

The Shaky Legal Foundations for Institutional Action under the Employment, Lisbon and EU2020 Strategies

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Abstract: This chapter considers the legal foundations for the EU institutions to act in the context of the Lisbon and EU2020 Strategies, including the EES (the Luxembourg European Employment Strategy). It begins by examining the formal structure provided by the Treaties for these processes and the legal basis for the resulting measures, focusing on the social strand of the three strategies. The chapter then examines the documents resulting from these strategies to see whether a legal basis is specified and, if so, what. These data are used to conclude that, outside the context of the EES, there is a remarkable absence of any express legal basis for particular EU institutions to act. Nevertheless, the European Council has assumed a pre-eminent role, pushing forward these strategies even in the absence of express competence to do so. The legitimacy of this mode of decision-making is then considered, particularly in the light of the changes introduced by the Lisbon Treaty.

I. INTRODUCTION

THE LISBON STRATEGY 2000, its precursor the European Employment Strategy (EES) and Lisbon's replacement, the EU 2020 Strategy, form a (controversial) part of the DNA of the European Union. Much has been written of the new governance methodologies, and in particular of the open method of coordination (OMC), which have been developed in order to attain these strategies, and their legitimacy (or otherwise).¹ This contribution considers another aspect of the legitimacy question,

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¹ See, eg J Zeitlin, P Pochet and L Magnusson (eds), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (Brussels, Presses

namely the very legal foundations of these strategies. In other words, what is the competence—ie legal basis—for the EU to act in both drawing up these three strategies and shaping their direction? As Armstrong notes,² competence concerns manifest themselves both at the systemic level—illustrated by the difficulties encountered in ‘constitutionalising’ the OMC in the ill-fated Constitutional Treaty—and at a more micro-level, in terms of whether the Treaties provide a solid legal basis for the substantive evolution of policy-coordination processes. As section II will show, in the field of the EES, the Treaties now provide a more solid legal foundation for coordination. However, in respect of other aspects of the Lisbon and EU 2020 Strategies, a solid legal foundation is much less apparent. These strategies have been driven forward instead by the European Council, a body that until December 2009 was not formally recognised as an institution by the Treaties,³ albeit that its coordinating function has been officially recognised since 1974.⁴

It is the legal basis for the institutions to act, rather than the substantive areas in which those actions are occurring, that is the main concern of this chapter. The chapter looks at the documents leading up to, and resulting from, the Lisbon and EU2020 Strategies, including the EES, to see whether a legal basis is specified and, if so, what (Annex I). The chapter takes as a focus the social strand of the Lisbon and EU2020 Strategies, namely the modernisation of the European social model. This process of modernisation includes ‘more and better jobs’. The Luxembourg EES, launched in November 1997, has been called in aid to achieve this objective. The data

Interuniversitaires Européennes-Peter Lang, 2005); J Zeitlin, ‘Social Europe and Experimentalist Governance: Towards a New Constitutional Compromise?’ in G de Búrca (ed), *EU Law and the Welfare State: In Search of Solidarity* (Oxford, Oxford University Press, 2005); E Szyszczak, ‘Experimental Governance: The Open Method of Coordination’ (2006) 12 *ELJ* 486; K Armstrong and C Kilpatrick, ‘Law, Governance, or New Governance? The Changing Open Method of Coordination’ (2007) 13 *Columbia Journal of European Law* 649; the essays resulting from the JCMS symposium on EU Governance after Lisbon (2008) 46 *Journal of Common Market Studies* 413; M Heidenreich and G Bischoff, ‘The Open method of Coordination: A Way to the Europeanisation of Social and Employment Policies’ (2008) 46 *Journal of Common Market Studies* 497.

² K Armstrong, ‘Governance and Constitutionalism After Lisbon’ (2008) 46 *Journal of Common Market Studies* 413.

³ For a fuller discussion of the different capacities in which the ‘Heads of State or Government’ can act, see A Dashwood, ‘Decision-Making at the Summit’ (2000-2001) 3 *CYELS* 79.

⁴ Communiqué issued by the Paris summit: ‘Recognising the need for an overall approach to the internal problems involved in achieving European unity and the external problems facing Europe, the Heads of Government consider it essential to ensure progress and overall consistency in the activities of the Communities and in the work on political coordination. The Heads of Government have therefore decided to meet, accompanied by the Ministers of Foreign Affairs, three times a year and, whenever necessary, in the Council of the Communities and in the context of political cooperation’. The Single European Act (SEA) 1986 specified the composition of the European Council but ‘deliberately abstained from defining its role’ (J Peterson and M Shackleton, *The Institutions of the European Union*, 2nd edn (Oxford, Oxford University Press, 2006) 45).

gained from the mapping exercise are used to show that the techniques employed under these strategies seek ‘policy convergence but by means other than the constitutionalized legislative process’⁵ (section III). In other words, outside the EES there is no express legal basis for the EU institutions to act, ie there is no legal basis either in the narrow, technical sense of the term (where a Treaty provision gives the EU institutions the power to act on a proposal from the Commission in accordance with, say, the ordinary legislative procedure) or in the broader sense of the term (ie whether the matter falls within the scope of EU law at all).

This raises the question as to how policy convergence comes about and its legitimacy. It will be argued that the European Council has assumed for itself considerable freedom to act. As a political actor, it has felt itself, in the past at least, to be largely unconstrained by the constitutional rules limiting the actions of the other institutions. While the entry into force of the Lisbon Treaty may have changed this, current practice suggests not. Nevertheless, a continuing disregard for the constitutional limits laid down by EU law may have something important to say about the changing approach to governance in the EU: perhaps a shift (back?) from the Classic Community Method (CCM) to greater intergovernmentalism. This has implications for the balance of power between institutions and between the EU and the Member States.

The chapter concludes by considering whether the shaky legal foundations of the Lisbon and EU2020 Strategies actually matter (section IV). Some might argue that if the strategies are launching initiatives that are working, is it really of concern what their legal foundations might be? Others might, however, argue that in a system based on the attribution of powers, expressly articulated for the first time in the Lisbon Treaty, the institutions should respect these limits. To an extent, the post hoc Treaty amendments have sought to constitutionalise some of the practices which were already occurring. This demonstrates a desire to place these ‘emerging governance techniques on a surer constitutional and legal footing’,⁶ possibly to limit their impact, possibly to facilitate their development⁷ or, more likely, to render less shaky the legal foundations of practices that were already taking place.

We begin by examining the formal structure provided by the Treaties for these processes and the legal basis for the resulting measures (section II). In practical terms, we shall focus on the EES, the only policy area where the Treaties—at Amsterdam—have given express competence to the EU to act. However, in order to understand the EES we need to take a step back and consider the Essen process which pre-dated the Amsterdam Treaty.

⁵ Armstrong, above n 2, 417.

⁶ *Ibid.*

⁷ *Ibid.*

II. THE FORMAL FOUNDATIONS OF THE STRATEGIES

A. Introduction

Before considering the formal legal basis for the EES, we shall take a brief look at the background to what became the Employment Title in the Treaties. The reason for this is to highlight the significant role played by the European Council, working in tandem with the Commission, a role that, it will be argued, became the pattern for subsequent cooperation in the context of the Lisbon Strategy. The approach adopted by the European Council and the Commission prior to the Amsterdam Treaty was subsequently formalised at Amsterdam. Likewise, the significant leadership role played by the European Council from 2000 to 2010 in respect of the Lisbon Strategy was formalised, at least in part, by the Lisbon Treaty.

B. The Essen approach

1. *The background*

By the mid-1990s, the European Union was becoming increasingly concerned about the high levels of unemployment in Europe, drawing unfavourable comparisons with the US, where the rate of unemployment was lower than the European average and the rate of job creation higher.⁸ The Employment Rates Report argued that as many individuals as possible should have an attachment to the world of work to contribute to, as well as participate in, an active society, and to enjoy the benefits of progress and prosperity. This was necessary not only for reasons of social cohesion and personal dignity,⁹ but also for reasons of economic efficiency.

