



European
Research Area

EUROPEAN POLICY BRIEF

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The Governance of Uncertainty and
Sustainability: Tensions and Opportunities

**Policy Brief 5.4 EU Governance and Social
Policy: larger and larger uncertainties looming**
Ongoing project

SUMMARY

Objectives of the research

This paper analyses the multiple uncertainties brought about by EU governance for national institutional arrangements governing social protection schemes and public services. EU governance combines mechanisms including macro-economic coordination, social dialogue, EU law and soft law coordination.

Scientific approach / methodology

The research uses various methods to capture the combined influence of these mechanisms, instead of the mainstream approach that focuses on only one at a time. Methods include: taking stock of the official documents; case studies of social services and labour law in four countries; panels with social actors; more than two hundred interviews with EU officials, EU lawyers, representatives of associations and NGOs, legal scholars, and social protection actors from across the EU over a time span of 4 years; and long-term participatory observation in EU forums.

New knowledge and/or European added value

We find three related dimensions of uncertainty. *Legal uncertainty* (the lack of precision of the basic concepts and the prevalence of a unilateral view of the economy). *Political uncertainty* is related to the ambiguity of the governance instruments. *Economic uncertainty* because positive outcomes of EU federalism have tended to disappear with the crisis.

Key messages for policy-makers, businesses, trade unions and civil society actors

More and more “social” stakeholders and EU citizens perceive EU as a threat for their personal and collective protection. This poses a remarkable challenge for EU legitimacy, which members of EU and national elites should heed seriously.

Main findings: outline

This Brief proceeds in three steps: it first presents cross-cutting issues that result from the numerous interviews, the case studies, the detailed analysis of a panel of stakeholders in France and the taking stock of the main EU strategies with regard to their impact on social policy, social services and social protection in general, and especially since the Maastricht treaty. In doing this the paper draws on the existing sociological, economic and political science literature. Four main issues are identified: the Janus-faced nature of EU law; the ambiguous nature of the principle of subsidiarity; the opposition between individual rights and collective entitlements; and the selective and unilateral view embedded in EU law of the nature of valuable social activities. Secondly, the Brief goes on to illustrate these issues while reviewing three policy areas: the labour law; social services; and the question of EU social policy, or, put in more familiar terms, the state of “Social Europe”. Finally, the paper deals with the political problems created by the combination of macroeconomic policy, the growing enforcement of economic freedoms and the marginalization of EU level social policy. It concludes with reflections on the increasingly problematic state of EU governance legitimacy.

Cross-cutting issues: EU law as the god Janus

With respect to EU integration, the social science literature has now firmly established the prevalent roles of macroeconomic governance and of EU law (notably in comparison with social dialogue and the Open methods of coordination). However not all consequences of this situation have been drawn to date, when it comes to its influence on social policy. This is mainly explained by the commonly shared belief that social matters have remained the preserve of member states. The present research has the advantage of taking place in very testing times: never before has the reach of EU law into social questions gone so far, and, at the same time, the economic and political crisis Europe is experiencing is the strongest ever since World War II. These two circumstances help enhance the rationale of EU governance impact on social policy and the “European social model”. Overall, EU law has extended the social rights of individuals: our interviewees and the review of legal documents entirely confirm this fact. The most conspicuous area is equality between men and women. The firm antidiscrimination orientation of EU law has also had immense consequences in extending individual rights to discriminated groups. Indeed, the exploration of the EU institutions carried out by the research stresses that this extension of individual rights, especially favourable for mobile EU citizens is one of the main assets upon which the legitimacy of the EU polity is based. Both achievements of the EU are however accompanied by more ambiguous developments.

A first cross-cutting issue is the profoundly asymmetrical nature

of EU law. It is comparable to the Latin God of thresholds, Janus, who had two distinct faces. To sum up, the first face is favourable towards the protection and the enhancement of the rights of individuals (as outlined above), whereas the second face has only recently revealed itself to stakeholders of social policy as a sword of Damocles. Up until very recently, these characteristics lacked visibility and had no salience in public debates. But this has changed since, three times in a row, referendums on the EU failed: in the Netherlands in 2005, and in France the same year, in Ireland in 2008. Two aspects of EU law emerge as problematic from an in-depth legal analysis and from the interviews of social policy stakeholders. The first is the asymmetry of EU law. This aspect has been more and more illustrated by the case-law of the Court of Justice of the European Union (CJEU), which has increasingly submitted social rights to testing their compatibility with economic freedoms. A string of cases – Viking, Laval, Rüffert, Luxembourg, Commission against Germany – have alarmed union members and associations in the social domain since 2007. Promises of rebalancing both types of rights, economic and social, have failed to materialize so far. The second very problematic aspect of EU law is its supremacy, and the increasingly visible role of the Court of Justice in deciding about matters which affect social policy, social services and social security schemes, in a word, social protection.

