

ETUI-REHS

Social Europe: does hard law still have a role to play?

European Economic and
Employment Policy Brief

No. 2 — 2008

ISSN 1782-2165

Philippe Pochet

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Philippe Pochet, ETUI

Introduction

It has become ever more widely accepted over the last ten years that the traditional instruments of European law – directives and regulations – are ill-adapted to the increasing diversity of national systems and to a period of inherently uncertain economic and social change. What is more, critical analysis points up the shortcomings of law as a means of altering behaviour, as shown for instance by the still chronic pay gap between men and women despite an increasing legislative arsenal aimed at the eradication of this scourge. Such findings have prompted a focus on the ‘modernization’ of national systems and, at EU level, on the implementation of instruments supposedly more in keeping with the idea of ‘soft law’. ‘Learning’, ‘evaluation’, ‘comparison’, ‘imitation’ are, accordingly, just a few of the key words that crop up recurrently in the new vocabulary of Social Europe.

It had become generally accepted by most of the academic community, including myself, that the number of social directives was fast dwindling and that the few such instruments that were still adopted tended to be characterised by an extremely minimalist content. Accordingly, the Open Method of Coordination (OMC) had come to be regarded by many – and even by those not fundamentally in favour of such an approach – as the only possible response to the lack of political support for EU social regulations.

In an extended article (Pochet, 2009), of which this policy brief provides a summary, I challenge this conventional wisdom using both quantitative and qualitative arguments.¹ Firstly, as from 1997, and at least until 2004,

¹ An important source of inspiration was the book by Falkner *et al.* (2004) which was the first to show the stability of social legislation until 2002.

there were, in reality, no fewer social directives than in the late 1980s and early 1990s. Secondly, analysis of the content of recent directives reveals it to be no less substantial than in the case of earlier legislation. Of course, this does not mean that social Europe has become a reality, but merely that there was no decline in the number and scope of social directives after 1997 (when the employment strategy was launched), at least not until enlargement.

The paper is in three parts. The first section briefly describes the different stages of EU social policy, while the second offers a quantitative analysis. The third section presents three directives and one regulation, analysing their context, content and implementation process. This section is followed by a conclusion.

1. A brief history of social policy at EU level

To recount the history of European social policy is to tell a story of more failures than successes. Nevertheless, since the beginning of the European Community, at least five successive attempts have been launched – each with its own priorities, underlying rationales and particular fields of interest – to institute social policy instruments within the EU context (Hemerijck, 2004).

The first step, in the early 1960s, was limited to the free movement of workers, the purpose and approach, at this early stage, being not to harmonise different national policies but to ensure that within each individual member state EU migrants and nationals enjoyed the same rights. One aspect entailed allowing workers to accumulate and combine benefits (e.g. pensions) acquired in different countries; another was the creation of the European Social Fund (ESF) which aimed to promote labour mobility.

In the 1970s, the Community tried to define a way ‘to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained’ (art.117, Treaty of Rome). Several directives (equality between men and women, health and safety in the workplace) as well as certain aspects of labour law (collective redundancy, transfer of undertakings, and insolvency of the employer) were adopted in a context of economic downturn and labour militancy at national level. In 1974 the first European Social Programme was adopted.

The end of the 1970s represented a turning point. The Thatcher and Reagan governments initiated a neo-liberal turn, which led to a pause in social regulation at European level and a process of deregulation at national level. A number of legislative proposals (the Vredeling directive, the reduction of working time, the regulation of atypical contracts) that had been put forward at EU level at around this time failed to be adopted.

In 1985, however, the Single European Act (SEA) expanded the Community’s social competencies, allowing, among other new developments, the adoption of health and safety measures by qualified majority. The SEA also contained a rather vague provision on social dialogue. The end of the 1980s and the beginning of the 1990s, a period of triumphant neo-liberalism and globalisation, were characterised by a strategy to define at European level – in the Community Charter of the Fundamental Social Rights of Workers (1989) – a floor of minimum standards which must not be undercut. The development of social dialogue led to the establishment of the Social Agreement between the European social partners who thereby gained the right to sign collective agreements that can be extended *erga omnes* by a Council directive or to allow voluntary collective agreements to be implemented by their national affiliates.