2. *The process of policy formulation*

While there was much agreement on the need to increase the employment rate, there was much less agreement as to how to bring it about and who was to realise this (the Member States, the EU or both working in cooperation). According to Rhodes, it was the European Commission, operating in 'full entrepreneurial mode', which managed to mobilise a coalition of

⁸ F Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, Oxford, 1999) 123. Further details of the Essen approach can be found in C Barnard, *EC Employment Law* (Oxford, Oxford University Press, 2006) ch 3.

⁹ This was recognised by the Amsterdam European Council's Resolution on Growth and Employment 97/C236/02: 'This approach, coupled with stability based policies, provides the basis for an economy founded on principles of inclusion, solidarity, justice and a sustainable environment, and capable of benefiting all its citizens. Economic efficiency and social inclusion are complementary aspects of the more cohesive society that we all seek.'

like-minded social democratic governments in support of the creation of a common European policy for employment promotion.¹⁰ He added:

Attempting to blend the priorities of European social democrats, Christian democrats and liberals, the tactical aim of this initiative was to strike a new political balance between notions of solidarity and competitiveness behind the EU's 'social dimension'.¹¹

The question then was how this should be achieved. For example, should centralised—ie European-level—expenditure be used to stimulate demand, and thus employment, through investments in infrastructure and public works?¹² While this approach received some impetus from the Delors Commission's 1993 White Paper on *Growth, Competitiveness and Employment*,¹³ the Member States refused to countenance a significant increase in the Commission's budget. However, the importance of this White Paper lay in the policy mix it proposed based on the centralised coordination of employment policies and its combination of a deregulatory agenda with active labour market measures.

This policy mix was essentially endorsed by the Essen summit in 1994, which identified five job creation priorities,¹⁴ including: greater investment in vocational training; an increase in the employment-intensiveness of growth through more flexible organisation of work; and, most importantly, a move from a passive to an active labour market policy. A number of these proposals were clearly deregulatory in character¹⁵; others assumed a more proactive role for the State and were based on an agenda of restructuring public expenditure in favour of more active employment market policies (eg subsidies for training) and strengthening structural policy objectives relating to those excluded from the labour market (women, young people and the long-term unemployed).¹⁶

From a procedural perspective, the approach agreed at Essen was also of longer-term interest. The European Council laid down a monitoring procedure under which the Member States were required to report back on the steps they had taken. A benchmarking exercise was conducted to promote

¹⁰ M Rhodes, 'Employment Policy: Between Efficacy and Experimentation' in H Wallace, MA Pollack and AR Young, *Policy-making in the European Union*, 6th edn (Oxford, Oxford University Press, 2010) 294.

¹¹ *Ibid.*

¹² C Barnard and S Deakin, 'A Year of Living Dangerously? EC Social Policy Rights, Employment Policy and EMU' (1998) 2 *Industrial Relations Journal European Annual Review* 117.

¹³ EC Bull Supp 6/93.

¹⁴ Bull 12/94.

¹⁵ See S Deakin and H Reed, 'Between Social Policy and EMU: The New Employment Title of the EC Treaty' in J Shaw (ed), *Social Law and Policy in an Evolving European Union* (Oxford, Hart Publishing, 2000).

¹⁶ E Szczyrak, 'The New Paradigm for Social Policy: A Virtuous Circle' (2001) 38 *CML Rev* 1125, 1136.

best practice, focusing on long-term unemployment, youth unemployment and equal opportunities.

3. *The legal foundations for the action by the institutions*

Essen therefore provided the template for what became the EES, and the Essen priorities were replicated in the EES's employment guidelines. Most significantly, Essen showed the Member States that it was possible to coordinate their activities at *European* level to achieve *national* objectives of reducing unemployment. For the purposes of this chapter, however, what is remarkable is that the Commission took the lead in policy-making by suggesting various possible approaches both in terms of substance as well as methods, and these were then followed up by the European Council in the precursor of what was to become one of the heavier forms of the OMC.

The absence—pre-Amsterdam—of any formal legal basis for this form of policy-making was also striking. The Commission, of course, has a role as guardian of the Treaties under what was then Article 155 EEC, subsequently Article 211 EC. Under these original Treaty provisions, it had the power to

formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary;

It also had

... its own power of decision and [must] participate in the shaping of measures taken by the *Council* and by the European Parliament in the manner provided for in this Treaty; (emphasis added)

The reference to the Council, and not the European Council, is instructive. The European Council was not recognised at that stage as an institution (although it did have a coordinating role under Article 4 EU¹⁷). Furthermore, the Commission's powers were confined under Article 211 EC to ensuring the 'proper functioning or development of the common market'. At the time that the Essen documents were being drafted, 'a high level of employment'¹⁸ was not actually identified as a task of the European Economic Community, although the Commission might have thought that increasing the employment rate was implicit in the reference in Article 2 EC to 'the raising of the standard of living and quality of life, and economic and social cohesion'.

Some of these specific, competence-related problems were subsequently addressed by Treaty amendment. The Amsterdam Treaty amended Article 2 EC to give the Community the task of promoting 'a high level of employment'. Following the Lisbon Treaty, the attainment of 'full employment' is now a task

¹⁷ This is considered below.

¹⁸ Art 2 EC as amended by the Treaty of Amsterdam.

of the Union under Article 3 TEU. In addition, the Commission's powers have now been redrafted in Article 17(1) TEU. The Commission is to

promote the general interest of the Union and take appropriate initiatives to that end ... It shall exercise coordinating, executive and management functions, as laid down in the Treaties.

These new powers 'codif[y] the general practice before the Lisbon Treaty'.¹⁹

C. The Amsterdam Treaty and the Employment Title

1. The Treaty foundations

Despite the fact that there had been little evaluation of the success of the Essen strategy,²⁰ its approach was a defining feature of the new Employment Title introduced by the Amsterdam Treaty.²¹ According to Article 145 TFEU (ex Article 125 EC), the key provision of the new Title:

Member States and the Union shall, in accordance with the Title, work towards developing a *coordinated strategy* for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change with a view to achieving the objectives defined in Article 3 of the Treaty on European Union.²²

Article 146 TFEU (ex Article 126 EC) makes clear that the principal actors are the Member States. They are required to coordinate their policies for the promotion of employment (which is to be regarded as an issue of 'common concern')²³ within the Council, but in a way consistent with the broad economic policy guidelines (BEPGs) laid down within the framework of EMU.

In terms of process, each year the Council and Commission are to make a joint report on employment in the Union.²⁴ This is then considered at

¹⁹ J-C Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge, Cambridge University Press, 2010) 230, writing in the context of the amendment of some of the other provisions on the Commission.

²⁰ P Pochet, 'The New Employment Chapter of the Amsterdam Treaty' (1999) 9 *Journal of European Social Policy* 271, 275. This section draws on C Barnard, *EC Employment Law* (Oxford, Oxford University Press, 2006) ch 3.

²¹ See also M Biagi, 'The Implementation of the Amsterdam Treaty with Regard to Employment: Coordination or Convergence?' (1998) 14 *International Journal of Comparative Labour Law and Industrial Relations* 325.

²² Emphasis added.

²³ Art 146(2) TFEU (ex Art 126(2) EC). Sciarra notes the parallel track of coordination and cooperation in the Employment Title: S Sciarra, 'The Employment Title in the Amsterdam Treaty: A Multilanguage Legal Discourse' in D O'Keefe and P Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Oxford, Hart Publishing, 2009).

