

1. Introduction

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Over the last twenty years, European employment and social policy have undergone a dramatic transformation. The burden of labour market adjustments was transferred to the individual employee or welfare recipient via activation policies. Attention has shifted from the provision of social protection to the promotion of employment: new forms of governance, accompanied by the introduction of new forms of policy delivery and audit, have emerged as central characteristics of the new European Employment Strategy (EES). One main focus of this book lies in addressing the limitations of this approach, limitations which became particularly apparent during the financial crisis since 2008. The book's aim is to provide ideas for an alternative European reform agenda that employs insights from two influential theoretical approaches, the transitional labour market approach and the capabilities approach, drawn from the work of Amartya Sen.

The two theoretical approaches share the fate of being known in Brussels, but misunderstood and neglected as far as their implications for European policy are concerned. This observation is especially pertinent for the capabilities approach but also holds true for the transitional labour markets approach, despite the influence it has had on the EES.¹ The neglect is in part related to a drift from policies designed to substantially affect social reality to measures that are merely intended to amplify political communication, a trend that is gaining ground in Europe (and which would merit further study but lies beyond the confines of our book). Announcing a rising employment rate is much more satisfactory in terms of communication than undertaking far-reaching action that truly improves the employment situation but fails to grab media headlines. The flexicurity concept promoted by the European Commission seems to us an example for this trend; in any case, as Günther Schmid shows in Chapter 3, this concept, if misunderstood, bears the danger of increasing employment precariousness rather than securing transitions in labour markets.

The objective of our book is to make proposals for the transformation of content and method of European employment policy. The transformation requires clearly defined concepts and innovative empirical work and implies a two-pronged approach: criticism and proposals that reciprocally support each other. The book is organised in two parts, both demonstrating how the twin approach of criticism and proposal can be used in specific areas. Part I describes and compares the two theoretical and political approaches covered by the book, the transitional labour market approach (Chapters 2 to 5) and the capabilities approach (Chapters 6 to 8), and Part II (Chapters 9 to 12) presents implications for European policy which include the need for new welfare typologies that are capable of apprehending real differences in national welfare models; the necessity of a new reflexive law and support for soft law solutions like codes of conduct and other mechanisms of self-regulation; and promotion of constitutive conventions for the common market of goods, capital, services and employment in Europe. From these policy implications emerges the outline of an 'integrated approach to employment' that thoroughly renews the bases of the current approach.

PART I: SECURING TRANSITIONS AND PROMOTING CAPABILITIES

Of the four policy agendas – flexibility, flexicurity, capabilities and transitional labour markets – that Peter Auer and Bernard Gazier outline in Chapter 2, the last two deserve close attention for the future of employment in Europe, and these two perspectives are explored in this book. As regards the first two policies, one – flexibility – contradicts the objectives of the other – flexicurity. The flexibility agenda that emphasises deregulation of the labour market, external numerical flexibility (instantaneous adjustment of the amount of work to the vagaries of the economy) and weakening or elimination of legal and social protection in the event of redundancy is diametrically opposed to the flexicurity agenda as pursued in the EU's EES and Lisbon strategy of 2000 and the ILO's Decent Work Agenda of 1999. However, questions are beginning to emerge about the adequacy of the flexicurity agenda in light of the current crisis. It is an open question if flexicurity represents a way out of the crisis, or simply goes hand in hand with this situation.²

The topic of reconciling flexibility and security dates back to debates surrounding the launch of the EES at the Luxembourg summit meeting in 1997. Günther Schmid and Robert Salais emphasised in similar vein but from separate perspectives the possibility and political advantages of this

positive dynamic relationship in their contributions to the research conference that accompanied the 1997 Luxembourg summit, Schmid from the point of view of transitional markets and Salais from that of capabilities.³ The concept of flexicurity has evolved considerably since then. From the initial idea of a mutual reinforcement of employment security and internal flexibility of companies, the debate has gradually turned to the realistic assessment of a trade-off between security and flexibility. The idea of trade-off is central in EU documents like the 2007 Green Paper on modernising labour law. According to the authors of this paper, labour laws should be amended in key areas to meet the European companies' increasing needs for flexibility, which in return, it is suggested, leads to firmer growth in employment.