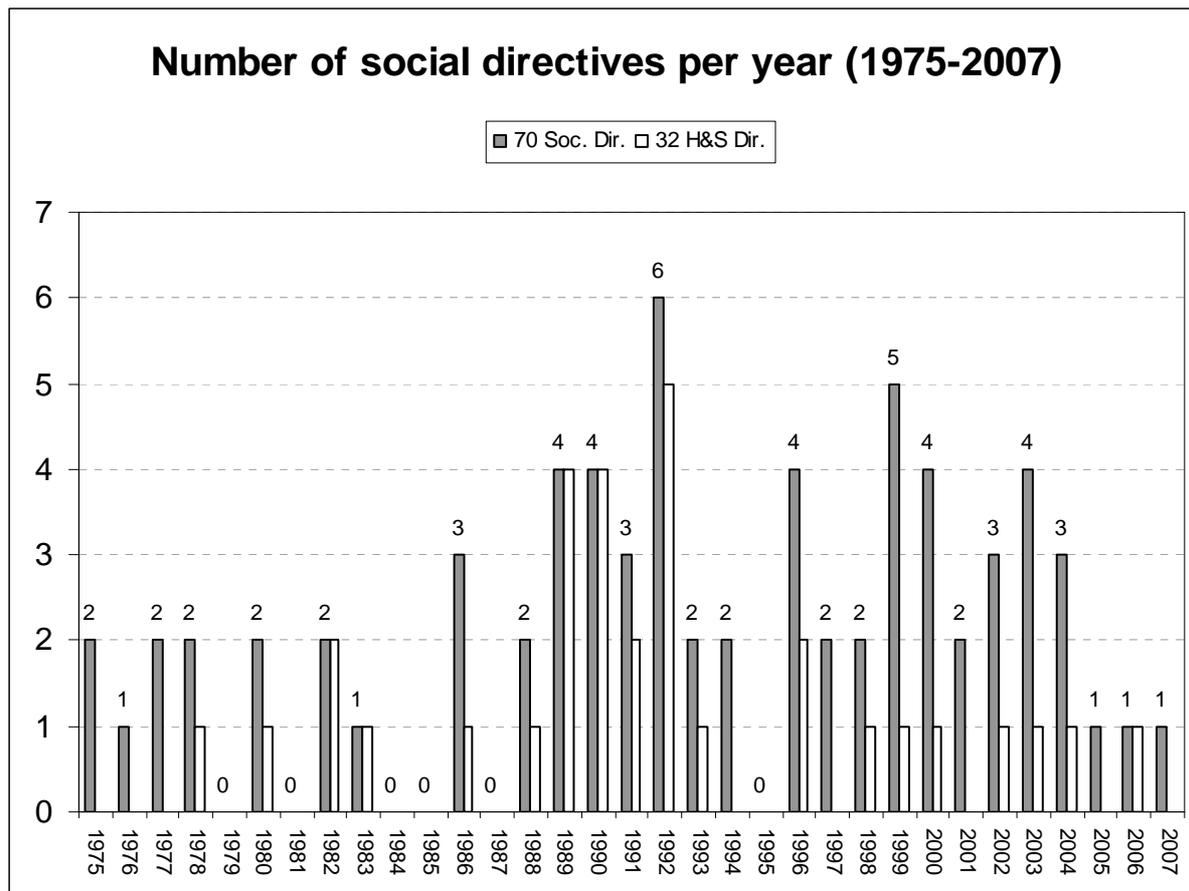
In 1997 an Employment Title was included in the Amsterdam Treaty and qualified majority