²⁴ Art 148(4) TFEU (ex Art 128(4) EC).

a European Council meeting which draws up its conclusions.²⁵ On the basis of these conclusions, the Council, acting by qualified majority on a proposal from the Commission (after consulting the European Parliament, the Economic and Social Committee, the Committee of the Regions and the Employment Committee (EMCO)), draws up employment guidelines—guidelines consistent with the BEPGs issued in relation to EMU²⁶—which the Member States ‘shall take into account in their employment policies’.²⁷ This process recognises that the European Council is not a legislator; rather, its decisions are political.²⁸ Decisions requiring legal effect—the adoption of the guidelines—must follow traditional CCM procedures.²⁹

Once the employment guidelines for a given year are adopted, Article 148(3) TFEU (ex Article 128(3) EC) requires each Member State to make an annual report to the Council and the Commission on ‘the principal measures taken to implement its employment policy in the light of the guidelines for employment’—the so-called National Action Plans (NAPs),³⁰ renamed in 2005 as National Reform Programmes (NRPs). These reports are considered by the EMCO as part of a process of mutual surveillance and peer review. The EMCO then reports to the Council, which examines the employment policies of the Member States in the light of the guidelines on employment. The Council (EPSCO—the Employment, Social Affairs, Health and Consumer Affairs Council, now ESPHCA) and the Commission then submit a joint report to the European Council³¹ on how far the guidelines have been implemented.³² The annual process then starts again.

When making its examination of the NAPs/NRPs, the Council may, acting by qualified majority on a recommendation from the Commission, ‘make recommendations to Member States’.³³ This recommendation procedure is the main innovation in the Employment Title: if the employment guidelines are not being observed by a Member State, a recommendation

²⁵ Art 148(1) TFEU (ex Art 128(1) EC).

²⁶ Art 121 TFEU (ex Art 99 EC).

²⁷ Art 148(2) TFEU (ex Art 128(2) EC).

²⁸ Peterson and Shackleton, above n 4, 55.

²⁹ N Nugent, *The Government and Politics of the European Union*, 6th edn (Basingstoke, Palgrave Macmillan, 2006) 236.

³⁰ Communication from the Commission ‘From Guidelines to Action: The National Action Plans for Employment’, COM(98) 316. E Szyszczak, ‘The Evolving European Employment Strategy’ in J Shaw (ed), *Social Law and Policy in an Evolving European Union* (Oxford, Hart Publishing, 2000); J Kenner, ‘The EC Employment Title and the Third Way: Making Soft Law Work?’ (1999) 15 *International Journal of Comparative Labour Law and Industrial Relations* 33; S Sciarra, ‘Integration through Coordination: the Employment Title in the Amsterdam Treaty’ (2000) 6 *Columbia Journal of European Law* 209.

³¹ The report is drafted by the Commission and is then modified and/or endorsed by ESPHCA.

³² Art 148(5) TFEU (ex Art 128(5) EC). The first Joint Employment Report can be found at <http://www.europa.eu.int/comm/employment_social/employment_strategy/report_1998/jer98_en.pdf> accessed 19 July 2010.

³³ Art 148(4) TFEU (ex Art 128(4) EC).

can be issued which is, in effect, a warning for failure to comply with the guidelines.³⁴ A similar procedure can be found in monitoring the compliance with EMU. However, under EMU, a Member State which fails to observe warnings issued by the Council in relation to excessive levels of national debt and excessive budget deficits may be subject to a fine³⁵; under the Employment Title the recommendation is without sanction. This recommendation process is supposed to form part of the ‘naming and shaming’ process. These NRPs are subsequently ‘peer reviewed’ in the ‘Cambridge’ process—a closed two-day meeting of the Employment Committee. The peer review is followed by bilateral meetings between representatives of government and the Commission.³⁶

Not only can the Council issue recommendations, it can also act to

adopt incentive measures designed to encourage cooperation between Member States and to support their action in the field of employment through initiatives aimed at developing exchanges of information and best practices, providing comparative analysis and advice as well as promoting innovative approaches and evaluating experiences, in particular by recourse to pilot projects.³⁷

However, these limited measures ‘shall not include harmonisation of the laws and regulations of the Member States’.

2. Observations

For the purposes of this chapter, three observations may be made about the Employment Title. First, it formalised, and thus legitimised, a process which had already begun to take shape at Essen. This was all the more important given that the EU was stepping into a sensitive national domain (employment). Secondly, the Amsterdam Treaty gave a firmer foundation to the (at the time) ‘unorthodox’ method deployed (OMC)—and a ‘heavy-duty’³⁸ version of OMC at that, since it was backed up by (soft law) sanctions. The Employment Title also provided a legal basis for the subsequent employment guidelines adopted annually by the Council of Ministers. For the first

³⁴ See Deakin and Reed, above n 15. The first recommendations were issued in 2000: Council Recommendation 2000/164/EC, [2000] OJ L52/32.

³⁵ Art 126(1) TFEU (ex Art 104(1) EC).

³⁶ M Rhodes, ‘Employment Policy: Between Efficacy and Experimentation’ in H Wallace, MA Pollack and AR Young, *Policy-making in the European Union*, 6th edn (Oxford, Oxford University Press, 2010) 294.

³⁷ Art 149 TFEU (ex Art 129 EC).

³⁸ Or, to use the terminology of Belgian Minister Frank Vandenbroucke, open coordination is not some kind of ‘fixed recipe’ that can be applied to whichever issue but is instead ‘a kind of cookbook that contains various recipes, lighter and heavier ones’: cited in J Zeitlin, ‘Introduction: The Open Method of Coordination in Question’ in Zeitlin *et al* (eds), above n 1.

two years, these took the form of soft law resolutions (see Annex I below).³⁹ Subsequently, they were adopted as Decisions, probably reflecting the fact that the CCM method is prescribed in Article 148(2). These Decisions are the only hard law measures adopted under the EES. Most of the measures are soft law: particularly reports and recommendations.⁴⁰ Thirdly, the European Commission and the European Council, working in tandem, play a leading role.

D. The Lisbon Strategy

The Luxembourg EES and the various economic strategies were reviewed at the end of 1999. This review led to a more fundamental new agenda: the Lisbon Strategy. On 23–24 March 2000, the European Council held a special meeting in Lisbon to agree a ‘new strategic goal’ for the Union in order to ‘strengthen employment, economic reform and social cohesion as part of a knowledge-based economy’.⁴¹ This strategic goal was for the Union 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..⁴²

The Strategy aimed at:

- a) preparing the transition to a knowledge-based economy;
- b) sustaining the healthy economic outlook and favourable growth prospects by applying an appropriate macro-economic policy mix; and
- c) most importantly for our purposes, modernising the European Social Model.⁴³

The Lisbon Strategy identified four elements to this process of modernisation, including more jobs and better-quality jobs. In order to achieve this, the Lisbon Strategy looked to the Luxembourg process, as amended by the mid-term review,⁴⁴ to give substance to this goal. However, it recognised that the Luxembourg process needed to be targeted better. The Heads of State therefore agreed at Lisbon to set employment rate targets for what

³⁹ The use of ‘resolutions’, at least in the first year, reflects the fact that the Amsterdam Treaty, which introduced the Employment Title, was not yet in force.

⁴⁰ See eg L Senden, *Soft Law in European Community Law: Its Relationship to Legislation* (Oxford, Hart Publishing, 2004); B de Witte, ‘Legal Instruments and Law-Making in the Lisbon Treaty’ in S Griller and J Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty* (Vienna, Springer-Verlag, 2008).

⁴¹ Lisbon Presidency Conclusions, 23 and 24 March 2000.

⁴² *Ibid.*, para 5.

