norms imply that the ‘regime itself’ changes. Krasner explains: ‘When norms and principles are abandoned, there is either a change to a new regime or a disappearance of regimes from a given issue-area.’<sup>227</sup> While Krasner refers to internal change (i.e. in rules and decision-making procedures) as “evolutionary” regime change, he classifies the demise of a certain regime and/or its replacement by another (i.e. change in norms and principles) as “revolutionary” change in terms of regime disappearance or regime transformation.<sup>228</sup>

### 2.5.2. Varieties of “regime theory”

As we will illustrate below, the regime-notion has gained popularity also in different fields of social science enquiry. Ruggie (1998) reminds us to appreciate regimes as “conceptual creations”, not concrete entities: ‘the concept of regimes will reflect common-sense

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<sup>223</sup> Ibid. at 2. He stresses that international regimes are generally ‘understood as something more than temporary arrangements that change with every shift of power’. Ibid.

<sup>224</sup> Krasner maintains: ‘Finally, it is necessary to distinguish the weakening of a regime from changes within or between regimes. If the principles, norms, rules, and decision-making procedures of a regime become less coherent, or if actual practice is increasingly inconsistent with principles, norms, rules, and procedures, then a regime has weakened.’ Ibid. at 5.

<sup>225</sup> Ibid. at 3.

<sup>226</sup> Ibid.

<sup>227</sup> He cites that ‘change from orthodox liberal principles and norms before World War II [focusing on a market rationale] to embedded liberal principles and norms [conceiving state intervention as an instrument to contain market failures] after World War II’. In reference to Ruggie, *ibid.* at 4.

<sup>228</sup> In reference to Hopkins and Puchala, *ibid.* at 20.

understandings, actor preferences, and the particular purposes for which analyses are undertaken [and] will [ultimately] remain a “contestable concept”.<sup>229</sup>

Welfare regime theory is probably the most renowned example of regime analysis from the field of political economy. Esping-Andersen’s (1990) seminal work *The Three Worlds of Welfare Capitalism* provided the starting point for building a rich body of comparative social policy research.<sup>230</sup> He identifies three types of political economies to explain variations in welfare state regimes: the “liberal”, the “corporatist” and the “social democratic” welfare state.<sup>231</sup> These regime clusters are used to analyse the causes and processes associated with welfare state formation and performance of individual countries. In comparative social policy research, his regime typology is typically used either ‘as a heuristic device to analyze and compare different systems and policy domains; [or to question] the appropriateness of the typology’.<sup>232</sup>

One of these more critical accounts is useful in pointing out some key characteristics of welfare regimes. Kasza (2002) highlights two central traits: While dealing with different social policy items through a variety of welfare programmes, each regime will simultaneously embody a distinctive rationale for public welfare.<sup>233</sup> In other words, ‘most of the key policies will indeed reflect a similar approach to issues of public welfare’.<sup>234</sup> So, welfare regime theory regards the State’s contribution to social welfare as providing a package of public policies that conforms to certain principles. These principles are consequently considered to provide certain *coherence* to the design of a country’s welfare policies.<sup>235</sup>

Another popular contribution to the diverse body of regime theory is the work by Hood *et al.* (2001).<sup>236</sup> This develops a functional approach to regime analysis for the study of “risk regulation regimes”. They connote the concept of “regime” with ‘the overall way risk

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<sup>229</sup> Ruggie (1998) at 87

<sup>230</sup> Esping-Andersen (1990). This work represented a fundamental shift in welfare state analysis towards an interactive approach. See Heintz and Lund (2012).

<sup>231</sup> He proposes an ideal typical construction, following which welfare regimes comprise three core elements – State policies as well as the welfare contributions of family and market.

<sup>232</sup> Ferragina, Seeleib-Kaiser and Tomlinson (2013) at 783-784.

<sup>233</sup> Kasza (2002) at 272.

<sup>234</sup> Ibid.

<sup>235</sup> Kasza underlines that: ‘a regime is said to reflect a set of principles or values that establishes a coherence in each country’s welfare package. The principles may derive from the political ideology of governmental forces such as the Scandinavian social democratic parties, or from Catholic or other religious traditions as in southern Europe, or from more secular cultural values as in the case of Japan and some of its Asian neighbours. The point of regime analysis is that each country’s welfare regime *makes sense*, that each conforms to a practical and/or normative understanding of the state’s proper role in forging public welfare.’ [emphasis in the original] Ibid. at 272. Precisely this basic assumption of coherence in a State’s welfare policies Kasza regards as false. He argues that rather the inconsistencies in national welfare programmes need to be recognised as being caused by the ‘inherent features of welfare policymaking’ (i.e. (1) the cumulative nature of welfare policies, (2) the diverse histories of policies in different welfare fields, (3) the involvement of different sets of policy actors, (4) variations in the policymaking process, and (5) the influence of foreign models). He thus questions the usefulness of the regime concept as an analytical tool and instead considers it more fruitful to focus comparative studies on particular policy fields (such as pension policy). Ibid. at 284.

<sup>236</sup> Hood, Rothstein and Baldwin (2001).

is regulated in a particular policy domain'.<sup>237</sup> They also employ a comparative approach to explain variation in risk-regulation regimes and their change over time. Their main objective is 'to describe how these regimes work – and fail – and to examine and understand the forces shaping them'.<sup>238</sup> For the area of risk regulation they define a regime as 'the complex of institutional geography, rules, practice, and animating ideas that are associated with the regulation of a particular risk or hazard'.<sup>239</sup>

Hood and his co-authors adopt a "broad institutional" approach by taking 'a comparative focus on rules, conventions, and organisations' as a point of departure.<sup>240</sup> The main characteristics of regimes in the field of risk regulation can be summarised as follows. They represent 'relatively enduring phenomena', displaying a certain degree of 'continuity over time'.<sup>241</sup> In line with a "system-based approach",<sup>242</sup> regimes are considered as 'sets of interacting or at least related parts rather than as "single-cell" phenomena'.<sup>243</sup> This means, when studying 'the features that shape the content of regulatory regimes', one should be aware the larger systems of control that these regimes are nested in.<sup>244</sup> Hence, one must be sensitive to the *level* of regime being analysed.<sup>245</sup>

### 2.5.3. Considering the development of the EU employment governance-regime

Those examples from the "regime"-literature indicate that there are many varieties in which regime analysis has been used.<sup>246</sup> Nevertheless, these different social science approaches reveal some similar or shared assumptions, from which we can deduce the following basic characteristics of governance regimes:

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<sup>237</sup> Ibid. at 8.

<sup>238</sup> Ibid.

<sup>239</sup> Ibid. at 9.

<sup>240</sup> Ibid. at 8.

<sup>241</sup> Ibid. at 9, 11.

<sup>242</sup> In order to further delineate the regime-concept, they draw conceptual parallels with other analytic themes, especially systems theory and the idea of network governance developed in institutional accounts.

<sup>243</sup> While recognising that there is a fine line between minor adjustment of existing regime and what counts as a step-change in regime, Hood et al determine that at a minimum, the regime concept 'implies a set of characteristics that are often retained beyond the tenure in office of any one leader, government minister, or political party. Ibid. at 9.

<sup>244</sup> Ibid. at 10. Risk regulation regimes 'are conceived as relatively bounded systems that can be specified at different levels of breadth'. Ibid. at 10. This is important for the analysis of regimes because they may be perceived as 'systems that can be nested in larger systems'. Ibid. at 11.

<sup>245</sup> Illustrating this point at the example of healthcare risks, Hood et al. highlight how the level of analysis may have an influence on the interpretation of the factors to be studied – most important of which, the problem definition and the governance solution offered. Ibid. at 10.

<sup>246</sup> Cf. Hasenclever, Mayer and Rittberger (1997).



- a. First, the “regime”-notion is accorded considerable explanatory power as a type of “institution” that *structures cooperation* between actors;
- b. Second, characterising a governance regime as “integrated” points to the fact that the latter should reveal a certain *coherence* in that a distinctive rationale for policy design is identifiable at the level of norms and principles; and
- c. Third, such a regime is usually composed of *interacting parts*, often embedded in larger structures that provide a reference framework for assessing continuity over time and comparative analyses.

This overview provides useful orientation for the subsequent study of how the EU employment governance-regime has developed over the past decade. Additionally, based on the presumption of effectiveness inferred from Kilpatrick’s “integrated regime”-thesis, we also aim to assess whether the EU’s governance instruments are still working effectively towards the achievement of common employment objectives. For this assessment, we find that Krasner’s authoritative typology still provides useful guidance. Table 2.1. below illustrates the elements that need to be considered when analysing processes of regime formation and change.

TYPES OF REGIME CHANGE	
<i>Type of regime change</i>	<i>Object of change</i>
Regime (trans)formation	Norms and principles
Change within regime	Rules and decision-making procedures

**Table 2.1.: Typology of regime (trans)formation and change**

On that basis, and given the legal approach to the study of EU employment governance, the subsequent enquiry will face the challenge of ultimately integrating the respective regime analysis with a normative argument. In the next chapter, we will therefore construct a conceptual framework for conducting a multi-layered analysis on the question of *what* influences the formation of regimes in the EU context and for assessing European governance capacity regarding employment regulation.

## Chapter 3: Recasting the conceptual basis of the regime-thesis and building the analytical framework

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### 3.1. INTRODUCTION

Aiming to study the development of EU employment governance from a labour law perspective, we are particularly interested in the question of whether it is (still) effective in achieving the Union's contemporary employment objectives. As explained in Chapter 1, the argument builds on the integrative notion of "EU employment governance".<sup>247</sup> Conceiving European employment governance in such a broad way is useful because it points to the fact that the EU disposes of more than just traditional legal instruments through which it can influence national employment regulation. In that respect, we have noted that Kilpatrick's "integrated regime"-thesis in principle puts forward a *presumption of effectiveness*.<sup>248</sup>

This recognition is decisive for designing our analytical approach. While we could simply describe how the various instruments of EU employment governance have developed over the past years, this would not be enough to analyse to what extent they are still *interacting* effectively towards the achievement of the EU's employment goals. Within the framework of the "integrated regime"-thesis, it is thus important to understand the development of regimes in EU governance. Chapter 2 has provided the theoretical groundwork for this endeavour through a brief review of the literature on "regime theory".

In fact, the presumption of effectiveness underlying Kilpatrick's integrated characterisation of EU employment governance draws attention to the broader governance *context*. Therefore, we seek to comprehend *what* influences the creation and demise of governance regimes in the EU. In other words, below we aim to devise a theoretical framework for studying the dynamics of regime formation in EU governance.

As indicated earlier, Kilpatrick herself however recognizes that her "integrated regime"-thesis about EU employment governance is founded on somewhat unsatisfactory conceptual ground.<sup>249</sup> This relates to the uneasy relationship between EU Constitutionalism

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<sup>247</sup> Kilpatrick (2006) argued that the hybrid interaction of the various governance instruments (EU legislation, non-binding coordination tools, and expenditure instruments) at the time represented an "integrated regime" of EU employment governance, aligned to the effective achievement of broad common objectives assembled under a progressive "social justice-competitiveness"-paradigm. We are referring to this account as the "integrated regime"-thesis.

<sup>248</sup> According to this presumption, the idea of "regime integration" implies that when a specific issue-area of EU governance (such as employment) is being governed by an integrated regime, it means that various relevant governance instruments are aligned towards the effective achievement of the specific common objectives, which guide that governance area.

<sup>249</sup> Kilpatrick considered what role the EU's 'governance tools' for the regulation of employment play in constitutional theorisations of the EU legal order. Eventually, she identified *processual Constitutionalism* as the path best suited to accommodate accounts of employment governance. However, she expressed certain discontent with this conclusion which seemed reminiscent of both

and New Governance, as described in the previous chapter. Undoubtedly, the attempt at joint theorisation of these two schools of thought – albeit troubled – had its appeal at the time to underline that interaction between EU employment governance instruments was already ongoing.<sup>250</sup> As a conceptual basis, though, for analysing the effectiveness of EU employment governance today, the problematic EU Constitutionalism-New Governance relationship provides rather challenging ground.

This chapter, therefore, seeks to recast the conceptual basis in a constructive way. It aims to advance the hypothesis of regime formation in order to construct an analytical framework for both, examining how EU employment governance has developed throughout the past decade and judging its effectiveness today. We will build the argument as follows.

Firstly, we propose to refocus the problem in order to surmount the theoretical difficulties of the New Governance-EU Constitutionalism relationship (Section 3.2.). This shift of the analytical focus provides several advantages. Most importantly, it helps to centre our attention instead on the problem of understanding the relationship between law and governance in the EU polity. This will secondly provide more fruitful ground to develop further Kilpatrick's broad conception of the interplay of EU governance instruments (Section 3.3.). It is conducive to a more inclusive notion of EU governance in general that builds on a recast notion of hybridity. We will denote this as the "framework"-approach which allows restating the law-governance relationship in a constructive way. This conceptual expansion will be eased by introducing the idea of the EU "governance architecture". Finally, we will consider the repercussions of the inclusive view on EU governance for the concept of law.

Following the recognition of the law's dual function within the EU governance architecture, we will lastly assemble our analytical framework with the help of the conceptual tools provided by the idea of the "governance architecture" (Section 3.4.). Two graphical charts (see Figures 3.1. and 3.2. below) will help to illustrate the main working hypothesis and the conceptual framework built on the idea of the EU governance architecture.

### 3.2. THE NEED TO OVERCOME THEORETICAL DIFFICULTIES – REFOCUSING THE PROBLEM

As described in Chapter 1, Kilpatrick has used the idea of hybridisation of EU governance as an argumentative bridge. On the one hand, she has provided a factual account revealing the existence of hybridised employment governance at European level. On the other, this analysis has helped to illustrate how constitutionalist approaches could make sense of – and to what extent they could integrate with – New Governance. This latter discussion,

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New Governance's and European Constitutionalism's inherent failure of accounting for their mutual relevance. See Kilpatrick (2006) at 146.

<sup>250</sup> Kilpatrick (2006) at 131 *sequ.*

however, has revealed previously mentioned difficulties in combining the diverging conceptualisations of EU Constitutionalism and New Governance (see Chapter 2).

In order to overcome these difficulties in the conceptual basis of the “integrated regime”-thesis, we suggest to phrase the problem in somewhat simpler terms (see Section 3.3.). In essence, the debate between EU Constitutionalism and New Governance can be reduced to the core problem of conceptualising the *interrelationship between law and governance* within the context of the EU. Through this refocusing, we can strip the discussion of much cumbersome “theoretical baggage” and make room for a more nuanced account of the law-governance relationship. Before doing so, however, we will first justify how and why these difficulties need to be surmounted in order to build a conceptual framework for the analysis of EU employment governance on a more constructive basis.

We contend that restating the enquiry in such more general terms (i.e. analysing how law and governance co-exist and interact within the EU) will allow for more careful differentiation. Such a conceptual shift seems useful for two reasons in particular. Both relate to the legacy left behind by the troubled theorisation of the EU Constitutionalism-New Governance relationship.

The first reason concerns the compromising effect that the tension inherent in the EU Constitutionalism-New Governance divide has on the notion of hybridity. On the one hand, hybrid approaches – as the one suggested by Kilpatrick – appear most promising in providing a potential remedy to the quandary of joint theorisation, by offering a more conciliatory form of conceptualisation.<sup>251</sup> On the other hand, however, caution is also required in the context of hybridity – notably, with regard to the potential bias in the underlying conceptualization of the relationship between law and governance.

This bias stems from the fact that hybrid approaches have primarily been a product of the New Governance literature. While they have exhibited an important evolution in this school of thought,<sup>252</sup> New Governance’s inherent binary logic may have actually inhibited the analytical potential of hybrid conceptualisation. Surely, hybrid approaches have proven their added value in explanatory studies.<sup>253</sup> But normative research on hybridity tends to struggle with the logical predicament inherent in “New Governance” – whereby the “old” is conceived in opposition towards the “new”.<sup>254</sup> Therefore, we argue that refocusing the problem on the relationship between law and governance may aid

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<sup>251</sup> E.g. Dawson (2013).

<sup>252</sup> Dawson (2011b); and Chapter 2.3.3.A.

<sup>253</sup> Walker (2006).

<sup>254</sup> Walker maintains that New Governance theorisation is grounded in this juxtaposition of ‘logical opposites’ that is based on a ‘causal interface between old and new, where each is conceived in general or holistic terms’. He recognises the explanatory potential of hybrid approaches but underlines ‘the awkwardness of developing hybrid forms of normative [...] theory’ owing to the theorisation’s inherent binary logic. He borrows De Búrca’s and Scott’s distinction between baseline, developmental and default hybridity to clarify this point. He supports his argument by asking, based on these three categories: ‘under what circumstances and to what extent [...] does the old underpin (baseline) or provide a catalyst (developmental) for the new, or, indeed, its disciplining counterfactual (default)?’ Ultimately, Walker claims that this juxtaposition eventually leaves ‘very little analytical leverage for hybrid forms to develop’ from a normative standpoint.Ibid.

especially the development of the notion of hybridity (for further discussion, see Section 3.3.1.A.).

The second reason is more fundamental in nature. The reconceptualization in terms of the law-governance relationship also helps to recognise that the *real* source of the problem is in fact this fundamental tension, which underpins the legal order of the EU polity.<sup>255</sup> As intimated in Chapter 2, EU law claims to delimit EU powers and to clarify the division of competences between the Union and its Member States. In practice, though, we are facing an expansion of EU regulatory activity driven by the functional demands of pragmatic governance processes. As a result, experiences of competence and power-sharing between levels and sites of decision-making abound. This “*constitutional paradox*” raises doubts of to what extent law can (still) properly fulfil its well-tried (constitutional) functions in the EU context to support the democratic credentials of political community.<sup>256</sup> Indeed, it raises the fundamental question of how law can (continue to) ensure the legitimacy of EU rule-making and the accountability of decision-makers while maintaining the efficacy of EU regulation.

Hence, these issues underline the necessity of reconceptualising the theoretical foundation of the “integrated regime”-thesis. They alert us to the risk of adopting a binary approach, i.e. conceptualising law in opposition to governance, which represents one of the central difficulties characterising the EU Constitutionalism-New Governance relationship. Additionally, they remind us to reflect in more depth on the role of law in the post-national context of the EU polity. In that connection, it is also worth recalling that the three challenges outlined in Chapter 1 have put up for discussion the viability of labour law today and what role the EU is playing in this respect. The more general and abstract reflections advanced in this chapter should therefore sensitise us for a critical analysis of EU employment governance and how it affects labour law today (for further discussion, see Section 3.3.3.).

On that basis, we now need to advance our understanding of EU governance in order to restate the law-governance relationship more constructively. The preceding considerations point to the need for greater comprehensiveness in the theorisation of the law-governance relationship. In fact, Kilpatrick’s own “integrated regime”-thesis offers helpful inspiration in this respect. Her integrative view on the interaction of governance instruments encourages expanding the analytical focus by revisiting the notion of hybridity.

### 3.3. REVISITING THE LAW-GOVERNANCE RELATIONSHIP TO RECAST THE CONCEPTUAL BASIS

As we intend to study the development of EU employment governance, we first need to advance the “integrated regime”-thesis by expanding on some of its underlying

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<sup>255</sup> In fact, irrespective of the tension between EU Constitutionalism and New Governance, what ultimately unites both schools of thought is the pursuit of – whether implicitly or explicitly – a higher goal, namely that of defining what kind of polity the Union is considered to be, or to become. Walker and de Búrca (2007) at 527.

<sup>256</sup> Cf. Velluti (2013); Armstrong (2013); and Dawson (2013).

assumptions. The assessment of whether the European governance instruments are (still) functioning effectively in reaching the EU's employment objectives first requires an understanding of *what* makes the EU's various instruments for employment regulation interact. We thus need an analytical framework to study the *context* in which EU employment governance takes shape. A so-called "*framework perspective*", as proposed by Kilpatrick and Armstrong (2007), seems to offer a promising analytical approach in that respect.<sup>257</sup>

Below we will proceed by recasting the conceptual basis of the "integrated regime"-thesis. At first, we will reconsider the notion of hybridity to arrive at a more inclusive notion of EU governance.<sup>258</sup> From there, we will develop our "framework"-approach to the study of EU socio-economic governance. The conceptual expansion will particularly be facilitated by the idea of the "EU governance architecture". Last but not least, we will discuss what implications this approach has for the conception of law.

### 3.3.1. The role of hybridity and the "framework perspective" on EU governance

In the introduction above, we have highlighted that Kilpatrick's broad conception of European employment governance adds value because it helps to appreciate how the EU exerts influence on national labour law through more than just traditional legal instruments. In her "integrated regime"-thesis, hybridity refers to the mutual interaction of the different governance tools. That interaction, Kilpatrick argues, stems from the fact that the various EU employment governance instruments are configured towards the realisation of the same common objectives.<sup>259</sup>

We have furthermore noted the explanatory value of this conception of hybridity. It helps to make sense of the increasingly complex nature of EU governance, with its growing diversity in regulatory instruments. Trubek and Trubek (2007) have in fact characterised this type of interaction as "complementarity".<sup>260</sup> As we are taking an interest in how EU employment governance has evolved since then, however, the hybridity-concept presented may be deemed less useful to advance normative arguments.<sup>261</sup>

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<sup>257</sup> Cf. Kilpatrick and Armstrong (2007); see also Walker and de Búrca (2007).

<sup>258</sup> As mentioned in Chapter 2, in his evolutionary account of theory development on New Governance, Dawson (2011b) intimated that it would be more fruitful both to conceive law and governance as distinct phenomena as well as to recognise that their mutual cooperation and interaction may actually be beneficial.

<sup>259</sup> She maintains, 'in a *hybridized governance regime*, particularly a poly-centred one, all governance tools are aimed at the effective and legitimate delivery of the same broadly defined set of goals'. Kilpatrick (2006) at 131.

<sup>260</sup> 'While the directives operate at the level of individual cases, the EES operates to change national policy and employer attitudes. Finally, the EU Structural Funds can be used in a way that complements both the directive and the EES by providing funding for projects that further the general goal of equal access for women, such as improved day care facilities. In a study of the operation of these three processes, Claire Kilpatrick has argued that not only are they operating in a complementary fashion, but, as their potential interaction becomes clearer to policy makers at the EU and Member State levels, conscious efforts are being made to increase complementarity.' Trubek and Trubek (2007) at 545.

<sup>261</sup> See *supra* note 254.

The subsequent deliberations will therefore stage our attempt to restate the law-governance relationship in a way that accounts for their mutual relevance. For that purpose, we will deconstruct some of the main critical contentions about hybrid interaction in the law-governance relationship. This will help to formulate a more nuanced approach to the understanding of hybridity, based on which we can then elaborate the “framework”-perspective on EU governance.

#### A) The need for more careful differentiation

Critical perspectives on New Governance have pointed to the potential pitfalls in the theorisation of the law-governance relationship and highlighted the importance of conceptual differentiation. As indicated above, caution is especially required with regard to the basic assumptions upon which hybrid accounts are built. The debate between supporters and opponents of New Governance is often based on preconceived ideas and underlying stylisations of both EU law and governance which fail to hold true upon closer examination.<sup>262</sup> In order to avoid such bias, Armstrong and Kilpatrick (2007) have proposed to distinguish between governance *instruments* (or tools), on the one hand, and *modes* (or techniques) of governance, on the other.<sup>263</sup> They argue such distinction offers a more sensible way of accounting for the diversity in means of regulation that characterises EU governance.

Indeed, this differentiation provides for useful clarification. With respect to governance *tools*, we will henceforth refer to the actual tangible instruments – such as EU regulations, directives, decisions and recommendations etc. The study of EU governance draws special attention to the growing importance of non-binding instruments. These will also be discussed in more detail, when we revisit the concept of law below (Section 3.3.3.). The *techniques* of EU governance refer to different modalities of control. Based on insights from regulation theory, we can identify the most common modes of governance as “*hierarchy*” (comprising, for instance, rules backed by judicial enforcement), “*community*” (involving forms of self-regulation) and “*competition*” (as found, for example, in the target-based comparison of performance through benchmarking).<sup>264</sup> The identification of governance modes usually involves locating the respective mechanisms for decision-making and norm-setting on a continuum between centralization and decentralization. Still, also here caution is required regarding broad-brushed generalizations in the EU context.<sup>265</sup>

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<sup>262</sup> E.g. Armstrong (2013); Velluti (2013).

<sup>263</sup> Armstrong and Kilpatrick (2007, at 654) thereby highlight the limited explanatory value of umbrella terms or composite categories – as, for example, the “Community method” or the “open method of coordination”.

<sup>264</sup> Cf. Scott (2012)

<sup>265</sup> It is certainly tempting to equate the traditional legal techniques of the EU – i.e. harmonization and coordination – with the modalities of hierarchy and community respectively. But such indiscriminate equation is at risk of misrepresentation and represents a common pitfall. Armstrong (2013).

As the EU's means of regulation have become increasingly diversified,<sup>266</sup> the distinction between governance modes and instruments supports a more nuanced scrutiny of these means. In fact, it helps scrutinising between different *rationalities* that drive the adoption of specific governance responses.<sup>267</sup> One governance instrument may serve several rationalities, which will explain how different modalities of control may be combined to regulate a specific issue. EU directives, for example, provide judicially enforceable legislation (hierarchy). They are however only binding with regard to the result (i.e. objectives) they impose. Accordingly, they grant Member States considerable flexibility (community) in the choice of means for the directive's implementation.

Such scrutiny of the rationales for adopting a specific form of EU regulation can raise awareness on how the eternal power struggle between the supra-national institutions and the Member States affects the design of governance responses to achieve common policy aims.<sup>268</sup> Based on such an approach, for example, Ashiagbor (2005) evaluated the role of EU employment policy coordination much more critically than Kilpatrick did.<sup>269</sup>

In short, scrutinising between instruments and modes of governance helps to understand better the convoluted nature of EU regulation. It makes us alert to the subtleties that shape the way in which the EU may exert influence on national systems. This more nuanced approach will facilitate a more thorough understanding of the nature of certain governance arrangements and the motives of combining different instruments to achieve certain policy goals.<sup>270</sup> It thus helps sensitising our conceptual lens when reconsidering the concept of hybridity as such.

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<sup>266</sup> Snyders (1994).

<sup>267</sup> Armstrong and Kilpatrick (2007) at 654.

<sup>268</sup> For example, the rationale for establishing European coordination of economic and employment policies in the 1990s is rooted in the fact that the prerogative to regulate in these policy fields continues to rest with the Member States.

<sup>269</sup> Ashiagbor (2005) raises question marks on the progressive quality of the EES as a bridging tool. She characterised the EES as an attempt 'to *circumvent* the tired dichotomy between inter-governmentalism and supra-nationalism by means of innovative regulatory techniques, in particular the OMC, which have the potential to construct a middle course btw full harmonization and mutual recognition or regulatory competition' [emphasis added, NB]. This circumvention exposed 'tensions between the adoption of minimal regulatory standards at EU level, permitting regulatory competition between Member States (negative integration), and centralized harmonization through common European policies to shape the conditions under which markets operate (positive integration)'. This central difficulty that characterises EU employment policy coordination – which more traditional legal observers may regard as a problem of "competence creep" – she skilfully framed as the challenge 'to reconcile competing policy discourses'. Ibid. at 301.

<sup>270</sup> Armstrong (2010) provides an illustrative typology of hybridisation, presenting a variety of possibilities how different governance techniques and tools may be combined. He identifies (1) a combination of 'pure modes' (e.g. co-regulation or self-regulation both revealing 'the anticipation of hierarchy with a community mode'); (2) modes combining 'in the governance of a particular field or activity', denoting 'the deployment of multiple modes of governance; and (3) the possibility that a single instrument governs 'multiple modes' simultaneously (e.g. through a directive, or also '[i]n the context of the OMC it is possible to see elements that seek to invoke hierarchy, competition and community engagement'). Comprehending hybridity in this way enables him to conceive of the OMC as 'a technique which exhibits multiple modes of governance'. Armstrong (2010) at 47.



Indeed, when adopting such a more differentiated approach, Armstrong (2013) stresses that the fact whether the regulatory output of governance is a binding norm, or not, actually becomes less relevant.<sup>271</sup> The focus essentially shifts towards assessing the Union's overall ability of dealing with complex governance problems. On that view, it becomes important to ask what the different ways are in which the EU is exerting influence on the regulation of specific policy fields and whether it is thereby reaching its goals. This approach, in effect, helps to surmount the tendency in the New Governance literature 'to treat law as a proxy for hierarchy and new governance as a synonym for non-hierarchical modes of governance'.<sup>272</sup>

#### B) The "framework-approach" to the study of EU governance

Accordingly, we are now in the position to reconsider the conception of hybridity itself. We have already noted how hitherto it has been common to conceive of hybridity in one way or another as inter-relationships *between* law and governance.<sup>273</sup> This has usually been based on a narrow notion of EU governance – equating the latter, for instance, with one particular mode of governance (e.g. the OMC). Therefore, by reconceptualising the notion of hybridity we will also propose a more inclusive conception of EU governance itself.

Following the path of more careful differentiation, a more fruitful way instead – Armstrong argues – could be to conceptualise hybridity in terms of 'relationships *within* governance'.<sup>274</sup> On this view, the notion is redefined as referring to possible forms of interaction between modes, instruments and authors of governance delineated within a broader *framework* of EU governance. Hereafter, we will refer to this approach as the "framework-approach" to EU governance.<sup>275</sup>

The main purpose of this framework of EU governance, Armstrong defines, as the supply of 'governance solutions to governance problems'.<sup>276</sup> This view implies that 'changes in patterns of governance are about changes in governance *capacity*' [emphasis added, NB].<sup>277</sup> It underlines that a core challenge today, for public authorities at all levels, is to provide governance solutions to problems under general conditions of uncertainty and

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<sup>271</sup> Armstrong (2013) at 28.

<sup>272</sup> Ibid.

<sup>273</sup> Cf. Scott and De Búrca (2006); and Trubek and Trubek (2007).

<sup>274</sup> Armstrong (2013) explains 'the differences that are combined in "hybridity" are differences between modes and instruments and authors of governance rather than differences between law and (new) governance.' Accordingly, he denotes the idea of "hybrid governance" as revolving around the concept of hybridity referring to 'the combinations of modes and instruments of governance which, in turn, give rise to a range of legal encounters'. He elucidates further: 'At its most basic, the idea of hybrid governance is the recognition that many of society's pressing problems are addressed by multiple forms of intervention. At an instrumental level, these interventions may be legislative and non-legislative. Market mechanisms may co-exist with hierarchical rules and processes for self or co-regulation.' Ibid. at 28-29.

<sup>275</sup> Cf. Armstrong and Kilpatrick (2007).

<sup>276</sup> Armstrong (2013) at 7-8.

<sup>277</sup> Ibid.

interdependence.<sup>278</sup> For the study of EU governance, this framework-approach thus puts the question of *how governance capacity may be enhanced (or reduced) through the co-existence and interaction of different governance responses* the centre of attention.

In this context, it is also useful to note that Trubek and Trubek (2007) have distinguished two more types of “hybridity” in EU governance, next to the complementary form expressed by Kilpatrick’s “integrated regime”-thesis. These are “*rivalry*” and “*transformation*”. The former refers to co-existing governance instruments that may actually have contradictory effects, acting like rivals.<sup>279</sup> The latter holds governance arrangements to be transformative when modes or instruments do not only complement but, actually, depend on and mutually reinforce each other.<sup>280</sup> These categories, in effect, help to illustrate how EU governance capacity may be enhanced or reduced.

### 3.3.2. The idea of the “EU governance architecture”

The proposed conceptual expansion can be further facilitated by thinking of EU governance in terms of being framed and structured by a “governance architecture”.<sup>281</sup> This idea offers practical analytical resources that help to articulate the framework-approach advanced above and, thus, consolidate the inclusive view on EU governance.

The concept of the EU governance architecture has been used to describe the multi-annual strategic frameworks, such as the Lisbon Strategy,<sup>282</sup> that have assumed a central role in EU governance throughout the past two decades. Europe 2020, the Union’s current ten year-strategy, can also be understood in this way. These multi-annual strategies frame EU governance by means of strategic long-term objectives and concrete policy targets. They provide a comprehensive (yet, periodically adaptable) plan and, thereby, a normative structure for the operation of different governance tools and their mutual interaction.

The rhetorical image of a “governance architecture” has been created by political scientists. Borrás and Radaelli (2011) have devised it to study the politics involved in the creation, change and effects of the EU’s multi-annual strategic frameworks for socio-economic governance. However, legal scholars have also adopted the concept for its analytical utility in deconstructing and making sense of the complexity of EU governance and identifying the latter’s interactions with and implications for EU law.<sup>283</sup>

Including the notion of the governance architecture adds value to our conceptual analysis because it provides valuable analytical tools. Most importantly, it allows us to differentiate that EU governance comprises “ideational” and “organizational” components (to be further elaborated below in Section 3.4.3.A.).<sup>284</sup> This interpretation, in fact,

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<sup>278</sup> De Búrca (2010).

<sup>279</sup> Trubek and Trubek (2007).

<sup>280</sup> Ibid.

<sup>281</sup> Borrás and Radaelli (2011).

<sup>282</sup> Also referred to as the “Lisbon Agenda” – hereafter, we will use both names interchangeably.

<sup>283</sup> Smismans (2011), Armstrong (2012). See also Sabel and Zeitlin (2008).

<sup>284</sup> Borrás and Radaelli (2011) at 470-471.

encourages the understanding of EU governance in a constructive way: both as ‘an emerging structure – i.e. an institutional arrangement among public and private actors – and a process or practice, at the same time’ [emphasis added, NB].<sup>285</sup>

In that way, the idea of the governance architecture helps to enhance the inclusive notion of EU governance. We thus regard EU governance both as an architectural framework that structures ideational and organizational components and a dynamic process of interacting governance arrangements. At the same time, the inclusive view, in turn, also invites the advancement of the concept of the EU governance architecture itself. Especially from a legal perspective, it seems necessary to expand that notion, which we will attempt below.

### 3.3.3. Repercussions for the concept of law

Hence, we have recast the notion of hybridity and, thereby, proposed a framework-approach to the study of EU governance. The underlying inclusive view on EU governance as a framework that delineates the interaction between governance modes and instruments makes it necessary to revisit also the role that law plays within this context. After all, this conceptual approach strives to account for the mutual relevance of law and governance within the EU context. The analytical distinction between the structure and the process of EU governance, as provided for by the concept of the EU governance architecture, facilitates this discussion.

Within that architecture, law can (and should) be conceived as fulfilling a dual role – namely, a *constitutional* and an *instrumental* one. The former captures the law’s capacity of providing a constitutive and legitimizing normative framework. The latter function puts the focus on law as a governance instrument, which necessarily builds on a broad notion of law as a regulatory tool. In order to understand better the implications of the inclusive view on EU governance for the conception of law, and consider the consequences for our subsequent analysis, we will discuss these two functions in reverse order.

#### A) The role of law in the EU governance process

The framework-approach to studying EU governance, suggested above, directs the focus towards *governance capacity*. Accordingly, we aim to explore the Union’s ability to solve governance problems through the governance arrangements that combine different governance modes and instruments.<sup>286</sup> Complementary to the explanations above,<sup>287</sup> let us clarify here what it means – in the light of the inclusive view – to regard EU law as a governance *instrument* in the process of EU governance.

For lawyers with a more traditional mind-set this may surely feel odd. Nonetheless, this conception in fact helps to surpass the stylising tendencies of the past where European governance tools were equated exclusively with non-binding instruments.

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<sup>285</sup> Aalberts (2004) at 40.

<sup>286</sup> See, in particular, Chapters 5 and 7.

<sup>287</sup> See the discussion above in Section 3.3.1.A.

As intimated above, the framework perspective on European governance builds on the recognition that not only the EU's governance instruments have diversified but also the techniques by which it seeks to steer. It recognises that both binding and non-binding instruments may exert legal, or rather, normative effects.

When considering law's instrumental function in the EU context, of course, the more traditional legal tools of EU legislation come to mind immediately. European employment legislation usually comprises directives that establish minimum rules concerning substantive and procedural issues. Furthermore, it is noteworthy that also the EU's means of expenditure related to employment (such as the ESF) are based in legislation. Usually, EU regulations define their scope and conditions of application and their provisions are directly applicable.

Meanwhile non-binding instruments have been playing an increasing role in the EU governance process.<sup>288</sup> Most prominent in the employment context are what we will refer to as the "coordination instruments" (such as guidelines and recommendations), deployed within the framework of policy-specific OMCs (such as the EES). The label of "soft law", emphasising their non-binding nature, has commonly captured the normative quality of these instruments. However, due to the conceptual limitations that such stylisation imposes, we will try to avoid categorising the EU's legal instruments in binary dichotomies, such as "soft" and "hard" law.<sup>289</sup> Senden (2005) offers an instructive overview – reproduced in Table 3.1. below – of the range of possible EU instruments in this category and their (more subtle) normative functions.<sup>290</sup>

Classification	Instruments	Role
<i>preparatory &amp; informative instruments</i>	Green Papers, White Papers, action programmes & informative communications	<i>pre-law</i> function (preparing further EC law & policy and/or providing information on EC action)
<i>interpretative &amp; decisional instruments</i>	Commission's communications, notices & also certain guidelines, codes & frameworks (e.g. competition law and state aid)	<i>post-law</i> function (interpretation & application)
<i>steering instruments</i>	<i>formal</i> : recommendations <i>non-formal</i> : declarations, conclusions, resolutions & codes of conduct	<i>para-law</i> & pre-law functions (giving further effect to Union objectives & policy, often in political/declaratory way or to enhance closer cooperation/harmonisation)

**Table 3.1.: Classification of "soft law" instruments, based on Senden (2005), at 22-23.**<sup>291</sup>

Furthermore, she usefully describes the peculiarity of these instruments as follows:

<sup>288</sup> Snyder (1994).

<sup>289</sup> On this point, see the discussion in Section 3.3.1.A.

<sup>290</sup> These core features have been deducted 'by looking at the instrument itself, its actual contents and the intention of its drafters'. Senden (2005) at 22.

<sup>291</sup> Ibid. at 22-23.

'Rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain – indirect – legal effects, and that are aimed at and may produce practical effects.'<sup>292</sup>

### B) The role of law in the EU governance structure

The inclusive view of EU governance thus implicates a broad notion of law. On that basis, it is consequently necessary to acknowledge also that the EU governance architecture must comprises a *composite* nature in its structural dimension.

Regarding law's constitutional function, then, it is obvious that the Union's constitutional law is embodied in the EU Treaties. The Treaty on European Union (TEU), the Treaty on the functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union (CFREU) provide its constitutional framework in all but the name. The adoption of the Lisbon Treaty and its successful ratification by all Member States has consolidated the European constitutional framework.

In addition, we must recognise that also non-traditional legal instruments (such as Commission communications and Council conclusions) evidently exhibit constitutive qualities. As pointed out above, the idea of the EU governance architecture developed in relation to the Union's multi-annual strategic frameworks also ascribes to the Europe 2020 Strategy the quality of a normative structure.

Hence, it seems only logical to assume that the EU governance architecture is composed of a strategic framework and a constitutional framework (to be discussed in Chapter 4). Each of these fulfils an important function vis-à-vis the overall governance structure. On the one hand, the 'Treaties' constitutional resources underpin the EU governance architecture with a set of fundamental norms and values. Law thus adopts a fundamental task vis-à-vis the EU governance framework. EU constitutional law confronts the EU governance structure with the basic demand to be more than merely a loose framework that assembles different governance arrangements for the achievement of transient functional objectives. It stipulates that EU governance is not a "free-standing" structure but that it is *supported by and builds upon* the Union's legal order as a sort of "constitutional baseline".<sup>293</sup>

On the other hand, the strategic framework of the EU governance architecture *complements* the Union's legal order with more functional goals and concrete targets. Notably, it aims to make the EU's regulatory structure more *adaptable* in the light of the fast-changing needs of global markets and post-industrial societies.

### C) The concept of law within a post-national context

Based on these clarifications, it is still worth deliberating further what broader implications the "framework"-approach to EU governance has for the conception of law. Our aim of

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<sup>292</sup> European Commission (1996), quoted in *ibid.* at 22.

<sup>293</sup> Cf. the idea of "baseline hybridity" developed by de Búrca and Scott (2006).

studying EU governance is to identify how it shapes employment regulation and what consequences this has particularly for labour law. The previous considerations have already underlined that the inclusive view on EU governance builds on a broad notion of law. Here, we will discuss in more depth what value this conception has for our subsequent analysis.

The Lisbon Treaty, as will be explained in the next chapter, has affirmed and sanctioned the EU's standing as a supra-national polity. In that respect, we have already noted a constitutional paradox that typifies the EU system. Importantly, that paradox highlights a fundamental friction that contributes to the growing complexity in EU governance. This friction occurs between the deployment of functional governance arrangements at European level and the formal limitations and procedural requirements that emanate from the constitutional division of competences between the EU and the Member States.

In the following, we will try to elucidate further, what implications this post-national context of the EU polity has for the notion of law. Here, too, we will first regard the process dimension and then the structural one.

#### *The effectiveness challenge*

The recognition that the constitutional paradox provides a fundamental dilemma that typifies the EU legal order draws attention to the fact that *governance challenges law* – notably, in its process dimension.<sup>294</sup> Globalised markets and other, especially transnational, phenomena provoke questions about the efficacy of law as a regulatory tool. Public regulation is therefore increasingly challenged by the functional necessity to answer to a range of varied and possibly conflicting goals in a pluralist society.<sup>295</sup>

In response to this problem, the conceptual move to “embed” law into a framework perspective on EU governance represents an attempt to make sense of ‘a distinct and novel stage of legal integration’.<sup>296</sup> This implies that we need to reconsider the forces in the EU polity that drive the European integration process.

Today, we witness a Union with a “variable geometry”, decisively shaped by processes of “differentiated integration”.<sup>297</sup> Notably, in view of the on-going diversification of governance tools and techniques at EU level, the process of European integration must also be open to more differentiation. The (better) accommodation of diversity actually appears to become an essential pre-requisite for the advancement of the European construction.

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<sup>294</sup> A particular advantage of the “governance turn” in EU studies has been its emphasis on *process*. Especially to lawyers, the governance-perspective highlights the importance of the diversification of regulatory instruments and modes of control in the EU context. See Chapter 2.

<sup>295</sup> Cf. Trubek, Cottrell and Nance (2006).

<sup>296</sup> Dawson (2013) at 223.

<sup>297</sup> De Witte (2013).

Thereby, it is intriguing to see how EU governance has uncovered ‘the *changing rationalities of law itself*, in the process of “integrating Europe”’ [emphasis added, NB].<sup>298</sup> Undoubtedly, in some form law still represents a well-trying medium to create stability and safeguard societal values and social order by means of binding rules that are backed by judicial enforcement. Still, as intimated above, it is also necessary to recognise the legal effects that non-traditional steering instruments may entail. In fact, it is indispensable to realise that in a Union of still-28 Member States,<sup>299</sup> “one-size-fits-all”-type of regulation will usually have limited reach in putting the EU’s broad objectives into effect:

“This stage has produced opportunities to adapt legal institutions, to a new post-national environment, where neither the cultural and normative values, nor the available pool of social knowledge upon which law rests, can ultimately be taken for granted. Law must be able to both accommodate normative difference, and adapt appropriately to rapid technological and scientific change.”<sup>300</sup>

With regard to this need for differentiation, the idea of governance is known to offer some distinct and potent resources – such as the more *reflexive* nature of its processes and instruments and their *capacity to stimulate learning*.<sup>301</sup> In that way, it confronts law’s prior monopoly on public regulation.<sup>302</sup> As Chapter 2 has underlined, in a complex globalised world traditional command-and-control type of regulation may not always be that expeditious. Accordingly, the *effectiveness* of governance arrangements in answering collective problems may in fact be enhanced by rendering them more responsive through the combination of different instruments and techniques. Kilpatrick’s “integrated regime”-thesis suggests that one way to do so could be by promoting the complementarity between different governance tools through governance regimes.<sup>303</sup>

### *The legitimacy challenge*

Meanwhile also the flipside of the constitutional paradox must be taken into account. That is, of course, that also *law challenges governance* – notably, in its structural dimension. It does so by demanding that the solutions drawn up to solve collective problems and the actors who implement them carry certain legitimation and justification.

With the advance of European integration (most notably, the introduction of the single currency) and further trade liberalisation (such as through the free movement of services), EU activities have increasingly been reaching into politically sensitive domains that were hitherto reserved to the national domain. Consequently, there is a need to ensure

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<sup>298</sup> Dawson (2013) at 223.

<sup>299</sup> Although the United Kingdom voted to leave the EU in a referendum in June 2016, we will still refer to the Union as currently composed of 28 Member States (EU-28). EU law in principle continues to apply along with the negotiations of the “Brexit”, based on Article 50 TEU, and the two-year transition period.

<sup>300</sup> Dawson (2013) at 223.

<sup>301</sup> Cf. Sabel and Zeitlin (2008).

<sup>302</sup> Cf the evolutionary perspective advanced by Teubner (1983).

<sup>303</sup> Trubek and Trubek (2007) at 645.

that governance responses designed to address delicate socio-economic issues within the wider setting of the EU continue to be democratically legitimated.<sup>304</sup> A legal perspective, especially the constitutional lens, reminds us that there are important values – other than those representing functional strategic demands – whose enforcement is in the public interest. It underlines the value of public regulation and the responsibility of public authorities. Recognising the mutual relevance of law and governance is therefore considered indispensable also in this regard.

However, the EU's peculiar post-national setting is likely to challenge traditional (national) assumptions about legal order. As indicated in Chapter 2, Walker (2006) alerts us that (traditional) constitutional language has been cultivated within the context of the nation-state. In a globalised world characterised by a great plurality of legal orders, however, lawyers must be acutely aware that legal concepts depend on the interpretation in the context which they are applied in. Lindahl (2010) describes this condition by referring to legal orders as inherently “bounded”.<sup>305</sup>

The post-national context of the EU is shaped by the realities of multi-level policy-making and increasingly dense European governance arrangements, while it builds on a basic division of legal competences between the European and the national levels. In that context, it is important to realise that the *EU faces an essential predicament with regard to its general policy aspirations*. This relates to the fact that the nature of the European legal order is inherently “divided” which raises the problem of the so-called “*implementation gap*”.<sup>306</sup> This means that the EU faces a unique dilemma ‘in bridging the gap between its political aspirations and the distinct legal systems of its member states’.<sup>307</sup> This central limitation in the Union’s ability to exert influence on national implementation must be seen as both a source for and a product of the complexity of the EU regulatory system.

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<sup>304</sup> Cf. Büttgen 2013; Chalmers (2012).

<sup>305</sup> See Lindahl (2010) on the idea of *boundedness* of legal systems. He considers that ‘how legislation is an act of collective self-ordering, that is, the different ways in which legal norms regulate human behaviour. Most generally, the law orders human behaviour by setting its boundaries, that is, by determining, explicitly or implicitly, individually or in general, who ought to do what, when and where. These four boundaries are, of course, what the legal doctrine dubs the subjective, material, temporal and spatial ‘spheres of validity’ of legal norms. The material and subjective spheres of validity of legal norms are posited in the process whereby, articulating what they deem to be the collective interest, legal officials establish what rights and obligations accrue to whom. This account, however schematic, entails that the subjective and material spheres of validity of legal orders are bounded. The key here is the reference to a common interest. Indeed, a common interest is always determinate: legal officials select some interests as worthy of legal protection, and discard others, usually implicitly, as legally irrelevant. The fact that the material sphere of validity of legal norms and orders is bounded means that only a finite schedule of rights and obligations is made available by any given legal order.’

<sup>306</sup> Dawson highlights: ‘This problem arises from a specific difference. Whereas in the national context, the institutions which create legal programmes are also responsible for applying them, European institutions have to rely on national governments to implement common rules. All European law in this sense faces significant gaps – in terms of how rules are interpreted and enforced, and even of possible “cheating” on rational or normative grounds – between the rules set out in legislation, and the way law is implemented in national systems.’ Dawson (2011a) at 89.

<sup>307</sup> Ibid.



In that connection, the law's inherent "boundedness" furthermore produces *problems of "translation"* that affect the exchange of legal notions between the EU and its Member States. Dawson (2013) astutely highlights how in 'a European polity made up of diverse national cultures, invoking complex regulatory structures, no law can stand independently of the cultural and functional context into which it is to be applied.'<sup>308</sup> Hence, valuations of legal concepts and constitutional ideas 'have often been based on concerns and categories that barely survive the translation from a national context to a supra-national one'.<sup>309</sup> In short, the EU polity provides a rather challenging new context particularly for the interpretation and dissemination of legal ideas and especially constitutional concepts.<sup>310</sup>

It is thus crucial to recognise that the post-national context of the EU provides wider social and economic conditions, which require their own constitutional language. This may even go so far, Dawson notes, as to challenge the (constitutive) role of law as an ordering mechanism – i.e. as a stable and coherent 'medium whose basic parameters are fundamentally decided upon'.<sup>311</sup> The complex structure of EU governance, in fact, allows a larger set of actors (at different levels) to influence the ongoing interpretation of European rules.<sup>312</sup> The multi-level and transnational nature of European integration may, therefore, require fostering more responsive and legitimate forms of decision-making and norm-setting. Law's inherent need for context-dependent interpretation indeed seems to warrant 'a search for "reflexive", "dynamic" and other ways of achieving legal values'.<sup>313</sup> This seems particularly true with regard to law's constitutional function.<sup>314</sup>

Accordingly, the benefit of a legal perspective is in reminding us to be careful when examining EU governance based on the inclusive conception. It alerts us to the potential pitfalls when studying the development and elaboration of normative ideas at European level. Thereby, they help to scrutinise the ways in which EU governance influences the national level more thoroughly.

All in all, the dual function that law fulfils within the EU governance architecture underlines the reality of how entangled law and governance have become. While the two undoubtedly represent distinct conceptual phenomena, the idea of the EU governance architecture lets us appreciate their mutual relevance. Given the broad notion of law that accompanies the framework-approach, we propose that the EU governance architecture, in effect, should be viewed as a composite structure. It is both framed by strategic objectives and concrete policy targets, on the one hand, and underpinned by constitutional norms and

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<sup>308</sup> Dawson (2013) at 224. He explains further: 'The diversity of national polities has often led to attempts to provide the national level with some flexibility in incorporating EU law obligations in the domestic realm, where new cultural or political factors may require rules to be re-framed precisely in order to give force to their original meaning.' Ibid. at 238.

<sup>309</sup> Ibid.

<sup>310</sup> See, for example, Kochenov's critique on the EU's use of the principle of the "rule of law". Kochenov (2009).

<sup>311</sup> Dawson (2013) at 239.

<sup>312</sup> Ibid.

<sup>313</sup> Ibid. at 224, 239.

<sup>314</sup> Kochenov (2009).

values, on the other. By implication, the more inclusive conception advanced here stipulates that *enhancing* governance capacity at the supra-national level should – in principle – mean *mastering the balancing act* between effectiveness and democratic legitimacy in the design of governance responses.

### 3.4. BUILDING THE ANALYTICAL FRAMEWORK ON ADVANCED “INTEGRATED REGIME”-THESIS

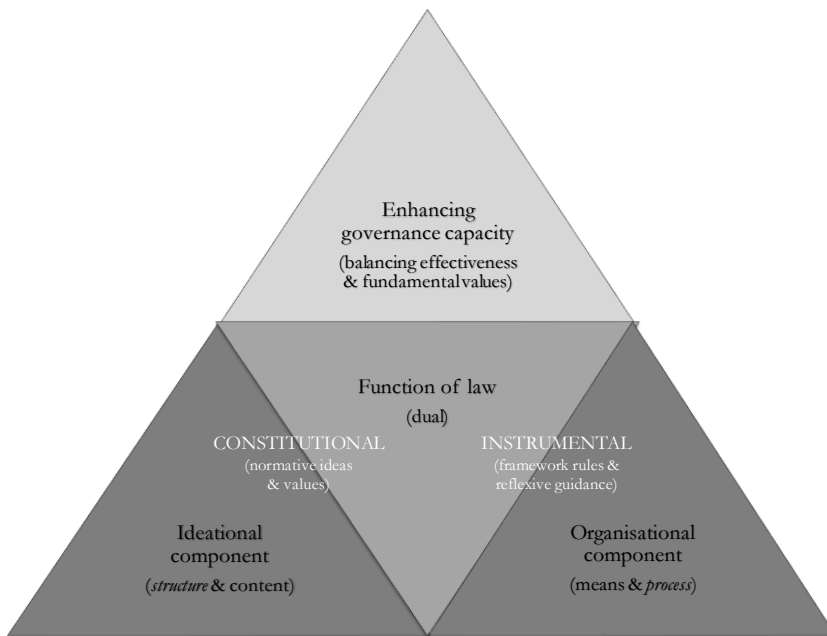
We will now assemble the necessary building blocks for our analytical framework. The considerations above present the attempt of over-coming the theoretical difficulties associated with the EU Constitutionalism-New Governance relationship that served as a conceptual basis for Kilpatrick’s “integrated regime”-thesis. We will first summarise the main arguments presented above, which will enable us to recast the conceptual foundation for our study of EU employment governance. On that basis, we will then translate the framework-approach into an analytical framework for studying how European employment governance has developed in relation to the broader EU governance architecture and concomitant dynamics of regime formation and change.

#### 3.4.1. Broadening the conceptual foundation

The following points describe the main features of the propagated “framework”-approach, intended to serve as a basis for our analytical framework:

1. The “framework”-approach provides for the *analytical distinction of conceiving EU governance both as a structure and a process*. We have denoted this as the *inclusive* conception of EU governance and consider it useful to enhance our understanding of EU governance. While the structural and the process dimensions closely inter-relate and condition each other in practice, their distinction for analytical purposes has facilitated reflection on the notion of hybridity. EU governance is thus conceived as providing an architectural infrastructure that frames the interaction between governance instruments, modes and actors. Rather than pitting law and governance against each other, on that view *hybridity refers to the inter-relationships between various instruments within the broader framework of EU governance*. As we seek to understand how the Union influences labour law through different means of regulation, we will subsequently study in more detail how the EU governance architecture is composed and how it shapes the governance process.
2. The inclusive notion of EU governance essentially helps us to get a *better grasp on the complex workings of the EU polity*. It allows us to reconsider the role of law in that context. Therefore, the framework-approach can be usefully complemented by the idea of the *EU governance architecture*. That concept has already proven its utility from a legal perspective in deconstructing and making sense of the complexity of EU governance and, hence, identifying the latter’s interactions with and implications for EU law. Our approach builds on the recognition that *law fulfils a dual role* with respect to the EU

governance architecture, providing both a constitutive framework and a regulatory instrument. That recognition presupposes a broad conception of law. It embraces both the possibility of legal effects exerted by non-traditional (i.e. non-binding) legal instruments and alerts us to the post-national challenges that confront law's inherent need for context-dependent interpretation. This broad notion, in turn, makes us recognize that the EU governance architecture possesses a *composite* structure. It comprises both a fundamental legal-constitutional framework and a more adaptable politico-strategic one.



**Figure 3.1.: The conceptual framework of the EU governance architecture**

3. The “framework”-approach thus allows us to *appreciate the distinctiveness and mutual relevance of law and governance* within the EU context, which we have tried to illustrate in Figure 3.1. above. It recognises that the “constitutional paradox” challenges the European polity – which is hence, by nature, forced to design public regulation in response to conflicting demands: How can we ensure the rule of law to safeguard the democratic credentials of political community in the EU system of multi-level governance while simultaneously maintaining the efficacy of public interventions in a post-national societal context and globalised economy? In that regard, the purpose of the EU governance architecture is to sustain and enhance governance *capacity*. We denote the latter as the ability to provide adequate governance solutions to complex, collective problems. To be more precise, based on the more inclusive conception advanced here, the *enhancing of governance capacity* at the supra-national level should ideally

mean *mastering the balancing act* between effectiveness and democratic legitimacy in the design of governance responses.

### 3.4.2. Recasting the “integrated regime”-thesis

On that basis, we are now equipped with the necessary arguments to recast Kilpatrick’s “integrated regime”-thesis in order to study both the development and the effectiveness of EU employment governance today. According to the framework-approach, the development of EU employment governance needs to be regarded as part of the broader evolution of the EU governance architecture.

This broader framework of EU governance should help to understand better processes of regime formation that may affect the effectiveness of particular governance arrangements. Consequently, the “*integrated regime*”-thesis can be reconceived as follows. We argue that (the peculiar configuration of) the EU governance architecture (at the time) provided the main source for the inference that EU employment governance represented an integrated regime. Our working hypothesis for the subsequent analysis thus provides:

The EU governance architecture influences European governance capacity in a certain governance area through processes of issue-specific regime formation.

This complex influence of EU governance is what we seek to understand in this study. That is, we aim to make sense of the *hybridised* influence that EU governance emits onto the national level. The particular experiences of EU law provide some useful lessons and critical insights, when we are trying to understand and assess contemporary European governance arrangements and their diversified normative effects. They alert us to important structural obstacles, such as the “implementation gap” and “translation problems” that circumscribe the Union’s ability to deliver normative solutions. On that basis, we can now convert the “framework”-approach into a practical analytical framework.

### 3.4.3. Articulating the “framework”-approach through the EU governance architecture

In Section 3.3.1. above, we have introduced the idea of the EU governance architecture to advance the inclusive view of EU governance. This has allowed us to restate the law-governance relationship in a constructive way. The framework-approach is designed to make sense of the diversified normative influences that EU governance is exerting on labour law today. The “architecture”-idea provides a valuable analytical concept in support of that argument, since it helps putting the focus on the *context* in which Kilpatrick’s integrated characterisation of EU employment governance has taken shape. Therefore, we will now outline the key parameters of our analytical framework.

#### A) The analytical tools

The notion of the governance architecture provides useful analytical tools. It allows us to differentiate, as Borrás and Radaelli (2011) do, between the *ideational* and *organizational*

components of EU governance.<sup>315</sup> The first component refers generally to the ideational repertoire, a set of central (open-ended) ideas (such as “growth”, “competitiveness”, “sustainable development” etc.) that characterise and steer the governance architecture. The second component comprises the EU’s formal and informal arrangements needed to organise the governance process (including the design of decision-making structures, the selection of policy instruments and their procedural requirements). Of course, this compositional distinction is primarily a conceptual one, and should therefore not be treated as an overly strict separation.

Still, in this way, the idea of the governance architecture usefully complements our framework-approach by enabling the study of EU governance both as a structure and a process. The *structural dimension* can particularly be recognized within the ideational component which is also understood as a ‘discourse that uses the ideational repertoires in order to discipline, organize and legitimize the hierarchical relationships between the goals of a high-profile initiative and the policy instruments’.<sup>316</sup> The *process dimension* instead corresponds to the organisational component. That is understood as ‘the explicit politico-organizational machinery where the ideational repertoires and discourses are in fact defined and patterned through complex political processes of a multi-level nature’.<sup>317</sup>

This means, while the Union’s policy aspirations are expressed by broad common objectives and thus structured in the ideational-normative framework, they are further articulated through normative discourses advanced by the EU’s governance instruments and processes. By studying the ideational and organizational components of the EU governance architecture, we intend to illuminate how the interaction of different instruments and processes of EU governance reproduces and affects these over-riding normative ideas.

ANALYTICAL FRAMEWORK BASED ON THE COMPOSITE EU GOVERNANCE ARCHITECTURE		
Level of analysis	Function	Type (and objects) of regime change
<i>Ideational component</i>	Constitutional framework	Regime transformation (norms and principles)
	Strategic framework	
<i>Organisational component</i>	Governance instruments	Change within regime (rules and decision-making procedures)
	Governance techniques	

**Table 3.2.: Schematic overview of the analytical framework**

<sup>315</sup> Borrás and Radaelli (2011) at 470-471.

<sup>316</sup> Ibid. at 471.

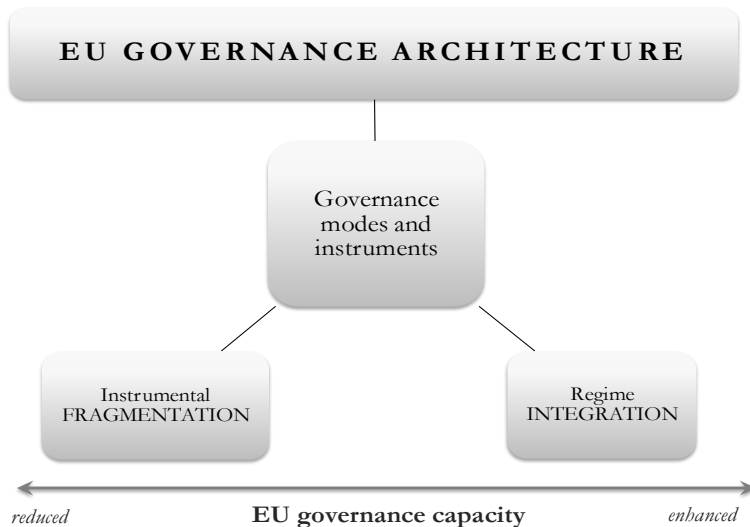
<sup>317</sup> Ibid.

## B) The analytical framework

Constructed from the preceding arguments, Table 3.2. above summarises our analytical framework. It is designed to study how processes of regime formation are shaped by the broader governance context. Accordingly, it is based on the hypothesis that the EU governance architecture influences European governance capacity in a certain governance area through processes of regime formation. Based on the inclusive notion of EU governance, law fulfils both a constitutive role (structural dimension) and an instrumental function (process dimension) in these processes.

Here, it is useful to recall again Krasner's (1983) basic distinction regarding the processes of regime change, discussed in Chapter 2. This considers modifications occurring at the organisational level (rules and decision-making procedures) as change occurring *within* a particular regime, whereas alterations occurring at the normative level (norms and principles) indicate regime *transformation*.

This means, we will see "transformative change" (i.e. whether a certain regime disappears or is replaced by another) at the level of underlying basic norms and principles. Thereby, we associate the *formation of new regimes with an enhancement of governance capacity in a particular issue area* (see Figure 3.2. below). This means that the enhancement of the hybrid interaction between different governance modes and instruments should simultaneously advance also the effectiveness of the governance arrangements.



**Figure 3.2.: The hypothesis of regime transformation under the influence of the EU governance architecture**

At the same time, the demise of a regime would correspond to instrumental fragmentation and therefore reduced governance capacity. This would hence result in a failure to deliver on the respective objectives in that respective policy field.

With the help of this framework, the following chapters will provide a multi-layered analysis, trying to answer whether EU employment governance can still be regarded as an integrated regime today. This will simultaneously permit us to judge also whether it is still operating effectively – i.e. achieving the EU's employment goals – today. This question is particularly relevant because the past decade has seen incidences of severe financial, economic and monetary crisis in Europe with grave repercussions for the level and quality of employment. In response particularly to the Euro crisis, European leaders have set about to overhaul the EU's system of socio-economic governance.

Accordingly, the aim of the following chapters is first to gain a better understanding of the EU governance architecture in its current form and how it has been affected by these developments (Chapters 4 and 5). Then, we will analyse how EU employment governance is embedded within that architecture (Chapter 6) and how the advancements in that framework have affected European employment regulation (Chapter 7).

## Chapter 4 – The current ideational framework of EU socio-economic governance: the Lisbon Treaty and Europe 2020

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### 4.1. INTRODUCTION

The broad analytical framework, outlined in the previous chapter, has been built on an inclusive view on EU governance and hence designed around the idea of the “governance architecture”. This makes it possible now to examine both *how the different instruments of EU employment regulation have developed until today and how their interaction has been shaped by the EU governance architecture*. Thereby, we consider how the configuration of that architecture is influencing processes of regime formation and change in a given issue area. We are trying to answer whether EU employment governance can still be regarded as an integrated regime today – and, thus, whether it is (still) operating effectively. Notably, we seek to fathom whether the relevant instruments continue to interact complementarily and how EU governance is influencing labour law in diverse ways.

As intimated in Chapter 3, since 2010, the EU’s general governance architecture jointly builds on the Lisbon Treaty and the EU’s new multi-annual growth strategy, Europe 2020. We will refer to this composite framework as the “Lisbon 2020”-architecture. It is important to realise that the Treaty’s entry into force in late 2009 and the hasty adoption of Europe 2020 in early 2010 took place in the aftermath of the global financial and economic crisis. The sovereign debt crisis in the Euro area (EA) – hereafter, the “Euro-crisis” – then started to crystallise around the same time. The European crisis management has included a series of far-reaching reforms intended both to prompt emergency measures and to strengthen the EU’s system of economic governance. These reforms have had a significant impact on the broader EU governance architecture and important implications for EU employment governance, in particular. Therefore, we cannot adequately analyse the EU’s architecture of socio-economic governance without also studying in more detail the impact of this fundamental overhaul in response to the crisis. The aim of this chapter and the next one is therefore to better understand this reshaped architecture.

In this chapter, we will focus on the *structural* dimension of EU governance. This means, we will examine in detail the ideational framework of the “Lisbon 2020”-architecture and *how the EU is thereby advancing its normative aspirations concerning socio-economic governance*. We distinguish between the EU’s constitutional choices and its broad strategic ambitions. We will first look at the effects of the Treaty reform and then describe the development of the EU’s broader strategic framework since 2010. We will put special focus on how EU crisis management has impacted on the constitutional framework of the EU governance architecture. Chapter 5 will then explore in more detail how EU crisis management has also impacted on the strategic framework of that architecture and its politico-organisational apparatus.



## 4.2. CONSTITUTIONAL CHOICES (POST-2009)

The EU Treaties provide the basic constitutional framework to the EU's governance architecture. Following its signature in late 2007, the Treaty of Lisbon replaced the draft Treaty establishing a Constitution for Europe. It became effective from December 2009.

It is important to note that the main purpose of the former Constitutional Treaty had been to improve the efficiency of the Union's institutions and make them more democratic. The Lisbon Treaty bore witness to the fact that the need and desire for institutional reform of the EU had persisted despite European citizens' rejection of the Constitutional Treaty in the mid-2000s. Meanwhile the Union's membership had doubled within just a few years and decision-making had become more cumbersome as a result. Thus, the EU institutions and its policy-making structures still had to be adapted.

The so-called "Reform Treaty" eventually provided the answer to these problems.<sup>318</sup> It effectively updated the TEU and introduced modifications to the Treaty establishing the European Community (TEC). The latter was replaced and succeeded by the TFEU. The Lisbon Treaty also gave binding force to the CFREU. Nevertheless, the Euro crisis would soon expose some fundamental flaws in the construction of the Union's constitutional framework.

Subsequently, we will discuss the most important changes, which the Lisbon Treaty brought about with respect to socio-economic issues in the constitutional framework. After that, we will focus on the European Economic Constitution and the question of how EU crisis management has proceeded to mend some severe shortcomings therein.

### 4.2.1. The EU constitutional framework following the Lisbon Treaty

The TEU and the TFEU (hereafter, also referred to as "the Treaties") jointly define the Union's fundamental objectives, its institutional set-up, tasks and responsibilities, and the limits of its competences.

#### A) Constitutional objectives

The Treaty of Lisbon reaffirms the EU's status as a polity in its own right, conferring it standing as a "legal entity".<sup>319</sup> The new Article 2 TEU now explicitly lists the values on which

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<sup>318</sup> It provided a compromise to which all Heads of State and Government could – at last – agree in the Portuguese capital by mid-October 2007. Piris (2010).

<sup>319</sup> In other words, the EU has been conferred the ability to enter into a contract, including becoming a party to an international convention (Article 3 (2) TFEU) or a member of an international organization, e.g. Article 6 (2) TEU stipulates that the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). See OPINION 2/13 of the Court of Justice of the European Union [2014] ECLI:EU:C:2014:2454.

the Union is founded.<sup>320</sup> And Article 3 TFEU reinforces and broadens the EU's goals.<sup>321</sup> With the establishment of the Internal Market and the EMU, the EU pursues the following Treaty objectives:

‘It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a *highly competitive social market economy*, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States.’ [emphasis added, NB]<sup>322</sup>

This provision consolidates the Union's constitutional ambitions in a set of fundamental common objectives. For the achievement of these basic goals, the TFEU determines the distribution of legal competences, organises the Union's tasks and responsibilities and the different modes of decision-making.