voting was introduced in a few social policy areas by incorporation of the Social Protocol into the Treaty. The OMC was introduced at this time as a flexible means of working towards shared European objectives via national plans which are assessed in accordance with common criteria (indicators), following (in some but not all cases) guidelines and/or targets decided jointly by national ministers at European level (Zeitlin and Pochet, 2005). In the absence of legal compulsion, it is peer pressure – and the force of public opinion – that represent the means of ensuring that national governments stick to their European commitments. The exchange of good practices is intended to improve knowledge and lead to a learning process that will foster improvement of public policies. The main objective is no longer to create a set of European rules distinct from national regulations but to favour an interaction between different levels of governance. With this new multi-level arrangement, the European bodies have created a new form of intervention that is aimed less at harmonising institutions or legislation than at achieving a form of convergence based on common ideas, visions, conceptions, knowledge and norms for action.

2. A quantitative analysis

Given the new approach to governance, it might have seemed normal to expect a decrease in directives from 1997 when the European employment strategy was adopted and the discourse on the need for a soft-law approach was constructed in the light of the difficulty – if not the impossibility – of continuing along the path of hard law.

The conventional wisdom in this sphere can be verified empirically by considering the data on the number of directives/regulations adopted each year. Figure 1 presents, in black, the total number of directives/social regulations (including health and safety directives) and, in white, the number of health and safety directives among them.



Source: Observatoire social européen Internal database, 2008

Quite clearly, and contrary to generally accepted notions, the number of directives adopted did not decrease in the second half of the 1990s and first years of the new millennium. On the contrary, a rather comparable picture emerges for the periods 1988-1995 and 1996-2004. It is hardly possible to speak of a crisis of the Community method in the face of these numbers, at least up until enlargement in 2004.

Dividing the data into ‘social’ and health-and-safety directives allows us to consider whether the overall stability in numbers is attributable to an increased number of health and safety directives.² In fact, we see that most new directives relating to health and

safety were adopted in the early/mid-1990s in the wake of the 1989 health and safety framework directive. Moreover, the four directives adopted between 2002 and 2006 derived from the same parent directive, dating from 1993, which was split into four different proposals in the late 1990s. The relative stability in the number of directives adopted can accordingly not be explained by a surge in health and safety legislation.

Another possible approach to explaining the stability is to consider texts adopted by the social partners and subsequently transposed in the form of directives. As from 1995, seven collective agreements were turned into directives, three of them deriving from the cross-sectoral (parental leave 1995, part-time work 1997, fixed-term work 1999) and four from the sectoral level; two of the latter are an adaptation of the working time directive to the transport sectors (seafarers 1998, civil aviation, 2000) and the other two

² A few directives adopted under art. 118 health and safety in order to benefit from the qualified majority associated with this legal base, but having a broader scope than health and safety (working time 93/104, pregnant workers (92/85), young workers (94/33), have been classified as general social directives.

are agreements concluded in the railways sector in 2004 (one fully transposed into a directive in 2005 and the other partly so in 2007). On average one text coming from the social partners is extended *erga omnes* by a directive every two years. Thus the development of sectoral directives clearly does contribute to explaining the overall legislative stability.

In terms of subjects covered, the directives adopted since 1997 relate to traditional social fields like the European company (2001), information and consultation at national level (2002), the statute of the European cooperative (2003), anti-discrimination directives (2000), equality between men and women (2004), free movement (2004), etc. Stability is thus also reflected in the thematic continuation and extension of the traditional social agenda.