⁴³ *Ibid.*

⁴⁴ See Barcelona European Council, 15–16 March 2002, para 30.

would amount to ‘full employment’, something they had not managed at Luxembourg.⁴⁵ The targets were ambitious, consisting of

raising the employment rate from an average of 61% today to as close as possible to 70% by 2010 and to increase the number of women in employment from an average of 51% today to more than 60% by 2010.⁴⁶

An additional target was added by the Stockholm European Council, namely increasing the average EU employment rate among older men and women (55–64) to 50 per cent by 2010.⁴⁷

Principal among the means of achieving these targets, while at the same time guaranteeing better-quality jobs, is the ‘flexicurity’ agenda.⁴⁸ As the Commission explains in its 2007 Paper, *Towards Common Principles of Flexicurity: More and better jobs through flexibility and security*,⁴⁹ ‘Flexicurity promotes a combination of flexible labour markets and adequate security’. It says that flexicurity is not about deregulation, giving employers freedom to dissolve their responsibilities towards the employee and to give them little security. Instead, flexicurity is about bringing people into good jobs and developing their talents. Employers have to improve their work organisation to offer jobs with a future. They need to invest in their workers’ skills. The Commission calls this ‘internal flexicurity’. However, the Commission also recognises that keeping the same job is not always possible. ‘External flexicurity’ attempts to offer safe moves for workers from one job into another, and good benefits to cover the time span, if needed.

E. EU2020

1. What it does

The Lisbon Strategy was revised in 2005 and replaced by EU2020 in June 2010. The EU2020 Strategy had to respond to the economic crisis starting in the Autumn of 2008. This crisis revealed the extravagance of the targets prescribed by the Lisbon Strategy: Europe is far from being the most dynamic knowledge-based economy in the world in 2010. The crisis wiped out any gains in economic growth and job creation which had occurred over

⁴⁵ Cf Commission Communication, *Proposal for Guidelines for Member States Employment Policies 1998*, COM(97) 497, Section I, where the Commission proposed a target of increasing the employment rate from 60.4% to 65% thereby creating at least 12 million new jobs.

⁴⁶ Above n 42, para 30. Intermediate targets were also set of 67% overall and 57% for women: Stockholm European Council, 23 and 24 March 2001, para 9.

⁴⁷ *Ibid*, para 9.

⁴⁸ See more generally J Kenner, ‘New Frontiers in EU Labour Law: From Flexicurity to Flex-security’ in S Currie and M Dougan (eds), *Fifty Years of the Treaty of Rome* (Oxford, Hart Publishing, 2009).

⁴⁹ COM(2007)359, 5.

the previous decade—GDP fell by 4 per cent in 2009, industrial production dropped back to the levels of the 1990s, and 23 million people (10 per cent of the active population) were unemployed. Public finances have also been severely affected, with deficits at 7 per cent of GDP on average and debt levels at over 80 per cent of GDP.⁵⁰

Does that mean that the Lisbon Strategy was a failure?⁵¹ Certainly, many of the criticisms of the Lisbon Strategy proved justified: the goals were too ambitious, there were too many targets, the Commission had no real powers to use against defaulting States, there was a lack of commitment to the Strategy by a number of States, many of which saw it as a bureaucratic exercise which had little effect on their day-to-day government, and, at a time of the largest expansion of the European Union and major Treaty reform, insufficient attention was paid to realising the Lisbon Strategy and communicating and promoting its benefits.

On the other hand, the shift in emphasis identified by the Lisbon Strategy in fact has marked a more permanent and fundamental change in the EU's approach to workers: workers are no longer seen as (passive) beneficiaries of social rights; instead they are seen as having to take (active) responsibility for updating their skills and making themselves employable.

The modernisation agenda made concrete by the Lisbon Strategy fed directly into the less ambitious Europe 2020 programme adopted in March 2010. It also puts forward three mutually reinforcing priorities:

- a) *Smart growth*: developing an economy based on knowledge and innovation.
- b) *Sustainable growth*: promoting a more resource-efficient, greener and more competitive economy.
- c) *Inclusive growth*: fostering a high-employment economy delivering social and territorial cohesion.

The 'inclusive growth' priority is the direct descendant of the third limb of the Lisbon Strategy of 'modernising the European social model' and the active labour market policies it envisaged. So, the Commission says that

Inclusive growth means empowering people through high levels of employment, investing in skills, fighting poverty and modernising labour markets, training and social protection systems so as to help people anticipate and manage change, and build a cohesive society.⁵²

⁵⁰ Commission Communication, *Europe 2020. A Strategy for smart, sustainable and inclusive growth*, COM(2010) 2020, 5.

⁵¹ The Swedish Prime Minister, Frederick Reinfeldt, is reported as having recognised this: EurActiv, 'Sweden admits Lisbon Agenda "failure"', 3 June 2009, available at <<http://www.euractiv.com/en/priorities/sweden-admits-lisbon-agenda-failure/article-182797>>, accessed 19 July 2010.

⁵² COM(2010) 2020, 16.

It continues that ‘Implementing flexicurity principles and enabling people to acquire new skills to adapt to new conditions and potential career shifts will be key’. Further, in a reference to the principles underpinning its 2007⁵³ and 2008 Social Agenda Communications,⁵⁴ the Commission says that inclusive growth is also about ‘ensuring access and opportunities for all throughout the lifecycle’.⁵⁵

The 2020 document proposes a more limited (but still ambitious) set of targets than the Lisbon Strategy. These EU targets, which have to be translated into individualised national targets and trajectories, include 75 per cent of the population aged 20–64 to be employed; 3 per cent of the EU’s GDP to be invested in research and development; and the share of early school leavers to be under 10 per cent. These targets are interrelated. As the Commission notes, better educational levels help employability, and progress in increasing the employment rate helps to reduce poverty. A greater capacity for research and development as well as innovation across all sectors of the economy, combined with increased resource efficiency, will improve competitiveness and foster job creation.

III. THE APPROACH ADOPTED IN THE STRATEGIES

What measures and documents have resulted from the Luxembourg EES, the Lisbon Strategy and EU2020? The key ones have already been referred to in section II above. However, Annex I below attempts to map more systematically the main documents and instruments in the social field which have resulted from these processes. They have been recorded in a chronological table which also identifies the main actors, the legal basis of the measure, if any, a brief summary of the content of the measure, and any other observations. This mapping process enables the following observations to be made.

A. Significant leadership provided by the European Council

It has long been observed that the Lisbon and EES Strategies have benefited from much intergovernmental input. This is borne out by the chronological survey. The key points in the evolution of the Lisbon and Luxembourg Strategies have been signposted by the European Council’s ‘Presidency Conclusions’. This raises the question of the legitimacy of the European Council. Article 4 EU provided that

⁵³ *Opportunities, access and solidarity: towards a new social vision for 21st century Europe*, COM(2007) 726.

⁵⁴ *Renewed Social Agenda: Opportunities, Access and Solidarity*, COM(2008) 412.

⁵⁵ *Ibid.*

The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof.

This emphasises that the role of the European Council is ‘essentially a political one’,⁵⁶ a view confirmed in the Lisbon Presidency Conclusions of March 2000, which said that the European Council is to take a ‘pre-eminent guiding and coordinating role to ensure overall coherence’, in particular through an additional meeting of the European Council, taking place in the Spring, concerned solely with economic and social questions.⁵⁷

The European Council thus sees itself as the pre-eminent body of the EU, even though it did not acquire the status of an institution until the Lisbon Treaty.⁵⁸ This was, perhaps, inevitable. Absent a body taking a leadership role, albeit at the risk of upsetting the constitutional balance between institutions, the EU risked stagnating. The question, then, is what powers does the European Council have to act? Is it confined to acting in the areas already identified as falling within the scope of EU law, or can its remit extend further? As the chronology set out in Annex I shows, there is no evidence of any legal basis (in either the narrow or the broad sense) being stated for the European Council’s actions.

On one view, the European Council is an intergovernmental, political body operating outside the sphere of the EU ‘constitution’. According to this perspective, the absence of any legal basis for the European Council to act is unremarkable: the Member States retain their sovereign powers and are exercising them through the European Council formation. In other words, if (when) the European Council is a gathering of top people from the Member States, it does not need to comply with the formalities and limits laid down by European Union law since it is essentially an intergovernmental meeting.