Notably, the objective of establishing a “competitive social market economy” (CSME) is a novelty. It attests to the advanced state of European integration, recognizing that the EU has in fact evolved from a common market based on economic cooperation to a supra-national polity. The goal of establishing a CSME thus captures the common desire to find a new equilibrium between economic and social objectives in European integration. A desire to enhance the social dimension of European integration has been growing especially since the European Communities were transformed into the European Union. It is thus officially recognized that the EU polity does not only have an economic but also a social purpose.<sup>323</sup>

From this perspective, it is not surprising then that the Lisbon Treaty has bolstered the constitutional framework with the following two horizontal obligations. They represent specific social concerns which the Union is obliged to mainstream into its day-to-day activities. Article 8 TFEU binds the EU ‘to eliminate inequalities, and to promote equality, between men and women [in all its activities]’. Article 9 TFEU – also known as the “horizontal social clause” – requires the Union to promote amongst others ‘a high level of

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<sup>320</sup> ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’ (Article 2 TEU)

<sup>321</sup> Based on Article 3 (1) and (2) TEU, the Union aims to promote peace, its values and the well-being of its peoples. It shall offer its citizens an area of freedom, security and justice without internal frontiers, where the free movement of persons is ensured [...].

<sup>322</sup> Article 3 (3) TEU.

<sup>323</sup> Azoulai (2008).

employment, the guarantee of adequate social protection, [and] the fight against social exclusion' when defining and implementing its policies and activities.<sup>324</sup>

## B) The Union's legal basis to act

It is commonly known that the legal division of competences between the EU and the Member States is a hierarchical one.<sup>325</sup> Indeed, the European project has been known to owe its success to the infamous paradigm of "integration-through-law".<sup>326</sup> On that basis, the Treaties further define the basic delimitation of competences in more detail.

### *Delimitation of competences*

EU action within the multi-level governance system is confined by the principles of conferral, subsidiarity and proportionality, and that of sincere cooperation between the Member States. The Lisbon Treaty has moved these principles from the TEC to the TEU.<sup>327</sup>

Articles 3 till 6 TFEU now specify the EU's (exclusive and shared) legislative, coordinating and supplementary competences. The Union's exclusive competences have not changed.<sup>328</sup> Its primary competence over monetary policy is a case in point (to be discussed in more detail Section 4.2.2.A). The EU *shares* competence with the Member States as regards the Internal Market, for certain aspects of social policy circumscribed by the Treaty, and economic, social and territorial cohesion.<sup>329</sup> This means the EU can adopt legislation in these areas once the supra-national institutions have commonly ascertained the necessity and proportionality of harmonising certain conditions at European level. In the fields of economic and employment policy, the Union's authority is restricted to the *coordination* of national policies. The prerogative to legislate in these fields rests with the Member States. Additionally, the EU's faculty to take initiatives for the coordination of Member States' social policies is merely optional.<sup>330</sup> In other areas – such as education, vocational training and youth policy, or industrial policy, any action by the EU may only be *supportive*.<sup>331</sup>

Evidently, compared to the TEC, the list of competences in the TFEU has become more elaborate. As a result, however, the division of responsibilities between the EU and the Member States now appears rather more convoluted than clearer. Notably, the technique of

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<sup>324</sup> Article 9 TFEU also promotes the mainstreaming of requirements linked to a high level of education, training and protection of human health.

<sup>325</sup> Based on the principle of primacy of EU law and the doctrine of direct effect.

<sup>326</sup> Weiler (1982, 1991). EU law, in principle, supersedes national law based on the doctrines of "supremacy" and "direct effect".

<sup>327</sup> Article 5 TEU. See also Section 4.3.3.A.

<sup>328</sup> Article 3 (1) TFEU enumerates: "The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; and (e) common commercial policy."

<sup>329</sup> Article 4 (a), (b) and (c) TFEU; Article 6 TFEU supplementary competence (e.g. industry).

<sup>330</sup> Article 5 TFEU.

<sup>331</sup> In these areas, EU competence is confined to 'actions to support, coordinate or supplement the actions of the Member States'. See Article 6 TFEU.

coordination is now recognised as a self-standing competence of the Union that lies at the basis of European socio-economic governance.

*A bolstering of social competences?*

Considering that the Lisbon Treaty confirms the Union's constitutional obligation to pursue economic and social objectives in a balanced manner, two further changes must be highlighted that relate to the division of competences. Firstly, changes in the Title on Social Policy are minimal but important. Article 152 TFEU has been added which accords more formal recognition to the role played by the European social partners. It orders the EU to promote that role by facilitating the European social dialogue, while respecting its autonomy. The provision also creates a legal basis for the Tripartite Social Summit for Growth and Employment, which had already been an annual practice for most of the preceding decade.<sup>332</sup>

A second important change is that the Lisbon Treaty has afforded the CFREU 'the same legal value as the Treaties'.<sup>333</sup> Previously, the enforceability of the Charter had provided a bone of serious contention in the negotiations (both, in the Convention and the respective two IGCs) leading up to the Lisbon Treaty.<sup>334</sup> Therefore, the application and interpretation of the Charter's provisions has been made subject to strict conditions.

Article 51 (1) CFREU determines that the CFREU is binding to the extent that it applies generally to the EU 'institutions, bodies, offices and agencies'. To the Member States it applies 'only when they are implementing Union law'. The legal enforcement of the Charter is therefore subject to strict subsidiarity. In addition, the enforceability of its provisions is limited even further by the distinction between "rights" and "principles". The *rights* recognised by the Charter, in principle, grant individual access to supra-national legal protection – albeit subject to several conditions that Article 52 CFREU, paragraphs (2) till (4) determine regarding their application.<sup>335</sup> In contrast, though, Article 52 (5) CFREU provides that those Charter provisions containing *principles* require implementing legislation or executive acts in order to be 'judicially cognisable only in the interpretation of such acts and in the ruling on their legality'. The dichotomy will be discussed in more detail in Chapter 7.

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<sup>332</sup> See Council Decision 2003/174/EC of 6 March 2003 establishing a Tripartite Social Summit for Growth and Employment. Based on European Commission, *Communication on The European Social Dialogue, a Force for Innovation and Change* (COM(2002) 341 final, Brussels, 26 June 2002).

<sup>333</sup> Article 6 (1) TEU.

<sup>334</sup> de Búrca (2003).

<sup>335</sup> The provisions subject the exercise of rights 'for which provision is made in the Treaties' to the conditions and limits defined by the latter; it stipulates that the meaning and scope of those rights, corresponding to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), must be at least the same as those laid down by the said Convention; and it recognises 'fundamental rights as they result from the constitutional traditions common to the Member States' requiring them to 'be interpreted in harmony with those traditions'.

### C) Procedural requirements

Regarding organisational modifications, the Lisbon Treaty introduces the following noteworthy changes: the abolishment of the pillar-structure, the affirmation of the European Parliament and the Council of Ministers as co-legislator (co-decision became the “ordinary legislative procedure”); recognition of the European Council as an official EU institution which has thereby also gained a stable presidency, and additional measures to enhance democratic participation.<sup>336</sup> Moreover, we consider the new provisions regarding possible Treaty revisions and the general consistency-requirement worth describing in more detail.

#### *Treaty revision requirements*

The Treaties embody the Member States’ and the EU institutions’ fundamental agreement on how the Union should be structured and how powers should be divided as a matter of principle. To safeguard this consensus, they tightly regulate the legal conditions (such as, voting requirements) and procedures for its own amendment.<sup>337</sup> Strict procedural requirements under the so-called *ordinary revision procedure* have barred the Member States from altering the Treaties in a precipitant manner.<sup>338</sup> Hence, *durability* is undoubtedly one of the defining features of the constitutional framework.

It is, nevertheless, also vital to ensure the proper *functioning* of the Union. Its constitutional framework might sometimes therefore require subtle changes that can be applied more swiftly.<sup>339</sup> Hence, an important change is that the revision procedure of the Treaties has been simplified to facilitate such minor modifications. The Lisbon Treaty expands on the so-called “bridging clauses” (or, according to the French name, “*passerelle clauses*”) which facilitate the modification of the constitutional provisions.

Specific *bridging clauses* had already existed before. They allow that the mode of decision-making for specific policy items can be changed from unanimity to qualified

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<sup>336</sup> E.g. the creation of the European citizens’ initiative (Article 11 (4) TEU and Article 24 TFEU); or the so-called “yellow card”-procedure allowing a majority of national parliaments to veto EU legislative initiatives. On the latter, see Chapter 6.

<sup>337</sup> From an institutional perspective, the European Commission and the Court of Justice haven’t traditionally been the guardians of this common consensus.

<sup>338</sup> The *ordinary revision procedure* is now laid down in Article 48(2) to (5) TEU. In this case, any proposed Treaty changes – to be determined by an Intergovernmental Conference (IGC) – need to be agreed unanimously and subsequently ratified by all Member States.

<sup>339</sup> The Treaties have always contained a so-called “flexibility clause”, now Article 352 TFEU, whereby the Council can adopt appropriate measures, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, if action by the Union should prove necessary and the Treaties have not provided the necessary powers. On a proposal from the Commission and after obtaining the consent of the European Parliament, such measures can only be adopted by unanimity. The use of this flexibility clause has been further clarified by the Lisbon Treaty to specifically exclude the CFSP, and to the effect that it cannot be used to increase the Union’s competences. A new protocol states that the Union may take action under this provision to ensure free and undistorted competition in the internal market.

majority voting (QMV).<sup>340</sup> The Lisbon Treaty establishes two more of these *passerelle clauses*. Here, the European Council may activate and decide, unanimously, on the use of the “general passerelle clause” (Article 48 (7) TEU) and “the specific passerelle” for the Multiannual Financial Framework (Article 312 TFEU).<sup>341</sup>

The Lisbon Treaty also supplements the constitutional framework with a new, general bridging clause for Treaty changes. Article 48 (6) TEU thus provides the new *simplified revision procedure* for the general revision of primary EU law. It empowers the European Council to introduce minor amendments to Part Three of the TFEU by unanimous decision.<sup>342</sup>

### *The consistency requirement*

Finally, the Treaty’s consistency requirement is worth highlighting. The new Article 7 TFEU forms part of the ‘Provisions having general application’ (Title II). It states:

‘The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.’<sup>343</sup>

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<sup>340</sup> In the employment law field, Article 153 (2) TFEU, 4<sup>th</sup> sentence, provides that the Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the ordinary legislative procedure applicable to the ‘protection of workers where their employment contract is terminated’; the ‘representation and collective defence of the interests of workers and employers, including co-determination’ (yet, subject to the exclusion of specified collective labour rights from the EU’s legislative competence); and the ‘conditions of employment for third-country nationals legally residing in Union territory’. See, respectively, paragraph 1(d), (f) and (g) of Article 153 (1) TFEU. Article 192 TFEU is another example of a bridging provision that may be enacted with regard to certain environmental matters.

<sup>341</sup> The *general passerelle* allows the European Council, acting unanimously and after obtaining Parliament’s approval, to authorise application of the ordinary legislative procedure (QMV) for any legal basis under the Treaty covering policy areas, provided that no national parliament makes known its opposition within six months. See [http://europa.eu/rapid/press-release\\_MEMO-09-531\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-09-531_en.htm?locale=en) (accessed 15 January 2016).

<sup>342</sup> Article 48 (6) TEU reads: ‘The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union. The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements. The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties.’

<sup>343</sup> Conceptually, this Article builds on the TEU’s institutional provisions, notably Article 13 (1) TEU which states: ‘The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions. [...]’ The provision then goes on to list the Union’s main institutions (i.e. the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors).

We consider this provision to be the key in *linking* the EU's constitutional framework (i.e. the Treaties) with the strategic framework of, what is currently, Europe 2020. As will be elaborated in more detail below, the Europe 2020 Strategy provides – even more so than its predecessor, the Lisbon Strategy<sup>344</sup> – a deliberate attempt of providing direction and “consistency” to the EU's system of governance.

All in all, because of those recent changes by the Lisbon Treaty, the Treaties and the Charter together represent a constitutive and durable legal framework, subject to the enforcement of the CJEU. They provide the constitutional foundation – of an unprecedented nature – for the supranational polity that the EU has become.<sup>345</sup> Indeed, it must be recognised that given the expansion of its objectives and recognition of fundamental values, formally the Union's social “face” has never been as manifest as today under the Lisbon Treaty.

Still, it is true that the origin of the Union anchors in its broad economic constitution that has become ever more sophisticated over time. The Lisbon Treaty naturally reaffirms the EU's economic powers. In that regard, it may be questioned to what extent the Union's social objectives actually take *effect* these days.<sup>346</sup> Chapters 6 and 7 will illuminate this question from the angle of the protection of workers' rights. Meanwhile, at this point it is necessary to draw attention to the specific adjustments that the European Economic Constitution has undergone in the course of the Euro-crisis.

#### **4.2.2. The European Economic Constitution and its crisis**

After the global financial system started to corrode rapidly in 2007-2008, the ensuing Great Recession had a devastating impact on economic growth and employment everywhere. Accordingly, the attention of public authorities at all levels turned to preventing a total economic meltdown. In the EU, the downturn also threw the processes of common socio-economic governance off the rails. In late 2009, hopes started budding that the worst of the global financial and economic crisis would soon be overcome. However, European leaders soon faced further challenges from the eruption of failing market mechanisms.

Notably in the EA, the bushfire-like spread of financial risks drastically unmasked the deep systemic inter-dependencies among European economies. From 2010, therefore, for several European countries the struggle continued in the form of a rampant debt crisis. This “Euro-crisis” comprised acute threats to the stability (and, for some, even the survival)

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<sup>344</sup> This multi-annual strategic programme adopted by the European Council at its Spring Summit in Lisbon in March 2000 goes by both names, the “Lisbon Strategy” or the “Lisbon Agenda”. Hereafter, we will employ these labels interchangeably.

<sup>345</sup> Surely, when compared to national constitutions, the EU's constitutional framework may still appear rather incomplete – not least, since the (controversial) constitutional label has been removed. But, then again, the EU does not represent a nation-state but a supra-national union of 28 Member States.

<sup>346</sup> I.e. Does their actual reach manage to transcend – in their practical application – the traditionally “narrow notion” of the Union as an integrated market?

of the common currency. In its wake, it mobilised political leadership to revamp fundamentally the EU framework for socio-economic governance in the years to follow.

The EU's crisis management has been tackling – amongst others – certain fundamental flaws in the constitutional framework of the EMU. To fathom how these flaws have been approached, we first need to provide an overview of the Union's constitutional mandate with regard to regulating economic and monetary matters.

#### A) The uneven Treaty basis of EU economic governance

The principles of free movement and free competition in the EU Single Market and the common provisions on economic and monetary policy together are understood as composing the so-called “European Economic Constitution”.<sup>347</sup> Through these means, specifically, the Union shall ‘work for the sustainable development of Europe based on balanced economic growth and price stability’ etc.<sup>348</sup>

European economic integration, in the context of the Internal Market, is about enhancing trade for economic growth and well-being, through harmonisation. This means the approximation of Member States’ laws shall remove trade barriers and so ensure the cross-border mobility of production factors (i.e. goods, services, workers, and capital),<sup>349</sup> while the EU ensures the general conditions for free and fair competition.<sup>350</sup>

Complementary to this, in the context of the EMU, EU integration is based on the establishment of the common currency. It is all about ensuring price stability to enhance trade, growth and living standards in Europe. This fundamental objective should be further supported by the close coordination of national economic policies following the principle of an open market economy with free competition.<sup>351</sup>

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<sup>347</sup> Cf Joerges (2012). The EU has the constitutional duty both to establish the Internal Market and the EMU, including the introduction of the Euro as its single currency. See Article 3 (3) and (4) TEU respectively.

<sup>348</sup> Article 3(3) TFEU.

<sup>349</sup> This approximation may occur either through “negative harmonisation” or “positive harmonisation”. A negative form of harmonisation occurs when the Court of Justice strikes down national laws perceived as barriers to the freedom of movement and undistorted competition. Barnard and Deakin (2000, at 333) explain: ‘Since these principles have the status of fundamental rights under the EC Treaty, they are capable of having direct effect in national legal orders in such a way as to confer rights on individual parties. Moreover, thanks to the doctrine of the supremacy of EC law, they take priority over national provisions in the event of a conflict.’ Positive harmonisation refers to instances where the EU legislator [is] acting to regulate a certain matter by adopting binding rules, provided ‘that the power to act in a given area exists’. (Ibid. at 334). Articles 114 and 115 TFEU provide general legal bases for the approximation of laws in the “positive” sense in order to ensure the functioning of the Internal Market. Thereby, it is noteworthy that Article 114 (2) TFEU excludes any measures harmonising the rights of persons in employment based on QMV. Under Article 115 TFEU, instead, the latter is possible but based on decision-making by unanimity.

<sup>350</sup> Articles 101-102 TFEU; and Regulation (EC) No. 139/2004. Craig and de Búrca (2015) at 1001-1116.

<sup>351</sup> See Article 119 TFEU.



It is noteworthy that in particular, the Treaty principle of free movement of capital and payments reveals how the Internal Market and the EMU project are closely interlinked.<sup>352</sup> It only gained the status of a fundamental freedom from 1992.<sup>353</sup> The primary objectives of monetary union (price stability and exchange rate stability) have promoted the establishment of a single marketplace for capital and financial services in the EU.<sup>354</sup> As a result, competition in the financial markets has been gradually Europeanised – especially, through the integration of banking markets.<sup>355</sup>

In recent years, EU leaders have attempted to re-introduce some measures of control to contain (and to avert future) crisis in the financial sector. Yet, more importantly, European anti-crisis measures have linked the sovereign debt crisis that followed from 2010 to severe deficiencies in the design of the EMU. Below, we will therefore first describe the key features of the EMU's constitutional set-up and then focus on the main changes induced by EU crisis management. In the light of the official narrative that drove these changes, we will also discuss briefly how the liberalisation of capital flows in the EU and the advanced integration of the European banking system have contributed to the financial and the Euro crisis.<sup>356</sup>

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<sup>352</sup> Shaw (2000).

<sup>353</sup> Establishing a common market in financial activities was only advanced pro-actively at European level from the mid-1980s. (Shaw et al. 2007, at 184) Due to Member States' fears of capital flight, the provisions on cross-border capital movements in the Rome Treaty were relatively weak compared to those prescribing the free movement of goods, services and workers. This was remedied legally already to some extent in 1988 when European secondary legislation was put forward as part of the Single Market Programme to promote and strengthen cross-border capital mobility. (See Article 1 of Directive 88/361 obliged Member States to remove restrictions on capital movements; see also Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 EEC.) Concerns were growing that restrictions on the movement of capital and payments hampered access to capital for domestic firms due to increased costs and reduced Member States' attractiveness for foreign investment. Freeing up the cross-border mobility of capital would furthermore be essential to further expediting the free movement of goods, business and persons and thus to completing the Internal Market.

<sup>354</sup> The Maastricht Treaty replaced the former provisions on capital movements with a single framework, more comparable to that of the other fundamental freedoms (Shaw et al. 2007, at 184). The provisions adopted in Rome, Articles 67-73 EEC, were replaced by, what are now, Articles 63-66 TFEU and Article 75 TFEU. The Court of Justice then soon confirmed that Article 56 (1) and (2) EC (now Article 63 (1) and (2) TFEU) had direct effect and that the free movement of capital provided a fundamental principle of the Treaty. (See Joined cases C-163, 165 and 250/94 *Criminal Proceedings against Lucas Emilio Sanz de Lera* [1995] ECR I-4821; and Case – 463/00 *Commission v Spain* [2003] ECR I-4581, para 68; quoted in Shaw et al. (2007) at 186.) See Shaw (2000).

<sup>355</sup> Market access was facilitated through the corresponding adaptation of the *Cassis de Dijon*-principles. Mutual recognition of the regulatory standards and regulatory authorities of one Member State ensured that market actors established and legally doing business in one Member State were entitled to enter the markets of all other Member States. See Moran, 'Politics, Banks, and Financial Market Governance in the Euro-Zone' in K. Dyson (ed), *European States and the Euro – Europeanisation, Variation, and Convergence* (Oxford University Press, Oxford, 2002) 257-277, at 268.

<sup>356</sup> In fact, the absence of an integrated EU-level framework was regarded as a key destabilising factor in the construction of the EMU. European Commission, Communication on A blueprint for a deep and genuine Economic and Monetary Union (COM(2012) 777 final/2, Brussels, 30 November 2012) at 3.

Traditionally, both strands of *economic policy-making* had been organised within the confines of the nation-state. *Fiscal policy* refers to the government's pursuit of economic policy objectives through budget allocation, while *monetary policy* concerns central banks' pursuit of macro-economic policy objectives.<sup>357</sup> For political reasons, however, the EU Treaties have separated the power for economic (notably, fiscal) and monetary policy-making between the national and the European level. This divided legal set-up imposed on two closely interrelated policy fields provides a fundamental source of complexity for the system of economic governance in the EU.

Following its adoption in 1992, the Maastricht Treaty determined that the EMU would be built on a divided institutional structure for regulating economic and monetary policy matters.<sup>358</sup> Economic policy-making was thus significantly reorganised for those countries that adopted the Euro as their common currency: Monetary policy would henceforth (i.e. from 1999) be set by a supranational central bank. But fiscal policy would remain in the hands of national governments that must coordinate their economic policies and fiscal planning according to common European objectives.<sup>359</sup>

Consequently, the more technical domain of monetary policy has been centralised in the hands of an independent (read: "de-politicised") European Central Bank (ECB).<sup>360</sup> The ECB controls the supply of money in the EA. It governs interest rate and exchange rate policy for (currently) nineteen Member States whose currency is the Euro.<sup>361</sup>

At the same time, the EA member countries – by law – retain the prerogative of fiscal policy-making. The national governments decide how public money is spent to achieve economic policy aims, including the European ones. Thus, legally, the design of national budgets is merely subject to coordination – not harmonisation – at European level based on commonly defined objectives.<sup>362</sup>

In effect, economic policy-making at national level in principle continues to be typified by *politicisation* in the domestic realm, where it is weighed against demands of social

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<sup>357</sup> It does not take an expert in macro-economics to understand the following basics about the relationship between economic and monetary policy: 'When policymakers seek to influence the economy, they have two main tools at their disposal – monetary policy and fiscal policy. *Central banks indirectly target activity by influencing the money supply* through adjustments to interest rates, bank reserve requirements, and the purchase and sale of government securities and foreign exchange. *Governments influence the economy by* changing the level and types of taxes, the extent and composition of spending, and the degree and form of borrowing.' [emphasis added, NB] See <http://www.imf.org/external/pubs/ft/fandd/basics/fiscpol.htm>

<sup>358</sup> Article 3 (1) (c) TFEU, and Article 5 TFEU respectively.

<sup>359</sup> A key factor in advancing the so-called "variable geometry" of the EU which induces lawyers to characterise European integration today above all as a process of "differentiated integration". Cf. De Witte (2013).

<sup>360</sup> Dawson (2013, at 476) highlights that 'it was in Maastricht – through its separation of monetary and fiscal policy; separation of monetary and fiscal policy; the former being controlled by a de-politicised central bank, the latter being coordinated at the national level – that this model [of the European "regulatory state"] reached its zenith'. See below, note 364.

<sup>361</sup> See Articles 119 (2) and 282 (1) TFEU.

<sup>362</sup> Article 119 (1) TFEU.

policy-making and subjected to more intrusive means of control such as fiscal transfers and redistribution.<sup>363</sup> The European level, in contrast, remains largely characterised by the absence of institutional spaces that channel political conflict and hence can bring about the deeper societal legitimization required for sensitive redistributive decisions.<sup>364</sup>

*No bailouts, sustainable convergence and the “Sound Budgets”-rule*

Nonetheless, the close interrelation between monetary and fiscal policy is still reflected in the following rules that put the EMU into operation. These relate to the ECB’s ability to extend credit to the Member States, the convergence criteria and the related “Sound Budgets”-rule. The latter underpins the process of defining common European objectives for the coordination of the Member States’ economic policies. Each will briefly be discussed and put into context.

Firstly, for the EA Member States, the Treaty circumscribes budgetary policy-making in relation to the ECB’s principal mandate.<sup>365</sup> This is limited to keeping inflation in check,<sup>366</sup> while the objective of maintaining price stability is also meant ‘to support the general economic policies in the Union’.<sup>367</sup> The Treaty however prohibits Member States from receiving financial assistance – the so-called “no bailout”-clause.<sup>368</sup> It also bars the EA

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<sup>363</sup> See Chapter 1 and 2. For political scientists – like Scharpf (2002, at 647) – this approach still represented the original consensus on European integration. This integration model produced a “constitutional asymmetry” that followed ‘from the selective Europeanization of policy functions’ and a “*decoupling*” of the European economic constitution from the national social constitutions. Meanwhile at ‘the national level, economic policy and social-protection policy had and still have the same constitutional status – with the consequence that any conflict between these two types of interests could only be resolved politically, by majority vote or by compromise.’ Scharpf (2002), at 647

<sup>364</sup> For lawyers, this integration model was characterised by a limited and defined ability on the part of the supra-national institutions to interfere in the political decision-making of its Member States. Majone (1994) thus famously portrayed the nascent Union as a “regulatory state”. In order to achieve European policy goals, the supra-national interference centres on a set of regulatory standards to be implemented by national administrations, and enforced by private individuals. See also Dawson (2013) at 476.

<sup>365</sup> Interestingly, these provisions belong to the Treaty’s ‘Chapter on economic policy’, not that on monetary policy.

<sup>366</sup> In the absence of a clear Treaty definition of price stability, the Governing Council of the ECB defines price stability quantitatively ‘as a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2%.’ For more information, see <https://www.ecb.europa.eu/mopo/strategy/pricestab/html/index.en.html> (last accessed 21-10-2016). National central banks, in contrast, traditionally have a broader mandate to pursue macro-economic policy objectives. Cf. Dyson (2002),

<sup>367</sup> See Article 119 (2) TFEU. ‘A stable currency is the foundation of a healthy economy. It protects savers and income earners from the erosion of wealth while promoting growth and employment.’ [https://www.bundesbank.de/Redaktion/EN/Standardartikel/Tasks/Monetary\\_policy/monetary\\_policy.html](https://www.bundesbank.de/Redaktion/EN/Standardartikel/Tasks/Monetary_policy/monetary_policy.html)

<sup>368</sup> Based on Article 125 (1) TFEU, both the Union (first sentence) and Member States (second sentence) were barred from providing financial assistance to a(nother) Member State, its public authorities or its public undertakings. This is equally prohibited, according to Article 124 TFEU, to come from a financial institution. Only Article 122 (2) TFEU provides an exception to this prohibition stating that the Council, upon a proposal by the Commission, might decide on granting

countries from requesting overdraft facilities either from the ECB or another national central bank in the EU.<sup>369</sup>

These provisions show that the Treaty drafters in Maastricht had neither provided for the possibility of fiscal transfers,<sup>370</sup> nor envisaged that the ECB would act as a so-called “lender of last resort”.<sup>371</sup> Yet, precisely, the initial incapacity of organising emergency funding at European level was like putting oil into the Euro crisis’ fire (to be further discussed below).

Secondly, the functioning of the EMU is based on the idea of “*sustainable convergence*”. Members of the EA (and those aspiring to accede) are bound to strive for the convergence of national socio-economic indicators. Convergence should be attained by coordinating the operation of the different domestic production and welfare models at EU-level.<sup>372</sup> The ECB plays a central role in the supervision of the convergence process. It will determine convergence based on the following criteria, which include (in simplified form):

- Price stability, judged by the inflation rate of the three best performing Member States;
- Sustainable government finances, with the prerequisite to avoid excessive deficits; and
- The durability of convergence as measured by Member States’ long-term interest rate levels.<sup>373</sup>

To ensure the functioning of the EMU, the Treaty drafters have furthermore translated the convergence criteria into a set of guiding principles. The principles of ‘stable prices, sound

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financial assistance to a Member State experiencing or threatened with ‘severe difficulties caused by natural disasters or exceptional circumstances beyond its control’.

<sup>369</sup> The Treaty bars the ECB from providing direct credit to public authorities, including the direct purchase of debt instruments from national governments. See Article 123 TFEU and Article 21 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank).

<sup>370</sup> With the exception of the confined use of structural funds in the framework of European cohesion policy.

<sup>371</sup> P. De Grauwe, ‘The European Central Bank as Lender of Last Resort in the Government Bond Markets’ (2013) 59 *CE/Sifo Economic Studies* 3, 520–535, at 529.

<sup>372</sup> The legal provisions concerning the “Member States whose currency is the Euro” have been regrouped under the Lisbon Treaty. The new Article 133 TFEU provides the legal basis for the adoption of legislative measures necessary for the use of the Euro as the single currency. Also here, the European Parliament and the Council will co-decide based on the ordinary legislative procedure and after consultation with the ECB.

<sup>373</sup> Article 140 (1) TFEU defines the ECB’s role in monitoring the so-called “convergence criteria”, based on: ‘the achievement of a high degree of sustainable convergence by reference to the fulfilment by each Member State of the following criteria: (i) the achievement of a high degree of price stability; this will be apparent from a rate of inflation which is close to that of, at most, the three best performing Member States in terms of price stability; (ii) the sustainability of the government financial position; this will be apparent from having achieved a government budgetary position without a deficit that is excessive as determined in accordance with Article 126(6); (iii) the observance of the normal fluctuation margins provided for by the exchange-rate mechanism of the European Monetary System, for at least two years, without devaluing against the euro; and (iv) the durability of convergence achieved by the Member State with a derogation and of its participation in the exchange-rate mechanism being reflected in the long-term interest-rate levels.’

public finances and monetary conditions and a sustainable balance of payments' thus frame the conduct of economic and monetary policy in the EU.<sup>374</sup> Thus membership of the EA requires national governments to conduct their fiscal policies soundly, committing them to prudent budget planning. While these criteria have been designed to pave the way of accession to the EA, the Euro crisis has painfully exposed the negative effects if convergence is not sustained. This, too, will be elaborated further below.

National fiscal policy is consequently subject to multi-lateral surveillance, i.e. controlled through multiple sources at EU level. Since the convergence criteria stipulate the sustainability of government finances, the ECB fulfils a general monitoring function regarding the fiscal policies of EA Member States. Consequently, the ECB's inflation rate target and its key interest rate flank economic policy-making for those countries.<sup>375</sup> At the same time, the domestic budget planning of all Member States is subject to a general prohibition of excessive Government deficits contained in the Treaty. The Commission and the Council act together in monitoring Member States' fiscal policies and in overseeing the process of "enhanced surveillance" designed to bring about governments' reduction of excessive national budget deficits (see below).

#### *Economic policy-making as a common concern*

The TFEU determines the procedure to enforce the correction of these deficits, i.e. the Excessive Deficit Procedure (EDP) – including sanctions for non-compliance by EA members.<sup>376</sup> EU law therefore defines benchmarks based on which the institutions can judge whether to regard the planning of national budgets as "sound". There is a deficit-criterion and a debt-criterion that add up to what we, hereafter, will refer to as the "*Sound Budgets*"-rule.<sup>377</sup>

Importantly, the European Council initiated in 1997 that these constitutional provisions would be backed up by the Stability and Growth Pact (SGP). This was considered necessary to make sure that the EMU would actually be established. European leaders thus stressed 'the importance of safeguarding sound government finances as a means to strengthening the conditions for price stability and for strong sustainable growth conducive to employment creation'.<sup>378</sup> The SGP thus seeks to bolster the implementation of the "Sound Budgets"-rule. Not only shall Member States avoid excessive government deficits but also more broadly 'ensure that *national budgetary policies support stability oriented monetary policies*' [emphasis added, NB].<sup>379</sup> Next to a resolution by the European Council, the SGP was based

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<sup>374</sup> See Article 119 (3) TFEU.

<sup>375</sup> See <https://www.ecb.europa.eu/mopo/decisions/html/index.en.html> (last visited 12 May 2017).

<sup>376</sup> Article 126 TFEU. Notably, Article 126 (14) TFEU empowers the Council to adopt further provisions regarding the implementation of the EDP.

<sup>377</sup> Governments' public finances will generally be regarded as compliant when they remain within a target of 3% for budget deficits in relation to the national gross domestic product (GDP) and a target of 60% for the level of public debt. See Protocol No. 12 on the "Excessive Deficit Procedure".

<sup>378</sup> European Council, Resolution on the Stability and Growth Pact (Amsterdam, 17 June 1997).

<sup>379</sup> First consideration of the Resolution on the Stability and Growth Pact (European Council, Amsterdam, 17 June 1997).

on two Council regulations. One regulation details the requirements for multi-lateral surveillance regarding government budgets and for the coordination of economic policies (the so-called “*preventive arm*”).<sup>380</sup> The other gives “teeth” to the EDP by fitting it up with stringent time limits and clarifying the application of sanctions for the EA Member States (i.e. the “*corrective arm*”).<sup>381</sup> Those will be addressed in more detail in Chapter 5.

Importantly, the Lisbon Treaty has clarified and complemented the EU competences to regulate in the field of economic governance, especially for the EA. EU economic policy continues to be based on the ‘close coordination of Member States’ economic policies, on the Internal Market and on the definition of common objectives’.<sup>382</sup> The coordination of national economic policies should contribute to the achievement of the EU objectives, as defined in Article 3 TFEU, and be conducted in the context of the Broad Economic Policy Guidelines (BEPG).<sup>383</sup> Article 121 TFEU requires the Member States to ‘regard their economic policies as a matter of common concern’. It provides the legal basis for the formulation of the BEPG.<sup>384</sup> The European Parliament and the Council together should lay down detailed rules for the procedure of multilateral surveillance by means of regulations.<sup>385</sup>

Finally, Articles 136-138 TFEU lay down the distinctive legal arrangements for the EA. Most importantly, the new Article 136 TFEU imposes on the Council alone the obligation to adopt specific measures to strengthen the coordination and surveillance of budgetary discipline within the EA, and to set out economic policy guidelines for the latter.<sup>386</sup> In this context, voting rights are reserved for the EA Member States only.

## B) The Euro-crisis and its narrative

Having gained a general idea of the main legal set-up of the EMU, it is now time to look into some crucial changes that European leaders have implemented in response to the Euro-crisis. To that end, we use the term “EU crisis management” to refer summarily to the series of far-reaching reforms introduced as anti-crisis measures: Some needed urgently as emergency measures, several others intended to strengthen the apparatus of economic governance. It has thus included both ‘the creation of a procedure for direct assistance to

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<sup>380</sup> Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies.

<sup>381</sup> Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure.

<sup>382</sup> Article 119 (1) TFEU.

<sup>383</sup> Article 120 TFEU.

<sup>384</sup> The implementation of these guidelines is to be monitored through the multilateral surveillance by the EU institutions to ensure the closer coordination of economic policies and the sustained convergence of the Member States’ economic performances. Article 121(3) and (4) TFEU set out the general procedure of multilateral surveillance. See the respective roles of the Economic and Financial Committee & Economic Policy Committee.

<sup>385</sup> Article 121 (6) TFEU.

<sup>386</sup> Article 137 TFEU deals with the arrangements for the Euro Group (see below), while Article 138 TFEU entitles the Council to adopt common positions to secure the Euro’s place in the international monetary system.

Eurozone members experiencing severe financial difficulties’ as well as the installation of ‘a new system of European Economic Governance as part of the Europe 2020 Strategy adopted in 2010’.<sup>387</sup>

In the following, we will first recapitulate briefly the development of the Euro-crisis and consider the “crisis narrative” that has been promoted at EU level. On that basis, it will be useful – in line with our analytical framework – to examine the European anti-crisis reforms separately regarding the changes they have brought about at the constitutional and the strategic level of the EU governance architecture. Section 4.2.2.C. will explain how the EU crisis management went about to mend certain fundamental flaws in the constitutional framework of the EMU. Chapter 5 will then deal with the implications of EU crisis management for the strategic framework of the EU governance architecture and the main organisational changes it has prompted.

If anything, the establishment of the EMU has been a great political achievement.<sup>388</sup> It represented a quantum leap of European integration in terms of creating the conditions for an increasingly integrated transnational market, where national economies are interlinked by a common currency and greatly enhanced capital mobility. Despite high-flying political ambitions, though, the previous section has already indicated that a primary concern of European leaders – when designing the EMU in Maastricht – was to insulate themselves legally from fiscal spill-overs. Therefore, the EMU’s legal set-up did not foresee the taking of shared responsibility for trade imbalances or bank failures.<sup>389</sup> Eventually, the Euro crisis was to expose the devastating effects of this important omission.

The origins of this crisis can, in fact, be related to the significant inter-dependence of national economies that has resulted from the advanced entanglement between the EMU and the intensified capital mobility driven by the Internal Market. Wilsher (2013) elucidates how – before the near-collapse of the global financial system in 2008 – cross-border bank lending fuelled localised asset, wage and consumption booms, and stresses the importance of cross-border interrelations between trade surpluses and private debt accumulation across the EA. He emphasises, it was mainly *after* private sector activity collapsed following the financial crisis that the *public debts* of many Member States’ skyrocketed.

The Euro crisis progressed from 2010, once the Greek crisis revealed the dangerous exposure of weaker economies’ banking systems to an erosion in market confidence. It seems therefore fair to relate (at least, part of) the origins of the sovereign debt crisis in the EA to the unbridled flow of complex capital movements and the scale of (cross-border) banking debts. This suggests that the policy structures determining money supply and economic policy-making in the EA, which originated in 1992, allowed above all unsustainable *private imbalances* to develop.

The Euro crisis thence unfolded, as more and more (peripheral) Member States suddenly saw themselves confronted with extremely elevated levels of public debts. Instability grew as these governments encountered increasing difficulties to refinance their

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<sup>387</sup> Müller 2015

<sup>388</sup> Dyson 2002

<sup>389</sup> Wilsher 2013, at 281.

debts at international markets due to spiking interest rates. Then, the Greek government's unprecedented request for international financial assistance in April 2010 entailed a chain reaction. Risk evaluations on the bonds of other vulnerable governments were being drastically reconsidered, as financial investors lost confidence in European sovereigns' capacity to vouch for their debts.

For European countries that were severely affected by that crisis – such as Ireland and Spain – the causes for instability did not emanate from unbalanced budget planning but rather from broader macro-economic policies that were unsound. The case of Greece, however, is a specifically tragic one (for which certainly neither public authorities at national level nor at European level can be discharged of past mistakes). Whilst the causes for all these difficulties may have been diverse, the result was a common one – namely, that the stability (and, possibly, even the survival) of the common currency was put in danger. Still, more critical observers agree that – contrary to the make-believe of policy-makers defending the anti-crisis reform agenda – fiscal policy was *not* an immediate cause of the Euro-crisis.<sup>390</sup>

Surely, the ensuing political responses and the cumbersome collective decision-making at European level represented more a “muddling through” from one crisis moment to the next, than a coherent “management” of crisis events.<sup>391</sup> At the very minimum, though, these common endeavours eventually produced certain consensus that the response to the stability-problem in the EA had to be collective. Accordingly, a common “*crisis narrative*” was forged that did, in fact, tailor the blame for the Euro-crisis for a large part on fiscal policy.<sup>392</sup> The following list summarises the main elements of what the European Commission considered major shortcomings in its governance system that were uncovered by the crisis:

- Insufficient budgetary surveillance;
- Lack of attention to macro-economic imbalances and surveillance of competitiveness developments;
- Insufficient alertness to the stability of the entire currency area and deficient enforcement, since the credibility of sanctions in the EA was undermined;
- Reduced decision-making capacity regarding macro-economic developments based on institutional weaknesses; and
- Lack of mechanisms to grant financial support to countries in financial difficulties and thereby prevent a spreading of risks.<sup>393</sup>

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<sup>390</sup> E.g. Prassl (2015).

<sup>391</sup> Cf Balamoti (2015) on Merkel's “Union Method”.

<sup>392</sup> ‘The global economic crisis has challenged the current mechanisms of economic policy coordination in the European Union and revealed weaknesses. The functioning of the Economic and Monetary Union has been under particular stress, due to earlier failures to comply with the underlying rules and principles. The existing surveillance procedures have not been comprehensive enough.’ European Commission, Communication on Reinforcing Economic Policy Coordination (COM(2010)250 final, Brussels, 12 May 2010) at 2.

<sup>393</sup> The Commission's website provides an illustrative account of this narrative: [http://ec.europa.eu/economy\\_finance/explained/the\\_financial\\_and\\_economic\\_crisis/why\\_did\\_the\\_crisis\\_spread/index\\_en.htm](http://ec.europa.eu/economy_finance/explained/the_financial_and_economic_crisis/why_did_the_crisis_spread/index_en.htm)



Next to a few institutional shortcomings, the EU crisis narrative thus uncovered in particular legal deficiencies related to the original design of the EMU.

### C) Mending the construction faults of the EMU

As the EU set out to mend these latter shortcomings in its constitutional framework, actually the 'question of what the EU *may* legally do [became] entangled with that of what it *should* do'.<sup>394</sup> In the following, we will consider in some detail the establishment of the European Stability Mechanism (ESM) as a key example for changes that European leaders have implemented in response to the crisis at constitutional level.

#### *Crisis resolution through constitutional means: Legalising EU bailouts*

The so-called Troika, a consortium of officials from the European Commission, the International Monetary Fund (IMF) and the ECB, visited Athens from 21 April to 3 May 2010. It assessed the Greek bailout-request in the light of the risk it posed to the stability of the common currency. The 'Troika's mission resulted in an agreement by the Finance Ministers of the EA countries (the so-called Eurogroup) to grant a financial assistance package to Greece.<sup>395</sup> However, the Greek government would only enjoy the merit of that support, if it agreed to a far-reaching Economic Adjustment Programme. The international creditors thereby made the bailout conditional upon the implementation of structural reforms, which were outlined in a Memorandum of Understanding (MoU).<sup>396</sup>

That decision to grant financial assistance to Greece, however, did not succeed in restoring the stability of the Euro. As explained above, severe financial difficulties very soon also threatened other EMU countries, as the state of their public finances became the object of financial market speculation.

The more fundamental problem, still, was that the EMU's constitutional framework as designed in Maastricht was not up to the task. As explained above, the Treaty provisions were built on the ratio that each Member State was individually responsible for its economic and budgetary policies.<sup>397</sup> The Maastricht legal set-up relied primarily on self-regulation (as captured by the idea of "market discipline") to keep public budgets under control (see below). This was backed up by European coordination and a system of policing excessive budget

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<sup>394</sup> Wilsher (2013) at 242.

<sup>395</sup> The package comprised financial support in the form of bilateral loans from EA Member States, pooled by the European Commission, and a conventional stand-by arrangement of the IMF. This first bailout-package for Greece amounted to €110 bn in total. The €80 billion-strong so-called "Greek Loan Facility" (GLF) was decided by the Eurogroup on 2 May 2010. The total amount would be disbursed from May 2010 until June 2013. The original amount was eventually reduced by €2.7 billion, when Slovakia renounced its participation in the GLF and also Ireland and Portugal withdrew because they requested financial assistance themselves. The IMF contributed an additional €30 billion. For more information, see [http://ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/greek\\_loan\\_facility/index\\_en.htm](http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm) (accessed 4 March 2016). Until now – there have been three Economic Adjustment Programmes for Greece.

<sup>396</sup> In total, three Economic Adjustment Programmes have until now been agreed for Greece.

<sup>397</sup> Van den Bogaert and Borger (2013) at 457-458.

deficits (i.e. so-called “public discipline”).<sup>398</sup> It did not however provide for a *fire department* to contain “the fire” (i.e. financial risks) from spreading, leaving Member States successively in potentially devastating financial distress.

The initial shock of these accumulating stability challenges in the EA (such as, in Ireland and Portugal) was absorbed by two temporary crisis resolution mechanisms, the European Financial Stabilisation Mechanism (EFSM)<sup>399</sup> and the European Financial Stability Facility (EFSF).<sup>400</sup> But the severity of the Euro-crisis highlighted the need for a permanent mechanism to safeguard the stability of the Euro in the long-term.

Nonetheless, it was clear that Article 125 TFEU – the so-called “no bailout- clause” – would not be modified. In December 2010, European leaders agreed on the text of a limited amendment to the Treaty, providing for the future establishment of a permanent stability mechanism.<sup>401</sup> Three months later, using the new simplified revision procedure for the first time, the European Council decided a Treaty amendment by “fast-track”, adding a

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<sup>398</sup> Ibid.

<sup>399</sup> Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism. The European Financial Stabilisation Mechanism (EFSM) was based on the exception clause of Article 122 (2) TFEU. It was modelled on the EU’s power to come to the (financial) rescue of governments outside the single currency area whose severe budgetary difficulties could jeopardise the functioning of the Internal Market. This power is based on the Balance-of-Payment (BoP) Regulation (EC) No 332/2002 applicable to non-EA Member States, which emanated from the Transitional Provisions of the EMU adopted in 2002 (see Article 143 TFEU). Based on this Treaty provision and the Regulation, the EU could come to the (financial) rescue of Governments outside the single currency area whose severe budgetary difficulties could jeopardise the functioning of the Internal Market or the implementation of the common commercial policy. The EFSM, instead, empowered the EU to provide financial assistance to ailing Member States by empowering the Commission to borrow in financial markets on behalf of the Union. Thereby, the Commission could issue bonds and other debt instruments on capital markets up to a total of € 60 billion, under an implicit EU budget guarantee. The EFSM provided a particular lending arrangement that excluded any debt-servicing cost for the Union. As the Commission lent on the proceeds to the beneficiary Member State, the latter was responsible for repaying all interests and loans (via the Commission). Yet, in the case of the borrower’s default, the EU budget guaranteed the repayment of the bonds. EFSM assistance was granted to Ireland and Portugal (2011 – 2014) and to Greece in July 2015 as a short-term assistance (bridge loan). The EFSM has been replaced by the ESM (see below) and therefore remains active merely to finance existing loans, not to give out new ones. For more information, see [http://ec.europa.eu/economy\\_finance/eu\\_borrower/efsm/index\\_en.htm](http://ec.europa.eu/economy_finance/eu_borrower/efsm/index_en.htm) (accessed 4 March 2016).

<sup>400</sup> European Council, Conclusions of 17 June 2010 (EUCO 13/10, Brussels, 2010). The European Financial Stability Facility (EFSF) was established by the EA Member States in June 2010. It was created outside the framework of the Union – notably, as a company, incorporated in Luxembourg – as a temporary measure for emergency financing. The shareholders were the Member States whose currency is the Euro. Its aim was to provide temporary financial assistance to any EA Member State in need thereof. While the EFSF continues to service its financial commitments taken on during its operation, as of 1 July 2013 it can no longer engage in new financing programmes or enter into new loan facility agreements. See <http://www.efsf.europa.eu/about/key-figures/index.htm> (accessed 4 March 2016).

<sup>401</sup> European Council, Conclusions of 17 December 2010 (EUCO 30/10, Brussels, 2010).

new third paragraph to Article 136 TFEU.<sup>402</sup> The amendment explicitly provided for action by the Member States of the EA. These countries then concluded the *Treaty establishing the European Stability Mechanism* (short: “ESM Treaty”) on 2 February 2012.<sup>403</sup> The new permanent stability mechanism started operations on 8 October 2012;<sup>404</sup> five Member States have hitherto called upon the ESM for assistance.<sup>405</sup>

#### *Strict conditionality as pre-condition for legality ESM assistance*

To fathom the meaning of the ESM Treaty for the broader EU governance architecture, it helps to examine the legal challenge regarding the adoption of that Treaty brought before the CJEU in the *Pringle* case.<sup>406</sup> In the process of analysing whether or not the ESM Treaty had altered the Union’s competences, the Court explains why it is indispensable that any assistance granted by the ESM is subject to strict conditionality.

The Court’s reasoning pivots on the distinction between monetary and economic policy. Considering whether the amendment of Article 136 TFEU encroached upon the EU’s competence regarding monetary policy and the coordination of national economic policies, the CJEU finds first that *assistance granted under the ESM must be considered a measure of economic*

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<sup>402</sup> On the basis of Article 48 (6) TEU, after consulting the European Parliament, the Commission and the European Central Bank the European Council unanimously adopted Decision 2011/119/EU on 25 March 2011. Conclusions of the European Council adopted on 25 March 2011 on the establishment of a European stability mechanism. The new Article 136 (3) TFEU provides: ‘3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.’

<sup>403</sup> In particular, Germany had pushed for this amendment of the TFEU for domestic (institutional) reasons. ‘It is commonly assumed that the German government was anxious to have a clear Treaty basis for action in order to forestall any adverse judgment of the German Constitutional Court.’ European Union Committee, Amending Article 136 of the Treaty on the Functioning of the European Union (House of Lords, London, 2011) available at <http://www.publications.parliament.uk/pa/ld201011/ldselect/ldecom/110/11003.htm> (accessed 7 March 2016) at 20; and sources cited.

<sup>404</sup> From October 2012, the ESM functioned concurrently with its predecessor the EFSF until June 2013. Just like the latter, the ESM equally represents a company established in Luxembourg.

<sup>405</sup> Greece was the first and is currently still the only “programme country” receiving financial assistance under the ESM. See third programme 2015-2018. The four other Member States that have received assistance have completed their programmes: Ireland (2010-2013), Portugal (2011-2014), Spain (2012-2013) and Cyprus (2013-2016). Three of them (Ireland, Portugal and Cyprus) are still subject to enhanced post-programme surveillance. For more details, see J. Angerer and M. Hradiský, BRIEFING Macro-Financial Assistance to EU Member States: State of Play – February 2016 (European Parliament, IPOL/EGOV, PE 497.721, 8 February 2016) available at [www.europarl.europa.eu/.../IPOL-ECON\\_NT\(2014\)497721\\_EN.pdf](http://www.europarl.europa.eu/.../IPOL-ECON_NT(2014)497721_EN.pdf) (accessed 8 March 2016).

<sup>406</sup> CJEU, Case C-370/12 Thomas Pringle v Government of Ireland [2012] ECLI:EU:C:2012:756. Irish MP Mr Pringle sued the Irish government for contravening its obligations under EU law by ratifying, approving or accepting the ESM Treaty. He disputed the lawful adoption of European Council Decision 2011/119/EU regarding the Article 136 (3) TFEU-amendment because it entailed an alteration of EU competences contrary to the third paragraph of Article 48(6) TEU. In July 2012, the Irish Supreme Court consequently referred questions on the validity of the European Council Decision to the CJEU. The latter delivered its judgment in November 2012.

*policy*.<sup>407</sup> To support this finding, it highlights the close link between the ESM, the Treaty provisions relating to economic policy and the (newly amended) regulatory framework for the strengthened economic governance of the Union (paras 58-60).<sup>408</sup> The Court then stresses that in line with the EU's merely coordinating competence in the field of economic policy, it was not competent to establish a permanent facility for financial assistance like the ESM (para 68).

Accordingly, the European judges confirm that the Treaty amendment did *not* alter the Union's competences because the Member States were in fact competent to establish the ESM outside the EU framework (para 69). The Court emphasises, in that respect, that this faculty of the Member States depended on the imposition of *strict conditionality*. In fact, conditionality formed a *pre-condition for rendering the operation of the ESM compatible with EU law*. Attaching strict conditions to the grant of assistance under the ESM was indispensable to ensure that this financial support would comply with the Treaty provisions on the coordination and surveillance of the Member States' economic and budget policies.<sup>409</sup>

Regarding the compatibility of the ESM Treaty with EU law, the Court thus determines that the "no bailout"-clause – at the basis of the EMU – could not be construed as excluding altogether the grant of financial assistance to Member States in severe financial difficulties. The primary aim of Article 125 TFEU was, according to the CJEU, to ensure that the Member States followed sound budgetary policy: It stipulated that the national governments remain subject to the "logic of the market" when entering into debt in order to prompt them to maintain budgetary discipline. The Court regards compliance with such discipline as contributing 'at Union level to the attainment of a *higher objective*, namely maintaining the financial stability of the monetary union' [emphasis added, NB] (para 135). Therefore, it confirms the validity of Article 136 (3) TFEU and the ESM Treaty because the lawful granting of ESM assistance to a Member State depended on the requirement of budgetary discipline that emanates from Article 125 TFEU.

In short, the EMU-system relies for an important part on national self-regulation, albeit sustained by a system of "market discipline". Its legal provisions are therefore based on the assumption that national economic policy-making includes the possibility of an overly

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<sup>407</sup> The Court confirms that the ESM's purpose was not to maintain price stability (para 96). Neither does it exclude that the ESM's operation might have an effect on price stability (para 56). Still, even such indirect effects did not alter the conclusion that the grant of financial assistance to a Member State did not fall within monetary policy, i.e. the exclusive competence of the Union (para 57).

<sup>408</sup> The Court highlights that the EU law and governance related to economic policy served to prevent or reduce the risk of public debt crises, while the ESM established a stability mechanism to manage financial crises that may arise in spite of such preventive actions (para 59).

<sup>409</sup> The conditions attached to ESM funding – such as those specified in a memorandum, for example by an Economic Adjustment Programme (see Articles 5 (6)(f) and 13 ESM Treaty) – did not themselves constitute an instrument for the coordination of national economic policies. Instead, they were intended to ensure that the activities of the ESM are compatible with *inter alia* Article 125 TFEU and the Union's coordination measures (paras 110-112, 121). The MoU must specify the policy reforms – notably, those of a "structural" nature – which the recipient Member State is expected to implement in order to prove its commitment to returning to a sustainable state of solvency and regain credibility in the financial markets.

expansive budget policy (i.e. a government spending beyond its means) as “moral hazard”. Article 125 TFEU seeks to control that hazard by prohibiting any financial assistance to a Member State that would reduce the recipient government’s incentive to conduct a sound budgetary policy. Consequently, the Court concludes that ESM assistance can *only* be considered compatible with Article 125 TFEU *if* it is indispensable to safeguard the stability of the EA *and* subject to strict conditions (para 136).<sup>410</sup> This means that the conditions attached to any financial assistance granted by the ESM must be such as to prompt sound budgetary policy-making (paras 137, 143).

*EU crisis management and its effects on the Union’s constitutional framework*

On that basis, we can now discuss what implications the ESM and other constitutional changes during the Euro crisis have for the EU’s broader architecture of socio-economic governance. The establishment of the ESM has surely been vital to the restoration of stability in the EA.<sup>411</sup> But the reasoning of the CJEU in defence of the ESM’s compatibility with EU law may not entirely resolve the tension that characterises the distribution of competences between the Member States and the EU regarding economic and monetary policy.<sup>412</sup>

On the one hand, the amendment of the EU’s constitutional framework has unquestionably been overdue: It casts into legal form the recognition that Europe may be haunted by financial and fiscal crises despite the EU’s bulwark of (preventive) economic policy coordination and (corrective) budget surveillance. On the other hand, the ESM introduces into the EU governance architecture *a new enforcement technique – which we will refer to as “negative conditionality”*. The rationale of conditionality aims to ensure, as explained above, that the grant of financial assistance to programme countries is compatible with EU law. We denote it as “negative” because the incentive structure, which it represents as the rationale for granting emergency funding, builds on an element of force: Member States in severe financial distress will only get access to ESM assistance, if they agree to a package of conditions and structural reforms as outlined in an MoU.<sup>413</sup>

This technique, however, has come into straight conflict with the Union’s fundamental (social) objectives.<sup>414</sup> The range of structural reform conditions imposed by the Troika (now, more euphemistically referred to as “the Institutions”)<sup>415</sup> on recipient countries in exchange for financial support has been very intrusive.<sup>416</sup> Consequently, with pushing

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<sup>410</sup> See Article 12 (1) of the ESM Treaty.

<sup>411</sup> This kind of stabilisation seems necessary – at least, as long as any sort of EU channel for organising meaningful fiscal transfers between the members of the EA are missing.

<sup>412</sup> The Court’s defence of the new tasks and responsibilities that the ESM treaty bestows upon the European Commission, the ECB and the CJEU itself (paras 156-158, 164-165) may be proper in legal terms but it sure leaves a sense of awkwardness, given the judges’ equally fervent assertion that the Union is not competent to establish a permanent facility for the granting of financial assistance like the ESM.

<sup>413</sup> Cf Lavin (1996) on “asphyxiation”.

<sup>414</sup> Clauwaert and Schömann (2012).

<sup>415</sup> Mueller (2015).

<sup>416</sup> Clauwaert and Schömann (2012). For further discussion see Chapter 7.

through the demanded austerity policies, the programme countries had to face deteriorating social conditions, popular protests and ever bleaker prospects of recovering economic growth.

The ESM is just one example of how amendments in the European constitutional framework, resulting from EU crisis management, have significantly *increased the EU's leverage over the economic policy-making of the Member States*. Especially with regard to national budgetary policy, the EU institutions' powers of supervision have effectively increased. And so, has their influence in demarcating domestic fiscal planning. The bolstering of the Union's constitutional framework has enhanced the legal status of "budgetary discipline" to a *conditio sine qua non* for ensuring the stability of the Euro in crisis situations.

This conclusion, in fact, is further borne out by other constitutional innovations that resulted from the EU crisis management. It is also visible, for instance, in the strengthened role of the ECB as a "crisis manager". Notably, the *ECB's leverage over the enforcement of budgetary discipline* has amongst others been substantiated through its direct involvement in the ESM<sup>417</sup> and the European Banking Union.<sup>418</sup> Considering its main objective on the maintenance of price stability, the ECB's responsibility for supervising the convergence process has been crucially expanded to ensuring the stability of the common currency area as a whole. It is *de facto* no longer confined to keeping in check the inflation rate and interest rate levels, and conducting the associated surveillance of national budgetary policies. Based on the (partly extra-legal) changes to the EU's constitutional framework, the ECB is now officially vested with authority to act as a "crisis manager" in support of common efforts to safeguard the stability of the EA. The leverage of this non-elected, highly independent institution over national policy choices has thus increased considerably. What impact this has for European economic policy-making will be further discussed in Chapter 7.<sup>419</sup>

Finally, the European anti-crisis reforms have not only strengthened the requirement of budgetary prudence in crisis situations. The Treaty on Stability, Coordination and Governance (TSCG), also referred to as the "Fiscal Compact",<sup>420</sup> has imposed the

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<sup>417</sup> The ESM Treaty has strengthened the ECB's role – in liaison with the Commission – in the granting of stability support, negotiating conditionality, and monitoring the recipient Member State's compliance with the latter. See Article 13 (1), (3) and (7) ESM Treaty.

<sup>418</sup> The European Banking Union is built on three main pillars: (1) harmonised rules contained in the so-called Single Rulebook, (2) a Single Supervisory Mechanism (SSM), and (3) a Single Resolution Mechanism (SRM). Notably, the SSM now centralises the management of financial risks by conferring supervisory tasks onto the ECB. The latter thus gains supervisory responsibility alongside the national supervisory authorities of the participating EU Member States. See Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions; and Regulation (EU) No 1022/2013 of the European Parliament and the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) (EBA)).

<sup>419</sup> For further discussion, see Section 7.3.2.A.

<sup>420</sup> The TSCG was signed on 2 March 2012 and took effect on 1 January 2013 when 16 Member States had completed ratification (minimum of 12 was required). Full ratification by all 25 signatories (except Croatia, Czech Republic and the UK) was achieved by 1 April 2014. The Fiscal Compact is

“golden rule” of “Balanced Budgets”. While the Treaty’s significance has been mainly regarded as symbolic, it practically breathes new life into the “Sound Budgets”-rule. It requires that the Contracting States implement automatic correction mechanisms at national constitutional level.<sup>421</sup> The TSCG, thereby, obliges governments to *exercise budgetary discipline as a priority – irrespective of economic and political fluctuations*. Traditionally, the pursuit of economic policy objectives through budget planning provides the core of national politics because it involves vital redistributive decisions. The Fiscal Compact, however, considerably buttresses EU-level surveillance of national fiscal policies through institution-building at national level (i.e. by constitutionalising the enforcement of the Sound Budgets-rule).<sup>422</sup> In effect, it seems to contribute to a de-politicisation of fiscal policy at domestic level.

#### 4.3. STRATEGIC CHOICES (SINCE 2010)

Above we have analysed the Union’s constitutional choices casted into the Treaty of Lisbon and the changes brought about in that framework by EU crisis management. Now we will turn to the strategic choices that have recently shaped EU’s architecture for socio-economic governance. After a short historical background, we will elucidate the key features of the Europe 2020 Strategy. Then, we will zoom in on how the development of a European vision of “Good Governance” is integral to these strategic choices.

In early March 2010, the European Commission proposed an outline for the EU’s new multi-annual framework of strategic priorities for the next decade – the Europe 2020-Strategy.<sup>423</sup> The European Council soon agreed on the main elements of this new strategy and formally adopted the latter on 17 June 2010.<sup>424</sup> To understand the strategic framework

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binding on the EA members, for the other Contracting States compliance is optional until they adopt the Euro.

<sup>421</sup> Article 3 TSCG sets out the Treaty’s core provision – the “Balanced Budget Rule”, also known as the “golden fiscal rule”. This binds the Contracting Parties, i.e. the undersigned Member States, to reconfirm their commitment to maintain their public budgets within the established criteria of the Sound Budgets-rule, orientated towards sustainable convergence. The European Commission must indicate country-specific objectives to foster a path of sustainable convergence in line with the more detailed Balanced Budget-provisions of the TSCG. Based on the principle of “Balanced Budgets”, compliance is measured through fiscal benchmarks that are established and monitored by the Commission. Deviation from those benchmarks (as measured by each Member State’s MTO or the adjustment path towards it) must be temporary and is only permitted under exceptional circumstances. If Government budgets deviate considerably and for longer time, a correction mechanism will be triggered automatically. This mechanism must include the obligation of the Contracting Party concerned to implement measures to correct the deviations over a defined period of time. The Commission is in charge of surveillance, monitoring the Treaty’s implementation and application.

<sup>422</sup> Prompting institutional innovations at national level – another notable enforcement technique further exploited by EU crisis management – European economic governance reforms have included the creation of national fiscal boards. See Armstrong (2013a).

<sup>423</sup> European Commission, Communication on EUROPE 2020 A Strategy for Smart, Sustainable and Inclusive Growth (COM(2010) 2020final, Brussels, 3 March 2010).

<sup>424</sup> ‘Our efforts need to be better focused in order to boost Europe’s competitiveness, productivity, growth potential and economic convergence: a) The new strategy will focus on the key areas where

of the EU's governance architecture in its current form, it is useful to sum up first the main features of Europe 2020's predecessor.

#### **4.3.1. The EU governance architecture at the time of the “integrated regime”-thesis**

In 2000, European leaders drew up the Lisbon Agenda – a broad programme to make the EU ‘the most dynamic and competitive knowledge-based economy in the world by 2010 capable of sustainable economic growth with more and better jobs and greater social cohesion and respect for the environment’.<sup>425</sup> Based on this ambitious goal, European leaders articulated a comprehensive reform strategy to increase the Union's productivity and competitiveness in the face of advancing global competition, technological and demographic change (notably, an ageing population).<sup>426</sup>

The Lisbon Strategy thus forged a progressive European policy discourse. By building knowledge infrastructures, enhancing innovation and economic reform, and modernising social welfare and education systems, it sought to renew Europe's unique “social model” by ‘investing in people and combating social exclusion’. At the same time, reforms had to be based on ‘an appropriate macro-economic policy mix’ to sustain the healthy economic outlook and favourable growth prospects.<sup>427</sup>

The Lisbon Agenda embodied the important realisation that – in contrast to the 1992 Single Market Programme – the ambitious reform strategy could not be implemented at EU level alone.<sup>428</sup> It would require close co-operation between the EU and the Member States, since many of the policy areas involved national competences. Therefore, the Agenda put forward the OMC as a new governance model.<sup>429</sup> This prompted Member States to advance the required modernisation efforts with their own means, while their reform progress would be commonly assessed and coordinated at EU level. The role of the EU was viewed as a “catalyst” to help improve upon existing regulatory processes.<sup>430</sup>

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action is needed: knowledge and innovation, a more sustainable economy, high employment and social inclusion.’ European Council, *Conclusions of 26 May 2010*. EUCO 07/10, Brussels.

<sup>425</sup> European Council, *Presidency Conclusions of 23 and 24 March 2000* (Lisbon, 2000) at para 5.

<sup>426</sup> With the completion of the Internal Market and EMU now effectively underway, the new millennium awakened a new zest for action. Compared to the economic volatility of the 1990s, Europe now witnessed a more stable economic climate. Moreover, the biggest enlargement yet was looming on the Union's doorstep which promised new opportunities for growth and employment. Both economic and social reforms were required to stimulate sustainable growth and address persistent problems of unemployment, an underdeveloped service sector and sectoral skills gaps.

<sup>427</sup> European Council, *Presidency Conclusions of 23 and 24 March 2000* (Lisbon, 2000) at para 5. The European Council determined: ‘If the measures set out below are implemented against a sound macro-economic background, an average economic growth rate of around 3% should be a realistic prospect for the coming years.’ Ibid. at para 6.

<sup>428</sup> Borras and Radaelli (2011).

<sup>429</sup> e.g. Ter Haar (2011), Zeitlin (2005), Heritier (2011).

<sup>430</sup> It was stressed: ‘Achieving the new strategic goal will [...] depend on mobilising the resources available on the markets, as well as on efforts by Member States. The Union's role is to act as a catalyst in this process, by establishing an effective framework for mobilising all available resources for the transition to the knowledge-based economy and by adding its own contribution to this effort



In this context, it seems fair to identify the Lisbon Agenda as one of the key factors contributing to the broad “social justice-competitiveness” paradigm integral to Kilpatrick’s “integrated regime”-thesis on EU employment governance. At the beginning of the millennium, the European Treaty framework was still rather fragmented, but it had already been bolstered with the titles on employment and social policy. In fact, Kilpatrick attributed the dramatic expansion of the EU governance tool-kit in particular to the creation of the EES and the EU Charter of Fundamental Rights.<sup>431</sup> In the course of a ‘general re-configuration of employment policy and employment legislation’,<sup>432</sup> the Lisbon Agenda in the early 2000s added a broader strategic framework in which ‘more heavily populated governance spaces have been designed to deliver employment objectives that combine in new ways competitiveness and social justice’.<sup>433</sup>

Importantly, though, after 2005 the Commission notably refocused the Agenda on the two meta-objectives of “growth and jobs”. This move coincided with a broader overhaul of EU governance, including reform of the SGP and the merging of the BEPG and the EEG into a common set of “Integrated Guidelines” (IGs).<sup>434</sup> The reforms were justified by the need to prioritise better between governance objectives and streamline governance processes to improve implementation. The implementation of the Lisbon Agenda post-2005 was therefore characterised by a growing emphasis on “competitiveness” as a master-discourse.<sup>435</sup>

In hindsight, though, the Lisbon Strategy could hardly be called a success – if only, as judged by its ambitious targets (such as raising the overall employment rate to 70%, and increasing R&D to 3% of GDP).<sup>436</sup> Despite trying to maintain a positive tone in its final evaluation of the Agenda,<sup>437</sup> the Commission took issue with the overall pace of implementing reforms, the lack of national ownership, citizens’ involvement and weak governance structures.<sup>438</sup> Even so, it considered the *forming of a broad European consensus on the*

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under existing Community policies while respecting Agenda 2000.’ European Council, *Presidency Conclusions of 23 and 24 March 2000* (Lisbon, 2000) at para 41.

<sup>431</sup> Kilpatrick (2006).

<sup>432</sup> Ibid.

<sup>433</sup> Ibid.

<sup>434</sup> With the mid-term review of the Lisbon Strategy in 2005, the Commission started to sync the governance cycles for the coordination of the Member States’ economic and employment policies. Following the recommendations of the high-level expert group around former Dutch Prime Minister Kok, the Commission merged the BEPG and the European Employment Guidelines (EEG) into one integrated set of guidelines. See European Commission, COM(2005)33, at 6; also Employment Taskforce (“Kok I-Report”, November 2003).

<sup>435</sup> Smismans (2011).

<sup>436</sup> See European Commission SEC(2010)114. See also Copeland (2012).

<sup>437</sup> The Commission lauded the Lisbon Strategy’s contribution in increasing employment (at least, up until the devastating economic impact of the crisis) and making the EU economy more resilient (by the count of having “weathered the storm” of the crisis reasonably well compared to international competitors).

<sup>438</sup> European Commission, SEC(2010)114.

*need for modernisation reforms* its most notable achievement.<sup>439</sup> Based on this, we will now outline the most important features in the strategic framework of Europe 2020.

#### 4.3.2. The strategic framework under Europe 2020

Like its predecessor, Europe 2020 provides a multi-annual strategic framework. It sets out the EU's over-arching strategic orientations through functional goals and concrete targets to promote jobs and growth in Europe. In the following, we will outline the Strategy's main objectives, how it conceives of the distribution of responsibilities between the EU and the Member States and its requirements for implementation.

##### A) Strategic objectives

Europe 2020, in fact, elaborates on the Union's central constitutional objective of establishing a CSME.<sup>440</sup> It sets 'out a vision of Europe's social market economy for the 21st century.'<sup>441</sup> The strategic framework of the EU governance architecture is, in principle, therefore also tailored to the simultaneous pursuit of economic and social goals.