This leads to a second cross-cutting conclusion of the present research, about the principle of subsidiarity. Prominent specialists of EU law have established for a long time that the *de facto* developments of the reach of EU law in social matters have encountered very few obstacles: these scholars downplay the common belief that strict barriers exist between matters which are the competence of member states, and matters where the EU can intervene. In strict legal terms, such a separation exists in the provisions of the Treaty of the functioning of the EU. But *in practice*, the consistent and continual progress of the promotion of economic freedoms is bound to clash with social provisions which have remained national. The same applies, as has been seen since 2009, to the growing impact of macroeconomic decisions upon the national systems of social protection: one just has to take the examples of Greece, Portugal and Ireland. In actual fact, the CJUE retains a power of definition on many matters that are liable to challenge social protection schemes if they are not protected more strictly than they are today. The Court of Justice and the Commission can decide unilaterally about the “manifest errors” of member states in defining for instance social services or services of general interest. As is illustrated by the current public controversy over the role of Dutch housing corporations, this ultimately means that the EU institutions are able, by the way of praetorian (or

judge-made) law, to impose definitions of what social services are. True, this has remained more of a potential threat of EU law than an actual one. But stakeholders of social protection are increasingly anxious.

A third cross-cutting issue of EU governance is the opposition between individual rights and collective entitlements: the distinction is not strictly legal. If there is no ambiguity to what is “individual”, what we refer to as “collective” are entitlements that result from solidarity arrangements within a profession, a sector, a nation. Social insurance principles for social security are a case in point. Up to now, constant case law of the Court of Justice, after the 1993 Poucet-Pistre joint decisions, has insulated schemes based on solidarity, declaring them “non-economic” services. Yet this “protection” of solidarity schemes is fragile, as the recent case-law illustrates for “complementary schemes”. Perhaps without rational motives, actors in the unions (often managing these collective programmes) in the associations, and in the administration fear for the sustainability of these programmes with regard to the increasing scrutiny they are submitted to by EU institutions.

Finally a fourth finding of the research concerns the rigid and dogmatic mainstream interpretation of EU law with regard to the nature of social activities. The dichotomy embedded in the legal doctrine and philosophy of EU law leaves only room for two types of activities: those which are deemed “non-economic” and those that are “economic”. Hence, providers of certain services are all considered as “enterprises”. However, in the real life various forms of economics exist and there is an increasing awareness in Europe of the “social economy” (including in the recent proposals put forward by the Commission). A unilateral view embedded in a very “economist” conception of EU law is bound to be seen as lacking flexibility and legal innovations are bound to be called for.

**Areas of social policy:
social services, labour law
and EU level social
coordination**

The present research especially centred its investigation on three areas: social services, labour law and social policy especially seen through two governance mechanisms, the Open method of coordination and social dialogue.

The area of social services emerges from the case studies and the numerous interviews conducted as one of the most problematic areas of the influence of EU governance. The Commission has until very recently been reluctant to legislate because, it argued, national and even more, infra-national diversity made the designing of unified legal references impossible. However, since the 2003 Herzog Report adopted by the European Parliament, the matter is present in the discussion. What the research shows is that, exactly in parallel with existing difficulties of coordination for unions in the EU, there is an built-in obstacle in the Union as to the development of long-term cooperation between actors across national

frontiers, because of the diversity the Commission rightly notes. EU law implementation varies enormously according to different parameters: ideal-types of social protection, countries, and also, within countries, groups and individuals. The difficult cooperation between German, Belgian and French actors in the area of the social economy since the late 1990s is a case in point: different legislations, histories and even languages explain this partly failed attempt. Yet, the European Union is as the slogan goes, intrinsically a “Union of diversity”. The combined and quasi-automatic mechanisms of “negative integration” and “spill-over” have tended to exclude so far the designing of *legal protection measures* from the agenda of the Council and the European Parliament. This has created a situation where three uneasy and sometimes controversial aspects remain: state aid legislation; public procurement regulation; the free movement of services. Very recent measures taken by the Commission in December 2011 seem to show that contrary to some polemic analyses, the problem of social services of general interest, and of public services more generally, is not only a “French” question. Case studies conducted in the Czech Republic, in the Netherlands, in the UK and in France show that the issue is present across all these countries, not to mention countries not reviewed in the present research (as Germany and Italy). Least expected of all was the UK case, where our inquiry showed that, despite a very “liberalized” playing field, the NHS and local authorities are suffering from various forms of uncertainty with regard to their financing and provision of services.

