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**Deconstructing EU old age policy:  
Assessing the potential of soft OMCs and hard EU law**

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**Abstract:** When it comes to EU old age policy, the political science literature primarily focuses on soft governance through the OMC (Open Method of Coordination) on social inclusion, pensions and health care. However, a mapping of EU old age policy instruments shows that developments started earlier and are broader and more influential. Employing a policy analysis perspective, I explore problem perceptions and actor constellations to explain the development of a number of directly or indirectly relevant policy instruments and discuss their (potential) effects. On this basis, I show that the governance capacity of soft steering instruments that seek to trigger reforms in the area of pensions is typically overvalued. In contrast, we tend to underestimate how much the EU shapes national room to manoeuvre on ageing and old age security through legislative instruments establishing individual rights for equal treatment or through the free movement of capital and persons. What is more, tracing when and how a range of instruments developed brings to the fore a number of different actors and arenas, interest constellations and conflict lines. Thus, contrasting with the OMCs, the present analysis provides for an understanding of EU governance as a complex, at times contradictory and inherently political process.

**Keywords:** political science; Europeanization, governance, open coordination, directives; social policy

## Table of Contents

Introduction.....	2
1. Deconstructing governance: Soft OMCs and hard EU law, direct and indirect influence.....	3
2. Policy making without competences: Early developments from the founding days to the 1990s.....	7
3. Legislative instruments .....	9
3.1. The ‘social’ sphere: Prohibiting age discrimination .....	9
3.2. Indirect influence: Supplementary pensions as financial market instruments .....	10
3.3. The same but different: Direct influence through supplementary pensions.....	11
4. Coordinative instruments .....	12
4.1. Indirect impact: Older workers in the European Employment Strategy .....	12
4.2. OMC on social protection and inclusion: Between direct implications and EMU.....	14
Conclusion .....	15
References.....	16

## Introduction

There are good grounds to consider old age policy a least-likely issue to be dealt with at the EU level. Whereas pensions are the most important instrument to deal with ageing workers and old age security at the national level, governments are reluctant to transfer powers over pensions to the supranational level. Pensions are institutionally deeply entrenched (Schludi, 2003), historically linked to nation building through welfare states (Korpi, 1983) and highly salient as can be seen in election disasters and high levels of mass mobilization when reforms are on the agenda (Hartlapp and Kemmerling, 2008). In addition, at the EU level a lack of financial resources renders distributive social policy a closed path – or at least a very narrow one.<sup>1</sup> At the same time, decision-making on social policy is an intricate matter given the growing diversity of Member States (Scharpf, 2002), and the EU regulatory state continues to be characterised as limited (Majone, 2005). Taking a closer look at this policy area, however, a number of instruments exist that influence national old age policies through soft coordination or hard legislation. Much of the existing political science research in the area primarily debates the OMCs and in particular the OMC on pensions (de la Porte and Pochet, 2002b; Natali and de la Porte, 2004; Eckardt, 2005; Pochet, 2005; Lodge, 2007; Kerber and Eckardt, 2007; Natali, 2009). Starting from this observation, I critically ask how far the focus

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<sup>1</sup> Some of the budget lines dedicated to the European Social Funds allow for financing projects for ageing workers. However, there is no distributive policy primarily targeted at older workers, let alone one that covers pension issues.

on soft governance via the OMC adequately reflects EU governance and its potential effect on old age policies.

Telling the story of how EU old age policy emerged, I will trace the form and substance of a range of EU instruments potentially impacting on national old age policies instead of focusing on the OMC as the most visible and most directly related instrument. This matters empirically as well as conceptually. First, analysing only the OMC on pensions is *too brief*. Going beyond an isolated assessment, this paper argues that EU old age policy was initiated much earlier, unfolding over at least two decades. This is important for understanding whether EU governance has changed over time, and also for assessing the relevance of specific contextual conditions in relation to the more long-term systemic factors, e.g. Member State opposition to certain measures at a certain time or the action capacity of the European Commission in the EU political system. Secondly, it is *too narrow*, because a number of (often less well-known) instruments work in parallel, exerting direct influence (e.g. pension portability), belonging to the social policy context (e.g. age-discrimination or participation of older workers in the labour market) or mattering for old age policy indirectly (financial services). Looking at their sum enables us to gain an adequate understanding of the different actors, arenas and interest constellations involved and thus of EU old age governance as a complex, at times contradictory and inherently political process (cf. Barbier, this issue). Thirdly, and following from the first two points, this has implications for the *depth and breadth of (potential) effects* on national social policy arrangements. While the governance capacity of the ‘soft’ OMC on pensions is typically overvalued, hierarchical influences of regulatory initiatives, e.g. via individual rights for non-discrimination or indirect influences of a fiscal logic on national social policy via the European Monetary Union are often underestimated.