On the one hand, the Europe 2020-framework attaches crucial importance above all to the over-arching "Growth"-objective.<sup>442</sup> It elaborates this central goal by attaching the following attributes – "smart", "sustainable" and "inclusive" – which structure the EU's strategic priorities to achieve growth. This threefold structure is complemented by *five headline targets* concerning employment, R&D investment, action against climate change, educational attainment and poverty reduction (to be discussed in more detail in Section 4.3.2.C.). The Strategy thus seeks to steer the EU towards full economic recovery and modernise public services and market systems to put Europe on a sustainable path to growth. Thereby, it retains the idea of "competitiveness" as a master discourse.<sup>443</sup> The ability to compete in markets and the process of competition itself are considered indispensable for achieving growth in Europe.<sup>444</sup>

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<sup>439</sup> The European Council acknowledged the value of the Lisbon Agenda 'in setting a framework for strengthening European competitiveness and encouraging structural reform'. European Council, Conclusions of 10-11 December 2009 (EUCO 6/09, Brussels, 11 December 2009).

<sup>440</sup> Article 3 (3) TEU.

<sup>441</sup> European Commission (COM(2010)2020) at 5, 10.

<sup>442</sup> Cf. Copeland (2012); Daly (2014). Frequently, Europe 2020 is simply referred to as the EU's "growth strategy". From 2005, the relaunched Lisbon Agenda already increased the focus on the objectives of "growth" and "employment".

<sup>443</sup> As noted above, already in the previous decade, 'the competitiveness focus of the [Lisbon] agenda has been conceptualized as the *raison d'être* of the EU'. Borrás and Radaelli (2011) at 466.

<sup>444</sup> This emphasis, in fact, is not surprising from a constitutional perspective. The idea of organising economic relations based on competition is constitutive of the Internal Market. Based on Article 3 (1)(b) TFEU, the establishing of the competition rules necessary for the functioning of the Internal Market is part of the exclusive competences of the Union. Indeed, the EU's competition rules (including the provisions applying to undertakings, Articles 101-106 TFEU, and those on State aid, Articles 107-109 TFEU) lie at the heart of the Internal Market *acquis* – complementing the fundamental principle of the freedom of movement. They regulate the conduct of economic actors (both private and public) in the Internal Market, once barriers to the free circulation of production factors is ensured. Craig and De Búrca (2015) at 1001-1116.

On the other hand, normative ideas such as “high-level employment”, “innovation”, “sustainability” and “cohesion” also continue to be integral to the EU’s strategic ideational repertoire. Just like the “Growth”-objective, the promotion of employment – i.e. the so-called “Jobs”-objective – represents another inter-connecting theme of central significance. Europe 2020’s thematic approach (explained below) provides a good example for this assertion. It has been deliberately designed in an *integrated* fashion. All three of the EU’s “Growth”-priorities may hence affect to a greater or lesser extent aspects of employment regulation (such as job creation, skills development, youth employment etc.).<sup>445</sup>

In that way, the 2020-Strategy clearly ranks “Growth” and “Jobs” first – as two functional meta-objectives. This means that all the Strategy’s components ultimately only seem to possess value by how they contribute to improving growth and employment in the EU.<sup>446</sup> The two meta-objectives thus serve as a sort of *mantra* – an almost sacrosanct catchphrase in EU discourse – delivering a slogan intended to capture both the EU’s commitment and vital contribution to ensuring the well-being of Europe’s economy and its citizens.<sup>447</sup> Consequently, we regard this “Growth and Jobs”-mantra of Europe 2020 as the ideational offspring – albeit in very cryptic form – of the EU polity’s new *raison d’être*, i.e. the establishment of a CSME.<sup>448</sup>

One cannot help but notice, however, a certain ambiguity that accompanies these broad policy notions. These broad ideas transmit certain normative aspirations for the European project – especially, in the sense of appearing progressive and by being functionally tied to the achievement of concrete policy targets. But in substance, their meaning is deliberately vague and somewhat indeterminate. Borrás and Radaelli characterise the ideas that define the EU’s (strategic) governance architecture, as follows:

‘They are discursively malleable. They are *infused with norms that can be contested, changeable or purposefully created*. To build a strategy around them, political actors have to orchestrate [through discourses] the attribution of meanings and create consensus around meanings via coalitional politics. Indeed, the social construction

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<sup>445</sup> While the connections with employment are rather obvious in the categories of *Smart Growth* (e.g. concrete employment target) and *Inclusive Growth* (e.g. addressing employment qualifications through skills development and occupational training), similar aspects also feature in the *Sustainable Growth*-priority. For instance, the European Commission sees so-called “green jobs” as one of the key areas with potential for major (future) job creation. See European Commission (2010).

<sup>446</sup> In that sense, the Europe 2020 Strategy represents the culmination of a trend that started with the relaunch of the Lisbon Strategy. In 2005, the EU institutions began to frame their policy discourses on socio-economic governance in terms of promoting “growth and employment”. See European Commission, COM(2005)24; and European Commission, COM(2005)330; and European Council, Presidency Conclusions of 22 and 23 March 2005 (7619/1/05 REV 1, Brussels, 23 March 2005).

<sup>447</sup> Europe 2020 encourages revisiting almost any policy aspect (be it, trade, culture, languages, education and training, e-skills, investment etc.) from the perspective of improving “Growth” and “Jobs”. See, for instance: [http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/eu-tools-for-growth-and-jobs/index\\_en.htm](http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/eu-tools-for-growth-and-jobs/index_en.htm) (accessed 12 October 2016)

<sup>448</sup> Daly (2014).

of strategy (around these prismatic repertoires) is the essence of ideational politics in the EU.’ [emphasis added, NB]<sup>449</sup>

This vagueness may therefore be understandable since the EU’s strategic governance framework must cater to a very broad audience. Still, it will be interesting to study how these broad ideas gain meaning at the politico-organisational level where they are patterned and elaborated into strategic narratives.<sup>450</sup>

#### B) The “partnership”-principle

The EU’s strategic framework stresses that the Member States and the European institutions should be striving for the realisation of the “Growth and Jobs”-mantra *together*. It puts special emphasis on pursuing a “partnership approach”. Europe 2020 stipulates:

‘The European Council will have full ownership and be the focal point of the new strategy. The Commission will monitor progress towards the targets, facilitate policy exchange and make the necessary proposals to steer action and advance the EU flagship initiatives. The European Parliament will be a driving force to mobilise citizens and act as co-legislator on key initiatives. This *partnership approach* should extend to EU committees, to national parliaments and national, local and regional authorities, to social partners and to stakeholders and civil society so that everyone is involved in *delivering* on the vision.’ [emphasis added, NB]<sup>451</sup>

This shows that the EU’s strategic partnership approach builds on a rather broad and dynamic understanding of the distribution of responsibilities in European public affairs. In fact, the European Commission has long been promoting the principle of partnership as an ideal of “Good Governance” (see below). Not only does it denote the open engagement with and participation of private actors (like the social partners) and other representatives of civil society.<sup>452</sup> It also refers specifically to the mutual engagement of both EU institutions and Member States acting with equal responsibility for the achievement of their common goals.<sup>453</sup>

In that latter sense, the European idea of partnership pre-supposes “national ownership” regarding the implementation of the common objectives.<sup>454</sup> This ownership

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<sup>449</sup> In reference to Jabko (2006), see Borrás and Radaelli (2011).

<sup>450</sup> Chapters 6 and 7 will examine how the EU’s broader policy aspirations on socio-economic governance are elaborated and structured through its governance apparatus and what effects this has for the EU’s governance capacity in terms of regulating particular issue areas like employment.

<sup>451</sup> European Commission, COM(2010)2020, at 6

<sup>452</sup> For instance, in the area of cohesion policy, the Commission has recently drawn up a European Code of Conduct on Partnership. This aims to facilitate the principle’s implementation and streamline its application in the Member States. See the Commission Delegated Regulation (EU) of 7 January 2014 on the European Code of Conduct on Partnership in the framework of the European Structural and Investment Funds.

<sup>453</sup> Cf. Smismans (2011) on the notion of “coordination”.

<sup>454</sup> Next to re-enforcing the promotion of synergies in EU policy-making regarding socio-economic issues, Lisbon II became more result-oriented by fostering a “New Partnership for Growth and Jobs”. Ensuring that the EU agenda was result-oriented became even more of an institutional priority

however has – as indicated above – been recognised as a particularly “sore spot” in the final evaluation of the Lisbon Agenda.<sup>455</sup>

### C) Procedural requirements

For the decade 2010-2020, a two-pronged approach has been chosen with which Europe 2020 aims to guide European policy-making in an *integrated* manner. This comprises a thematic approach and country reporting.

The *thematic approach* structures the Union’s prevalent strategic objectives and clusters EU actions respectively. Based on these five headline targets, the thematic approach is articulated through so-called “flagship initiatives”. These are targeted political programmes tailored to the EU’s three main growth priorities to be achieved by 2020.

Table 4.1. below illustrates how the implementation of the EU’s strategic priorities is linked to the flagship initiatives. Each flagship initiative brings together a diverse set of (partially overlapping) governance arrangements that is respectively aligned to the achievement of the five targets. With this approach, Europe 2020 in fact expands on the idea of the Lisbon Strategy to incentivise Member States to reform by making their socio-economic performances measurable and hence comparable for benchmarking (to be explained in more detail in Chapter 5).<sup>456</sup>

The second mechanism of *country reporting* therefore is designed in a complementary fashion to better monitor and fuel national progress towards the achievement of the 2020-goals and targets. Already favoured as a surveillance technique under the Lisbon Agenda, the governments’ obligation to report through the so-called National Reform Programmes (NRPs) has been retained and further developed.<sup>457</sup>

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following the rejection of the Constitutional Treaty (see below). In order to respond to the perceived discontent of Europe’s citizens, the Commission felt confirmed in refocusing the EU integration process on practicable key deliverables to create growth and jobs. It further insisted on the partnership approach to forge ‘real national consensus’. European Commission, *Communication to the Spring European Council ‘Time to Move Up a Gear – The New Partnership for Growth and Jobs’* (COM(2006) 30 final – PART 1, Brussels, 25 January 2006).

<sup>455</sup> For instance, having identified “communication” as the Achilles’ heel of the Lisbon Strategy, the Commission explains: ‘Overall, there was not enough focus on communicating both the benefits of Lisbon and the implications of non-reform for the EU (or indeed the eurozone) as a whole. As a consequence, awareness and citizens’ involvement in and public support for the objectives of the Strategy remained weak at EU level and at national level was not always sufficiently co-ordinated. Where Member States communicated around Lisbon-type reforms, these were only rarely presented as part of a European strategy.’ European Commission, SEC(2010)114 at 7.

<sup>456</sup> This will be explained in more detail in Chapter 5.

<sup>457</sup> Next to that the Member States are also obliged to report on their compliance with the Sound Budgets-rule in the framework of the SGP. The Member States whose currency is the Euro must submit National Stability Programmes (NSPs); the other non-EA Member States must submit National Convergence Programmes (NCPs). See respectively Articles 3 and 7 of Regulation 1466/97, as amended by Regulation 1175/2011.

Europe 2020 – Priorities & Flagship Initiatives	
<i>Priorities &amp; headline targets<sup>458</sup></i>	<i>Flagship Initiatives</i>
<i>Smart growth</i> <ul style="list-style-type: none"> <li>• 75 % of the population aged 20-64 employed</li> <li>• 3% of the EU's GDP to be invested in R&amp;D</li> </ul>	<ul style="list-style-type: none"> <li>• Digital agenda for Europe</li> <li>• Innovation Union*</li> <li>• Youth on the move</li> </ul>
<i>Sustainable growth</i> <ul style="list-style-type: none"> <li>• The "20/20/20" climate/energy targets to be met (including an increase to 30% of emissions reduction if the conditions are right)</li> </ul>	<ul style="list-style-type: none"> <li>• Resource efficient Europe<sup>459</sup></li> <li>• An industrial policy for the globalisation era*</li> </ul>
<i>Inclusive growth</i> <ul style="list-style-type: none"> <li>• Reduce share of early school leavers under 10% and ensure at least 40% of the younger generation to have a tertiary degree</li> <li>• 20 million less people at risk of poverty</li> </ul>	<ul style="list-style-type: none"> <li>• An agenda for new skills and jobs* <sup>460</sup></li> <li>• European platform against poverty</li> </ul>

**Table 4.1.: Thematic approach designed to support the strategic priorities in the Europe 2020 Strategy<sup>461</sup>**

Europe 2020 thus aims to render the EU-level monitoring of the Member States' reform progress more comprehensive and effective. It significantly advances the EU's governance ideal of so-called "*integrated coordination*". This holistic governance technique is based on an enhanced set of IGs – i.e. the "2020-Guidelines" – that jointly coordinate the economic and employment policies of the Member States.<sup>462</sup> Within the revamped strategic governance framework from 2010, these guidelines aim to streamline further the multi-faceted process of country reporting.<sup>463</sup> They are to ensure *consistency* in the implementation of the common strategic priorities.<sup>464</sup>

<sup>458</sup> European Commission (COM(2010) 2020).

<sup>459</sup> [Directorate-General for Climate Action (DG CLIMA) since February 2010]

<sup>460</sup> European Commission, [New skills for new jobs-Initiative aimed at anticipating and matching labour market and skills needs, based on COM(2008) 868 final.

<sup>461</sup> Based on «[http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/flagship-initiatives/index\\_en.htm](http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/flagship-initiatives/index_en.htm)» (last accessed 31-10-2014). The asterisk denotes those initiatives where the Smart Regulation is applied to improve framework conditions for business (see Section 4.3.3.B.).

<sup>462</sup> See *supra* note 136 and, for more explanation, Ch 5.4.1.B.

<sup>463</sup> Regarding the added value of the synchronization of governance cycles, the Commission highlighted in 2005: 'Overall consistency is reinforced even further by incorporating both texts into one and the same document, thus making it possible to present to the Union and the Member States a clear strategic vision of the challenges facing Europe in the macro-economic, micro-economic and employment fields. [...] The efforts to make the Integrated Guidelines consistent should also apply to the national programmes. These should therefore bring together within a single summary document all the existing national reports which are relevant to the Lisbon strategy. [...] Using this simplified mechanism of reports, the Member States will thus be able to focus more fully on implementation.' European Commission, COM(2005)141, at 7-8.

<sup>464</sup> The Europe 2020 Strategy provides that: 'Integrated guidelines will be adopted at EU level to cover the scope of EU priorities and targets. Country-specific recommendations will be addressed to

Here, it is relevant to note already that “weak enforcement” has also been considered a critical factor in the Euro-crisis. EU leaders therefore regarded Europe 2020 as a welcome opportunity to augment the focus on implementation – notably, the implementation of those policy outputs produced by the system of European economic governance. Consequently, they have created the so-called “European Semester” which deliberately incorporates the surveillance, monitoring and coordination activities related to the SGP and to the Europe 2020-Strategy respectively into one comprehensive governance cycle. How this has been done will be discussed in more detail in Chapter 5.

In short, Europe 2020 offers a long-term agenda for attaining an innovative, growing and durable economy and thereby improve general well-being in Europe. It provides a comprehensive framework that strategically guides, structures, and coordinates EU governance and European public policy action towards the achievement of the overall “Growth”-objective and the multiple priorities connected to it.

### 4.3.3. Promoting a European vision of “Good Governance”

The two ideals mentioned, i.e. the partnership approach and “integrated coordination”, highlight that the development of a *European* vision on “Good Governance” is actually integral to the strategic framework of the EU’s governance architecture. Therefore, we will briefly review how the Union has purposefully developed this vision to extend its own influence. Then, of course, we will also look at how these broader endeavours to improve regulation, relate to Europe 2020.

#### A) The cultivation of means to enhance EU influence

The strategic adjustment of supra-national policy-making and organisational structures has long been instrumental in advancing European competences. Already from the late 1980s, the European Commission deliberately sought to cultivate a ‘new legislative culture’.<sup>465</sup> This intention was built on a dual strategy:

1. pursuing *simplification* and deregulation under the motto ‘Do less in order to do better’ in the legislative domain, and
2. promoting the *diversification* of the modes of governance including the increased use of so-called “soft law” instruments.<sup>466</sup>

The second feature has since served to extend European influence into traditionally national policy fields, as already explained in Chapter 3.3.3. The first feature has aimed ‘to improve the quality of European legislation’, involving the “consolidation” and “codification” of the Union’s existing legislative *acquis* and the removal of ‘obsolete or invalid’ hard law measures.<sup>467</sup> It has subsequently been anchored in the principles of conferred powers,

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Member States. Policy warnings could be issued in case of inadequate response.’ European Commission, COM (2010) 2020, at 6.

<sup>465</sup> European Commission (1996) quoted in Senden (2005) at 5.

<sup>466</sup> Ibid.

<sup>467</sup> Ibid./ at 22.

subsidiarity and proportionality, which were included into the Treaty framework in Maastricht and are now found in Article 5 TEU.<sup>468</sup>

Following the adoption of the Lisbon Strategy, the European Commission launched more determined efforts to foster a proper European notion of “Good Governance”. These efforts became institutionalised in an official policy programme, the so-called Better Regulation-agenda.<sup>469</sup> First, the Commission defined its contribution to the international debate on “governance” in the White Paper on European Governance in October 2001.<sup>470</sup> Second, it drew up an Action Plan for Better Regulation, based on the recommendations of a high-level expert group.<sup>471</sup> The corresponding actions eventually culminated in the first Interinstitutional Agreement on Better Law-Making two years later, which determined the common commitments and objectives of the three main EU Institutions with a view to improving EU regulation and governance.<sup>472</sup> Afterwards, the Commission took further initiative to update and simplify the Union *acquis*.<sup>473</sup>

Also, under Europe 2020 the Better Regulation-agenda – now in the guise of “Smart Regulation”<sup>474</sup> – has increasingly emphasised the need for simplification in the legislative domain. So, we will discuss below how Better Regulation affects the ideational framework of the EU governance architecture. The next chapter will then analyse how the strategy of

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<sup>468</sup> In this respect, the Presidency Conclusions of the European Council in Edinburgh in December 1992 stressed that: ‘whenever possible, action has to be taken at the national level, be it by other ways of cooperation between the Member States, the use of voluntary codes or self-regulation. If European measures are deemed necessary, then non-binding measures such as recommendations should be used, if possible. If legislation is considered necessary, resort should preferably be taken to - framework - directives, not to regulations.’ Edinburgh European Council (1992) paraphrased by Senden (2005) at 8. ‘this point of view has been confirmed on various occasions, and most importantly in the Protocol on subsidiarity and proportionality attached to the Treaty of Amsterdam.’ An updated Protocol on the Application of the Principles of Subsidiarity and Proportionality was also attached to the Lisbon Treaty. Cf. D. Fromage, ‘Subsidiarity: From a General Principle to an Instrument for the Improvement of Democratic Legitimacy in Lisbon’ in M. de Visser & A.P. van der Mei, *The Treaty on European Union 1993-2013: Reflections from Maastricht* (Intersentia, Cambridge, 2013) at 139-156.

<sup>469</sup> After all, ‘[a]pplication of the notions of flexibility and differentiation and of the principles of subsidiarity and proportionality is not an end in itself; this is considered to contribute to enhancing the effectiveness, legitimacy and transparency of Union action.’ L. Senden, *Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?* (2005) 9 *Electronic Journal of Comparative Law* 1, <<http://www.ejcl.org/>>, at 9.

<sup>470</sup> European Commission, *White Paper on European Governance* (COM(2001)428 final, (2001/C 287/01), Brussels, 12 October 2001).

<sup>471</sup> Mandelkern Group, *Better Regulation – Final Report* (Brussels, 13 November 2001).

<sup>472</sup> European Parliament, Council and Commission, *Inter-institutional Agreement on Better Law-Making* (2003/C 321/01, Brussels, 31.12.2003). A new Inter-Institutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making has been adopted on 13 April 2016.

<sup>473</sup> European Commission, *Communication on an Action Programme for Reducing Administrative Burdens in the European Union* (COM(2007)23 final, Brussels, 24 January 2007).

<sup>474</sup> European Commission, *Communication on Smart Regulation in the European Union* (COM(2010)543 final, Brussels, 8 October 2010).



diversification has been further promoted through that architecture's organisational apparatus.

### B) Europe 2020 and Better Regulation

Here, it should be noted that others have regarded Europe 2020 as just one among many of the EU's instruments in the field of socio-economic governance.<sup>475</sup> Such a view however, we argue, does not do justice to the Strategy's proper nature. The inclusive view of EU governance, elaborated in Chapter 3, indeed requires us to recognise the broad all-encompassing set-up of Europe 2020.<sup>476</sup> The Strategy reveals both an aspiration as well as the capacity for general ordering with respect to the EU's broader governance architecture.<sup>477</sup> Two features typify this ordering capacity of the 2020-Strategy – namely, that it is advancing a governance approach which is both persistently holistic and reflexive. Especially, the EU's Better Regulation agenda provides an excellent illustration of these features.

#### *Smart Regulation through an integrated approach to evaluation*

Corresponding to the Europe 2020's "Growth"-objective, Smart Regulation is to enhance especially the overall efficiency of EU governance by improving framework conditions (notably, for business).<sup>478</sup> In this framework, the Commission points to the raised urgency of the 'need to address incomplete, ineffective, and under-performing regulatory measures' because of the crisis.<sup>479</sup> It therefore concentrates on developing a pro-active approach towards assessing the impact of European policies, legislation and other measures 'at every stage – from planning to implementation and review'.<sup>480</sup> Managing the "quality" of the stock of EU policy outputs becomes a priority. It includes *ex ante* evaluations of initiatives and

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<sup>475</sup> Cf. Zeitlin and Vanhercke; Bekker (2014).

<sup>476</sup> Smismans (2011).

<sup>477</sup> Vgl. Borrás and Radaelli (2011); and Smismans (2011). Zeitlin and Vanhercke (2014) point out how the Commission deliberately rejected paralleling policy coordination processes outside Europe 2020, notably the Social OMC, in part because it sought to reduce the burden of overlapping reporting processes incumbent upon Member States. Zeitlin and Vanhercke (2014) at 29.

<sup>478</sup> Europe 2020 determines that the Smart Regulation-approach should be applied to enhance the functioning of the Single Market and, in particular, in the realisation of three Flagship Initiatives (regarding innovation policy, industrial policy, and employment policy). See Table 4.1. above.

<sup>479</sup> European Commission COM(2010)543, at 2. 'The economic and financial crisis has revealed costs of non-action, weak legislation and enforcement in some areas. It has prompted a call for strengthened economic governance and financial regulation at EU level. At the same time, the crisis has focused attention on the costs of EU legislation and the challenges of implementing and enforcing the laws already on the statute books. National administrations, already under strain, find it difficult to keep up with the transposition and application of EU legislation. Businesses and citizens raise concerns about the complexity and administrative load of laws. The European Council has called for further efforts to reduce the overall regulatory burden at EU and national level.' The Commission is therefore determined to 'continue to strengthen its regulatory tools and to apply them systematically across its regulatory activities.' European Commission (COM(2012)746) at 2-3.

<sup>480</sup> European Commission (COM(2010)543). For an overview, see [http://ec.europa.eu/smart-regulation/index\\_en.htm](http://ec.europa.eu/smart-regulation/index_en.htm) (last visited 25-04-2014).

legislative proposals through Impact Assessments (IAs), *ex post* efficiency checks on existing EU legislation and public consultations to solicit stakeholder views on EU policy measures.

Smart Regulation, especially, focuses on comprehensive and impact-based *evaluation* which should always be conducted in an *integrated manner*.<sup>481</sup> The aim is to evaluate any specific EU law, policy or funding programme for *effectiveness* (whether the EU action reached its objectives), *efficiency* (what are the costs and benefits), *relevance* (whether it responds to stakeholders' needs), *coherence* (how well it works with other actions), and *European added value* (what are the benefits of acting at EU level). For instance, the Commission conducts IAs on all EU (legislative and non-legislative) initiatives that are expected to have significant economic, social or environmental impacts.<sup>482</sup>

The Union's legislative *acquis* is moreover subjected to still more comprehensive scrutiny through the Regulatory Fitness and Performance (REFIT) Programme. Within REFIT, the Commission conducts so-called "regulatory fitness" checks for both new and existing pieces of legislation.<sup>483</sup> These *fitness checks* further evaluate secondary EU law deliberately in an integrated manner. They provide:

‘a type of evaluation that assesses several related actions [focusing] on identifying how different laws, policies and programmes interact, any inconsistencies or synergies, and their collective impact’.<sup>484</sup>

In that way, the REFIT Programme is especially designed to single out opportunities to reduce so-called "regulatory burdens" and increase the effectiveness of European law-making.<sup>485</sup> Importantly, it has recently been incorporated into the preparation of the

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<sup>481</sup> Recently, the Commission presented a blueprint for a 'new approach' designed to cultivate an "evaluate first" culture. European Commission, *Communication on Strengthening the foundations of Smart Regulation – improving evaluation* (COM(2013) 686 final, Brussels, 2 October 2013).

<sup>482</sup> These can be: legislative proposals; non-legislative initiatives (e.g. financial programmes, recommendations for the negotiations of international agreements); and implementing and delegated acts. Every year, it compiles the findings of the impact assessment process in IA reports. See the Commission's database on IA reports; [http://ec.europa.eu/smart-regulation/impact/ia\\_carried\\_out/cia\\_2016\\_en.htm](http://ec.europa.eu/smart-regulation/impact/ia_carried_out/cia_2016_en.htm). Regarding planned EU legislation, the cost-benefit analysis of the IAs can also be instrumental in preparing "preventive action" to facilitate Member States' implementation and enforcement of EU legislation. For example, the Commission offers 'support to Member States during implementation to anticipate problems and avoid infringement proceedings later on; transposition workshops for new directives such as for regulated professions, insurance, banking, accounting and auditing; and guidelines to help Member States implement new legislation'. European Commission COM(2010)543, at 7.

<sup>483</sup> European Commission, *Communication on EU Regulatory Fitness* (COM(2012)746 final, Strasbourg, 12 December 2012).

<sup>484</sup> See [http://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/evaluating-laws\\_en](http://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/evaluating-laws_en)

<sup>485</sup> European Commission (COM(2012)746).

Commission's annual work programme.<sup>486</sup> Every year the Commission identifies new REFIT actions which are compiled in a comprehensive scoreboard.<sup>487</sup>

The Commission's understanding of "Good Governance" thus implies – above all – fostering a comprehensive "evaluation culture". This standard of *reflexivity* is to be nurtured among the Member States and must necessarily also apply to the Union's own activities.<sup>488</sup> Following such self-assessment, the Better Regulation-framework has been restructured in 2015. This has resulted primarily in a re-arranging of existing elements to improve upon on their alignment and focus.<sup>489</sup> It has also included the issuing of Better Regulation Guidelines to ensure the quality of the evaluation process itself.<sup>490</sup> And, an independent body – the Regulatory Scrutiny Board (RSB) – has been charged with checking the quality of each IA report, major evaluations and fitness checks.<sup>491</sup>

*Good Regulation = reduced regulation?*

It is however necessary to distinguish ideals from reality more clearly. Following the EU's "Good Governance"-ambitions, the Better Regulation agenda intends to enhance both the legitimacy (promoting citizens' interests) and the effectiveness (delivering the full range of

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<sup>486</sup> The Commission presents the REFIT achievements as follows: 'since 2012, 83 legislative initiatives proposed, containing 17 exemptions or lighter regimes for SMEs: 32 adopted and 20 implemented in EU countries'; 141 laws in preparation withdrawn; 37 laws repealed in 2015 and 2016; 30 evaluations and fitness checks carried out; 39 scheduled in 2016; 40 REFIT actions in the Commission's 2016 work programme'. See European Commission (2015).

<sup>487</sup> The results of the fitness checks may trigger corrective actions considered necessary to ensure that the EU *acquis* is "fit for purpose": "These actions include legislative initiatives to simplify and reduce regulatory burden, repeals of legislation no longer needed, withdrawals of proposals without a realistic chance of adoption or where the initial objectives can no longer be achieved and evaluations and Fitness Checks to assess relevance, coherence, efficiency, effectiveness and EU added value of EU legislation and identify further opportunities for simplification and burden reduction.' European Commission, Annex III 'REFIT Actions' of COM(2014) 910 final.

<sup>488</sup> Based on the partnership approach, Better Regulation is a "shared responsibility" between the EU institutions and the Member States. See for further discussion Chapter 7.3.3.1.

<sup>489</sup> Following the outline of incoming Commission President Juncker's political priorities, the Commission adopted a set of integrated measures – known as the Better Regulation Package – on 19 May 2015. See European Commission, Communication on Better regulation for better results - An EU agenda (COM(2015) 215 final, Strasbourg, 19 May 2015).

<sup>490</sup> The Better Regulation Guidelines advise public authorities at all levels, for example, on how to conduct IAs. They have been complemented with an Interactive Toolbox, including Common Better Regulation Principles and further complementary advice on methods etc. See European Commission, Better Regulation Guidelines (SWD(2015)111 final, Strasbourg, 19 May 2015); and for the Better Regulation Toolbox, see [http://ec.europa.eu/smart-regulation/guidelines/toc\\_tool\\_en.htm](http://ec.europa.eu/smart-regulation/guidelines/toc_tool_en.htm)

<sup>491</sup> 'The Regulatory Scrutiny Board provides a central quality control and support function for Commission impact assessment and evaluation work. It was set up on 1 July 2015 and replaced the Impact Assessment Board. The Board examines and issues opinions on all the Commission's draft impact assessments and of major evaluations and "fitness checks" of existing legislation. In principle, a positive opinion is needed from the Board for an initiative accompanied by an impact assessment to be tabled for adoption by the Commission. [...] The Board is independent of the policy making departments.' See [http://ec.europa.eu/smart-regulation/impact/iab/iab\\_en.htm](http://ec.europa.eu/smart-regulation/impact/iab/iab_en.htm)

public policy objectives) of EU regulation through comprehensive evaluation.<sup>492</sup> Its purpose is depicted in terms of the seemingly uncontroversial aim of improving regulation.<sup>493</sup> The Commission thus recognises that ‘Regulation has a positive and necessary role to play’.<sup>494</sup> The generic incorporation of Better Regulation-discourses into the EU’s broader strategic framework, however, does not entirely escape controversy.

In fact, the Commission prides itself in sorting out the “most burdensome pieces of EU legislation” every year. The “burden” of regulation is plainly conceived in terms of *costs*.<sup>495</sup> The Commission considers that burden of implementing EU rules to affect especially small- and medium-sized businesses (SMEs) disproportionately. Taken to represent 99% of all businesses in the EU, SMEs are ascribed a critical role in Europe’s growth potential and employment creation.<sup>496</sup> The reduction of regulatory burdens – also often captured by the neo-liberal idiom of “cutting red tape” – both at EU and national level is presented as necessary to improve Europe’s business environment. In that way, the Better Regulation agenda confronts public authorities at all levels with clear *impulses for deregulation* in the name of competitiveness and cost efficiency. To advance this process, a so-called REFIT Platform has recently been set up to receive and evaluate the relevant input about “burdening” regulations from the Member States, citizens and other stakeholders directly.<sup>497</sup>

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<sup>492</sup> ‘Better regulation matters. Legislation is not an end to itself – it is a means to deliver tangible benefits for European citizens and address the common challenges Europe faces. Well-targeted, evidence-based and simply written regulation is more likely to be properly implemented and achieve its goals on the ground, whether these are economic, societal or environmental. Modern, proportionate rules that are fit for purpose are essential for the rule of law and upholding of our common values, but also for the efficiency of public administrations and businesses.’ European Commission, COM(2016)615.

<sup>493</sup> Cf. Scott etc (2011).

<sup>494</sup> European Commission COM(2010)543, at 2.

<sup>495</sup> The Commission presents the “concrete benefits” of its REFIT-actions as follows: ‘simpler financial reporting system for 5 million micro-companies (estimated annual savings €6.3 billion); registration fees under REACH chemicals legislation cut by up to 95% for SMEs procurement costs cut by up to 20% thanks to new electronic procurement rules; new digital tachographs for lorry drivers increase safety and cut red tape (estimated annual savings €400 million); fitness check begun on EU chemicals legislation other than REACH; an evaluation will assess REACH in the light of REFIT goals; and VAT simplification measures, particularly for SMEs, ongoing’. See [http://ec.europa.eu/info/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less\\_en](http://ec.europa.eu/info/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less_en)

<sup>496</sup> See European Commission, Report on Minimizing regulatory burden for SMEs – Adapting EU regulation to the needs of micro-enterprises (COM(2011)803 final, Brussels, 23 November 2011); European Commission, *Smart Regulation – Responding to the needs of small and medium-sized enterprises* (COM(2013)122 final, Brussels, 7 March 2013); and European Commission, *Communication on the Commission Follow-up to the “TOP TEN” Consultation of SMEs on EU Regulation* (COM(2013)446 final, Brussels, 18 June 2013) listing the ‘top ten most burdensome pieces of EU legislation as identified by SMEs’.

<sup>497</sup> An online form entitled ‘Lighten the load’ is to encourage people’s suggestions on how to reduce the regulatory and administrative burdens of EU laws. The REFIT Platform is chaired by Vice-President Timmermans (also known as “Mr. Better Regulation”) and composed of a Government Group, comprising representatives of all Member States, and a Stakeholder Group that convenes representatives of business, social partners and civil society, European Economic and Social

All in all, Smart Regulation thus focuses on ways to improve the “delivery” of the Europe 2020-objectives of smart, sustainable and inclusive growth. For that purpose, the Commission now deliberately applies an integrated approach to IAs and the quality review of EU legislation. The Better Regulation agenda furthermore strongly promotes the rationales of *reflexivity* (in the sense of continuous self-assessment) and *revisability* (i.e. a propensity for swift adjustments in response to deficiencies discovered during the self-assessment or in the light of changed circumstances) as inherent features of that strategic framework.

However, when the Better Regulation-discourses repetitively portray European regulation generally, and EU legislation specifically, as a “burden”, their primary claim of improving that same regulation almost appears as an oxymoron.<sup>498</sup> Is it possible that the Better Regulation-agenda thereby – contrary to its aim of improving the quality of regulation – actually limits the manoeuvrability of European public regulation with a view to the increasingly ambitious objectives that are put forward by the EU’s own strategic framework? This question will be further discussed in Chapter 7.

#### 4.4. CONCLUDING REMARKS: SHAPED BY CRISIS – THE EU GOVERNANCE ARCHITECTURE OF “LISBON 2020”

In this chapter, we have set out to explain how the governance architecture of “Lisbon 2020” is composed. We have analysed the constitutional and the strategic frameworks, which together make up the broad ideational framework of EU governance (see Table 4.2. below). Through this composite framework, the EU is today advancing its normative aspirations concerning socio-economic governance. Given our aim to study the influence of EU governance on labour law, this analysis has been important because it provides useful insights on the *normative context* which EU employment governance is embedded in.

We will now recapitulate the main constitutional and strategic choices that characterise the “Lisbon 2020”-architecture by reflecting on how the two relate to each other. We will compare them with respect to the objectives they put forward, the delimitation of competences, important procedural requirements, and the impact of the EU crisis management on the broader governance architecture.

##### *The EU’s normative objectives*

The entry into force of the Lisbon Treaty in late 2009 has consolidated the EU’s constitutional framework – i.e. the TEU, the TFEU and the CFREU – providing the foundation of the EU governance architecture. The Treaty framework confirms the Union as a polity in its own right and makes explicit that its members share a set of common fundamental values. On that basis, the constitutional objective of establishing a CSME becomes the *raison d’être* of the EU. It confirms that the supra-national polity has both an

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Committee and Committee of the Regions. See [http://ec.europa.eu/smart-regulation/refit/refit-platform/index\\_en.htm](http://ec.europa.eu/smart-regulation/refit/refit-platform/index_en.htm)

<sup>498</sup> Cf. Schömann (2015).

economic *and* a social purpose and must therefore pursue economic and social objectives in a balanced manner. In that respect, two horizontal clauses are now included in the TFEU in order to mainstream equality and social concerns when the EU is defining and implementing its policies and activities.

EU NORMATIVE ASPIRATIONS ( <i>structural dimension</i> )			
Level of analysis	Objectives	Competences	Procedural requirements
CONSTITUTIONAL framework	Establishing a CSME	Hierarchical division based on subsidiarity but diffuse	Consistency requirement
		EU “coordination” as self-standing competence	Durability
STRATEGIC framework	“Growth & Jobs”-mantra	More heterarchical, dynamic notion of “partnership”	Good Governance-ambitions
		Mutual responsibility EU-MS to enhance European governance capacity	Reflexivity & revisability

**Table 4.2.: The composite ideational framework of the “Lisbon 2020”-architecture**

This broad ambition of combining economic and social objectives is also reflected in the strategic framework – notably, by the “*Growth and Jobs*”-mantra of Europe 2020. These two functional meta-objectives of “growth” and “jobs” circumscribe the strategic framework like two inter-connecting themes. They are very much hybrid in nature, being deliberately open-ended and vague. Still, they clearly maintain authoritative appeal by conveying a sense of (social) progress. The next chapters will examine how these broad ideas gain meaning at the politico-organisational level where they are further elaborated in strategic narratives.

*The delimitation of competences between the EU and the Member States*

Under the Lisbon Treaty, the delimitation of competences between the Union and the Member States has become more elaborate. Among the principles of constitutional ordering, “*subsidiarity*” probably captures best the current state of affairs: The division of competences remains in principle hierarchical but the Treaty-based allocation of responsibilities between the European and the national level appears increasingly diffuse. Notably, the “coordination” of national policies by the EU is now recognised as a self-standing competence, which is central to European socio-economic governance. Next to that, the CFREU now holds the same legal value as the Treaties but its enforcement has been severely circumscribed based on a very narrow understanding of subsidiarity.

Europe 2020 immediately conveys a more dynamic, heterarchical approach to allocating responsibilities between the Union and its members based on the notion of

“partnership”. The partnership-approach builds on a more organic division of tasks and, in fact, presupposes a *mutual responsibility* of the Member States and the EU institutions towards enhancing European governance capacity. Importantly, prior concerns about the lack of national ownership in delivering on the 2020-vision have significantly contributed to the re-designing of the EU’s strategic governance framework in 2010.

Altogether, the re-adjustments of the Union’s composite ideational framework have in fact paved the way for an upgrading of the EU’s coordination activities to improve the implementation of the common objectives. This will be elucidated more in Chapter 5.

#### *Important procedural requirements*

The Union’s constitutional framework is characterised by the *durability* of its choices of constitutional ordering. This remains true even though the Lisbon Treaty has slightly extended the possibilities for revising the Treaties. The strategic framework, in contrast, is designed to ensure that the implementation of the 2020-objectives is continuously being optimised based on the principles of *reflexivity* and *revisability*. This is supported by the Better Regulation-agenda, which has institutionalised a European vision of “Good Governance”. Surely, the main purpose of this vision is primarily to improve the delivery of the Union’s strategic objectives. At the same time, it also provides a useful channel for the Commission *to cultivate means of enhancing EU influence through the strategies of simplification and diversification*.

Moreover, the Better Regulation agenda now subjects the EU’s activities to a continuous effectiveness review. Smart Regulation plays a crucial role in organising the implementation of the EU’s strategic objectives through an integrated approach to evaluation. Here, however, caution is required regarding a certain *bias* that consequently seems to beset the strategic framework of the EU governance architecture. We have noticed increasing emphasis on the need to reduce and adjust regulation to remove “burdens” and thereby improve the business environment. It is, however, questionable if this competitive drive properly satisfies the Union’s own “Good Governance”-ambitions which, too, are subject to the EU’s new constitutional duty of a balanced pursuit of economic and social objectives.

In that regard, we have recognised the all-encompassing nature of the 2020-Strategy (i.e. its function of general ordering) and how it is linked to its architectural counterpart, the constitutional framework. The Lisbon Treaty obliges the Union to ensure *consistency* between its policies and activities, taking into account all of its objectives. This is matched by Europe 2020’s intention to guide European policy-making in an integrative manner. The TFEU, however, attaches an important condition to this consistency-requirement. The horizontal synchronisation of the EU’s goals and activities must comply with the principle of the conferral of powers. This means, the promotion and implementation of the broad European objectives may not result in supra-national intervention *ultra vires*.

This chapter has shown that the Union's social "face" has never been as manifest as today under the Lisbon Treaty. The respective constitutional provisions, however, still provide no match to the highly sophisticated legal framework of the European Economic Constitution. Above, we have focused on the Union's constitutional mandate with regard to regulating economic and monetary matters under the EMU because of its connection with the Euro crisis. Notably, with the example of the establishment of the ESM, we have critically examined the (emergency) changes that European leaders have implemented in response to the crisis at constitutional level.

The EU's system of economic governance is characterised by high complexity, which has its roots in the asymmetric legal set-up of the EMU. The Treaties assign the Union exclusive competence over monetary policy while affirming the Member States' prerogative in fiscal policy-making. This means, the legal responsibilities for economic policy-making in the EA have been carefully divided between the European and the national level.

Our analysis has revealed, however, that the amendments of the European constitutional framework that resulted from EU crisis management have considerably increased the EU's leverage over the economic policy-making of the Member States. Especially regarding national budget policies, the EU institutions' powers of supervision have been amplified. And so has their influence in demarcating domestic fiscal planning.

This bolstering of the EU's constitutional framework has accorded the rationale of "budgetary discipline" the legal status of a *conditio sine qua non* for ensuring the stability of the Euro in crisis situations. This is borne out by all the constitutional amendments discussed above that were triggered by the European anti-crisis measures. It has been reinforced even further by the Fiscal Compact. The TSCG commands that national governments regard prudent budget planning as a priority at all times – that is, irrespective of economic and political fluctuations.





## Chapter 5 – The politico-organisational framework of “Lisbon 2020” and the new integrated regime of EU Economic Governance

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### 5.1. INTRODUCTION

Building on Chapter 4, in this chapter we aim to further enhance our understanding of the broader EU governance architecture. We are examining the “Lisbon 2020”-architecture taking into consideration the major reforms that European leaders have pushed through at EU level in response to the Euro crisis. Thereby we seek to better comprehend the *normative context* – based on the Lisbon Treaty and the Europe 2020 Strategy – in which EU employment governance is embedded today. Comprehending the bigger picture first is necessary to be able to analyse the question of whether EU employment governance is still functioning as an integrated regime in the next chapters. In that context, then, we will more specifically study the different ways in which EU governance influences labour law today.

In the previous chapter, we have explored the composite ideational structure of the “Lisbon 2020”-architecture through which the EU is structuring its normative ideas about socio-economic governance. This has provided us with an overview of the different constitutional and strategic sources that feed into the formulation of the Union's policy aspirations. Now we turn to the *process dimension* of EU governance, in order to examine the organisational machinery through which the “Lisbon 2020”-architecture is operating.

It has become clear that the EU is strategically promoting a proper European vision of “Good Governance”. The diversification of regulatory instruments forms an essential part of that vision. At the same time, the Union is required to deploy its activities in a coherent and an effective manner. Therefore, the functional aim of “integrated coordination” provides one of the Union's core governance ideals – that has recently been epitomised in the establishment of the European Semester. The Semester provides a comprehensive governance schedule for meta-coordination to implement the EU's strategic 2020-objectives. It integrates the deployment of multiple instruments and diverse governance techniques into an annual cycle. The analysis below will therefore focus on *how the EU has deliberately cultivated a sophisticated technique of coordination through the Semester to advance its policy aspirations*.

Accordingly, we will study the main instrumental and modal choices that have accompanied the establishment of the Semester-cycle. This, however, cannot be done without first acknowledging how EU crisis management has affected the strategic framework of the EU governance architecture. The European Semester has in fact been a key innovation created in response to the Euro crisis – i.e. intended primarily to strengthen the system of European economic governance. The 2010 process of re-formulating and renewing the Union's long-term growth strategy coincided with the EU's early efforts to manage the Euro crisis. The development of the European Semester, therefore, reveals a clear imprint of EU policy-makers' primary motivation of strengthening European

economic governance. We will discuss how both the new and amended legislative rules and coordination instruments have been affected by that central motivation.

In short, we will elucidate how the EU's anti-crisis reforms have not only advanced the diversification of the instruments of socio-economic governance but also driven their targeted interaction. It will therefore also be useful to study the technique of benchmarking which plays a central role in connecting the EU's various meta-coordination activities. This will help us to fathom how the EU exerts influence on the national level by using the successive coordination instruments throughout the Semester-cycle. We will explain how the complex multi-level governance processes of the EU define and pattern the ideational repertoires and discourses through so-called "framing". This will reveal that the EU's organisational machinery, in fact, fulfils a delineating role with respect to the EU's policy aspirations that originate in the ideational framework of "Lisbon 2020". Finally, we will conclude how the governance reforms brought about by the EU crisis management have led to the creation of a newly integrated regime of EU Economic Governance.

## 5.2. EU CRISIS MANAGEMENT: ENHANCING THE IMPLEMENTATION OF THE EU'S STRATEGIC OBJECTIVES

In the previous chapter, we have discussed what effects European crisis management has had on the constitutional framework of the "Lisbon 2020"-architecture. Now we will elucidate how it has affected that architecture's strategic framework that is by nature more dynamic and amenable to swifter adjustments. Shortly after the launch of Europe 2020, the EU's apparatus for socio-economic governance has thus been substantially amended.

In the following, we will describe how this organisational reform has fitted the implementation of the Union's strategic objectives into a yearly cycle of meta-coordination. We will then zoom in on how the primary motivation for this reform has, in fact, been the strengthening of EU economic governance.

### 5.2.1. The European Semester – scheduling the implementation of the 2020-objectives

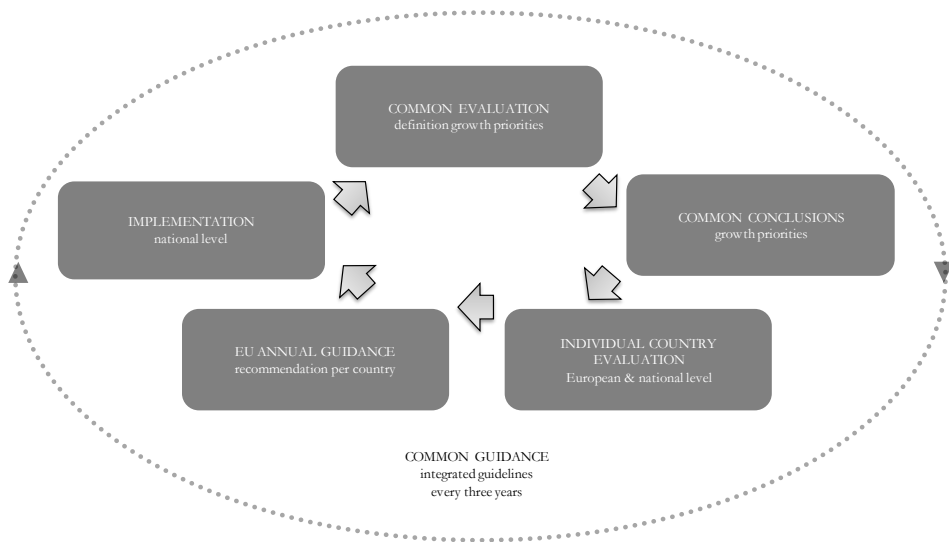
We have seen that Europe 2020 relies on a combination of a thematic approach, including priorities and headline targets, and country reporting. While the Treaty provides the legal bases for EU-level coordination,<sup>499</sup> the 2020-Strategy frames the European monitoring activities and the coordination of national socio-economic policy-making by tying them to strategic common objectives – above, all the "Growth and Jobs"-mantra.<sup>500</sup>

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<sup>499</sup> See Articles 121 (3) and (4), and 148 TFEU.

<sup>500</sup> The Europe 2020 Strategy provides that: 'Integrated guidelines will be adopted at EU level to cover the scope of EU priorities and targets. Country-specific recommendations will be addressed to Member States. Policy warnings could be issued in case of inadequate response.' European Commission, COM (2010) 2020, at 6.

In that context, the technique of “integrated coordination” has been taken to a whole new level since 2010.<sup>501</sup> A range of instruments have been created and/or re-designed, which are reproducing and shaping the EU strategic policy aspirations in a cyclical manner. Surely, the iterative nature of the governance processes had already been an outstanding feature within the Lisbon Strategy.<sup>502</sup> But under Europe 2020, it has been further institutionalised through a strictly defined, repetitive timetable – the so-called “European Semester”.



**Figure 5.1: The annual cycle of meta-coordination for the implementation of the 2020-objectives under the European Semester**

The Semester now effectively forms the procedural anchor for the annual implementation of the EU’s 2020-objectives in the light of the broader guidance provided by the IGs. It organises various tools employed for country reporting, common evaluation and guidance within a succinct annual governance schedule that structures an overall process of “meta-coordination”.<sup>503</sup> This schedule integrates the different monitoring and steering mechanisms pertaining to the coordination and multilateral surveillance of the Member States’ economic and employment policies. The flow chart (Figure 5.1.) above provides a basic visualisation of the annual cycle of European meta-coordination, whose operation will be explored further below (see Section 5.3.).

<sup>501</sup> See Smismans’ (2011) reflections on the notion of “coordination” in EU discourse.

<sup>502</sup> Ibid.

<sup>503</sup> For more information, see [http://ec.europa.eu/europe2020/making-it-happen/index\\_en.htm](http://ec.europa.eu/europe2020/making-it-happen/index_en.htm) (accessed on 09-01-2016).

### 5.2.2. The European Semester – remedying weaknesses in EU economic governance

However, this significant re-design of European socio-economic governance, described above, did not happen by chance. The crisis had in fact exacerbated significant economic and budgetary divergences between the Member States.<sup>504</sup> As outlined in Chapter 4, the EU crisis narrative has linked these divergences to the weak enforcement of the European fiscal rules, which had been designed to bring about the convergence of national performances. Logically then, it was argued that these structures had to be strengthened – not only to help overcoming the crisis (by creating sound conditions for a return to economic growth) but also to render European economies more resilient against future crises.

For both the Commission and the European Council, the renewed strategic governance framework of Europe 2020 provided a new opportunity to address those challenges highlighted by the Euro crisis. It was to serve as ‘a coherent framework for the Union to mobilise all of its instruments and policies and for the Member States to take enhanced coordinated action [and] promote the delivery of structural reforms’.<sup>505</sup>

As European leaders were witnessing the onset of the European debt crisis from 2010, the EU crisis narrative helped to forge a consensus that several faults in the strategic governance framework had to be addressed.<sup>506</sup> Hence, common agreement was soon secured that – next to the emergency measures, described in Chapter 4 – the EU’s system of economic governance had to be reinforced. Reform was considered especially necessary to tackle the roots of the crisis and the factors for its deterioration which were associated primarily with the failure of the enforcement instruments of the SGP.

Demands for reinforcing European economic governance had in fact been around for considerable time.<sup>507</sup> They were emphasised both in the Convention on the

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<sup>504</sup> ‘Divergent growth patterns lead in some cases to the accumulation of unsustainable government debts which in turn puts strains on the single currency. The crisis has thus amplified some of the challenges faced by the euro area, e.g. the sustainability of public finances and potential growth, but also the destabilising role of imbalances and competitiveness divergences.’ European Commission COM(2010)2020, at 26.

<sup>505</sup> European Council, *Conclusions of 17 June 2010*. EUCO 13/10, Brussels. The Europe 2020 Strategy identified the need for “stronger governance”, especially through more strengthened and closer policy coordination. It called for an effective framework for deeper and broader surveillance and to address imminent threats to the financial stability of the EA. European Commission COM(2010)2020, at 27.

<sup>506</sup> For an overview, see Chapter 3.2.2.B.

<sup>507</sup> Already in 2003, the SGP had been put to a serious test when the Council had failed to follow the Commission’s recommendation to impose sanctions on Germany and France for exceeding the common 3%-rule concerning budget deficits. The Court of Justice subsequently supported the Commission’s complaint but eventually had to confirm that the authority to enforce the SGP rested with the Council. See Case C-27/04 Commission / Council [2004] ECR I-6649. As a result, the SGP was reformed in 2005, extending Member States’ discretion in the application of the EDP. See Council Regulation (EC) No 1055/2005 of 27 June 2005 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, and Council Regulation (EC) No 1056/2005 of 27 June 2005 amending

Future of Europe and in the IGCs preparing the Lisbon Treaty.<sup>508</sup> But it was not until the Euro-crisis that the plan to strengthen the governance of the EMU was combined with a determined “reform zeal” among all actors involved.<sup>509</sup> A clear sense of urgency underpinned the EU Executive’s proposal on strengthening European economic policy coordination.<sup>510</sup> As explained in the previous chapter, the EU’s sovereign debt crisis unmasked the profound inter-dependence of national systems where the financial malaise of one Member State could quickly lead to toxic spill-over effects that might jeopardise the stability of the entire EA. Therefore, according to the official narrative, the instruments to enforce the SGP – including the BEPG and the EDP – had obviously failed to deliver the convergence and stability they were meant to produce.

At the same time, the existing instruments and insufficient implementation results under the Lisbon Agenda were furthermore deemed inadequate for helping Europe to a more expedient economic recovery. Importantly, with regard to creating growth the basic rationale of fiscal discipline as enshrined in the stern budget criteria of the SGP was not questioned.<sup>511</sup> On the contrary, as demonstrated in Chapter 4, EU crisis management has actually reinforced an institutionalised bias towards stability-oriented economic policies and imposed new restraints on domestic fiscal planning.<sup>512</sup>

Furthermore, it was recognised that existing EU instruments were incapable of detecting and preventing so-called “macro-financial risks”, such as housing bubbles or competitiveness divergences.<sup>513</sup> This was, in particular, linked to a lack of alignment and mutual interaction between the SGP and the Lisbon Agenda:

‘Macro-economic imbalances and competitiveness problems were at the root of the economic crisis, and were not adequately addressed in the surveillance of Member States’ economies carried out through the Stability and Growth Pact

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Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure. The 2005 reform has been criticized for watering down the Pact to the extent of rendering it useless. In reference to Pisani-Ferry (2006), see Maher (2007) at 687. Liberal economic thinkers characterized the situation as a failure of law and hence demanded the resuscitation of “hard” economic rules to re-establish the Pact’s credibility.

<sup>508</sup> Piris (2010) at 304.

<sup>509</sup> See Joerges (2012) on the relevance of the “crisis”-narrative.

<sup>510</sup> The Communication outlining the first steps to strengthen EU economic governance was published only a few days after the decision to establish a permanent stabilisation mechanism and renewed political commitment to accelerate fiscal consolidation to fight persistent crises in the EA. European Commission, COM(2010)250, at 3.

<sup>511</sup> ‘The Stability and Growth Pact provides the right framework to implement fiscal exit strategies and Member States are setting down such strategies in their stability and convergence programmes.’ European Commission COM(2010)2020, at 26.

<sup>512</sup> This theme will still be explored further also in Chapter 7.

<sup>513</sup> The Commission presented these faults as follows: ‘However, the Lisbon Strategy was not sufficiently equipped to address some of the causes of the crisis from the outset. [...] with the benefit of hindsight, it is clear that the strategy should have been organised better to focus more on critical elements which played a key role in the origin of the crisis, such as robust supervision and systemic risk in financial markets, speculative bubbles (e.g. in housing markets), and credit-driven consumerism which in some Member States, combined with wage increases outpacing productivity gains, fuelled high current account deficits.’ European Commission, SEC(2010)114, at 4.

and the Lisbon Strategy, which tended to operate in parallel rather than complementing one other.<sup>514</sup>

The Euro crisis thus produced considerable impetus to launch a long-needed overhaul of the EU economic governance system. Fault was sought particularly with the European rules on budgetary discipline. Notably, weaknesses in their enforcement was considered to have contributed to the crisis. But also, macro-economic imbalances – especially, uneven competitiveness developments – were considered further aggravating factors.<sup>515</sup> Against this background, the main instrumental and procedural changes that resulted from the process of reinforcing European economic governance will be studied below.

### 5.3. INSTRUMENTAL CHOICES (SINCE 2010)

Next to bolstering the European Economic Constitution to enable emergency assistance to ailing Member States, EU crisis management has thus also included extraordinary efforts to strengthen the Union's overall system of economic governance. Within the framework of the Europe 2020 Strategy, the establishment of the European Semester has provided a central building block in these endeavours. From late 2010, it has provided a basic *frame of reference* within which the EU has advanced its instrumental choices and innovations in a deliberately integrated manner.

In the following, we will explain how the Union has adopted two packages of new legislation to strengthen the implementation and enforcement of European fiscal rules. Thereby, it has pursued mainly two rationales – to strengthen the SGP, especially regarding the procedure of budgetary surveillance, and to create a new procedure for monitoring and counteracting macro-economic imbalances in the inter-dependent national economies. We will discuss how, altogether, these legislative changes have been instrumental in strengthening the framework conditions for EU economic policy coordination and thus bolstering the European Semester-process. And, ultimately, we will explore the cyclical interplay of the coordination instruments within the Semester-cycle in more detail.

#### 5.3.1. Strengthening procedural framework rules

The EU crisis management included legislative responses aimed at strengthening economic policy coordination and, especially, fiscal surveillance in the EU. In November 2011, when the Euro crisis was still in full swing, the European Parliament and the Council rather swiftly adopted a set of six pieces of legislation, the so-called “Six-Pack”.<sup>516</sup> This new set of rules (containing five regulations and one directive) serve to strengthen EU economic governance in three essential ways: by strengthening the SGP;<sup>517</sup> by further enhancing

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<sup>514</sup> European Commission, SEC(2010)114, at 4.

<sup>515</sup> European Council, Conclusions (EUCO 13/10, Brussels, 17 June 2010) at points 11-12.

<sup>516</sup> The regulations entered into force on 13 December 2011.

<sup>517</sup> Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; and Council

budgetary surveillance in particular;<sup>518</sup> and by creating a new procedure to prevent and correct macro-economic imbalances of systemic significance.<sup>519</sup>

One and a half years later, another legislative package – the “Two-Pack” – followed, putting even more focus on reinforcing fiscal surveillance in the EA.<sup>520</sup> The two regulations set up common rules aimed to improve the design of national budgetary frameworks and further prop up the tools for budgetary surveillance for those EA Member States experiencing severe financial difficulties.<sup>521</sup>

Below, we will highlight the most important changes that the new rules implemented with respect to the SGP and budgetary surveillance. The new imbalances procedure will be discussed afterwards in terms of its contribution to the EU’s economic policy coordination.

#### A) Mending the SGP’s deficiencies through legislation

As indicated above, enhancing the enforcement mechanisms of the SGP had been a long-standing aspiration of the Commission. Additionally, the crisis has exposed serious negligence in that EU-level monitoring of national fiscal performances had previously been focused too much on budget deficits. With respect to the SGP’s two operative dimensions, the Six-Pack has therefore strengthened both the preventive and the corrective arm of fiscal policy coordination.<sup>522</sup>

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Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure.

<sup>518</sup> With regard to the EA, the Six-Pack included Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area. The Two-Pack then added Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area; and Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

<sup>519</sup> Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macro-economic imbalances in the euro area; and Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macro-economic imbalances.

<sup>520</sup> The European Parliament and the Council adopted the Two-Pack on 21 May 2013. The two regulations entered into force on 30 May 2013.

<sup>521</sup> Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area; and Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

<sup>522</sup> The SGP elaborates on the Treaty obligations in Articles 121 and 126 TFEU, with the first provision outlining its preventive arm and the second its corrective limb including the EDP. Protocol 12 defines the reference values of 3% of GDP for public deficit and 60% of GDP for public debt. See Chapter 4.2.1.



Regarding the preventive arm, the new legislation has brought some clarification regarding the monitoring of national budgetary positions. It provides a quantitative definition of a “significant deviation” from the medium-term objective (MTO) or the adjustment path towards it.<sup>523</sup> This facilitates the EU institutions’ assessment of what it means for a Member State to run an excessive government deficit and/or an excessive public debt level.

Regarding the corrective arm of the SGP, the Six-Pack has in fact operationalised the debt criterion. Previously, enhanced budgetary surveillance under the EDP had mainly focused on non-compliance with the deficit-rule. Now the EDP must also be launched when a Member State’s public debt ratio (structurally) exceeds 60 per cent of GDP and is not being reduced at a satisfactory pace. This means, the EA Member States will also face financial sanctions if they have persistently breached the debt criterion.<sup>524</sup>

Furthermore, there have been considerable problems with executing the sanctions of the EDP in the past.<sup>525</sup> The Six-Pack bolsters the SGP’s range of sanctions to be applied and the decision-making regarding their enforcement. For that purpose, it introduces the procedure of so-called reverse qualified majority voting (RQMV).<sup>526</sup> This is to render the application of sanctions semi-automatic and accordingly increase the likelihood of sanctioning (plus their deterrence effect) for EA members. With regard to sanctions, the Pact’s corrective arm has moreover been reinforced by the Fiscal Compact, effective from January 2013.<sup>527</sup>

Next to that, the Six-Pack has also introduced additional rules – beyond the SGP – that increase the pressures on Member States to conduct budgetary discipline as a matter of priority. Notably, it has established minimum requirements for national budgetary frameworks for the medium-term. These should ensure that national fiscal planning is conducted with a multi-annual perspective (i.e. at least every 3 years), based on the attainment of the MTO as reference value.

## B) Bolstering budgetary surveillance in the EA

However, as financial instability in the EA persisted and emergency negotiations of new rescue packages for various Member States continued, the plan was to strengthen fiscal coordination even further for the Member States whose currency is the Euro. The new provisions of the Two-Pack establish common fiscal rules and provide for “enhanced surveillance” and enforcement.

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<sup>523</sup> This provision has been further complemented by the Fiscal Compact, see Article 3(x) TSCG.

<sup>524</sup> Sanctions should be applied in a gradual way and may accumulate up to 0.5 per cent of the GDP.

<sup>525</sup> See *supra* note 9.

<sup>526</sup> RQMV implies that a Commission proposal or recommendation to sanction a non-compliant EA member will be considered adopted by the Council *unless* a qualified majority of Member States votes against it.

<sup>527</sup> The TSCG has mandated all signatory Member States to put in place automatic fiscal correction mechanisms in their domestic systems, where possible, at constitutional level. It also provides for infringement proceedings before the CJEU in case a contracting Member State fails to implement the rules of the Fiscal Compact. See Chapter 4.2.2.B.

Regarding the former, they add a new element to the European Semester-cycle by requiring the EA members to submit their draft budgets for review to the European Commission by October every year. This review links the national budget planning of these countries directly with the duty of safeguarding the financial stability of the EA.<sup>528</sup> Regarding the latter, the Two-Pack has further strengthened the application of the EDP.<sup>529</sup> Enforcement should improve by subjecting non-compliant EA members to graduated monitoring to improve the early detection and correction of risks.<sup>530</sup> Additionally, a country entering the EDP will have to sign up to an economic partnership programme (EPP) that sets out a roadmap for structural reforms deemed beneficial to a swift and durable correction of the excessive deficit.

Most of the new rules from the legislative packages are of a procedural nature. In other words, they either define aspects of or establish more specific instruments pertaining to the process of multi-lateral surveillance. They thus feed into and shape the cycle of economic policy coordination which is nowadays structured through the European Semester (see the next section below). EU crisis management has thereby brought about a new set of harmonised framework conditions that Member States must take into account when formulating and implementing fiscal policy choices. Of course, it is still the essence of EU coordination that in principle, national governments have the prerogative to choose what *type* of economic policy they prefer.<sup>531</sup> However, as we will further explain below, a directly applicable and binding European procedural framework now significantly circumscribes the choice of policy options.

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<sup>528</sup> 'In the exceptional cases where, after consulting the Member State concerned, the Commission identifies in the draft budgetary plan particularly serious non-compliance with the budgetary policy obligations laid down in the SGP, the Commission, in its opinion on the draft budgetary plan, should request a revised draft budgetary plan, in accordance with this Regulation. This will be the case, in particular, where the implementation of the draft budgetary plan would put at risk the *financial stability* of the Member State concerned or risk jeopardising the proper functioning of the economic and monetary union, or where the implementation of the draft budgetary plan would entail an obvious significant violation of the recommendations adopted by the Council under the SGP.' [emphasis added, NB] Recital 20, Preamble of Regulation (EU) No 473/2013.

<sup>529</sup> Additionally, the Two-Pack seeks to ensure 'transparent, efficient, streamlined, and predictable surveillance processes' for the *EA members threatened with or experiencing serious difficulties* regarding their financial stability. European Commission (2014) COM(2014)905final, at 9. It details the procedural requirements for enhanced surveillance applicable to those countries that have requested financial assistance and are subject to a macro-economic adjustment programme (or post-programme surveillance). Note that, currently, only Greece is undergoing its third Macroeconomic Assistance Programme, backed by the ESM. See J. Angerer and M. Hradský, BRIEFING Macro-Financial Assistance to EU Member States: State of Play – February 2016 (European Parliament, IPOL/EGOV, PE 497.721, 8 February 2016) available at [www.europarl.europa.eu/.../IPOL-ECON\\_NT\(2014\)497721\\_EN.pdf](http://www.europarl.europa.eu/.../IPOL-ECON_NT(2014)497721_EN.pdf) (accessed 8 March 2016). The latest financial assistance package for Greece has been authorised in spring 2017. This legislation, in fact, creates a direct link between the ESM Treaty and the EU *acquis*. See Article 1 and 2 (3) of Regulation 472/2013.

<sup>530</sup> The concerned Member State will be bound to regular reporting every six or three months, according to the stage of the procedure/the severity of imbalances.

<sup>531</sup> Hodson and Maher (2002).

### 5.3.2. The enhancement of EU economic policy coordination

It has become clear that the EU's legislative packages have added some important mechanisms to strengthen economic governance. Another key contribution from EU crisis management has been – as already indicated earlier – the comprehensive alignment of (economic) governance processes through the establishment of the European Semester.<sup>532</sup> The Semester now stands for an intricate process of meta-coordination that convenes multiple coordination instruments and surveillance processes. By providing a concise annual time schedule, it structures and steers both European and national policy-making on socio-economic issues according to commonly agreed objectives. It provides a common anchor for deploying the instruments of the SGP to ensure the observance of the European fiscal objectives and implementing the IGs and thereby the broader strategic 2020-objectives.

Below, we will explain in more detail the functioning of the European Semester. Throughout the past years, the timetable and various elements of the European Semester have been amended several times for further streamlining. Its evolution is thus a tale of considerable complexity. We, however, require merely a basic understanding of how the Semester-cycle generally works.<sup>533</sup> For our purposes, it is indeed sufficient to acquire a general idea of how it channels the interplay between the main coordination instruments that the EU uses for evaluation and guidance. Therefore, at the risk of over-simplification, the following overview will not be sensitive to the finer intricacies of the Semester's development.<sup>534</sup> After that, we will zoom in further on some of the most important coordination instruments as well as the new procedure regarding macro-economic imbalances.

#### A) The Semester-cycle in action

Each November the European Commission publishes the Annual Growth Survey (AGS) alongside its Autumn Economic Forecast. Three seasonal forecasts on the European economy's general developments and growth projections in the light of current events and latest data accompany the Semester-cycle. On that basis, the AGS determines the direction for European socio-economic policy-making for the coming twelve months and formally launches the Semester-process.<sup>535</sup> It surveys comprehensively the conditions for growth in Europe, based on a “package-approach”.

This means, attached to the AGS are two more specialised reports. One is a draft Joint Employment Report (JER) which provides a comprehensive overview of the

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<sup>532</sup> See Section 5.1.1.

<sup>533</sup> The summary under A) is based on the Semester-cycle of 2016. The analysis in Chapter 7 will deal with the AGS from 2011 until 2016.

<sup>534</sup> These have been skilfully discussed elsewhere: Bekker (2013, 2015); Bekker and Klosse (2013, 2014); Zeitlin and Vanhercke (2015).

<sup>535</sup> In the first AGS in 2011, for example, the Commission set off on an “integrated approach to recovery” concentrating on key measures in the context of Europe 2020 and encompassing three main areas: (a) the need for rigorous fiscal consolidation for enhancing macro-economic stability; (b) structural reforms for higher employment; and (c) growth enhancing measures. See AGS (2011).

employment situation in the EU. It serves to monitor and coordinate the Member States' implementation of the Employment Guidelines. The other attachment is the Alert Mechanism Report (AMR), an initial screening-device by which the Commission now scans broader macro-economic developments across Europe to detect potential imbalances (see the next section). The AGS-package is submitted to the Council for deliberation and endorsement in January.

As recently amended, together with the Winter Economic Forecast, the European Commission then produces individual Country Reports (CRs) in February. It assesses the respective situation and potential need for socio-economic reforms in each Member State. These reports will feed into the Commission's bilateral dialogues with the Member States with a view to providing more tailored policy guidance. They are then presented to the EPSCO Council in March, when the latter also adopts conclusions on the AGS and the final version of the JER.<sup>536</sup> The European Council endorses the final AGS-package at the Spring Summit by adopting the annual growth priorities.

