"The European Employment Strategy as a new governance paradigm for EU-level social policy and its implementation through the Open Method of Coordination"

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Abstract

The paper looks at the European Employment Strategy (EES) within the discourse of New Governance. In particular, I focus on three main research questions.

Does the EES, implemented through the 'Open Method of Co-ordination,'(OMC) represent a new mode of policy-making?

What is the impact of benchmarking, peer pressure and exchange of best practices at the national level?

What is the contribution of the EES and OMC to the extant EC Social Policy regulation in terms of policy transfer?

I then suggest a series of amendments to Title VIII and XI of the EC Treaty in order to strengthen the institutional framework of the EES and EC Social Policy *sensu lato*.

EC social policy has attracted the attention of a large community of lawyers, policy makers and scholars in particular because it presents the European Union with a difficult regulatory task.

EC social policy developed its bone structure originally from the focus on the creation of a Single Market and later on the establishment of the Economic and Monetary Union (EMU) and has, accordingly, mainly concerned labour market policies and employment issues, which were directly linked to them. This explains why Community social policy has traditionally lacked the same general scope as national social law, which has always typically embraced areas such as regional policy, structural policy, cultural policy, education policy and health policy.

The EES represents a sea change with regard to the lawmaking process in the European Union both at the national and at the European level. In fact it entails a shift from "*social law* and *legislative initiatives*, towards *soft law*, or rather *policies* aimed at employment creation, which for the most part eschew legislation." [1] Secondly, and related to the former, it attempts to establish a nexus between the different EU policy areas by widening its scope of action, which goes beyond the field of social policy *strictu sensu*. The EES therefore aims at developing a *social dimension* to the activities of the European Union.

In respect to its mode of operation the EES looks at reform in the short run with a gradual shift towards major restructuring in the long run.

[1] See D. Ashiagbor, "EMU and the shift in the European Labour Law agenda: from 'Social Policy' to 'Employment Policy'," 2001 7(3) *European Law Journal* 317.

It does not cover all policies that are related to employment. Important areas such as monetary, fiscal and wage policy that concern economic and employment growth in the European Union are not included in the EES. The latter has developed as a supply-side strategy focusing on altering structural impediments to employment. Nonetheless, the strategy embraces a much larger number of areas than have ever been addressed at the European level through traditional social policy regulation.

As a new form of soft law, which also represents a novelty compared to previous non-binding legal instruments, [2] the EES represents a challenge to legal theory.

At the Lisbon Summit followed by subsequent Summits the EES has been defined as a regulatory tool to be included in the 'Open Method of Co-ordination.' [3]

This new mode of governance can be described as constituting an enmeshment of open participation in the implementation of policies, consensus building, use of benchmarks, exchange of best practices and information, self-regulatory codes of conducts and more broadly co-operation and co-ordination within a multi-tiered framework of governance. [4]

It refers to the alternative "softer" method of policy-making that is used either in areas in which there has traditionally been a very narrow margin of opportunity for action at

[2] See S. Régent, "The Open Method of Coordination: A Supranational Form of Governance?" (2002) *International Institute for Labour Studies* 6-20.
[3] See Presidency Conclusions of the European Council of Lisbon, 23-24 March 2000, [online]. Available at:<URL:http://ue.eu.int/presid/conclusions.htm>.
[4] See E. Szyszczak, "The New Paradigm for Social Policy: A virtuous circle?," (2001) 38 *CMLRev* 1125-1170; S. Régent, "The Open Method of Coordination: A Supranational Form of Governance?" (2002) *International Institute for Labour Studies* 15-23.

European level or in areas, which have never been in the remit of Community decision-making. [5]

The implementation of the EES through the OMC has created a new cultural framework within the European Union [6] by gradually reconfiguring policy networks, fostering co-operation between different policy areas, increasing the exchange of information on innovation, fostering the exchange and benchmarking of best practices, promoting deliberative modes of governance for problem solving through systems of partnerships between different stakeholders and different levels of authority. [7]

This has been possible by dint of soft regulatory measures, such as exchange of best practices and benchmarking, which have generated self-regulatory codes of conduct and voluntary networks that aim to optimise the efficiency of national policies. It has thus fostered the inclusion of new social policy areas on the agenda of the Community.