What follows is a brief historical tracing of direct old age policy without formal competences since the 1980s (section 2). Turning to more recent policy developments, problem perceptions and actor constellations will be discussed. Here, legal instruments that exert their potential effect on old age through social legislation (anti-discrimination) or indirectly (financial services) (section 3) will be contrasted with soft governance instruments coordinating national policies in the area of employment and pensions (section 4). The final section offers conclusions.

## **1. Deconstructing governance: Soft OMCs and hard EU law, direct and indirect influence**

In the late 1990s, the EU level witnessed the emergence of the Open Method of Coordination (OMC). Taking a starting point with the European Employment Strategy in 1994 (Schäfer, 2004), it was constantly reformed and extended to other areas such as social protection and inclusion, education, youth and training but also taxation – all areas where Member State competence prevails. The OMC has attracted much interest from political science research fascinated with what was considered a new policy instrument. The dominant hope was that learning among Member States would be possible through coordination, negotiation and soft

steering. Concrete measures centre on jointly identifying and defining policy goals to be reached, measuring performance with new instruments, and exchanging best practices. “Its [OMC, MH] real effectiveness and influence nationally is part of a collective learning process” (de la Porte and Pochet, 2002a: 13; also Regent, 2003: 191). Ideally, learning was understood as a process free of (conflicting) interests and unaffected by power relationships. Many believed this could lead to a form of discursive democracy for the benefit of the integration process and European societies more generally (Goetschy, 2000; Jacobsson and Schmid, 2003; Zeitlin and Trubek, 2003; Zeitlin, 2005b; Sable and Zeitlin 2008, drawing on “democratic experimentalism” established by Cohen and Sable, 1997; Dorf and Sable, 1998). In the same breath it was often claimed that the OMC had significant effect. E.g. was the OMC attributed a “prominent part” in the introduction of a negative income tax for low income (*Prime pour l’emploi*, PPE) and the *Plan d’Aide au retour à l’Emploi* (PARE) in France (Zeitlin, 2005a: 451), in Germany it was seen as „part of the inspiration and justification“ (Zeitlin, 2005a: 451) for the youth employment program (JUMP) and in Denmark and Sweden it is described as a trigger for concrete measures against sex segregation in the labour market and integration of minorities (Zeitlin, 2005a: 452).

Although today in many accounts learning is still considered the crucial mechanism of OMC induced policy changes and it is argued that there are “unequivocal effects on national politics through the articulation of common targets, the collection of comparable data on key indicators, the agreement on joint priorities, and valuable opportunities for mutual learning” (Weishaupt and Lack, 2011: 33) other mechanisms of change are increasingly covered to support the view that “the OMC has contributed significantly to both substantive and procedural reforms” at the national level (Heidenreich and Zeitlin, 2009). Overall empirical work has drawn a more nuanced picture over time, critically reflecting the effect of the OMC (Büchs, 2007; Barbier, 2008; Kröger, 2009). Surely, national actors often alter their frames of reference with respect to policy goals established at the EU level, and this might in turn influence what is conceived or discussed as feasible reform at the national level. It is much more difficult, though, to show concrete and direct effects on complex national reforms or outcomes of policy change that result from the OMC (cf. different chapters in Kröger, 2009). More sceptical views on the influence of the OMC stress the a priori limited ability of the OMC as an instrument to trigger learning processes, a lack of shared understanding and definitions of core notions (cf. Koukiadaki, this issue), the limited steering potential of learning where it takes place and the fact that policy effects depend on how OMC goals and influences are digested under specific national political and economic conditions (Hartlapp, 2009).

With OMCs taking a prominent place in the EU governance literature generally, this can also be claimed more specifically for the OMC on pensions. When it comes to EU old age policy in the last decade, much of the literature has engaged primarily with the OMC on pensions, later reformed into the OMC on social protection and today reframed as the OMC on social inclusion, pensions and health care (de la Porte and Pochet, 2002b; Natali and de la Porte, 2004; Eckardt, 2005; Pochet, 2005; Lodge, 2007; Kerber and Eckhardt, 2007; Natali, 2009; for an exception, see Haverland, 2007; Haverland, 2011). In contrast, this paper deconstructs

EU old age policy in terms of different instruments and in different policy areas. According to Barbier (this issue), EU old age governance is understood as purposive intervention of EU level actors exerting potential effect on national pension policies including transitions from the labour market. I employ the notion potential effect or potential influence to underline that although in some cases influence can be documented easily, systematic judgment on de facto effect and influence requires a different research perspective. First, a specific national situation would need to be assessed before tracing and judging the respective changes flowing from EU policy.