Subsequently, the Member States must present their NRPs (implementation Europe 2020) and SPs/CPs (implementation SGP) to the Commission for evaluation (March-May).<sup>537</sup> Based on the ensuing bilateral negotiations, the Commission will then present draft recommendations for each Member State (May-June) – together with the Spring Economic Forecast. These Country-Specific Recommendations (CSRs) will be discussed and approved by the Council and endorsed by the European Council before the summer recess (June-July).

After that, the focus shifts to the national implementation. National governments ought to incorporate the CSRs into their reform plans. Through the national reports due in spring, the Member States are expected to feed the results of their implementation back to the European Commission for re-assessment. For the EA Member States, the Commission already starts assessing the draft budget plans each autumn (September-October).

A month later, the Commission will present the follow-up AGS-package. It thus recommences the governance cycle for the following year with its overall assessment of the EU's economic situation in November.<sup>538</sup> The Autumn Economic Forecast now also includes the specific Economic Policy Recommendations for the EA and the Commission's opinion on the EA Member States' draft budgetary plans submitted under the Two-Pack.

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<sup>536</sup> In the same month, the EU institutions also consult with the European social partners at the Tripartite Social Summit (TSS). However, the latter is formally part of the Macro-Economic Dialogue which so far has not been officially integrated into the European Semester. See Section 5.2.2.

<sup>537</sup> 'The reporting of Europe 2020 and the Stability and Growth Pact evaluation will be done simultaneously, while keeping the instruments separate and maintaining the integrity of the Pact.' European Commission, COM (2010) 2020, at 6.

<sup>538</sup> For a useful (yet, somewhat outdated, because no longer updated) depiction of the different institutional roles – see European Commission, Making it happen: the European Semester (2016), available at: [http://ec.europa.eu/europe2020/making-it-happen/index\\_en.htm](http://ec.europa.eu/europe2020/making-it-happen/index_en.htm). An updated version is available on: [https://ec.europa.eu/info/european-semester/european-semester-timeline\\_en](https://ec.europa.eu/info/european-semester/european-semester-timeline_en) (last accessed 2 July 2017).

This basic overview describes how the concise schedule and repetitive nature of the Semester-cycle highlight the mutual relevance of the respective instruments and ensure their continuous interaction. The extent of that interaction will be further elaborated in Section 5.3.3. below. It has notably resulted in a much-enhanced synchronisation of the cycles of preventive and corrective economic policy coordination.<sup>539</sup>

#### B) Policing macro-economic imbalances

Moreover, it is important to emphasise that the EU's surveillance of national policies under the reinforced European economic governance of the Six-Pack has now gained a truly *holistic* character.<sup>540</sup> Next to the coordination of Member States' economic policies and strengthened fiscal surveillance, EU-level supervision has been expanded to cover the prevention and correction of macro-economic imbalances.

The AMR, which comes attached to the AGS every autumn, provides for the initial screening in the so-called Macro-Economic Imbalance Procedure (MIP).<sup>541</sup> Countries for which the AMR has identified potential 'imbalance issues of common interest' will be subjected to an individual In-Depth Review (IDR).<sup>542</sup> The IDRs will then feed into the preparation of tailored policy recommendations.

The MIP resembles the procedures under the SGP, since the procedure is also set up in a bipolar fashion. If – during the preventive monitoring of a country – a potentially harmful imbalance has been identified, the Member State concerned will be grouped under the corrective arm of the MIP. It will become subject to enhanced surveillance and demands for urgent policy action which should be outlined in so-called “corrective action plans”. Should the excessive imbalance(s) persist and pose a threat to macro-financial stability, the respondent State will be subjected to specific monitoring under the new Excessive Imbalance Procedure (EIP) and may eventually face sanctions.<sup>543</sup>

To be more precise, through the MIP, the Commission is checking whether national policy choices lead to excessive macro-economic imbalances, beyond budget deficits and public debts. The aim is to prevent the accumulation of “macro-financial risks” or, if imbalances already start to materialise, to ensure their correction. The MIP focuses on issues (such as trade deficits or surpluses, housing bubbles associated with rising household

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<sup>539</sup> The impact of this synchronisation will be discussed in more detail in Section 5.4.2.B.

<sup>540</sup> It has been adopted in the framework for multilateral surveillance set out in Article 121 TFEU, notably based on paragraph 6, and in an effort to supplement the procedure envisaged in paragraphs 3 and 4. See point 1 and recital 9, preamble of Regulation (EU) No 1176/2011.

<sup>541</sup> The Six-Pack had provided the legal basis and procedural requirements for the MIP (see *supra* note 19), the AMR was launched in February 2012 and then integrated into the European Semester-cycle. European Commission, Report on the Alert Mechanism Report 2013 (COM(2012) 751 final, Brussels, 28 November 2012).

<sup>542</sup> See European Commission (2014) Communication on the Economic governance review – Report on the application of Regulations (EU) No 1173/2011, 1174/2011, 1175/2011, 1176/2011, 1177/2011, 472/2013 and 473/2013 (COM(2014) 905final, Brussels, 28 November 2014) at 7.

<sup>543</sup> Just as the procedure to combat excessive government deficits and debts (EDP) under the reinforced SGP has been enhanced by RQMV, so has the EIP been equipped with the same semi-automatic voting mechanism. See Regulation (EU) No 1174/2011.

debt etc.) that have been associated with the financial and the Euro crises but that are not covered by the SGP. To that end, the Commission conducts a holistic evaluation for each Member State based on a scoreboard of (now) 14 main indicators and a range of auxiliary variables.<sup>544</sup> The Commission's weighing of the different factors is guided by the following cumulative criteria:

1. *Developing the concept of sustainability to prevent abrupt and damaging market corrections* (caused by the occurrence of either structural weaknesses, such as losses in competitiveness or the development of bubbles in credit or asset prices, or weaknesses in the financial sector that endanger the financial stability and may transmit to the whole economy);
2. *Identifying gravely distorted allocations of resources that may incur high social and economic costs* (like the excessive expansion of a particular sector, e.g. the construction sector or the public sector, or imbalances illustrated by persistently large account surpluses); and
3. *Detecting the formation of damaging spill-overs to partners* by assessing macro-economic risks in view of the specific situation, dynamics, and policies being implemented (based on the recognition that spill-overs may represent aggravating factors of other imbalances, such as large current account surpluses or deficits).<sup>545</sup>

Based on these criteria, the Commission is weighing 'both the likelihood of unfavourable developments and their impact on growth, jobs, and financial stability on each country and the EU and the euro area as a whole'.<sup>546</sup> The MIP thus adds an extra layer of surveillance. It notably expands the scope of the EU's annual monitoring, to reviewing the Member States' economic policy choices in a very broad sense.<sup>547</sup> The express purpose of AMR screening is fostering an "economic reading" of the scoreboard of macro-financial indicators.<sup>548</sup>

### 5.3.3. Institutionalising meta-coordination to reinforce European economic governance

The preceding descriptions show that, all in all, the European Semester provides a timetable for the structured interaction between evaluation instruments on the one, and guidance instruments on the other hand. It presents an iterative governance cycle that pools the coordination processes for the 2020-objectives, the SGP, the MIP and for the

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<sup>544</sup> The original eleven headline indicators measure developments regarding external imbalances, competitiveness, and internal imbalances. In 2015, three new labour market indicators (activity rate, long term unemployment rate, youth unemployment rate) have been added. Next to these, there are 28 additional indicators to facilitate the economic reading of the MIP scoreboard. These developments will be briefly revisited in Chapter 7.

<sup>545</sup> See European Commission 2013 (COM(2014) 905) Annex 2, at 22.

<sup>546</sup> See *ibid.*

<sup>547</sup> The Commission highlights that the 'implementation of the MIP is *embedded* in the "European Semester" of economic policy coordination so as to ensure *consistency* with the analyses and recommendations made under other economic surveillance tools' [emphasis added, NB]. European Commission, Alert Mechanism Report 2016 (COM(2015) 691 final, Brussels, 26 November 2015) at 2.

<sup>548</sup> Bekker and Klosse (2014).

enhanced budget surveillance in the EA. We can draw two conclusions from this. The integrated nature of the Semester-cycle does not only ascertain the interaction but, notably, also the mutual reinforcement between the different coordination instruments.

Section 5.3.2. has shown that the integrated nature of the Semester-cycle ensures the *interaction* between different instruments. While we have already underlined the cyclical nature of this interplay within the meta-coordination process,<sup>549</sup> Figure 5.2. (below) illustrates how the different legal instruments jointly feed into the tailored policy recommendations given out every year by the EU to the individual Member States.

The resulting CSRs consequently reveal an amalgamated nature because they pool concrete policy guidance obtained from various instruments (i.e. the IGs, SGP/EDP, MIP/EIP, Two-Pack) with diverse legal effects.<sup>550</sup> Accordingly, it becomes rather difficult to link a particular recommendation back to a specific instrument. Bekker (2014) denotes this difficulty as “coordination ambiguity” which she considers problematic for two main reasons. It may give rise to uncertainty as to which coordination mechanism prevails in the case of conflicting goals and policy advices.<sup>551</sup> It also may lead to tensions between competences of EU-level versus national-level public administrations.<sup>552</sup>

In contrast, the arguments presented above provide the basis for an alternative, more differentiated view. We maintain that the various instruments have been combined in the Semester-cycle *with the intention* of effectuating “integrated coordination”.<sup>553</sup> The question of whether any one of these instruments has a binding effect or not thus loses its relevance because they have been designed (or, amended) to depend on and reinforce each other mutually.<sup>554</sup> Hence, the inter-connection and overlap between the different coordination processes is not only taken for granted but in fact intended.<sup>555</sup>

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<sup>549</sup> See Section 5.2.1. above, notably Figure 5.1.

<sup>550</sup> Bekker and Klosse (2014) at 10.

<sup>551</sup> Bekker (2014) at 297; see also Zeitlin (2010).

<sup>552</sup> Bekker (2014) at 301.

<sup>553</sup> The Europe 2020 Strategy stresses the necessity of taking an “integrated approach” to policy design and implementation: “The strategy should be organised around a thematic approach and a more focused country surveillance. This builds on the strength of already existing coordination instruments. [...] To achieve this, the Europe 2020 and Stability and Growth Pact (SGP) reporting and evaluation will be done simultaneously to *bring the means and the aims together*, while keeping the instruments and procedures separate and maintaining the integrity of the SGP. This means proposing at the same time the annual stability or convergence programmes and streamlined reform programmes which each Member State will draw up to set out measures to report on progress towards their targets, as well as key structural reforms to address their bottlenecks to growth.” {emphasis added, NB} European Commission, COM(2020)2010, at 27.

<sup>554</sup> Compare the discussion on the notion of hybridity, following Armstrong (2013), in Chapter 3.

<sup>555</sup> Recital 4 of the Preamble of Regulation (EU) No. 1173/2011 reads: “The improved economic governance framework *should rely on several interlinked and coherent policies* for sustainable growth and jobs, in particular a Union strategy for growth and jobs, with particular focus on developing and strengthening the internal market, fostering international trade and competitiveness, a European Semester for *strengthened coordination* of economic and budgetary policies, an *effective framework* for preventing and correcting excessive government deficits (the Stability and Growth Pact (SGP)), a *robust framework* for preventing and correcting macroeconomic imbalances, minimum requirements for national budgetary frameworks, and enhanced financial market regulation and supervision,

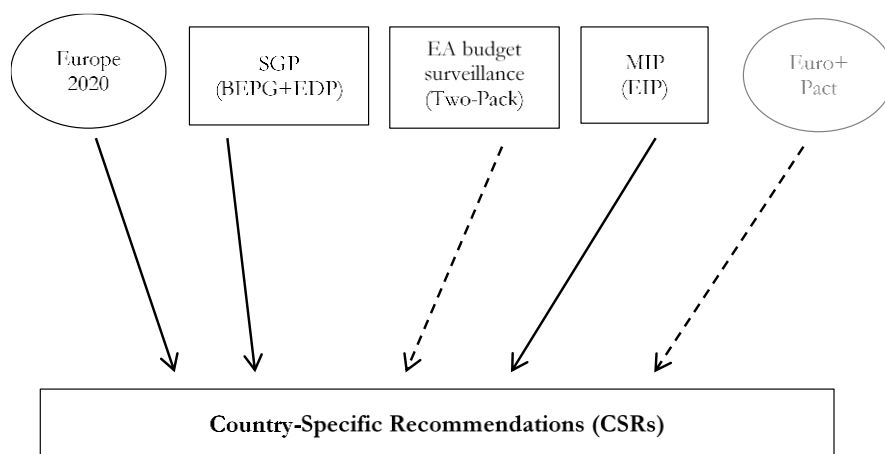


Figure 5.2.: Legal instruments used as basis for the CSRs<sup>556</sup>

Next to that, Section 5.3.1. has indicated that the Semester-cycle's integrated nature furthermore ascertains the *mutual reinforcement* between different instruments – notably, in the EA.<sup>557</sup> This is because the EU crisis management has bolstered the meta-coordination process by at least two important features.

First, newly harmonised framework conditions for national budgets in the EA must ensure that EU coordination helps warranting fiscal sustainability and financial

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including macroprudential supervision by the European Systemic Risk Board.' The same paragraph has also been included in the other Six-Pack Regulations (see Recital 1 of Preamble Regulation 1174/2011; Recital 9 of Preamble Regulation 1175/2011; Recital 4 of Preamble Regulation 1176/2011; Recital 6 of Preamble Regulation 1177/2011). Additionally, Recital 9 of the Preamble of Regulation (EU) No. 473/2013 states: 'Gradually strengthened surveillance and coordination, as set out in this Regulation, will *further complete the European Semester* for economic policy coordination, will *complement* the existing provisions of the SGP and *strengthen* the surveillance of budgetary and economic policies in Member States whose currency is the euro. A gradually enhanced monitoring procedure should *contribute to* better budgetary and economic outcomes, macro-financial soundness and economic convergence, to the benefit of all Member States whose currency is the euro. As part of a gradually strengthened process, closer monitoring is particularly valuable to Member States that are subject to an excessive deficit procedure.' [emphasis added, NB]

<sup>556</sup> Based on Bekker and Kloss (2014) at 10. The Commission Services explain: 'The Euro Plus Pact originated at the height of the crisis as one of the measures to stabilise the euro area. Driven by French and German concerns that at least part of the financial and economic fallout was due to underlying factors that had hitherto not featured prominently in the crisis response – such as Unit Labour Costs and employment rates – the Euro Plus Pact was conceived as an inter-governmental solution to increase fiscal and economic discipline in the Member States. After integration in the euro area governance framework – and guided by the largely ineffective Open Method of Coordination – it has since lost traction with Member States and suffers from a lack of political ownership.' See European Political Strategy Centre (EPSC), The Euro Plus Pact - How Integration into the EU Framework Can Give New Momentum for Structural Reforms in the Euro Area (European Commission, EPSC, Strategic Notes No. 3, 8 May 2015) available at [https://ec.europa.eu/epsc/publications/strategic-notes/euro-plus-pact\\_en](https://ec.europa.eu/epsc/publications/strategic-notes/euro-plus-pact_en) (last visited 2 July 2017)

<sup>557</sup> Cf Armstrong (2013a).



stability. The Commission’s annual review of the Member States’ draft budgets reinforces the continuous multi-lateral monitoring at European level to make sure that national public finances in the EA are kept in check. Second, the Commission and the Council now have at their disposal strengthened semi-automatic sanctioning mechanisms (EDP, EIP) that enhance the authoritative character of EU economic policy coordination.<sup>558</sup> As soon as national policy performance is judged to occur in excess of the expanded Sound Budgets-criteria, Member States are subjected to enhanced European surveillance. The same fate will befall those countries whose economic performances reveal grave imbalances that may pose a threat to macro-financial stability. These procedures further tighten the reins on governments’ leeway in using expansive fiscal policies in their budget planning.

Scope	Function	
	<i>Evaluation</i>	<i>Guidance</i>
<i>Common</i>	AGS-package	IGs
<i>Individual</i>	CRs	CSRs

**Table 5.1: Categorisation of the Semester’s main coordination instruments**

Table 5.1. above highlights the main instruments of the meta-coordination process that bundles the various coordination activities of the EU regarding socio-economic governance. In practice, it is the very essence of the meta-coordination process that the functions of evaluation and guidance are combined in the deployment of the various instruments. But for analytical purposes it is still useful to distinguish between evaluation and guidance instruments. Indeed, on that basis it is opportune now to explore further how the EU uses these instruments to advance its policy aspirations. Since implementation and national ownership have been particularly sore spots in the Union’s strategic governance framework in the past, we would like to establish how the EU actually exerts influence at the national level through its coordination instruments enhanced by the Semester.

#### 5.4. MODAL CHOICES: THE INTEGRATED NATURE OF META-COORDINATION

In the following, we will briefly describe the development of benchmarking as an increasingly favoured technique in EU socio-economic governance. This should help to illuminate further how the EU policy guidance delivered through the coordination cycle of the European Semester carries definitely *authoritative force*. Next to that, we will also – to complete the picture – elucidate what types of influence the EU exerts through its coordination activities. Therefore, we will discuss the so-called “framing effect” and how it has been enhanced by the European Semester.

<sup>558</sup> This is complemented by automatic correction mechanisms to enforce the Balanced Budget-rule (i.e. a so-called “*Schuldenbremse*” (debt break)) that must be implemented at national (constitutional) level, based on the TSCG. See Chapter 4.2.2.B.

### 5.4.1. Benchmarking – the heart of integrated coordination

The idea of “benchmarking” originated in the private sector, notably the area of corporate governance.<sup>559</sup> It describes the conduct of competitive performance comparisons at management level to advance the implementation of over-arching goals and the achievement of performance targets. Below we will consider the development of benchmarking as a European regulatory technique, briefly review how it functions today, and discuss the added value of this mode of governance.

#### A) A new regulatory technique for the EU

The Irish Presidency in 1996 took the initiative to adapt the idea of benchmarking as a new regulatory technique for the EU.<sup>560</sup> Initially, it served primarily to shape the framework conditions for improved European competitiveness. Through performance comparisons the EU sought to stimulate competition among the Member States, based on best practice, to drive up the economic performance of European industry.<sup>561</sup>

As the establishment of the EMU progressed according to plan, European leaders soon recognised that benchmarking could also advance the development of a European coordinated strategy for employment policy. Conducting competitive performance comparisons of Member States’ labour market performances, based on commonly defined objectives, was considered beneficial for the EU-wide convergence process that was required for monetary union.<sup>562</sup> Benchmarking would facilitate the monitoring and evaluating of the effects related to national employment policies.

From 2000, then, the Lisbon Agenda further institutionalised this new practice of cross-country comparisons. It thus confirmed the EU’s strategy of diversifying the regulatory instruments to enhance its influence over national policy-making.<sup>563</sup> The appeal of benchmarking as a new governance technique for the EU institutions lay particularly in the fact that it relied on competition – instead of hierarchy – as its central mode of control. Therefore, it provided an increasingly attractive alternative to harmonisation.<sup>564</sup>

#### B) Comparing Member States’ performances under Europe 2020

Today, benchmarking is integral to the Commission’s coordination activities in the area of socio-economic governance. It is based on the principle that all targets and strategic objectives, as elaborated through the 2020-Guidelines, should be monitored by relevant indicators.<sup>565</sup> The basic technique of benchmarking works as follows:

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<sup>559</sup> Cf. Ashiagbor (2005).

<sup>560</sup> See Wobbe 2001. The four elements of benchmarking (at the level of action) comprise: (a) Political commitment; (b) analytical preparation; (c) improvement and learning mechanisms; and (d) monitoring.

<sup>561</sup> See Competitiveness Council proceedings (1996).

<sup>562</sup> Cf. Ashiagbor (2005) at 201-202.

<sup>563</sup> See Chapter 4.3.2.

<sup>564</sup> European Council, Presidency Conclusions of 13 and 14 December 1996 (Dublin, 1996).

<sup>565</sup> Cf. Ashiagbor (2005) at 204.

‘Benchmarking goes beyond competitive analysis by providing an understanding of the processes that create superior performance. It first identifies the key areas that need to be benchmarked and the appropriate criteria on which to evaluate that area. It then sets out to identify best practices world-wide and to measure how those results have been achieved.’<sup>566</sup>

Within the framework of Europe 2020, the Commission has identified a full range of strategic policy *themes*. Figure 5.3. below depicts these themes against the inter-connected backdrop of the EU’s three strategic growth priorities. Each theme is backed up by a set of quantitative indicators based on which data are collected from the Member States and computed to compare relative country performance.<sup>567</sup>

The measurement and cross-country comparison of Member States’ performances on these indicators serve particularly two functions. Firstly, they are to enhance the understanding of socio-economic developments in the EU. And, secondly, they enable inferences about the countries’ progress towards the common strategic objectives.<sup>568</sup> Based on these comparative data, the Member States will be ranked according to their performance. Notably, the three best and the three worst performing Member States are being benchmarked. On that basis, then, best practices are identified and promoted as examples among the lesser performing countries. They provide crucial input for the Commission’s individualised policy recommendations.

Thus, benchmarking presents a *central source of information input* for the meta-coordination process of the European Semester. But the technique’s added value to the EU governance process actually extends much further.

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<sup>566</sup> European Commission, Communication on Benchmarking the Competitiveness of European Industry (COM(1996)463 final, Brussels, 1996).

<sup>567</sup> The Commission uses thematic fiches to explain the relevance and design of its choice of indicators as well as possible limitations in the computation of certain indicators. See [http://ec.europa.eu/europe2020/making-it-happen/key-areas/index\\_en.htm](http://ec.europa.eu/europe2020/making-it-happen/key-areas/index_en.htm) (last accessed 7 December 2016). For instance, for the area of “national fiscal frameworks” country performance is measured along two dimensions, namely the “design of fiscal rules” and “medium-term budgetary frameworks” respectively. Or, in the area of “public finances and growth-friendly expenditure” the “relative size of expenditures that should positively affect economic growth” is being assessed, based on the breakdown of expenditure data by category (e.g. public investment) and by function (e.g. spending on education and on research and development (R&D)). At the same time, the Commission cautions for important caveats regarding the measurement of growth-friendly expenditure, noting that ‘the level of public expenditure on any specific item does not explain how efficiently those resources are used’ making it ‘an imperfect indicator of its actual contribution to economic growth’. It also recognises that the selection of spending categories and functions must be non-exhaustive because ‘any attempt to single out growth-friendly spending items based on theoretical considerations is, to some extent, arbitrary and potentially controversial, as all spending items may in theory contribute to enhancing growth potential’. See also European Commission, *The Quality of Public Expenditure in the EU* (European Economy, Occasional Papers 125, December 2012) [http://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2012/pdf/ocp125\\_en.pdf](http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp125_en.pdf).

<sup>568</sup> Bekker (2016).

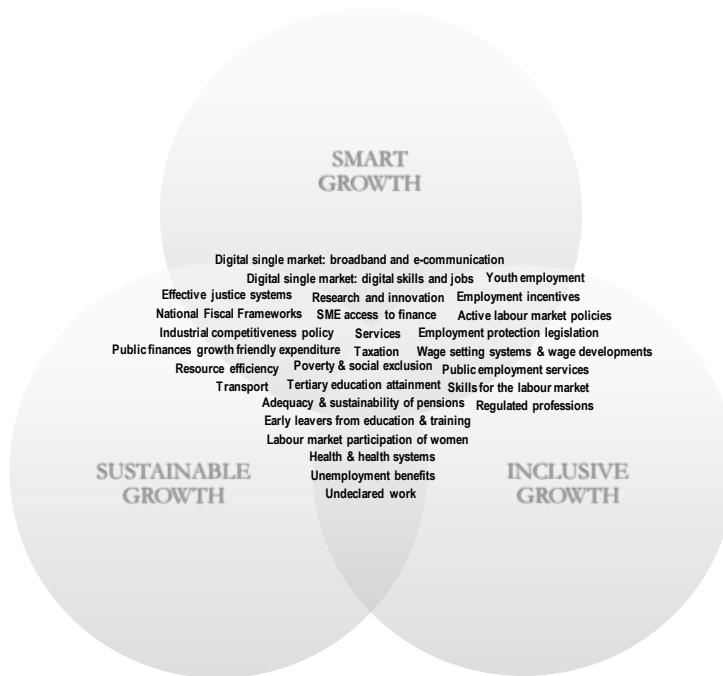


Figure 5.3.: Europe 2020 key areas for comparing Member States' performances<sup>569</sup>

### C) Implementing best practice as rational choice in a competitive environment

The steep career of benchmarking as a regulatory technique in EU governance may be attributed to the fact that it is instrumental in *bridging* the EU's infamous "implementation gap".<sup>570</sup> In this respect, it has been maintained that:

‘the most important and original element in benchmarking best practice is to prepare the ground for implementation. Even more at European than at national level “indirect implementation” is of the highest importance. This means preparing implementation by raising awareness of competitive gaps, the feasibility of better and best practice and the impact of not applying best practice.’<sup>571</sup>

The EU's benchmarking practice thus provides essential groundwork – notably, the analytical preparatory work and the exchange of information regarding the most preferred ways of implementation – for policy evaluation, adaptation and formulation. Thereby, it

<sup>569</sup> Based on [http://ec.europa.eu/europe2020/making-it-happen/key-areas/index\\_en.htm#](http://ec.europa.eu/europe2020/making-it-happen/key-areas/index_en.htm#) (status 18 May 2016)

<sup>570</sup> See Dawson 2013; see also Chapter 3. ‘At European and often at national level the political power to implement changes immediately in the direction of best policy practice is lacking.’ Wobbe (2001).

<sup>571</sup> Wobbe (2001).

puts in place crucial procedural requirements that prompt the *mobilisation* of concerned policy actors.<sup>572</sup>

Accordingly, we can see how benchmarking has become indispensable to European policy coordination as a modality of control. In fact, the mobilisation of actors is presumed to result from rational decision-making:

‘Benchmarking is not a short-term instrument for cutting costs. If innovation and economic development are to be encouraged, it is necessary to overcome entrenched approaches so as to find *rational* solutions in the search for best practices.’ [emphasis added, NB]<sup>573</sup>

Here, it becomes visible that the origins of the idea of coordination lie in economic theory. Studies in the field of game theory address the so-called “problem of coordination”.<sup>574</sup> Particularly in situations of inter-dependence, this problem can be overcome by choosing a strategy of best practice which then qualifies as rational behaviour because it is based on individual preferences defined in one’s own best interest.<sup>575</sup> Additionally, the prospect of “naming and shaming” (such as through peer review, another feature of EU policy coordination) is considered to provide an additional deterrent from acting unreasonably and align individual preferences accordingly.<sup>576</sup> In other words, promoting policy solutions that have been designed based on benchmarking works because the implementation of best practice is considered a rational choice.

In short, within the EU’s evolving strategic framework, benchmarking has developed into a key technique to monitor and promote the implementation of broad and multi-faceted policy objectives. It truly lies at the heart of integrated coordination. Continuous competitive performance comparisons broadly sustain and drive the annual cycle of meta-coordination. They supply both the *data* for evaluating to what extent the EU’s policy aspirations are being implemented effectively and thus also the *incentives* (i.e.

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<sup>572</sup> ‘At European level, benchmarking framework conditions for industrial competitiveness mainly means sharing information and communication among the levels that have to move towards best practice. The aim of all the activities is to reach agreement on salient issues, to organise the analytical preparatory work, to exchange information, to display best practice and to foster competition among the actors in the implementation phase. The EU has therefore to convince Community actors to apply best practice. [...] Partnership and consensus of all the concerned actors builds the capacity to adapt to circumstances and to utilise the full potential of those involved.’ [emphasis added, NB] Wobbe (2001).

<sup>573</sup> Wobbe (2001).

<sup>574</sup> This stands in contrast to the problem of cooperation, which provides the basis for the famous prisoner’s dilemma – i.e. a zero-sum game. On that view, instances of coordination might rather be characterised as “win-win” situations. Gauthier (1975, at 201) provided an early authoritative definition of the “Principle of Coordination”: ‘in a situation with one and only one outcome which is both optimal and a best equilibrium, if each person takes every person to be rational and to share a common conception of the situation, it is rational for each person to perform that action which has the best equilibrium as one of the possible outcomes’. Cited in Janssen (2001) at 222.

<sup>575</sup> This is because choosing an unreasonable (i.e. non-optimal) strategy would lead to lower pay-offs for the involved players. Janssen (2001) at 226.

<sup>576</sup> Janssen (2001) at 227.

rankings and best practices) for advancing national policy implementation. This information then feeds into the various coordination channels (i.e. common guidance through annual growth priorities and individual guidance through the CSRs).

Benchmarking, accordingly, warrants that the coordination of the national policy performances is both *reflective* and *normative*. The policy guidance which the EU delivers through the European Semester thus vitally depends on recording and evaluating to what extent Member States progress towards the common objectives. Based on that, the EU institutions adjust and reproduce their recommendations to stimulate further reform progress at national level. Below we will elucidate further how exactly the EU's coordination activities exert normative effects onto the national level.

#### **5.4.2. Exploring how EU meta-coordination exerts influence at national level**

Ultimately, we aim to understand in what ways – next to the traditional legal means – EU governance influences labour law. Above, we have argued that the Union's influence has been growing by channelling the implementation of its strategic objectives through the meta-coordination cycle of the European Semester. Hence, we must still better understand *how* exactly the EU influences the national level through its coordination instruments.

##### A) The “framing effect” of EU policy coordination

Over the past two decades, the Union's influence on those policy areas where it has limited competences has been increasing through the sustained strategic deployment of coordination instruments. The European coordination of economic policies (through the BEPG) and employment policies (through the EES) provide two cases in point.<sup>577</sup> These policy fields are typified by significant sensitivities that result –amongst others – from diverging national interests which are based in the historic variety of welfare state models in Europe.<sup>578</sup> Those sensitivities compel the supra-national institutions to voice their policy aspirations in rather vague and flexible terms – as the Member States largely retain their autonomy with regard to implementation. Nonetheless, EU policy coordination still influences the national implementation through more than just the benchmarking of socio-economic performances.

##### *The EU's ideational influence on the national level*

Insights from political science help to understand better how the EU's aspirations are relayed to the domestic realm through policy coordination.<sup>579</sup> The impact of EU policy guidance delivered through the coordination instruments (such as guidelines and recommendations) on national policymaking is rather *indirect* in nature. It occurs more subtly than the formal impact of EU legislation – not through direct transposition but

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<sup>577</sup> Cf. Hodson and Maher (2002), Trubek and Mosher (2003).

<sup>578</sup> E.g. Esping-Andersen (1990), Hall and Soskice (2000).

<sup>579</sup> This branch of literature on Europeanization deals with Member States' adaptation in response to European influences. Cf. Olsen (2002).

rather less tangibly by shaping domestic beliefs and expectations.<sup>580</sup> It is thus at *ideational level* where EU coordination instruments have long been known to exert most influence on national policy-making.<sup>581</sup>

In that respect, the idea of “policy framing” has proven useful to explain Europeanisation effects in terms of national adaptation. López-Santana (2006) explains the so-called “framing effect” at the example of the EES, as follows:

‘By framing a set of common guidelines, Europe is establishing the idea that X (e.g. low levels of spending on active labour market policies) is a common problem and, therefore, policy-makers should perceive, identify, and/or define X as such. As a consequence, conditions defined by the EU as problems have an advantage over other conditions because the supra-national level legitimizes and frames them as matters of individual concern.’<sup>582</sup>

Using coordination tools such as guidelines, targets, benchmarking, and recommendations, the ‘EES imparts frames to analyse and (re)formulate domestic problems and policies’.<sup>583</sup> This means, through policy coordination the EU exerts influence in the form of an ‘indirect coercive transfer of policies from the supra-national to the domestic level’.<sup>584</sup> Such normative effects – albeit indirect – are then sustained and enforced through the interactive and iterative nature of the EU’s coordination instruments.<sup>585</sup>

In that regard, López-Santana’s findings thus highlight how EU coordination shapes the *policy space* in which policy-makers define and select their potential courses of actions.<sup>586</sup> Thereby, it can have simultaneously an *expansive* and a *restrictive* impact.<sup>587</sup> She

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<sup>580</sup> ‘The emergence of such policies based on Europeanization by framing domestic beliefs and expectations is particularly likely when the EU decision-making context, above all the underlying conflicts of interests between the Member States, only allows it to adopt policies which are vague and more or less symbolic.’ Knill and Lehmkuhl (2002) at 259.

<sup>581</sup> Smismans underlines: ‘However, while the precise impact of the “soft” OMC procedure remains unclear, the first years of experience show at least its important potential in the diffusion of a cognitive framework defining in which terms and with which priorities debates on certain policies, such as employment, should take place in the Member States.’ Smismans (2005) at 220.

<sup>582</sup> López-Santana (2006) at 487.

<sup>583</sup> López-Santana (2006) at 491.

<sup>584</sup> In reference to Dolowitz and Marsh (1996), see López-Santana (2006) at 494.

<sup>585</sup> Ibid.

<sup>586</sup> Her explanation is worth quoting at length: ‘The “framing effect” persuades domestic policy-makers to reflect on soft European prescriptions and then construct their proposals within the limits of these frameworks. Subsequently, they develop their potential courses of action within the range of the options promoted by the EES and tend not to move outside the policies recommended by the EU. Given the broad nature of this regulative instrument, *member states manoeuvre within the multiple policy configurations promoted by the supranational level*; for instance, activation can be implemented in many ways.’ [emphasis added, NB] López-Santana (2006) at 494.

<sup>587</sup> The impact of EU policy framing is multifaceted: (a) defining (and reinforcing) what problems domestic policy-makers should attack to increase member state competitiveness, and to deal with internal and external challenges; (b) pointing out and/or reinforcing the idea that a policy line is good or bad and necessary; (c) restricting and limiting the policy options and courses of action that domestic policy-makers should develop; and (d) providing potential courses of action that allow

finds that ‘the EES expands the courses of action available to policy-makers by providing information and opening new spaces for cooperation, while simultaneously restraining their options by framing good and bad policy’.<sup>588</sup>

#### *Understanding the EU policy framing process*

Having recognised the primarily ideational influence of EU policy coordination, we still would like to know how exactly the respective coordination instruments impart policy frames and thereby transmit European policy aspirations to the national level. Therefore, we need to refine further our understanding of the framing process.

Radulova (2011) highlights that policy frames, in fact, fulfil a number of functions in processes of Europeanisation. An important pre-requisite for framing, thereby, is the existence of a certain normative belief system that includes a set of normative values and cognitive beliefs, based on which phenomena from the social reality can be evaluated and possibly identified as problems. On that basis, she defines a “policy frame” as ‘*a perspective toward social reality that identifies problems, suggests explanations and proposes certain public policy actions that could remedy (solve) these problems*’. [emphasis in the original]<sup>589</sup>

Hence, we can deduce that the process of framing is constituted by three main functions. Based on a given normative belief-system, EU policy framing comprises the functions of *problem identification*, *explanation* (i.e. the developing of connective narratives) and *policy guidance*.<sup>590</sup> Figure 5.4. below illustrates the process of EU policy framing in a cyclical way, since it is integrated into the iterative process of European policy coordination.

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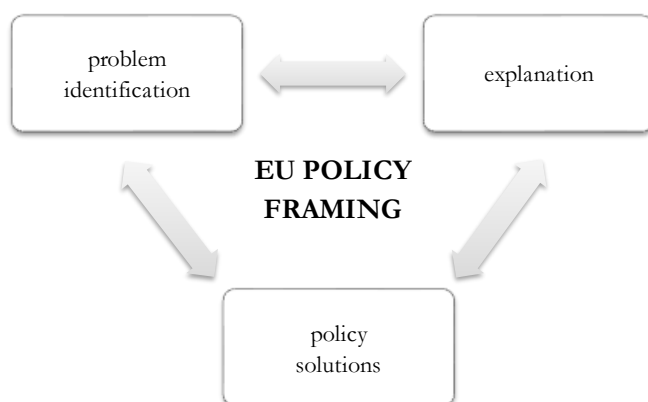
policy-makers to “draw lessons” and to “learn” about ways to solve or diminish the problem in question’. López-Santana (2006) at 482.

<sup>588</sup> López-Santana (2006) at 494.

<sup>589</sup> Radulova (2011) at 42.

<sup>590</sup> Ibid. at 43-44. Radulova explains further that the process of framing comprises the following four dimensions: (1) a *normative* one which corresponds to the set of normative values and beliefs to judge and attach value to social phenomena; (2) a *constitutive* one whereby such phenomena are identified and labelled as problems; (3) a *cognitive* one that presents social reality in terms of cause-effect relations and accordingly narrates what has led to the problem; and (4) a *policy* dimension that outlines a course of public actions that would remedy the problem.





**Figure 5.4.: The types of policy frames through which EU policy coordination influences the national level**

Finally, Armstrong (2010) points to the need of making another distinction when it comes to the process of policy framing by the EU. Because of the Union’s strategy of “integrated coordination”, the development of policy frames does not only take place within a particular policy field (“intra-framing”) but also outside of it, i.e. across policy areas (“inter-framing”).<sup>591</sup> Based on these methodological insights, we can now expand how the European Semester has enhanced the Union’s framing capacity.

#### B) Enhanced framing through the European Semester

We have explained above how the authoritative force of EU coordination has been increased by the establishment of the European Semester – notably, through the bipolar set-up of economic policy coordination. Having furthermore noted that EU coordination exerts influence primarily at the stage of national policy formulation, we will now consider how the development of EU meta-coordination has further enhanced the framing effect. Notably, it has strengthened the functions of problem identification and explanation.

The “Lisbon 2020”-architecture distinctly provides the requisite normative belief-system, as outlined in Chapter 4, based on which the different framing functions can be defined. Within that architecture, the European Semester coordinates the implementation of the strategic 2020-objectives – which are assembled under the “Growth and Jobs”-mantra.<sup>592</sup> It ensures that the multi-level interplay between the common evaluation and guidance activities is structured in a recurrent and mutually reinforcing way.

<sup>591</sup> Cf. Armstrong (2010).

<sup>592</sup> In Chapter 7, we will analyse the AGS in relation to the three framing functions.

*Problem identification through guidelines and benchmarking*

The framing effect in terms of problem identification becomes visible in those coordination instruments, which primarily serve the purpose of *common* guidance, i.e. the IGs, and evaluation, the AGS-package, for the EU/EA as a whole. We will consider below how each type of these instruments contributes to the framing of common problems at EU-level.

As indicated above, the IGs have been around for a considerable time. The Treaty provides the legal basis for both, the BEPGs and the EEGs.<sup>593</sup> The 2020-Strategy emphasises the need to enhance the “integrated coordination” of European socio-economic policies through comprehensive country reporting, tied to strategic objectives and concrete targets. While the CSRs deliver tailored advice yearly to each Member State, the IGs give collective guidance for the EU as a whole for the medium-term.<sup>594</sup> The Council renews the guidelines substantively only every three years, to keep the focus on implementation. In that way, they elaborate the EU’s common strategic goals into more concrete policy prescriptions and update them according to circumstances.

The new set of “2020-Guidelines”, adopted in 2010,<sup>595</sup> was considerably smaller than previous batches. This was to improve prioritisation, better reflect the decisions of the European Council and integrate agreed targets.<sup>596</sup> For the period 2011-2014, the BEPGs recommended the soundness and sustainability of public finances, promoting a balanced development and innovation, resource efficiency and modernising the industrial base. Next to that, the EEGs recommended increasing labour market participation, promoting a

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<sup>593</sup> See Articles 121 (3) and (4), and 148 TFEU respectively.

<sup>594</sup> The Europe 2020 Strategy underlines: ‘Integrated guidelines will be adopted at EU level to cover the scope of EU priorities and targets. Country-specific recommendations will be addressed to Member States. Policy warnings could be issued in case of inadequate response.’ European Commission, COM (2010) 2020, at 6.

<sup>595</sup> Council Recommendation 2010/410/EU of 13 July 2010 on broad guidelines for the economic policies of the Member States and of the Union; and Council Decision 2010/707/EU of 21 October 2010 on guidelines for the employment policies of the Member States.

<sup>596</sup> The number of IGs was reduced from previously 24 guidelines (15 BEPG and 9 EEG) to 10 “2020-Guidelines” (6 BEPG and 4 EEG). See European Commission, COM (2010)2020, at 28.

skilled workforce and well-performing education and training systems.<sup>597</sup> Additionally, they now included a separate target on poverty reduction and social inclusion.<sup>598</sup>

During the first half of 2015, following the review of the Europe 2020 strategic framework, the IGs also underwent revision.<sup>599</sup> The new, even shorter set of BEPG (now four instead of six), adopted in July 2015,<sup>600</sup> now added guidance on promoting investment in the EU.<sup>601</sup> The EEGs, adopted three months later,<sup>602</sup> also expanded the focus towards boosting the demand for labour.<sup>603</sup> Alongside these general guidelines, the Council has also been issuing annually more specific guidance on economic governance for the Euro

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<sup>597</sup> The IGs for the period 2010-2014 included: Ensuring the quality and the sustainability of public finances (Guideline 1); Addressing macroeconomic imbalances (Guideline 2); Reducing imbalances within the euro area (Guideline 3); Optimising support for R & D and innovation, strengthening the knowledge triangle and unleashing the potential of the digital economy (Guideline 4); Improving resource efficiency and reducing greenhouse gases (Guideline 5); Improving the business and consumer environment, and modernising and developing the industrial base in order to ensure the full functioning of the internal market (Guideline 6); Increasing labour market participation of women and men, reducing structural unemployment and promoting job quality (Guideline 7); Developing a skilled workforce responding to labour market needs and promoting lifelong learning (Guideline 8); Improving the quality and performance of education and training systems at all levels and increasing participation in tertiary or equivalent education (Guideline 9); and Promoting social inclusion and combating poverty (Guideline 10).

<sup>598</sup> Guideline 10 is the remainder of what is formally left of the former “Social OMC”, which had at first been largely dismantled and replaced by the European Platform for Poverty and Social Exclusion, one of the Europe 2020 flagship initiatives. These actions caused much commotion among civil society stakeholders and some Member States. Within the framework and support of the SPC, certain Member States subsequently committed to continued monitoring and evaluation of social developments in the EU. See Zeitlin (2010).

<sup>599</sup> European Commission, Factsheet - Setting the medium-term policy horizon: results from the Europe 2020 public consultation and publication of the integrated economic and employment guidelines (MEMO/15/4526, Brussels, 3 March 2015). See also European Commission, Communication on Results of the public consultation on the Europe 2020 strategy for smart, sustainable and inclusive growth (COM(2015) 100 final, Brussels, 2 March 2015). For more information, see [http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/index\\_en.htm](http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/index_en.htm) (accessed 15 March 2016).

<sup>600</sup> Council Recommendation (EU) 2015/1184 of 14 July 2015 on broad guidelines for the economic policies of the Member States and of the European Union; and Council Decision (EU) 2015/1848 of 5 October 2015 on guidelines for the employment policies of the Member States for 2015.

<sup>601</sup> For the period 2015-2018, the BEPGs include: Promoting investment (Guideline 1); Enhancing growth through Member States' implementation of structural reforms (Guideline 2); Removing key barriers to sustainable growth and jobs at Union level (Guideline 3); Improving the sustainability and growth-friendliness of public finances (Guideline 4).

<sup>602</sup> Following a detailed report and a range of amendments to the Commission's proposal advanced by the European Parliament, the Council adopted the Decision for the new set of Employment Guidelines on 5 October 2015. See European Parliament, Report on the proposal (COM(2015)98 – C8-0075/2015 – 2015/0051(NLE)) for a Council decision on guidelines for the employment policies of the Member States (A8-0205/2015, Committee on Employment and Social Affairs, Rapporteur: Laura Agea, 22 June 2015); and See Council Decision (EU) 2015/1848 of 5 October 2015 on guidelines for the employment policies of the Member States for 2015

<sup>603</sup> For the period 2015-2018, the EEGs include: Boosting demand for labour (Guideline 5); Enhancing labour supply, skills and competences (Guideline 6); Enhancing the functioning of labour markets (Guideline 7); Fostering social inclusion, combatting poverty and promoting equal opportunities (Guideline 8).

members.<sup>604</sup> The EA Guidelines (EAGs) focus on more tailored implementation of the BEPG for the Euro members. They represent an attempt at articulating a common economic policy for the EA.<sup>605</sup>

Besides this, we have recognised above that the benchmarking of the Member States' socio-economic performances has been of central importance to EU policy coordination. Below we will therefore also elucidate how the European Semester has further reinforced this role. Concerning the framing effect, it is important to understand how benchmarking produces the information input required for the identification of governance problems.

The cycle of meta-coordination, in fact, depends vitally on the continuous collection and cross-evaluation of quantitative data.<sup>606</sup> The Member States' individual and common performances are subject to the EU's constant monitoring based on a sizeable range of socio-economic indicators (see Figure 5.3. above).<sup>607</sup> These data then feed into competitive performance comparisons that allow identifying best and worst performers. We have already recognised that the benefit of this benchmarking for the design of European policy solutions lies in its capacity to stimulate rational decision-making.

In other words, the Commission proceeds to use these cross-country comparisons to highlight relative disadvantages and advantages of national performances vis-à-vis the common strategic objectives and concrete targets. This has the effect that 'if a member state is not achieving what others are accomplishing, then the EU *frames* this relative disadvantage as a *domestic problem*' [emphasis added, NB].<sup>608</sup> Benchmarking thus delivers the necessary intelligence for the EU's *identification* of common governance problems.

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<sup>604</sup> Based on Article 136 (1)(b) TFEU, introduced by the Lisbon Treaty. Since the first Semester cycle of 2011, these specific guidelines usually accompanied the adoption of the CSRs in July. However, the latest reforms of the European Semester in 2015 have moved these EA recommendations forward to better align the EA and the national dimensions of EU economic governance. This means the EA recommendations have this time been drawn up along with the AGS 2016 at the beginning of the Semester-cycle. See European Commission, Recommendation for a Council Recommendation on the economic policy of the euro area (COM(2015) 692 final, SWD(2015) 700 final, Brussels, 26 November 2015).

<sup>605</sup> For instance, in July 2015 the Council recommended prioritising Member State and Eurogroup action related to the following items: (1) Promoting 'structural reforms that facilitate the correction of large internal and external debts and support investment'; (2) Enhancing the coordination of fiscal policies 'to ensure that the aggregate euro area fiscal stance is in line with sustainability risks and cyclical conditions'; (3) Expediting the establishment of the European Banking Union, including by promoting 'measures to deepen market-based finance', improving 'access to finance for SMEs', and developing 'alternative sources of finance'; and (4) Taking forward work on deepening EMU in line with the recommendations of the Five-Presidents' Report. Council Recommendation of 14 July 2015 on the implementation of the broad guidelines for the economic policies of the Member States whose currency is the euro.

<sup>606</sup> EUROSTAT has since also seen its role increased continuously and functions as coordinator among the respective national authorities that are required to forward the national statistical input.

<sup>607</sup> In practice, this multilateral surveillance is organised through several committees composed by representatives of the Commission and the Member States.

<sup>608</sup> López-Santana 2006, at 487.

In that regard, it is crucial to note that the reliability of the data input represents a very sensitive issue – especially, regarding the data for the EU’s fiscal surveillance. The comparison of quantitative indicators depends on reliable data, which the Commission however does not have the resources to obtain on its own. Savage (2015) refers to this situation as one of “asymmetric information” because the Commission vitally depends on the national data provided by the Member States.<sup>609</sup>

In the past, the EU’s possibilities of verifying the validity of the necessary information provided by national authorities had indeed been rather limited.<sup>610</sup> But, also, this problem has also been addressed by the EU’s recent anti-crisis reforms. The Six-Pack has introduced new investigative powers for the Commission with regard to the manipulation of statistics to enhance the enforcement of budgetary surveillance in the EA. These powers have also been backed up by new sanctions subject to the enforcement of the Court of Justice.<sup>611</sup>

#### *Developing narratives – explaining problems and defining solutions*

In every Semester-cycle, the progression of coordination instruments directs European policy guidance from common priorities set by the AGS to individualised recommendations to the Member States. In the light of the determination of common problems by the 2020-Guidelines, the AGS-package establishes annual policy priorities. Where necessary, it shifts emphasis based on the statistical data input from benchmarking and taking into account changing external factors (such as developments in the global economy). It thus expands on the definition of common problems and provides *connective narratives* that explain what has led to the problems and pinpoint desired policy action. The Commission then repeats this exercise for each Member State individually in the Country Reports.<sup>612</sup>

Based on these comprehensive evaluations (and the ensuing bilateral reform dialogue between the Commission and the Member States), the Commission and the Council finally provide more tailored guidance through the CSRs. These recommendations individualise the common European problems for each Member State and point out preferred *policy solutions*, intended to steer national performance towards the achievement of the 2020-goals.<sup>613</sup>

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<sup>609</sup> Savage (2015).

<sup>610</sup> The events leading up to the sovereign debt crisis in Europe (especially, the case of Greece) exposed that the relationship between the EU and its Member States is characterised by a problem of “asymmetric information”. Ibid.

<sup>611</sup> Article 8 (5) of Regulation 1173/2011 provides that the CJEU has ‘unlimited jurisdiction to review the decisions of the Council imposing fines under paragraph 1. It may annul, reduce or increase the fine so imposed’. The so-called “Valencia case” illustrates that the Court does not shy away from using these new competences. Ibid.

<sup>612</sup> The Member States have the opportunity to present their own estimation of problems, causes, and solutions in the NRPs and the NSPs/NCPs.

<sup>613</sup> López-Santana (2006, at 487) explains: ‘[...] *individual recommendations to a member state define what the EU perceives as a domestic problem*, which consequently will persuade domestic actors to, at the very least, initiate a discussion about why X is considered a problem by the EU, and why domestic policy-

This sophisticated process of EU policy guidance applies, in the first place, for the purpose of *ex-ante* coordination, i.e. the preventive modus of economic policy coordination. In the corrective modus of coordination, the framing process is essentially the same but for the denser timetables of enhanced surveillance and additional procedural requirements (especially for EA members) if Member States fail to correct excessive government deficits or imbalances in due time. Enhanced surveillance consequently accentuates the severity of problems related to budget deficits, public debts and macro-economic imbalances and increases the urgency for the concerned government to take effective remedial action.

In brief, to design its policy guidance towards the Member States, the Commission processes the information input from benchmarking through the successive coordination instruments (AGS, CRs, CSRs) in the Semester-cycle. It drapes the comparative performance results into more elaborate problem definitions and links them to concrete policy recommendations. In this way, it confronts national governments – if necessary, year after year – with what is perceived from a European perspective as priority problems and preferential policy solutions. As explained above, this framing process tends to have both an expansive effect regarding the courses of action available to policy-makers, and a restrictive effect regarding their choice of policy options due to the specification of good and bad policy. Chapter 7 will therefore examine the narratives provided by the AGS in terms of how much policy space they leave for solutions that safeguard/promote worker protection.

## 5.5. CONCLUDING REMARKS: THE ORGANISATIONAL APPARATUS OF “LISBON 2020” AND THE NEW REGIME OF EU ECONOMIC GOVERNANCE

In this chapter, we have analysed the organisational apparatus of the “Lisbon 2020”-architecture to understand how the EU has further diversified its toolkit of socio-economic governance in recent years. Our focus has been on the European Semester and how it has become the epitome of “integrated coordination”, one of the EU’s central “Good Governance”-ideals. We have studied the growing collection of instruments, which has been significantly bolstered by successive reforms in response to the Euro crisis, and how these instruments are being deployed through the Semester-cycle. We have furthermore analysed in what ways EU meta-coordination elicits normative effects.

On that basis, we contend that because of the modifications that EU crisis management has brought about in the “Lisbon 2020”-architecture, a *new integrated regime of EU Economic Governance* has emerged. This conclusion is supported by the following statement of the European Commission:

“The lessons learned from the recent economic, financial and sovereign debt crises have led to important reforms of the EU’s economic governance rules. Surveillance systems have been strengthened for budgetary and economic

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makers should also define X as such. This means that domestic policy-makers need not come on their own to the realization that a policy must be revised and that “something is wrong” because the *supranational level points it out for them.* [emphasis added, NB]

policies and a new budgetary timeline for the euro area has been introduced. The rules (introduced through the so-called "Six Pack", the "Two Pack" laws and the Treaty on Stability, Coordination and Governance) are grounded in the European Semester, the EU's economic policy coordination calendar. This *integrated system* ensures that there are clearer rules, better coordination of national policies throughout the year, regular follow-ups and the possibility of swifter sanctions for non-compliance. This helps Member States to deliver on their budgetary and reform commitments, while making the Economic and Monetary Union more robust.' [emphasis added, NB]<sup>614</sup>

We will defend this claim by summarising below the main findings of the analysis.

#### *Reinforced integrated (economic) policy coordination*

It seems the EU is striving to perfect the art of coordination by advancing the hybrid interplay of different governance instruments. Thereby, the implementation of the strategic 2020-objectives has become inextricably interlinked with the enhancement of European economic governance. The EU crisis narrative has facilitated the adoption of two legislative packages by co-decision.<sup>615</sup> European leaders have thus created new binding rules and expanded sanctioning procedures to address the weaknesses in the EU's governance apparatus, considered to have contributed to the Euro crisis. These new rules have considerably strengthened the framework conditions for EU economic policy coordination and thus bolstered the European Semester-process. Consequently, this directly applicable and binding European procedural framework drastically circumscribes the options of devising economic policy for national governments.

The EU's coordination capacity has thereby been significantly enhanced. Due to its integrated nature, it has become practically irrelevant that the bulk of European policy guidance advanced through the Semester originates from non-binding instruments. As demonstrated above, the EU's anti-crisis reforms have deliberately driven the diversification of regulatory modes and instruments and, even more so, their targeted interaction. As the annual cycle of meta-coordination interlinks the various coordination instruments, its integrative and iterative set-up ensures that different modalities of control reinforce each other. In that respect, Table 5.2. below summarises how the EU has cultivated a sophisticated technique of integrated coordination through the European Semester.

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<sup>614</sup> European Commission, *Fact Sheet - The EU's economic governance explained* (MEMO/14/2180, Brussels, 28 November 2014) available at [http://europa.eu/rapid/press-release\\_MEMO-14-2180\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-2180_en.htm) (last accessed 12-09-2016).

<sup>615</sup> Chapter 4 has shown that even some extra-legal instruments (such as the ESM and the TSCG) have additionally been created outside the EU *acquis* for lack of unanimity for Treaty amendment. These unusual amendments of the constitutional framework have been ascribed to the perceived urgency of the need for effective action to restore the stability of the common currency.

THE INTEGRATED REGIME OF EU ECONOMIC GOVERNANCE		
European Semester meta-coordination – <i>key rationales</i>	Governance processes (and instruments)	
	<i>Prevention</i>	<i>Correction</i>
Economic policy COORDINATION	Integrated guidance (2020-IGs, EARs, CSRs)	
<i>Implementation 2020-objectives</i>	Integrated evaluation (AGS package, CRs)	Enhanced surveillance (EDP, EPPs) <i>incl. varied sanctions/E.A</i>
Fiscal policy COORDINATION	Budgetary surveillance (SGP, MFFs, TSCG, ECB)	
<i>Surveillance “Sound Budgets”-rule &amp; beyond</i>	Macro-economic imbalances surveillance (AMR, MIP)	Enhanced surveillance (EIP, CAPs) <i>incl. varied sanctions/E.A</i>
Strategic EXPENDITURE		
<i>Implementation 2020-objectives &amp; EU crisis management</i>	<i>Strategic investment (EFSTI)<sup>616</sup></i>	Emergency funding (ESM)

**Table 5.2.: The reinforced process of EU economic policy coordination under “Lisbon 2020”**

### *The normative effects of EU meta-coordination*

We have identified three ways in which the European Semester has enhanced the EU’s coordination capacity regarding socio-economic policies. That is three ways, in which EU meta-coordination emits normative effects: the bipolar set-up of preventive and corrective economic policy coordination, the framing effect and extensive benchmarking.

First, the *bipolarity* of EU economic policy coordination enhances the authoritative character of the entire process of meta-coordination. The harmonised framework conditions, advanced by EU crisis management, have consolidated this bipolar set-up of EU Economic Governance. That means, the Semester is structured according to the *logic of prevention* as one “pole” of coordination and the *logic of correction* as another. The former promotes *ex ante*-policy coordination (notably, through the BEPG and the AMR) and privileges exclusively those instruments that traditionally provide for relative autonomy in implementation. Yet, despite their non-binding nature, the respective policy tools still obtain normative force from the fact that they are *embedded* in the iterative process of coordination and multi-lateral surveillance. Here, the latter corrective cycle is

<sup>616</sup> The European Fund for Strategic Investments (EFSTI) is a joint initiative of the European Commission and the European Investment Bank (EIB). It aims to mobilise private investment in projects, which are strategically important for the EU, to help overcome the current investment gap in the EU. See Chapter 7.4.3.



simultaneously deployed through strengthened procedures of enhanced surveillance (EDP, EIP), intended to ensure *ex-post* correction of excessive deficits and macro-economic imbalances. For the EA members, these procedures include the threat of varied sanctions. The Semester-schedule synchronises the two concurrent cycles and, especially, provides a *common reference framework* in which both preventive and corrective coordination processes mutually reinforce each other.

Second, we have learned that the EU coordination instruments influence the national level especially in the early stages of domestic policy formulation through *policy framing*. The IGs first delineate the initial identification of common governance problems based on the normative framework of the “Lisbon 2020”-architecture. While it may be obvious that the designated guidance instruments – notably, the CSRs – have a framing effect by specifying *policy solutions*, we have illustrated how also the Semester’s evaluation instruments – above all, the AGS – fulfil important framing functions. The AGS frames through *problem definition* and *explanation* for the EU and the EA as a whole. The additional risk screening of the AMR for the MIP has furthermore extended the scope for problem definition, forging an “economic reading” of a broad range of performance indicators. The CRs (and, where applicable, the IDRs) then repeat this framing for each individual Member State.

As the European meta-coordination thus proceeds from collective evaluation to individual guidance every year, the technique of benchmarking plays a central connecting role. The extensive use of *benchmarking* provides the third way in which the EU’s meta-coordination exerts enhanced normative effects. The EU’s policy guidance advanced through the European Semester is sustained by the recording and evaluation of national implementation and its progress towards the common objectives. Therefore, continuous competitive performance comparisons sustain the annual coordination cycle. Apart from the lack in competence for economic policy, the appeal for the EU to choose benchmarking as a governance technique over harmonisation does not so much lie in the fact that it uses competition (rather than hierarchy) as a mode of control. It rather anchors in the belief that a European policy solution that has been designed based on *best practice* should represent a rational choice to national policy-makers and therefore ought to be easier to implement.

In addition, benchmarking is of fundamental importance to the Semester-process due to its *integrating role* by providing not only information input but also *problem identification*. We have explained how the technique warrants that the coordination of the national performances is both *reflective* and *normative*. The ranking of best and worst performing countries serves to motivate reform progress at national level by treating their relative disadvantages as domestic problems. This, in turn, feeds the *normative capacity of the AGS*. The latter may be primarily intended for evaluation. It compares and assesses national *policy performances* in the light of the Union’s annual growth priorities. Yet, thereby, it not only records but – based on the benchmarking results – also stimulates *policy progress*. This creates the basis for the EU institutions to reproduce or adjust their recommendations

every year in order to improve the Member States' implementation of the common guidelines.

In sum, through the comprehensive meta-coordination cycle the EU exerts influence in the following ways. The cycle's integrated nature warrants that the different instruments reinforce each other mutually through bipolar (i.e. preventive and corrective) coordination cycles. This transformative interaction between binding and non-binding instruments effectively bestows authoritative force onto the policy guidance (primarily, based on recommendations) advanced through Semester – especially, in the context of the EA.<sup>617</sup> The AGS furthermore fulfils a key role in shaping this integrated European guidance. It frames priority problems, based on the benchmarking of the Member States' socio-economic performances, and connects them to preferred policy solutions through explanatory narratives. Its normative effects may be subtler, but it still authoritatively demarcates the *conceptual space* available for devising policy solutions. In Chapter 7, we will therefore analyse to what extent the EU's meta-coordination process leaves room for solutions that promote workers' rights.

#### *The main objectives of EU Economic Governance*

Bringing together our findings from this and the previous chapter, we note the following as the main features of the new EU Economic Governance-regime. Among the constitutional and strategic sources feeding into the formulation of the Union's economic policy aspirations, we count the European Economic Constitution, notably the EMU and its recent enhancements (e.g. the ESM, the TSCG), the reinforced SGP and Europe 2020's growth priorities. On that basis, we identify the following as the main objectives of EU Economic Governance:

- *Price stability* (to promote the functioning of the Single Market and convergence in the framework of the EMU)<sup>618</sup>
- *Macro-financial stability* (including safeguarding the stability of the Euro through fiscal discipline, preventing competitiveness divergences and avoiding excessive imbalances)<sup>619</sup>
- *Competitiveness* (by advancing market integration and as a basis for growth and jobs)<sup>620</sup>

Our analysis of the constitutional framework in Chapter 4 has pointed out that the CJEU proclaimed maintaining financial stability in the EA as a higher objective. Furthermore, the European anti-crisis reforms have strengthened EU governance capacity through institution-building (e.g. the “golden rule”, expanded mandate ECB). As a result, EU

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<sup>617</sup> Cf. Trubek and Trubek (2007); see also Chapter 3.

<sup>618</sup> Article 119(2) TFEU.

<sup>619</sup> Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macro-economic imbalances in the euro area.

<sup>620</sup> European Commission, Communication on Smart Regulation in the European Union (COM(2010) 543 final, Brussels, 8 October 2010).

institutions have been afforded more leverage both, in the management of crisis in the EA as well as in the general surveillance of national budgets.

The newly harmonised framework conditions for planning national budgets in the EA ensure thereby that EU coordination helps to guarantee sound budgets as well as the stability of the Euro. Rather than causing “coordination ambiguity”, we claim that the new EU Economic Governance-regime is ensuring the *consistency* in the interaction of diverse governance instruments. To be more precise, because of the EU’s reinforced coordination capacity national governments’ choice of policy options in economic policy-making has become considerably more circumscribed. Notably, the EA Member States’ leeway in using expansive fiscal policies in their budget planning has effectively been curbed, as they are prompted to take into account the potential repercussions of their choices for other Member States and the stability of the EA as a whole.

## Chapter 6: EU employment governance embedded within the “Lisbon 2020”-architecture – key to a European social market economy?

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### 6.1 INTRODUCTION

The previous two chapters aimed to improve our understanding of the contemporary EU governance architecture and how it has been affected by the reforms in response to the crisis. The “Lisbon 2020”-architecture provides a general framework for socio-economic governance in Europe. We have fathomed both, the composite ideational framework of that architecture and the politico-organisational apparatus it has put in place.

This chapter and the following chapter will locate EU employment governance within this architecture and examine *whether EU employment governance can still be regarded as an integrated regime today*. Thereby we seek to better understand the different ways through which the EU influences employment regulation based on the analytical framework set out in Chapter 3. Hence, we will first elucidate the ideational component (structural level) of EU employment governance and, then, its organisational component (process level) within the framework of the “Lisbon 2020”-architecture. This should enable us to reflect critically on the current state of the Union’s governance capacity regarding employment regulation.

As explained in Chapter 4, the architecture’s ideational framework comprises both, the constitutional framework based on the Lisbon Treaty and the strategic framework shaped by the Europe 2020 Strategy. It thus provides a bounded pool of broad ideas about how the Union should best be governed in the light of commonly defined goals. Among these general policy aspirations of the EU, we find the fundamental objective of establishing a CSME as the *raison d’être* of the European polity. This means that the Union has an economic and a social purpose and hence the core obligation of pursuing both economic and social goals in a balanced way. This is equally reflected in the “Growth and Jobs”-mantra of Europe 2020.

On that basis, we will first *seek a better understanding of the EU’s policy aspirations regarding employment regulation*. As explained in Chapter 1, Kilpatrick linked her characterization of the much-expanded EU employment governance toolkit as an integrated regime to the prevalence of a broad “social justice-competitiveness” paradigm. We have argued in Chapter 4 that at the beginning of the millennium, this paradigm was supported by the prospect of an “EU Constitution” (still) being on the horizon and the adoption of the comprehensive Lisbon Agenda. While the first promised Treaty-status to the CFREU, the latter expressed a common desire to modernise comprehensively the MSE. Against this backdrop, the “integrated regime”-thesis of EU employment governance inferred a general reconfiguration of employment policy (based on the EES) and an expanded body of EU employment legislation according to a set of hybridised objectives.

Below we will therefore explore in more detail how the MSE has functioned as a connective narrative to promote jointly employment and social objectives at EU-level in the face of progressing European economic integration. We will revisit this idea in the light

of the “Lisbon 2020”-framework. The MSE-narrative recognises that the Union’s legal competences regarding employment and social policy matters are limited. Simultaneously, it transcends these limitations and proves more resourceful. It thus helps to elucidate further the appeal of the “integrated regime”-thesis from a normative perspective by providing a framework for reflecting on the purpose of European employment regulation.

In fact, the goal of modernising the MSE has opened up new channels for revisiting the ambition of political integration based on the diversification of regulatory techniques at EU level. In this connection, we will consider how the advancement of the Union’s capacity for employment regulation today is facing complex challenges. These theoretical reflections will then serve as a basis to analyse what impact the “Lisbon 2020” architecture has had on the EU employment governance-apparatus in the next chapter.

## 6.2. UNDERSTANDING THE EU’S ASPIRATIONS REGARDING EMPLOYMENT REGULATION

To comprehend properly the different channels through which the EU influences labour law today, it is useful to clarify first what policy aspirations the Union has regarding the regulation of employment. Kilpatrick’s “integrated regime” thesis held that by about 2005, EU employment governance was characterised by a set of hybridised objectives.<sup>621</sup> The objective of “worker protection” at the top of the list was followed by the objectives of ‘increasing the employment rate and lowering unemployment; including excluded groups in the labour market; and increasing the competitive efficiency of employing enterprises’.<sup>622</sup>

In this section, we will discuss how the EU’s employment objectives have developed in the context of the “Lisbon 2020”-architecture. Thus, today, these objectives must be seen in the light of the meta-objective of establishing a CSME in Europe. Surely, from a legal perspective, the objective of worker protection remains of special concern. But to appreciate the hybridisation of objectives, it is helpful to consider how the MSE has supplied a connective narrative for the EU’s aspirations for employment regulation and beyond.

Therefore, it is useful to look at the role that the MSE has been playing in the European integration process. This shows how the model is characterised by a fundamental discrepancy between ends and means. On the one hand, this gap results in important limitations regarding the realisation of the EU’s social aspirations. On the other, it has fuelled the pragmatism of the supra-national institutions and, accordingly, the adaptability of the Union’s regulatory apparatus.

### 6.2.1. The European Social Model (MSE) and the gap between ends and means

As we are tracing the Union’s social objectives and its aspirations regarding employment regulation specifically, it is important to note that the Maastricht Treaty of 1992 in principle built on a delicate yet express consensus: European integration was to be advanced both

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<sup>621</sup> See Chapter 1.

<sup>622</sup> Kilpatrick (2006) at 129.

through the establishment of the EMU, and by paving the road for political integration.<sup>623</sup> This means, the building of monetary union and of political union was originally intended as a “package deal”.<sup>624</sup> Political integration was to be accomplished, amongst others, through the development of the Community social dimension.<sup>625</sup> However, while the adoption of the 1992 Treaty backed monetary union with a concrete roadmap for institutional change, the ambitions for political union remained rather open and vague.

Next to ensuring the establishment of the EMU, the EU then made its mission to “preserve and develop” the MSE.<sup>626</sup> Reference to the MSE has since provided shorthand for the promotion and protection of social objectives in the context of European integration, as the institutional conditions for advancing economic and monetary integration were gradually put in place.

#### A) The MSE – some theoretical considerations

It is important to highlight some peculiarities about the MSE-narrative. The MSE-concept itself provides a rather flexible idea, making it hard to pinpoint a single European conception.<sup>627</sup> In the 1994 White Paper on Social Policy, the Commission emphasised that a set of shared values provided the foundation of that model:<sup>628</sup> ‘These include democracy and individual rights, free collective bargaining, the market economy, equality of opportunity for all and social welfare and solidarity.’<sup>629</sup> The EU institutions have subsequently used reference to the MSE as an important currency to promote the Europeanisation of both social and employment policies.<sup>630</sup> With time, then, that list of

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<sup>623</sup> Based on a Franco-German initiative (Mitterrand-Kohl), embedding the reunification of Germany in the establishment of a Political Union in Europe was intended to ensure peace and stability. Noël (1992). See European Council, Presidency Conclusions, Rome 14 and 15 December 1990 (Part 1, SN424/1/90) at 2-3.