The flexibility and fluidity found in this approach is recognised by Peterson and Shackleton:

... viewing the European Council as a locus of power helps explain its ambivalence in institutional terms. Without the Constitutional Treaty its powers, procedures, and decision-making are not determined by legal texts. It deals with whatever problem it wants to deal with, in the manner it judges most appropriate. Nowhere is its role clearly defined, yet that role is fundamental to the life of the Union. It can live with that ambivalence because it is bent on the exercise of the power *de facto* and not on legally-binding decision-making.⁵⁹

The authors do, however, note the paradox that for the first 12 years of its existence (1974–86), the European Council met, and exercised significant power,

⁵⁶ A Arnall *et al*, *Wyatt and Dashwood’s European Union Law*, 5th edn (London, Sweet & Maxwell, 2006) 31. See also J Werts, *The European Council* (London, John Harper Publishing, 2008).

⁵⁷ Preliminary Conclusions, paras 35 and 36.

⁵⁸ Art 13 TEU.

⁵⁹ Peterson and Shackleton, above n 4, 47.

without any legal basis in the Treaties. They continue, ‘In a highly structured legal system, such as the [Union], this was indeed a strange phenomenon’.⁶⁰

If, on the other hand, the European Council is seen as operating as the ‘European Council’, an institution of the Union under Article 13 TEU, it will be subject to the principle of conferral laid down in Article 5(1) TEU and so must confine its activities to the subject areas recognised as falling within the scope of EU Treaties. Furthermore, it needs to justify its action with reference to some legal basis in the Treaties. As the role of the European Council has been formalised with each Treaty amendment—culminating in its recognition as an EU institution with a full-time chair and its own rules of procedure⁶¹—this latter view seems to be the better one. There is, of course, nothing to prevent the Heads of European States getting together *qua* states to discuss matters of common concern where they will not be tied by obligations under EU law.⁶² However, when they meet as the ‘European Council’, both in the areas specified by the Treaties, such as under Article 148(1) TFEU considering the employment situation in the Union, and in other areas where they put out Conclusions in the name of the European Council, the European Council must respect the requirements and limitations of EU law. Thus, an interesting paradox arises: the greater the formalisation of the position of the European Council through Treaty amendment—in the interests of transparency—the less flexibility there is for the European Council to act.

Yet if the modern view is correct, why does the European Council continue to disregard the standard legal formalities associated with action by an EU institution? There are four possible explanations for this. First, practice has not caught up with the increasing formalisation of the role of the European Council. As Peterson and Shackleton note: ‘The European Council has always attached the highest importance to the informality of its meetings ...’⁶³ Requirements to specify any legal foundations of particular activities, especially political activities, interfere with such informality. Secondly, the European Council is a body comprised of politicians—Heads of State—who in their national capacities are ‘ultimate decision-takers’. Again, as Peterson and Shackleton put it:

Collectively they consider themselves, in the European context, as having a similar task. Essentially, they come together to take decisions, and expect those decisions to be respected.⁶⁴

⁶⁰ *Ibid*, 43.

⁶¹ See Arts 235–236 TFEU and EU Council Dec 2009/882/EU, [2009] OJ L315/51. Earlier rules for the organisation of the proceedings of the European Council can be found in Annex I of the Seville European Council Presidency Conclusions, 21–22 June 2002.

⁶² See also Dashwood, above n 3, 103 ‘... there is no actual need for express [Heads of State or Government] attribution. The European Council is free to discuss any matter it chooses, at any level of generality or particularity’.

⁶³ Peterson and Shackleton, above n 4, 47.

⁶⁴ *Ibid*, 45. See also Dashwood, above n 3: ‘... a clearly framed set of instructions is sure to be complied with by the institutions with formal legal powers.’

Thirdly, if those politicians consider that they are taking political, as opposed to legal, decisions then the need to subject those decisions to legal formalities probably seems to them to be unnecessary. Fourthly, there is an absence of effective sanctions or other control mechanisms over the European Council. While, following amendments introduced by the Lisbon Treaty, the Court of Justice has jurisdiction over acts of the European Council ‘intended to produce legal effects *vis-à-vis* third parties’,⁶⁵ it will not have jurisdiction over the European Council’s more general functions. Furthermore, control by the other EU institutions is also weak. The European Parliament appears to wield little influence over the European Council, albeit that the President of the European Parliament addresses the opening sessions of summits to inform Heads of State or governments (HSG) of the European Parliament’s thinking.⁶⁶ Accountability of HSGs to national parliaments is also feeble.

Taken together, these reasons help to explain why the European Council continues to do as it always did and legal requirements, particularly over questions such as legal basis, largely remain overlooked.

B. The influential role of the Commission

The pre-eminence of the European Council has come at the expense of the other institutions. For the Commission, soft coordination has not necessarily been a good thing: it has reinforced its think-tank role, at the expense of its role in hard policy, and this makes the Commission look weaker than the other institutions.⁶⁷ On the other hand, much of the thinking and the creativity has come from the Commission. Its role in shaping OMC, proposing the amendments to the Lisbon Strategy, drafting the integrated guidelines, may have been overlooked. In particular, the June 2010 European Council Conclusions on EU 2020 are largely a carbon copy of the Commission’s proposals of March 2010.

The Commission has also been influential in developing related policies. Take for example, the ‘flexicurity’ agenda (section II.D below). After two calls by the European Council for a Communication on flexicurity (Spring and June European Councils 2007), the Commission delivered its influential 2007 Communication,⁶⁸ which was then approved by the Employment Affairs Council. Flexicurity still features in the EU2020 agenda.

⁶⁵ Art 263(1) TFEU. However, as Philip Allott notes, the Lisbon judgment of the German Federal Constitutional Court seems to suggest that the European Council would be subject to the jurisdiction of that court even in respect of those functions, with the possibility that the Federal Constitutional Court might find that the European Council had exceeded its limits.

⁶⁶ Nugent, above n 30, 238.

⁶⁷ Discussion with Commission official.

⁶⁸ See above n 51.

The Commission has also played an important role in offering various visions for a social agenda for the EU. Its social policy agenda of July 2000, based on the Lisbon Strategy and the Commission's programme of action announced to the European Parliament, saw social policy as an input into growth. This was reflected in the European Council's conclusions at Nice in December 2000. Further, the Commission's Renewed Social Agenda of 2007 and 2008 mooted 'third-way' and 'capabilities' thinking (in essence helping individuals to help themselves).⁶⁹ While this experimentation has left less of an indelible mark, perhaps thwarted by the financial crisis of 2008, it does show the Commission's role in generating ideas. However, as discussed above,⁷⁰ prior to the Lisbon Treaty amendments, the formal legal basis on which the Commission could act was far from clear.

C. The lack of visibility of the European Parliament

While the Commission has enjoyed some influence, the European Parliament and national parliaments have been almost invisible in these strategies.⁷¹ According to Article 148(2) TFEU, the European Parliament is to be consulted in the drawing up of the employment guidelines (although it is not involved in any other OMC process), but experience over the first five years of the EES showed that its role was marginal, in part due to the lack of time in the EES timetable for it to prepare its opinion.⁷² This was addressed, at least in part, by the 2005 reforms. The European Parliament did establish a website on the Lisbon Strategy,⁷³ which largely played a cheer-leader role for the Strategy, albeit that it did admit:

Many of the measures agreed at Lisbon were not legislative but intergovernmental, based on coordination and benchmarking among Member States, with the Commission and European Parliament in a bystanders' role.

Perhaps most telling was the frank admission that

A more effective form of governance in the employment and social area than the open method of coordination, which failed to achieve some of its aims, is needed for the years to come ...