One way to approach governance is through a perspective focused on instruments (cf. Bähr et al., 2007). In this view, the open method of coordination is characterized as a coordinative governance instrument understood to matter by triggering learning in deliberative processes (e.g. Zeitlin, 2005a, Sable/ Zeitlin 2008). This contrasts with legislative policymaking under the community method. Here, common EU standards exist and are implemented through legislative instruments (typically directives, regulations or decisions) as part of a regulatory framework. Consequently, looking at the different instruments, I differentiate between coordinative interventions (mainly OMCs) and hard steering through legislation.

Turning to the policy areas where we can observe EU governance on old age, the table places pensions as the core area of respective policies at the nation-state level. Existing EU policy instruments matter directly where they target national pension policies explicitly. However, we need to look at other policy areas too, and not just the ongoing reform efforts to bring private elements into old age security. Where EU instruments do not address pensions but nevertheless impact on their form or their substance, they can be classified as having indirect influence. Among EU instruments exerting indirect influence, market regulation is quite important (Haverland, 2007), as are macroeconomic policies in the context of the EMU.<sup>2</sup> Finally, between them we can observe instruments from the social domain (equal treatment and employment). When it comes to actors involved in governance, this perspective implies focussing not only on the EU pension policy arena, where typically the Commission Directorate General (DG) for Employment and Social Affairs interacts with representatives from pension institutions, employer organisations and trade unions. In the Council, matters are negotiated and decided among Social Ministers and the respective Employment and Social Affairs Committee in the European Parliament. Other portfolios and organised interests both at the national and supranational level add to the picture of actors and arenas, e.g. the DG for Internal Market or DG for Economic and Financial Affairs and their respective stakeholders, such as industry organisations.

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<sup>2</sup> Note in this respect that the research was conducted as part of a large project ([http://ec.europa.eu/research/social-sciences/projects/398\\_en.html](http://ec.europa.eu/research/social-sciences/projects/398_en.html)) which consciously decided to abstain from systematically including the EMU in EU old age policy analysed. This is not to say that the EMU does not exert indirect influence on national pension policies. It constrains Member States' abilities in anti-cyclical macroeconomic policies by limiting budgets and spending policies on social protection (e.g. Featherstone, 2005). What is more, it has been shown that it influences retrenchment and reform of pension systems, especially of single pillar systems (Hering, 2006).

**Table 1: EU old age policy: Instruments and areas (not exhaustive)**

<b>Instruments / areas</b>	<b>Legislation</b>	<b>Coordination</b>
<b>Direct</b>	<i>Supplementary pensions</i> Portability when moving in the EU (98/49/EC, revised proposal pending)	<i>OMC Pensions</i> (today: Social inclusion, pensions and health care)
<b>Social</b>	<i>Anti-discrimination</i> Employment Framework Directive (2000/78/EC) & proposal for Equal Treatment in Services (pending) Association Belge des Consommateurs Test- Achats ASBL (C-236/09) Römer (C-147/08)	<i>European Employment Strategy</i> Stockholm & Barcelona target
<b>Indirect</b>	<i>Supplementary pensions</i> Institutions for Occupational Retirement Provisions (2003/41/EC)  Denkavit International (C-170/05) Robins (C-278/05)	<i>Stability and Growth Pact</i>

Source: author

In the following sections, I describe EU old age policy since the 1980s. Conducting policy analysis, I explore policy developments, problem perceptions and actor constellations and discuss their (potential) effect. They will be classified along the conceptual lines of instruments and areas. What comes of the understanding of EU old age governance as a complex and contested area with a number of instruments, actors and interests is that this mapping exercise can hardly be complete. However, the examples were chosen to allow an understanding of the breadth and depth of the policy instruments, actors and interests constituting EU old age governance. The material for the analysis is drawn from primary and secondary sources. 26 semi-structured expert interviews were conducted with European Commission officials from different DGs and hierarchical levels as well as with interest group representatives (2006-2009).<sup>3</sup>

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<sup>3</sup> In order to preserve anonymity, I refer to these interviews as “COM1”, “NGO2”, etc.

## 2. Policy making without competences: Early developments from the founding days to the 1990s

Approaching policy instruments in a historical sequence, we start with equal treatment rulings of the Court of Justice of the European Union (CJEU)<sup>4</sup> that substantially changed national pension arrangements. In the 1980s, Defrenne (C-149/77), Marshall (C-152/84) and Barber (C-262/88) put in place the equal treatment of men and women with respect to retirement age. Until today, it can be argued that “[t]hus far, this ruling has had the most significant effect on older workers of any of the actions of the EU” (McDonald and Potton, 1997: 300). As a result, national policies on ageing have been moving in the same direction with a view to the equal treatment of the sexes – moderate convergence can be asserted. We note, however, that this instrument was not intended or specifically looked at as EU old age policy, but can be situated in the social area.<sup>5</sup> This is in juxtaposition to the following developments that directly addressed old age but are of very limited effect.