<sup>624</sup> However, it should be noted that the Intergovernmental Conference (IGC) on Political Union soon lost traction and lagged significantly behind the IGC on Economic and Monetary Union. The result was the Treaty on European Union – on which the conclusions of the Maastricht European Council, in December 1991, merely recognised ‘that eleven Member States desire to continue on the path laid down by the Social Charter in 1989’. European Council, Presidency Conclusions, Maastricht 9 and 10 December 1991 (SN271/1/91) at 2.

<sup>625</sup> The following building blocks underpinned the development of the EU social dimension: the Single European Act (SEA), the 1989 Community Charter, and the Social Policy Protocol (SPP) which attached the Social Policy Agreement (SPA) of 11 (out of 12) Member States to the Maastricht Treaty in 1992. Ebsen (1996).

<sup>626</sup> European Commission, COM(1994)333.

<sup>627</sup> Barnard (2014).

<sup>628</sup> European Commission, European Values in the Globalised World (COM(2005)525, Brussels, 20 October 2005) at 4.

<sup>629</sup> European Commission, COM(1994)333, at 2. These common values had already been given expression at European level by the 1989 Community Charter of the Fundamental Social Rights of Workers.

<sup>630</sup> For an indicative overview of MSE-references in communications and social agendas of the EU Commission and in the Presidency Conclusions of the European Council. see Schoukens (2016), notes 2 and 3.

values has been expanded and come to ‘represent a *European choice in favour of a social market economy*.’ [emphasis added, NB]<sup>631</sup>

In the academic literature, the MSE has generated quite different understandings depending on the field of enquiry. In the social sciences, the purpose of a “model” is to bring order into and make sense of social facts.<sup>632</sup> Here, the MSE is usually in some form or another associated with the varieties of capitalism and the welfare state systems that characterise European economies.<sup>633</sup> Jepsen and Serrano Pascual (2005) identify three clusters of common definitions in order to clarify the polysemy of the MSE-notion. The concept may be used to denote distinct common features of the EU system (e.g. institutions, values etc.); to describe the variety of different national models; or, to designate a particularly European ideal that guides transnational cooperation.<sup>634</sup>

For lawyers, instead, ‘a model refers to a reference framework against which a system or rules can be set off in order to have it assessed.’<sup>635</sup> It is a fact that we find a great diversity in national social law systems in Europe. The Member States provide employment protections as well as individual and collective labour rights through sophisticated labour law and industrial relations systems, while they maintain redistributive social security and social protection systems that provide social insurance and cost compensation covering common social “risks” (such as unemployment, retirement pensions, work incapacity, health care, and family allowances) and social assistance (minimum income protection). In view of this national variety, the question is to what extent the MSE actually provides a *European reference framework*. In other words, does the EU dispose of (binding) minimum standards that provide common ‘yardsticks against which [national social law] systems overall, and reforms in particular could be tested with reference to their social value’?<sup>636</sup>

It has been observed that the ‘lack of coherence and theoretical distinction in referring to the [MSE] is compensated for by an enumeration and description of

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<sup>631</sup> This choice is based on the values of ‘solidarity and cohesion, equal opportunities and the fight against all forms of discrimination, adequate health and safety in the workplace, universal access to education and healthcare, quality of life and quality in work, sustainable development and the involvement of civil society’. European Commission, COM(2005)525,

<sup>632</sup> ‘The purpose of model-building is not to admire the architecture of the building, but to help us to see some order in all the disorder and confusion of facts, systems and choices concerning certain areas of our economic and social life.’ Titmus (1974) at 145.

<sup>633</sup> Giddens (2014) at 88: ‘the European Social Model if not wholly European, not wholly social, not a model’.

<sup>634</sup> ‘In the first cluster of definitions the ESM is considered as the model that *incorporates certain common features* (institutions, values, etc.) that are inherent in the status quo of the European Union member states and are perceived as enabling a distinctive mode of regulation as well as a distinctive competition regime. The second cluster of definitions establishes the ESM as being *enshrined* in a variety of different national models, some of which are put forward as good examples; the ESM thus becomes an ideal model in the Weberian sense. The third way of identifying the ESM is as a *European project* and a tool for modernization/adaptation to changing economic conditions as well as an instrument for cohesiveness. Under this cluster of definitions, the ESM is an emerging transnational phenomenon.’ [emphasis in the original] Jepsen Serrano Pascual (2005) at 234.

<sup>635</sup> Schoukens (2016) at 6.

<sup>636</sup> Schoukens (2016) at 8.

competences and policies pursued by the European institutions'.<sup>637</sup> Such a descriptive approach reveals, as the next subsection will show, how EU employment regulation is actually at the heart of the MSE.

#### B) The Union's competences regarding social policies and the lack thereof

In order to recapitulate which legal powers the Union possesses to implement its aspirations regarding employment regulation, the notion of "social policy" requires some clarification. This, too, is a rather vague concept. From the perspective of social sciences, social policy is 'involved in choices in the ordering of social change', being concerned – just like economic policy – with "what is and what might be".<sup>638</sup> In the various legal traditions of the Member States, the label of "social policy" generally covers the two principal legal categories of social security and labour law.<sup>639</sup>

In the EU context, however, the notion of "social policy" is more nebulous. The term of "EU social policy" effectively refers to 'the body of policy upon which the *employment-related* legislative, administrative, and judicial activity of the European [Union] is based' [emphasis added, NB].<sup>640</sup> This, in turn, leads to the awkward situation where the concept of "employment policy" at EU-level 'comes to be used for the different purpose of describing the policy agenda relating to job creation and maintenance, and the maintenance or enhancement of employment skills by means of vocational training' (see below).<sup>641</sup>

Freedland (1996) explains how Daintith's theory on *government by imperium* (GBI) and *government by dominium* (GBD) helps to clarify that the relationship or association between employment law and employment policy is, in reality, one of "continuity".<sup>642</sup> The former (GBI) associates the use of public power with a 'sense of command' or 'rule-making'.<sup>643</sup> The latter (GBD) refers to public interventions that 'use the wealth of government to create positive or negative inducements'.<sup>644</sup>

He illuminates further how 'employment law exists mainly in the mode of GBI' commonly linked to the use of – what Deakin and Wilkinson (1994) denoted as – 'substantive and procedural standards'.<sup>645</sup> Next to that, "promotional standards" are 'the

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<sup>637</sup> Rogowski (2008) at 88.

<sup>638</sup> Titmus (1974) at 145. Titmus defines the term "policy" as referring 'to the principles that govern action directed towards given ends. The concept denotes action about means as well as ends and it, therefore, implies change: changing situations, systems, practices, behaviour. And here we should note that the concept of policy is only meaningful if we (society, a group, or an organisation) believe we can affect change in some form or another.' Ibid. at 138-139.

<sup>639</sup> Ebsen (1996).

<sup>640</sup> Freedland (1996) at 277.

<sup>641</sup> Ibid.

<sup>642</sup> In reference to Daintith (1982, 1994), see Freedland (1996) at 284. See also Kilpatrick (2006).

<sup>643</sup> Freedland (1996) at 283.

<sup>644</sup> Ibid. Such "inducements", Freedland, explains, usually include authorising 'government or its agents to gather in or distribute wealth and [defining] the conditions upon which those things can be done'. Ibid. at 284.

<sup>645</sup> Ibid.



very stuff of which GBD consists', foreseen for the implementation of employment policy.

<sup>646</sup> The latter are 'designed to channel economic activity through the provision of public support services or subsidies, as occurs in the case of vocational training and worker placement'.<sup>647</sup> Today, regulation by means of promotional standards is commonly known as "active labour market policy" (ALMP).<sup>648</sup>

Based on these conceptual clarifications, the description below how EU social policy thus circumscribes principally those provisions of primary EU law (the Treaties) and secondary EU law (legislation in the form of regulations and directives) that cover aspects of the employment relationship. Employment policy and other aspects of social protection (such as healthcare, pensions, education etc.), instead, remain prerogatives of the Member States.

### *The EU employment acquis*

Article 151 TFEU outlines the general scope of European "social policy" and its main objectives.<sup>649</sup> Both European and national measures – when implementing the enumerated social policy objectives – should take into account the diversity of national systems, particularly with regard to contractual relations, and the need to maintain the competitiveness of the Union economy.

Article 151 TFEU itself, however, is a programmatic provision that does not bestow any legal competence on the Union on its own. Its particular value lies in 'identifying the cluster of relevant norms in the EU legal system and thus operat[ing], in the employment sphere, as a normative bridge'.<sup>650</sup> Moreover, Treaty provisions from which direct individual entitlements (such as the right to equal pay between men and women) can be deduced are the exception in EU social policy.<sup>651</sup>

Instead, Article 153(2)(b) TFEU generally empowers the European Parliament and the Council to adopt 'by means of directives, minimum requirements for gradual implementation'. Based on this power of "partial harmonisation", the Union has accumulated a considerable body of secondary EU law. The pertinent EU directives

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<sup>646</sup> Ibid.

<sup>647</sup> Deakin and Wilkinson (1994) at 291; and Freedland (1996) at 282.

<sup>648</sup> ALMP 'covers a number of mechanisms aimed at improving vocational training, assisting job search and encouraging employers to take on additional workers. It mostly takes the form of targeted public expenditure and subsidies to enterprises.' Deakin and Reed (2000) at 83-84.

<sup>649</sup> It determines that the EU and the Member States should have as their objectives: the promotion of employment; improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained; proper social protection; dialogue between management and labour; the development of human resources with a view to lasting high employment; and the combating of exclusion. In that respect, it also recalls explicitly the importance of fundamental social rights such as those set out in the 1961 European Social Charter and in the 1989 Community Charter of the Fundamental Social Rights of Workers. In fact, Article 151 TFEU has been considered a crucial source of inspiration for the emergence of the so-called "European Social Model". Cf. Ales (2010) at 135.

<sup>650</sup> Lecomte (2011) at 19; see also Büttgen (2013).

<sup>651</sup> Article 157 TFEU.

standardise the rights of employees by setting EU-wide minimum requirements regarding – amongst others – equal treatment in employment, working conditions (such as occupational health and safety, working time, and employment contract information), safeguards in the event of business restructuring and relating to workers’ rights of information and consultation.<sup>652</sup>

Here we see that the Treaty *expressly links the EU’s legislative capacity to the objective of protecting labour rights*.<sup>653</sup> In that regard, it is interesting that reflexive law scholars ascribe EU employment regulation the advantage of providing a so-called European “*floor of rights*”,<sup>654</sup> subject to judicial review. This notion conceives of EU employment law as establishing basic employment standards below which governments may not deviate.<sup>655</sup> This view seems confirmed *a contrario* by Article 153(4)(2) TFEU. That provision articulates a so-called “social progress”-clause, which holds that Member States must not be prevented ‘from maintaining or introducing more stringent protective measures compatible with the Treaties’.

This capacity, however, is qualified by two important limitations. On the one hand, for some particularly sensitive employee rights the Treaty requires unanimity voting for setting minimum requirements by directive.<sup>656</sup> On the other hand, essential collective labour rights – namely, ‘pay, the right of association, the right to strike or the right to impose lock-outs’ – are entirely excluded from this legislative power.<sup>657</sup>

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<sup>652</sup> For an overview, see Barnard (2012).

<sup>653</sup> Based on Articles 153(1) and 153(2)(b) TFEU, the EU may adopt minimum requirements regarding the (a) improvement in particular of the working environment to protect workers’ health and safety; (b) working conditions; (c) social security and social protection of workers; (d) protection of workers where their employment contract is terminated; (e) the information and consultation of workers; (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5; (g) conditions of employment for third-country nationals legally residing in Union territory; (h) the integration of persons excluded from the labour market, without prejudice to Article 166; and (i) equality between men and women with regard to labour market opportunities and treatment at work.

<sup>654</sup> Deakin and Rogowski (2011).

<sup>655</sup> Importantly, Deakin and Reed postulate that the idea of a “floor of rights” represents the “*the economic purpose of social policy intervention*”. They explain this as follows: ‘Rather than prohibiting competition over rules, it regulates that process, in effect giving it a steer away from the direction of a “race to the bottom”. It forecloses certain options of Member States, while allowing others. For free market purists, this is not much of an improvement upon outright prohibition. However, the key issue here is whether a completely unregulated market for social policy systems within the EU would select the most efficient available solution.’ Deakin and Reed (2000) at 82. They elaborate further: ‘A race to the bottom could easily result in a “low level equilibrium” where no jurisdiction felt able to take steps to raise its standards, for fear of capital flight and further “social devaluations” by its rivals.’ Ibid. at 83.

<sup>656</sup> In other words, each Member State has an effective right to veto respective EU legislative initiatives that seek to harmonise the social security and social protection of workers; the protection of workers where their employment contract is terminated; the representation and collective defence of the interests of workers and employers, including codetermination; and the conditions of employment for third-country nationals legally residing in Union territory (bullets (c), (d), (f), and (g) respectively). For the rest, the ordinary legislative procedure applies.

<sup>657</sup> Article 153(5) TFEU.

These limitations underline the fact that the Union shares legislative competence with the Member States for aspects of social policy defined by the Treaty.<sup>658</sup> Importantly, shared competences are subject to the principle of *subsidiarity*.<sup>659</sup> This is recognised by Article 153(2)(b) TFEU which requires that EU employment directives are ‘having regard to the conditions and technical rules obtaining in each of the Member States’. In this sense, then, “subsidiarity” is no more than a recognition that in the social field uniformity is neither possible nor desirable, that [Union] standards must be flexible enough to take account of the diversity of national practices while achieving equivalent outcomes’.<sup>660</sup>

Bercusson (1994), however, considers the subsidiarity principle could actually have more far-reaching implications. He points out that the test of “relative sufficiency”, which establishes whether the EU is competent to act concerning a particular social policy matter,<sup>661</sup> is at risk of a common misconception. He does not believe that the subsidiarity principle is based on the rationale of exclusive allocation (i.e. allocating powers to either a higher or lower level). Alternatively, Bercusson pleads for a more *dynamic* understanding. He underlines its value in *coordinating* between the European and the national level in order ‘to delineate the respective advantages of *each* level and promote *cooperation* between them, rather than assign exclusive jurisdiction to one or the other’.<sup>662</sup> Thereby, he suggests that the EU can actually *learn* from the national level because the need to coordinate action at different levels ‘is a familiar problem in labour law and industrial relations: the relative roles of legislation and collective bargaining in regulating different policy areas’.<sup>663</sup> The discussion will pick up again on this argument later.<sup>664</sup>

In short, based on the Union’s shared legislative competence in this field, the EU employment acquis in fact lies *at the heart* of the MSE.<sup>665</sup> Yet, precisely this recognition – together with the idea of a European “floor of rights” – evokes questions about the role of the CFREU in this context. The Charter defines a range of labour and social rights.<sup>666</sup> Most provisions from the Solidarity Title exhibit direct importance to the employment

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<sup>658</sup> Article 4 (b) TFEU.

<sup>659</sup> Based on Article 5(3) TEU.

<sup>660</sup> Hepple (1990) at 646.

<sup>661</sup> This test is used to check whether the two requirements (1. *insufficient* achievement by the Member States of the objectives of the proposed action; and 2. *better* achievement by the Community by reason of the scale or effects of the proposed action) that justify EU action in regulating a recognised aspect of employment, are being met. Bercusson (1994) at 14.

<sup>662</sup> He explains ‘deciding which level is *better* implies that *both* have something to contribute. Though one may be better *overall*, the other may be more advantageous *in some respects*. [...] *Within* the relevant field of competence, [the solution might be to use the subsidiarity principle so that] different levels can coordinate their action.’ [emphasis in the original] Bercusson (1994) at 15.

<sup>663</sup> *Ibid.*

<sup>664</sup> See Section 6.3.2.B.

<sup>665</sup> See Barnard (2014) at 200; and European Council, Presidency Conclusions (Nice, December 2000), at 12.

<sup>666</sup> ‘The inclusion of social and labour rights in the CFREU underlines their heightened relevance in EU law. It also is a decisive step for guaranteeing different categories of human rights alongside each other.’ Schiek (2015) at 16.

context.<sup>667</sup> Further employment-related rights and principles are scattered throughout the Charter.<sup>668</sup> However, as indicated earlier,<sup>669</sup> the effect of these provisions is subject to the known limitations of the Charter's enforceability. These issues will therefore be discussed in more detail in the next Chapter.

*Alternative competences to further social and employment policy objectives*

Anchored in the Treaty, more competences relating to employment regulation are available at European level. These comprise the recognition and promotion of the European Social Dialogue (ESD) and the development of a coordinated strategy for employment.

The involvement of the social partners at both European and national level has been actively promoted in the development of European employment regulation.<sup>670</sup> It now ranges from aiding in the development of pan-European rules and formulating (cross-)sectoral employment standards,<sup>671</sup> over facilitating the implementation of EU rules and guidelines in greatly varying industrial relations systems,<sup>672</sup> to partaking in regular high-level discussion forums deliberating macro-economic developments across the EU.<sup>673</sup> It is especially noteworthy that Article 155 TFEU offers the possibility of incorporating framework agreements – following a proposal by the Commission and approval by the Council – into a directive. This provides an important alternative to the ordinary legislative route to adopt negotiated employment standards into EU law.<sup>674</sup>

Furthermore, the previous chapters have shown how the coordination of national policies through the EU has increased in importance with the establishment of the EMU. In that domain, the command that the Member States should treat unemployment as a

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<sup>667</sup> Notably, these are: workers' right to information and consultation within the undertaking (Article 27 CFREU); the right of collective bargaining and action (Article 28 CFREU); the right of access to placement services (Article 29 CFREU); protection in the event of unjustified dismissal (Article 30 CFREU); fair and just working conditions (Article 31 CFREU); the protection concerning the reconciliation of family life and professional life (Article 33 CFREU); and social security and social assistance (Article 34 CFREU).

<sup>668</sup> See the principle of human dignity (Article 1 CFREU); the prohibition of slavery and forced labour (Article 5 CFREU) and prohibition of child labour and protection of young people at work (Article 32 CFREU); rights to non-discrimination and equality between the sexes (Articles 21 and 23 CFREU respectively); the right to education (Article 14 CFREU); the freedom to choose an occupation and right to engage in work (Article 15 CFREU) and the freedom to conduct a business (Article 16 CFREU).

<sup>669</sup> See Chapter 3.2.1.

<sup>670</sup> Commission President Delors can be said to be the father of European social dialogue by inviting the social partners to the famous Val Duchesse meeting in the mid-1980s. Cf. Bercusson (1996).

<sup>671</sup> Article 154 and 155 TFEU.

<sup>672</sup> Article 153(3) TFEU.

<sup>673</sup> Since 2002, the Tripartite Social Summit takes place every year on the eve of the Spring European Council and provides the basis for the European Macroeconomic Dialogue between the EU institutions, the ECB and the European social partners (the so-called Cologne Process).

<sup>674</sup> Interestingly, Bercusson (1994) ventured that (what are today) Articles 154 and 155 TFEU, read in combination with Article 151 TFEU, might be interpreted in a way that transcends the exclusion of collective labour rights in Article 153(5) TFEU from EU standard-setting – conceding that the European social partners could possibly be recognized to regulate such matters at European level.

‘common concern’ has provided a central rationale for the coordination of national employment policies. Article 145 TFEU obliges the Member States and the Union to work towards developing a coordinated strategy for employment, which has taken the shape of the European Employment Strategy (EES).<sup>675</sup> The Member States carry the prime responsibility to coordinate their employment policies within the Council,<sup>676</sup> following the procedure outlined in Article 148 TFEU. The Treaty requires consistency in the coordination of national employment policies with that of economic policies under the BEPG – which, today, is to be ensured through the IGs and in the setting of the EU Semester.<sup>677</sup>

Within the framework of the EES, the EU has thus formally the role of coordinator,<sup>678</sup> not legislator.<sup>679</sup> It is additionally obliged, as reinforced by Article 9 TFEU, to take the objective of a high level of employment into consideration in the formulation and implementation of Union policies and activities. To contribute to a high level of employment, the Union shall encourage the Member States’ cooperation by supporting and, if necessary, complement their action, while respecting domestic competences. The European Parliament and the Council may adopt incentives measures to encourage the exchange of knowledge, best practices and comparative analysis among the Member States.

In that respect, a crucial question is to what extent the EU is equipped to “govern by dominium”, i.e. using promotional standards to realise its aspirations regarding employment creation.<sup>680</sup> The Union does not possess a proper fiscal capacity. Proposals to that effect have up to now not been successful.<sup>681</sup>

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<sup>675</sup> This should include in particular the promotion of a skilled, trained and adaptable workforce as well as labour markets that are responsive to economic change, and with a view to achieving the Union’s objectives defined in Article 3 TEU, and Article 145 TFEU.

<sup>676</sup> Article 146 TFEU.

<sup>677</sup> Article 121(2) TFEU.

<sup>678</sup> Article 150 TFEU establishes the Employment Committee, an advisory body composed by representatives of each Member State and the Commission. Its mission is to promote coordination between Member States on employment and labour market policies, by monitoring the employment situation and employment policies in the Member States and the Union, and formulating opinions at the request of either the Council or the Commission or on its own initiative, and contributing to the preparation of the Council proceedings in the framework of the EES (Article 148 TFEU). In fulfilling its mandate, the Committee should consult management and labour. Each Member State and the Commission should appoint two members of the Committee.

<sup>679</sup> Article 147 TFEU.

<sup>680</sup> See the discussion about the conceptual delimitation between social and employment policy in the beginning of this sub-section.

<sup>681</sup> The failure of the Delors Commission’s plans for launching large-scale European investment project to develop transnational public infrastructure, presented in the 1993 White Paper on Employment and Competitiveness, is probably the most renowned example in this respect. European Commission, COM(93)700. However, recently such proposals have again met with more approval in the wake of the Euro crisis – notably, the option of developing fiscal capacity for the EA (to promote the role of automatic stabilisers) is being considered as a possible way of strengthening the EMU. See A. D’Alfonso and A. Stuchlik, A fiscal capacity for the euro area? Options for reforms to counter asymmetric shocks (European Parliamentary Research Service (EPRS), PE 589.774, European Parliament, September 2016).

At the same time, we should not neglect that the Union has had structural financial instruments at its disposal for the promotion of employment from the very beginning of the European project. In the framework of cohesion policy, particularly the ESF has traditionally been serving to alleviate negative employment effects resulting from structural change driven by European integration.<sup>682</sup> It has been designed ‘to improve employment opportunities for workers in the Internal Market and to contribute thereby to raising the standard of living’.<sup>683</sup> Here, too, the EU shares legislative competence with the Member States for economic, social and territorial cohesion. However, it faces a basic limitation in that the Treaty expressly excludes harmonisation measures from EU competence in the field of employment policy.<sup>684</sup>

*No “floor of rights” in social security law*

It has been established that the EU has considerable competence to act in pursuit of its employment objectives by setting basic binding employment standards and coordinating national employment policies. Next to that, though, it is also important to highlight that in the area of social protection and social security law, the Union lacks comparable capacities. Surely, the coordination of social security has been playing a critical role in (realising) the freedom of movement in the EU. For that purpose, so-called conflict-of-laws rules have long existed to facilitate the cross-border mobility of workers, self-employed and others by coordinating the mutual recognition of national social entitlements and the exportability of social insurance benefits.<sup>685</sup> The continued relevance of these coordination rules is borne

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<sup>682</sup> The ESF has provided such structural support already since the 1950s in the context of the European Coal and Steel Community (ECSC). Bercusson (1996).

<sup>683</sup> See Articles 162-164 TFEU.

<sup>684</sup> Article 149 TFEU. The Treaty provides a separate title on education and vocational training policy, connected to youth policy, see Articles 165-166 TFEU.

<sup>685</sup> See Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004. Already from early on, Regulation (EEC) No. 1612/68, now replaced by Regulation (EU) no 492/2011, detailed the harmonised free movement rights of workers. Besides this, it was agreed that – while respecting the Member States’ prerogative in defining and organising their proper systems of social protection – the realisation of the free movement of workers required the coordination (instead of harmonisation) of social security at European level by means of conflict rules. Council Regulation (EEC) No 1408/71, the predecessor of the current Regulation 883/2004, therefore established rules determining the applicable legislation and other conflict rules concerning the allocation of social benefits in different cross-border situations in which employed and self-employed persons and their family members moving within the Union may find themselves. From an employment law perspective, it is particularly interesting that in order to secure the right to free movement for workers, the Court of Justice ruled that the concept of “worker” had a Community meaning. This, it argued, arose directly from the respective Treaty provisions. See Case 75/63 *Unger v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 1977; Case 66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR-2121, at 17; and Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR-1035, at 11. With the introduction of the EU citizenship concept, following the Maastricht Treaty, the dividing line between economically active and economically inactive persons for the entitlement to residence and movement rights has increasingly been blurred.

out by the fact that they are currently, once again, up for revision to update relevant provisions.<sup>686</sup>

Nevertheless, to date, no directive has been adopted to harmonise the social security and social protection of workers.<sup>687</sup> In effect, the EU is lacking both a (legal) reference framework and binding minimum standards in these areas, against which national developments might be weighed.<sup>688</sup> Furthermore, the Treaty stipulates that Union action adopted pursuant to Article 153 TFEU ‘shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof’.<sup>689</sup>

Instead, a diverse set of coordination processes (regarding social inclusion, pensions, healthcare etc.) has been instituted in order to monitor social policy developments at European level.<sup>690</sup> The EU has devised such coordination activities particularly within the realm of the Lisbon Agenda. As indicated in the previous chapters, they have been gradually expanded under the generic label of the OMC, with the aim to help modernising national welfare states and social protection systems.

The OMC has thus provided an ideal-typical frame for modelling diverse coordination processes,<sup>691</sup> promoting European policy objectives dependent on national competences.<sup>692</sup> In that way, it has primarily served to assess and compare the social outcomes of the national social protection systems based on common indicators and stimulate mutual learning with a view to promote “best practice” policy solutions.<sup>693</sup> Thereby, it has ensured that issues of social protection have remained – in one form or another – on the European policy agenda.<sup>694</sup> But so far, according to Schoukens (2016), EU coordination has not been able to compensate for the lack of a European reference framework for social protection policies.<sup>695</sup>

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<sup>686</sup> See European Commission, COM(2016)815 final. See also van der Mei (2016, 2017).

<sup>687</sup> Article 153(1)(c) and 153(2) TFEU subject respective legislative proposals to unanimity voting.

<sup>688</sup> Schoukens (2016) at 8.

<sup>689</sup> Article 153(4)(1) TFEU.

<sup>690</sup> Similar to, Article 160 TFEU provides the basis for establishing the Social Protection Committee, which fulfils similar monitoring and advising functions, like the Employment Committee, in relation to issues of social protection.

<sup>691</sup> The EES has served as a blueprint for the OMC. ter Haar (2012) at 3.

<sup>692</sup> European Council, ‘Presidency Conclusions’, Lisbon, 23-24 March 2000, at paragraphs 5-7.

<sup>693</sup> Zeitlin (2010).

<sup>694</sup> Whilst ‘[t]he Social OMC was reduced to a “parallel” process to the revised Lisbon Strategy, rather than an integral (but rather weak) part of it.’ Vanhercke (2016) at 15. The so-called “Social OMC” is designed to promote and monitor Member States’ efforts to modernise their social protection systems regarding healthcare, pensions and poverty reduction. Under Europe 2020, the issue of combatting social exclusion has been pushed onto the agenda of the EU’s integrated policy coordination by adding poverty reduction target as a separate guideline to the IGs. Daly (2012).

<sup>695</sup> Schoukens underlines that ‘the procedure is of too general a nature and the EU recommendations far too open ended for it to be considered as a reference framework (model) against which systems and reform plans can be legally assessed’. Schoukens (2016) at 9. Even though Article 151 TFEU and Article 34 CFREU call for respect for the fundamental social rights of the Council of Europe (such as the European Social Charter 1961 and Revised European Social Charter), these rights cannot be

In brief, while the dispersed and convoluted nature of the EU's competences regarding employment regulation is clearly evidence of their long laborious development,<sup>696</sup> the descriptive approach essentially reveals a lack of direction in their common development. Indeed, Freedland (1996) already recognised that 'both at the level of terminology and at a deeper ideological level, there is no single clear or accepted policy agenda for employment law in the European Union'.<sup>697</sup> More recently, Barnard (2014) has characterised this normative deficiency of EU employment law as a "crisis of purpose".<sup>698</sup>

At the same time, however, the descriptive approach also reveals how European employment regulation is central to the idea of the MSE. Hence, that model appears supported – at least – by a partial legal reference framework. On that basis, we argue that the MSE is in fact as close as it gets to defining social ambitions at EU-level. It may (yet) have been unable to provide a straightforward policy agenda or comprehensive justification for the advancement of EU employment regulation. But, as we will further argue below (see Section 6.3.1.), it can nevertheless provide a compelling connective narrative for the development of the Union's social dimension – with employment regulation at its epicentre.

## 6.2.2. The main objectives of EU employment governance

Based on the review of the EU's pertinent competences, it should be clear by now that, despite the lack of definition, the MSE also has an "aspirational" character.<sup>699</sup> The model thus cannot be merely understood descriptively or "cognitively" (what is the status quo), as explained above. It carries a *normative* understanding (what should be) as well.<sup>700</sup>

Here, the MSE serves as an "*ideal-type*" regarding which there exist two different conceptions. Either it serves to appeal to values of solidarity that (need to) guide European economic policy-making.<sup>701</sup> Some maintain, for example, that the CFREU represents a codification of key principles of the MSE.<sup>702</sup> Alternatively, the MSE is considered integral to the distinct European political economy of the EU so that the coordination of social (protection) policies is seen as contribution to economic efficiency and therefore indispensable to the success of future integration.<sup>703</sup> Either way, it seems safe to deduce that *normative understandings of the MSE build on the assumption of 'the mutually supportive role of economic and social policies'*.<sup>704</sup>

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regarded 'as a concrete emanation of the EU social model, as they have not been legally endorsed by the EU as an institution'. Schoukens (2016) at 9.

<sup>696</sup> Cf. Lörcher (2012).

<sup>697</sup> Freedland (1996) at 278.

<sup>698</sup> Barnard (2014).

<sup>699</sup> Rogowski (2008).

<sup>700</sup> Cf. Jepsen and Serrano Pascual (2005) at 238-239.

<sup>701</sup> Rogowski (2008) at 89.

<sup>702</sup> See Jepsen and Serrano Pascual (2005) at 236. However, a proper normative definition of the MSE at European level is still lacking. Ibid.

<sup>703</sup> In reference to Offe (2003), see Rogowski (2008) at 89.

<sup>704</sup> European Commission, Communication on Employment and Social Policies: a Framework for Investing in Quality (COM(2001)313, Luxembourg, 20 June 2001) at 5. Importantly, this assumption



In that connection, it is now opportune to specify the EU objectives concerning employment regulation as they emanate from the “Lisbon 2020”-architecture. Among the constitutional and strategic sources that feed into the formulation of the Union's policy aspirations regarding employment regulation we count the Treaty resources – notably, the Social Policy and the Employment Titles, and the CFREU – on the one hand, and the Europe 2020 Strategy and several complementary political programmes, on the other. On that basis, the main objectives of EU employment governance can be summarised as follows:

1. *Achieving a high-employment economy* (75% by 2020 for people aged 20-64,<sup>705</sup> formalise undeclared work);<sup>706</sup>
2. *Creating a genuine European labour market* (free movement and common standards);<sup>707</sup>
3. *Flexicurity* (modernising labour market regulation by combining efficient worker protection with facilitating transitions);<sup>708</sup>
4. *Social inclusion* (including excluded groups in the labour market, especially promoting female employment and reducing labour market segmentation);<sup>709</sup> and
5. *Entrepreneurship* (increasing the competitive efficiency of enterprises (that provide employment)).<sup>710</sup>

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in turn is based on the belief that ‘Social policies are not simply an outcome of good economic performance and policies but are at the same time an input and a framework.’ Ibid. In line with the original “package approach” envisaged in Maastricht, the Commission still seemed to have a clearer vision on “the development of European social policy”, stating in 1993 that ‘the next phase [thereof] cannot be based on the idea that social progress must go into retreat in order for economic competitiveness to recover. On the contrary, as has been stated on many occasions by the European Council, the Community is fully committed to ensuring that economic and social progress go hand in hand. Indeed, much of Europe’s influence and power has come precisely from its capacity to combine wealth creation with enhanced benefits and freedoms for its people.’ European Commission, *Green Paper on Social Policy – Options for the Union* (COM(93) 551, 17 November 1993) at 7.

<sup>705</sup> An overall employment rate of 69% in the EU in 2010 provided the starting point.

<sup>706</sup> European Commission, (COM(2010)2020. See also Article 3(3) TEU and Article 9 and 147(2) TFEU.

<sup>707</sup> The Commission has elaborated its vision on how to foster a “genuine EU labour market” in the so-called 2012 “Employment Package”. European Commission, *Communication on Towards a job-rich recovery* (COM(2012)173 final, Strasbourg, 18 April 2012). See also Article 45 TFEU.

<sup>708</sup> European Commission, *Communication on An Agenda for new skills and jobs: A European contribution towards full employment* (COM(2010) 682 final, Strasbourg, 23 November 2010). See also Articles 145 and 151 TFEU.

<sup>709</sup> The most obvious manifestation of this EU employment objective is the incorporation of the poverty reduction-target into the Employment Guidelines via Europe 2020. European Commission, COM(2010) 2020, at 11.

<sup>710</sup> Although closely related to the second objective and thus the motivation to spur job creation within the EU, the “entrepreneurship”-objective deserves separate mention among the EU employment governance-objectives for the centrality it has assumed in this context. Not only does it capture the need to “foster entrepreneurial mindsets”, for self-employment is promoted both as a *direct* alternative to unemployment and as a more *indirect* way to job creation (with a view to innovative start-ups or SMEs assumed to grow and employ new people, when successful). But it is also linked to the “good governance”-ideal of Better Regulation (now captured by the EU’s REFIT-programme), which is to promote this “indirect” way to employment creation by fostering a more “employment-friendly business environment”. E.g. European Commission, COM(2012)173, at 4.

These broad employment objectives guide the process of EU employment governance. To be more precise, they provide a pool of normative ideas and corresponding discourses that are being further defined and patterned through the varied EU employment governance-toolkit. Representing them in a ranking is intentional, because the “Growth and Jobs”-mantra inherent to the “Lisbon 2020”-architecture illustrates how the objective of achieving high employment in Europe has been elevated to a sort of meta-objective, hovering above all the other EU employment objectives.<sup>711</sup>

In this context, the objective of worker protection has apparently lost prominence among the EU’s employment objectives. Yet, significantly, it has not been abandoned. It seems to have rather been re-packaged – namely, in the form of the Flexicurity-objective. “Flexicurity” provides a relatively novel European concept to the extent that it formulates a new vocabulary.<sup>712</sup> Still, the underlying idea is as old as the EU itself: how to strike the right balance between flexibility and security in labour market regulation. As a policy objective, Flexicurity is hence based on four components (flexible and reliable contractual arrangements; comprehensive lifelong learning (LLL) strategies; effective active labour market policies (ALMP); and modern social security systems).<sup>713</sup> The Member States are expected to design – based on a commonly defined set of principles<sup>714</sup> – their individual Flexicurity “pathways” whereby they develop the above components in the light of the specific circumstances prevailing in each country.

All in all, the EU evidently maintains rather ambitious aspirations in the field of employment regulation while its competences remain divided. Importantly, the EU system is characterised by a partial “floor of rights” in European employment law, while it lacks similar minimum standards regarding social security law and social protection. Although we thus see an obvious gap between ends and means at the core of the Union’s social model, the strength of the MSE-narrative is grounded in the fact that this discrepancy has

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<sup>711</sup> See Chapter 4.3.1.A. In the strategic framework, we see clearly the dominance of discourses focused on “job creation”. Semantically this primary employment-objective is directly linked to the meta-objective of economic “growth” that is predominantly linked to discourses about the improvement of “competitiveness”.

<sup>712</sup> Bekker (2011).

<sup>713</sup> To be more precise, the Flexicurity-components comprise: *Flexible and reliable contractual arrangements* (from the perspective of the employer and the employee, of “insiders” and “outsiders”) through modern labour laws, collective agreements and work organisation; *Comprehensive lifelong learning (LLL)* strategies to ensure the continual adaptability and employability of workers, particularly the most vulnerable; *Effective active labour market policies (ALMP)* that help people cope with rapid change, reduce unemployment spells and ease transitions to new jobs; and *Modern social security systems* that provide adequate income support, encourage employment and facilitate labour market mobility. This includes broad coverage of social protection provisions (unemployment benefits, pensions and healthcare) that help people combine work with private and family responsibilities such as childcare.<sup>7</sup> European Commission, *Communication Towards Common Principles of Flexicurity: more and better jobs through flexibility and security* (COM(2007) 359, 27 June 2007) at 12.

<sup>714</sup> The EPSCO Council adopted the *Common Principles of Flexicurity* on 6 December 2007, which were then endorsed by the European Council a week later. See Council of the European Union, *Towards Common Principles of Flexicurity - Council Conclusions* (Employment, Social Policy, Health and Consumer Affairs, 16201/07, Brussels, 6 December 2007); and Brussels European Council, *Presidency Conclusions* (16616/1/07 REV 1, Brussels, 14 February 2008).

traditionally *not* been portrayed as constraint. On the contrary, the EU's (limited) legal powers and capacity to coordinate, next to the Member States' prerogative in regulating social matters, constitute part of the model's distinctiveness and Europe's comparative advantage.

Moreover, in the example of the Flexicurity-objective we see how the main objectives of EU employment governance in the "Lisbon 2020"-architecture continue to be essentially hybrid in nature. This evolved hybridisation is, indeed, better understood when we recognise the *connective role* that the MSE has been playing in the Europeanisation of both social and employment policies.

### 6.3. EUROPEAN EMPLOYMENT REGULATION IN THE LIGHT OF ESTABLISHING A CSME

Since the development of the MSE has been linked expressly to the building of a European social market economy,<sup>715</sup> we have emphasised how this ambition is now anchored in the "Lisbon 2020"-architecture. As explained in Chapter 4, both the Lisbon Treaty and Europe 2020 pivot on the objective of establishing a CSME. Hence, today, the balanced pursuit of economic and social goals expressly carries constitutional status.<sup>716</sup>

Moreover, we have identified above the development of European employment and social objectives as a key dimension to past endeavours to establish a political union at EU-level. In the following, we will therefore contend how – despite increasing obstacles to the prospects of European political integration – the diversification of regulatory tools has helped maintaining employment and social issues on the EU agenda. The MSE-narrative has indeed proven rather innovative in that regard. It provides certain direction to EU employment regulation by emphasising the need for modernisation.

However, it is necessary to point out as well that the realisation of the ideal of establishing a CSME through the further development of EU employment regulation is facing important challenges. Particularly for the EU institutions, these amount to the critical need to overcome the EU's "social deficit" by putting into operation a balanced integrated approach.

#### 6.3.1. Developing a European capacity for political integration

As noted above, a concrete agreed plan for creating a political union at European level may have been lacking. Still, next to the establishment of the EMU, the MSE has long provided shorthand for promoting and protecting social objectives in the process of EU integration.

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<sup>715</sup> See Section 6.2.1.A.

<sup>716</sup> One could therefore argue that formally, the broad "social justice-competitiveness" paradigm, which underpinned Kilpatrick's "integrated regime"-thesis on EU employment governance, has thus been reinforced. Yet, as we have built our analysis on the inclusive notion of EU governance, the answer is necessarily more complex than that.

From the early 2000s, however, two crucial factors have particularly complicated and impinged upon the prospects for political integration at EU-level.<sup>717</sup> For one, the demise of the EU Constitutional Treaty proffered a hard blow against those hopes that expected the EMU's establishment to also summon up sufficient momentum towards creating a political union. Although the "Reform Treaty" adopted at Lisbon in 2007 took up most provisions from the Draft Constitutional Treaty, it too carried the symbolic defeat of the nominal constitutionalist project for Europe.<sup>718</sup>

At the same time, European enlargement to the East welcomed into the Union a sizeable number of new Member States which had recently undergone remarkable transformations from former communist regimes. As a result, within a few years, the Union expanded to almost double its size while its membership has come to be typified by dramatic socio-economic disparities. Consequently, the EU has been grappling with institutional adaptation while its prospects for future integration have become much more complex.

Whereas the obstacles to European political integration have thus been growing considerably, we argue that *the MSE-narrative has nonetheless been instrumental in keeping the idea within the range of possibility*. This is because the model possesses an inherent capacity for innovation, which is visible at both the procedural and the substantive level.

First, as indicated above, the MSE-narrative has been continuously used for framing the targeted development and diversification of regulatory tools at European level.<sup>719</sup> The Union has deliberately promoted the experimentation with different modes of regulation.<sup>720</sup> Thereby, it has put particular emphasis on developing the European coordination of national policies, such as through the EES. Despite the legal limits to the realisation of its social aspirations, the EU has thus demonstrated a remarkable ability for pragmatism and adaptability – especially in the field of employment regulation.<sup>721</sup>

In that respect, Rogowski (2008) underlines that a chief quality of the MSE discourse has been 'to provide the main unifying aspects of the coordination policies' developed by the EU.<sup>722</sup> This is where we see the important *connective role of the MSE*. In essence, the MSE provides 'an integral part of the ambitious project of a European Union that is *capable* of coordinating a wide range of policies, including the economic and employment as well as immigration, energy, and foreign and security policies of the

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<sup>717</sup> Degryse et al. (2013) distinguishes three approaches towards political integration at EU-level – (1) 'monetary union as the natural outcome of political union' (mainly 1970s); (2) 'monetary union as the trigger for political union' (from 1992); and (3) 'monetary union without political union' (actually presumes the impossibility of establishing true political union). They maintain that the latter two approaches have existed in mutual tension for the last two decades, but that much supports 2005 represented a turning point in favour of the third model, favouring 'market-driven convergence within monetary union'. Degryse et al. (2013) at 9-11.

<sup>718</sup> Avbelj (2008/10).

<sup>719</sup> Cf. Rogowski (2008).

<sup>720</sup> E.g. 2001 White Paper on EU Governance and as part of its "regulatory culture", see Chapter 4.

<sup>721</sup> Barnard (2014) at 216.

<sup>722</sup> Rogowski (2008) at 88.

member states’ [emphasis added, NB].<sup>723</sup> This coordinating capacity builds on the *adaptability* of the EU’s governance resources – i.e. a feature that, despite their diversity, characterises all the supra-national instruments to promote employment and social goals.<sup>724</sup> This common feature originates in the fact that the EU employment instruments (both, binding and non-binding) are generally designed in a “reflexive” manner to accommodate the national diversity in social protection systems and industrial relations traditions.<sup>725</sup>

Second, we have further intimated above that the MSE is as close as it gets to defining social ambitions at EU-level and thus bestowing purpose on European employment regulation. Its innovative capacity is therefore also visible in the *shift in emphasis* that the MSE-narrative has undergone at the start of the new millennium. As indicated in Chapter 4, the Lisbon Agenda pronounced a broad strategy around the need for *modernisation*.<sup>726</sup> The European Council’s vision for Europe ‘to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion’ required, amongst others, ‘modernising the European social model, investing in people and combating social exclusion’.<sup>727</sup>

Priority has thus been put progressively on modernising national welfare state models in the face of imminent common risks arising from ageing societies, globalisation, as well as new technologies.<sup>728</sup> This has included focussing EU policy action increasingly on “job creation” which has proven an expedient response to the economic situation of the time (and for the benefit of establishing the EMU).<sup>729</sup> The conceptual shift has equally been supported by the growing reliance on the development of the EU coordination instruments.<sup>730</sup> Jepsen and Serrano Pascual (2005), for instance, ascribe the latter a central place in their conception of the MSE ‘as a political project’. They emphasise the model’s contribution to constructing a European identity and thereby increasing the legitimacy of the policy interventions of the EU institutions and the integration process as such.<sup>731</sup>

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<sup>723</sup> Rogowski (2008) at 88.

<sup>724</sup> Armstrong (2013).

<sup>725</sup> Barnard (2014) at 217-218. See also Deakin and Rogowski (2011).

<sup>726</sup> ‘Most of the authors/policymakers who use the concept of ESM as a European project take the current situation to be a turning point between different models of advanced capitalism. The *process of globalization* produces a variety of common pressures which, in turn, expose the different parts of the world (including the USA and Europe) to the same imperatives of competitiveness and internal economic integration. In the face of *technological, economic and social change, which are presented as inevitably and obviously “given”*, the “need” for social and institutional modernization (structural reform, more training for new technologies, etc.) is considered equally obvious [...]’ [emphasis added, NB] Jepsen and Serrano Pascual (2005) at 236.

<sup>727</sup> European Council (2000) at 5.

<sup>728</sup> European Commission, COM(2005)525, at 5.

<sup>729</sup> Barnard (2014) at 217.

<sup>730</sup> See Chapter 2.

<sup>731</sup> The authors explain that such process of identity formation proceeds primarily through the construction of policy paradigms (that is, by framing shared problems and common solutions) through the EU’s coordination instruments (e.g. in the framework of the EES). Jepsen and Serrano Pascual (2005) at 240.

In short, this means, although the institutional conditions for strengthening the EU's social dimension may have become more complex, the MSE-narrative has proven to be resourceful for a considerable time. Not only has it helped retaining employment and social issues on the EU agenda.<sup>732</sup> More importantly, it has also provided European employment regulation with a sense of direction. On that view, it is possible to regard the MSE as a purposeful rhetorical framework that strives to master the delicate balancing act between respecting the sensitive division of competences between Union and Member States and promoting European social and political integration. In this way, we can also explain how the MSE – in its normative understanding – has promoted the hybridisation of EU employment objectives, given its role as a connective narrative for the EU's diverse coordination activities.

### 6.3.2. The challenges ahead

In effect, we argue that the goal of modernising the MSE has opened up new channels for upholding the ambition of political integration based on the diversification of regulatory techniques at EU level. To the extent that this modernisation includes the further development of EU employment regulation, it relates to realising the constitutional objective of establishing a CSME.

In that regard, it is important to review in more detail some of the complexities mentioned above that are clouding the prospects for future European integration in the social domain. In view of the necessity of implementing hybrid objectives in a balanced manner, a core challenge for the EU is overcoming its extant “social deficit”. Accordingly, we will propose that when implementing the EU's hybrid employment objectives, a *balanced integrated approach* will be key to modernising the MSE.

#### A) Recognising the EU's “social deficit”

Despite its considerable development (as illustrated in Chapter 4), the Union's constitutional framework is (still) a far cry from providing anything close to a “social constitution”. In the last decade, this deficiency has become especially apparent in the context of free movement – notably, in the jurisprudence of the CJEU.

As the EU polity is taking shape, the Court is increasingly called upon to make delicate judgments weighing nationally protected social rights against the European economic freedoms. In two landmark decisions of 2007, known as *Viking*<sup>733</sup> and *Laval*<sup>734</sup>, it dealt with a set of intricate cross-border disputes in the context of the free movement of services. While the judges recognised the establishment of a CSME as the *raison d'être* of the EU,<sup>735</sup> they eventually concluded their assessment in favour of the companies' free

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<sup>732</sup> Schoukens (2016).

<sup>733</sup> Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* [2007] ECR I-10779, ECLI:EU:C:2007:772.

<sup>734</sup> Case C-341/05 *Laval un Partneri* [2007] ECR 2007 I-11767, ECLI:EU:C:2007:809.

<sup>735</sup> Azoulai (2008) 1335-1356.

movement rights, by submitting the social action in defence of workers' rights to a proportionality test.<sup>736</sup>

According to Joerges and Rödl (2009), these judicial decisions lay bare the fact that a severe “social deficit” pervades the EU’s constitutional framework up to this day. Thereby, they highlight the fundamental constitutional significance of ‘the [original] exclusion of the social dimension from the integrationist objectives’,<sup>737</sup> referring to Scharpf’s famous “decoupling thesis” regarding the social and the economic sphere in the European project.<sup>738</sup> That deficit, they emphasise, is still manifest in ‘this jurisprudence [being] a step towards the “hard law” of negative integration’.<sup>739</sup> They explain:

‘The issue in the cases of Laval and Viking concerned the economic (ab)use of mere wage differences, which resulted in the unions reacting with national strategies in the Laval and post-national strategies in the Viking case. The unions took action, in order to counter the increased power of employers caused by the European economic freedoms. To argue that the right to collective action to national constellations is subject to a European right is not only to conceal the *de facto* decoupling of the social from the economic constitution, but also to *de jure* subordinate the former to the latter.’<sup>740</sup>

The CJEU is thus criticised for overstepping its mandate.<sup>741</sup> Recognising that ‘the establishment of a comprehensive European welfare state’ seems out of reach, Joerges and Rödl note ‘the respect for the common European legacy of *Sozialstaatlichkeit* seems to require both the acceptance of European diversity and judicial self-restraint whenever

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<sup>736</sup> The Court thereby exhibited restraint in respect of the EU’s limitation with regard to social competences; it chose not to fill some very significant statutory gaps left unfilled by the EU legislator. Ibid. at 1351.

<sup>737</sup> Joerges and Rödl underline the problematic nature of this decoupling, by arguing ‘that this question is of fundamental constitutional significance. The exclusion of the social sphere from the integration project provides the recipe for potential failure which could be of constitutional significance for those who assume that the citizens of constitutional democracies are entitled to vote in favour of welfare policies. This is by no means a trivial premise, not even at national level. The second query concerns the integration process. In the course of its intensification and growing impact on the “economy and society”, a response to the “social deficit” has become a political necessity.’ In reference to McCormick (2007), Joerges and Rödl (2009) at 3.

<sup>738</sup> See Chapter 1 and 4. Joerges and Rödl rephrase the central problem as follows: ‘To summarise, Europe was conceived according to principles of a dual polity. Its “economic constitution” was non-political in the sense that it was not subject to political interventions. This was its constitutional-supranational *raison d’être*. Social policy was treated as a categorically distinct subject. It belonged to the domain of political legislation, and, as such, had to remain national. The social embeddedness of the market could, and, indeed, should, be accomplished by the Member States in various ways— and, for a decade and a half, the balance appears to have been stable.’ Ibid at 5.

<sup>739</sup> Ibid. at 19.

<sup>740</sup> Ibid.

<sup>741</sup> ‘The ECJ is *not a constitutional court* with comprehensive competences. It is *not legitimated to reorganise the interdependence of Europe’s social and economic constitutions*, let alone replace the variety of European social models with a uniform Hayekian *Rechtsstaat*.’ [emphasis added, NB] Joerges and Rödl (2009) at 18.

European economic freedoms come into conflict with national welfare state traditions'.<sup>742</sup> So far, however, the Court seems to have failed to practice such self-restraint in respective conflict situations.

As confirmed by subsequent CJEU decisions,<sup>743</sup> the Laval case law deals with the effects that the Internal Market – i.e. the cross-border provision of services – has on European employment regulation. It highlights the incompleteness of the Union's constitutional framework given its apparent failure to put fundamental social rights on an equal footing with the Treaty's economic freedoms, when applied in practice.

What implications does this “social deficit” have for our study of the different ways in which the EU influences employment regulation through its socio-economic governance apparatus? We are specifically interested in the effects that EU Economic Governance – and, especially the EMU – has on European employment regulation. Also, here, the existing national divergences (i.e. on important socio-economic indicators such as growth, employment levels, competitiveness etc.) provide cause for concern. The maintenance of price stability in a monetary union, in principle, requires that its members are relatively homogenous. Considering the very diverse macro-economic landscape of the EA, however, convergence is an essential requirement to ensure the proper functioning of the EMU.

In view of the central objective of establishing a European social market economy, a key question is how to bring about this convergence. As economic actors and Member States compete in the Internal Market, the convergence process may take either direction – upward or downward. Notably, the notion of “downward convergence” has been associated with the idea of regulatory competition and its potential negative impact in terms of “social dumping”.<sup>744</sup> The distinct character of the MSE with the EU employment acquis at its core, however, seems to require that EU-level convergence encompasses “social progress” and a minimum of respect for basic workers' rights (at least, those codified by EU directives). On that view, the design of governance tools for implementing the EU's hybrid employment objectives will therefore require a *balanced integrated approach* to modernising the MSE. Hereafter, we will attempt to outline the main elements of this approach

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<sup>742</sup> Joerges and Rödl (2009) at 18. ‘It should therefore refrain from “weighing” the values of *Sozialstaatlichkeit* against the value of free market access. Its proper function, we have argued, is to develop supranational law which compensates for the “democracy failures” of nation states. National welfare traditions do not—by definition—represent such failures. [...] the watering down of welfare state positions through supranational law cannot be accepted as a correction of the failures of national democracy, but rather, as a dismantling of modern democratic self-determination without offering any kind of replacement.’ Ibid. at 18-19.

<sup>743</sup> See Case C-346/06 Rüffert [2008] ECR I-1989; and C-319/06 Commission vs Luxembourg [2008] ECR I-4323.

<sup>744</sup> Cf. Barnard and Deakin (2000, 2001).



## B) The need for a balanced integrated approach

With regard to the Internal Market, overcoming the Union's social deficit would especially require judicial self-restraint whenever European economic freedoms come into conflict with national welfare state traditions. This seems necessary to instil a basic acceptance of European diversity into EU economic law. Regarding the EMU, instead, the convergence process required for the smooth -functioning of the Euro needs to be directed towards sustaining a CMSE. This has implications for the design of the interventions of the EU institutions involved in the economic governance of the Union.

### *Move from negative to positive integration*

A key challenge for policy-makers will be putting into practice the general move from negative to positive integration. While the former describes the removal of national legal and administrative barriers to the free flow of production factors, positive integration includes the elaboration of European standards through common rule-making. This means that for the Union to become truly a supra-national polity founded in a social market economy, it must move *beyond* its collective self-concept as an exclusive market entity. This is because positive integration namely requires the 'reconsideration of the legal scope of negative integration in the light of social and political goals other than the maximisation of market competition'.<sup>745</sup>

As the equivalent of the CMSE, the Europe 2020-Strategy builds on the "Growth and Jobs"-mantra to direct EU economic governance. The "Jobs"-objective essentially reflects the fact that the EMU practically obliges the EU to exert itself for increasing the level of employment, despite its limited powers in that regard. Deakin and Reed (2000) regard this 'overlap between employment policy and EMU' as 'the key area for the resolution of conflicts between economic and social policy objectives'.<sup>746</sup> In this connection, it is useful to recall our earlier indication that in EU discourse, the notion of "employment policy" assumes a rather awkward position.<sup>747</sup> Conceptually, it finds itself sandwiched between social policy and economic policy (see Figure 6.1. below).<sup>748</sup>



**Figure 6.1.: The conceptual overlap that typifies EU discourse regarding employment regulation**

<sup>745</sup> Scharpf (1999) 160; see also Rogowski (2008) at 88.

<sup>746</sup> Deakin and Reed (2000) at 86. See also Freedland (1996).

<sup>747</sup> See Section 6.2.1.B.

<sup>748</sup> See Freedland (1996); and cf. Büttgen (2013).

Deakin and Reed advocate that an “integrated approach” to labour market regulation might help to resolve potential normative conflicts between the policy fields. Their proposal is worth considering at some length.

In fact, it is based on the recognition ‘that rules relating to employment security and the effectiveness of macro-economic policy in stabilising employment levels play an important role in underpinning employment policy’.<sup>749</sup> An integrated approach, therefore, needs to be carefully balanced through the alignment of social, employment and macro-economic policies. Deakin and Reed emphasise:

‘it is the *linkages* between social policy (or labour standards), employment policy (in the form of measures directed at enhancing labour market participation on the basis of investments in human capital), and macro-economic policy (the setting of general conditions for stable and sustainable economic growth) which matter.’<sup>750</sup>

*The need to align social, employment and macro-economic policies*

They support this claim with the following three reasons. Firstly, as regards EU employment or labour standards, the authors define the ‘economic purpose of social policy intervention’ as countering the destructive effects of regulatory competition.<sup>751</sup> This point links back to our discussion of the gap between ends and means that underpins the MSE-narrative.

In that regard, it is important to recognise that in the framework of EU social policy, the aim of harmonisation has never been to achieve uniformity or the parity of costs.<sup>752</sup> On the contrary, the whole idea of establishing a European “floor of rights” builds not only on the *acceptance* of national diversity as a given, but also on the *necessity* of maintaining and promoting that diversity. Precisely this diversity of employment and social institutions and regulatory approaches, in fact, provides the foundation for mutual learning and thus the potential for advancing (local) employment standards through *experimentation*.<sup>753</sup> The prevention of destructive competition between the Member States’ regulatory systems through EU employment regulation thus becomes an essential precondition to attain this *enabling capacity* in the application of translational labour standards.<sup>754</sup>

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<sup>749</sup> Deakin and Reed (2000) at 85.

<sup>750</sup> Deakin and Reed (2000) at 85.

<sup>751</sup> They elaborate: ‘Rather than prohibiting competition over rules, it regulates that process, in effect giving it a steer away from the direction of a “race to the bottom”. It forecloses certain options of Member States, while allowing others. For free market purists, this is not much of an improvement upon outright prohibition. However, the key issue here is whether a completely unregulated market for social policy systems within the EU would select the most efficient available solution.’ Deakin and Reed (2000) at 82.

<sup>752</sup> Ibid.

<sup>753</sup> Cf. Schiek (2012).

<sup>754</sup> ‘A race to the bottom could easily result in a “low level equilibrium” where no jurisdiction felt able to take steps to raise its standards, for fear of capital flight and further ‘social devaluations’ by its rivals.’ Deakin and Reed (2000) at 83.

This argument, in fact, links up with Bercusson's "dynamic" understanding of the subsidiarity principle, presented earlier.<sup>755</sup> He maintained that there is an actual need for the EU to "learn" from the labour law systems of the Member States - for instance, regarding the constructive coordination between different modes of regulation (such as standard-setting through legislation and by collective labour agreements).

Secondly, it is important to recognise that the interaction between social policy – i.e. notably, labour standards – and employment policy is very complex.<sup>756</sup> As noted above, the European notion of "employment policy" comprises measures to improve job creation and skills development.<sup>757</sup> Such ALMP measures include 'a number of mechanisms aimed at improving vocational training, assisting job search and encouraging employers to take on additional workers [and] mostly takes the form of targeted public expenditure and subsidies to enterprises'.<sup>758</sup> The design of these measures should be responsive.<sup>759</sup> Considering that 'the economic effects of employment regulation are complex', entailing both negative and positive consequences in the labour market, it is important that ALMP plays a "compensatory" role regarding 'the effects of labour standards and wage determination policies which put firms under continuous pressure to improve productivity'.<sup>760</sup>

Finally, the proposed integrated approach also recognises the need for intervention on the demand side of the employment market by means of macro-economic policy. In the mid-twentieth century, the Keynesian ideal of "full employment" and the corresponding active role for government intervention used to be broadly accepted among economic policy-makers.<sup>761</sup> Today, however, the question of managing economic demand through public policy is a much more sensitive, highly politically divisive one. This is

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<sup>755</sup> See Section 6.2.1.B.

<sup>756</sup> 'As such, [employment policy] interacts with "social policy" – or, at least with that part of it relating to labour standards – in a number of complex ways. In contrast to the specific statutory form which is given to most interventions in the social policy field, active labour market policy is authorised only by general legislative provisions which confer broad discretionary powers upon governmental bodies. In this sense, active labour market policy is characteristics of "promotional" labour standards, the purpose of which is to promote employment growth and the reintegration of excluded groups into the labour force.' In reference to Sengenberger and Campbell (1994); Deakin and Wilkinson (1994); and Freedland (1996), see Deakin and Reed (2000) 84.

<sup>757</sup> See Section 6.2.1.B.

<sup>758</sup> Deakin and Reed (2000) 83-84.

<sup>759</sup> Deakin and Reed argue that 'long-run effects of labour standards, in terms of raising productivity and hence the competitiveness of industries and firms, have to be set against potentially disruptive effects in terms of the exclusion from employment or the less highly skilled and the long-term unemployed. [...] it is because these offsetting effects of labour standards may operate to the disadvantage of certain groups that active labour market policy measures must be designed so as to interact as far as possible with interventions in the field of social policy.' Ibid.

<sup>760</sup> In reference to Nickell (1997: 62), see *ibid.*

<sup>761</sup> 'In terms of labour markets, the long-term development from the 19<sup>th</sup> century to the 1960s reveals that Western European societies increasingly organised themselves on a national basis around the concept of wage labour. This orientation was socially stabilised by a political and institutional guarantee in the form of a commitment to "full employment" with a comprehensive and protective unemployment insurance should that guarantee exceptionally fail.' Str  th (2000) at 15.

especially the case at European level, because it effectively escapes Union competence.<sup>762</sup> As confirmed in the past, in principle, the EU has neither the power nor the funds to organise large-scale public work programmes that could have a meaningful impact on employment creation on the ground. Deakin and Reed, nonetheless, stress how important it is for macro-economic policies to play a stabilising role in view of employment levels:

‘Under conditions of reduced or falling demand for labour, or under circumstances where employers can hire and fire at will, a further problem is that subsidy schemes tend to result in “churning”, as individuals simply move from subsidised work back into unemployment.’<sup>763</sup>

In conclusion, the authors emphasise that the ‘realisation of [such] an integrated approach to labour market regulation would represent a highly significant step in the modernisation of the European social model’.<sup>764</sup>

#### 6.4. CONCLUDING REMARKS: EU EMPLOYMENT GOVERNANCE AS KEY TO MODERNISING THE EUROPEAN SOCIAL MODEL

This chapter has sought to increase our understanding of the EU’s policy aspirations regarding employment regulation. That attempt results from our main purpose of studying EU employment governance to evaluate the EU’s capacity to uphold and promote workers’ rights in Europe. Therefore, we do not only reflect on the *state* of EU employment governance today but also aim to discuss *potential needs for improvement* from a labour law-perspective. Accordingly, we have set out some critical parameters to serve as a basis for this evaluative discussion (see Chapter 8).

Firstly, we began by reviewing how the Union’s competences regarding employment and social policies feature under the Lisbon Treaty. This has shown how EU employment regulation lies at the core of the MSE. Our examination has therefore, secondly, focused on what role the MSE has played alongside the establishment of the EMU. This has helped to better comprehend the hybrid nature of the EU employment objectives. As a connective narrative that has jointly promoted employment and social objectives at EU-level in the face of progressing European economic integration, the MSE has underpinned the hybridisation process that has increasingly blended the Union’s aspirations for socio-economic governance. This development is now essentially reflected in the fact that the objective of establishing a CSME has been constitutionalised.

In a third step, we have furthermore discussed how the development of European employment and social objectives has contributed to long-standing endeavours to establish a political union at EU-level. This has in fact revealed the innovative capacity inherent in

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<sup>762</sup> Cf. Caponetti (2015).

<sup>763</sup> Deakin and Reed (2000) at 85.

<sup>764</sup> Ibid. This would have the effect, they anticipate, that ‘the traditional core of social rights, with its emphasis on protection and compensation, would then extend to the *right to participate in the labour market on the basis of meaningful employment opportunities*.’ [Emphasis in the original] Ibid.

the MSE-narrative that has effectively helped maintaining employment and social issues on the EU agenda despite the Member States' prerogative to regulate in these fields. It has done so by justifying EU policy action with the need for modernising European welfare models and linking this with the diversification of regulatory tools.

Consequently, we have defined *our normative understanding of the MSE* as providing a purposive rhetorical framework that strives to master the delicate balancing act between respecting the sensitive division of competences between Union and Member States and promoting European social and political integration. In that sense, we have argued that the MSE is as close as it gets to bestowing purpose onto EU action in the employment field. Of course, it may (yet) be unable to provide a straightforward policy agenda or a comprehensive justification for European intervention. Still, the MSE effectively links European employment regulation to the development of the Union's social dimension, which is considered critical to the functioning of the EU polity. On that view, it may arguably be able to transcend the normative deficiency that characterises EU employment law by supporting the advancement of EU employment regulation in a more comprehensive manner.

Finally, then, the goal of modernising the MSE has the capacity of keeping alive (if only, remotely) the ambition of European political integration. Even though the ideational framework of "Lisbon 2020" now pivots on the balanced pursuit of economic and social goals as the *raison d'être* of the EU polity, the prospects for this ambition have become increasingly complex. Accordingly, we have singled out the critical need to overcome the Union's "social deficit" as a key challenge for the EU institutions in order to bring the ideal of a European social market economy to fruition.

In the context of the Internal Market, the onus of this challenge is particularly on the CJEU by practicing more self-restraint when faced with conflicts between the European economic freedoms and nationally protected social rights. In the context of the EMU, the responsibility is primarily on European policy-makers to put into practice a *balanced integrated approach*. The corresponding proposal by Deakin and Reed, discussed above, considers the key to modernising the MSE is in the pursuit of:

'a "high wage, high productivity" route to competitiveness based on an extensive floor of labour standards [that] pre-supposes an equally extensive range of administrative and financial measures aimed at promoting training and investment in human capital, reintegrating the unemployed into the labour market, and maintaining sustainable levels of demand for labour so as to limit "churning".'<sup>765</sup>

These theoretical reflections provide a constructive basis for analysing, in the next chapter, what impact the "Lisbon 2020"-architecture and its amendments during the crisis has had on the organisational aspects of the EU employment governance-apparatus.

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<sup>765</sup> Deakin and Reed (2000) at 84-85.

## Chapter 7: EU employment governance instruments in operation under the “Lisbon 2020”-architecture

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### 7.1. INTRODUCTION

This chapter continues the preceding analysis of how EU employment governance has been embedded in the architectural framework of “Lisbon 2020.” It will examine *whether EU employment governance can still be regarded as an integrated regime today*. We are thereby trying to assess comprehensively the Union’s governance capacity regarding employment regulation. Since discussing regime dynamics in EU governance is evidently a rather abstract endeavour, we will simultaneously aim to show the practical relevance of that discussion.

Recalling in that regard our proposition from Chapter 1, Kilpatrick’s “integrated regime” thesis was constructed around a *presumption of effectiveness*. Her characterisation of an “integrated” EU employment governance-regime in 2005 built on the assumption that the various governance instruments’ mutual interaction effectively contributed to the achievement of the EU employment objectives that emanated from an over-arching “social justice-competitiveness” paradigm. By implication, then, studying (the development of) the EU employment governance-regime is actually about *assessing whether or not European employment regulation is (still) effective today in reaching the EU’s employment goals*.

We will address these two questions by analysing the EU employment governance instruments in operation today. That is, we will consider how the “Lisbon 2020”-architecture has affected them, focusing specifically on the (longer-term) consequences of the EU crisis management. As argued in Chapters 4 and 5, the efforts to strengthen economic governance have revealed the emergence of a *new* integrated regime of EU Economic Governance centred on the European Semester. The latter thus does not only epitomise the ideal of “integrated coordination” for implementing the 2020-objectives. It also unites the operation of two inter-dependent cycles of preventive and corrective economic policy coordination. We will therefore study what implications this new regime has for European employment regulation.

To do so, we will proceed in the following way. First, we will review what it means to study the effectiveness in implementing EU *hybrid* objectives (Section 7.2.). This will prepare the methodological ground for the subsequent analysis of the EU employment governance instruments. There (Section 7.3.), we will examine critically the impact of “Lisbon 2020”, considering the EU’s expansive coordination capacity and how it relates to the bloc’s standard-setting capacity in employment regulation. This will be complemented by a brief discussion of an alternative scenario (Section 7.4.), highlighting some positive developments of recent years, before concluding how fragmentation typifies today’s EU employment governance (Section 7.5.).

## 7.2. THE EFFECTIVENESS IN IMPLEMENTING HYBRID OBJECTIVES

Chapter 6 has clarified how the Union's policy aspirations regarding employment regulation relate to its express duty to pursue economic and social goals in a balanced manner. The core obligation of establishing a CSME, now formally incorporated in the "Lisbon 2020"-architecture, confronts the EU institutions with the critical challenge of overcoming the Union's "social deficit".

In this connection, we have further explored the hybrid nature of the EU employment governance objectives and recognised that the connective role of the MSE-narrative in European integration has propelled this hybridisation. We have explained that relationship as follows. On the one hand, the European employment *acquis* finds itself at the heart of the MSE, based in the Union's power to set minimum employment standards (*descriptive understanding*). On the other, the MSE-narrative has been bestowing purpose onto European employment regulation and its advancement in EU integration, based on the recognition of the mutually supportive role of economic and social policies (*normative understanding*). EU employment regulation can therefore be located at the centre of driving the development of the Union's social dimension towards establishing a European social market economy.

These two types of conceptions help to structure the following deliberations. Firstly, we will review the limits of the EU's legislative capacity as the preferred means to safeguard workers' rights. The normative view of the MSE instead emphasises the hybrid nature of the EU employment objectives and how these are linked to a diversified pool of governance tools. We will therefore, secondly, highlight how the normative vagueness of these objectives necessarily implies that further meaning will be created at the politico-organisational level. Accordingly, we will outline the methodological approach for analysing the framing narratives of the AGS, which will be done in Section 7.3.