There was indeed a definite reduction of the use of hard law measures in the years 2005, 2006 and 2007 but, on the basis of recent instances of consultation of the social partners, it seems appropriate to question whether this is a permanent trend. In 2007 the social partners were consulted on six topics: active inclusion; seafaring jobs in the EU; cross-border transfers of undertakings; reconciliation of professional and family life; musculoskeletal disorders; needle-stick injuries. These consultations are intended to lead to the presentation by the Commission of formal draft directives or to a decision by the social partners to negotiate together. In 2008 the Commission has consulted the social partners on the revision of the European Works Council directive and in July it presented a draft directive on this subject. Meanwhile, the Social Affairs Council of June 2008 reached a common position on the working time and temporary agency directives (adopted in October 2008). In July 2008 a new proposal was presented in the field of non-discrimination (COM 2008) 406). This activity would seem to indicate the likelihood of a continuing flow of hard-law measures in the coming years.

3. A qualitative analysis

On the matter of potential impact, the key question is whether these directives and regulations have a significant and structural impact (at least for some member states in which they call into question some fundamental aspects of national social law) or whether they are minimalist directives creating a very low level of protection at EU level and introducing little change at national level.

Below we analyse two anti-discrimination directives (2000/43 and 2000/78), one directive on information and consultation at national level (2002/14), and one regulation, a revision of Regulation 1408/71 (883/2004). We are not claiming that, in terms of their content, these instruments reflect the average ambition of all directives adopted over the last ten years. On the contrary, these particular examples have been selected because we know that they were of specific importance for some member states. However, these were not the only instruments of interest, and a similar mix – a handful of important directives among a greater number of measures with more limited impact – was characteristic of the late 80s/early 90s period (Pochet, 1993). In relation to each case, we will present the process of adoption, detail the content, and offer a brief evaluation of the implementation.

3.1. Revision of Regulation 1408/71 (883/2004)

The original purpose of Regulation 1408/71 was to facilitate the free movement of labour by stipulating equal treatment of national and Community workers within each national social security system, thereby enabling intra-Community EU migrant workers to be sure that periods spent working in different member states would be taken into account in calculation of their social security entitlements. The growing complexity generated by the fact of ever-increasing diversity of national systems led to multiple – and frequently ad hoc – revisions of the regulation.

3.1.1. Process

Efforts to simplify the original regulation began with the Commission proposal of December 1998. The text underwent analysis, chapter by chapter, over a period of two years, enabling key issues to be identified. In 2001, the European Council invited the Council to set parameters aimed at modernizing Regulation 1408/71. From one presidency to the next, partial agreements were reached, during which time the evolving case law of the European Court of Justice frequently exerted a decisive influence on the course and content of the negotiations.

In September 2003 the European Parliament ended its first reading and the Commission approved the amended proposal in October of the same year. The common position was then approved by the Council in January 2004. Two events contributed to speeding up the process in this way: the enlargement to 25 member states from May 2004 and the June 2004 European elections. The two EP amendments to the common position were thus quickly approved by the Council and Regulation 883/2004 was definitively adopted on 29 April 2004, exactly two days before enlargement.

3.1.2. Content

The new regulation will apply to every insured person, regardless of status (employee, self-employed, student, etc.), in each member state. This represents a significant simplification, insofar as it will no longer be necessary to have recourse to sophisticated definitions to ascertain whether any given individual is to be classified as an employee or self-employed worker or to different provisions governing different categories of insured person. At the same time, the regulation becomes an instrument for all European citizens moving within the Union, no longer applying to workers alone.

On certain points, the text of the new regulation introduces major simplifications. For instance, a number of principles gover-

ning the coordination of social security have been gathered together to form general provisions so that the principles relating to each specific branch of national systems no longer need to be repeated. The section covering the rules for determining the applicability of the legislation has also undergone drastic simplification.

Other important innovations include the following:

- in relation to family allowances, the distinction between employee, self-employed and retired person has been removed ;
- more explicit criteria have been adopted to determine for what category of services the application of residence criteria (non-exportability) may be permissible;
- new provisions have been introduced to ensure compulsory administrative collaboration between member states, particularly in connection with determination of the rights of interested parties.