⁶⁹ C Barnard, 'Solidarity and the Commission's "Renewed Social Agenda"' in M Ross and Y Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford, Oxford University Press, 2010) 73.

⁷⁰ See text to nn 17 and 18 above.

⁷¹ See also Rhodes, above n 10, 299.

⁷² The 2003 reforms have helped to overcome this problem: Rhodes, above n 37, 295.

⁷³ Available at <<http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20070202BKG02682&language=EN#title1>>, accessed 19 July 2010.

and that the Council and the Commission must

involve Parliament fully in drawing up objectives, targets and indicators for the new economic and employment strategy, and also to give Parliament access to documents, meetings, and work on monitoring and reviewing progress.⁷⁴

The Lisbon Treaty has not changed this. Despite the generalising of the ordinary legislative procedure by the Lisbon Treaty, this has not been extended to Article 148 TFEU, the legal basis for adopting the employment guidelines. It was hoped that the involvement of the Social Partners would fill this legitimacy gap, but the commitment on paper to the participation of the Social Partners has often not manifested itself in practice. This has led some commentators to suggest that, on the one hand, the involvement of such a wide range of actors has actually blurred responsibility for economic and social policy; and on the other hand, the absence of effective participation by the Social Partners, the lack of involvement of the European Parliament and the absence of judicial review have meant that the EES and Lisbon Strategies, far from being open, heterarchical and deliberative, are more closed, elitist and less democratic than the classic Community method.⁷⁵

D. Limited role of hard law

In the light of the above observations, it is perhaps not surprising that the documents that have resulted from these processes have not produced much 'hard law'. The Council's Decisions on the employment guidelines are the only traditional hard law form, adopted (after the first two years) via the CCM with an appropriate legal basis. Otherwise, the processes are characterised by a range of soft law instruments not recognised by Article 288 TFEU (ex Article 249 EC), such as European Council Presidency Conclusions, Resolutions and Commission policy documents. In addition, as we have already seen (section II.C.1.), the EES expressly envisages a role for recommendations⁷⁶ as a sanction against poorly-performing Member States.⁷⁷ However, unlike soft law adopted under the CCM—such as the recommendation on sexual harassment, which is

⁷⁴ Available at <http://www.europarl.europa.eu/news/expert/infopress_page/048-73522-116-04-18-908-20100426IPR73482-26-04-2010-2010-false/default_en.htm>, accessed 19 July 2010.

⁷⁵ P Syrpis, 'Legitimising European Governance: Taking Subsidiarity Seriously within the OMC', *EUI Working Papers*, Law 2002/10. See the calls in the Final Report of Working Group XI on Social Europe, CONV 516/1/03, para 44, for the 'incorporation of the open method of coordination in the Treaty [which] would improve its transparency and democratic character, and clarify its procedure by designating the actors and their respective roles'.

⁷⁶ See, eg, Council Recommendation of 14 October 2004 on the implementation of Member States' employment policies 2004/741/EC, [2004] OJ L326/47.

⁷⁷ Art 148(4) TFEU (ex Art 128(4) EC).

subject to judicial interpretation⁷⁸ and, once hardened into hard law, judicial enforceability—the soft law of the EES derives its regulatory strength from government powers or capacities.⁷⁹ As Kilpatrick puts it, OMC does not constitute a hard law opportunity manqué; rather, soft law in this regard is shorthand for ‘different from law (in its classical conception)’, not ‘less than law’.⁸⁰

Nevertheless, this heavy reliance on various forms of soft law absolves the EU from jumping through the traditional hurdles required by the traditional legislative methods adopted under CCM (an identifiable formal legal basis for a proposed measure, the involvement of the European Parliament, etc.). This leads to a vicious—or virtuous (depending on your perspective)—cycle: the absence of formal measures means there is less need for formal structures. The more informal the structure, the less need there is for formal checks and balances—in particular, the less need there is for formal measures which are subject to the traditional vehicles of control, in particular judicial review. This suits the political orientation of the European Council’s decision-making.

E. Justification by bootstrapping

Because of the absence of hard law, the traditional legal mechanisms to guarantee the legality of a measure—such as the need for a legal basis to ensure that the decision-maker has competence to act—become at one level less pressing. On the other hand, given the amorphous nature of the EES and the Lisbon and EU2020 Strategies, and their potential to invade areas of sensitive national sovereignty, it could be argued that there is an even greater need for justification for EU-level action. This brings us to our fifth observation. The justification for some action is derived from other soft EU instruments. So, for example, the basis for the Council Resolution of 1998 was the conclusions of the extraordinary European Council meeting on employment of 20 and 21 November 1997. The justification for the Commission’s scoreboard was the Nice European Council conclusions. The basis for the EU2020 Strategy was the October 2009 European Council conclusions. This is justification by bootstrapping. It means that the basis for further Union action for these demanding programmes is built on already shaky foundations.

⁷⁸ See Case 322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4407, where the Court of Justice said in the context of a recommendation on compensation for persons with occupational diseases, that national courts were bound to take recommendations into account in order to decide disputes before them, in particular where they clarify the interpretation of national rules adopted in order to implement them or when they are designed to supplement binding Union measures.

⁷⁹ S Borrás and K Jacobsson, ‘The open method of coordination and new governance patterns in the EU’ (2004) 11 *Journal of European Public Policy* 185, 188 and 199.

⁸⁰ C Kilpatrick, ‘New EU Employment Governance and Constitutionalism’ in G de Búrca and J Scott (eds), *Law and New Governance in the EU and the US* (Oxford, Hart Publishing, 2006).

IV. CONCLUSIONS

But do the shaky foundations for action actually matter? If the EU is able to deliver on the promise offered by these documents and put into practice the policies that they espouse, then what is there to worry about? If there are lingering concerns about legitimacy then these can be overcome by the role of the Member States in the European Council. Yet this argument is weakened by the fact that review by national political processes is already attenuated. The argument is further undermined by the introduction by the Lisbon Treaty of a President of the European Council (Mr Van Rompuy) who already wields considerable power and influence.⁸¹

More fundamentally, the output legitimacy argument is undermined by the general perception that the Lisbon Strategy has been a failure. Even if it had been a success, a continued disregard of any formal legal basis would jeopardise one of the proclaimed successes of the Lisbon Treaty, namely the creation of a catalogue of competences for the EU. There is a further paradox here: as the Treaties move towards supporting greater use of the CCM, practice suggests a move towards greater intergovernmentalism. It is this intergovernmentalist methodology that the European Parliament, at least, attributes to the failure of the Lisbon Strategy. Guy Verhofstedt, leader of the Liberal group in the European Parliament and former Belgian Prime Minister, noted:

The Lisbon Strategy, started in 2000, was based on intergovernmental cooperation. The intergovernmental method, based on best practices and peer review, is the complete failure of this strategy ... If we continue like that, we shall talk again in ten years about Europe 2030, but we shall also see the failure of the 'Europe 2020' strategy if we continue with this loose intergovernmental approach.⁸²

Even if EU2020 does deliver, the methodology nevertheless reinforces concerns that with the tentacles of the EU entering into sensitive areas of national sovereignty, unaccountable EU institutions are requiring major shifts in national policy-making. Practice, even following the adoption of the Lisbon Treaty, has failed to address these concerns.

⁸¹ His role is defined only cursorily by Art 15(6) TEU:

'The President of the European Council:

- (a) shall chair it and drive forward its work;
- (b) shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission ...
- (c) shall endeavour to facilitate cohesion and consensus within the European Council;
- (d) shall present a report to the European Parliament after each of the meetings of the European Council. ...'

⁸² 'Parliament threatens to block "Europe 2020" plan', *euractiv*, 7 June 2010, available at <<http://www.euractiv.com/en/priorities/liberals-threaten-block-europe-2020-plan-news-494914>>, accessed 19 July 2010.