### 7.2.1. The EU employment *acquis* – enough as a basis for European worker protection?

Regarding the first descriptive notion, it is important to realise that legislative instruments have until recently been playing the decisive role in the protection of workers' interests at EU-level because the EU possesses the competence to set minimum employment standards. In this respect, we will briefly review to what extent the EU employment *acquis* is still sufficiently equipped to fulfil that role in the framework of the highly sophisticated EU governance architecture. Thereby, we will focus on the problem of legislative inertia, the limitations to the enforceability of CFREU rights and the impact of Better Regulation.

As mentioned in Chapter 6, these shortcomings in the EU's capacity to set basic employment standards through traditional legal means have been linked to the claim of normative deficiency that is said to characterise EU employment law.<sup>766</sup> This view laments the lack of a clear policy agenda for the advancement of European employment regulation. The following will provide an overview of the main limits to the EU's legislative capacity as preferred means to safeguard workers' rights within the context of "Lisbon 2020".

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<sup>766</sup> Cf. Barnard (2014); and Freedland (1996).

### A) Legislative inertia

Considerable inertia has in fact been characterising the legislative domain of EU employment governance for some time now. The reasons for this inactivity are broadly familiar.

Social policy involves rather delicate policy choices, including redistributive questions, which are sensitive to national cultures, histories and institutions. With its successive enlargements that led to an almost doubling of its membership within a matter of a few years, the EU has been forced to accommodate a large variety of national social protection systems. This growing heterogeneity has inevitably increased the difficulties in European decision-making with regard to achieving consensus or even gathering qualified majorities on defining common labour standards. The eight-year long legislative procedure that led to the adoption of the Temporary Agency Work Directive in 2008 is a case in point, as is for instance the stalemate on the negotiations regarding the revision of the Maternity Leave Directive.<sup>767</sup> Furthermore, the failure of the so-called “Monti II-proposal” showed EU leaders that, following the adoption of the Lisbon Treaty, national parliaments are also a new potential veto power to reckon with – especially, when legislating on the appropriate balancing between economic freedoms and social rights.<sup>768</sup>

In addition, the alternative route of standard-setting through framework agreements by the social partners – with the option of incorporating such agreements into an EU directive – is experiencing various hindrances.<sup>769</sup> To date, there are only three cases where such agreements have been included in EU Directives, such as the Fixed-Term Work Directive.<sup>770</sup> One such hindrance is that structural imbalances complicate the

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<sup>767</sup> European Commission, Delivering for parents: Commission withdraws stalled maternity leave proposal and paves the way for a fresh approach (Press release, IP/15/5287, Brussels, 1 July 2015) [http://europa.eu/rapid/press-release\\_IP-15-5287\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5287_en.htm) (accessed 31 March 2017).

<sup>768</sup> In March 2012, the Commission advanced a legislative package in response to the upheaval caused by the Laval case and the corresponding jurisprudence that followed it. It intended to promote quality employment in the context of cross-border services provision and increase competitiveness in the EU by updating and improving the way the single market works, while safeguarding workers' rights. However, its codification attempt – the so-called “Monti II-Proposal” – of putting workers' rights and their freedom to strike on an equal footing with the freedom to provide services failed miserably. European Commission, Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (COM(2012)130, Brussels, 21 March 2012). As explained in Chapter 6, this gave rise to two yellow card-procedures.

<sup>769</sup> See, for instance, the failed negotiations on the revision of the Working Time Directive. S. Clauwaert, Failure of the Revision of the Working Time Directive negotiations (EU Social Dialogue – Latest Developments, ETUI, December 2012) <http://www.worker-participation.eu/EU-Social-Dialogue/Latest-developments/Failure-of-the-revision-of-the-working-time-Directive-negotiations> (accessed 31 March 2017).

<sup>770</sup> Next to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP; there is the Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC; and the Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC.



propensity of the European social partners to reach such agreements.<sup>771</sup> Employers' and business interests are essentially entrenched with the Union's traditional aspirations for market integration. On that view, there is little incentive for the European employers' associations to conclude framework agreements, when those are perceived as jeopardising that classical central rationale. The union side, in contrast, is not only structurally disadvantaged in terms of organisational resources and weaknesses at the national bases of the European trade union movement. It is also facing a fundamental disadvantage in that the ETUC is seeking a 'major change of course'<sup>772</sup> for the EU project– as, for example, illustrated by its Social Progress Protocol.<sup>773</sup>

Despite these discrepancies, there have been issues, on which the European social partners have agreed in recent years.<sup>774</sup> But even then, the adoption of negotiated employment standards at EU level are not guaranteed. Here, an institutional obstacle may emerge when the European Commission, being wary of political quandaries, eschews the social partners' request to adopt their agreement into a proposal for a directive.<sup>775</sup>

#### B) The limitations on CFREU enforceability

Against this backdrop, the question arises of to what extent the CFREU may step in regarding the safeguard of fundamental social rights in EU employment governance. Chapter 4 already illustrated the range of labour and social rights contained in the Charter.<sup>776</sup> Now we will try to understand better how the enforceability of those rights is constrained.

Undoubtedly, the elevating of the legal status of the Charter to the 'same value as the treaties' has been a crucial step forward for the European Union.<sup>777</sup> Together with the extended social values and objectives of the EU, it has – at least, symbolically – advanced the European integration project by subjecting the Internal Market to “constitutional embedding”.<sup>778</sup>

The CFREU's practical role in terms of safeguarding fundamental social rights, however, remains ambiguous because of the limitations that frame its interpretation and application. Andronico and Lo Faro (2005) provide an illustrative summary of these

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<sup>771</sup> Barnard (2014) at 214.

<sup>772</sup> Ibid.

<sup>773</sup> ETUC (2008). See <https://www.etuc.org/proposal-social-progress-protocol> (accessed 31 March 2017).

<sup>774</sup> See most recently the European Social Partners' Autonomous Framework Agreement of 8 March 2017 on Active Ageing and an Inter-generational approach of the ETUC, BUSINESSEUROPE, CEEP, and UEAPME, available at [https://www.etuc.org/sites/www.etuc.org/files/press-release/files/framework\\_agreement\\_on\\_active\\_ageing\\_003.pdf](https://www.etuc.org/sites/www.etuc.org/files/press-release/files/framework_agreement_on_active_ageing_003.pdf) (accessed 31 March 2017).

<sup>775</sup> A. Broughton, Commission rejects proposed agreement in hairdressing sector (EUROFOUND, 18 November 2013) <https://www.eurofound.europa.eu/observatories/eurwork/articles/commission-rejects-proposed-agreement-in-hairdressing-sector> (accessed 31 March 2017).

<sup>776</sup> See Chapter 4.2.1.B.

<sup>777</sup> Article 6 TEU.

<sup>778</sup> Cf. Schiek (2015).

limitations in relation to those whom the Charter is in principle addressed to – the EU institutions, the individual, and the Member States.<sup>779</sup>

First, the Charter's provisions are addressed to 'the institutions, bodies, offices and agencies of the Union'.<sup>780</sup> The EU institutions should respect and apply these provisions 'in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties'.<sup>781</sup> The Charter thus takes a "neutral" stance regarding the division of competences between the EU and the Member States.<sup>782</sup> Considering its character as a catalogue of fundamental rights, this is odd since it casts doubts on the CFREU's potential of actually granting effective protection of such rights. This restraint has clearly been included for political reasons and to reaffirm effectively the application of the subsidiarity principle. The most renowned example for that neutrality is the resulting tension between the Charter's inclusion of the freedoms of assembly and association and the right of collective bargaining and action, on the one,<sup>783</sup> and the exclusion of collective labour rights from the Treaty's Social Policy Title, on the other hand.<sup>784</sup>

Second, the individual is a traditional addressee of "rights" discourses. Here, one distinguishes between the "negative" and "positive" conception of fundamental rights. In the first case, they impose limits on the (arbitrary) exercise of public power towards the individual, i.e. playing a reactive role through ex post adjudication.<sup>785</sup> The second conception ascribes fundamental rights an active role in the sense that they impose upon States a positive obligation to take programmatic action to ensure the implementation ex ante.<sup>786</sup>

Under the CFREU, the question of to what extent citizens may derive subjective entitlements from its provisions is less straightforward because of the distinction between "rights" and "principles". The former are to be 'respected',<sup>787</sup> the latter 'observed'.<sup>788</sup> This means, those provisions that contain principles will not be judicially cognisable beyond the status of an interpretative tool unless they have been implemented by legislation or executive acts.<sup>789</sup> However, the identification as to which of the CFREU's provisions

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<sup>779</sup> Based on Andronico and Lo Faro (2005).

<sup>780</sup> Article 51(1) CFREU.

<sup>781</sup> Ibid.

<sup>782</sup> Article 51(2) CFREU states: 'The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.' This means, it 'does not alter the system of rights conferred by the EC Treaty and taken over by the Treaties.' Explanations (\*) Relating to the Charter of Fundamental Rights, OJ 2007 C 303/02, at 33.

<sup>783</sup> Articles 12 and 28 CFREU respectively.

<sup>784</sup> Article 153 (5) TFEU.

<sup>785</sup> Smismans (2005) at 222; and Andronico and Lo Faro (2005) at 52.

<sup>786</sup> Smismans (2005) at 222; and Andronico and Lo Faro (2005) at 53.

<sup>787</sup> Subject to the conditions outlined in Article 52 (1) until (4) CFREU.

<sup>788</sup> Article 51 (1) CFREU.

<sup>789</sup> Article 52 (5) CFREU. Schiek (2015) at 83.

contain justiciable rights and which principles remains tricky.<sup>790</sup> The restriction seems to target particularly those ‘economic and social rights, which are considered to require a greater degree of positive action and social expenditure than other rights’.<sup>791</sup> This may suggest that social rights are “constitutionally inferior” vis-à-vis civil and political rights in the EU order. Such a view, however, would appear inconsistent with the fact that the Charter’s structure and set-up, as adopted in 2000, promised that such hierarchical conception had been overcome.<sup>792</sup>

Third, other direct addressees of the CFREU provisions are the Member States. This, however, applies only to the extent that national governments implement Union law, and not when they act in autonomous capacity.<sup>793</sup> The Charter ‘cannot be understood as extending by itself the range of Member State action considered to be “implementation of Union law”’.<sup>794</sup> Accordingly, the question arises of what amounts to an implementation of European law. Further below, we will show how this question and the other issues gain renewed attention in the context of the EU’s enhanced engagement in the meta-coordination of socio-economic policies.

### C) Reluctance to legislate?

Finally, another trend is noteworthy, adding to the impression that the EU’s legislative capacity in the employment domain seems currently compromised. In Chapter 4, we have described the EU’s Better Regulation-agenda, which is deliberately promoting an integrated approach to the impact assessments of Union initiatives and the evaluation of the existing EU acquis. We have, however, also expressed doubts as to whether this strategic commitment of the EU to better law-making might actually represent a sort of Trojan horse. Several reasons support these doubts.

The EU deploys the Better Regulation-agenda in an attempt at fostering a proper European notion of “Good Governance”. Thereby, the ideal of evidence-based policy-making is inspiring the design of the respective tools and methods.<sup>795</sup> Of course, policies should be well-founded irrespective of the level of decision-making. But, given the long-standing criticism of the democratic deficit at European level, one may wonder to what extent this persistent preoccupation with verifying policy effect and impact actually contributes to a (further) depoliticization of the EU legislative process.<sup>796</sup>

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<sup>790</sup> In this respect, Schiek (2015) underlines: ‘Although the difference matters, the Charter does not clarify which of its provisions contains rights and which contain principles. In so far as the explanations have legal value, the wording of the Charter itself does not seem decisive. The explanations categorise Articles 25, 26 and 37 as principles, although the headings of the first two articles contain the term “right”. The explanations also state that articles may contain rights and principles alongside each other, and mention Article 34 as an example.’ Ibid. at 83.

<sup>791</sup> In reference to De Búrca (2003), see Andronico and Lo Faro (2005) at 58.

<sup>792</sup> Andronico and Lo Faro (2005) at 58.

<sup>793</sup> Article 51(1) CFREU.

<sup>794</sup> Explanations (\*) Relating to the Charter of Fundamental Rights, OJ 2007 C 303/02, at 32.

<sup>795</sup> Smismans (2015). In view of the problem of the “implementation gap”, evidence-based policy-making is regarded useful to legitimise European rule-making.

<sup>796</sup> See Chapter 4.

This risk relates to several concerns that have been accompanying the agenda and which can be summed up as follows. These regard critically, for instance, the Commission's monopoly in the design and implementation of the Better Regulation initiative and the REFIT-programme. This includes targeting the lack of transparency in calculation and the inadequate nature of assessment methods. Additionally, the Commission's use of public consultations appears not only more frequently but apparently indiscriminately. These extensive surveys are criticised for often being ill-defined and time-consuming, and susceptible to stalling the legislative process through "paralysis by analysis".<sup>797</sup> Finally, the role and choice of advisors and consultants have been questioned,<sup>798</sup> fuelling worries about turning the agenda into a "government by experts".<sup>799</sup> Altogether, such objections regarding methodological inadequacies risk breeding mistrust in EU law-making. Consequently, they may also jeopardise the credibility of the Union's legislative capacity.

Overall, the Union's capacity for setting binding rules on substantive issues in the employment field thus appears currently rather curtailed. The restraint emanates above all from structural obstacles to the legislative process. In view of the apparent absence of a clear narrative as to why the EU should act in the social field (descriptive understanding of the MSE), the present absence of a credible possibility for the EU to legislate on employment matters would not seem much of a surprise.<sup>800</sup>

## 7.2.2. Studying the implementation of the Flexicurity-objective

While its general purpose may be obscure, EU employment law is still linked constitutionally to the objective of protecting workers' rights. Yet, given the current constraints on the EU's capacity to use traditional legal means for worker protection, we look to consider the potential of other instruments in the EU governance architecture to contribute to this capacity.

In that connection, from a normative perspective, the MSE-narrative has been conceived as giving purpose to EU employment regulation. This purpose, today, is epitomised in the central objective of establishing a CSME, ingrained in the Union's constitutional framework. Such a view recognises that EU social policy has shown remarkable resilience in the past,<sup>801</sup> and provides a more constructive basis for deliberating

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<sup>797</sup> Schömann (2015).

<sup>798</sup> Notably, there were misgivings surrounding the re-appointment of the chairman of the HLG despite expressed objections to his leadership role in 2014. Ibid.

<sup>799</sup> Ibid.

<sup>800</sup> Cf. Barnard (2014).

<sup>801</sup> The enforcement of the existing EU employment *acquis* continues to play a meaningful role, which contradicts – at least, to certain extent – the sense of crisis regarding its purpose, impact and legitimacy. Barnard accordingly concludes: 'Despite the sense of crisis surrounding EU social policy, the fact is that a fairly extensive body of EU regulation remains. Sure, it is not perfect, and it is imperfectly implemented and enforced in the Member States, but it is there, and, by and large, it is beneficial. It is now hard to think of a time when, for example, discrimination on the grounds of race, disability, or sex was not prohibited. And, outside the field of collective rights, the Court has still managed to deliver judgments which have raised or at least reinforced the social floor.' Barnard (2014, at 220-221).

obstacles and opportunities for an advancement of European employment regulation. It especially highlights the hybrid nature of the EU employment governance objectives, which has implications for studying their effectiveness.

The subsequent examination of the effectiveness of EU employment governance in the framework of “Lisbon 2020” will focus on the implementation of the Flexicurity-objective (see below). This provides a central element in the discussion of overcoming the Union’s “social deficit” in the context of the EMU.<sup>802</sup>

#### A) The implementation of hybrid employment objectives

On this view, then, European employment regulation does carry normative capacity. It may be vague – but it is there, fostered and sustained by the cross-cutting narrative of the MSE. The latter has been providing the directional framework for developing European employment regulation in a more comprehensive manner, building on the assumption of the mutually supportive role of economic and social policies.

In line with earlier considerations, we assert that in the post-national context of EU governance, this *normative vagueness* is necessary and even desirable. Notably in the social field the EU cannot do with “one-size-fits-all” solutions. Even EU social policy harmonisation is not about achieving uniformity but rather about supporting the diversity in national labour law and social systems to enable social progress.

That vagueness, however, will most likely be challenging for the determination of corresponding policy prescriptions. That is, the lack of precision will allow for a multiplicity of views and policy courses that may fit the broad objectives. This recognition then has implications for studying the effectiveness regarding the implementation of these hybrid objectives through the EU’s governance apparatus.

#### B) Evaluating the policy frames of the AGS

Not only is the Flexicurity-goal of direct relevance to labour law, it is also very much representative of the EU ambitions on modernising the MSE.<sup>803</sup> Flexicurity provides a direct “product” and hence illustrative example of the hybridisation process, described above. It implies the conciliation of labour market flexibility and worker protection with an emphasis on social security.<sup>804</sup> Since this involves reconciling potentially conflicting demands, studying the effective implementation of such hybrid objectives requires asking whether they are being implemented in a balanced manner.<sup>805</sup>

In Chapters 4 and 5 we have seen how the EU’s normative discourses gain meaning by being structured and elaborated at the organisational level.<sup>806</sup> In the light of the regime thesis, it therefore seems fair to expect that certain normative ideas will dominate

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<sup>802</sup> As we have seen in Chapter 6, the problem of the EU’s “social deficit” has already received plenty of attention in the Internal Market context, notably in connection with the *Viking-Laval* case law.

<sup>803</sup> Cf. Sciarra (2007).

<sup>804</sup> Ales (2008).

<sup>805</sup> Cf. Bell (2012).

<sup>806</sup> See also Chapter 5.

or, be more successful than others are, to the extent that they yield more “mobilisation” with the help of aligned governance structures and corresponding actor engagement.

In this connection, the model of the balanced integrated approach, introduced in Chapter 6, provides a useful yardstick for evaluating the implementation of the Flexicurity-objective. The assumption that the goal of modernising the MSE bestows normative purpose on the advancement of EU employment regulation has produced the following hypothesis.

Were EU employment governance still to represent an integrated regime today, then it would have to be built on a balanced integrated approach that recognises and jointly promotes:<sup>807</sup>

- a. The important *productive role of labour standards* (growth model based on high quality high productivity – innovation, preventing destructive competition);
- b. The important *mitigating role of employment policy/ALMP* in remedying the negative effects of employment regulation (active approach to reducing unemployment and integrating excluded groups); and
- c. The *reinforcing role of macro-economic policy* with room for demand-oriented measures (to stabilise employment levels).

This provides a constructive basis for discussing the effectiveness of the Flexicurity-objective below by analysing the narratives of the AGS.

#### *The analysis of the AGS-narratives*

In Chapter 5, we have highlighted that the EU has been progressively pursuing a proper integrated approach throughout the past decade. The organisational machinery of “Lisbon 2020” has been very much shaped by these endeavours. The European Semester represents a crucial innovation to improve the integrative functioning of the multiple governance instruments and techniques on socio-economic governance. It provides a concise governance cycle that plays a key role in putting the Union’s core objective of a CSME into effect.

Therefore, we have chosen the AGS as one of the Semester’s central evaluation instruments to study how the EU’s policy aspirations are being further elaborated at operational level. We will thereby use the three components of the model-approach above as yardsticks for evaluation and structure the subsequent analysis accordingly.

The EU uses the European Semester to issue authoritative guidance to the Member States.<sup>808</sup> This has reinforced the EU’s influence on national policy-making

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<sup>807</sup> Based on Deakin and Reed (2000).

<sup>808</sup> Building on the comparative results of the Member States’ socio-economic performances retrieved from benchmarking, certain Semester instruments are thereby key to shaping the integrated European guidance. The amalgamated CSRs provide policy guidance for each individual Member State. See Clauwaert (2014, 2015, 2016); and Bekker (2013, 2015). The AGS delivers integrated evaluation and priorities at the collective level – i.e. for the EU and the EA as a whole. The Commission takes the lead in drafting each of these policy instruments.

significantly, notably at the ideational level. The hybridized European coordination processes are known to exert influence, above all, through “policy framing”.<sup>809</sup>

In the comprehensive meta-coordination cycle, the AGS assumes a perhaps rather subtle but still important role in the framing process because it identifies governance problems by rank of priority and correspondingly develops *narratives* that explain these problems and link them with appropriate solutions. It thus has a primary role in identifying and defining problems and solutions considered relevant to the EU and the EA as a whole. Thereby, it largely pre-determines the conceptual room for devising policy solutions.

As indicated above, we are trying to understand here how the European normative discourses are given meaning through EU coordination. We consider it therefore useful to deconstruct these narratives to identify what the Union regards as common problems, and to which preferred policy solutions it links these. The ensuing analysis of the AGS will primarily focus on the narratives that the Commission has delivered throughout the initial Semester-cycles (AGS 2011 until AGS 2013).<sup>810</sup> We will assess to what extent the AGS has elaborated the “Growth and Jobs”-mantra in a balanced manner.<sup>811</sup>

In preparation of this analysis, the main governance problems that the Commission identifies in relation to the “Growth and Jobs”-mantra can be summarised as follows. In the early Semester-cycles, the AGS-narratives are still very much shaped by the context of the Euro crisis. In that period, we identify four main problems in the Commission’s articulation of the two meta-objectives:

1. *Instability*: The root of instability – and thus of crisis – is perceived to lie in the imminent ‘vicious cycle of unsustainable debt, the disruption of financial markets and low economic growth’.<sup>812</sup> The Commission links the resulting “lack of confidence” to ‘the negative feedback between the sovereign debt crisis and the situation in the financial sector together with a slowdown in the global economy’.<sup>813</sup>
2. *Competitiveness*: The Union’s perceived lack of competitiveness, in contrast, is not so much a problem born out of crisis but rather linked to a context of global competition and already existed before the financial and economic crisis.<sup>814</sup> Since the Lisbon Strategy’s aim of making the EU the most competitive economy had

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<sup>809</sup> Cf. Lopez-Santana (2006); Radulova (2011).

<sup>810</sup> With economic recovery slowly picking up from late 2013, one could observe a concomitant shift in emphasis in the subsequent AGS 2014 until AGS 2016. Therefore, these findings on shifting policy frames in the AGS in that period will be discussed in the last Section 7.4.

<sup>811</sup> For a general discussion of this mantra, see Chapter 4.3.2.A.

<sup>812</sup> AGS (2011) at 4.

<sup>813</sup> ‘The Autumn forecasts for 2011-2013 published by the Commission on 10 November 2011 show that economic recovery has come to a standstill and that low levels of confidence are adversely affecting investment and consumption. [...] The impact has been particularly acute in the Euro area. As a result, GDP is likely to stagnate in the coming year and overall growth in the EU is forecast to be as low as 0.6% for 2012. Unemployment levels are likely to remain high at around 10% in 2012 and into 2013, exacerbating the social impact of the crisis.’ [emphasis added, NB] AGS (2012) at 2.

<sup>814</sup> Cf. Crouch (2002).

been missed,<sup>815</sup> Europe 2020 has re-invigorated the importance of competitiveness as a basic principle to ensure the growth of the European economy.<sup>816</sup> The AGS continues the common practice of using performance comparisons with the EU's main competitors (notably, the United States) to highlight the gap in (labour) productivity as a key issue for European policymakers to improve competitiveness.<sup>817</sup>

3. *Unemployment*: The elaboration of the “Jobs”-objective is all about framing the problem as one of the “legacy” of the crisis: The large loss in economic activity, including the fall in productivity and the negative impact on finances, has been accompanied by a substantial *increase in unemployment*, especially among the young. There is also concern about the lacking increase in labour participation rates in Member States. Not only does the Commission regard the level of employment as generally unsatisfactory in many parts of Europe. It also takes issue with the considerable variation that typifies the participation rates across Member States. It worries that the EU's return to growth could be “jobless growth” and that people may face long-term exclusion from the labour market.<sup>818</sup> Soon, it also recognises that there is a “time lag” before an economic upswing, however weak, translates into recovery in the labour market and leads to job creation.<sup>819</sup>
4. *Governance*: Finally, the Commission recognises “governance” as an autonomous, horizontal problem. It underlines that there is a persistent “implementation gap” with respect to EU legislation and the use of European structural funds. It considers such shortcomings as signs of “poor administrative capacity” in domestic systems, which contributes further to the insufficiency in economic growth.<sup>820</sup>

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<sup>815</sup> European Commission, Lisbon Strategy evaluation document (SEC(2010)114 final, Brussels, 2 February 2010).

<sup>816</sup> Since the end of the 1990s, the European Commission has been monitoring price and cost competitiveness developments. DG ECFIN is tracking changes in the nominal and real exchange rates of the EA, the individual Member States of the EU and several non-EU countries. Thereby, the real effective exchange rate (REER) provides a particularly important measure for assessing a country's or currency area's price or cost competitiveness relative to its principal competitors in international markets. The nominal exchange rate (NEER) tracks changes in the value of a given currency relative to the currencies of the respective country's principal trading partners. [http://ec.europa.eu/economy\\_finance/db\\_indicators/competitiveness/index\\_en.htm](http://ec.europa.eu/economy_finance/db_indicators/competitiveness/index_en.htm) (last accessed 2 July 2017).

<sup>817</sup> ‘Long before the current crisis overall EU performance has been weaker than key competitors. In spite of some progress in terms of employment, the EU has been lagging behind notably in terms of productivity, and this productivity gap is widening. There are many factors to explain such a gap. But there are two specific obstacles for the EU in comparison to a number of other major competitors: first, the Europe-wide market is still too fragmented and does not allow firms to grow and enjoy the same economies of scale; second, several framework conditions – from access to finance to innovation capacities or regulatory obstacles – are less conducive for firms to create and invest.’ AGS (2012) at 7.

<sup>818</sup>: ‘Given the length of unemployment periods, the rapid restructuring of the economy and the difficulties of finding a job, there is a risk that unemployment will become increasingly structural and that a growing number of people withdraw from the labour market. There are also clear indications that risks of poverty and social exclusion are increasing in many Member States. Additional pressures on social protection systems also affect their capacity to perform their welfare functions.’ AGS (2013) at 10.

<sup>819</sup> AGS (2013, 2014).

<sup>820</sup> AGS (2012) at 13.



On that basis, we will examine below the policy solutions the Commission advocates to overcome these problems. The aim is to discuss how the new EU Economic Governance-regime has affected EU employment governance – notably, regarding the interplay of different governance tools and the achievement of the Flexicurity-objective. To that end, we will *assess the preferred policy solutions in the light of recent case law from the CJEU regarding employment protection* – i.e. on the application of the European legislation dealing with temporary employment.<sup>821</sup> The Fixed-Term Work Directive and the Temporary Agency Work Directive have both been associated with the Flexicurity-idea.<sup>822</sup>

This assessment intends to highlight the practical relevance of our discussion of the EU's influence on employment regulation in Europe. The Court's case law exhibits disputes from daily life regarding actual employment relationships. Both directives aim to improve the legal position of temporary workers based on the right of equal treatment with permanent employees.<sup>823</sup> Additionally, the Fixed-Term Work Agreement offers certain employment protection with provisions against the abuse of successive fixed-term contracts.<sup>824</sup> The selection of recent decisions of the CJEU has been based on the criterion to what extent the cases depict employment disputes that have (mostly) arisen from, or been affected by, national measures with an actual or topical connection to EU policy coordination. The discussion then seeks to illustrate some key legal issues that typify temporary employment contracts and (may) come within the range of EU law. They will help to reflect on EU law's propensity to safeguard workers' interests in the light of the Union's enhanced coordination capacity.

### 7.3. EU EMPLOYMENT GOVERNANCE IN ACTION – BALANCED IMPLEMENTATION OF FLEXICURITY?

Based on the methodological approach outlined above, we are now able to consider how the EU meta-coordination process affects employment regulation. This builds on the findings of Chapters 4 and 5 on how EU crisis management has shaped the institutional context for the coordination of socio-economic policies. Accordingly, we will examine critically the EU's expansive coordination capacity and how it relates to the bloc's standard-setting capacity in employment regulation. Thereby we will discuss both the changes in the institutional setting and the impact of aligned governance structures.

#### 7.3.1. “Lisbon 2020”'s impact on the EU's employment coordination capacity

This section will deal with how the enhanced role of the ECB is affecting the institutional context of EU meta-coordination and, subsequently, the effects of the European framing of economic policy choices on employment regulation.

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<sup>821</sup> The Fixed-Term Work Directive 1999/70/EC, including the Fixed-Term Work Agreement; and the Temporary Agency Work Directive 2008/104/EC.

<sup>822</sup> Bell (2012); Peers (2013).

<sup>823</sup> See respectively Clause 4 of the Fixed-Term Work Agreement; and Article 5 of Directive 2008/104/EC.

<sup>824</sup> Clause 5 of the Fixed-Term Work Agreement.

## A) The enhanced role of the ECB

In view of the impact of the European anti-crisis reforms on the Union's constitutional framework,<sup>825</sup> this section will study in more detail the assertion regarding the ECB's increased leverage over fiscal policy and consider how this has been affecting EU employment governance.<sup>826</sup> We will explore this role in relation to the two types of policy preferences that typify the Bank's stance on economic policy – that is, austerity-oriented budget planning and structural reforms to increase labour market flexibility.

### *The ECB as a guarantor for the market's "disciplining" effect in the EMU*

The ECB's reinforced role provides an illustrative example of how, as intimated in Chapter 3, EU governance makes room for a *larger set of actors to influence the interpretation of European rules*. For a central bank – notably, one with its mandate exclusively focused on monetary policy, the ECB is showing unusual interest in making normative statements about fiscal policy. In fact, the bank sustains an outright "obsession" with government deficits (i.e. budget deficits and debt levels).<sup>827</sup> Already before the Euro crisis, one of its key messages has been that "lower deficits are good". This emanates from the express 'fear that monetary policy will not be able to do its job because of excessive budget deficits in individual EA Member States'.<sup>828</sup>

That pre-occupation with national budget planning seems to originate (at least, in part) in the peculiar set-up of the EMU. As shown in Chapter 4, the rationale of "market discipline" plays a vital role in the EMU-setting due to the lack of EU competence over fiscal policy.<sup>829</sup> It necessitates the conduct of stability-oriented monetary and sound budget policies as indispensable requirements (SGP) for the functioning of the Euro.

Normally, such budgetary prudence is asked where there is a threat of so-called "fiscal dominance". This problem refers to a potential conflict between fiscal and monetary

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<sup>825</sup> See Chapter 4.2.2.C. If anything, these reforms have considerably advanced the complexity that already characterised the EU's system of economic governance since its conception in Maastricht. This inevitably has had a bearing on the awkward division of legal responsibilities for economic policy-making in the EA between the European (monetary policy) and the national level (fiscal policy).

<sup>826</sup> Formally, the Bank's mandate remains focussed on maintaining price stability (Article 127 TFEU). Thereby, it is merely to support the general economic policies in the Union with a view to contributing to the achievement of the Union's objectives – including, 'a highly competitive social market economy, aiming at full employment and social progress' (Article 3(3) TEU).

<sup>827</sup> Wren-Lewis (2013).

<sup>828</sup> Ibid. See Draghi's following quote regarding the limited effectiveness of the ECB's "accommodative" monetary policy to boost demand: "At the same time, such aggregate demand policies will ultimately *not be effective without* action in parallel on the supply side. Like all advanced economies, we are operating in a set of initial conditions determined by the last financial cycle, which include low inflation, low interest rates and a large debt overhang in the private and public sectors. In such circumstances, due to the zero lower bound constraint, there is a *real risk that monetary policy loses some effectiveness* in generating aggregate demand. The debt overhang also inevitably reduces fiscal space.' [emphasis added, NB] Mario Draghi, Unemployment in the euro area (President of the ECB, Speech at the Annual Central Bank Symposium in Jackson Hole, 22 August 2014).

<sup>829</sup> Van den Bogaert and Borger (2013).

policy, because in a national setting a government can ultimately force the central bank to monetise the government's public debt.<sup>830</sup> The ECB, in contrast, is in an exceptional and, therefore, better position to resist this dominance-problem. It fulfils a crucial mediating function between the financial markets and public decision-makers, its role is essentially in controlling the EMU-system of "market discipline" to ensure that it remains intact.

This mediating function emanates from the "twofold structure" – general rules and normative prescriptions enshrined in other less binding instruments (i.e. the SGP and the BEPG) – underpinning the EMU. Degryse et al. (2013) explain this, as follows:

'Under these types of arrangement, the ECB is an external agent taking part in the debates but above all creating the conditions for its "independence" from the political power and its credibility vis-à-vis the markets.'<sup>831</sup>

The Treaty provides that the ECB 'shall be independent in the exercise of its powers and in the management of its finances'.<sup>832</sup> At the same time, the Bank is formally integrated in the institutional infrastructure on economic policy coordination. The ECB President, for example, attends the meetings of the ECOFIN Council, which is the key forum for the coordination of national economic policies.<sup>833</sup> In the framework of this institutional involvement, the ECB has taken on the role of ensuring that *the "disciplining" effect of the market*, at the basis of the EMU-system, functions (the way it is supposed to) and contributes to macro-economic stability.

This means, national governments in the EA are typically confronted with the volatility of the financial markets regarding the coverage of their financial needs (i.e. refinance their debt). The Euro crisis has shown how – due to this dependency – lenders may gain important leverage over the borrower by setting the terms of credit (i.e. interest rate levels):

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<sup>830</sup> Such preference for prudent budget planning is usually motivated by the desire *to avoid a potential conflict between fiscal and monetary policy* that may arise when 'a fiscal policy maker might not even attempt to stabilise debt' by raising taxes or cutting expenses sufficiently. Wren-Lewis (2013) stresses that in principle, 'monetary policy can always neutralise the impact of higher debt on inflation by raising interest rates'. In the resulting standoff between the central bank and the government over the possible inflation effects of such fiscal expansion, normally – i.e. in a national setting – *the government had ultimate power. It could thus force the central bank to prevent a sovereign default by monetising the deficit.*

<sup>831</sup> In reference to Buiter (2008), see Degryse, Jepsen, Pochet (2013) at 29.

<sup>832</sup> Article 282 TFEU.

<sup>833</sup> Article 284 TFEU. The ECB is also a statutory member of the Economic and Financial Committee which prepares the ECOFIN meetings. The Committee is composed of senior representatives from national Finance Ministries, central banks and the Commission. See Article 134 (2) TFEU. Moreover, the bank is a frequent guest at the meetings of the Eurogroup as well, the forum of EA Finance Ministers that deliberates developments and policy requirements specific to the functioning of the Euro. See: <https://www.ecb.europa.eu/ecb/tasks/europe/cooperation/html/index.en.html#relations> (accessed 21 May 2017).

‘At the level of actors, the financial markets became a fully-fledged actor which would differentiate the risks displayed by each country and become sensitive to any signs of instability.’<sup>834</sup>

Between these two settings – the political forum and the financial markets – the ECB fulfils this key role of guarantor or mediator. Its legal independence thereby reinforces its “position of authority”,<sup>835</sup> since as a supra-national central bank it has in principle the power to let an EA member default. Simultaneously, given the uncertainty regarding the consequences of such a sovereign default, the ECB has also maintained its credibility vis-à-vis the markets by eventually committing to do “whatever it takes” to save the Euro.<sup>836</sup> Degryse et al. helpfully elucidate the Bank’s mediating role, as strengthened by the crisis:

‘The ECB also stepped out of its isolation and became explicitly part of the new structures. This was the counterpart of the fact that the ECB (in the absence of any credible coordinated political response) became *the only body capable of exerting a firm influence on the financial markets*. It agreed to take on this role in exchange for the guarantee that the EU would oversee developments in those countries that had run adrift. The *ECB’s new position was therefore right at the centre of gravity of the normative apparatus, located mid-way between the markets and the political sphere.*’ [emphasis added, NB]<sup>837</sup>

Yet, despite the ECB’s influential position vis-à-vis the financial markets, the EU crisis management was still typified by *ad hoc*-style decision-making, while several Member States were facing severe financial and economic hardship. The “disciplining” rationale underpinning the EMU thus appears as a key factor in explaining this “muddling through”-type of crisis management.

European leaders – i.e. including the ECB – must have perceived a benefit of “allowing” (or, rather, *utilising*) *bond market pressure to ‘achieve certain economic and political goals’*.<sup>838</sup> This tendency seems visible from both, the difficulties of negotiating emergency assistance for governments in dire financial distress as well as the ECB’s reluctance to act as a

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<sup>834</sup> Degryse, Jepsen, Pochet (2013) at 29.

<sup>835</sup> Ibid. at 18, 31. The ECB’s inclusion in the Troika (now, the “Quadrige” or “the Institutions”) seems to make sense in the light of this power position, giving it a say in the design of the bailout-packages under the ESM and the attached conditionality imposed on the programme countries. Cf. Müller (2015).

<sup>836</sup> Cf. the CJEU’s decision declaring the ECB’s OMT programme compatible with EU law, provided it meets certain conditions. Case C-62/14 Gauweiler [2015] ECLI:EU:C:2015:400; BVerfG, Judgment of the Second Senate of 21 June 2016 - 2 BvR 2728/13 - paras. (1-220), [http://www.bverf.de/e/rs20160621\\_2bvr272813en.html](http://www.bverf.de/e/rs20160621_2bvr272813en.html).

<sup>837</sup> Degryse, Jepsen, Pochet (2013) at 30.

<sup>838</sup> Wren-Lewis (2013). See Wilsher (2013) on the frictions between creditor and debtor nations. See also Eurogroup President Dijsselbloem’s inappropriate recent comments about Southern Member States’ alleged thriftlessness regarding public budgets, M. Khan and P. McClean, *Dijsselbloem under fire after saying eurozone countries wasted money on “alcohol and women”* (Financial Times, 21 March 2017, <https://www.ft.com/content/2498740e-b911-3dbf-942d-ecce511a351e>, accessed 21 May 2017).

sovereign lender of last resort.<sup>839</sup> Linking back to the discussion on the “no bailout”-clause in Chapter 4, this motivation suggests the intentional use of the market’s “disciplining effect” built into the EMU-system.<sup>840</sup>

*The “loss of confidence”-narrative and austerity-based budget policies*

Recognising the vital mediating function of the ECB, in effect, helps to understand the liberty with which it has been giving out fiscal policy advice. In this respect, Torres (2013) usefully points out:

‘For the ECB, this “invasion of other policy domains” – by calling for sound economic policy management, in particular in the fiscal domain, for structural reforms and for reinforced economic governance in general – is motivated by the fact that the euro area is at the epicentre of the sovereign debt crisis’.<sup>841</sup>

More specifically, the ECB tends to resort to “loss of confidence”-rhetoric, invoking *punitive market actions* “as a backstop” vis-à-vis unsound budget policies.<sup>842</sup> For instance, once it had overcome its reluctance to act as a sovereign lender of last resort, ‘the ECB, in justifying OMT, tend[ed] to favour the argument that the market has unjustified fears of Euro break up, rather than that the market is not looking at fundamentals’.<sup>843</sup> With this

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<sup>839</sup> Wren-Lewis (2013) notes: ‘So even though those goals have nothing to do with the ECB’s [formal] mandate, the ECB might be reluctant to see those pressures reduced by its own actions.’ In addition, De Grauwe and Li (2013) intimate: ‘While the ECB finally acted in September 2012, it can also be argued that had it acted earlier much of the panic in the markets may not have occurred and the excessive austerity programs may have been avoided.’

<sup>840</sup> As we have seen in Chapter 4, even the Court of Justice has confirmed that it is actually the primary purpose of Article 125 TFEU (i.e. the “no bailout”-clause) to sustain this principal enforcement mechanism. The provision stipulated that the national governments remain subject to the “logic of the market” when entering into debt in order to prompt them to maintain budgetary discipline. The Court regards compliance with such discipline as contributing ‘at Union level to the attainment of a *higher objective*, namely maintaining the financial stability of the monetary union’ [emphasis added, NB] (para 135). CJEU, Case C-370/12 *Thomas Pringle v Government of Ireland* [2012] ECLI:EU:C:2012:756. See Chapter 3.2.2.B.

<sup>841</sup> Torres (2013) at 293-4; see also Degryse et al. (2013) at 30.

<sup>842</sup> ‘Turning to fiscal policy, since 2010 the euro area has suffered from fiscal policy being less available and effective, especially compared with other large advanced economies. This is not so much a consequence of high initial debt ratios – public debt is in aggregate not higher in the euro area than in the US or Japan. It reflects the fact that *the central bank in those countries could act and has acted as a backstop for government funding*. This is an important reason why markets spared their fiscal authorities the loss of confidence that constrained many euro area governments’ market access. This has in turn allowed fiscal consolidation in the US and Japan to be more backloaded.’ [emphasis added, NB] Mario Draghi, *Unemployment in the euro area* (President of the ECB, Speech at the Annual Central Bank Symposium in Jackson Hole, 22 August 2014).

<sup>843</sup> Recalling Keynes’ teachings, the commentator points out that ‘prices in financial markets may not reflect fundamentals but instead just what market participants thought that other participants would do’. In reference to De Grauwe and Li (2013), see Wren-Lewis (2013).

type of rhetoric, the *Bank has indisputably weighed in on the EU's general crisis narrative* that has presented fiscal policy as a cause of the crisis (and its tenacity).<sup>844</sup>

In short, the ECB's restrictive stance on budget policy appears to be prompted, for a significant part, by the EMU's very own peculiar set-up. The Bank has thus not been shy in giving out fiscal policy advice – vindicating the prescription of austerity policies as prime urgency to calm panic (i.e. remedying the loss of confidence) in the markets.<sup>845</sup>

### B) Confining the room for fiscal policy-making

In the following, we will describe how that advice has framed fiscal policy choices and accordingly extended into the area of employment regulation as well.

#### *Internal devaluation through structural reforms*

Traditionally, governments would use exchange rate adjustments to create short-term growth to counter unfavourable shocks in their economies.<sup>846</sup> However, the centralisation of monetary policy through the EMU has deprived EA countries of such traditional fiscal stabilisers and thus constrained their economic adjustment capacity considerably.<sup>847</sup>

The ECB has therefore taken an increasing interest in the developments and the regulation of labour markets.<sup>848</sup> In pursuit of price stability and economic convergence, the Bank promotes the necessity of structural adjustment based on the principle of “internal devaluation”. This principle ‘is intended to act as a functional substitute to currency devaluation’.<sup>849</sup> It implies that EA governments are to explore the toolbox of economic policy, using so-called *structural reforms* to influence price developments and maintain adjustment capacity. Deakin and Reed (2000) explain:

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<sup>844</sup> See Chapter 4.2.2.B.

<sup>845</sup> ‘Since the start of the debt crisis financial markets have provided wrong signals; led by fear and panic, they pushed the spreads to artificially high levels and forced cash-strapped nations into intense austerity that produced great suffering.’ De Grauwe and Li (2013).

<sup>846</sup> Armington and Baccaro (2012) explain: ‘The standard solution to a competitiveness problem is exchange-rate devaluation. This would allow countries to stimulate their exports while making imports more expensive. In addition, exchange-rate devaluation would probably be more effective in reducing real wage wages than nominal wage cuts, as wages tend to be sticky. Furthermore, devaluation would probably increase domestic inflation and this in turn would alleviate the debt problem.’ Armington and Baccaro (2012) at 261.

<sup>847</sup> Crouch (2002).

<sup>848</sup> The following quote is exemplary of views on labour market regulation held at the ECB: ‘In a monetary union such as the euro area a flexible and well-functioning labour market provides an economic environment that greatly facilitates the price stability-oriented monetary policy of the ECB. *Reforms which deliver greater flexibility in employment and wages* would reduce adjustment costs associated with idiosyncratic shocks and enhance the efficiency and effectiveness of the monetary policy transmission mechanism.’ [emphasis added, NB] Task Force of the Monetary Policy Committee, *Euro Area Labour Markets and the Crisis* (Structural Issues Report, Occasional Paper series No 138, ECB, October 2012) at 10.

<sup>849</sup> ‘Its goal is to reduce prices relative to other countries by cutting employment and wages and by introducing structural policies (especially labour market and welfare state liberalization) aimed to increase wage and price flexibility.’ Armington and Baccaro (2012) at 255-256.

‘As national governments lose the power to adjust to changing economic conditions by modulating the exchange rate and altering the balance between taxation and public expenditure, the burden of adjustment is thrown on to the labour market, which is now required to operate with maximum flexibility in the sense of bringing wages and terms and conditions into line with changes in demand. In this scenario, the process of economic integration creates a momentum of its own for deregulation at the national level.’<sup>850</sup>

The envisaged reforms consequently build on a particular notion of “labour market flexibility”.<sup>851</sup> It refers to increasing flexibility in a context of enhanced capital mobility and a (better) functioning Single Market. That includes specifically ‘[a]djustments in the euro zone (particularly in terms of competitiveness and productivity) [which are] to take place by way of wages, labour law, and social security’.<sup>852</sup>

#### *Labour cost developments and wage-setting*

The policy advice on wage developments provides an illustrative example in this respect. The ECB has been taking an active interest in the development of wages (as a key price index) in the EA.<sup>853</sup> In line with the idea of internal devaluation, prices and wages are to be kept flexible to render inflation responsive to economic activity.<sup>854</sup> Wages matter in economic policy based on their perceived link with unemployment and competitiveness. Conceived as unit labour costs (ULC), they provide a key indicator of productivity and thus of competitiveness.<sup>855</sup>

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<sup>850</sup> Deakin and Reed (2000) at 98.

<sup>851</sup> Cf. Deakin and Reed (2000).

<sup>852</sup> Degryse et al (20130) at 18.

<sup>853</sup> Amongst others, the Wage Dynamics Network (WDN), set up in 2006 in the context of the ESCB, ‘was intended to provide a better understanding of the link between wages and prices at both the micro and macro level’. Task Force of the Monetary Policy Committee (2012) at 55, note 53.

<sup>854</sup> ‘Structural reforms might also have affected inflation dynamics in the euro area. Such an impact can occur through increased flexibility of prices and wages, which can render inflation more responsive to economic activity. [...] An analysis of wage developments also indicates an increasing responsiveness of wages to unemployment as the crisis becomes more protracted, possibly suggesting that labour market reforms are starting to make wages more flexible in some euro area countries.’

European Central Bank, *Progress with Structural Reforms Across the Euro Area and their Possible Impacts* (ECB Economic Bulletin, Issue 02/2015) at 12. See also Armingeon and Baccaro (2012) at 255-256.

<sup>855</sup> In its first European Competitiveness Report, the Commission explains: ‘Labour costs influence competitiveness in two separate ways. The first, and most direct way, is through the effect on prices. As a cost of production, labour enters into the final production price. For manufacturing industry, labour costs represent approximately 30% of total costs (and 70% of value added) compared with 60% for purchases of goods and services and finance the remainder [...]. The second way concerns the way labour costs affect job creation and therefore employment.’ European Commission, *The Competitiveness of European Industry* (Office for Official Publications of the European Communities, Luxembourg, 1997) at 48.

Next to that, a dominant view highlights the importance of the *relation between the level of unemployment and wage growth*.<sup>856</sup> If unemployment is high, wages are expected to go down to enable competitiveness adjustments.<sup>857</sup>

So, the ECB has been advocating wage moderation and decentralisation of wage-setting systems to increase the competitive adjustment capacity of EA members.<sup>858</sup> It considers unresponsive wage structures reveal “downward wage rigidity”.<sup>859</sup> This advocacy of structural reforms to improve labour market flexibility has in fact gone as far as the ECB President, at the height of the Euro crisis, sending out confidential letters to gravely indebted governments with reform policy prescriptions.<sup>860</sup>

From a labour law perspective, these developments are rather disconcerting. They indicate far-reaching institutional intervention that interferes – first and foremost – with the social partners’ collective bargaining autonomy. This fundamental freedom sets the basis for the many diverse European systems of industrial relations and wage determination.

Importantly, the ECB’s position on wage developments is also reflected (albeit not by direct reference) in the guidance provided through the European Semester. Especially, the MIP provides an illustrative example in this respect.<sup>861</sup> It conceives *labour cost developments as a potential risk factor* to external imbalances and competitiveness. It thus

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<sup>856</sup> The so-called “non-accelerating inflation rate of unemployment” (NAIRU) measures the flexibility of a labour market by the extent to which wages respond to unemployment. Ashiagbor (2005,) explains that it is common among economists to refer to the NAIRU as the “natural rate of unemployment”, denoting ‘full employment as the minimum unemployment rate which puts no upward pressure on inflation’. This describes ‘an economy where employment is as high as it can be without labour shortages that lead to rising wages and hence prices’. In reference to Lachs et al (1997), see Ashiagbor (2005) at 166-167. NAIRU - also referred to as the long-run Phillips curve – is often taken to represent *equilibrium* between the state of the economy and the labour market. [www.investopedia.com/terms/n/non-accelerating-rate-unemployment.asp](http://www.investopedia.com/terms/n/non-accelerating-rate-unemployment.asp)

<sup>857</sup> ‘Downward wage rigidities are an impediment to restoring competitiveness (and thus employment), particularly in those euro area countries that had accumulated external imbalances before the crisis. In the presence of high unemployment, a flexible response of wages to labour market conditions should be a key priority, so as to facilitate the necessary sectoral reallocation underpinning employment creation and reductions in unemployment.’ Task Force of the Monetary Policy Committee (2012) at 9.

<sup>858</sup> ‘Wage bargaining institutions have been singled out as a major source of wage rigidity by the WDN.’ Task Force of the Monetary Policy Committee (2012) at 55.

<sup>859</sup> The WDN ‘provides evidence that downward wage rigidity is prevalent in Europe: firms freeze wages instead of cutting them during a sharp economic downturn.’ Task Force of the Monetary Policy Committee (2012) at 55.

<sup>860</sup> Barnard (2014); Degryse et al. (2013). This (leaked) correspondence to Italy and Spain detailed what range of structural labour market reforms (including reforming collective bargaining system in favour of firm-level agreements; reviewing the rules on dismissal protection, and cutting public sector wages), which the ECB expected the concerned governments to take ‘in return for its intervention on the sovereign debt market’. See ‘La lettera originale in inglese – Trichet e Draghi: un’azione pressante per ristabilire la fiducia degli investitori’ Corriere de La Serra, August 2011; see also Degryse et al. (2013) at 18. The ECB’s latitude to exert pressure on national governments – notably, those whose vulnerability emanated from a debt-riddled banking system – is founded in its power to decide who is an “eligible counter-party” for credit extension, based on its “risk control framework”.

<sup>861</sup> Explained in Chapter 5.3.2.B.



subjects the products of wage-setting, a traditional function of the national social partners' fundamental right to collective bargaining, to an express "economic reading".<sup>862</sup>

Admittedly, the respective EU Regulation requires that the MIP 'shall respect national practices and institutions for wage formation' and explicitly 'does not affect the right to conclude collective agreements or take collective action'.<sup>863</sup> Nonetheless, this economic risk screening and the Council's related power to issue recommendations<sup>864</sup> stand uncomfortably vis-à-vis the Treaty's express exclusion of EU competence regarding the harmonisation of pay, the right of association, the right to strike.<sup>865</sup>

Based on the above, we see two important developments. First, EU crisis management has empowered certain strategic actors – above all, the ECB – and thus increased its influence on framing fiscal policy choices. Second, the new EU Economic Governance-regime has effectively absorbed or *colonised* specific aspects of employment regulation. The preceding explanations show how the peculiar set-up of the EMU pre-conditions these developments to a significant extent.

Besides this, Degryse et al (2013) have emphasised that the ECB apparently does not deem political union a viable option for the EU.<sup>866</sup> The ECB President himself insinuated in 2012 that the MSE might already be "gone".<sup>867</sup> The Bank's important role in shaping the framework conditions of economic governance is thus based on a model that pursues 'monetary union [that is forcing] economic union' through "market-driven convergence".<sup>868</sup> Equally, the way in which the Bank is giving out fiscal policy advice reveals a conviction that regards 'neo-liberal policies as self-evidently beneficial'.<sup>869</sup> EU employment governance is thus placed in an institutional context that maintains a sturdy belief in the efficiency of "free" market allocation.

### C) Fiscal consolidation – policy framing through the AGS

Next to the ECB, the Commission and the European Council have also seen their roles strengthened through the EU crisis management.<sup>870</sup> While the latter has seized the process of decision-making,<sup>871</sup> the successive reforms have reinforced the former's *coordinator role* in the European economic governance apparatus considerably. The Commission has in this way assumed a key position in the process of meta-coordination, as institutionalised in the

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<sup>862</sup> See Article 4 (4) of Regulation (EU) No 1176/2011.

<sup>863</sup> In reference to Article 152 TFEU and Article 28 CFREU, see Article 1 (3) of Regulation (EU) No 1176/2011.

<sup>864</sup> See particularly Article 6 (3) of Regulation (EU) No 1176/2011.

<sup>865</sup> Article 153 (5) TFEU. This will be discussed further in the Chapter 8.

<sup>866</sup> Degryse et al. (2013).

<sup>867</sup> Draghi interview (2012) WSJ; Barnard (2014); Natali (2011).

<sup>868</sup> Cf. Degryse et al. (2013) at 10.

<sup>869</sup> Wren-Lewis (2013) highlights that this conviction is probably based in a thoroughly technocratic worldview, grounded in neoclassical philosophy: 'They are just giving good economic advice, advice that is needed because politicians too often respond to vested interests rather than sound economic reasoning.' Ibid.

<sup>870</sup> Article 134 TFEU establishes the Economic and Financial Committee.

<sup>871</sup> Cf. Dawson and De Witte (2012).

European Semester. Now it is time to turn our attention to the AGS' crucial framing function.

In that regard, it is worth recalling some of the main effects of EU economic governance reforms in response to the Euro crisis. While stricter procedures affect particularly those Member States receiving financial assistance and the countries placed within the corrective coordination cycle,<sup>872</sup> stronger European surveillance has also limited the room for manoeuvre in fiscal policy-making in the preventive coordination mode. The Union's amended constitutional framework now accords the rationale of "budgetary discipline" the legal status of a *conditio sine qua non*. This condition is not only regarded as indispensable for ensuring the stability of the Euro in crisis situations. The TSCG additionally commands that national governments regard prudent budget planning as priority *at all times*, irrespective of economic and political fluctuations.

Based on this, we will examine more closely below the Commission's narratives in the AGS that explain the problems identified and link them with appropriate solutions. We aim to assess in particular the implications for EU employment regulation, focusing first on the guidance regarding fiscal consolidation and, then, that regarding labour market reforms.

### *Stability as a pre-condition for growth*

For a return to growth, the Commission underlines the need, from a European perspective, to address the problem of instability and the problem of competitiveness as matters of "urgency".<sup>873</sup> Next to financial sector reform,<sup>874</sup> it concentrates its demands primarily on an

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<sup>872</sup> Chapter 5 has stressed how, especially, powers of supervision regarding national budgetary policies have been amplified as has the EU influence on demarcating domestic fiscal planning. This increased influence has been drastically felt in the so-called "programme countries" through the institutionalisation of debt conditionality or "negative conditionality" at European level. Any grant of financial assistance under the ESM is conditional upon the implementation of structural and otherwise corrective reforms. See the discussion in Chapter 4.2.2.B. Arguably, a *weakened version of conditionality* as an enforcement rationale applies to Member States placed under "enhanced surveillance". For the EA countries, the incentive structure of the corrective coordination cycles builds on a similar element of force – in this case, the threat of sanctions if budget deficits, excessive public debts or macro-economic imbalances are not corrected in a timely agreed manner. The legislative reforms of both the Six-Pack and the Two-Pack have strengthened this mechanism.

<sup>873</sup> See Joerges (2012) and the importance of "emergency discourse".

<sup>874</sup> The EU has been taking a leading role in driving financial sector reform. A main concern has been severing the hazardous link between vulnerable banks and the potentially devastating exposure of public budgets managed by vulnerable governments. Notably, the establishment of the European Banking Union, as indicated in Chapter 3/4, is intended to correct former weaknesses in regulation and systemic supervision. The Commission uses the AGS to push further for the completion of the banking union (including the mechanisms that ensure more effective supervision and resolution of banks and the implementation of the common EU rulebook). This is expected to improve market confidence and thus reinforce financial stability in the EA and support access to finance. 'To prepare the transfer of the supervision mandate to the ECB [in the context of the Banking Union], a comprehensive assessment has been launched to enhance transparency regarding the health of banks' balance sheets, identify and repair any remaining weaknesses, and so improve market confidence. This should help to accelerate the process of balance-sheet repair and lay the conditions for a strong and sustainable resumption of credit growth. [...] The completion of a fully-fledged Banking Union is the core element of the EU response. It is essential not only for the stability of the euro area, but also

accelerated overhaul of public finances to counter the problem of instability (and thus the portrayed causes of the debt crisis).<sup>875</sup>

Its central premise focuses on the need to ensure the stability of government expenditure as a *basis for growth*. While the countries with excessive debt levels are in the spotlight, the Commission's general advice for all Member States – and, especially, for the EA – also focuses on budgetary discipline.<sup>876</sup> Curtailing public expenditures provides the key recipe for reducing public debt, austerity policies the basis for *fiscal consolidation*. Any expenses governments are planning should be redesigned to become “growth-friendly” – i.e. using *existing* resources to produce a stronger impact on growth and competitiveness.<sup>877</sup>

By 2013, the outlook for the European economy remains nevertheless rather “precarious”, with some Member States still on the verge of financial collapse.<sup>878</sup> The proclaimed “one-size-fits-all”-approach to stabilizing public finances (alone) apparently cannot deliver the expected recovery. The Commission then starts to emphasize the need for “differentiated” fiscal consolidation, with its advice on how it would like to see government finances to be reformed becoming increasingly detailed. On the expenditure side, national governments should review the *efficiency* of spending. A central component of this review should be the modernization of national social protection systems (especially pensions and healthcare) to ensure greater financial sustainability.<sup>879</sup> The Commission explicitly accepts that this may entail a ‘negative impact’ on growth in the short-term.<sup>880</sup> In turn, on the revenue side, it stresses the overall tax *burden* ought to be reviewed to the extent it forms a “detriment” to growth and jobs.<sup>881</sup>

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for the functioning of the single market and overcoming the increasing fragmentation of financial markets.’ AGS 2014 at 8.

<sup>875</sup> During the crisis years, a whole range of measures has been taken within the framework of EU crisis management – mostly on an *ad hoc* basis – to overcome the pressing *problem of instability*. See Chapter 4.2.2. As the sovereign debt crisis swells, concerns are growing that the stability of the EA as a whole is at risk, triggering fundamental questions about the future of EMU. In the context of the European Semester, a sizeable number of Member States are placed in the *corrective* arm of multilateral surveillance due to the difficulties in adjusting excessive government deficits and high debt levels.

<sup>876</sup> ‘In Member States which do not have an excessive deficit, and that are on an appropriate adjustment path towards their medium-term objectives, budgetary policy can play its counter-cyclical and stabilising role, as long as medium-term fiscal sustainability is not put at risk.’ AGS 2012 at 4.

<sup>877</sup> AGS (2012) at 9.

<sup>878</sup> AGS (2013) at 13: ‘The EU economy is slowly emerging from the deepest financial and economic crisis in decades. Member States are starting from different positions, the nature and size of the challenges they face are not the same and the pace of reforms varies. The situation remains fragile.’

<sup>879</sup> Meanwhile the problem of the ageing workforce receives (renewed) attention from 2012, which the Commission stresses to have an accelerating effect on the diminishing of the working age population and hence the state of public finances: ‘Public finances must be brought back on track to restore their sustainability. This is important not only for the confidence of investors in the short term but also to meet the needs of an ageing society and preserve the prospects of future generations.’ AGS (2013) at 13.

<sup>880</sup> ‘The pace and nature of fiscal consolidation may vary: while some Member States need to reduce deficits rapidly, others have more room for manoeuvre. *Any negative impact on growth in the short term can be mitigated* by appropriate measures on the expenditure and revenue sides of government budgets.’ Ibid.

<sup>881</sup> AGS (2013) at 5.

The following quote from the AGS (2012) shows why the Commission considers fiscal consolidation so important to create sound conditions for growth in the EU:

‘The focus needs to be simultaneously on reform measures having a short-term growth effect, and on the *right growth model* in the medium-term. Financial markets are assessing the sustainability of Member States’ government debt on the basis of long-term growth prospects, on their ability to take far reaching decisions on structural reform and their commitment to improve competitiveness.’ [emphasis added, NB]<sup>882</sup>

According to the Commission, Member States’ commitment to improve competitiveness will thus have a bearing on the favourability of their lenders’ terms of credit. This assertion, in fact, creates a *link* between the problem of stability and the problem of competitiveness. It reminds us of the fact, illustrated above, that the EMU’s system of market discipline enforces a difficult dependency between the EA members and the financial markets. The above statement suggests that the Commission, in fact, seeks to use this dependency as leverage to bring across its own policy aspirations.

Given this inherent connection, for the Commission, the problem of competitiveness is just as pressing as the instability one. To regain competitiveness – particularly, while the EU’s economic situation is considered in a state of emergency – it pleads the need for economic restructuring to meet external demand (i.e. generated by ‘high growth-markets’) to help Europe’s recovery and return to economic growth.<sup>883</sup> An *export-led growth model* clearly underpins its economic policy advice.<sup>884</sup> Therefore, the Commission ascribes “*structural reforms*” in *services, product and labour markets* a *priority role* in enhancing the EU economy’s overall efficiency and adjustment capacity (to be further discussed below).<sup>885</sup>

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<sup>882</sup> AGS 2012 at 3.

<sup>883</sup> AGS (2011) at 7. The Commission reports reform progress in 2014: ‘10: An important change is taking place in countries which have engaged in deep structural reforms, with signs of an emerging shift in economic activities from the non-tradable sector to the tradable sector, in particular in the Member States which cannot use the exchange rate instrument. This is exemplified by an increase in exports and reduction of current account deficits in several countries. Such trends were helped by adjustments to labour costs as part of a broader strategy to reinforce the competitiveness and productivity of the economy. Improving the export performance of individual countries is also supported by an ambitious trade policy at EU level.’ AGS (2014) at 10.

<sup>884</sup> BEPG 2010, preamble: ‘(12) The Union’s and the Member States’ structural reforms can effectively contribute to growth and jobs if they enhance the Union’s competitiveness in the global economy, open up new opportunities for Europe’s exporters and provide competitive access to vital imports. Reforms should therefore take into account their external competitiveness implications to foster European growth and participation in open and fair markets worldwide.’

<sup>885</sup> ‘Given the need for fiscal consolidation, structural reforms must play a key role in enhancing the overall efficiency and adjustment capacity of the EU economy. While the growth enhancing effects of structural reforms deliver their results gradually over time, creating a perspective of improved growth can have a positive short-term effect on growth by improving confidence and help all Member States, in particular those under market pressure.’ AGS 2012 at 7

In addition, it consistently supports this demand by calls for action to simplify the regulatory framework and to reduce the administrative burden for businesses.<sup>886</sup> Also, the primary responsibility for reform lies with the Member States. From 2012, the Commission stresses particularly the need for public sector reform to improve the efficiency, transparency and quality of public administrations.<sup>887</sup> It increasingly promotes the use of EU structural funds as well, recommending the “re-programming” to support the new growth focus.<sup>888</sup>

In short, during the initial Semester-cycles the AGS prioritises measures of fiscal consolidation intended to restore stability and structural reforms to improve competitiveness and, thus, growth. It underlines the urgency of implementing these policy solutions by presenting them as pre-conditions for securing governments’ access to the financial markets.

#### *The impact of fiscal consolidation on public sector employment*

What implications does this European drive towards fiscal consolidation have for employment regulation? Prassl (2014) highlights that ‘direct reductions in public sector employment’ have been a popular measure to effect deficit reduction in national spending.<sup>889</sup> One could therefore witness a ‘disparate impact’ on public sector workers,<sup>890</sup> who would bear ‘the most negative consequences [and] find themselves increasingly exposed to higher employment risks’.<sup>891</sup>

In that connection, the decision of the Court of Justice in *Mascolo and others* illustrates the impact of budget cuts on the working conditions of public sector workers.<sup>892</sup> The disputes concerned excessive renewals of temporary contracts in the Italian education sector and came within the realm of the European employment protection rules, by challenging the application of the Fixed Term Work Directive. In the references at hand,

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<sup>886</sup> ‘In addition, the Commission considers the following to be particular *contributors to growth*: [...] Simplifying the regulatory framework for businesses and reducing the administrative burden and red tape, particularly at national level. ‘ (emphasis added, NB) AGS (2013) at 12.

<sup>887</sup> ‘The quality of public administration at EU, national, regional and local level is a determining element of competitiveness, and an important productivity factor.’ AGS 2012 at 12. ‘The squeeze on public finances has created renewed momentum for the modernisation of public administration. In the EU, public expenditure accounts for almost 50% of GDP and the public sector represents about 17% of total employment.’ AGS 2013 at 12.

<sup>888</sup> ‘Using the potential of the EU structural Funds can and must be part of a new growth focus: [...] There is still considerable room for using or re-programming available funds to boost growth and competitiveness and to implement the country specific recommendations of the first European semester. [...] The persistent implementation gap in the application of EU legislation, or in the use of structural funds, is in many cases the result of a poor administrative capacity.’ AGS (2012) at 9, 13.

<sup>889</sup> Prassl (2014) at 216.

<sup>890</sup> Prassl (2014) at 225; Miranda (2014), Mazuyer (2014); De La Porte (2015).

<sup>891</sup> In reference to Loi (2014), see Prassl (2014) at 225.

<sup>892</sup> Joined Cases C-22/13, C-61/13 to C-63/13 and C-418/13 *Mascolo and others* [2014] ECLI:EU:C:2014:2401.

the Court concluded by advising that the Italian situation be regarded as amounting to abuse.<sup>893</sup>

The crucial point of this judgment for our discussion is where the Court points to the *vital connection between fiscal policies and the safe-guarding of workers' rights*. In fact, the source for the abuse by successive fixed-term contracts in the Italian education sector lay in the Italian authorities' failure to hold the required competitive selection procedure for filling tenured positions.<sup>894</sup> In that respect, the Court then stresses explicitly that budgetary considerations could *not* justify the lack of any measure to prevent such misuse of fixed-term contracts.<sup>895</sup> While conceding that such considerations may underpin the Member States' *choice* of social policy and influence the nature or scope of such policy measures, it underlines that 'they [did] *not in themselves constitute an aim pursued by that policy*' [emphasis added, NB].<sup>896</sup>

This judicial decision, therefore, raises an important inference for the process of meta-coordination under the European Semester. It suggests that based on EU employment rules, there are *limits* to the application of an absolute conception of fiscal consolidation "at any price" – i.e. as an *automatic* affair. The Court's interpretation implies that the abuse of workers' rights may be a consequence of policymakers' failure to distinguish adequately between the chosen means and the policy aims pursued. In effect, the *Mascolo* decision underlines the need to carefully weigh and justify the necessity and proportionality of policy measures when applying an integrated approach to policy-making.<sup>897</sup>

### 7.3.2. The impact on the EU's standard-setting capacity in employment regulation

This section will now analyse the interaction between employment standards and coordination instruments in the context of the European Semester. First, we will revisit in a more general discussion the possibilities for combining EU coordination with employment standards. Second, we will study how policy choices are being framed through the European guidance on labour market reform. Finally, we will deliberate further on the impact of Smart Regulation on the EU's standard-setting capacity in the employment field.

#### A) Combining EU coordination with employment standards – as "shield" or "sword"?

In Chapter 5, we have posited that in theory the European Semester epitomises the EU's "Good Governance"-ideal of integrated coordination. The latter has come a long way from its "open" predecessor, i.e. the OMC, which the Lisbon Agenda had put forward as a self-

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<sup>893</sup> *Mascolo and others* [2014] at 104-113. Based on Claus 5 (1) of the Fixed-Term Work Agreement.

<sup>894</sup> For more than ten years, no competitive selection had been organised. Mazuyer (2015).

<sup>895</sup> Aimo (2015).

<sup>896</sup> *Mascolo and others* [2014] at 110.

<sup>897</sup> While it is surely risky to make such general inferences based on the casuistic judgements of the CJEU, it should be noted that the *Mascolo* decision follows a trend in European case law regarding the role of budgetary considerations in national social policy-making. See Bell (2012).

standing, novel governance technique.<sup>898</sup> Taking (again) a closer look at these origins is useful to clarify how the European coordination instruments relate to the protection of fundamental social rights at Union level.

It was especially during the European Convention that deliberated the Union's constitutional future where the relationship between the OMC and the CFREU provided a central point of discussion.<sup>899</sup> Considering some of the main tenets of this debate helps preparing to review the role of employment standards in the Semester more generally.