In the early 1990s, a combination of interests and initiatives in the European Commission and the European Parliament<sup>6</sup> prepared the ground for the *First Action Programme for the Elderly* (1991-1993). Earlier instruments had only touched upon older persons indirectly. The Action Programme put forward by DG Employment and Social Affairs now directly called for a new old age policy instrument by implementing the (non-binding) *Charter on Fundamental Rights of Workers*. Here, older persons were addressed as a separate group of people with specific rights, such as the right to resources to afford a decent standard of living, minimum income and medical and social assistance (Art. 24 and 25). An *Action Programme* focused on preventative strategies to face economic and social consequences of an ageing society and proposed measures to develop the potential of older people. It culminated into the *European Year of Older People and Solidarity between the Generations* (1993). Though they were barely visible politically, in substance these initiatives mark issues that even today – about 15 years later – still appear innovative at the national level (e.g. flexible retirement age). Influence on national policies took place through altering discourses and by offering some very limited financial incentives.

In preparing these initiatives and ensuing regulatory policy, the European Commission consciously altered the constellation of actors involved in old age governance. Lobbying activities for policy on older people at the EU level started in 1982 with the founding of

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<sup>4</sup> For reasons of clarity I refer to the CJEU throughout the text although in some instances ECJ would be the correct historical term.

<sup>5</sup> Another early EU old age policy instrument in the social area is the coordination of national social security systems (cf. regulations on the “Freedom of movement for workers within the Community”, 1612/68/EEC). Seeking to increase mobility of workers in the common market, it regulates interfaces of social protection. Although the instrument explicitly covers pensions, its potential influence is limited since comparability between national systems is sought without interfering in national policies.

<sup>6</sup> Most importantly, the Recommendation entitled “Principles of a European policy on retirement age” put forward by the Commission in 1982 and the founding of the Intergroup Ageing in the European Parliament in 1984.

Eurolink Age, whose agenda includes organizing the exchange of information, expert consultation and direct contact to EU institutions via the “Liaison group on the Elderly” and Intergroup Ageing. However, as an EU-wide network of national non-profit organizations, Eurolink Age was not directly involved in EU legislative policymaking. FERPA, by contrast, an organization for retired trade unionists, which had a large membership, was clearly rooted in a corporatist policy understanding (cf. Marginson and Keune, this issue). When it came to the formulation of EU old age policy, FERPA was a difficult partner for the European Commission to engage in innovative policymaking. According to interviewees, FERPA was embroiled in internal struggles and was by and large not very enthusiastic about EU-level initiatives for ageing workers. Rather, this was an issue whose place was clearly seen at the national level (interview COM18, 2008). In this situation, the proactive involvement of civil society groups and the broadening of stakeholders by DG Employment and Social Affairs can be understood as a strategic move, “trying to generate the pan-European interest group network on an NGO basis, which could sustain us and which would give some coalition partners which we could use against the Council” (interview COM22, 2008, Hartlapp, 2011). What matters for EU governance in this area is that the move decisively altered the number and orientation of actors involved in future policymaking. To this day, trade unions are rather reluctant to shape EU old age instruments, while NGOs are very active in the field. The most recent example is responses to the public consultation on the European Year for Active Ageing (planned for 2012), where NGOs participated in higher numbers than public institutions, while only two trade unions raised their voice (European Commission, 2011).

Drawing on these developments, a second Action Programme was proposed under Commissioner for Social Affairs Flynn in 1995. Intended to triple the financial volume of the first Action Programme, it was rejected by Member States.<sup>7</sup> As a result, the European level was left with a vacuum in terms of how to approach the issue through regulatory activities directly aimed at old age.<sup>8</sup> According to an interviewee, this situation raised the question, “should one imagine that Europe would have a typical dossier of older people like Member States had, with everything that applied to older people, with certain policies for certain age groups, or should we have something else, and what were the other instruments?” (interview COM22, 2008). The question was not decided consciously, but answered incrementally under changing interest constellations within the given set of institutional constraints. In the following, I discuss where and how “escape routes” (Héritier, 1999) and “bypasses to social Europe” (Obinger et al., 2005) were taken to address questions of ageing societies and old age security even when direct competencies were lacking. They constitute the purposive intervention of EU-level actors exerting potential effect on national pension policies including transitions from the labour market and can be situated alongside legal and coordinative instruments in different policy areas.

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<sup>7</sup> The German and UK governments were reluctant to agree out of a matter of principle to block spending policies and creating any precedence of action programs respectively.

<sup>8</sup> The proposal for the second Action Program was sitting in front of the Council for a number of years and was withdrawn in 2000 under the Prodi Commission only.