The second area of social policy studied more in detail was the influence of EU law on working time regulation in the member states. In all countries surveyed (the UK, France, the Czech Republic and The Netherlands), one is confronted with a specific problem in the medical and hospital sector. In France and in the Netherlands problems exist as to the discrepancy existing between EU legal and national concepts. Another striking point which had already been stressed by previous research is the capacity of certain member states to be very compliant in transposing EU legislation while at the same time not really caring for its actual implementation. The most controversial point in the matter has remained the question of the “opt-out” which, as we documented, is used as a means *not to implement* the restrictions and protections EU law provides for, and appears as favouring a conception of “individual” rights as opposed to one of collective regulation. More generally – as the recent failure of a revision of the Directive on Working Time illustrates – the very “relevance” of EU law in the matter of working time regulation is deeply challenged. While complex discussions and horse trading is happening at the EU level, the real, binding and more or less effective regulation has remained

national, and embedded in the national traditions and diverse political cultures with regard to the attitude to work, its repartition in society, etc.

The third area is the coordination of social policy at the EU level. Scholarly work in sociology and political science has shown that, after the 2004 integration of ten and then twelve member states (in 2007), the coordination of social policy has been *de facto* sidelined. Innovative efforts organized around the procedure of the Open method of coordination have decidedly become less and less visible. If social dialogue has persisted and achieved many successes, especially in the sector social dialogue, this is not the case with the OMCs. The research shows that in the area of pensions too much attention has been given to the OMCs, whereas hard legislation has been underestimated as to the constraints it has gradually imposed on the type of pensions reforms in the member states. The research also shows, that when one compares the first years of the European Employment Strategy (1997-2001) and the current process, the EES has been marginalized. The stress put on quality in the EES is gradually fading away, and the macroeconomic governance regulations and austerity packages implemented across the EU bypass the consultation of social partners in many countries and even at the EU level. On top of this, the strategy pursued by the European Union institutions in the area of Sustainable development (SD) is blurred and - as the Commission itself remarked during the Lisbon strategy – difficult to understand and to disentangle from other policies. Moreover, the essential fact that no credible SD strategy can be designed without a “social dimension” has remained very difficult to accept by EU actors in charge of this domain of public policy. This is an extremely serious problem.

Serious challenges: Key messages for policy-makers, businesses, trade unions and civil society actors

Understandably, policy lessons taken from this overview mainly deal with the question of European citizens' perceptions of EU interventions in the social domain. These perceptions are inadequately known today, despite the systematic collection of opinions by Eurobarometer surveys. However, as the recurring legitimating difficulties that EU integration and institutions have faced illustrate, there is much more to understanding European citizens than reading Eurobarometer studies. It is important that wider circles in the Brussels arenas and forums heed the many alerts that are emerging in most member states. Such an awareness was recognized as germane in Mario Monti's report on the reform of the Single Market. But lessons drawn from the failures of the French, Irish and Dutch referendums seem to have remained superficial. The overhaul and soft politicization of the Commission communication strategy, especially after the 2006 White Paper of the Commission, has been based on the false premises that citizens in Europe were not aware enough of the benefits of Europe. Such a strategy which failed in

favourable times is bound to fail in the dire circumstances the European Union is in today with a persisting economic and political crisis.

For instance, in the area of social services, a growing politicization of the issues related to EU law has been observed from the second half of the 2000s onwards. This was true in the Netherlands and in France especially. In Ireland for the second referendum in 2009, the Council had to make explicit promises, with regard to “public” services the name of which is altogether absent from the Treaty (as replaced by the notion, unknown to European citizens, of “services of general interest”).

Misunderstandings and uncertain legal interpretation have abounded but this certainly did not translate into a systematic (and automatic) range of homogenous consequences across the Union. Three types of consequences were documented among the actors of social protection (associations, unions, NGOs): difficulties, contestations and perceived threats to the existing systems of provision of social services and protection. EU law is often seen as foreign and threatening by a significant proportion of the actors, but also by a significant proportion of the citizens – whether or not this situation can be exactly attributed to any precise impact of EU legislation. The EU approach to economics and the economy is often perceived as being too simplistic. It is very unlikely that a homogenous and simple conception of economic activity could be able – as the current legal one pretends to do – to cover all forms of economic activities. Multiple economies, hybrid forms certainly call for flexible treatment in EU law. In view of the way politicization of social questions within the EU has until now been developed, it is unlikely that the European publics will accept without discussion and contestation the implementation of legal provisions that they see as threatening – even when national governments have kept trying to blame “Brussels” and EU law, as cover for their own political decisions. This has wide potential consequences in terms of the overall legitimacy of the European Union. Innovations and new forms of regulation – including hard law, and innovative ways of interpreting the Charter of Fundamental Rights, are called for to counter the increasingly heard arguments against the EU and the falling rates of approval of EU membership in many member states. After a sort of “golden age” of Social Europe experienced under the presidency of Jacques Delors and in the following years, when social actors were powerful at the EU level, the severe shock imposed by the crisis cannot be dealt with without serious corrections, leading to a strategy of sustainable development, fully including investment in social programmes.

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