Furthermore, the National Action Plans for Employment process within the EES illustrates the way the Europeanisation process operates, which is an open process itself leading to a re-regulation of national policies to meet supranational standards. [8]

[5] See C. De La Porte, "Is the Open Method of Co-ordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?" (2002) 8/1 European Law Journal 38-39.
[6] See M. Biagi, "The impact of the European Employment Strategy on the Role of Labour Law and Industrial Relations," (2000) 16 *IJCLLIR*, 161.
[7] See J. Goetschy, "The European Employment Strategy, Multi-level Governance and Policy, Coordination: Past, Present and Future," forthcoming in Zeitlin and Trubek (eds) *Governing work and welfare in a New Economy: European and American experiments,* (London, OUP, 2002), p. 11.

Contemporaneously, the EES whilst introducing innovation and foreseeing an important and renovated role for the state and for the social partners, maintains intact the extant institutional design. [9]

The analysis of the EES as an innovative regulatory tool in the decision-making process of the European Union must necessarily be included within the discourse of *differentiated integration* and New Governance in the area of social policy. [10]

The new social paradigm, which attempts to alter EU and national perceptions, may be effectively described as a "transverse form of policy-making." [11] This new process draws upon a *trans-national multi-tiered form of governance* [12] and basis of self-regulation, [13] co-regulation, [14] voluntary networks and more specifically on the interaction of actors distributed across the various levels of policy-making. It is articulated upon "co-operative and horizontal" forms of subsidiarity and proximity.[15]

Globalisation has fostered the birth of these new processes by way of decentralising the making of law and politics. In addition to its fragmenting tendency it has also

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[8] See S. Sciarra, "Global or Re-nationalised? Past and Future of European Labour Law," in F. Snyder (ed.) *The Europeanisation of Law. The Legal Effects of European Integration*, (Oxford, Hart Publishing, 2000), pp. 269-289.

[9] See EC Commission, *European Governance, A White Paper*, COM (2001) 428 final, Brussels, 25.07.2001, pp. 22-23.

[10] See J. Scott and D. M. Trubek, "Mind the Gap: Law and New Approaches to Governance in the European Union," (2002) 8(1) *European Law Journal* 1-18.

[11] See EC Commission "Targeted Socio-Economic Research, I- Guidance note relating to the work programme 1996,"pp. 4 and 10, (Luxembourg: Office for Official Publications of the European Communities) where the concept of "transversality" is used to highlight the inter-action between the different elements/themes of the Fourth Framework programme (1994-8).

[12] See I-J. Sand, "Understanding the New Forms of Governance: Mutually Interdependent, Reflexive, Destabilised and Competing Institutions" (1998) 4(3) *European Law Journal* 276-286.

[13] See White Paper on "European Governance, COM(2001) 428, p. 20 where self-regulation is referred to as one of the complementary tools to legislation.

[14] *Ibidem*, p. 21, where the Commission has also outlined the conditions for its application.

integrated the different levels of policy-making, *i.e.* supranational, national and regional, creating a form of *trans-national* or *trans-border multi-level* of governance.[16]

The main challenge with which the European Union is confronted with lies in bridging the gap between these new trans-national forms of policy-making and its democratic legitimisation. At present the Community's regulatory structure is inadequate to adjust to these new processes.

Moreover, some of the elements on which the EES is based upon also constitute its weaknesses.

Firstly, the proliferation of new actors and bodies in the European Union, the different typology of acts and the new processes that it has established, maintaining intact the Community's institutional design has generated confusion among lawyers and policy-makers. [17]

In fact various questions arise in this context. How do these complementary forms of policy-making interact with one another? How does the establishment of an epistemic community with the creation of a voluntary network system, which now includes civil society and reinforces the consultative role of extant committees such as the

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[15] *i.e.* decisions should be taken as closely as possible to the grass roots level. See C. Paterman, *Participation and Democratic Theory* (Cambridge, Cambridge University Press, 1970), who refers to proximity in order to develop a more democratic workplace.