3.1.3 Implementation

The effort to accelerate the process was not entirely successful, insofar as some highly technical questions had not been completely resolved. In 2004, two of the annexes remained empty and several others needed updating to take into account the requirements of the new member states. Finally, in July 2007 the Commission presented the requisite material to complete the annexes and enable implementation of Regulation 883/2004. At the time of writing, however, adoption of the new material is still pending. In other words, the provisions of the new regulation cannot yet be enforced.

3.2. EU information/consultation at national level Directive (2002/14/EC)

The European Commission's 1995 medium-term Social Action Programme contained a proposal on an EU-level framework action for employee information and consultation. The closure of the Renault plant at Vilvoorde in Belgium in 1997 prompted a

debate concerning the need for additional legislation to complement the European Works Councils directive.

3.2.1. Process

In June 1997 the Commission initiated a first, and in November 1997 a second, round of consultations on the content of possible EU legislation on this issue. From 1995 until the autumn of 1998 developments revolved around whether or not the employers' federation (then UNICE, now renamed *BUSINESSEUROPE*) could be persuaded to engage in negotiations. The employers finally decided against such involvement and in November 1998 the Commission adopted a proposal for a Directive.

Because the United Kingdom lacks institutional representative bodies along the lines of works councils, the New Labour government was strongly opposed to the draft directive and it initially secured the support of the German government to block the proposal, in return for which the UK agreed to support the German position in the European Company debate. However, once political agreement had been reached on the European Company Statute – in December 2000 – it became clear that the German government would not continue its opposition to adopting the information/consultation Directive. Denmark and Ireland's concerns were accommodated by revisions to the text and the UK government, faced with the disintegration of the blocking minority, was forced to abandon its opposition, though it did secure concessions on the implementation timetable. Council formally adopted its common position in July 2001 after which, in October, the European Parliament adopted a series of amendments that were rejected by the Council. Finally, the joint Parliament-Council conciliation committee agreed on the text of the EU Directive that was finally adopted in February 2002, seven years after presentation of the original proposal.

3.2.2. Content

Subject to the choice of individual member states, the Directive is to apply either to undertakings with at least 50 employees in one member state, or to workplaces with at least 20 employees. The directive defines minimum standards to be covered by information/consultation (for instance regarding the timing of meetings, the provision of information by the employer, the submission of opinions by employee representatives).

The Directive allows member states to let the social partners negotiate, by collective agreement, the procedures for informing and consulting employees. They may even, in this way, agree not to observe the minimal requirements for information/consultation.

Member states must put in place appropriate measures in the event of non-compliance. In particular, they are required to ensure that adequate administrative or judicial procedures (including sanctions) are available to enable the obligations deriving from this directive to be enforced.

This requirement goes substantially beyond the previous directives on collective redundancies or European Work Councils for which no sanctions were foreseen in the event of non-observance of the information/consultation procedures.

The Directive had to be transposed for implementation by 2005 but transitional arrangements apply to member states without established statutory systems of employee consultation and representation, namely the UK and Ireland. These countries are required, on a step-by-step basis, to cover all undertakings with 50 or more employees (or workplaces with 20 or more employees) by 2008. In the UK, the implementing regulations for the directive are based on a framework agreed by the CBI and the TUC.

3.2.3. Implementation

It is in the UK that the impact of the Directive has been greatest, while in Ireland its implementation was delayed. There exists the possibility of retaining, in the absence of a majority of the workforce willing to open new negotiations, procedures for information/consultation that were in existence previous to the directive. It should be noted that the penalty for non-compliance is rather high, having been set at a maximum figure of £75,000. The use of this new option was criticised by the employers who have lobbied for a minimalist interpretation. Many trade unionists were also ambivalent, fearing that this new (institutional) approach could have a damaging effect on the voluntaristic approach to industrial relations that is characteristic of the UK. Their main fear was that the employers could use the directive (at least the UK interpretation of it) as a means of by-passing the unions (Hall, 2006, Taylor *et al.* 2007). Schöman *et al.* (2006) confirm, in their evaluation of the implementation of the directive at national level, that a rather minimalist approach was followed in most but not all (e.g. Belgium) member states.