### 3. Legislative instruments

#### 3.1. The ‘social’ sphere: Prohibiting age discrimination

Anti-discrimination has been a particularly active field for EU policymaking since the founding days. Yet for a long time, equal treatment was thought of in the context of discrimination for reasons of nationality and sex. The Amsterdam Treaty first called “to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, *age* or sexual orientation” (article 13, now 19, on the negotiation process, see Flynn, 1999). A short time later, the Commission presented a proposal for a general framework for equal treatment in employment and occupation (2000/78/EC, short: Employment Framework Directive). Anti-discrimination standards that had been established for the sexes were extended to other areas. The directive was adopted when a window of opportunity emerged through the critical stance many governments took towards the election of populist right leader Haider in Austria (e.g. Tyson, 2001). However, the form and substance of the directive had been prepared prior to this when DG Employment and Social Affairs strategically developed the policy area (and with it the EU legal order), orchestrating an interplay with the CJEU and strengthening actors that would support the directive (cf. Hartlapp, 2011). This instrument prohibits direct and indirect age discrimination in the workplace. Its effects are visible in the disappearance of age limits in job postings. Beyond that, its influences can be traced in changes made to corporate human resources policies.

However, Member States successfully pushed for more relaxed rules that allow discrimination when it is objectively and reasonably justified or seeks a legitimate goal (Art. 6). What is legitimate is legally uncertain and thus subject to concrete rulings. A short time after the transposition deadline was reached, the CJEU clarified in a first indicative case that regardless of the exemptions, equal treatment was given priority over enhancing labour market opportunities for older workers (C-144/04). In what is known as the Mangold case, a 56-old employee questioned the German *Teilzeitbefristungsgesetz*, which relaxes temporary contract limits for workers over 52 to improve their incorporation into the labour market. The CJEU held that older workers should in principle be treated equally to other workers even though this might worsen the situation for older unemployed persons. So far, it remains an open question how legal uncertainty will influence national policies and practices beyond this case, e.g. with respect to fixed retirement ages (Palacios de la Villa C-411/05 or Prigge, Fromm, Lambach C-447/09) or potentially with respect to seniority in pay inhibiting older people’s employment.

Anti-discrimination policy is increasingly considered fundamental rights at the EU level (Geddes, 2004), implying that rather than an employee in a labour relationship any individual in European societies is the addressee. A case in point is the most recent Commission proposal for a directive that seeks to extend protection against discrimination beyond employment to the social sphere. In the case of adoption, age-discrimination is prohibited in social security (including social protection and health services), education and access to and

supply with services. Examples cover barrier-free access to public transport and credit – insurance companies and banks are no longer allowed to use age-based actuarial factors as practiced before. The directive faces vehement opposition from Germany as well as a number of other Member States (including Czech Republic, Italy, Lithuania and Malta, cf. EUobserver, 2010). Concerns centre on how to assure that characteristics potentially linked to the reasons for discrimination can be used in assessing the risk portfolio of customers without turning them into a blank justification for different assessments. Arguments about the likely outcome of this second directive therefore seem premature. However, in the case of adoption, the insurance industry would have to change its practices considerably. Risks of individuals with very different characteristics would have to be pooled in much broader baskets. This line has been supported by CJEU rulings made during the course of legislative negotiations, most importantly in *Association Belge des Consommateurs Test-Achats ASBL C-236/09* (cf. also *Römer C-147/08*).

### **3.2. Indirect influence: Supplementary pensions as financial market instruments**

With reform trends increasing the importance of schemes involving a second and third pillar (Ebbinghaus, 2011), we can observe the emergence of EU policy for supplementary pensions. Traditionally, pensions are an issue for social actors. However, where pensions are seen as financial service instruments, they fall under the Single Market, and EU regulations seek to prevent distortion of competition between national and external providers. Earlier instruments of DG Internal Market on supplementary pensions had been blocked in the Council where proponents of a pension fund culture (Ireland, Great Britain, to some extent Netherlands) favouring investment freedoms and Member States with an insurance culture (France, Germany) highlighting the need to protect the insured clashed (Haverland, 2007). Faced with a continuous stalemate, even an amended version (COM(93) 237final, 26 May 1993) had to be withdrawn in December 1994.<sup>9</sup> When a couple of years later, financial interests and markets took centre stage with the *Financial Action Service Plan* (1999-2004), the context was favourable for a new proposal on Institutions for Occupational Retirement Provisions (IORP, 2003/41/EC). The directive sets prudential rules on operation and investment strategies of IORPs. It harmonizes requirements on supervision authorities, their intervention rights and coverage rules. Influence in Member States is likely to be substantial. Ferrera (2005: 30) says that “the institutions affected by the Directive cover about 25% of the EU labour force and manage assets worth €2,500 billion, or about 29% of the EU GDP.” The directive is best understood not as a social policy but as a financial market instrument, since questions touching upon typically controversial (re)distributive implications as we know them