[16] See S. Sciarra, "Global or Re-nationalised? Past and Future of European Labour Law," in F. Snyder (ed.) *The Europeanisation of Law. The Legal Effects of European Integration*, (Oxford, Hart Publishing, 2000), pp. 269-289.

[17] See E. Szyszczak, "The Evolving European Employment Strategy," in J. Shaw (ed) *Social Law and Policy in an Evolving European Union*, (Oxford, Hart Publishing, 2000), p. 197.

Economic and Social Committee and the Committee of the Regions and the creation of the Social Protection Committee fit in effectively with the Community method, which the Commission has clearly stated as being the primary method of decision-making at the European level? What changes does it bring to the implementation of EC primary law? What is the relationship between hard law and soft law? With regard to the recent directives on sex discrimination or race discrimination, how does their effective implementation interact with the implementation of the fourth Pillar of the EES on equality between men and women? Neither types of law can be analysed in an isolated way.

The issue of soft law is also related to that of the distribution of competences and division of powers in the European Union.

The promotion of the social dialogue at Community level in fact seems to be used as a regulatory tool or technique by the Commission to resolve in a patched up way the important issue of democratic deficit at the European level, to the detriment of the EU Parliament. [18] This view is confirmed by the current status of those framework agreements, which lack of any legal relevance compared to those, which are implemented by way of a Council Directive.

Moreover, the use of soft law instruments with no legal sanctions leads to another issue, *i.e.* the effectiveness of the EES. The complexity of the institutional framework combined with the lack of legal sanctions and the absence of a rule of law approach

[18] See M. Biagi, "The Implementation of the Amsterdam Treaty with regard to employment: Co-ordination or Convergence?," (1998) 14 *IJCLLIR*, 325. The author argues that the Commission reduces Member States' decision-making power in the field of employment policy through the introduction of co-ordination.

entails a decrease in transparency and thus of credibility and legitimacy of the European Union's regulatory system. [19]

Finally, the limited number of quantified targets and the confusion regarding the results to be achieved undermines the effectiveness of the EES and, more generally, the validity of the OMC as a new mode of governance.

Other weaknesses of the EES and the OMC are the lack of co-ordination of the former with other EU policies namely EMU and EU State Aid Regime, in particular the existing subordination of the EPGs to the objectives listed in the Broad Economic Policy Guidelines (BEPGs) and also the insufficient allocation of EU financial resources. [20]

These weaknesses are also aggravated by the lack of a system of protection of social rights in the implementation of the EES. In particular, the lack of means of redress available to civil society and, more broadly, non-privileged parties against non-binding EU acts.

The adoption of the EU Charter of Fundamental Rights, [21] the Laeken Declaration [22] coupled with the setting up of a Convention charged with considering the future of the

[19] See Hodson, D. and Maher, I., "The Open Method as a new mode of governance: The case of soft economic policy co-ordination," 39(4) *Journal of Common Market Studies* 719-746.
[20] See S. Ball, "The European Employment Strategy: The Will but not the Way?," (2001) 30 *Industrial Law Journal* 359-366.
[21] The Charter was issued with a joint act by the European Parliament, the Council of the European Union and the European Commission on 7 December 2000 (see OJ 2000 C 364/1) and came into force on 26 February 2001.
For further documentation on the Charter visit the European Union website at: <URL: http://europa.eu.int/comm/justice_home/unit/charter/index_en.html>.
[22] See Presidency Conclusions of the European Council, Laeken 14 and 15 December 2001, Annex I to the Presidency conclusions, pp. 1-9.

European Union[23] before the next IGC in 2004 [24] have fostered the debate about a European Constitution and a catalogue of rights to be included in the EC Treaty. [25] These events illustrate how constitutional issues have not only become the Community top priority but also how strictly linked they are to the discourse of rights and citizenship.