Securing Transitions

A key concept in the discourse over European employment policy has been the concept of 'transitions', not only in relation to flexicurity. The concept creates the core idea of an alternative labour market policy concept known as the transitional labour market approach which served not only as a key theoretical concept of several European research projects since 1996 but has been most influential in the design of the European Employment Strategy.⁴ Bénédicte Zimmermann reminds us in Chapter 6 how the Commission links the concept of transitions to the flexibility discourse: 'Flexibility ... is about successful moves ("transitions") during one's life course: from school to work, from one job to another, between unemployment or inactivity and work, and from work to retirement...'. But what have the policies aiming at easing transitions accomplished in fact? Chapters 3 to 5 attempt to answer this question. They focus on the many ways in which transition policies have been implemented (Günther Schmid) and on the assessment of two prominent measures: the reform of placement services (Petra Kaps and Holger Schütz) and working-time savings accounts (Philip Wotschack).

In Chapter 3 Günther Schmid makes a number of concrete suggestions of how transition policies can achieve positive combinations of employment security and operational flexibility within a company. His starting point is the assumption that the increasing diversity of forms of employment leads to greater risk for workers and that different countries engage in different flexicurity practices. If designed well, transition policies ease passages between different positions in the labour market and help to build sustainable careers via 'social bridges' and stepping stones.

Schmid's comments are based on experience with the German model of employment protection and its adaptation to contemporary circumstances

and European requirements. The transitional labour markets approach considers job quality and enhancing chances for the acquisition of professional qualifications through training both as central normative goals and as practical proposals. These proposals are meant to combat inequality in a world of work in which professional requirements are increasingly exacting and employment is becoming precarious. If these ideas are applied in evaluating European policies it can be asked what the EES and the European flexicurity policies have done to achieve these goals. The answer has to be precious little, as the increasingly critical studies on the EES are beginning to show.

One of the central objectives of the EES is to enhance the efficiency of public employment services and a crucial indicator used to evaluate national strategies is how quickly the unemployed return to work. The Commission, as in the case of financial matters, is in this context thoroughly convinced by the theories of market efficiency, and supports contracting out of placement services, a policy that has rapidly spread across European countries. Great Britain was the pioneer in establishing 'quasi markets' with their job centres, followed by Germany in 2003 implementing the so-called Hartz reform programme, Italy experimenting with a voucher system⁵ and France where public employment placement and unemployment compensation services (UNEDIC) merged in 2008. The aim of all these reforms is to put public placement services in competition with private enterprises which are publicly funded and selected by tender based on cost and performance criteria. The competition is meant to induce greater efficiency, because service vendors are evaluated and risk financial penalties or non-renewal of their contracts if their performance is deemed inadequate. Petra Kaps and Holger Schütz in Chapter 4 present the results of empirical research evaluating the effectiveness of privatising employment services in Germany, and compare these results with those of similar work in other countries. Their criteria are those of transitional markets (some of which are also found in the capabilities approach): individual autonomy, solidarity, effectiveness, efficiency. The research does not confirm the expectations of the advocates of privatisation. Instead, their results confirm fears that competition increases 'selection of the fittest' effects and the pressure to accept the lowest bids; neglects criteria that determine the quality of insertion and that credible management tools are absent; and priority goes to those deemed at the outset to be most employable and that little freedom of choice is left to 'clients'.

In Chapter 5 Philip Wotschack evaluates the use of working time accounts in German companies. This flagship measure of the flexicurity programme allows employees, by accumulating time (overtime, shorter holidays) during their working life, to free up paid working time that can be

used for activities that they value: training, parenting of children, volunteer and civic activities. Several different approaches to labour market reform come together in this measure: transitional labour markets, capabilities, organisational approaches to life-long working careers.⁶ Ideally working time accounts are personal rights that supplement collective rights and do not replace them. The first step to ensure a real freedom of choice for employees is that they receive income (equivalent to their basic salary) for these periods devoted to other activities.