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<sup>9</sup> A couple of days later the Commission claimed to interpret Treaty rules and simply adopted a communication with largely the same wording, a move Member States judged to overstep Commission competences. The CJEU annulled the communication on the grounds that a legislative instrument should have been used (France against Commission C-57/95, 20 March 1997, on annulment actions more generally Bauer and Hartlapp, 2010).

from social policymaking are excluded from the debates and directive (Mabbett, 2009: 776). However, regarding unsolved questions, we may expect the CJEU to drive further policy developments. Cases in point are the rulings *Denkavit International* (C-170/05) judging against the unequal taxation of dividends from transferred pension funds, and *Robins* (C-278/05) on accrued pension rights in case of insolvency. In this case entitlements of British employees were considerably reduced, as the assets of the supplementary company or inter-company pension schemes were not sufficient raising the issue of conditional state liability. Given these developments, EU old age policy could gain more influence in the years to come through legal decisions on supplementary pensions.

### 3.3. The same but different: Direct influence through supplementary pensions

Supplementary pensions as regulatory substance are also critical to legislation concerned with the free movement of persons. What happens to supplementary pensions when a worker decides to move to another Member State? Are pensions taxed twice, once when acquired and once upon consumption? Are acquired rights maintained? Here, a lack of coordination between supplementary pension schemes might substantially curb worker mobility. Problems arise in situations where a worker has spent her working life in a country where occupational pensions are taxed when paid into a fund, but she decides to spend retirement in a country where taxes are due upon consumption of benefits.

Policy developments in this area have been characterised by input from a network of Member State experts on supplementary pensions (since 1992), the “Veil” *High Level Group* (set up in 1997) and the *Pension Forum*.<sup>10</sup> They reported to DG Employment and Social Affairs as well as to DG Economic and Financial Affairs on multiple occasions that the prospect of a loss of supplementary pension rights is a clear disincentive to mobility and represents a serious obstacle to the exercise of the right of free movement as foreseen by the EC Treaty. Taking up these arguments, DG Employment and Social Affairs proposed a directive “safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community” (98/49/EC). The directive regulates that acquired rights must be maintained in cases of cross-border movement. All EU nationals have to be treated equally and benefits should be portable to the territory of other Member States. As for the IORP Directive, differences between Member States impeded the adoption of more far-reaching standards proposed by the Commission, e.g. on equal tax treatment for contributions by workers paying

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<sup>10</sup> The Pension Forum is constituted as follows: one seat per Member State, four seats for the other EFA member countries, 14 seats for EU-level social partners, three seats for the European Federation for Retirement Provision (EFRP), one seat each for European Federation of Investment Funds and Companies (FEFSI), Association of European Cooperative and Mutual Insurers (ACME), International Association for Mutual Assistance (AIM), European Insurance Committee (CEA), European Association of Paritarian Institutions (AEIP), European Association of Public Sector Pension Institutions (EAPSPI), Groupe Consultatif des Associations d'Actuaires des pays de la CE (GCAACE), Banking Federation of the European Union (FBE) and European Older People's Platform (AGE).

in the home Member State from the host Member State. This left room for functional arguments to finally curb the continuing problems and arguments stressing that more social policy instruments were needed to assist the free movement of persons.

A second proposal for a directive on the portability of supplementary pension rights was proposed in 2005 (COM(2005)507). It seeks to establish that pensions can be accumulated even on the basis of short employment periods and at the beginning of a working career, and that they can be carried over to another scheme when taking up a new job. Moreover, the directive aims at safeguarding dormant rights through inflation and salary adjustments. The Council pressed for substantial changes especially on compulsory age and vesting periods. Germany and the Netherlands have been among the strongest opponents (EIRR, 2005). Consequently, a revised proposal put forward by the Commission in 2007 appears substantially watered down. Replacing harmonisation requirements with minimum standards, introducing compromises on minimum age (now 23 years) and the necessary length of employment relationships (2 years), the proposal is described by a Commission official as “now lacking any portability” (interview COM18, 2008, translation MH). The directive is still pending in the Council. In a more recent Green Paper (7 July 2010), the Commission stressed its interest in and support for adoption of the directive. In this case, the directive would substantially change national occupational pension schemes with considerable implications for any worker taking up a new job – not just in cross-border cases. It would alter the traditional purpose of supplementary pensions in Member States such as Germany, which is to bind employees to their employer (cf. Mabbett, 2009).

## **4. Coordinative instruments**

### **4.1. Indirect impact: Older workers in the European Employment Strategy**

Taking a look at coordinative EU old age policy, the *European Employment Strategy* comes first in the sequence of instruments. First established in the early 1990s, it has been the ‘role model’ for other OMCs. The instrument can be situated in the social area, and for the focus of this paper it is interesting to see how employment of older workers moved from the sidelines to become a core goal of the OMC.