3.3. The two antidiscrimination directives (2000/43/EC and 2000/78/EC)

Although the principle of eliminating all forms of discrimination is included in the 1989 Community Charter of the Fundamental Social Rights of Workers, it was not until the mid-1990s that a growing number of advocacy groups and NGOs came to support the introduction of anti-discrimination measures at EU level. They were able to rephrase the initial demand from migrant groups for a form of citizenship based on residence (instead of nationality) into a demand for an anti-discrimination policy. The result was the adoption in the Amsterdam Treaty of a new anti-discrimination article requiring unanimity in Council for any EU legislation.

3.3.1. Process

In November 1999 the Commission presented a package of anti-discrimination proposals

consisting of three elements: a general framework employment equality directive, a racial equality directive, and a six-year action programme 2001-2006.

The new proposals aimed to help combat discrimination on a much wider range of grounds than the existing EU law on equality between men and women. The 'race directive' was adopted in seven months, which is a record for a social directive. While 'no member state was opposed in principle (...) a number of Governments had serious difficulties with particular points' (Tyson, 2001:201). The main political factor precipitating adoption of this instrument was the victory of Haider's party in Austria and the resulting incorporation of the extreme-right into the Austrian government. It is this that explains why the French delegation took the lead in relation to a directive based on a vision so substantially different from the traditional republican approach (Guiraudon, 2004). The German delegation, meanwhile, adopted a low profile in order to avoid being associated with the developments in Austria.

3.3.2. Content

The aim of the 'employment equality Directive' is to establish a general framework for observance of the principle of equal treatment between persons, irrespective of race or ethnic origin, religion or belief, disability, age or sexual orientation. It applies to a) access to employment, self-employment and occupation, including selection criteria, recruitment conditions and promotion; b) access to all types and levels of training; c) employment and working conditions, including dismissals and pay; d) membership of, and benefits from, any workers', employers' or professional organisation. The proposal covers both direct and indirect discrimination. However, some differences of treatment may be allowed by member states insofar as they are based on a genuine occupational qualification regarded as essential for performance of the activities concerned. The proposal also contains a po-

sitive action clause (allowing for affirmative action policies). The member states must ensure that appropriate judicial and/or administrative enforcement procedures are available to all those who consider themselves to have been a victim of discrimination and that effective, proportionate and dissuasive sanctions are in place.

The ‘race directive’ on equal treatment irrespective of racial or ethnic origin is in many ways similar to the framework Directive. However, it differs both in focus and in scope. Its sole focus is implementation of the principle of equal treatment between persons of different racial or ethnic origins, and to this end it establishes a minimum framework for the prohibition of such discrimination, while also providing for a minimum level of legal protection for victims of any such discrimination. In addition to the four employment-related areas enumerated in the framework Directive, it also covers social protection and social security, and social benefits, including housing (see Tyson, 2001). The proposal covers both direct and indirect discrimination in these areas, but allows member states to provide that differences of treatment would be permissible if ‘based on a relevant characteristic related to racial or ethnic origin’. Member states are also allowed to adopt positive actions.

The proposal requires member states to set up an independent body to promote the principle of equal treatment between people of different racial or ethnic origin, and this must include provision of assistance to victims of discrimination (Bell, 2002). Other tasks of the bodies are to conduct independent surveys, publish reports and make recommendations. The member states are required, furthermore, to encourage national social partners to sign collective agreements on anti-discrimination and to develop a dialogue with non-governmental organisations.

3.3.3. Implementation

The impact of the anti-discrimination directives was not restricted to France or Germany;

the provisions also required the UK to tighten up legislation in certain areas, such as age discrimination. They also prevented the Dutch government from abandoning totally its anti-discrimination approach. According to Bell *et al.* (2006) ‘Whereas prior to (the directives) many member states provided protection against discrimination through a patchwork of – largely declaratory – equality clauses in a series of legislative instruments, most have now adopted more visible specific anti-discrimination legislation.’