Wotschak shows convincingly that the idea is a good one, but much remains to be done. There is also disappointment. Since this option became available in 2005 in German companies only a few employees have taken advantage of it. Where accounts were created, it was often at the employer's request to compensate for periods of unemployment or in connection with preparations for retirement. Many difficulties are still to be resolved: portability and preservation of rights when changing employer; protection of accounts against the temptation to use them to bridge periods of 'partial unemployment'; wider availability and true freedom of choice for account holders in how they use their rights; public subsidy to top up the amounts of accumulated resources, in particular for low-income workers. As is often the case (for instance, in ongoing training in companies) those who have the greatest need – those with low wages and/or intermittent jobs – do not benefit from the measure.

From the beginning the flexicurity agenda has been highly ambiguous, oscillating between neoliberal attempts to make the labour market more flexible and a reorientation towards institutional reform focusing on transitions as recommended by the transitional labour markets agenda. Chapters 3 to 5 contain a number of arguments to suggest that the balance has swayed in favour of the neoliberal flexibility agenda. The EES from the outset focused on individual employability and on the speed with which the unemployed return to work, rather than on the vulnerability of jobs to the vagaries of the economy or on the need for companies to prepare their employees for coming changes in work (and hence to invest in their professional development). These choices were made prior to the Luxembourg process and without public debate in Europe. During this period the European Commission funded research and reports on employability conducted mostly by mainstream economists and political inspiration came from, among others, the US-EU Working Group on Employment and Labor-Related Issues that was created in 1996 'to establish cooperation in providing a climate for job growth'. One of the first outgrowths was a symposium on Employment Policy and the Promotion of Employability Security held in Washington DC in May 1997.⁷ Its message was rather one-sided, centring on the supply of work from individuals (employability)

leaving demand for work to the initiative of companies, framed by a policy of deregulation. Given these ideological inputs it can be concluded that the European Commission has from the beginning of the EES made an unbalanced and instrumentalised use of the transitional labour markets agenda, largely neglecting its critical message and proposals.

Promoting Capabilities

In comparison with the transitional labour market approach the capabilities agenda has not yet truly been taken up at the European level, despite its relevance and proximity to European policies in other areas such as gender equality, life-long learning and social rights. The idea was supported in the 1999 report coordinated by Alain Supiot⁸ whose authors endorsed a capabilities development policy and envisioned positive synergies between security and flexibility. However, the fact that it has been confined to poverty and under-development issues has undoubtedly contributed to its poor treatment by the European Commission, in contrast to the ILO, where along with other sources it serves to underpin the Decent Work Agenda. It is also conceivable, paradoxically, that the emphasis on true freedom of choice and action in the capabilities agenda has created a negative aura around this approach, because of its seeming similarity to neoliberal positions, although, among others, it differs radically from and is even diametrically opposed to neoliberal doctrine by its insistence on the conditions that make this freedom effective.

The situation is gradually changing. The misconception regarding the meaning of the capabilities approach is challenged by a number of research programmes on the capabilities approach which are currently developed in several European countries.⁹ Chapters 6 to 8 engage with theoretical and practical difficulties of the approach and show the operational richness of the capabilities agenda. The areas addressed include vocational training and professional development in enterprises (Bénédicte Zimmermann), activation policies (Jean-Michel Bonvin) and public and social services (Noel Whiteside).