ANNEX I

<i>Year</i>	<i>Type of measure</i>	<i>Institution</i>	<i>Legal basis</i>	<i>Content</i>	<i>Other observations</i>
1997					
20–21 Nov 1997	Extraordinary meeting of European Council at Luxembourg, Presidency Conclusions	European Council	None	EES guidelines agreed	
15 Dec 1997	Council Resolution on 1998 Guidelines ⁸³	Council	The conclusions of the extraordinary European Council meeting on employment of 20 and 21 November 1997	(1) 4 pillars (2) 19 guidelines	Amsterdam Treaty entered into force on 1 May 1999
1998					
1999					

Continued

⁸³ [1998] OJ C30/1.

<i>Year</i>	<i>Type of measure</i>	<i>Institution</i>	<i>Legal basis</i>	<i>Content</i>	<i>Other observations</i>
22 Feb 1999	Council Resolution on 1999 Guidelines ⁸⁴	Council	The conclusions of the extraordinary European Council meeting on employment of 20 and 21 November 1997 and the Vienna European Council, 11–12 December 1998	Largely repeated those of 1998, more emphasis on family-friendly policies	Not clear why 'Resolution' was used since Amsterdam Treaty in force
3–4 June 1999	European Council, Presidency Conclusions	European Council	None	Anticipation of the Lisbon Strategy ⁸⁵	
2000					
13 Mar 2000	Council Dec 2000/228/EC on employment guidelines ⁸⁶	Council	Art 128(2) EC	Amending slightly the 1999 guidelines	
23–24 Mar 2000	Lisbon European Council, Presidency Conclusions	European Council	None	Lays down goals and methods for Lisbon Strategy	

⁸⁴ [1999] OJ C69/2.

⁸⁵ '11. The European Council welcomes the decision to convene a special meeting of the European Council on employment, economic reform and social cohesion (towards a Europe of innovation and knowledge) under the Portuguese Presidency in the spring of 2000 in order to review the progress made after the Cologne, Cardiff and Luxembourg processes.'

⁸⁶ [2000] OJ L72/15.

<i>Year</i>	<i>Type of measure</i>	<i>Institution</i>	<i>Legal basis</i>	<i>Content</i>	<i>Other observations</i>
19–20 June 2000	Feira European Council, Presidency Conclusions	European Council	None	Follow-up to Lisbon European Council	
July 2000	Commission Social Policy Agenda ⁸⁷	Commission	None but reference to Lisbon Strategy and its programme of action announced to the EP	(1) Virtuous cycle of economic and social policy (2) Social policy as a productive factor	
7–9 Dec 2000	Nice European Council	European Council	None	Sets social policy agenda for 2000–05 based on modernising and improving the European Social Model	
2001					
19 Jan 2001	Council Dec 2001/63/ EC ⁸⁸	Council	Art 128(2) EC	Five horizontal objectives added to four pillars to re-orientate the EES towards the Lisbon Strategy	
February 2001	Commission Score-board on Implementing the Social Policy Agenda ⁸⁹	Commission	Nice European Council		

Continued

⁸⁷ COM(2000) 379.

⁸⁸ [2001] OJ L22/18.

⁸⁹ COM(2001) 104. See also the Mid-term Review: COM(2003) 312.

<i>Year</i>	<i>Type of measure</i>	<i>Institution</i>	<i>Legal basis</i>	<i>Content</i>	<i>Other observations</i>
23–24 Mar 2001	Stockholm European Council	European Council	None	(1) Agreed to improve procedures so that the European Council's Spring meeting to become the focal point for an annual review of economic and social questions. (2) Sustainability added as a Lisbon objective	
15–16 June 2001	Göteborg European Council, Presidency Conclusions	European Council	None	Sustainable development strategy fleshed out	
25 July 2001	Commission governance white paper ⁹⁰	Commission	None (although reform of governance identified as one of its four strategic objectives in 2000)	New forms of governance including OMC, but also sees role for CCM	
14 Dec 2001	Laeken European Council, Presidency Conclusions	European Council	None	Emphasis on full employment being primary objective of EES	
2002					
18 Feb 2002	Council Dec 2002/177/EC ⁹¹	Council	Art 128(2)EC	Broadly following 2001 guidelines	

⁹⁰ COM(2001) 428.

⁹¹ [2002] OJ L60/60.

<i>Year</i>	<i>Type of measure</i>	<i>Institution</i>	<i>Legal basis</i>	<i>Content</i>	<i>Other observations</i>
15–16 Mar 2002	Barcelona European Council, Presidency Conclusions	European Council	None	(1) Emphasis on flexibility (2) Greater coordination between social and economic dimension (3) EES to be simplified	
July 2002	Commission review of EES ⁹²	Commission	Nice European Council		
Sept 2002	Commission, streamlining the annual economic and employment cycles ⁹³	Commission			
2003					
14 Jan 2003	Commission, Future of the EES ⁹⁴	Commission		(1) Need for simplification (2) 3 overarching objectives (full employment, quality and productivity at work, cohesion and inclusive labour market), 11 priorities, emphasis on delivery and governance	

Continued

⁹² 'Taking Stock of Five Years of the European Employment Strategy' COM(2002) 416.

⁹³ COM(2002) 487.

⁹⁴ 'The Future of the European Employment Strategy (EES). A Strategy for Full Employment and better jobs for all' COM(2003) 6.

<i>Year</i>	<i>Type of measure</i>	<i>Institution</i>	<i>Legal basis</i>	<i>Content</i>	<i>Other observations</i>
20–21 Mar 2003	Brussels European Council, Presidency Conclusions	European Council	None	(1) Three-year perspective of employment guidelines which should operate in way consistent with BEPGs (2) Commission to establish European Employment Task-force headed by Wim Kok to identify employment-related challenges (3) Welcomed establishment of Tripartite Social Summit for Growth and Employment ⁹⁵	
19 and 20 June 2003	Thessaloniki European Council, Presidency Conclusions	European Council	None	Follow-up to the Spring European Council	Note the high intensity of the intergovernmental activity in this period.
July 2003	Council Dec 2003/578/ EC ⁹⁶	Council		(1) Three-year policy cycle introduced (2) Four pillars replaced by three overarching and interrelated objectives (full employment, quality and	

⁹⁵ First meeting took place before the European Council.

⁹⁶ [2003] OJ L197/13.

<i>Year</i>	<i>Type of measure</i>	<i>Institution</i>	<i>Legal basis</i>	<i>Content</i>	<i>Other observations</i>
16–17 Oct 2003	Brussels European Council, Presidency Conclusions	European Council	None	productivity, and social cohesion/inclusion) (3) Ten specific guidelines	
Nov 2003	First Kok Report, <i>Jobs, Jobs, Jobs</i> ⁹⁷	—		Reiteration of need for effective social policies, in particular job creation Need to accelerate implementation of necessary reforms of employment	
12–13 Dec 2003	Brussels European Council, Presidency Conclusions	European Council	None	Concurs with issues raised by Kok Report ⁹⁸	
2004					
25–26 Mar 2004	Brussels European Council, Presidency Conclusions	European Council	None	Concern that 2010 targets will not be met unless pace of reform is speeded up	
4 Oct 2004	Council Dec. 2004/740/EC, ⁹⁹ Employment Guidelines	Council	Art 128(2) EC	2003 guidelines applied without alteration	

Continued

⁹⁷ 'Creating more employment in Europe'.

⁹⁸ Namely: (1) increasing the adaptability of workers and enterprises; (2) attracting more people to the labour market; (3) more and effective investment in human capital; and (4) ensuring the effective implementation of reforms through better governance.

⁹⁹ [2004] OJ L326/45.