Especially in the interest of consolidating social rights at Union level, the Charter's role 'as ideal institutional complement to the OMC' was pondered.<sup>900</sup> Two positions typified the debate. On the one hand, the CFREU was considered capable of acting as a "gigantic non-regression clause"<sup>901</sup> in view of the deregulatory tendencies feared to be inherent to the European coordination activities.<sup>902</sup> This perspective corresponds to the negative notion of justiciable rights providing a "shield" through ex post judicial review.<sup>903</sup> On the other, the EU's coordination instruments carried potential of actively providing 'decentralised, non-judicial implementation of fundamental rights recognised at EU-level'.<sup>904</sup> This view considers social rights as fulfilling a programmatic role in the EES in a preventive manner, i.e. acting ex ante as a "sword".<sup>905</sup> Developing an OMC specifically for the monitoring of the implementation and application of fundamental rights in the Member States has been a popular proposal in this regard.<sup>906</sup> This could have functioned as a basis for constructing a proper "EU fundamental rights policy" and for connecting this to other OMCs.<sup>907</sup>

Andronico and Lo Faro caution that such idealisations may amount to "constitutional engineering".<sup>908</sup> They propose to scrutinise 'the plausibility and concrete possibility' of fashioning the relationship between the OMC and the CFREU in the light of 'the unsatisfactory character of fundamental rights which have been codified within the

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<sup>898</sup> Hodson and Maher (2001).

<sup>899</sup> De Búrca (2003).

<sup>900</sup> Andronico and Lo Faro (2005) at 54.

<sup>901</sup> Ibid. at 52.

<sup>902</sup> 'Yet, while the participatory nature of the OMC is contested, also its openness in terms of capability to adjust to changing needs has raised criticism. In contrast to common legislative standards, the flexible benchmarks set by the OMC could arguably lead to regulatory competition resulting in a race to the bottom in terms of social standards. However, given the lack of legislative competence and/or political will, the adoption of social standards through European regulation is not a realistic alternative, and might not—given the diversity of welfare systems— even be desirable. Therefore, recourse to fundamental social rights may appear as an attractive solution, in the sense that in the absence of social legislation at European level, fundamental social rights may appear as a hard standard which OMC processes would have to respect, thereby avoiding deregulatory tendencies.' Smismans (2005) at 217-218.

<sup>903</sup> Smismans (2005) at 218.

<sup>904</sup> Andronico and Lo Faro (2005) at 53.

<sup>905</sup> De Schutter (2005).

<sup>906</sup> CDR-CFR report (2006); Smismans (2005).

<sup>907</sup> Smismans (2005) at 218. The EU Fundamental Rights Agency has indeed been established soon afterwards (2007), yet, it has a rather limited reach with regard to social rights.

<sup>908</sup> Andronico and Lo Faro (2005) at 54.

[EU] order'.<sup>909</sup> They structure this critique based on the classification of the Charter's limitations, as summarised above.<sup>910</sup>

Firstly, attention is drawn to the prejudice, which the restriction on the EU's competencies causes for fundamental rights in fulfilling an *active, ex ante* role in the European coordination processes. Andronico and Lo Faro point to the 'obvious conflict' between the Charter's "neutral" stance regarding the division of European and national competences and the requirement of an effective safeguard of fundamental rights. In reference to the Union's contradictory constitutional provisions on the freedom of association and the right to collective bargaining, they highlight:

'Many of the fundamental rights listed in the Charter pre-suppose a policy of monitoring and enforcement which also includes, and inevitably so, intervention on matters until now excluded from the competence of the Union.'<sup>911</sup>

Secondly, they underline the prejudice resulting from 'the mutilations of fundamental social rights (or principles) set forth by the Charter', which have been caused by the codified distinction between rights and principles.<sup>912</sup> This prejudice is notably affecting the reactive role of social rights, as their degradation to "principles" virtually reduces them to 'little more than symbolic pronouncements deprived of any real regulatory potential'.<sup>913</sup> The dilemma is that 'principles do not generally generate competencies; but competencies are necessary to give principles legal effect'.<sup>914</sup> This effectively undermines the idea of 'protecting the condition of the individual'. Accordingly, in the context of the EES, the option of *ex post* judicial enforcement has been regarded as very limited.<sup>915</sup>

Finally, concerning national governments and administrations as addressees of the Charter, Andronico and Lo Faro deliberate the chances for Member State action to be subjected to a constitutional review by the EU in the framework of an OMC. They emphasise that it is 'the regulatory action of the Member State which constructs the final "product" of the OMC' that is subject to EU surveillance.<sup>916</sup> Consequently, the question arises of whether 'the decisions assumed by a Member State within the framework of the OMC [can] be qualified as decisions assumed in the implementation of EU law'.<sup>917</sup> Regarding the specific case of the OMC as a prototypical governance technique, the authors infer in response:

'It is not easy to answer this question in a context of open coordination in which it is always difficult to tell *where the elaboration of regulations finishes and where their*

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<sup>909</sup> Ibid. at 54.

<sup>910</sup> See Section 7.2.1.B.

<sup>911</sup> Andronico and Lo Faro (2005) at 55.

<sup>912</sup> Ibid. at 58.

<sup>913</sup> Ibid. at 57.

<sup>914</sup> Ibid. at 57-58.

<sup>915</sup> Smismans (2005) at 218.

<sup>916</sup> Andronico and Lo Faro (2005) at 59.

<sup>917</sup> Ibid. at 59-60.



*implementation begins.* It is certainly relevant to note that the fundamental characteristic of the OMC is precisely – *by definition* – the exclusion of binding measures placed at a Community level, and, consequently, the absence of implementing measures imposed at the level of the Member States.’ [emphasis added, NB]<sup>918</sup>

They conclude by reiterating that the Charter is in principle barred from extending the range of Member State action that qualifies as implementation of EU law.

In short, these considerations provide us with a basic understanding of the various dimensions to the difficult relationship between the relationship between the OMC and the CFREU. Importantly, the Charter rights *could* play both an active and a reactive role vis-à-vis the European coordination process. However, the experiences of the EES have thus already cast doubts on either of these functions.

#### B) Labour market reform – policy framing through the AGS

Having reviewed the EU’s guidance on fiscal consolidation and its impact on employment regulation above, in the following we will examine how the Commission envisages that the required labour market reforms will take shape. As the crisis has exacerbated the number of job losses, Europe 2020 confirmed the raising of employment levels as a key strategic long-term interest of the Union. In the AGS, the Commission therefore stresses the need to prioritise labour market reforms to improve both, the level of employment and competitiveness.

A particular worry is that employment performances may fall short of the 2020-targets. The Commission therefore prompts Member States to implement a range of measures to enhance job creation and increase participation in the labour market in line with the Flexicurity-objective.<sup>919</sup> These measures include the promotion of flexible work arrangements and the reviewing of tax benefit systems to reduce undeclared work and encourage the participation of second earners. They also demand reducing early retirement schemes,<sup>920</sup> adjusting unemployment benefit systems to ensure *incentives* to work, improving skills levels through lifelong learning and facilitating young people’s access to the labour market. The Commission also advocates the reform of the Member States’ public employment services together with enhancing the implementation of ALMP.<sup>921</sup>

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<sup>918</sup> Andronico and Lo Faro (2005) at 60.

<sup>919</sup> ‘The implementation of balanced flexicurity policies can help workers to move across jobs and labour market situations.’ AGS 2012 at 10

<sup>920</sup> ‘In addition to the impact of the current crisis, the structural trend towards an ageing and, before long, a shrinking working-age population in parts of Europe creates particular challenges. Encouraging the early retirement of older workers in the hope that young people will be recruited in their place is a policy that has proven largely ineffective and very costly in the past, and should not be repeated.’ AGS 2013 at 10

<sup>921</sup> ‘The labour market situation and social situation call for an urgent response. Stepping up active labour market policies, reinforcing and improving public employment services, simplifying employment legislation and making sure that wage developments support job creation are essential elements of such a strategy. The situation of young people requires particular attention. Furthermore,

A crucial question is to what extent the more detailed elaboration of these measures foresees the implementation of the “Flexicurity”-objective in a balanced manner. To answer that question, we will focus below on the promotion of flexible work arrangements.

*Flexibilising employment protection legislation to reduce labour market segmentation*

The reform of national employment protection legislation (EPL) is a central element in the Commission’s vision for the development of flexible working arrangements.<sup>922</sup> In its advice to the Member States, the EU institution equates such reform with the need of ‘reducing the excessive *rigidities* of permanent contracts’ [emphasis added, NB].<sup>923</sup> It thus targets its guidance directly at the various kinds of legal protections against dismissal that, as explained in Chapter 1, are conceived as providing “employment protection” in the national context.

The purpose of EPL reform is that by ‘[r]educing the gaps in employment protection between different types of work contracts should [...] help to reduce *labour market segmentation*’ [emphasis added, NB].<sup>924</sup> The problem of unemployment is here translated into an image of a “divided labour market” – i.e. between those with permanent contracts and those without. The segmentation is effectively portrayed as inhibiting the adjustment capacity of the labour market:

‘The impact of the crisis has highlighted this issue: job losses for workers in temporary work were almost four times higher than for those in permanent employment.’<sup>925</sup>

The Commission’s interpretation of “balancing security and flexibility” therefore implies here the need to adjust EPL in order to favour job creation. EPL reform is intended to provide ‘protection and easier access to the labour market to those left outside, in particular young people’.<sup>926</sup> This could be done by ‘Member States [introducing] more open-ended contracts to replace existing temporary or precarious contracts in order to improve employment perspectives for new recruits’.<sup>927</sup>

The Commission furthermore views such *rigidities* not only as posing an obstacle to labour participation. It also regards them as hampering competitiveness and thus growth:

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efforts should be stepped up to promote social inclusion and prevent poverty by reinforcing essential safety nets.’ AGS 2013 at 14

<sup>922</sup> ‘In some Member States employment protection legislation creates labour market *rigidity*, and prevents increased participation in the labour market. Such employment protection legislation should be reformed to *reduce over-protection of workers with permanent contracts*, and provide protection to those left outside or at the margins of the job market.’ [emphasis added, NB] AGS (2011) at 7.

<sup>923</sup> AGS (2012) at 11.

<sup>924</sup> AGS (2013) at 10.

<sup>925</sup> JER (2011) at 11.

<sup>926</sup> AGS (2012) at 11.

<sup>927</sup> AGS (2011) at 7.

'Rigidities in labour and product markets have hindered competitiveness adjustment, efficient resource allocation and productivity growth and partly explain the divergence in potential growth rates across Member States.'<sup>928</sup>

In that respect, it emphasises increasingly the need to “simplify” EPL – a term familiar from the EU’s Better Regulation agenda (see below). Such “modern EPL” then ought to ensure both the ‘effective protection of workers and the promotion of labour market transitions between different jobs and occupations.’<sup>929</sup>

*The limits of EU binding rules in light of the “Jobs”-objective*

As part of the structural reforms to modernise national labour markets, the Commission hence eyes EPL reform to remove rigidities and fight labour market segmentation among the preferred policy solutions. Also, here, two recent decisions of the CJEU regarding temporary employment help to evaluate the Commission’s guidance on labour market reform. At the same time, the following examples also help to elucidate further the *limits* of the interaction between different EU employment governance instruments.

The CJEU decision in the Spanish reference *Poclava* is in fact illustrative of crucial tensions that may arise between European employment law and the EU’s policy guidance on the modernisation of labour markets.<sup>930</sup> The dispute concerned a special, new, open-ended employment contract that the Spanish Government introduced to facilitate job creation in the framework of the (second) major anti-crisis reform of the labour market (Law No. 3/2012). Subject to certain conditions, the “*contrato de trabajo por tiempo indefinido de apoyo a los emprendedores*” (contract of indefinite duration to support entrepreneurs) included an extended probationary period of up to one year.<sup>931</sup> Making it easier for Spanish employers to let (supposedly, unfit) workers go by temporarily removing the worker’s legal protections against dismissal was to *incentivise* employers to hire more.<sup>932</sup>

The national judge intimated that the “employment contract to support entrepreneurs” *factually* represented a peculiar type of fixed-term contract with less favourable working conditions. It asked the CJEU whether the new Spanish provision

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<sup>928</sup> AGS (2014) at 10. The Council already observed earlier that ‘many Member States are faced with insufficient or weak labour market transitions where the labour market is characterised by rigidity and relatively low turnover to meet changing demand patterns. [...] These factors have a negative direct impact on economic activity through hampering the efficient allocation of labour resources.’ JER (2011) at 11.

<sup>929</sup> AGS 2016 at 11

<sup>930</sup> Case C-117/14 *Poclava* [2015] ECLI:EU:C:2015:60.

<sup>931</sup> Based on Article 14 of the Spanish Workers’ Statute, the new exceptional one-year probation period compares to the ordinary probationary periods under Spanish labour law ranging from a minimum of one month for contracts lasting up to six months to a maximum probation period of six months for contracts that last longer than half a year.

<sup>932</sup> In effect, all the rights and obligations normally applicable to employment contracts under the Spanish Worker’s Statute also apply to this new specific type of contract *except* for those relating to the probationary period. See the Workers’ Statute (BOE No. 75 of 29 March 1995, p. 9654), consolidated version approved by Royal Legislative Decree 1/1995 of 24 March 1995.

breached the principle of non-discrimination between fixed-term and permanent workers under Directive 1999/70/EC as well as the right to protection against unjustified dismissal of Article 30 CFREU.<sup>933</sup> The case touches upon the delicate question whether the Spanish reform law amounted to implementation of EU law. The national court posited that the law was ‘prompted by the decisions and recommendations of the European Union on employment policy’.<sup>934</sup>

The Court of Justice, however, determined that it had no jurisdiction to judge on the substance of the case because the Spanish law did *not* represent an implementation of EU law. It insisted that the *formal* nature of this new contract type was of indefinite duration. Neither could Law No. 3/2012 hence be linked to the Fixed-Term Work Directive,<sup>935</sup> nor was there any EU directive on dismissal protection that implemented Article 30 CFREU and to which the Spanish law might be connected.<sup>936</sup>

The Court thus brushed away the thorny questions regarding the contradictory normative impulses that emanate from the EU’s different employment governance instruments.<sup>937</sup> It answered the question of the EU coordination instruments’ justiciability by highlighting the programmatic character of the relevant Treaty provisions on which these were based.<sup>938</sup> Thereby, the CJEU stressed that the EU’s policy recommendations relating to the creation of employment did not bear any legal force in a traditional sense and, hence, escaped judicial review. However, neither did it contest that national policy measures adopted to that end may indeed come into conflict with the objective of worker protection granted under (EU) employment law.<sup>939</sup> In the end, though, it had no choice but to reaffirm the *absence* of applicable binding rules at EU level.

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<sup>933</sup> *Poclava* [2015] at 23-25.

<sup>934</sup> To support its point, the referring court thoroughly enumerates the relevant non-binding instruments advanced under the European Semester. *Poclava* [2015] at 21-22.

<sup>935</sup> The Court thereby relied on the provisions of Law No. 3/2012, notably Article 4(2) and (3), at face value. With regard to Directive 1999/70/EC, the Court judged the situation to fall outside the scope of the EU’s fixed-term workers-rules because the latter covered explicitly only employment relationships ‘where the end of the employment contract or relationship [was] determined by objective conditions [...]’. Such conditions (e.g. the reaching of a specific date, completing a specific task, or the occurrence of a specific event) were not considered to be present here. See *Poclava* [2015] at 33.

<sup>936</sup> The CJEU underlines that Article 30 CFREU did not have any legislative counterpart within the EU employment *acquis* (based on Article 153 TFEU), i.e. a pertinent directive regulating protection against (unfair) dismissal which the Member States were supposed to implement. See *Poclava* [2015]. Also, the fact that the “employment contracts supporting entrepreneurs” could be financed with the help of the ESF did not change that conclusion.

<sup>937</sup> Its restraint in assuming the jurisdiction over the compatibility of Law 3/2012 with EU law seems understandable, given the salience and political sensitivity that surrounded the “anti-crisis” reforms in Spain and other Member States.

<sup>938</sup> The CJEU underlines that the European Employment Guidelines und Article 148 TFEU lack the necessary legal obligation, as does Article 151 TFEU aiming for the promotion of employment.

<sup>939</sup> In reference to Order C-361/07 Polier [2008] at 13, the CJEU underlines: ‘In that regard, it should be borne in mind that, when examining the French “new recruitment contract”, the Court held that, even though protection for workers in the event of the termination of the employment contract is one of the means of attaining the objectives laid down in Article 151 TFEU and even though the EU legislature has competence in this field in accordance with the conditions laid down in Article 153(2)

Another case shows how a lack of protection may also occur even where relevant EU legislation does exist. Such friction can for example arise in the area of ALMP where Member States may choose to use public funds for re-integration programmes of the long-term unemployed.<sup>940</sup> If such labour market re-integration involves activation measures based on fixed-term contracts, they may possibly come within the scope of Directive 1999/70/EC.

However, the Court's decision in *Sibilio* has underlined an important drawback of that Directive from the perspective of worker protection.<sup>941</sup> It recalled that the purpose of the Directive was to prevent fixed-term workers from ending up in a precarious situation.<sup>942</sup> That aim, however, seemed to be somewhat compromised by the lack of a common EU definition of who qualified as a "worker" under the Fixed-Term Work Agreement.<sup>943</sup> That left national authorities with considerable discretion in determining what types of fixed-term workers enjoy access to the protection offered under this EU law.<sup>944</sup> In this case, the Fixed-Term Work Agreement explicitly excluded fixed-term employment created through public funds.<sup>945</sup>

The Directive thus sanctions the Member State's plain discretion in denying workers on public re-integration programmes access to the right of equal treatment for fixed-term contracts. While stressing that disputed cases had to be subjected to a thorough assessment based on effective, transparent and controllable criteria,<sup>946</sup> the CJEU conceded that even such factual determination by a national court would hardly surmount that express discretion.

These two decisions confirm that, as indicated above, the justiciability of the EU's policy guidance delivered through the coordination instruments of the Semester remains

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TFEU, situations that have not been covered by measures adopted on the basis of those provisions do not fall within the scope of EU law.' See *Počlava* [2015] at 41. Interestingly, the French Constitutional Council back then, despite the rejection of the admissibility of the *Polier*-case by the European Court of Justice, eventually declared the new functional type of employment contract inadmissible based on a negative opinion received by the Collective Complaint Committee of the ILO, which confirmed the incompatibility of the concerned legislation with Convention No. Dalmasso (2011).

<sup>940</sup> 'Persistent long-term unemployment has implications for society as a whole, with dire social consequences for the persons concerned and a negative impact on growth and public finances. Long-term unemployment is one of the factors linked to the increase in poverty in the EU since the start of the crisis.' AGS (2016) at 10.

<sup>941</sup> Case C-157/11 *Sibilio* [2012] ECLI:EU:C:2012:148.

<sup>942</sup> *Sibilio* [2012] at 40.

<sup>943</sup> *Sibilio* [2012] at 42. See also the 17th recital of the Preamble of Directive 1999/70/EC. Ibid. at 44-45.

<sup>944</sup> Also, under national law such workers are in fact likely to be excluded from labour law-protection.

<sup>945</sup> Clause 2 (2) of the Framework Agreement.

<sup>946</sup> *Sibilio* [2012] at 56. If a national judge – based on such factual assessment – were to find such national classification (like that of "socially useful worker") to be merely fictitious, national (or, in this case, Italian) law would enable the national judge to determine that such a classification was merely disguising what in reality represented an employment relationship that could come within the scope of the Framework Agreement.

extremely limited.<sup>947</sup> For individual workers to enforce their rights against deregulatory impulses of the European recommendations via the judicial route is practically impossible where EU legislation is absent. And, even where employment disputes come within the scope of EU employment legislation, those binding rules may be of little avail – notably, to long-term unemployed posted to re-integrate through publicly subsidised employment.

### C) The European notion of competitiveness: Smart Regulation and social progress?

Based on the above findings, we observe that the new EU Economic Governance-regime has not only been affecting the Union’s capacity of coordinating employment policies due to the substantial constraint on public finances. The previous section has suggested that this regime also has a significant bearing on the interpretation of European employment standards. To these inferences, it is important to add a final point regarding the notion of “competitiveness” that is being promoted at EU-level – above all, through the European Semester. This discussion is aided by returning briefly to the impact of the Better Regulation-agenda.

The Commission’s urge towards exempting SMEs from labour, social and environmental regulation in the name of competitiveness features prominently in this agenda. It implies the preference of relinquishing this substantial group of businesses to self-regulation. This may well work to the benefit of that one group in society but may simultaneously be to the detriment of the general interest.<sup>948</sup> Still, the singling out of this target group for/through Smart Regulation is defended first and foremost as *sweeping measure to save costs*.

As described in Chapter 4, the EU Executive has been on a mission to reduce regulatory and administrative burdens, preferably quantified in cost terms. This emphasis on improving competitiveness appears to be omni-present in the programmes linked to Better Regulation. It however impresses a bias on the Union’s “Good Governance”-ambitions. REFIT, for instance, promotes hybridisation in EU regulation by nurturing an “evaluation culture” built on a broad horizontal approach. Instead, the apparent dominance of the “competitiveness”-discourses seems in fact to have the opposite effect.<sup>949</sup>

In this context, it is worth noting that for a considerable time, the EU has been cultivating a rather one-sided conception of “competitiveness”, conceived almost exclusively in price or cost terms. Hay (2007) warns that this limited notion of competitiveness has been based on the “dangerous” assumption that all markets are like ‘those for cheap consumer goods – that is, both highly price sensitive and highly demand

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<sup>947</sup> Remarkably, though, in a recent decision regarding the EU’s potential liability in the context of the financial assistance programme to Cyprus, the Court stressed that the CFREU was addressed to the EU institutions, including when they act outside the EU legal framework. The Commission was therefore bound to ensure that such a memorandum of understanding is consistent with the fundamental rights guaranteed by the Charter. Cf. Joined Cases C-8/15 P to C-10/15P *Ledra Advertising* [2016] ECLI:EU:C:2016:701.

<sup>948</sup> Article 17 TEU.

<sup>949</sup> See Chapter 4.3.

price elastic’.<sup>950</sup> He underlines that ‘[i]n anticipating the efficiency gains arising from heightened economic integration, [...] [t]his assumption leads the EU to privilege strategies of cost and price containment to the detriment of other strategies for enhancing competitiveness.’<sup>951</sup> The fixation with cost competitiveness effectively links the ability to compete to the “negative” understanding of market integration, justifying further market liberalisation by removing barriers to trade.<sup>952</sup>

Under the Better Regulation-agenda – and, as we have seen, the European Semester, this tendency seems to be taken even a nudge further. Here, it is no longer only the *differences* in the Member States’ domestic legislation obstructing the free circulation of production factors. The prevalence of “burden”-discourses seems to denunciate *regulation per se* as the problem.<sup>953</sup> Curiously, though, the costs of the expansive REFIT-machinery do not seem to be part of the equation.<sup>954</sup> In effect, then, this apparent preference for the absence of regulation sends clear impulses for deregulation, especially of labour and social regulation.

In practice, though, such absence amounts to an illusion. Ashiagbor (2005) points out that deregulation does not result in the abolition of regulation altogether but rather in the replacement of employment regulation with private law regulation.<sup>955</sup> The idea of deregulation, therefore, masks the attempt of changing the rationale for ordering social relations in the employment context. It replaces one legal fiction (recognising the inequality of bargaining power in employment relationships) by another (assuming the equality of market actors).<sup>956</sup> The result is likely to be a shift in the legal protection of the weaker party to that of more powerful interests.<sup>957</sup>

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<sup>950</sup> Hay (2007) at 25-26.

<sup>951</sup> Ibid. at 26.

<sup>952</sup> At the example of ‘the contested Bolkestein Directive on the internal market for services’, Hay shows that ‘the public discourse in and through which both the original and significantly revised Services Directive were framed is clearly predicated on the efficiency gains anticipated through the heightened competition engendered by market liberalization. The case for service market liberalization, then, does not rest on the problematic assumption that the competition between nations is analogous to that between corporations. It does, however, rest on an equally problematic and largely unacknowledged assumption – namely that markets for services are analogous to those for cheap consumer goods and are both highly price sensitive and demand price elastic.’ Hay (2007) at 26.

<sup>953</sup> The persistent reference to “cutting red tape” stems from the neo-liberal ideal of a “free” market. See from the latest examples, European Commission COM(2016) 615.

<sup>954</sup> Schömann (2015).

<sup>955</sup> Ashiagbor (2005); see also Deakin and Reed (2000).

<sup>956</sup> See Chapter 1.

<sup>957</sup> Kalecki (1942) observed in this respect: ‘Under a laissez-faire system the level of employment depends to a great extent on the so-called state of confidence. If this deteriorates, private investment declines, which results in a fall of output and employment (both directly and through the secondary effect of the fall in incomes upon consumption and investment). This *gives the capitalists a powerful indirect control over government policy*: everything which may shake the state of confidence must be carefully avoided because it would cause an economic crisis. But once the government learns the trick of increasing employment by its own purchases, this powerful controlling device loses its effectiveness. Hence budget deficits necessary to carry out government intervention must be

Last but not least, the latest Inter-Institutional Agreement (IIA)<sup>958</sup> imposes on the Member States the requirement to ‘inform the European Commission and explain to their citizens, whenever they add additional requirements to Union law in their national legislation’.<sup>959</sup> This duty is clearly intended to improve the transposition of EU law into the national domain. However, from an employment regulation perspective, it raises the question of *what implications it will have for the “social progress” clause anchored in the Treaty*.<sup>960</sup> As underlined in Chapter 4, that provision stipulates that Member States shall not be prevented ‘from maintaining or introducing more stringent protective measures compatible with the Treaties’. Within the competitiveness-focused context of Smart Regulation, though, such tailor-made employment regulations may well be at risk of being taunted at EU-level, if the recent experience of the European social partners’ hairdresser agreement is any indication.<sup>961</sup>

#### 7.4. DISCUSSING AN ALTERNATIVE SCENARIO – A MORE BALANCED INTEGRATED APPROACH IN THE MAKING?

The above analysis reveals how the EU Economic Governance-regime is based in a *reductive* understanding regarding the components of our model-integrated approach. These can be summarised as follows:

- a. *Restrictive macro-economic policy* to warrant the sustainability of public finances and ensure the stability of the Euro;
- b. *Employment policies* to ensure that EPL does *not create disincentives* to labour participation; and
- c. *Employment standards that do not pose a burden* on business (growth model based on “low cost low productivity” to maintain competitiveness for exports).

The recently dominating integrated regime of EU Economic Governance thus continues to build on a notion of market-driven integration for the European project. It includes much rhetoric on the need to enhance growth but provides institutional structures that favour above all stability – essentially relying on the market’s (or the EMU’s?) “invisible hand”,

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regarded as perilous. ‘The *social function of the doctrine of “sound finance” is to make the level of employment dependent on the state of confidence.*’ [emphasis added, NB]

<sup>958</sup> The IIA is a landmark of the Better Regulation-agenda that specifies the respective roles of the main EU institutions (the European Parliament, the Council of the European Union and the European Commission) in strengthening their common commitment to better law-making at European level, mainly through impact assessments to support legislative proposals and substantive amendments. It was first adopted in 2003 and has been replaced in April 2016 by a new agreement. See Inter-Institutional Agreement, OJ L 123, 12 May 2016, p.1. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2016:123:TOC>

<sup>959</sup> European Commission, COM(2016)615, at 10.

<sup>960</sup> Article 153(4)(2) TFEU. See Section 6.3.2.

<sup>961</sup> Uni Global Union, EU Commission mocks agreement to improve health & safety of hairdressers (Press Release, 16 November 2015) <http://www.uniglobalunion.org/news/eu-commission-mocks-agreement-improve-health-safety-hairdressers> (accessed 31 March 2017). See also *supra* note 11.



notably to create short-term growth (also through deregulation). Public expenditure for taxes and social security contributions are not recognised as crucial fiscal means of redistribution, but reduced to a burden on growth and jobs. The Flexicurity-objective is thus placed in an institutional context that actively promotes a narrow vision of labour market flexibility. It serves to restructure national labour legislation to provide protection simultaneously to those in employment and those outside.

Meanwhile, precarious employment and inequality keep rising. The Commission and the Council continue to attribute this trend to the impact of the crisis and unemployment:

‘Income inequality is growing across and within Member States, particularly in the Member States that witnessed the largest increases in unemployment [...] In many countries, the crisis has intensified the long-term trends of wage polarisation and labour market segmentation, which together with less redistributive tax and benefit systems have fuelled rising inequalities. The significant increases in inequalities can be related to high levels of unemployment (with the largest increases at the bottom of the labour market). In some cases the impact of fiscal consolidation has been also a factor.’<sup>962</sup>

Still, in view of these social consequences it is questionable how successful this reductive model of an integrated approach can be in the long-term.

Importantly, though, this rather sombre conclusion is not the end of the story which clearly does not grant EU employment governance a very bright future. It is therefore still worthwhile to recognise also another side of the story, by underlining some positive developments of recent years.

#### **7.4.1. EU law’s propensity to safeguard workers’ interests in light of the “Growth”-objective**

The following examples reveal not only that EU law still possesses the propensity of promoting workers’ interests – both, through policy-making and judicial enforcement. They also show the potential of positive interaction between different EU employment governance instruments and reveal the EU’s *innovative potential* regarding employment regulation.

##### A) Through policy-making

On this regard, it is important to note that other legislative instruments (other than the traditional EU employment directives) can also serve to promote the value of worker protection. Especially measures that strengthen the *enforcement* of labour standards – including national, European or international standards – seem to yield greater political acceptance. A few such measures have indeed been approved in recent years within the setting of the Internal Market.

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<sup>962</sup> JER (2014) at 56.

The most notable measure in this regard is probably the adoption of the Posting of Workers Enforcement Directive.<sup>963</sup> This piece was originally included in the package of legislative proposals that fell victim to the “Monti II”-debacle.<sup>964</sup> Nevertheless, with provisions mainly of a procedural nature, Directive 2014/67/EU eventually succeeded in completing the legislative process.<sup>965</sup> It aims to strike a balance between worker protection and facilitating the cross-border mobility of service providers.<sup>966</sup> It represents a first step towards mitigating the EU’s controversial role in defining minimum requirements for the posting of workers in the context of the free movement of services.<sup>967</sup>

Besides this, the recent revision of the European rules on public procurement provides an even more intriguing illustration for the *EU’s potential in supporting the enforcement of labour standards in the Member States*. Article 18 (2) of the Revised Public Procurement Directive 2014/24/EU lays down the following principle:

‘Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.’<sup>968</sup>

This Directive thus articulates a horizontal approach to the regulation of the public procurement market.<sup>969</sup> While lacking a direct reference to Article 9 TFEU,<sup>970</sup> the Directive

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<sup>963</sup> Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’).

<sup>964</sup> See *supra* note 2.

<sup>965</sup> Article 1 (1) of that Directive ‘establishes a common framework of a set of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of Directive 96/71/EC, including measures to prevent and sanction any abuse and circumvention of the applicable rules’. The Directive requires that ‘an overall assessment of all factual elements’ shall be made for the identification of a genuine posting and prevention of abuse and circumvention (Article 4). Furthermore, it seeks to improve access to information for workers and service providers (Article 5) and enhance the monitoring of compliance. The latter is based on specified control measures and criteria for inspections (Articles 9-10) and supported by additional provisions on administrative cooperation (Articles 6-8).

<sup>966</sup> The new Enforcement Directive ‘aims to guarantee respect for an appropriate level of protection of the rights of posted workers for the cross-border provision of services, in particular the enforcement of the terms and conditions of employment that apply in the Member State where the service is to be provided in accordance with Article 3 of Directive 96/71/EC, while facilitating the exercise of the freedom to provide services for service providers and promoting fair competition between service providers, and thus supporting the functioning of the internal market’.

<sup>967</sup> European Commission, Commission presents reform of the Posting of Workers Directive – towards a deeper and fairer European labour market (Press release IP/16/466, Strasbourg, 8 March 2016) – i.e. the so-called “Mobility Package”.

<sup>968</sup> Annex X refers to the major ILO Conventions, including No 87 on Freedom of Association and the Protection of the Right to Organize, No 98 on the Right to Organize and Collective Bargaining, and No 29 on Forced Labour.

<sup>969</sup> Barnard (2014).

binds national public authorities to integrate “social and labour requirements” appropriately into public procurement procedures.<sup>971</sup> A key rationale for the incorporation of these requirements has been to avoid destructive competition.<sup>972</sup> This is evident from the provisions on “abnormally low tenders”.<sup>973</sup> These add up to the possible rejection of a tender ‘where the contracting authority has established that the abnormally low price or costs proposed results from non-compliance with mandatory Union law or national law compatible with it in the fields of social, labour or environmental law or international labour law provisions’.<sup>974</sup>

Barnard (2014) characterises the Revised Public Procurement Directive as ‘an interesting example of using the power of the procurement market to ensure the enforcement of both national, EU and ILO rules while at the same time allowing states to experiment with different approaches as to how to promote social interests’.<sup>975</sup> From the perspective of worker protection this is a notable improvement, considering that ‘[i]n the past, the Court of Justice has viewed the use of public procurement for the purpose of promoting fair employment conditions with scepticism’.<sup>976</sup>

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<sup>970</sup> Regarding the incorporation of environmental protection requirements, the Directive refers expressly to the corresponding horizontal Treaty clause in Article 11 TFEU on the EU’s obligation to mainstream environmental protection requirements into its policies and activities. In this connection, Recital 91 of the Preamble underlines that Directive 2014/24/EU ‘clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.’

<sup>971</sup> Recital 37 of the Preamble of Directive 2014/24/EU demands ‘that Member States and contracting authorities take relevant measures *to ensure compliance with obligations in the fields of environmental, social and labour law* that apply at the place where the works are executed or the services provided and *result from laws, regulations, decrees and decisions, at both national and Union level, as well as from collective agreements*, provided that such rules, and their application, comply with Union law. [...] However, this should in no way prevent the application of terms and conditions of employment which are more favourable to workers. ...’

<sup>972</sup> Schiek (2015, at 99) explains: ‘The requirement that those providing services or delivering goods for a public contractor provide employment conditions in line with local usage is of particular interest. Depending on where the services are provided, or the goods produced, the reference point may be local conditions in the Member State where the public contract is concluded, or the local conditions in another Member State.’ She adds that following ILO Convention No. 94, ‘public procurement can be used to “buy social justice” by imposing social conditions on contractual partners’.

<sup>973</sup> Article 69 (1) of Directive 2014/24/EU imposes on economic operators the requirement ‘to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services’. Article 69 (3) requires the contracting authority to ‘assess the information provided by consulting the tenderer’, whereby paragraph (2) specifies relevant elements that may explain abnormally low prices (including the economics of the manufacturing process, the technical solutions chosen, or the originality of the tenderer’s work or services).

<sup>974</sup> See Article 69 (3) second sentence and Recital 103 of the Preamble of Directive 2014/24/EU.

<sup>975</sup> Barnard (2014) at 220.

<sup>976</sup> Schiek (2015) at 99. She highlights: ‘Directive 2014/24 and Directive 2014/23 allow for procuring entities to insist on making the local remuneration at the place of work a condition of fulfilling contractual obligations with a public entity. Practical implementation of these principles is likely to result in challenges before national courts, which may be heard before the European Court of Justice following a reference.’

## B) Judicial enforcement

In contrast, however, the Court's case law also offers promising examples where EU law gives precedence to the protection of workers' rights. This jurisprudence is of particular interest in the face of the European guidance on labour market reforms, which generically implies that employment legislation affects job creation negatively. Such a view is remarkably one-sided given the complex effects that labour standards have regarding the level of employment, as intimated in Chapter 6.<sup>977</sup> The evidence for such broad-based negative assertions is in fact rather controversial.<sup>978</sup> Therefore, it is important to note that the Court of Justice has recently taken a stance against the instrumentalisation of employment legislation to improve labour market outcomes.

In the Finnish case *AKT*, the Court interpreted the Member States' obligation 'to review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on the grounds mentioned', in Article 4(1) of the Temporary Agency Work Directive.<sup>979</sup> The dispute at hand concerned the "improper" structural use of agency workers by Shell Aviation Finland Oy (SAF) in breach of an applicable collective agreement. The defendants, in turn, claimed the collective agreement, which required the imposition of a fine for cases of abuse, to be an excessive restriction and therefore not in conformity with Article 4(1) of Directive 2008/104/EC. They asked the local judge to disapply the provision in question.

The CJEU determined that the review of whether (or not) regulatory restrictions on agency work were justified was the responsibility of the legislator, *not* of national courts. Thereby, it subordinated the Directive's aim of job creation to its other aim of safeguarding the protection of agency workers.<sup>980</sup> The Court's reasoning effectively portrayed that aim of employment creation primarily as an economic and thus a political obligation.<sup>981</sup>

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<sup>977</sup> Deakin and Reed (2000).

<sup>978</sup> See Lewis and Heyes (2015); and Deakin, Malmberg and Sarkar (2013).

<sup>979</sup> Case C-533/13 *AKT* [2015] ECLI:EU:C:2015:173.

<sup>980</sup> Article 2 provides as the aim of Directive 2008/104/EC: 'The purpose of this Directive is to *ensure the protection of temporary agency workers* and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to *contributing effectively to the creation of jobs* and to the development of flexible forms of working.' [emphasis added, NB]

<sup>981</sup> The chosen arguments seem, in fact, rather cherry-picked based on the Directive's textual resources, instead of appealing to its purpose and objectives. The Court denies national courts the responsibility of disapplying national provisions considered contrary to prohibition in Article 4(1) (*AKT* [2015] at 28). Thereby, it reaffirms the discretion granted to the Member States in deciding which restrictions on agency work were justified by grounds of general interest and which were not (*AKT* [2015] at 30). It does not follow the defendants' argumentation which would include reading into Article 4(1) a functional positive obligation incumbent on the Member States to adopt or adapt legislation in order to comply with the prohibition imposed (*AKT* [2015] at 17-18). Additionally, the CJEU underlines that no clear sign had been given by the EU legislator that may incite a different conclusion. It stresses that the duty to follow up on the required review of national measures was particularly on the European Commission (cf. Articles 4 (5) and Article 11 (1) of Directive 2008/104/EC; *AKT* [2015] at 29).

Importantly, it thus showed preparedness to exercise judicial restraint when asked to interpret the use of legislative means for employment policy – notably, those inserted directly into EU law.<sup>982</sup>

In addition, it is possible to retrieve from the latter example a potential positive stimulus to employment regulation when there is pertinent EU legislation in place. Such beneficial effect can also be seen in the *Nierodzik*-case.<sup>983</sup> That decision, in fact, fits neatly into the established line of European case law regarding the principle of equal treatment between fixed-term and permanent workers.<sup>984</sup> Still more intriguing, here, is the broader context in which the CJEU handed down this decision regarding unequal notice periods for contract termination for fixed-term and permanent workers in Polish labour legislation.<sup>985</sup>

In each Semester-cycle from 2012 until 2015, the Commission and the Council have recommended that Poland steps up efforts to combat labour market segmentation (and in-work poverty). Their key recommendation, in this regard, focused on ensuring a better transition from fixed-term to permanent employment and reducing the excessive use of temporary and civil law contracts in the labour market.<sup>986</sup> Accordingly, increasing pressure for reform was built up through multiple sources,<sup>987</sup> including the decision by the CJEU in March 2014. Following a prolonged legislative battle,<sup>988</sup> the Polish legislator

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<sup>982</sup> In effect, the Court's restraint is respectful of the sensitivities involved in the regulation of agency work, given the great variety of industrial relations systems that exist in Europe.

<sup>983</sup> Case C-38/13 *Nierodzik* [2014] ECLI:EU:C:2014:152.

<sup>984</sup> See, for instance, Case C-268/06 *Impact* [2008] ECR I-2483; and Case C-307/05 *Del Cerro Alonso* [2007] ECR I-7109.

<sup>985</sup> The referring court seeks clarification from the CJEU about the compatibility of Polish labour legislation with Article 1 of the Fixed-Term Work Directive and Clause 1 and 4 of the Framework Agreement.

<sup>986</sup> See Clauwaert (2015) at 106-107.

<sup>987</sup> Further pressure came from Brussels where the European Commission had addressed questions about a possible infringement to the Polish Government in December 2013, following a complaint submitted by the “Solidarity” trade union (*NSZZ Solidarność*). See [http://www.labourlawnetwork.eu/national%3Cbr%3Elabour\\_law/miscellaneous/miscellaneous\\_-\\_national\\_labour\\_law/prm/192/v\\_\\_detail/id\\_\\_3921/category\\_\\_27/index.html](http://www.labourlawnetwork.eu/national%3Cbr%3Elabour_law/miscellaneous/miscellaneous_-_national_labour_law/prm/192/v__detail/id__3921/category__27/index.html) (accessed 9 February 2016).

<sup>988</sup> Polish reform endeavours apparently only picked up tailwind in 2014. A first legislative proposal of unions and democrats in 2014 did, however, not survive the stage of parliamentary deliberations. But soon a consensus emerged between the Government and the social partners on the necessity to introduce changes. The former, hence, presented its own proposal on a respective legislative reform on 31 March 2015 and forwarded it to the Parliament on 10 April. The draft was further analysed and evaluated in response to the Commission's question on the Council Recommendation concerning Poland (delivered on 16 November 2014). See [http://www.labourlawnetwork.eu/national%3Cbr%3Elabour\\_law/national\\_legislation/legislative\\_developments/prm/109/v\\_\\_detail/id\\_\\_5688/category\\_\\_27/index.html](http://www.labourlawnetwork.eu/national%3Cbr%3Elabour_law/national_legislation/legislative_developments/prm/109/v__detail/id__5688/category__27/index.html) (accessed 9 February 2016). The Government's proposal, in fact, referred explicitly to the Council Recommendation of 8 July 2014 concerning Poland, underlining “efforts to ensure a better transition from fixed-term to permanent employment”. Finally, the Sejm, the country's National Assembly, approved the major amendment to the Polish Labour Code on 25 June 2015. The Senate followed suit adopting the law reform, without any changes, on 24 July 2015. See <http://www.sejm.gov.pl/Sejm7.nsf/PrzebiegProc.xsp?nr=3321> (accessed 9 February 2016).

eventually adopted a reform of the Polish Labour Code in summer 2015.<sup>989</sup> This introduced substantial changes to the nature of employment contracts, including the clarification and strengthening of the protection of fixed-term workers.<sup>990</sup>

Together, these two decisions reveal EU law's potential for safeguarding workers' interests in spite of clear tendencies in the European coordination instruments to promote job creation through deregulation. Although the employment dispute in *AKT* has been totally unconnected to the context of meta-coordination under the European Semester, it is nevertheless interesting that the Court's conclusion in this case sends a signal of judicial self-restraint regarding the endorsement of legislative means for employment policy. Instead, the Polish example shows more directly how EU policy guidance to reduce labour market segmentation in combination with the judicial enforcement of a workers right protected by EU law may actually contribute to national legislative changes strengthening the legal position of temporary workers. This reveals that the implementation of EU legislation and relevant coordination instruments can function in a mutually reinforcing way, i.e. facilitating the successful mobilisation of different societal and institutional actors.

#### **7.4.2. A turning point in the AGS narratives – capacity for institutional learning?**

Finally, we must also note the advantages of the European Semester's reflexive nature. Thereby, the EU's meta-coordination schedule provides a comprehensive reference framework that permits the AGS narratives to evolve. In fact, the analysis reveals an *important turning point* (AGS 2014-AGS 2016) by highlighting expanding policy definitions, adjusted explanations and preferred policy solutions.

It is remarkable that – as indicated above – until 2013, the AGS has been characterised by a distinctly fatalistic tone, presenting the economic and fiscal crisis as the “catalyst” of ongoing economic restructuring:<sup>991</sup>

‘The on-going economic and financial crisis in the EU has been a catalyst for deep change. Its impact can be seen in the profound restructuring of our economies which is currently taking place. This process is disruptive, politically

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<sup>989</sup> Following the President's signature, the amendments to the Polish Labour Code were passed into law on 21 August 2015 and have become effective on 21 February 2016. See J. Unterschütz (2015) Poland: during the summer new legislation on fixed term contracts and parental leave was adopted. Planet Labor, 7 September 2015, n° 9235, available at [www.planetlabor.com](http://www.planetlabor.com)

<sup>990</sup> For more details on the changes introduced to the Polish Labour Code in summer 2015, see [http://www.labourlawnetwork.eu/national%3Cbr%3Elabour\\_law/national\\_legislation/legislative\\_developments/prm/109/v\\_\\_detail/id\\_\\_6029/category\\_\\_27/index.html](http://www.labourlawnetwork.eu/national%3Cbr%3Elabour_law/national_legislation/legislative_developments/prm/109/v__detail/id__6029/category__27/index.html) (last accessed 16 September 2016).

<sup>991</sup> ‘The crisis is precipitating major shifts across the economy, with business undergoing fast restructuring, many persons moving in and out of employment and working conditions being adjusted to changing environments. With job prospects deteriorating, a significant share of the population may not manage such transitions. The share of long-term unemployed has increased, with risks of falling permanently outside the labour force. [...] At the same time, the effect of demographic ageing is now accelerating the withdrawal of experienced workers from the labour market and the prospect of a stagnating/diminishing working age population is imminent in several Member States.’ AGS 2012 at 10.

challenging and socially difficult – but it is necessary to lay the foundations for future growth and competitiveness that will be smart, sustainable and inclusive.<sup>992</sup>

In effect, the adjustment of working conditions and deteriorating job prospects have been practically regarded as a necessity of the economic downturn.<sup>993</sup>

From 2014, however, we note a gradual *shift* in emphasis in the Commission's elaboration of the "Growth and Jobs"-mantra (AGS 2014-AGS 2016). The discourse on integrated coordination in the AGS starts to reveal more confidence, as the Commission builds on the "strengthened framework" of overseeing and guiding national economic and budgetary policies. Then, next to the existing problems (instability, competitiveness, unemployment, and governance) which are being subjected to different weighting, it stresses the "new" *problem of investment* as the missing link to explain why European economic performances have not yet lived up to expectations regarding a swift recovery. Meanwhile, the preferred remedies in terms of policy solutions remain essentially the same, but the Commission's guidance becomes noticeably more nuanced and highlights the need for *improving the interconnections* between the various policy measures.

Whilst this shift undoubtedly correlates with the recognition that the crisis had reached a "turning point" with economic recovery impending, it can surely also be connected to the addition of a new scoreboard of "economic and social indicators" to the 2014 Semester-cycle.<sup>994</sup> Designed in response to mounting popular pressure, the scoreboard extended the monitoring under the JER in order to enable the EU institutions to account (better) for the social consequences of the crisis.<sup>995</sup>

Thus, the Commission expands its problem definition of low growth, proposing that all the mentioned ills associated with it (unsatisfactory implementation of structural reforms, persistence of imbalances, and low productivity growth) are being exacerbated by

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<sup>992</sup> AGS (2013) at 1.

<sup>993</sup> Cf. Joerges (2012).

<sup>994</sup> European Commission, Communication on Strengthening the Social Dimension of the Economic and Monetary Union (COM(2013)690, Brussels, 2 October 2013). The scoreboard includes five main criteria to better monitor social and labour market conditions: overall unemployment levels, youth unemployment, household income, poverty risk and income inequalities. EurActiv.com, 'European Semester: First-ever EU 'social indicators' fail to impress' (3 Jun 2014) <http://www.euractiv.com/section/social-europe-jobs/news/european-semester-first-ever-eu-social-indicators-fail-to-impress/> (last accessed 23 September 2016)

<sup>995</sup> The Commission designed the new scoreboard around 'a limited number of key indicators focusing on employment and social trends that can severely undermine employment, social cohesion and human capital'. It emphasises further: 'While the overall social agenda remains at the EU level, a well-functioning monetary union must be able to cater for the *social implications of reforms* that are necessary to boost jobs, growth and enhance competitiveness. It also needs to *detect and tackle in a timely way the most serious employment and social problems across its Member States as these can have a negative impact* beyond national borders and lead to long-lasting disparities. The recently strengthened economic governance rules aim to reinforce the EMU, addressing some of the initial weaknesses of its design. The development of the social dimension of a genuine EMU is an essential part of this process.' [http://europa.eu/rapid/press-release\\_MEMO-13-837\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-837_en.htm) (last accessed 23 September 2016)

a lack of lending.<sup>996</sup> From 2015, it refers to the existing discrepancy between the financial markets and the real economy as the “*investment gap*”. A crucial problem is now that growth in Europe is held back because “large investment needs are not being met”.<sup>997</sup>

Importantly, this expansion does not however move the Commission to contest the primacy of the export-based orientation for the EU’s growth model.<sup>998</sup> But it does widen its notion of what is an acceptable “driver for growth” so that it begins to appreciate the potential of stimulating *internal demand* to that effect as well.<sup>999</sup> Accordingly, from 2015, the Commission refocuses the integrated approach based on the following three pillars: launching a ‘coordinated boost to investment’;<sup>1000</sup> soliciting a ‘renewed commitment to structural reforms’; combined with the determined pursuit of ‘fiscal responsibility’.<sup>1001</sup>

Moreover, it has hitherto perceived the social impact of the crisis mostly in terms of increasing unemployment rates.<sup>1002</sup> Yet, increasing divergences in the Member States’

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<sup>996</sup> The gradual realisation that a crucial paradox is shaping the European recovery accompanies this shift: Although the financial markets now dispose of “ample liquidity” again, developments in the “real economy” remain comparatively disappointing due to limited access to credit. AGS (2015) at 7; AGS (2016) at 3.

<sup>997</sup> ‘These [investment] needs are acutely felt after so many years of low or no growth, with a risk that Europe’s productive capital stock shrinks and ages. This would further reduce our competitiveness and growth potential, weighing on our productivity and capacity to create jobs. There is no single or simple answer. This lacklustre investment performance has several sources: low investor confidence, subdued expectations of demand and high indebtedness of households, businesses and public authorities. In many regions, the uncertain outlook and credit risk worries have prevented SME’s from getting finance for worthwhile projects.’ AGS 2015 at 7. Even the low interest rates – and other supportive measures of the ECB – appear insufficient to translate into a proper revival of long-term growth.

<sup>998</sup> The Commission underlines ‘[...] in several Member States, further progress is needed in the implementation of structural reforms to assist in creating the much-needed investment opportunities that will help shift resources towards the production of tradable goods and services, increasing external competitiveness and boosting productivity.’ AGS 2014 at 5

<sup>999</sup> ‘Important restructuring is taking place across Europe as a result of the crisis. As companies and households shed excessive debt and production factors move to more productive sectors of the economy, growth is returning. The *driver for growth is moving from external to internal demand* too. At the same time, it is becoming clear that its composition will be – and needs to be – different from ten or just five years ago. Moreover, globalisation and technological progress are steering further changes.’ [emphasis added, NB] AGS 2014 at 9-10.

<sup>1000</sup> Alongside the AGS, the Commission put ‘forward an Investment Plan for Europe which should mobilise at least EUR 315 billion of additional public and private investment over the period 2015-2017 and improve significantly the overall investment environment.’ AGS 2015 at 4.

<sup>1001</sup> The Commission finds that ‘despite considerable progress in fiscal consolidation, Member States still need to secure long-term control over deficit and debt levels. Fiscal policies should be differentiated, depending on the situation of each country. Member States with more fiscal space should take measures to encourage domestic demand, with a particular emphasis on investment. Moreover, the quality of public finance should be raised by improving expenditure efficiency and prioritising productive investment in government spending, by making the tax system more efficient and supportive of investment. Addressing tax fraud and tax evasion is essential to ensure fairness and allows Member States to collect the tax revenues due to them.’ AGS 2015 at 5

<sup>1002</sup> ‘The social impact of the crisis is far-reaching. While the EU was able to create millions of jobs and increase the number of people in work since the mid-1990s, progress has stopped since 2008.



employment and social performances (especially, rising income disparities), the time lag in labour market recovery and persistent high levels of long-term and youth unemployment are causing growing concern.<sup>1003</sup> The AGS notes that the economic crisis has triggered an “on-going social crisis” and that inequalities are on the rise – also *expressly recognising the impact of fiscal consolidation measures to this effect*.<sup>1004</sup>

The Commission thereby expands its conception of the unemployment problem as well. It even acknowledges in the AGS 2016 that the high number of jobseekers is (now) linked to “low demand”. However, rather than linking it back to the equally newly recognised problem of the lack of productive investments in the real economy, it explains this problematic correlation in terms of mismatches in labour market supply and demand (i.e. workers’ skills not fitting the requirements of vacant jobs).<sup>1005</sup> This expansion, nevertheless, seems to help the Commission towards a more accommodating notion of employment regulation that generates employment stability and thereby a basis for skills development:

‘Stable and predictable work relationships and in particular more permanent types of contracts induce employers and employees to invest more in skills and life-long learning. [...] The more general move towards more flexible labour markets should facilitate employment creation but should also enable transitions towards more permanent contracts. It should not result in more precarious jobs.’<sup>1006</sup>

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Unemployment has increased significantly as a result, with 23 million people unemployed in the EU today.’ AGS 2012 at 10.

<sup>1003</sup> ‘Persistent long-term unemployment has implications for society as a whole, with dire social consequences for the persons concerned and a negative impact on growth and public finances. Long-term unemployment is one of the factors linked to the increase in poverty in the EU since the start of the crisis.’ AGS 2016 at 10. Additionally, a gender gap typifies employment levels in several Member States.

<sup>1004</sup> ‘Average household incomes are declining in many Member States. Between 2009 and 2011 gross household disposable income fell in two out of three Member States and the situation between countries diverged further. In most Member States, the protracted economic and labour market crisis combined with the need to pursue fiscal consolidation (involving cuts in benefits and increases in taxes) weakened the protective effect of national automatic stabilizers over time as beneficiaries reached the end of benefit entitlement or faced declines in benefit levels. As a result, household incomes declined especially in those Member States where the recession was prolonged. Fiscal consolidation measures implemented since 2010 seem to have contributed to reduce significantly household disposable incomes.’ JER (2013) at 14.

<sup>1005</sup> AGS (2016).

<sup>1006</sup> AGS 2016 at 11-12. ‘They allow individuals to plan for their future by providing sustainable prospects of career and earnings progression. In recent years, the increase in overall employment has been driven mainly by an increase in temporary contracts which is not unusual in the early stages of a recovery.’

## 7.5. CONCLUDING REMARKS: EU EMPLOYMENT GOVERNANCE IN THE SHADOW OF EU ECONOMIC GOVERNANCE

In this chapter, we have set out to analyse the development of EU employment governance as part of the evolved “Lisbon 2020”-architecture. In the light of Kilpatrick’s integrative proposal of 2006, the aim has been to assess, first, whether EU employment governance can still be regarded as an integrated regime today and, second, whether or not European employment regulation is (still) effective in reaching the EU’s employment goals. Thereby, we have tried to understand better the different channels through which the EU nowadays is influencing employment regulation in Europe. For examining their effectiveness in attaining European employment objectives, we have focused on the Flexicurity-objective due to its significance to labour law.

All in all, EU employment governance today appears considerably fragmented across the organisational apparatus of “Lisbon 2020”. The associated governance tools fail to reveal sufficient consistency and joined alignment towards meeting the European employment goals to allow concluding the continued existence of an integrated regime.

Clearly, European employment regulation has not seen comparable efforts as those undertaken to strengthen EU Economic Governance in previous years. Regarding the relevant governance instruments (put) in(to) operation under the “Lisbon 2020”-architecture, we observe that the EU has seen its influence on employment regulation both *expand* and *contract* throughout the past decade. It seems to have gained influence concerning those aspects of employment governance absorbed by the newly integrated EU Economic Governance regime. At the same time, despite some endeavours to maintain coherence by adopting an integrated approach, the Union has seen particularly its capacity for safeguarding workers’ rights reduced.

Indeed, the analysis has shown instead how the EU Economic Governance-regime is ensuring *consistency* in the interaction and, in fact, the interpretation of the diverse governance instruments.<sup>1007</sup> The latter have become effectively re-oriented towards the achievement of European economic governance goals. Since the EU crisis management has significantly reinforced the procedural framework conditions for economic governance, the EU’s meta-coordination cycle essentially shapes the *policy space* in which policy-makers define and select their potential courses of actions for implementing the 2020-objectives.<sup>1008</sup>

Accordingly, the European employment governance instruments seem currently captivated by that new regime, especially those intended for employment policy coordination. They are increasingly re-oriented towards serving the EU Economic

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<sup>1007</sup> The Commission stresses based on the example of the MIP: ‘The implementation of the MIP is embedded in the “European Semester”, with the aim of ensuring *consistency* with other economic surveillance tools. The Annual Growth Survey, which appears at the same time as the AMR, elaborates on the interlinkages between the correction of macroeconomic imbalances under the MIP, and the urgent challenges of promoting growth, fighting unemployment, ensuring sustainable fiscal policies and restoring lending.’ [emphasis added, NB] European Commission, EC MEMO/13/970. See also Chapter 5.3.3., in particular Table 5.1.

<sup>1008</sup> Cf. López-Santana (2006) at 494.

Governance objectives. The interpretation of the latter is, in turn, being dominated by rather orthodox views on the relationship between State and market and by actors who favour a market-driven European integration process, i.e. monetary union without political union.

On this basis, Chapter 8 will conduct the final evaluation, providing some more detailed conclusions in the light of the collective findings of the previous chapters.

## Chapter 8: Conclusion

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### 8.1. INTRODUCTION

In this study, we have analysed the development of EU employment governance to date, based on Kilpatrick's (2006) integrative conception – i.e. the “integrated regime”-thesis. The main aim has been to assess how the EU is influencing national labour law systems today – especially considering it has recently undergone one of its worst crises following the global financial breakdown and economic downturn. A special focus has been to what extent the Union (still) possesses a capacity for upholding and promoting workers' rights in Europe.

We have conducted a multi-layered analysis according to the so-called “framework approach”, considering European employment regulation both at the structural and the process level of EU governance. That approach conceives EU governance as an architectural infrastructure that frames the *interaction* between governance instruments, modes and actors. It tries to fathom the complexity of the Union's regulatory system to grasp the *hybridised* influence that EU governance emits at the national level. It implies that the purpose of the EU governance architecture is to sustain and enhance *governance capacity*, whereby the latter denotes the ability to provide effective governance solutions to complex, collective problems.

The analysis has therefore built on an adapted and somewhat more abstract version of the “integrated regime”-thesis based on this inclusive view of EU governance. The recasting has been necessary to overcome the theoretical difficulties, which underpinned the original conception of the EU employment governance-regime. Accordingly, our working hypothesis has postulated that *the EU governance architecture influences European governance capacity regarding the achievement of certain governance objectives through processes of regime formation and change*. This has facilitated a thorough reflection on the state of EU employment governance today, based on an analytical framework designed to apprehend how European crisis management has affected EU governance at large.

Comprehending the bigger picture first has thus been necessary to analyse whether EU employment governance is still functioning as an integrated regime today. In answer to this main research question, we will evaluate summarily below how European employment regulation is faring in the “Lisbon 2020”-architecture. This also gives us an opportunity to revisit the EU's current ambition to earn a “social triple A” in employment and social performance, presented at the beginning of this book. We will hence assess in how far the EU is (still) meeting its employment objectives through its hybrid governance apparatus, thereby underlining the practical relevance of discussing regime dynamics in EU governance. Finally, to conclude needs for improvement as seen from a labour law-perspective will be deliberated.

## 8.2. EU EMPLOYMENT GOVERNANCE WITHIN THE FRAMEWORK OF “LISBON 2020” – STILL AN INTEGRATED REGIME?

The “Lisbon 2020”-architecture structures the Union’s normative aspirations based on a durable constitutional framework (the Treaties, including the CFREU) and shaped by a more revisable, reflexive framework (Europe 2020) defining its strategic ambitions for the medium-term. Both pivot in principle on the core objective of establishing a CSME, making the balanced pursuit of economic and social goals the *raison d’être* of the EU polity. Hence it provides the broader context for the EU’s socio-economic governance activities.

The preceding analysis has shown that the EU crisis management has affected this broader governance architecture on both the structural and procedural levels significantly. Not only has the ideal of “integrated coordination” been institutionalized in the European Semester. The European anti-crisis reforms have also brought about the (deliberate) creation of a new integrated regime of “EU Economic Governance”. Based on this, we will now review the impact of the evolved “Lisbon 2020”-architecture on EU employment governance.

### 8.2.1. The new EU Economic Governance-regime

The main *locus* of action of EU employment governance has evidently shifted away from the legislative domain.<sup>1009</sup> While the Union’s *acquis* of binding rules defining minimum requirements for worker protection in Europe remains currently rather static, certain EU institutions focus increasingly on the design of labour market reforms in the framework of European policy coordination. In fact, European initiatives for enhancing employment regulation have in no way been comparable to those systematic efforts undertaken in past years to strengthen EU economic policy coordination and reinforce the EMU.

Chapters 4 and 5 have illustrated how European anti-crisis reforms have fostered the development of a *new integrated regime of EU Economic Governance*. The main features of this new regime can be summarised as follows:

- a. dense governance arrangements with diverse EU governance tools and techniques interacting in a transformative manner;
- b. strengthened and broadened objectives elaborated through a comprehensive procedural framework aligning that tool-kit; and
- c. an institutional context with much empowered strategic actors – notably, the ECB – favouring a market-driven integration process.

These elements have jointly contributed to enhancing the Union’s capacity regarding the achievement of its main economic governance objectives in the following way. Firstly, the establishment of the European Semester provides a crucial innovation. Whilst designed as a comprehensive governance schedule for meta-coordination to implement the EU’s strategic 2020-objectives, its creation has been an intent measure of EU crisis management to strengthen the system of European economic governance. The Semester’s integrated

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<sup>1009</sup> This builds on a trend already identified earlier, see Ashiagbor (2005); and Rodgers (2011).

nature warrants that diverse governance processes reinforce each other mutually through bipolar (i.e. preventive and corrective) coordination cycles. The resulting transformative interaction between binding and non-binding instruments effectively bestows authoritative force onto the policy guidance advanced through the Semester (albeit, formally, through recommendations) – especially, in the context of the EA.

Secondly, the enhancement of governance capacity the Union retrieves from this comes above all from a much-reinforced *coordination capacity*. Expanded benchmarking of the Member States' socio-economic performances is at the heart of the meta-coordination process. It provides both vital information input and targeted competitive incentives (i.e. rankings and best practices) for advancing national policy implementation. Based on these, the AGS furthermore fulfils a key role in *shaping* the EU's integrated guidance towards the Member States *a priori*. It frames priority problems and connects them to preferred policy solutions through explanatory narratives. This framing function has been bolstered by the AGS' "package approach" that provides more tailored evaluation with the JER and the AMR.

Finally, the last point (c) refers to the fact intimated in Chapter 3 that a larger set of actors is influencing the ongoing interpretation of European rules, facilitated by the complex structure of EU governance.<sup>1010</sup> The comprehensive overhaul of EU Economic Governance has undoubtedly increased the complexity of the supranational governance apparatus. And, EU crisis management has empowered strategic actors like the ECB. These developments have had a bearing on European normative discourse, as illustrated by the ECB's evident contribution to the EU's crisis narrative. Meanwhile, the other two points (a and b) highlight how the Semester's evaluation and guidance activities distinguish themselves by being very wide-ranging and inclusive. Our analytical findings (further discussed below) therefore make one wonder to what extent Union policy-makers realise their responsibility in this process of "inter-framing" (i.e. promoting governance solutions cutting across various policy areas) that EU policy coordination has become.

### 8.2.2. Implications for European employment regulation

The European Semester is thus supposed to play a key role in putting the Union's core objective of a CSME into effect. As comprehensive procedural reference framework, it synchronises the implementation of the 2020-objectives and the preventive and corrective coordination processes related to economic policy. It equally includes EU employment policy coordination which forms part of its integrated evaluation (through the AGS-package, notably the JER, and the CRs) and its integrated guidance (through the EEGs/2020-Guidelines and the CSRs) for the EU/EA as a whole and the Member States individually.

As indicated in Chapter 5, there have been concerns about the potential ambiguity that may characterise the policy guidance issued through the EU meta-coordination

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<sup>1010</sup> Cf. Dawson (2013) at 239. See Chapter 3.3.3.C.

process.<sup>1011</sup> Given the amalgamated and condensed nature of the CSRs, it has become very difficult to link a particular recommendation back to a specific instrument (such as the SGP, the MIP or the IGs). This may be problematic if uncertainty arises regarding which coordination mechanism prevails in case of conflicting goals and policy advice. We have argued instead that rather than causing “coordination ambiguity”, the new EU Economic Governance-regime is ensuring the *consistency* in the interaction and, in fact, the interpretation of the diverse governance instruments. The latter have become effectively re-oriented towards the achievement of the EU’s economic governance goals.

The preceding analysis has shown how the expanded governance toolkit has not only been aligned procedurally but also ideationally. This has the effect of delimiting national governments’ policy choices in socio-economic policy-making – especially, regarding budget policies. For one, the newly harmonised framework conditions for national budget planning in the EA ensure that EU surveillance helps to guarantee sound budgets as well as the stability of the Euro. The EA members’ leeway in using expansive fiscal policies is significantly curbed, as they are prompted to consider the potential repercussions of their choices for other Member States and the stability of the EA as a whole (subject to the Commission’s annual review). Owing to the EMU’s system of “market discipline”, the reduction of government deficits is further induced by the threat of losing access to credit either through the financial markets or, for those countries with ailing banking systems, through the ECB. Additionally, 25 Member States have effectively signed up to stricter budget discipline by instituting mechanisms for the *automatic correction* of budget deficits.<sup>1012</sup> The regulatory framework that underpins EU Economic Governance therefore restricts national governments’ (irrespective of political colour) room for manoeuvre in social and employment policy-making considerably when that requires significant budget allocations.

Moreover, specific aspects of employment regulation have been colonised by the new regime. The MIP has provided an illustrative example. Despite the Treaty’s express exclusion of EU competence regarding the harmonisation of pay, the right of association, the right to strike, the MIP-Regulations empower the Council to issue recommendations regarding labour costs based on the macro-economic risk screening of the AMR and the IDRs. In this context, wage developments are conceived as a *potential risk factor* to external imbalances and competitiveness. Next to that, even the Union’s strategic efforts of promoting “Good Governance” reveal the imprint of the EU Economic Governance-objectives. Smart Regulation-initiatives, such as the REFIT-programme, have not only disguised a certain reluctance (or incapacity?) to legislate in the social field. They have also

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<sup>1011</sup> Bekker (2014) at 297 and 301.

<sup>1012</sup> All Contracting Parties have significantly adapted their national fiscal frameworks to the requirements of the Fiscal Compact, putting in place binding and permanent balanced budget rules. The Commission considers that the TSCG has been successful in ‘increas[ing] the sense of ownership of EU fiscal rules and thereby play[ing] an important role in promoting sound fiscal policies’. European Commission, Commission Communication on The Fiscal Compact: Taking Stock (C(2017)1200 final, Brussels, 22 February 2017) at 4.

started to subject the existing EU employment *acquis* to competitiveness-reviews to clear out *regulatory and administrative burdens*.

As a result, overall, EU crisis management has reinforced the EU’s coordination capacity substantially. This effectively shapes the *policy space* in which policy-makers define and select their potential courses of actions.<sup>1013</sup> This space seems currently largely dominated by the EU Economic Governance-regime, which occupies the cycle of meta-coordination for the implementation of the 2020-objectives (see Table 8.1. below).

The EU employment governance-apparatus, in contrast, appears rather characterised by *fragmentation* – particularly because important aspects of employment regulation have been absorbed by the new regime. The interplay of employment instruments may have been perceived as an integrated regime in 2005. And, it is true that today EU employment governance is embedded in an ideational framework that is formally oriented towards establishing a CSME. However, the *associated governance tools fail to reveal a consistent and joined alignment towards meeting the European employment goals* that would allow concluding the continued existence of an integrated regime. Therefore, the next section will discuss to what extent the EU is actually (still) contributing to the achievement of the common employment objectives, assessing how much room the EU’s meta-coordination process leaves for solutions that promote workers’ rights.

“LISBON 2020”-ARCHITECTURE		
Level of analysis	Function	Regime developments
<i>Ideational component</i>	EU Treaties, CFREU + ESM, TSCG, EBU ( <i>Constitutional framework</i> )	Newly integrated EU Economic Governance-regime ( <i>Financial and price stability, competitiveness, job creation</i> )
	Europe 2020 ( <i>Strategic framework</i> )	
<i>Organisational component</i>	Six-Pack, Two-Pack, coordination tools ( <i>Governance instruments</i> )	Fragmentation of EU employment governance ( <i>Strict budget discipline, multilateral surveillance, market-driven convergence, deregulation</i> )
	European Semester meta-coordination ( <i>Governance techniques</i> )	

**Table 8.1.: Schematic overview of regime developments in EU socio-economic governance**

### 8.3. HOW MUCH POLICY SPACE FOR SOLUTIONS PROMOTING WORKER PROTECTION?

The preceding review of recent regime dynamics under the “Lisbon 2020” architecture should inspire us to reflect first a little more on the significance of the Union’s *post-national* setting, in which these socio-economic governance arrangements are taking shape. This will

<sup>1013</sup> Cf. López-Santana (2006) at 494.



provide a fruitful basis for concluding the evaluation of the EU's capacity for employment regulation and offering some proposals on its future prospects.