In Chapter 6 Bénédicte Zimmermann discusses the lack of European law and policy in addressing duties of companies for the professional development of their employees, in particular in relation to improvement of skills and planning of careers. Companies rarely feel pressurised by labour market conditions or by organisational needs to invest in the professional development of their employees and tend to refuse responsibility in this area, preferring to leave it to their employees or the state.¹⁰ In line with Sen and Vygotski, Bénédicte Zimmermann insists that the development of capabilities transcends the world of work and brings work and economic

activity back into the full set of each person's activities, framing these activities in the context of human development policy that has at its core true freedom and personal accomplishment.¹¹ The chapter demonstrates the operational dimensions of such a policy through a discussion of 'employee quality...produced by capabilities made available by the company in the areas of work, training, employee participation and work/life balance'.¹² Security is seen as dependent on acquisition of real freedom of choice in choosing one's work, and more generally in choosing the place that work occupies in one's life. Flexibility is possible on this basis, and a positive loop can be put in place between security and flexibility for both partners in the work relationship: motivation and efficiency on one side, true freedom and potential for accomplishment on the other. There is more at stake here than just the labour market. The obligation to put each individual in a situation of capability leads to another model of economic development. We will come back to this topic at the end of this introduction.

In Chapter 7 Jean-Michel Bonvin addresses a key element of the new European social policy called activation policies. Activation is achieved either through incentives ('making work pay') or through constraint ('workfare' schemes). In times of austerity and reduction of public policies, activation is seen by the European Union and its member states as a cost-effective solution. The chapter reviews through the prism of the capabilities approach a range of activation policies that have been implemented in the European Union. It seeks to define and specify evaluation criteria and methods that could be used to assess existing activation programmes and reform them to move in this direction.

Following Amartya Sen, Bonvin goes beyond short-term economic performance measures alone in defining the criteria for evaluating activation programmes. These criteria should assess the social opportunities created by the programmes and consider how much attention is given to the beneficiaries' participation. They should also look at ways in which the programmes augment political voice and the public debate on the fundamental motives, objectives and methods, thereby fostering public reasoning that is as broad and open as possible. One of the most sensitive issues is the place and role assigned to local actors and agencies. In line with Chapters 3 and 4, Bonvin shows in Chapter 7 the contradictions in which the programmes inspired by New Public Management become entangled when they seek to transfer state responsibilities to the market. Alternative pathways are suggested which include leaving room for local initiatives; preference for a participatory approach by letting some objectives remain undefined by the central authority; modifying evaluation criteria (that today focus on maximising the employment rate and rapidity of return to

work) in favour of criteria that give priority to beneficiaries' autonomy, support capacity-building and emphasise a long-term vision over a short-term view. Holding individuals responsible for their employment situation and insisting that they take charge of their own future in the labour market has become the main justification for activation policies. However, exercising responsibility assumes conditions that allow individuals to use this responsibility in ways that respect the motivations and values in which their life and work choices are grounded. A space of genuine freedom and choice must be created for each individual, in other words a 'capacitation' policy must be instituted.

Noel Whiteside demonstrates in Chapter 8 how reflection on historical precedent stimulates fertile thinking about 'situated' action. Assessing today's work in the light of yesterday's experience should be at the heart of public reasoning, and the lessons learned should help decision-makers realise that, today as yesterday, there is no one single path (the market) but several ways forward. No one path is intrinsically better from an economic standpoint. Each one offers possibilities and carries constraints. A lot depends on the scope and quality of the democratic practices that preside over public decisions, on the way in which the issue is framed to make it relevant and the level of collective decision-making at which it is posed.

As Europe becomes more and more engaged in distant macro political governance and member states abdicate their social responsibilities, many questions can be raised about situated public action. By 'situated' public action we mean public action that is carried out by autonomous actors in the field who possess practical knowledge of the situation and who are able to raise issues and pose solutions in ways that are most appropriate for achieving the common good.¹³ It is implemented via democratic deliberative processes that follow their own evaluation criteria and methods of amendment. The effectiveness of situated public action (in terms of both economic effectiveness and social justice) depends on choosing the most pertinent level of collective decision-making with respect to a given issue, using the subsidiarity principle in a discerning and flexible way. When engagement takes place at the appropriate level, situated action can develop a collective capacity to address and solve problems, a capacity that is independent of the market and of direct state intervention.