Provision to combat age discrimination represented a particular challenge as most of the countries had no previous legislation in this area. While almost all member states have equality bodies, few have adequately transposed the requirement to disseminate information on discrimination laws, to promote social dialogue and encourage dialogue with non-governmental organisations (Bell *et al.*, 2006). In July 2008 the Commission proposed a new draft directive to combat discrimination outside the workplace.

Conclusion

While the OMC has been a focus of academic and political attention in recent years, important legislative developments have occurred simultaneously and yet attracted less notice. Substantive pieces of legislation in the social field continue to be passed using the ‘unfashionable’ Community method, thereby contradicting the main argument put forward in favour of the soft-law approach which is that hard law has ceased to be a feasible option.

From our case studies of such legislation, it is clear that the dynamics behind the adoption were rather different in each case. Nevertheless the common trends are:

- construction of a consensus concerning the need for action, prompted largely by the pressure of external developments (enlargement, restructuring, extreme right) ;
- a window of opportunity for overcoming the tendency to engage in endless discussion

in the search for a consensus acceptable to all – in other words, principally, the UK.

Political constellation (more left-wing oriented governments) would seem to offer a partial explanation for these outcomes. Indeed, centre-left governments were in a majority in Europe between 1997 and 2002, a period which, in quantitative terms, differed little from the first part of the 1990s. The amendment of Regulation 1408/71 was passed when left-wing governments no longer predominated, the main driving force behind its adoption being the fear that the enlargement could block progress in this direction. Though it seems clear that enlargement did indeed occasion a pause in the adoption of social directives, proposals are now once again on the table (working time, temporary agency, posting directive, non-discrimination, parental leave, etc.) and the main reason they are currently being discussed is that it was foreseen to revise the relevant existing directives after a few years (with the exception of the temporary agency directive which is a new proposal). The role of the Court of Justice as an external destabilising agent is evident in the case of the working time and probably of the posting directive (see *Laval*, *Viking*, *Rüffert*, *Luxembourg* cases).

From the standpoint of content and scope, the legislation that has been passed in recent years is far from being completely toothless. If the United Kingdom is compared with the cluster of liberal countries (United States, Canada, Australia), the influence of European social legislation is readily apparent. Insofar as the information/consultation processes are not based on a pre-existing formal institution in the UK, they have led – or will lead – to important institutional changes in that country. The ‘race’ directive introduced important changes in various member states, particularly France. While the new Regulation 883/2004 served, to some extent, the purpose of enshrining Court of Justice case law in Community legislation, it is bound to prompt new developments leading to unpredictable effects in the future.

The directives under scrutiny here are also hybrid in terms of the actors involved. They contain provisions concerning and involving non-state actors (trade unions and employers for the information/consultation; NGOs, social actors and social partners for non-discrimination) who themselves supported the development of (new) institutions to foster and/or strengthen rights.

It may be reiterated, in conclusion, that the second half of the 1990s and the first years of the new millennium were characterised by a mix of different modes of governance rather than by a complete move away from hard and towards soft law. Hybridism is already a key feature of the European social laws insofar as they involve different actors – government, social partners and NGOs – in the implementation of directives. The most advanced example of this tendency is the anti-discrimination directive ‘which constructively seeks to combine elements of a rights model and a new governance model which might otherwise be thought of as fundamentally incompatible in their method and their aims’ (de Búrca, 2006:21).

To sum up: the European Union continues to issue binding legislation, albeit in the form of instruments displaying a number of novel features. This innovative capacity may also explain why these hard-law instruments continue to be regarded by many as an appropriate tool in seeking to confront the challenges represented by the ever growing complexity of Europe in the 21st century.

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