In the beginning, older people – in stark contrast to young people – did not receive specific attention. Older people are targeted in the employment guidelines for the first time in 1999. The respective recommendations issued at Member States put a lot of emphasis on the pull factors and incentives from the tax and benefit systems. If these were removed – the message went – the market could easily solve the (un)employment problem of older workers. Two years later, a specific guideline “Developing a policy for active ageing” was adopted at the Stockholm Council. Member State governments agreed to quantify the employment target for older workers to reach 50% by 2010. Looking at the workers most impedimental to that goal

(women, young and old workers) and addressing them with specific measures was seen as functional to reach the overall employment goal of 70% as set in the Lisbon Agenda (interview COM14, 2006). A second quantitative target of “65 as the average exit age by 2010” was adopted a year later (Barcelona target). The ambitious goal to increase the average exit age by five years had been pushed for by the Spanish president with support from Great Britain (interview COM22, 2008).

The means for reaching these targets have developed over time. We find a catalogue of measures such as continuous training, adoption of working conditions, phase retirement, internal flexibility measures, tutoring where experienced workers can pass know-how on and awareness-raising as well as the call on the Commission to organize an exchange of information, experience and good practice concerning employment of older workers. Their effects have to be seen in the context of the Lisbon Process at the time, which set the goal for the EU to become “the most dynamic and competitive knowledge-based economy in the world”. For the elderly, the most coherent notion developed was that of ‘active ageing’ policy, understood as an individual and societal strategy of “working longer, retiring later, being active after retirement and engaging in healthy ageing life styles even when frail” (European Commission, 1999).<sup>11</sup> Two aspects seem distinct to the EU’s ‘active ageing’ as a policy approach: First, (early) retirement is not seen as a beneficial achievement and due right of workers. Secondly, older workers are perceived as a resource to be mobilised to participate in the labour market. This perspective contrasted with policies and practices in most of the Member States adhering to the continental welfare state model. Here, in the late 1990s, the typical answer to ageing societies was still to shed older workers and provide for living through insurance and allowances at a relatively early age (Hartlapp and Kemmerling, 2008). In contrast to these practices, the broad idea of the *European Employment Strategy* and ‘active ageing’ clearly carries with it that participation in the labour market is the (perceived) best way to prevent social exclusion and to maintain social cohesion (Schäfer, 2005). It needs to be stressed that the goals set and policies proposed are mediated through national institutions and integrated into national programs. Concrete effects remain unclear; all that can be said is that where influence is traceable, it most likely carries with it the notion of re-commodification. Or as Weishaupt (2011: 34) argues in an encompassing recent analysis “the danger remains that the EES will be hijacked by actors with a neo-classical view on the economy with detrimental consequences for the “smart, sustainable and inclusive” growth goal”.

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<sup>11</sup> The concept was developed in the communication entitled “Towards a Europe for all Ages – Promoting Prosperity and Intergenerational Solidarity” (Commission of the European Communities, 1999) and discussed at the Commission conference “New Paradigm in Ageing Policy” (14-15 November 1999). Official documents lack a clear definition of ‘active ageing’ but note that it gave the name to the current European Year 2012 (“European Year for Active Ageing”).

#### 4.2. OMC on social protection and inclusion: Between direct implications and EMU

Finally we turn to the OMC on pensions – the starting point for the argument presented. From the mid-1990s onwards, debates on social protection issues, especially pensions as well as health and long term care for the elderly, started to gain momentum at the national and international level. OECD activities and debate proved particularly influential at the EU level, where discussions were dominated by financial players from 1999/2000 on (interview COM18, 2008). They stressed increasing pressures on public spending and highlighted the need for sustainable public finances in the context of the EMU. These concerns are reflected in progressive policy and structural developments. With respect to structure, in 1999 an *Ageing Population* (AWG) subgroup was set up in the influential *Economic Policy Committee*, which is made up of experts from national administrations, DG Economics and Financial Affairs, the ECB and the OECD, and which publishes forecasts on Member State public pension expenditures (interview COM13, 2006). With respect to policy content, the long-term sustainability of public finances was to be assessed as part of the *Stability and Growth Pact*. From this point on, the *Broad Economic Policy Guidelines* (BEPG) were to contain recommendations for public pension systems (Agence Europe N°7986, 18.6.2001). The dominant discourse at the EU level was “we must control public spending on benefits” (interview COM19, 2008) and that EU policies therefore have to address pensions.