My contention is that it is necessary to create a new institutional framework in the context of EU Social Policy, [26] in accordance with the principles of subsidiarity and proportionality in order to guarantee a clear distribution of competence among the relevant actors with an accurate definition of tasks, functions, consultation procedures and legal processes in creating legislation. This new institutional framework eliminates situations of uncertainty with regard to the distribution of competences and it increases transparency, legitimacy and the respect of the rule of law. This reform becomes particularly relevant in view of the enlargement process.

For the purpose of the present paper, which primarily looks at forms of New Governance I will not address the issue regarding the protection of social rights.

[23] The Laeken Declaration in fact set out the constitutional issues that the Convention has to consider: the division of competence between the Community and the Member States, the EU decision-making process, the simplification of the Union's legal instruments including the scope of new regulatory tools such as the OMC, democratic legitimacy, accountability and transparency together with the principles of subsidiarity and proportionality. Moreover, the Declaration addressed the issue of whether the European Community should accede to the European Convention of Human Rights and whether it should adopt a constitutional text for the European Union. *Ibidem*, pp. 4-7.
[24] *Ibidem*, p. 8.
[25] See P. Craig, "Constitutions, Constitutionalism and the European Union," (2001) 7(2) *European Law Journal* 125-150.
[26] See S. Sciarra, "The Employment Title in the Amsterdam Treaty. A Multi-language Legal Discourse," in O'Keefe D. and Twomey P. (eds) *The Treaty of Amsterdam* (Oxford, Hart Publishing, 1999), pp. 169-170.

In order to create this new institutional framework it is necessary to establish a link between the EES/OMC and the "acquis communautaire" of EC labour law, which is at present missing. Some first attempts towards the creation of this mutual relationship between soft law and hard law have already been made in the recent framework agreements and the Directives adopted according to Article 139 EC, *e.g.* the European Framework Agreement on Part-Time Work, on Fixed-Term Work, the Council Directive on Fixed-Term Work, and the Directive on Race and Ethnic Discrimination.

What follows are a first set of Treaty reforms, which aim at increasing the efficiency of the EU decision-making process and the effectiveness of EU Law and which revolve around the nexus democratic legitimacy-accountability-transparency of the polity system of the European Union.
I will then further develop these proposals into specific amendments to the Treaty provisions, in particular Title VIII and XI.

A first set of amendments, which should go in tandem with a series of institutional and structural reforms, [27] regards the systematisation of the legal instruments of the European Union by way of establishing a hierarchy of acts. [28] The latter should introduce a distinction between primary and secondary legislation, legislative and executive acts and binding and non-binding legal instruments [29] and also define the

[27] In this context, the system of management, advisory and regulatory committees, or comitology should be substantially simplified or reduced.
[28] In this respect, the next 2004 IGC will address the issue of adopting a European Constitution.
[29] For a similar view, see S. Sciarra, "Social Values and the Multiple Sources of European Social Law," (1995) 1 *European Law Journal*, 81. Sciarra argues that: "There is also a need to put rules in their place and to have a clear idea of sources and of their legal nature. This imperative must be appreciated in view of a better understanding and enforcement of European sources in each national system, which is also one of the aims specified in the Maastricht Treaty."

scope of application of the EU legal instruments. Such a reform would simplify the EU decision-making process by introducing greater efficiency, transparency and thus responsiveness and accountability.

At the top of this hierarchy, primacy should be given to the Treaties, followed by a set of constitutional principles, including those principles established and developed by the European Court case law, which are now part of primary law and a code of fundamental rights. [30]

At a lower level there should be the Regulation, the Directive and the Decision. In particular, the Directive should establish the aim, the obligations and the conditions of the envisaged measure. Moreover, once a Directive has been adopted and within a time agreed during a meeting of the Council, Member States should present reports stating how and when they intended to transpose the act into national law. This would not only guarantee legal economy but, most importantly, it would strengthen the principle of legal certainty and thus improve the legal protection offered to individuals. The Commission and *ad hoc* committees also at the national level should supervise the whole process of transposition into national law.

The lower level of the hierarchy should include the recommendation, the opinion, the guideline, the Green and White Paper, the action plan, the agenda, the declaration, the resolution and the statement, which fall in the category of non-binding legal instruments.