<i>Year</i>	<i>Type of measure</i>	<i>Institution</i>	<i>Legal basis</i>	<i>Content</i>	<i>Other observations</i>
	Second Kok Report ¹⁰⁰	—		Recognised the failure of the Lisbon Strategy (too many targets, lack of ownership)	
2005					
February 2005	Commission Communication on the Social Agenda 2005–2010 ¹⁰¹	Commission	None	(1) Positive interplay between economic, social and employment policies (2) Promoting quality ¹⁰² (3) Modernising systems of protection (4) Taking account of cost of lack of social policy	
February 2005	Commission Communication on Lisbon relaunch, ¹⁰³ including an Action Plan ¹⁰⁴	Commission			

¹⁰⁰ *Facing the Challenge: The Lisbon Strategy for Growth and Employment. Report from the High Level Group chaired by Wim Kok* (Luxembourg, OPEC, 2004).

¹⁰¹ COM(2005) 33.

¹⁰² Commission, 'Employment and social policies: a framework for investing in quality' COM(2001) 313 and the progress report: COM(2003) 728. Cf G Raveaud, 'The European Employment Strategy: Towards More and Better Jobs?' (2007) 45 *Journal of Common Market Studies* 411.

¹⁰³ 'Working Together for Growth and Jobs—a new start for the Lisbon Strategy' COM(2005) 24, 7. See also SEC(2005) 160, SEC(2005) 193.

¹⁰⁴ SEC(2005) 192.

<i>Year</i>	<i>Type of measure</i>	<i>Institution</i>	<i>Legal basis</i>	<i>Content</i>	<i>Other observations</i>
23–24 Mar 2005	Brussels European Council	European Council	None	(1) Endorsed ECOFIN report on the implementation of the Stability and Growth Pact (2) Relaunched Lisbon Strategy and welcomes Commission's approach (3) Three priorities: (i) knowledge and innovation as engines for sustainable growth; (ii) making Europe more attractive to invest and work; (iii) more jobs for social cohesion	Significant shift of EES to a more liberal, supply-side direction, placing more emphasis on adaptability of workers, including more flexible contractual arrangements. ¹⁰⁵
16–17 June 2005	Brussels European Council, Presidency Conclusions	European Council	None	Adopted 24 integrated guidelines for growth and jobs (17–24 concern employment issues) based on Commission document 'Integrated Guidelines for Growth and Jobs' ¹⁰⁶	

Continued

¹⁰⁵ Rhodes, above n 10, 298.

¹⁰⁶ COM(2005) 141. The microeconomic guidelines were re-ordered by the European Council but the employment guidelines were adopted verbatim.

<i>Year</i>	<i>Type of measure</i>	<i>Institution</i>	<i>Legal basis</i>	<i>Content</i>	<i>Other observations</i>
12 July 2005	Council Dec 2005/600/EC ¹⁰⁷ on employment guidelines	Council	Art 128(2) EC	(1) Three overarching objectives (full employment, quality and productivity, and social cohesion and territorial inclusion) ¹⁰⁸ (2) Activities based on the 8 integrated guidelines (which themselves are annexed to the Decision)	
2006					
23–24 Mar 2006	Brussels European Council, Presidency Conclusions	European Council	None	Emphasised European pact of gender equality	
18 July 2006	Council Dec 2006/544/EC ¹⁰⁹	Council	Art 128(2) EC	Approved 2005 guidelines	
22 Nov 2006	Commission Modernising Labour Law Green Paper ¹¹⁰	Commission	None	Rethinking role of labour law in how it can evolve to support Lisbon Strategy	

¹⁰⁷ [2005] OJ L205/21.

¹⁰⁸ This was followed up by Commission Communication, 'Common Actions for Growth and Employment: The Community Lisbon Programme' (COM(2005) 330) focusing on 8 key measures, and Commission Communication, 'Addressing the concerns of young people in Europe—implementing the European Youth Pact and promoting active citizenship' COM(2005) 206. This was followed up by the Annual Progress Report 'Time to Move up a Gear' COM(2006) 30.

¹⁰⁹ [2006] OJ L215/26.

¹¹⁰ 'Modernising labour law to meet the challenges of the 21st century' COM(2006) 708. Outcome of Communication can be found at COM(2007) 627.

<i>Year</i>	<i>Type of measure</i>	<i>Institution</i>	<i>Legal basis</i>	<i>Content</i>	<i>Other observations</i>
2007					
8–9 Mar 2007	European Council, Presidency Conclusions	European Council	None	Anticipating flexibility document	
21–22 June 2007	European Council, Presidency Conclusions	European Council	None	Anticipating flexibility communication	Period of consolidation? Little innovation?
27 June 2007	Commission Flexibility Communication ¹¹¹	Commission	None	(1) To achieve Lisbon objectives of more and better jobs, new forms of flexibility and security are needed. (2) Four flexibility pathways proposed	
10 July 2007	Council Dec 2007/491/EC ¹¹²	Council	Art 128(2) EC	Maintained 2005 guidelines	
20 Nov 2007	Commission Social Vision Communication ¹¹³	Commission	None	Third-way thinking, emphasis particularly on access and opportunities	

Continued

¹¹¹ ‘Towards Common Principles of Flexicurity: more and better jobs through flexibility and security’ COM(2007) 359.

¹¹² [2007] OJ L183/25.

¹¹³ ‘Opportunities, access and solidarity: towards a new social vision for 21st century Europe’ COM(2007) 726.

<i>Year</i>	<i>Type of measure</i>	<i>Institution</i>	<i>Legal basis</i>	<i>Content</i>	<i>Other observations</i>
5–6 Dec 2007	Employment Affairs Council adopts common principles on flexibility	Council	'In response to the 2007 Spring European Council mandate'		
14 Dec 2007	European Council, Presidency Conclusions	European Council	None	Preparing for 2008–10 Integrated Guidelines	
2008					
13–14 Mar 2008	European Council, Presidency Conclusions	European Council	None	European Council launches the second three-year cycle of the Strategy by confirming that the current Integrated Guidelines (BEPGs and Employment Guidelines) remain valid and should serve for the period 2008–10	
2 July 2008	Commission, Renewed Social Agenda Communication ¹¹⁴	Commission	None	Operationalises some of the ideas in 2007 Communication	
15 July 2008	Council Dec 2008/618/EC ¹¹⁵	Council	Art 128(2) EC	New three-year cycle but content reflects 2005 cycle	As anticipated by Spring European Council

¹¹⁴ 'Renewed Social Agenda, Opportunities, Access and Solidarity in 21st Century Europe' COM(2008) 412.

¹¹⁵ [2008] OJ L198/47.

<i>Year</i>	<i>Type of measure</i>	<i>Institution</i>	<i>Legal basis</i>	<i>Content</i>	<i>Other observations</i>
2009					
19–20 Mar 2009	European Presidency Conclusions	European Council	None	Anticipating EU2020	
May 2009	Prague Employment Summit	Troika presidencies + Commission		Agreed on (i) maintaining employment, creating new jobs and promoting mobility; (ii) upgrading skills and matching labour market needs; (iii) increasing access to employment.	
18–19 June 2009	European Council, Presidency Conclusions	European Council	None	'Flexicurity' is an important means to modernise and foster the adaptability of labour markets	
	Council Dec 2009/536/EC ¹¹⁶	Council	Art 128(2) EC	Maintained 2008 guidelines	
29–30 Oct 2009	European Presidency Conclusions	European Council	None	(1) European Council 'looks forward to discussing a new European strategy for jobs and growth as part of the upcoming review of the Lisbon Strategy' (2) emphasis on active labour market policy	

Continued

¹¹⁶ [2009] OJ L180/16.

<i>Year</i>	<i>Type of measure</i>	<i>Institution</i>	<i>Legal basis</i>	<i>Content</i>	<i>Other observations</i>
2010					
25–26 Mar 2010	European Council, Presidency Conclusions	European Council	None	EU2020 Strategy launched	
17 June 2010	European Council, Presidency Conclusions	European Council	None	Confirmed EU2020 and indicators set	