Shortly after the BEPG had become the entry point for EU policy developments on pensions, the Council reacted decisively. Member State governments showed an interest in addressing questions of pension systems by highlighting concerns other than long-term financial sustainability. “The Portuguese Presidency [...] attempted to reduce the virtually exclusive competence of the Economic and Financial Affairs Council (ECOFIN) over the Broad Economic Policy Guidelines and to take employment and social concerns into account in their drafting” (Vandenbroucke, 2002: 8). Supported by the Social Council formation, DG Employment and Social Affairs developed EU pension policy goals focusing on health insurance, social-security benefits, social security and an ageing population. Under the Belgian Presidency in 2001, budget orientation and the focus on adequate pensions were integrated. The Social Protection Committee and the Economic Policy Committee cooperated (for the first time) to agree on the process and goals of the OMC on pensions. The emergence of the OMC on pensions has been described in more detail elsewhere (e.g. Lodge, 2007; Pochet, 2005). What is important for the focus of this paper is that conflict lines ran between economic and financial players and social players rather than between the supranational and the national level (Hartlapp, 2007; Kerber and Eckhardt, 2007). Put differently, the emergence of EU-level pension policy – hitherto the exclusive domain of the national level – is best understood via the intrusion of EU fiscal and economic concerns into social policies. This is most convincingly argued by the director of the responsible department at DG Employment and Social Affairs. “If the Open Method of Coordination was not used in the area of social security, pension systems would be almost exclusively analysed in negative terms on the European level; as a risk to public finances and an obstacle to raising employment rates (Vignon, 2003: 14).

Summarizing developments of the OMC on pensions describes how decision-making difficulties among Member States that are especially sensitive where EU policy impinges upon national welfare state institutions are more likely to be overcome under specific constellations. This is the case where advancing economic integration exerts pressure on national welfare states, thereby changing the fall-back option of Member States. Turning to the effects at the national level “there is some evidence of convergence (together with persistent differences) between [...] the social insurance systems, and [...] multi-pillar systems” (Natali and de la Porte, 2004: 256). Beyond developments will most likely impact on the relative balance between actors involved in ageing policy. The influence of the ministry of finance as well as related arenas should increase relative to social and labour policy.

## Conclusion

In deconstructing EU old age policy, this paper mapped different instruments. These can be classified as legislative or coordinative instruments that exert direct influence, that matter through social policy or that impact on Member States indirectly through other policy areas. While the political science literature has paid much attention to the OMC on pensions, the analysis carried out in this paper shows that a number of different instruments exist in the legislative area. This is a very dynamic area of EU governance, as a number of highly relevant CJEU rulings illustrate (cf. also Martinsen and Falkner, 2011). The analysis also emphasised that EU policy on old age is carried out through other coordinative instruments beyond the OMC on pensions. Summarizing the most relevant empirical and conceptual implications, we observe the following:

EU old age policy started about two decades earlier than what is typically assumed as the starting point for the OMC on pensions (2001). Over time, the substance of policymaking changed from attempts to develop a genuine EU old age policy to one that includes a diverse bundle of instruments ranging from financial service regulation to freedom of movement, labour law and equal treatment. Each instrument emerged in a different arena among different actors and follows different goals. It remains an open question whether EU old age policy would have looked differently if Member States would have agreed to more far-reaching genuine social instruments at some earlier stage – e.g. a second Action Programme for the Elderly leading to a number of alternative (hierarchical) instruments.

Closely related to this observation is the fact that influences exerted on national pension policies including transitions from the labour market are unclear and partially contradictory (e.g. case law on equal treatment and employment). Attempts have been made to integrate other measures, e.g. economic and social concerns on pensions, in a separate OMC. According to a high-ranking Commission official, the idea to increase coherence among existing EU instruments is even at the core of the Green Book on Pensions (Fischer, 2011: 86).

Based on the analysis, I argue that coordinated EU policy seeking to trigger reforms in the area of pensions or the employment of older workers is typically overvalued. In contrast, we tend to underestimate how much the EU shapes national room to manoeuvre through legislative instruments establishing individual rights and requiring equal treatment regarding age or free movement of capital and persons. Finally, this article has only touched upon the limits the EMU sets for national policies on old age. It is highly likely that fiscal concerns are the most substantial EU influence on national ageing policies, and this has become even more tangible during the crisis.

Although at the national level we are inclined to think of old age policies as belonging to the social arena, at the EU level, market and economic policy instruments substantially affect the substance and content of EU old age policy. Interests, actor constellations and available Treaty bases better enable the adoption of instruments that strengthen economic concerns over social concerns and (neo)pluralist interest involvement over corporatist arrangements. With respect to actors, EU old age policy differs crucially from what we know about the making of national welfare states linked to nation-building and class alignment. This is likely to alter the balance of power between actors and interests at the national level.

Finally, there are good reasons to believe that this assessment should not be limited to old age policy. It is likely to apply to other areas of social policy, such as health care. Here too, we see a substantial amount of legislative developments linked directly (e.g. patient mobility or cross-border health care) and indirectly (anti-discrimination instruments and service provision) to EU governance. As for EU old age policy, these developments bring to the fore a number of different actors and arenas, interest constellations and conflict lines. More generally, we may thus conclude that a broader perspective would be beneficial, wherein we understand EU governance as a complex, at times contradictory and inherently political process.

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