In this respect, the hierarchy of acts should also clearly define the scope and the purpose of soft law instruments, such as co-regulation, the OMC and the use of benchmarks and self-regulatory codes of conduct. This would be facilitated by a strict definition of competencies. These instruments should be used only in those policy areas where there is no exclusive competence of the European Union or where there is a shared competence between the Community and the Member States.

With this regard, it becomes necessary to amend Article 308 EC in order to eliminate the ambiguity of the provision and to shed more clarity on when "action by the Community should prove necessary" and when the "Treaty has not provided the necessary powers." The amended provision could list a series of concrete circumstances in which Community action might be needed rather than simply stating "during the course of the operation of the common market."

Secondly and related to the former, Article 5 EC should be reviewed in the light of the new developments and pursuant to the idea of allocative efficiency, which the principle of subsidiarity has been subject to over the years. The Protocol attached to the Amsterdam Treaty in fact allows for a broader interpretation of subsidiarity: "subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its powers to be expanded where circumstances so require." [31]

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[30] In this respect, the 2004 IGC will address the issue of the incorporation of the EU Charter of Fundamental Rights into the EC Treaty.

[31] See European Council, "Protocol on the application of the principles of subsidiarity and proportionality," Traité d'Amsterdam modifiant le traité sur l'Union Européenne, les traités instituant les Communautés européennes et certains actes connexes, signé à Amsterdam le 2 octobre 1997, JOC340/1997/11/10/, 1-308. See also J. Kenner, *EU Employment Law, From Rome to Amsterdam,* Ch. 6, (Oxford, Hart Publishing, 2002), pp. 25-26, *forthcoming* who argues that subsidiarity is a natural by-product of the expansion of the Community's competencies. As the Community's reach expands,

Furthermore, the distinction between horizontal and vertical subsidiarity, which has been defined in academia, should be included in the provision that only refers to the distribution of competence between the Member States and the Community. [32] The inclusion of the horizontal element of subsidiarity takes into consideration the new multi-tiered structure of the EU policy-making process. The amended provision should include in paragraph 2: "[…] only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, by the regional, local authorities or by organised civil society..[…]."

A reviewed Protocol on the principle of subsidiarity should define what is meant by "regional," "local" authorities and "civil society" and establish a criterium to determine when to apply the revised principle of subsidiarity.

Thus these soft law instruments should be applied to those policy areas where consensus is difficult to achieve due to historical, political, social and cultural differences between the Member States and where harmonisation of policy at the EU level is explicitly excluded. Such has been the case in the context of the economic co-ordination of the Economic and Monetary Union (EMU), in the field of social policy *sensu lato*, in environmental policy with the "Sustainable Development Strategy"[33] and more recently, in the area of asylum and immigration policy. [34] A clear

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subsidiarity operates as a process for managing interdependence between sub-national, national and supranational actors.

[32] In this respect, the principle of horizontal subsidiarity should be given a broad meaning in order to include the principle of proximity, which refers to forms of participatory democracy.

[33] The "Sustainable Development Strategy" is considered to the follow-up to the Lisbon Strategy with the further inclusion of a third environmental dimension to it. See Presidency Conclusions of the Göteborg European Council, 15 and 16 June 2001, para. 20; see also Presidency Conclusions of the Stockholm European Council, , 24 March 2001, paras. 50-52.

[34] See Communication form the Commission to the Council and the European Parliament on the "Common asylum policy, introducing an open co-ordination method," COM(2001) 710 final, 28.11.2001.

distribution of competencies is a pre-condition for an adequate definition of those policy areas where soft law instruments may be used.

Soft law is often the precursor of subsequent legally binding decisions. It "smoothly" introduces changes at the national level. It creates an expectation that conduct of the European Union, Member States and individuals will be in conformity with the non-binding rule. More precisely, "during the process of creation of hard law, soft law can have a legitimising prohibitive or prescriptive effect on state conduct before the phase of legality is reached. The temporal element will play an important role in this regard." [35]

In respect to Title VIII Article 128 EC should be amended in order to include both European and national social partners.