### 8.3.1. Socio-economic governance in the EU's post-national setting

In fact, the *intricate distribution of competences* between the European and the national level is a given in the post-national setting of the EU polity. This is not likely to change any time soon (or, ever?). Also, it must even be considered necessary – at least, for as long as the Union is facing charges regarding its democratic deficit – because the limitations on its powers are justified by the fact that they usually cover those politically sensitive policy areas subject to vigilant processes of democratic legitimation at domestic level.<sup>1014</sup> This recognition has important consequences.

#### A) The tension between the consistency requirement and the EU's competence limitation

In this connection, Chapter 4 has indicated that a certain *tension* typifies the ideational dimension of the “Lisbon 2020”-framework based on the requirement of consistency inherent to the EU governance architecture. On the one hand, the diversity of governance instruments and techniques is grounded in the constitutional delimitation of the European competences. The EU may only act based on the powers conferred upon it. On the other hand, the composite governance architecture requires an integrative (and hence functional) approach. This prioritises the application of the consistency principle in the implementation of the broad European objectives and the corresponding design of Union activities. Consequently, as supra-national intervention is increasingly fashioning the functioning of its various governance instruments in a consistent manner, the risk that it is being judged *ultra vires* is certainly not negligible. The question then is what is won by those well-known accusations of “competence creep” (discussed further below).

We have further argued that the European Semester represents the epitome of the Union's current integrated approach. The Semester's hybrid nature is therefore very much *intentional*. Thereby, the question whether a specific instrument is binding or not indeed loses its relevance (at least, in this specific context). Chapters 5 and 7 have shown how the European guidance given through this meta-coordination schedule carries *authoritative force*, even though it is formally based on recommendations. This is so because it is put forward by means of various enforcement modes that mutually reinforce each other through the integrative and iterative nature of the Semester-cycle. These modes range from “best practice” competition over community/peer pressure to different degrees of negative conditionality (through the threat of sanctions or contingent access to, either credit or emergency assistance) as well as positive conditionality (through contingent access to support for investment).

These findings have led us to conclude that the EU Economic Governance-regime, which is pivoting on the European Semester, effectively aligns the interacting instruments to the achievement of the common economic objectives. In this respect,

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<sup>1014</sup> Cf. Chalmers (2012).

Chapter 5 has furthermore elucidated that EU policy coordination exerts normative influence onto the national level above all by *framing* common problems, explanatory narratives and policy solutions. Accordingly, it is important to recognise that the hybrid nature of the EU's governance objectives implies that the *policy problems* that underlie these objectives are also necessarily *hybrid* in nature.

#### B) The effect of the EU's limitation in competency on its governance arrangements

In the light of these considerations, we observe that the above-mentioned tension between the delimitation of competences and the consistency requirement has a crucial impact on European policy-making. Our analysis has revealed that with the growing complexity in the allocation of competences in the EU, the framing function of *problem definition* is significantly increasing in importance.<sup>1015</sup> This is because the legitimisation of policy interventions (i.e. the assignment of competence to act) has turned into a question of “labelling”. In other words, determining *the legal authority to regulate a certain issue essentially depends on how the underlying policy problem is framed*.

The controversial creation of the ESM – i.e. the setting up of a European stability mechanism to grant emergency assistance to debt-stricken governments – provides a useful illustration in this regard.<sup>1016</sup> The CJEU underlined that the underlying problem (the need for emergency assistance) was one of economic policy (and, not monetary policy) empowering the Member States to take action (and, not the Union), even if that meant adopting a constitutional agreement outside the European legal order. This interpretation was necessary to ensure that the ESM was compatible with the Treaty's “no bailout”-clause.

This effect, then, implies that public authorities involved in the Union's practice of meta-coordination carry a special responsibility. This responsibility relates especially to the process of *inter-framing* and the need for justifying given policy solutions.

### **8.3.2. Assessing the Union's capacity for employment regulation**

As explained in Section 8.2. above, within the current setup of the “Lisbon 2020”-architecture, *EU employment governance is operating in the shadow of the EU Economic Governance-regime*. Chapter 7 has shown how the Union is currently facing a reduced capacity regarding the achievement of its employment objectives.

#### A) How does this reduced capacity manifest itself?

One key problem is that the EU Economic Governance-regime is apparently promoting a *reductive, functionalist conception of an integrated approach* to policy-making. This is illustrated by the following quote from the 2020-Strategy:

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<sup>1015</sup> Cf. Lenoble and Maesschalck (2010). See also the discussion of the *Pringle*-case in Chapter 4.

<sup>1016</sup> See Chapter 4.2.2.C.

‘Country reporting would contribute to the achievement of Europe 2020 goals by helping Member States define and implement exit strategies, to restore macro-economic stability, identify national bottlenecks and return their economies to sustainable growth and public finances. It would not only encompass fiscal policy, but also core macro-economic issues related to growth and competitiveness (i.e. macro-imbalances). It would have to *ensure an integrated approach to policy design and implementation, which is crucial to support the choices Member States will have to make, given the constraints on their public finances*. A specific focus will be placed on the functioning of the euro area, and the inter-dependence between Member States.’<sup>1017</sup>

Here, an integrated approach to policy-making is not promoted for its intrinsic value as an inclusive strategy of contributing to the central objective of establishing a CSME. Instead it is presented as a necessary effect from the constraints on national public finances.

The consequences of this reductive understanding are, amongst others, reflected in the tense relationship between European social policy and employment policy. They also show in the lack of linkages or even conflicts that characterise the deployment of the EU’s employment governance instruments.

#### *The tense relationship between EU social policy and employment policy*

As indicated in Chapter 6, EU employment regulation is characterised by a conceptual *discrepancy* regarding two policy fields that have traditionally been closely intertwined. Like the tension typifying the fields of EU economic and monetary policy, certain friction is affecting the distinction between the European notions of “social policy” and “employment policy”. In the first case, the Union shares competence with the Member States regarding social policy issues and has the power to set minimum requirements by directive. On matters of employment policy (and social security), a competence to harmonise by legislation is in principle excluded, the EU’s role may be merely coordinating and supportive.

There are, nevertheless, examples where EU legislative instruments have evidently been utilised for purposes of employment policy.<sup>1018</sup> We have discussed the example of the Temporary Agency Work Directive that has codified the objective of job creation by promoting the use of agency employment in Article 2. This provision seems in conflict with the exclusion of harmonising employment policy in Article 149 TFEU. The CJEU’s self-restraint against adopting a purposive interpretation of that legislative provision (in combination with the Member States’ obligation to remove restrictions on agency employment) in the *AKT*-case is therefore rather not surprising. This judgment, in effect, touches upon the risk of the *instrumentalisation of labour law* for purposes of employment policy. That is a recurring theme when considering the interaction between various means of employment regulation.

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<sup>1017</sup> European Commission, COM(2020)2010, at 27.

<sup>1018</sup> The insertion of the prohibition of discrimination on the grounds of age (Article 6) into the Equal Treatment Framework Directive 2000/78/EC is probably the most renowned example for this.

Just like the economic policy-monetary policy divide, it is just such *conceptual tension that typifies the hybridity of policy problems* which the EU is trying to address. This tension highlights that the framing of underlying policy problems through the EU's meta-coordination is based on implicit assumptions about the role of "the State" (or, public regulation more generally) and "the market". This is notwithstanding the fact that the European Semester is commonly considered an overall technocratic process.

Accordingly, we arrive at a rather ambiguous conclusion. On the one hand, our analysis has revealed that the EU crisis management may have instigated procedural reforms which contribute to the de-politicisation of fiscal policy-making (such as the creation of automatic correction mechanisms for reducing government deficits). On the other hand, the *process of meta-coordination itself actually appears to be the place where essential political choices are being framed* – choices about which people will have differences of opinion based on different values.

#### *Lack of linkages between instruments or even conflicts*

Moreover, we have already seen above how EU Economic Governance promotes the image of employment regulation both as a potential "risk factor" in bringing about macro-financial imbalances (possibly contagious for the entire EA) and as a regulatory "burden" on businesses. Therefore, it is useful to summarise how far the reductive conception of the integrated approach advanced by the new regime is affecting the interplay between binding employment rules, ALMP and macro-economic policy measures.

The goal of worker protection is mainly tied to the EU employment acquis, which provides merely an incomplete "floor of rights". It has been repackaged into the Flexicurity-objective and has thereby gained a limited presence in the process of EU policy coordination. In the context of meta-coordination, in fact, the AGS has been putting forward a mostly *pejorative view on employment standards* through its narratives. It has linked a reduced or inflexible adjustment capacity of labour markets to the problem of segmentation, which in turn has been connected to recommended policy solutions that seek the reduction of the "excessive" protection of permanent employment contracts. Here, employment standards are portrayed as "rigidity". Such guidance seems to reduce the interaction between social and employment policy to ensuring that labour standards do not create disincentives to employment creation.<sup>1019</sup>

Another obvious incongruence concerns the absolutist notion with which fiscal discipline is being promoted as a priority dogma for national budget planning. In this regard, the AGS is advancing rather controversial policy messages. Through its narratives, the Commission commands both the stability-oriented reduction of government expenses as well as the "growth-friendly" curbing of public revenue streams (i.e. shifting the "overall tax burden" and reducing the "tax wedge on labour").<sup>1020</sup> At the same time, the respective

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<sup>1019</sup> UNRISD (2015.03).

<sup>1020</sup> The Commission promotes these measures expressly as cures to bring about "fiscal sustainability" – notably, as remedies against the fiscal impact of ageing populations. A cynic might

EU institutions hand out policy advice that characteristically necessitates public expenditure. Their integrated guidance includes the need for “smart” public investments. They expect the Member States to modernise *inter alia* their education and vocational training systems in the spirit of the Flexicurity-objective (i.e. based on the idea of LLL).

Meanwhile, the ageing of the working population is expounded as a priority problem and considered a main source of pressure on public budgets.<sup>1021</sup> Therefore, the incorporation of conditionality requirements to increase the efficiency of national social security schemes is a repeated European demand. This includes the fiscal instruction to redesign unemployment benefit allocations to include incentives for the activation of the (long-term) unemployed and their re-integration into paid employment.<sup>1022</sup>

Considering then the confined fiscal policy-space available for such activation measures under EU meta-coordination, from the perspective of worker protection it would be important to furnish adequate safeguards against abuse.<sup>1023</sup> The CFREU recognises the *principle* of social security, which amongst others is meant to provide protection in the case of loss of employment.<sup>1024</sup> However, it does not furnish any corresponding individual entitlements and the Union further lacks competence in this area. So, the Charter provides little substance for the enforcement of positive obligations either through the judicial route or the channel of EU policy coordination.

In view of these tensions, it can hardly be maintained that the Flexicurity-objective is currently being implemented in a balanced manner.

#### B) What role for employment standards in EU meta-coordination?

Considering the EU’s enhanced coordination capacity based in the European Semester, we should recall that in the context of employment regulation, the question of whether EU norms and rules are binding or not has traditionally played a very big role. And it still does, as illustrated by our discussion of the difficult relationship that the CFREU and the OMC have displayed so far.

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wonder how the simultaneous reduction of both a State’s expenses and revenues can be sustainable in the long run and bring about growth.

<sup>1021</sup> See AGS (2011) at 5-6: ‘Given the ageing of the EU population and the relatively low utilisation of labour compared to other parts of the world reforms are needed to promote skills and to create incentives to work. [...] European welfare systems have worked to protect people during the crisis. However, once the recovery has gained ground, unemployment benefits should be reviewed to ensure that they provide incentives to work, avoid benefit dependency and support adaptability to the business cycle.’ Such *incentives* ought to include that Member States introduce ‘time-limited support, and conditionality linking training and job search more closely to benefits’; ‘that work pays through greater coherence between the level of income taxes (especially for low incomes) and unemployment benefits’; and ‘adapt their unemployment insurance systems to the economic cycle, so that protection is reinforced in times of economic down-turn’ Ibid. at 6.

<sup>1022</sup> Cf. Schoukens (2016); Gundt (2013). The Commission highlights subsequently: ‘The impact of unemployment benefits should be monitored to ensure appropriate eligibility and effective job-seeking requirements.’ AGS (2013) at 10.

<sup>1023</sup> Cf. Eichenhofer (2013).

<sup>1024</sup> See Article 34 CFREU. It even provides a right of access to placement services Article 29 CFREU.

Chapter 7 showed that especially the prospect of fundamental social rights playing a *reactive role* regarding the policy outputs presented in the context of EU policy coordination is still extremely limited. Here, the implementation gap is still most acute, as ex post judicial enforcement remains very problematic where protective EU legislation is absent (*Počlára*) or where existing EU employment protection rules include express waivers (*Sibillo*). Hence, a crucial question is how much scope there is for European employment standards to play an *active, ex ante role* in the Union's meta-coordination cycle.

We have argued above that given the complex division of competences between the EU and the Member States, the framing function of problem definition has become decisive for determining who will be competent to act and regulate a certain issue. Based on our findings, presented above, we conclude that the European Semester actually provides an opportunity for the EU to develop further its role as a “problem-solver”. Although the Semester appears currently colonised by the EU Economic Governance-regime, it may provide a fruitful basis for devising a more dynamic application of the subsidiarity-principle and hence the advancement of EU employment regulation.

### C) The effectiveness of EU employment objectives

In brief, we have thus critically reviewed the different ways through which the EU is influencing employment regulation today. Notably, the developments in the “Lisbon 2020”-architecture – specifically those related to European anti-crisis reforms – have had important consequences for the implementation of the European employment objectives. As we have concluded that fragmentation characterises nowadays the operation of European governance instruments dealing with employment regulation, the answer to the question of their effectiveness provides a mixed picture.

The focus on measures to increase employment as a top priority (i.e. the “Jobs”-objective) seems to be paying off slowly. However, this achievement – it is recognised – is above all thanks to increases in atypical employment, including temporary contracts.<sup>1025</sup> A higher level of employment thus tends to come at the cost of creating more precarious work relationships.

Next to that, we have studied in particular the implementation of the Flexicurity-objective, given its direct relevance to the field of labour law. Due to the objective's hybrid nature, its implementation requires a balancing of potentially conflicting demands related to the joint pursuit of labour market flexibility and worker protection. It is thus to provide security to particularly those employment contracts that have been generated by the said flexibilisation measures devised for job creation. Based on the results from the analysis of the AGS-narratives in Chapter 7, the above evaluation (A) has pointed out important tensions that characterise the different instruments for employment regulation. One of these tensions relates to the continuous framing of employment standards as “rigidities” –

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<sup>1025</sup> The JER 2016 states: ‘Looking at contract types, in line with expectations, over the past years employment has been most volatile for temporary contracts, and less so for permanent contracts or self-employment, which have remained more or less stable since 2011. From 2013 the increase in overall employment has been mainly driven by an increase in temporary contracts.’ JER (2016) at 7.

even if the Commission's corresponding explanations and preferred policy responses have become more nuanced in recent years. This means that EU guidance for policy coordination, in effect, frames employment standards as the problem, not the solution.<sup>1026</sup>

#### 8.4. TOWARDS AN INNOVATIVE LEGAL FRAMEWORK FOR EMPLOYMENT REGULATION

Despite these rather sombre conclusions regarding the Union's capacity for employment regulation drawn in the previous section, our analysis has also shown a number of promising developments. In fact, these have indicated that the EU has, too, a propensity for safeguarding workers' interests.

On that basis, we will focus in this final section on the question of how the European Semester could provide the basis for the EU to implement a more balanced integrated approach. That is, one promoted deliberately for its intrinsic value in building a European social market economy. Firstly, the Semester already provides a potent procedural framework in this respect. Now there is an opportunity to complement this with a more supportive ideational framework. We will thus propose, secondly, how the MSE-narrative may (again?) provide a capable complement to address the "social deficit" of the EMU.

##### 8.4.1. The European Semester as opportunity for the Union as a problem-solver

At politico-organizational level, the Semester presents a comprehensive reference framework for the EU's socio-economic governance activities within the "Lisbon 2020"-architecture. It therefore provides a constructive basis for securing a more dynamic application of the subsidiarity-principle.

This idea builds on the fact of how the cycle of EU meta-coordination has enhanced European coordination capacity overall and the function of problem definition specifically. The benchmarking technique, for instance, already fulfils a vital role in the process of problem identification. As highlighted above, the information input and targeted competitive incentives generated by the continuous benchmarking of national performances are key to the integrated Semester-guidance and advancing national policy implementation. In that connection, Chapter 7 has underlined how important the range

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<sup>1026</sup> Interestingly, Flexicurity itself has provided a paradigm for stimulating a shift in the framing of employment-related policy problems. As a basis for the design of ALMP and labour legislation at national level, the employability principle has implied a shift from "job security" with a focus on job retention to "employment security" with emphasis on managing labour market transitions. Cf. Zekic (2015). While that shift has been accompanied by a focus on promoting measures of "external flexibility", the crisis has underlined particularly the importance of "internal flexibility" (e.g. job retention during an economic downturn thanks to short-time working arrangements that may be publicly co-funded). In effect, also here again a need for "balancing" seems to be the answer, recognizing how both job security and employment security are relevant to ensuring adequate worker protection and avoiding exploitation that is likely to undermine extant social standards (such as through a growth in precarious jobs). See also Auer (2007).

and definition of indicators is because by determining *what is measured* they simultaneously predetermine to a significant extent *what will be perceived as a problem* (social construction).

The shift of emphasis in the narratives of the AGS towards greater alertness for the social consequences of the crisis, illustrated in the previous chapter, can therefore not only be attributed to the fact that a new College of Commissioners took office in 2015. Additionally, we have motivated it by the fact of the introduction of employment and social indicators in late 2013 (i.e. still under the Barroso-Commission). This development reveals that the reflexive Semester-process bears the potential for fostering an important capacity for *institutional learning* at EU-level.

Against this background, the framing process of the European Semester could purposefully serve to determine not only who is competent but rather who, i.e. which level (national or European), is *best suited* to act – also, permitting the possibility that a cooperative solution may be the best way forward. This builds on the proposal of Bercusson (1994), discussed in Chapter 6, to conceive the rationale for allocating regulatory competence emanating from the principle of subsidiarity not as an “exclusive” affair but rather one of active “coordination”.<sup>1027</sup>

For that purpose, he argued, the EU could actually “learn” from the labour law systems of the Member States. Undoubtedly, the diversity of industrial relations systems in Europe provide plenty of inspiration for creative solutions in regulating different policy areas. The principle of favourability, for instance, has proven valuable in coordinating between different modes of regulation (such as standard-setting through legislation and by collective labour agreements). This perspective provides an intriguing opportunity for future research.

#### 8.4.2. Addressing the EMU’s “social deficit”

Based on this, let us return our attention to the tension between the EU’s competence limitation and the consistency requirement inherent in the “Lisbon 2020”-architecture. As argued above, today, the new EU Economic Governance-regime is essentially ensuring consistency in the interaction of the diverse governance instruments, effectively re-orienting the latter towards the achievement of the common economic governance goals.

##### A) The ideational impact of the EU Economic Governance-regime

It is worth summarising (once more) how this functional integrative approach is at risk of producing the *problem of competence creep*:

1. The growing complexity in the supra-national division of competences has increased the significance of the problem definition-function considerably. The latter pre-determines who has the *capacity to intervene* regarding a certain policy matter. The resulting policy problems then are essentially hybrid based on the integrated nature of the Semester’s evaluation and guidance activities. Public authorities at both European and national level therefore face the important

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<sup>1027</sup> Bercusson (1994) at 14-15.



*challenge of inter-framing*, i.e. devising balanced governance solutions cutting across various policy areas, since the policy measures that will be adopted in response need to address potentially conflicting values.

2. In view of this framing challenge, however, there is a problem because the limitations on the EU's competencies are in fact restricting the potential for employment standards and social rights to play an *active, ex ante* role in the meta-coordination process. As highlighted in Chapter 7, the Charter's "neutrality" regarding the Treaty's competence division is *problematic* for an effective safeguard of worker protection in the European Semester because of the incompleteness of the European employment acquis. An accusation of "creeping competence" may therefore result from the fact that the monitoring and enforcement that the active role would presuppose, would involve *intervention on matters until now excluded* from the Union's competence.

However, this study has shown that, in practice, the EU Economic Governance-regime has actually *surpassed* this problem. This conclusion is borne out by the examples of integrated guidance on wage determination issued despite the existing Treaty exclusion of collective labour rights, and on EPL reforms issued regardless of the lack of EU legislation covering protection against dismissal. The detailed guidance, from the AGS' integrated evaluation and the amalgamated CSRs, is in fact *justified* in reference to the EU economic governance objectives of improving competitiveness, fighting unemployment and achieving convergence.

In view of this on-going practice, which seems hardly reversible and given the lack of means for judicial redress, an insistence on defences in the style of "competence creep" appears rather futile and unproductive. Instead, we maintain it can be more fruitful to re-conceive the problem in terms of a *hierarchy of norms* foisted de facto upon the "Lisbon 2020" architecture by the new regime to ensure the functioning of the EMU. That hierarchy effectively legitimises EU normative guidance on a broad set of (hybrid) issues relevant to macro-financial and macro-economic stability.

#### B) The ambition of advising politically feasible solutions

This reconceptualization entails the acceptance of the EU Economic Governance-regime's new reality. It also provides a more constructive basis for attempts to change and improve it, by using its means and channels to imagine and devise innovative ways of overcoming the EMU's social deficit. In this respect, this thesis has provided important pointers for proposing possible improvements.

The socio-legal approach adopted for the study of EU employment governance puts us in the position of making normative proposals that exceed traditional legal solutions (like new legislation or Treaty change). The latter are not (yet) forthcoming given the widened conditions of the EU-28 and the intricate nature of its governance structures. The advantages of this enquiry have therefore been in highlighting the enabling capacity of legal rules and the relevance of the Union's evolving normative discourse. These have allowed us to appreciate the influence of the broader governance context on policy actors'

behaviour and, notably, on the results of their collaboration (policy outputs and legal-administrative structures).

This, however, is not to mean that we do not ultimately consider changes to the EU legal order necessary. Especially, an extension of the European “floor of rights” could not do without the supplementation of the Union’s applicable legal reference framework.<sup>1028</sup> But, because of the extremely limited likelihood of this happening any time soon, the study’s set-up has primarily been intended to help considering politically feasible solutions for enhancing the EU’s (legal) capacity in safeguarding and promoting workers’ rights.

The hope is for the discussion to contribute towards creating, at European level, a more favourable environment for deliberating and regulating issues of worker protection.<sup>1029</sup> As stressed in Chapter 1, we consider this vital for ensuring protective labour law-coverage for the majority of working people in subordinate employment and clarifying the value of public interventions in addressing employment issues. Yet, above all, it is considered a *democratic necessity* for employment regulation to re-invent itself and offer new remedies against growing inequality and its negative consequences. Given the advanced stage of its development, the EU today does not only have a moral responsibility to advance relevant common solutions. The “Lisbon 2020” architecture actually imposes upon it the *constitutional duty* to establish a European social market economy.

### C) Proposals for improvement

In Chapters 6 and 7, we have estimated that if there were an integrated regime of EU Employment Governance today, it would be based on a balanced integrated approach. That would jointly promote the productive role of employment standards, a mitigating role for employment policy/ALMP and a reinforcing role played by macro-economic policy.

Instead, based on the preceding analysis, we concluded that the current prevalence of the EU Economic Governance-regime is privileging a functional integrative approach that advances a restrictive view impinging on the interplay between Union’s employment governance tools. The implementation of this approach is pivoting on the Semester-cycle, which is currently embedded within an ideational framework aligned towards stability-oriented economic objectives. Empowered institutional actors that openly favour a market-driven integration model are in turn actively promoting these latter goals.

In fact, the five Presidents’ plea of 2015 that ‘Europe’s ambition should be to earn a “social triple A” in employment and social performance seems a direct reflection of this

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<sup>1028</sup> Ultimately, a true floor of rights would require also the codification of social security rights. In that regard, the latest Commission proposal on EU pension scheme to promote intra-EU mobility is noteworthy. Cf. Supiot (2001); see also D. Boffey, “EU pension” planned for people who move between countries (The Guardian, 29 June 2017 [https://www.theguardian.com/world/2017/jun/29/eu-pension-planned-for-people-who-move-between-countries?CMP=share\\_btn\\_link](https://www.theguardian.com/world/2017/jun/29/eu-pension-planned-for-people-who-move-between-countries?CMP=share_btn_link) (last visited 2 July 2017)).

<sup>1029</sup> Recent developments in the AGS have already been promising. There is however a need still for European leaders and institutions to prove (more clearly) that these more social assertions are more than just “window-dressing”.

institutional environment. A labour lawyer cannot but regret the unfortunate choice of terminology presented to inject new impetus into the development of the EMU's social dimension. Sure, "Triple A" represents a – by now – widely known quality mark (i.e. for financial services products), but one that thus forms part and parcel of financial industry speak. It escapes the author how the EU leadership can expect this label (a brainchild of the Juncker Commission) to function as anything else but a catchy buzzword to crown the proposal for the new initiative of establishing a so-called "European Pillar of Social Rights" (EPSR).<sup>1030</sup> "Triple A's" credibility as a *benchmark of quality* must be in serious doubt, considering that the credit rating agencies that monopolise the label's application have too played a significant part in bringing the global financial system to near-collapse.<sup>1031</sup>

Nonetheless, there are indications that the preceding description of the new regime's impact relates to but a temporary state of affairs. We have recognised, above all, the European Semester as a potent procedural framework offering an opportunity for the EU to develop further its role as a "problem-solver". Above (Section 8.4.1.), we have already suggested how the Union's meta-coordination schedule thus may provide a fruitful basis for fostering a more dynamic understanding of subsidiarity in the sense of providing "active coordination" in determining the capacity for different administrative levels to intervene.<sup>1032</sup>

On that basis, we will outline below some ideas on how the Semester could be complemented with an ideational framework that is more conducive to the advancement of EU employment regulation. Given its resourcefulness and innovative capacity, the MSE-narrative may (once again) provide such capable complement to address the "social deficit" of the EMU.<sup>1033</sup> This could offer the conceptual basis for putting into effect a balanced integrated approach, one promoted deliberately for its intrinsic value in building a European social market economy.

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<sup>1030</sup> As response to widespread criticism on the European anti-crisis measures focusing on austerity, the Commission has designed the EPSR Pillar aims to overcome the negative effects of the Eurozone crisis on the labour markets and social welfare systems of Member States. The Commission presented a first outline of the Pillar and launched a public consultation on 8 March 2016. Additionally, the Pillar also serves to follow up on the "Five Presidents' Report on Completing Europe's EMU" and the idea that "Europe's ambition should be to earn a social triple A". In effect, it is intended to give greater prominence to social considerations in the coordination of economic policies through the European Semester. For a comprehensive critical analysis of the EPSR, see Lörcher and Schömann (2016).

<sup>1031</sup> P. Kingsley, 'How credit ratings agencies rule the world' (*The Guardian*, 15 February 2012) available at <https://www.theguardian.com/business/2012/feb/15/credit-ratings-agencies-moodys> (last visited 2 July 2017).

<sup>1032</sup> As recognised in Chapter 3, the post-national context of the EU provides wider social and economic conditions, which require their own constitutional language.

<sup>1033</sup> As illustrated in Chapter 6, the goal of modernising the MSE has opened up new channels for upholding the ambition of political integration based on the diversification of regulatory techniques at EU level.

Contrary to ECB President Draghi's doubts in 2012 regarding the viability of the MSE, the crisis itself has shown the model's exceptionality and resilience. It has been those Member States with robust welfare and industrial relations systems and relatively "strict" employment protection rules that have fared best and come out the quickest from the economic downturn.<sup>1034</sup>

This observation points to the cognitive or "descriptive" notion of the MSE that tends to underline amongst others the productive diversity in European welfare systems. In Chapters 6 and 7, we have underlined how – in relation to the EU system – this notion centres on the employment acquis providing a partial floor of minimum standards that may act as legal yardsticks for testing policies' social value. We have however also noted that the descriptive approach essentially attests to the normative deficiency of European social policy, given the lack of a clear or accepted policy agenda. On that view, notably, EU employment law is characterised by a sense of crisis regarding its purpose, impact and legitimacy.<sup>1035</sup>

In contrast, we have defended the advantages of adopting a normative perspective on the MSE and of how such view helps to regard the advancement of European employment regulation as having a purpose (CSME). Hence, it is this view that could help refocusing the debate on the advantages of actively promoting the MSE as a conceptual framework for giving new impetus to political integration at European level. Namely, in the promotion of the diversification of governance techniques and the hybridisation of EU employment objectives, the MSE-narrative has already proven its innovative capacity.

Accordingly, this might be a good opportunity for the EU to develop an official normative definition for the MSE, based on the balanced integrated approach. This would, most importantly, recognise the productive role of employment standards. Firstly, this could help freeing the notion of Flexicurity from its negative stigma as a disguise for foisting labour market flexibility on national systems through deregulation. That is considered beneficial because, as a European neologism, we attribute the Flexicurity-notion the potential of providing a *supra-national* legal terminology, properly tailored to the Union's post-national setting. Therefore, we regard it capable of overcoming its own limitations once integrated in a more accommodating ideational framework.

Secondly, reviving the MSE as a political objective at EU-level may also give hope to the EPSR-initiative to become more than just empty promises. Despite the unfortunate slogans that accompany it, the initiative is gradually gaining substance, showing certain promise in offering a comprehensive range of and in framing individual rights.<sup>1036</sup> Considering that it is designed primarily for implementation in the EA, the EPSR might

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<sup>1034</sup> Cf. Hancké (2013).

<sup>1035</sup> Cf. Barnard (2014); see also Freedland (1996).

<sup>1036</sup> See European Commission, COMMISSION RECOMMENDATION of 26.4.2017 on the European Pillar of Social Rights (C(2017) 2600 final, Brussels, 26 April 2017); and European Commission, Communication on Establishing a European Pillar of Social Rights (COM(2017) 250 final, Brussels, 26 April 2017).

well gain sufficient leverage as a measure of enhanced cooperation. It could then carry the potential of overcoming the shortcomings of the CFREU.<sup>1037</sup> As underlined above, the greatest potential exists in enabling employment standards to play an active role in EU meta-coordination. In this regard, the Polish example and the Court's *Nierodzik* decision promise that much could be won if the EU's coordination capacity and its standard-setting capacity were deliberately better aligned to operate towards their mutual reinforcement.

#### *Enlarged governance spaces and the need for justification*

On another note, instrumentalist views on employment regulation are not uncommon in the current institutional environment of the EU. Our study has underlined that preferences for (orthodox) market solutions continue to prevail.<sup>1038</sup> These are evidently regarded not only as the practicable lowest common denominator in the process of negative integration (given the inertia in EU-28 decision-making regarding politically sensitive policy items) but they also reveal a fundamental belief in market-driven convergence. For some powerful institutional players, this is based on an absolutist notion of negative integration (i.e. free market orthodoxy) seen as the only valid option for deeper EU economic and monetary integration, repudiating any prospects of political integration.

Nevertheless, our analysis has also shown that market mechanisms must not necessarily result automatically in a reduction of worker protection – albeit, that is, only if designed adequately and underpinned by adequate regulation. This conclusion is borne out by the EU's recent legislative successes (i.e. the RPPD and the POWED) that have promoted European worker protection. They underline the benefit the Union can have in encouraging and actively facilitating targeted transnational cooperation. The new legislation thus points out the *EU's supportive capacity in the enforcement of existing labour standards*. This is based in the fact that the problem of the implementation gap knows its counterpart in the transnational context, i.e. the problem of an “enforcement gap”.<sup>1039</sup>

Considering the European capability for support, the increasing alignment of the ESF with the instruments of EU employment policy coordination is also noteworthy. There also seems generally a greater willingness and commitment from the EU institutions

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<sup>1037</sup> In fact, earlier versions of the Commission's EPSR communications have been critically scrutinised for their lack of (adequate) reference to the existing EU employment law acquis. See Schömann and Lörcher (2016).

<sup>1038</sup> See, for instance, the on-going determined efforts to establish a controversial Capital Markets Union of the Commission and the ECB. European Central Bank, Effectiveness of Monetary Union and the Capital Markets Union (Contribution of Vítor Constâncio, Vice-President of the ECB, for the magazine of the Eurofi conference in Malta (5-7 April 2017), 4 April 2017) available at [https://www.ecb.europa.eu/press/key/date/2017/html/sp170404\\_2.en.html](https://www.ecb.europa.eu/press/key/date/2017/html/sp170404_2.en.html) (last visited 2 July 2017).

<sup>1039</sup> In the transnational context, the Member States are considerably limited in their enforcement capacity, which they may in principle only exercise within their domestic territory. To address cross-border employment-related problems arising from the completion of the European Single Market, cooperation is of the essence. In that regard, the Union is extending its engagement by providing important network support and providing network support (such as through EURES, the PES network etc).

and the Member States to invest in targeted resources to address specific employment problems (such as that of young people Not in Employment, Education or Training (NEEET)). There may be comparatively limited funds available at EU-level for employment promotion but there seems a growth in recent initiatives of creating new mechanisms for social investment.<sup>1040</sup> More important though, in the context of this study, is the broadening of the scope for problem definition, in the AGS, towards the recognition of the “investment gap”.

Nonetheless, real progress on the side of expense allocation might probably only be expected from changing the mandate of the ECB to include the objective of full employment or the establishment of fiscal union in the EA. To bring about actual improvement in the alignment of fiscal policy measures with employment and social policy, such fundamental reforms would in any case have to address the difficult dependency between the Member States and the financial markets created by the EMU’s pervasive rationale of “market discipline”. It is promising that, since the crisis, vibrant discussions are going on regarding deeper integration and the future of the EMU with many insightful ideas for change.<sup>1041</sup> Based on our findings, we stress that one essential tenet for such a debate should be the ambition to overcome fatalistic types of reasoning (“There is no alternative”-discourses) and recognise the essential role that public regulation and authorities – both, at national and European level – are playing and will continue to fulfil in the interest of the public good.

Finally, yet importantly, the previous chapter has highlighted how a more balanced integrated approach would also require *more scope for politicisation at European level*. The CJEU in its *Mascolo*-decision has suggested that, based on EU employment rules, there are limits to the application of an absolute conception of fiscal consolidation “at any price” – i.e. as an *automatic* affair. The Court’s reasoning recognised the problematic effect that the abuse of workers’ rights may be a consequence of policymakers’ failure to distinguish adequately between the chosen means and the policy aims pursued.

In this respect, Ruggie (1998) reminds us that it is a common feature of international regimes that the ‘means and ends are often inseparable’.<sup>1042</sup> This is because in the daily practice of governance, every so often the availability and acceptability of means shape international collaboration, rather than the desirability of ends. Ruggie elucidates this point by stating that ‘notions such as reciprocity in the trade regime are neither its ends nor its means: in a quintessential way, they *are* the regime – they are the principled and shared understandings the regime comprises’ [emphasis added, NB].<sup>1043</sup>

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<sup>1040</sup> See European Commission, Communication on Towards Social Investment for Growth and Cohesion – including implementing the European Social Fund 2014-2020 (COM(2013) 83 final, Brussels, 20 February 2013).

<sup>1041</sup> See, for instance, on the series of workshops on ‘Which Social Dimension for the European Union? Normative, Political, Legal and Economic Perspectives’ organized by the Euroforum KU Leuven. See <https://www.kuleuven.be/euroforum/page.php?LAN=E&FILE=policy-papers> (last visited 2 July 2017).

<sup>1042</sup> Ruggie (1998), 85-101, at 99.

<sup>1043</sup> Ibid.

From a labour law-perspective, in turn, such merely functional validation of the process of EU meta-coordination that produces far-reaching normative guidance based in the hybrid interaction of binding and non-binding instruments, is not enough. Therefore, the legal conclusion in *Mascolo* helps to underline the need for carefully weighing and justifying the necessity and proportionality of policy measures when applying an integrated approach to policy-making:

‘it should be borne in mind that, whilst *budgetary considerations* may underlie a Member State’s *choice of social policy* and influence the nature or scope of the measures which it wishes to adopt, they do *not in themselves constitute an aim pursued by that policy* and, therefore, cannot justify the lack of any measure preventing the misuse of successive fixed-term employment contracts’.  
[emphasis added, NB]<sup>1044</sup>

Accordingly, policy-makers and administrators involved in the European Semester carry a special responsibility in justifying and thus legitimating those crosscutting governance solutions. The room for judicial redress in this respect, however, seems extremely limited in the context of EU meta-coordination. The room for political mobilisation, instead, seems the more expanded. The Semester-process undeniably provides numerous spaces and deliberative fora to elicit satisfactory justification for the choice of means and their adequacy in the light of the policy aims pursued.

It is promising here, from the viewpoint of capacity-building, to see that the current Commission has committed to instilling new impetus into the European Social Dialogue – and, even more so, its openness towards direct exchanges with the European social partners to improve their involvement in the various stages along the coordination-cycle. These are certainly steps into the right direction and deserve to be further developed.

In conclusion, then, it is still worth noting that the current political climate does seem predisposed to (re)cultivate an integrated regime of EU Employment Governance. Next to the on-going reflection process on the Union’s future options, new momentum is too created by the impending “Brexit” and the rise of powerful political figures elsewhere, propagating protectionism and right wing-populism.<sup>1045</sup> It remains to be seen whether this will be sufficient to generate the kind of leverage for consensus and reform that the economic and monetary crisis sustained for the creation of the EU Economic Governance-regime. Yet, precisely because the European governance architecture has become so highly sophisticated, it offers numerous opportunities for mobilization and, possibly, at some point also more favourable conditions for positive integration and the advancement of employment regulation.

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<sup>1044</sup> Mascolo and others [2014] at 110.

<sup>1045</sup> I. Krastev, *How Donald Trump Might Save the E.U.* (The New York Times, 20 February 2017) available at <https://www.nytimes.com/2017/02/20/opinion/how-donald-trump-might-save-the-eu.html> (last visited 2 July 2017).







## Addendum of valorisation

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The thesis represents a thought experiment to contribute to the discussion about what role the EU can (and should) play for the safeguarding and promotion of workers' rights in the context of globalised markets and structural unemployment. It adds value from a societal point of view, as it studies how EU level governance, given its advanced stage of market and monetary integration, addresses the three interrelated problems of non-standard employment, inequality and unemployment that public authorities are nowadays facing in the regulation of employment (relationships).

This research, too, is valuable from a scientific perspective because it explores the diverse instruments with which the Union exerts influence on employment regulation in the Member States based on an interdisciplinary approach. Given the complexity of the contemporary EU governance system, the study of its functioning and influence from merely one discipline can only deliver a limited understanding of certain aspects. This can, in turn, then only provide a partial perspective on proposals for change and policy recommendations.

The book aims to appeal not only to scholars and students, interested in European economic and social affairs, but also to policy-makers and public affairs professionals. On the one hand, based on its critical analysis, the thesis offers food for discussion as it provides relatively sombre conclusions regarding the current state of EU employment governance because of the dramatic changes that have occurred over the last decade. On the other hand, it should also offer some inspiration, since it highlights the EU's own capacity for innovation and learning, its propensity for actor empowerment and its facilitation of legal mobilisation and transnational cooperation. In that way, this study has already served as the basis for vivid discussion scholars from various disciplines and EU Commission officials.

With the aim of creating value from the knowledge gained through this thesis, we will briefly elaborate on these various aspects below.

### **Societal value**

Today it is increasingly common that public policy-makers and the departments of public administration are charged with increasingly colourful portfolios to reflect cross-cutting policy objectives. For instance, among the Vice Presidents of the current college of European Commissioners we find the following portfolios dealing with (aspects of) employment regulation: "Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights" (Commissioner F. Timmermanns), "the Euro and Social Dialogue, Financial Stability, Financial Services and Capital Markets Union" (Commissioner V. Dombrovskis), "Jobs, Growth, Investment and Competitiveness" (Commissioner J. Katainen) next to the Commissioner for "Employment, Social Affairs, Skills and Labour Mobility" (M. Thyssen).

Accordingly, there is a growing tendency to address policy problems in an integrated manner. This socio-legal study on EU employment governance examines the European practice of “integrated coordination” which today provides the pivot for socio-economic policy-making in the EU. It questions the corresponding trend of justifying European policy interventions with a functional rationale to meet seemingly objective efficiency standards.

It takes as point of departure labour law’s historical function of balancing social inequalities. Consequently, it confronts EU governance with the question whether the combined deployment of different forms of regulation does not require special care for preserving certain values (like human dignity and social justice). The labour law perspective reminds us that the safeguarding and promotion of worker protection is an essential ingredient for the democratic legitimation of any governing system. Market-driven policy approaches, so integral to EU governance, are conducive to creating more precarious employment (as the Commission has itself acknowledged in the framework of the European Semester). Thus, they seem to intensify today’s triple challenge of flexible employment, inequality and unemployment.

It is therefore important to deconstruct the rationales for designing hybrid policy solutions in order to fathom their potentially far-reaching effects and uncover underlying intentions. Such an endeavour helps to recognise the indispensable role of public regulation and State interventions for serving the common good. Especially considering the post-national context of the EU polity and its expanded socio-economic conditions, this role requires further development (and theoretical backing) in view of the multi-level and multi-polar nature of European governance and its diversified regulatory interventions.

The thesis thus provides a basis for future research that critically assesses EU level initiatives of strengthening employment and social performances in Europe. It attempts to provide a conceptual framework for examining what lies behind the often impenetrably progressive EU policy discourse and pierce the veil of seemingly reformist policy slogans like achieving a “social Triple A”. Accordingly, it has already served as a basis for submitting a critical contribution to the European Commission’s public consultation (December 2016) on the European Pillar of Social Rights.

### **Scientific value**

Moreover, we live in an age of fast increasing specialisation. However, social ordering and societal organisation in globalised contexts make it imperative to maintain a common language between the different disciplines as a basis for mutual understanding and cooperation. In that sense, the study’s interdisciplinary set-up has been inspired by systems theory (Luhmann) and the idea of reflexive law (cf. Teubner, Rogowski, Wilthagen). The latter have helped the author’s understanding of different scientific fields as being “operationally closed and cognitively open”. Conducting interdisciplinary research accordingly represents the basic attempt of finding such a common language to produce scientific results for the common good.

As intimated in Chapter 1, to better understand and assess the workings of EU hybrid regulation (such as that occurring in EU employment governance), we aim to espouse a legal approach with the methodological insights from the social sciences. Whereas the latter helps to better understand and explain the complex institutional dynamics at European level, the legal perspective remains vital to construct and advance a normative argument.

Hence, this socio-legal study aims to add value in two ways. First, it draws attention to the fact that EU governance arrangements regarding employment regulation (even though they may have lost their “novelty”-appeal) are still very much alive. While, the employment field has provided fruitful examples for the study of New Governance in the past, more recently, attention seems to have been diverted towards exploring other issue areas. Still, we argue that due to their advanced degree of diversification, a thorough study of the means of EU employment governance and, especially, their interaction among themselves and with other fields, represents a valuable contribution to the “governance” literature because it allows us to discuss further the notion of “hybridity” and its transformative qualities in the light of current circumstances.

Second, we believe that this thesis will contribute also to the legal literature. Examples of how EU governance has served as a study object for theory development in European employment law may have been less frequent, but no less stimulating. We argue that considering the fundamental challenges that labour law is facing today – and, especially, the increasingly globalised nature of economic activity, individual States are not likely to be adequately equipped to provide appropriate regulatory responses on their own. At the same time, the EU – given the advanced stage of its development – also ought to have a certain responsibility to address these problems with common solutions.

The thesis furthermore makes a contribution to the long-standing debate on the need to find a better balance between the economic and the social realm at EU-level. It may do so in a circuitous way by building on a rather extensive review of the “Lisbon 2020”-architecture. These elaborations are, nonetheless, considered necessary to grasp the intricate (and often indirect) implications of the much-advanced system of EU economic policy coordination for European employment regulation. The study indicates that this impact is especially felt in the area of employment protection, where the Union’s limited competences seem to have the ambiguous effect of propelling the deregulation of standard employment protection and bolstering the protection of non-standard workers.

Accordingly, this research has already provided the basis for several conference papers and presentations, and the following two publications:

- N. Büttgen, Conference report on the Workshop ‘Socio-Economic Governance in the EU since the Crisis: The European Semester in Theory and Practice’ Amsterdam Centre for Contemporary European Studies (ACCESS EUROPE), 11–12 December 2015, 22 *Transfer* 2 (2016), p. 265-269; and
- N. Büttgen, ‘EU regulation on employment matters – there ain’t no splitting a coin in two’, 2 *European Journal of Social Law* (2013), p. 121-146.

The 2013 publication has received an international award (Levenbach Institute, 2014).

Equally, the thesis still provides plenty material and inspiration for further dissemination. It is planned to be used as a basis for more article publications in scientific journals (such as the European Labour Law Journal, the European Law Journal, the European Public Policy Journal). The author also intends to follow up on offers from the European Trade Union Institute (ETUI) and the European Social Observatory (OSE) to submit working papers and/or policy briefs based on this research within the next months.





## 9. Executive Summary

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### Purpose and relevance (Chapter 1)

Today public authorities are facing three current problems in the regulation of employment: non-standard employment, inequality and unemployment. The thesis is interested in how EU level governance addresses these problems given its advanced stage of market and monetary integration, and particularly following the recent experience of financial, economic and monetary crisis.

The EU has tried to establish itself as a “crisis manager” to keep up both its global competitiveness and a sustainable “European Social Model” (MSE). Creating more and better jobs has been one of the main European goals to be achieved by 2020. This thesis approaches this broad ambition from a labour law perspective.

Based on the recognition that labour law has historically been fulfilling a crucial role in balancing social inequalities, we thus seek to assess the EU’s capacity of upholding and promoting workers’ rights in Europe. We conduct a socio-legal study of European employment regulation because of the intermingling of law and policy in this area.

Notably, we review how European employment regulation has developed over the past decade. We build on an inclusive notion of “EU employment governance”, the so-called “integrated regime” thesis. This view emphasises that the EU has an increasingly diverse set of regulatory instruments at its disposal with which it influences employment regulation. It conceives various governance tools (binding rules, policy coordination, and common expenditure) as constituting a “toolkit” operating in an integrated manner, tailored towards achieving the EU’s hybridised employment objectives. In the early 2000s, it had been implicitly assumed that through this *integrated regime of EU employment governance* the interaction of these tools meant the effective achievement of progressive “competitiveness-social justice”-objectives (hereafter the “integrated regime”-thesis).

Given dramatic changes over the last decade, the thesis assesses what capacity the Union (still) has in the field of EU employment governance and evaluate its implications for labour law in Europe. In response to the drastic experiences of financial, economic and monetary crises, the European system of socio-economic governance has been subjected to far-reaching changes. The analysis therefore addresses two main research questions. First, it asks *whether EU employment governance can still be regarded as an integrated regime today*. Second, we examine *to what extent the EU is (still) meeting its employment objectives through the hybrid interaction of different governance instruments*.

Accordingly, we aim both to explain how EU employment governance has developed throughout the past decade (explanatory analysis) and to evaluate the EU’s capacity to uphold and promote workers’ rights in Europe (normative analysis). Therefore, a comprehensive theoretical framework is developed to analyse regime “dynamics” (formation and change) in European governance and study the impact of the “hybridisation” of the Union’s objectives and instruments governing employment matters.



## Theoretical background (Chapter 2)

We regard “governance” as a complex process that involves multiple actors pursuing a wide range of substantive and organisational goals, notably, those of the common good. The notion helps thinking about what modalities of control and means of regulation are deployed (where, how and by whom decisions are taken, and is their implementation being executed and reviewed) to achieve common aims at supra-national level. According to the governance idea, the governing of society should be *effective*.

Next to that, based on the varied literature on “regime theory”, we take the notion of a governance “regime” to refer to a type of “institution” (in the sociological sense) that structures cooperation between actors. One way to conceive this is through shared norms and principles, common rules and decision-making procedures. A regime is generally characterised by a distinctive rationale for policy design, identifiable at the level of norms and principles. It is composed of interacting parts, embedded in a reference framework that helps to assess continuity over time.

It is however not easy to accommodate the “governance” idea within legal discourse. In academia, this challenge has been reflected in the difficulties of combining the two schools of EU Constitutionalism and New Governance. To overcome these difficulties, we have recognised that there is a fundamental paradox at the heart of the EU system: The uneasy co-existence of the Union legal order based in limited EU powers and the efficiency-based European policy-making that requires considerable competence and power sharing to deal with increasingly complex regulatory problems. The proliferation of different modes and instruments of governance at EU-level in fact brings to light the Union’s peculiarities and its integration process (such as its multi-level and multi-speed nature and its multi-polar decision-making structures). Adopting a binary approach that conceives different instruments and processes of governance (e.g. ESD, OMC) as distinct from – and, thus, potentially antithetical to – traditional legal regulation can be problematic.

## Methodology (Chapter 3)

Instead, it seems more constructive to use a “framework” approach for understanding the law-governance relationship at EU-level. Complemented with the idea of the EU “governance architecture”, this perspective regards EU governance as a broad framework that guides and structures the hybrid interaction between governance instruments, modes and actors. It represents an attempt to fathom the complexity of the Union’s regulatory system and, particularly, to grasp the hybridised influence that European governance emits at the national level.

This approach explicitly recognises the EU’s peculiar post-national context in which the law-governance relationship takes shape, building on a broad notion of law that recognises its dual function. The *constitutional* function captures the law’s capacity of providing a constitutive and legitimizing normative framework. The *instrumental* function focuses on law as a governance instrument. This inclusive view thus facilitates the analytical distinction between conceiving EU governance as a structure (ideational component) and a process (organisational component).

The framework approach then lets us endorse the mutual relevance of law and governance within the EU context. The purpose of the EU governance architecture is to sustain and *enhance governance capacity*. This should ideally mean *mastering the balancing act* between effectiveness and democratic legitimacy in the design of European governance responses to complex, collective problems. This provides the basis for reconceiving the “integrated regime”-thesis as follows: *The EU governance architecture influences European governance capacity in a certain governance area through processes of issue-specific regime formation*. This working hypothesis provides the basis for our analytical framework (see Table 3.2.) for studying the EU governance architecture and regime change.

### The “Lisbon 2020” governance architecture (Chapters 4-5)

The broader context of the EU’s socio-economic governance activities is shaped by what we refer to as the “Lisbon 2020”-architecture. This structures the Union’s normative aspirations based on a durable constitutional framework (the Treaties, including the CFREU) and shaped by a more revisable, reflexive framework (Europe 2020) defining its strategic ambitions for the medium-term. This composite normative framework pivots on the core objective of establishing a CSME, making the balanced pursuit of economic and social goals the *raison d’être* of the EU polity.

Within this framework, the delimitation of competences between the EU and the Member States has become more complex. It remains hierarchical relying on the subsidiarity principle. Yet, the Treaty-based allocation of responsibilities between the European and the national level appears increasingly diffuse. The EU’s power of “coordinating” national policies is now recognised as a self-standing competence. Meanwhile, the pursuit of the 2020-objectives requires a partnership-approach that builds on a more organic division of tasks. It presupposes the mutual responsibility of the Member States and the EU institutions towards enhancing European governance capacity.

Importantly, the “Lisbon 2020”-architecture puts up a consistency requirement. The TFEU obliges the Union to ensure *consistency* between its policies and activities, taking into account all of its objectives. Europe 2020 equally guides European policy-making in a deliberately integrative manner. Nonetheless, the Treaty also provides that the promotion and implementation of the broad European objectives must not result in supra-national intervention *ultra vires*.

On that basis, the analysis shows further how following the European anti-crisis reforms a *new integrated regime of EU Economic Governance* has (been) developed within this framework. The main features of this new regime can be summarised as follows:

- a. dense governance arrangements with diverse EU governance tools and techniques interacting in a transformative manner;
- b. strengthened and broadened objectives elaborated through a comprehensive procedural framework aligning that tool-kit; and
- c. an institutional context with much empowered strategic actors – notably, the ECB – favouring a market-driven integration process.

These elements have jointly contributed to enhancing the Union's capacity regarding the achievement of its main economic governance objectives. The resulting transformative interaction between binding and non-binding instruments effectively bestows authoritative force onto the policy guidance (recommendations) advanced through the meta-coordination cycle of the European Semester – especially, in the context of the Euro area (EA). The EU now knows a much-reinforced *coordination capacity* based on benchmarking practices that have been significantly expanded and the *framing* of comprehensive policy narratives throughout the Semester (identifying common problems and solutions).

The *new* integrated regime of EU Economic Governance, centred on the European Semester, unites the operation of two inter-dependent cycles of preventive and corrective economic policy coordination. We argue that this regime currently epitomises the ideal of “integrated coordination” pursued by the “Lisbon 2020”-architecture. Accordingly, we set out to study what implications this new regime has for European employment regulation.

## **EU employment governance – ideational aspects (Chapter 6)**

Having gained an overview of the EU's general governance architecture and an understanding of the significant changes that the European system of economic governance has undergone, we turn to examine *whether EU employment governance can still be regarded as an integrated regime today* and *whether it is effective in reaching the EU's employment goals*. Thereby we also aim to understand better the extent the EU's influence on employment regulation. Based on the analytical framework set out in Chapter 3, we discuss first the ideational component (structural level) of EU employment governance and, then, its organisational component (process level) within the framework of the “Lisbon 2020”-architecture.

### Understanding the EU's aspirations regarding employment regulation

To increase our understanding of the Union's policy aspirations regarding employment regulation at present, it is useful to recall the moment that marked the deliberate development of the social dimension of European integration. The 1992 consensus upon which the EU system of socio-economic governance has been built originally included plans for political integration, next to the establishment of the EMU. As the Maastricht Treaty put the monetary union on a concrete roadmap for institutional change, the ambitions for political union remained rather open and vague. Nevertheless, alongside the establishment of the EMU, the EU made its mission to “preserve and develop” the European social model (MSE). Reference to the MSE has since provided shorthand for the promotion and protection of social objectives in the context of European integration.

The EU maintains rather ambitious aspirations regarding employment regulation, but its competences remain divided. Importantly, the EU system is characterised by a partial “floor of rights” in European employment law, while it lacks similar minimum standards regarding social security law and social protection. This obvious gap between ends and means lies at the core of the Union's social model. Hence, one could regard EU

employment regulation as being in a state of crisis (regarding its purpose, impact and legitimacy), as it lacks a straightforward policy agenda or a comprehensive justification for European intervention.

However, the MSE-narrative (i.e. the promotion and protection of social objectives at EU-level) has been constructed in such a way that this discrepancy is *not* considered a constraint. On the contrary, the EU's (limited) legal powers and capacity to coordinate, next to the Member States' prerogative in regulating social matters, constitute part of the model's distinctiveness and Europe's comparative advantage.

#### European employment regulation in the light of establishing a CSME

The MSE is thus as close as it gets to defining social ambitions at EU-level. In that sense, it has functioned as a connective narrative that has jointly promoted employment and social objectives at EU-level in the face of progressing European economic integration. It has done so by providing a connective narrative to the progressive development of governance tools at European level. Despite increasing obstacles to the prospects of European political integration, the MSE-narrative has thereby proven rather innovative as this diversification of regulatory instruments has helped maintaining employment and social issues on the EU agenda.

On this view, then, the MSE is considered as giving EU employment regulation a sense of direction by emphasising the need for modernisation and the mutual significance of economic and social policies. In that way, it has also underpinned the hybridisation process, described in the previous chapters, which has increasingly blended the Union's aspirations for socio-economic governance. This development is nowadays reflected in the fact that establishing a "competitive social market economy" (CSME) is now a constitutional objective of the EU. Accordingly, this *normative perspective* regards the MSE as providing a purposive rhetorical framework that strives to master the delicate balancing act between respecting the sensitive division of competences between Union and Member States and promoting European social and political integration.

The recognition that the MSE effectively links European employment regulation to the development of the Union's social dimension is considered critical to the functioning of the EU polity. We argue that the MSE-narrative may therefore be able to transcend the normative deficiency that characterises EU employment law, by supporting the advancement of EU employment regulation in a more comprehensive manner. The realisation of the ideal of establishing a CSME, then, is facing important challenges – particularly, regarding the further development of EU employment regulation. For the EU institutions, these challenges are reflected in the critical need to overcome the EU's "social deficit" by putting into operation a "balanced integrated approach" (a "high wage, high productivity" route to competitiveness based on an extensive floor of labour standards).

#### **EU employment governance – organisational aspects (Chapter 7)**

Here, we consider how the "Lisbon 2020"-architecture is affecting the EU employment governance instruments, focusing specifically on the (longer-term) consequences of the EU

crisis management. As we examine the regime qualities of European employment governance, we seek to understand better the different channels (and their combined effect), through which the EU nowadays is influencing employment regulation in Europe, and their effectiveness in achieving the common employment objectives. We focus on the Flexicurity-objective due to its significance to labour law. Thereby, we too stay alert to the fact that studying the effectiveness of the EU's hybrid governance objectives is challenging because of their normative vagueness.

### The Effectiveness in implementing hybrid objectives

European employment regulation has clearly not seen comparable efforts to those of strengthening EU Economic Governance in previous years. It thus appears at present considerably fragmented across the organisational apparatus of "Lisbon 2020". The associated governance tools fail to reveal sufficient consistency. So, their apparent lack of alignment towards meeting the Union's employment goals hardly allows concluding the continued existence of an integrated regime of EU employment governance.

Under the "Lisbon 2020"-architecture, the EU has seen its influence on employment regulation both *contract* and *expand* throughout the past decade. Despite some endeavours to maintain coherence by adopting an integrated approach, the Union has seen reduced particularly its capacity for safeguarding workers' rights through standard-setting. We observe legislative inertia regarding the adoption of substantive employment rules in the area of policy-making. In the realm of judicial enforcement, it is important to recognise the limitations to the enforceability of the CFREU. And, additionally the political will to legislate on employment matters is being questioned, considering the expansive competitiveness review of the Union's existing employment *acquis* through the Better Regulation agenda.

At the same time, the EU seems to have gained influence concerning those aspects of employment governance now integrated into the European Semester. We analyse this more extensively, considering the effects of the significant reinforcement of the procedural framework conditions for economic governance brought about by the EU crisis management. More precisely, it will be interesting to see how the new EU Economic Governance-regime has affected EU employment governance.

Since EU policy coordination apparently exerts most influence at the ideational level (policy formulation and agenda-setting), the examination centres on the enhanced function of *policy framing* (Chapter 4) that the European Semester has brought about. The analysis therefore focuses on the Commission's Annual Growth Surveys (AGS 2011-2016) as one of the Semester's central evaluation instruments that weaves comprehensive policy narratives connecting commonly identified problems with preferred policy solutions. The AGS thus largely pre-determines the conceptual room for devising European policy recommendations.

Hence, we study how the EU's broader policy aspirations are being further concretised and elaborated at this operational level. For that purpose, the three

components of the following model (introduced in Chapter 6) serve as yardsticks for evaluating the policy frames of the AGS:

Were EU employment governance still to represent an integrated regime today, then it would have to be built on a balanced integrated approach that recognises and jointly promotes: (a) the productive role of labour standards; (b) the mitigating role of employment policy/ALMP in remedying the negative effects of employment regulation; and (c) the reinforcing role of macro-economic policy including both supply- and demand-oriented measures.

On that basis, we examine the policy solutions advocated by the Commission to overcome the common problems identified (instability, competitiveness, unemployment, and governance). Because the European Semester epitomises the idea of *integrated* coordination, we are particularly interested in the implementation of the Flexicurity-objective through the interplay of different governance tools. Accordingly, we *assess the preferred policy solutions in the light of recent case law from the CJEU regarding employment protection* – i.e. on the application of the European legislation dealing with temporary employment

#### EU employment governance in action – Balanced implementation of Flexicurity?

The analysis reveals how the EU's meta-coordination cycle essentially shapes the *policy space* in which policy-makers define and select their potential courses of actions for implementing the 2020-objectives. The analysis shows how the EU Economic Governance-regime proper is ensuring *consistency* in the interaction and the interpretation of the diverse governance instruments.

The EU employment governance instruments thus seem currently captivated by that new regime, especially those intended for employment policy coordination. They are increasingly re-oriented towards serving the EU Economic Governance objectives. The interpretation of the latter is, in turn, being dominated by rather orthodox views on the relationship between State and market and by actors who favour a market-driven European integration process (i.e. monetary union without political union). The EU Economic Governance-regime thus appears to promote a reductive understanding regarding the integrated approach. The Flexicurity-objective is accordingly placed in an institutional context that actively promotes a narrow vision of labour market flexibility and is rather conducive to deregulation.

Besides this sombre conclusion, we also discuss an alternative scenario, wondering if more positive developments in the European Semester actually reveal a more balanced integrated approach in the making. Here, we consider the propensity of EU law to safeguard workers' interests in light of the "Growth"-objective, both through policy-making and judicial enforcement. Furthermore, we discuss a turning point in the AGS narratives and to what extent this reveals a capacity for institutional learning.

## **EU socio-economic governance and the integrated regime thesis: How much policy space for governance solutions promoting worker protection? (Chapter 8)**

In the introduction, we have recognised that in the regulation of employment, public authorities nowadays are facing three inter-related problems: non-standard employment, inequality and unemployment. The thesis discusses how EU level governance addresses these problems given its advanced stage of market and monetary integration. Specifically, it asks what role the EU can (and should) play for safeguarding and promoting workers' rights in the context of globalised markets and structural unemployment.

### How much policy space for solutions promoting worker protection?

Regarding the question to what extent EU employment governance still represents an integrated regime within the “Lisbon 2020” governance architecture, we have demonstrated the emergence of a new EU Economic Governance-regime following the European anti-crisis reforms. The main *locus* of action for EU employment governance has evidently shifted away from the legislative domain. The Union's *acquis* of binding rules defining minimum requirements for worker protection in Europe remains currently rather static. So, EU institutions focus increasingly on the design of labour market reforms in the framework of European policy coordination.

The conclusion then reflects more broadly on how much policy space we encounter at EU-level for solutions that promote worker protection. It revisits the relevance of the EU's post-national setting, i.e. the intricate distribution of competences between the European and the national level, for aspects of socio-economic governance. This highlights the continued tension between the consistency requirement and the EU's competence limitation. As supra-national intervention is increasingly fashioning the functioning of its various governance instruments in a consistent – i.e. integrated – manner, the risk that it is being judged *ultra vires* is certainly not negligible. European employment regulation is accordingly confronted with the new EU Economic Governance-regime, which effectively aligns the interacting instruments to the achievement of the common economic objectives through the European Semester.

In effect, with the growing complexity in the allocation of competences in the EU, the framing function of the *problem definition* is significantly increasing in importance. This is because the legitimisation of policy interventions (i.e. the assignment of competence to act) has turned into a question of “labelling”. More precisely, this implies that determining *the legal authority to regulate a certain issue essentially depends on how the underlying policy problem is framed*. Therefore, public authorities – especially those involved in the Union's practice of meta-coordination – carry a special responsibility regarding the process of *inter-framing* (i.e. promoting governance solutions cutting across various policy areas) and the need for justifying given policy solutions.

### Assessing the Union's capacity for employment regulation

The analysis above underlines how EU employment governance is operating in the shadow of the EU Economic Governance-regime. The effect is (as Chapter 7 has shown) that the Union currently seems to face a reduced capacity regarding the achievement of its employment objectives.

This reduced capacity manifests itself, for instance, through a *reductive, functionalist conception of the integrated approach to policy-making*. The latter then is not promoted for its intrinsic value as an inclusive strategy of contributing to the central objective of establishing a CSME. Instead it is presented as a necessary effect from the constraints on national public finances. The consequences of this reductive understanding are, amongst others, reflected in the tense relationship between European social policy and employment policy. They also show in the lack of linkages or even conflicts that characterise the deployment of the EU's employment governance instruments.

Regarding the effectiveness of the EU employment objectives through the operation of the European governance instruments, there is a mixed picture. A higher level of employment, as recommended by EU policy guidance, appears to come at the cost of creating more precarious work relationships. The continuous framing of employment standards as “rigidities” means that EU guidance for policy coordination, in effect, frames employment standards as the problem, not the solution.

### Towards an innovative legal framework for employment regulation

Finally, there are indications that the European Semester may represent a powerful platform to address the problem of EU's fundamental problem of the implementation gap. It notably provides the Union with an opportunity to develop its role as a problem-solver vis-à-vis the complex *collective* issues that arise in the pursuit of common objectives.

On that view, it seems futile to address the tension between the EU's competence limitation and the consistency requirement inherent in the European governance architecture as a problem of competence creep. We plead to re-conceive the problem in terms of a *hierarchy of norms* foisted de facto upon the “Lisbon 2020” architecture by the new EU Economic Governance regime to ensure the functioning of the EMU. That hierarchy effectively legitimises EU normative guidance on a broad set of (hybrid) issues relevant to macro-financial and macro-economic stability – even including those issues that may be formally outside the Union's competence if approached from the perspective of a singular policy field.

Considering the role of employment standards in EU meta-coordination, we conclude that the iterative and reflexive set-up of the Semester encourages the EU to develop further its role as a “problem-solver”. Because of the complex division of competences between the EU and the Member States, the framing function of the problem definition has become decisive for determining who will be competent to act and regulate a certain issue.

We suggest that the Union's meta-coordination schedule could therefore provide a fruitful basis for fostering a more dynamic understanding of subsidiarity. This refers to



the idea of providing “active coordination” in determining the capacity for different administrative levels to intervene (based on the rationale of cooperation, rather than that of exclusive allocation).

Such dynamic understanding would have to be grounded in an EU governance architecture that is overall more conducive to the advancement of EU employment regulation. Given its resourcefulness and innovative capacity, the MSE-narrative may (once again) provide a capable complement to address the “social deficit” of the EMU. This could offer the conceptual basis for advancing European employment regulation as part of a balanced integrated approach, one promoted deliberately for its intrinsic value in building a European social market economy.





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## Author's biography

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Nina Büttgen (1984) was born and grew up in Düren, Germany, close to the border triangle with the Netherlands and Belgium. After obtaining her bilingual Abitur (German-English) at the Gymnasium am Wirteltor in Düren (1994-2003), she followed an interdisciplinary study with a concentration on social sciences at the University College Maastricht (UCM, Bachelor of Arts *cum laude*, 2006). She acquired specialisation in European and international law through her enrolment in the master programme “Law and languages” at the Faculty of Law of Maastricht University (I.L.M. *cum laude*, 2008). In that time, she gained valuable study experience during three semesters spent abroad at the Pontificia Universidad Catolica, Santiago de Chile, McGill University, Montréal, Canada, and Paul-Cézanne Université, Aix-en-Provence, France. After her studies, she practised for three years as a public affairs consultant with PA Europe NV in Brussels and in The Hague. Here she focused on, amongst others, corporate social responsibility projects and organised comparative law study missions for parliamentary delegations with the Public Advice International Foundation.

In mid-2011, Nina returned to the Law Faculty of Maastricht University to conduct her Ph.D. research. She has been a fellow of the Levenbach Institute, a national network of social law academics, the Maastricht Center for European Law (MCEL) and the Center for European Research in Maastricht (CERiM). Alongside she taught classes on European labour law and social security law at the University of Hasselt, Belgium.

She also completed a research traineeship (2015-2016) at the European Trade Union Institute (ETUI) in Brussels. And she was awarded the second place of the International Levenbach Prize 2014 for her journal article N. Büttgen, 'EU regulation on employment matters - there ain't no splitting a coin in two' (2013) *European Journal of Social Law* 2, p. 121-146.

In the regulation of employment, public authorities face three current problems: non-standard employment, inequality and unemployment. The thesis is interested in how EU level governance addresses these problems given its advanced stage of market and monetary integration. This socio-legal study therefore explores the diverse instruments with which the Union exerts influence on employment regulation in the Member States. Given dramatic changes over the last decade, it assesses what capacity the Union (still) has in the field of EU employment governance. The analysis focuses on the impact of reinforced economic policy coordination. It evaluates whether the joint use of different modes of regulation is as progressive as the competitive-social justice promises the EU's expansive regulatory framework makes on paper. The thesis represents a thought experiment to contribute to the discussion about what role the EU can (and should) play with regard to safeguarding and promoting workers' rights in the context of globalised markets and structural unemployment.