With regard to the European social partners, Article 128(2) EC should be linked to Article 138(2) and (3) EC. [36]

Secondly, Article 128(2) EC should also be amended in order to enhance the role of the EU Parliament, the Economic and Social Committee and the Committee of the Regions in the adoption of the Employment Guidelines. Thus, the legislative procedure regarding the adoption of the EPGs should be changed so that the EU Parliament rather than being *consulted* by the Council should *act together* with the Council in the adoption of the guidelines for employment. The legislative route to be used would be the co-operation procedure, pursuant to Article 252 EC.

[35] See K. C. Wellens and G. M. Borchardt, "Soft Law in European Community Law," (1989) 14 *European Law Review* 314.

[36] Article 138(2) and (3) EC provides that: "To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action. If, after such consultation, the Commission considers Community action advisable,

Within this context amendments should be made to the last sentence of paragraph 2 in order to eliminate the implicit subjection of the EPGs to the BEPGs.

Thirdly, Article 128(3) EC should be reviewed to include the participation of the social partners in the elaboration and implementation of the NAPs at the national level and to include the concertation between European, national, sectoral and enterprise social partners.

Fourthly, Article 128(4) EC should be amended in order to include the EU Parliament, the Economic and Social Committee and the Committee of the Regions.

The new provision in Article 128(2) EC would be as follows:

"The Council acting with the procedure referred to in Article 252, and after consulting the Economic and Social Committee and the Committee of the Regions and the Employment Committee, and on a proposal from the Commission according to Article 138(2) and (3) EC, shall each year draw up guidelines, which Member States shall take into account in their employment policies. These guidelines shall be adopted in accordance with the objectives of the broad guidelines adopted pursuant to Article 99(2) EC. To this end, the Spring European Council shall assess the implementation of both guidelines, which are devoted to an overall social and economic strategy."

The new version of Article 128(3) EC would be as follows:

"Each Member State shall provide the Council and the Commission with an annual report on the principle measures taken, in consultation with management and labour, to implement its employment policy in the light of the guidelines for employment as referred to in paragraph 2. The European social partners shall provide the Council and the Commission with a synthesis report on the principle measures taken, in concertation with the national, sectoral and enterprise social partners. "

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it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation."

The new version of Article 128(4) EC would be as follows:

"The Council, on the basis of the reports referred to in paragraph 3 and having received the views of the Economic and Social Committee, the Committee of the Regions and the Employment Committee, shall each year carry out an examination of the implementation of the employment policies of the Member States in the light of the guidelines for employment. The Council, acting by a qualified majority on a recommendation from the Commission and after consulting the Parliament, may, if it considers it appropriate in the light of the examination, make recommendations to Member States."

Moreover, the EPGs [37] should be amended in order to strengthen partnership on the basis of the principle of proximity and establishing an integrated approach to tackle social issues. This could be achieved strengthening the role of the social partners at all levels but also by including the local and regional authorities and NGOs creating a link between the NAPs and regional (RAPs) and local action plans (LAPs), which are emerging in some Member States. [38]

The EES should also be linked to other Community level initiatives such as the "Territorial Employment Pacts" (TEPs) launched as pilot projects in 1997 [39] and URBAN. [40] Furthermore, the new Regulations governing the Structural Funds for the 2000-2006 period support the EES in the local and regional dimension of the

[37] In particular G6 (combating emerging bottlenecks); G13, G14 (modernisation of work organisation); G15 (Lifelong Learning); G17 (equal opportunities) G18 (reconcile work and family life) and Horizontal Objectives B (Quality of Work); C (Lifelong Learning Strategy) D (partnership) and F (common structural indicators).

[38] RAPs have been adopted in Finland, Portugal and the United Kingdom whereas LAPs have been adopted in Greece, France, Ireland and Sweden. See Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on "Strengthening the local dimension of the European Employment Strategy," COM(2001) 629 final, p. 6.

[39] For information on the territorial pacts, see the Commission website, <URL:http://inforegio.cec.eu.int/pacts>.

[40] See COM(2001) 629 final, p. 10.

implementation of the Fund. [41] The new ESF Regulation contains a specific provision aimed at facilitating the participation of local partners and NGOs in the ESF and supported programmes in the form of small grant schemes. [42]

Finally, with regard to the implementation of the NAPs, the meetings between the representatives of the Government of the Member States and officials of the Commission on the exchange of best practices and aimed at providing feedback on the implementation of the EPGs should include representatives of management and labour. These meetings should also be given a formal format and the minutes of the meetings should be made public.
With this regard a new Annex to the Employment Guidelines could provide a set of procedural rules on the organisation of these meetings.

The inclusion of different levels of social partners, the EU Parliament, the Economic and Social Committee and the Committee of the Regions, regional and local authorities and NGOs with the insertion of clearer procedural rules reinforces the effectiveness of the Employment Strategy by increasing the transparency of the process and representative and participatory forms of democracy to the whole strategy.

With regard to Title XI the propositions are made taking into consideration the fact that the social partners were included in the legislative process as a regulatory tool that, it was hoped, would enhance democracy.

[41] See Communication on European Social Fund support for the EES, COM (2001) 16 final/2, 23.01.2001.

A first set of propositions regards the representativity of management and labour, the role of the EU Parliament and a better involvement of the social partners at the European, national, sectoral, and company level.

A second set of propositions focuses on the status of collective agreements stipulated pursuant to Article 139 EC and their validity *erga omnes*.

A third set of propositions regards the incentive measures under Article 129 EC and Articles 136, 137 and 140 EC.

Firstly, the representativity criteria listed in the Communication on *New Procedures Introduced by the Agreement on Social Policy and the Role of Management and Labour*, [43] should not only be amended in order to include other social partners, *e.g.* sectoral and enterprise level, but they should also be extended to the negotiation stage. In addition, they should be included in a binding legal document, which could be a Decision as envisaged in Article 249 EC. This latter amendment would in fact allow the representatitivity criteria to be challenged before the European Courts.

Secondly, Articles 136-139 EC should be amended, in line with the revised representativity criteria, in order to include a broader spectrum of social partners.

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[42] Article 4(2) of Regulation (EC) 1784/1999 on the ESF provides that Member States will allocate a reasonable amount of Objective 1 and 3 appropriations for global grants, managed by intermediary bodies that will in turn support in the form of small grants the NGOs and local partnerships.

[43] COM(93) 600, 14.12.1993. The Communication *Adapting and Promoting the Social Dialogue at Community Level* COM(98)322 final, 20.05.1998, confirmed the list outlined in the previous Communication. See, however, EC Commission, "The European Social Dialogue, a Force for Innovation and Change. Proposal for a Council Decision Establishing a Tripartite Social Summit for Growth and Employment," COM(2002) 341 final, which has introduced some important amendments to the assessment of the social partners representativeness.

Thirdly, Article 139 EC should be amended in order to include the EU Parliament together with the Council in the implementation of the collective agreements. The legislative procedure to be applied would be the one envisaged in Article 251 EC. Fourthly, a new paragraph could be added to Article 139 EC, which would define the legal status of the two types of collective agreements and in particular their *erga omnes* validity. This is particularly relevant since the *erga omnes* validity rule is not applied in all the Member States. Linked to the former, the provision should also specify the legal nature of the "decision" of the Council, which is not envisaged in the sense of Article 249 EC but has been interpreted to mean any legally binding act. This is at odds with the Council power to either amend [44] or reject an agreement. [45]

Finally, the policy objectives prescribed in Articles 136, 137 and 140 EC could be covered by the incentive measures envisaged in Article 129 EC. This latter amendment is particularly relevant as it highlights the common objectives of the two Titles and thus strengthens my contention of establishing a new framework by way of linking the two Titles together.

The propositions made above are in line with the processes of consolidation and constitutionalisation taking place in EC labour law.

[44] Pursuant to Article 250 EC.
[45] In accordance with Article 202 EC.