Noel Whiteside shows that at the turn of the last century the major cities of Europe successfully experimented with public services and social policies in this way. The political agendas were not always the same, and the beneficiaries varied, but these achievements have the common characteristic of coordinating social policies (social assistance, unemployment benefits, labour market policies) and public services (transport, electricity, sanitation, urban planning, housing) at the local level. These urban policies

remind us that there are pathways other than importing market principles into the sphere of public services. Above all, they were developed by local authorities in the wake of the flagrant failure of market solutions that even the most ardent advocates of market orientations like the city corporation of Birmingham were forced to recognise.

PART II: WHAT FUTURE FOR EUROPEAN EMPLOYMENT POLICY?

A full-scale implementation of the principles for reforming the work and employment market that satisfy the two approaches of transitional labour markets and capabilities requires a profound change of European policies, in particular methods and the ways in which policies are combined. For example, New Public Management governance methods (steering according to performance indicators; competition between public agencies and private companies; privatisation of social services; absence of participation by beneficiaries; denial of real local autonomy) often hinder or contradict the recommendations that stem from these two approaches. New governance techniques are spreading fast and shape not only most European policies but also the content of the 2020 Agenda and, for example, the Competitiveness Pact suggested by France and Germany and attempts to reduce public deficits as a result of member state efforts to rescue the banking industry. Furthermore, citizens increasingly perceive the European Union as a configuration of actors orbiting like satellites in outer space. What is needed is bringing Europe 'back down to Earth' through systematic intervention of their representative bodies at intermediate levels in favour of employment for European citizens. This intervention should be the core of a reformed integrated approach to employment.

The contributions in Chapters 9 to 12 provide the base for this new approach to employment. They offer new typologies of welfare regimes that are able to apprehend national circumstances (Chapter 9); they rehabilitate the role of law as a driving force in Europe through promotion of reflexive law (Chapters 10 and 11); they request other constitutive conventions for the single market (Chapter 12).

European authorities make extensive use of welfare typologies and national models for benchmarking. The practice is inconsistent, one day promoting a national model (for instance, the Danish model taken as the paragon of flexicurity) and the next day preferring competition between national models as a way to select the lowest social bids. Colin Crouch shows in Chapter 9 that welfare typologies, including those based on the

welfare models made popular by Esping-Andersen, while not totally useless, are at best fragile, often fabricated from only a few macro indicators. Esping-Andersen's work is indeed inconclusive. An analysis of the data he conveniently published in his work reveals that they do not support his typology; in particular the group of so-called 'corporatist-continental' countries is in fact a hodgepodge of countries that have nothing in common.¹⁴ Crouch extends this analysis to all the countries in geographical Europe, towards the east (the former USSR and ex-socialist republics) and the south (including Turkey). By also including sectors, paying close attention to services to enterprises and to collective and individual social services that grow in importance in terms of employment, he arrives at an alternative, more realistic cluster of welfare regimes. However, the political or operational relevance of societal typologies can be questioned. For example the alleged superior nature of free-market economies when it comes to innovation and employment can be called into doubt.

All chapters in Part II concur with the observation that social Europe is incomplete and threatened with disintegration under the advancing encroachment of market principles. The importance attached to European social policy and employment law during the Delors Presidency has vanished. Economic freedoms increasingly prevail over national social law, a trend that culminated in new rulings of the Court of Justice of the European Union (CJEU). Furthermore with the increase in soft law European law loses its binding force, and unclear legal terms, for example introduced in framework agreements, leave room for interpretation to member states and to the CJEU that sometimes produce outcomes contrary to the legislators' intentions. In addition countries with large Euro-sceptical populations are increasingly prone to use their right to opt out.

A way ahead for European law lies in reflexive law. A key notion of reflexive law is the ability to understand and make creative use of the limits of regulation. It proposes the magic formula of regulation of self-regulation and corporate social responsibility (CSR) is a prominent example in the field of corporate and labour law. CSR is an instrument that, if not exactly an alternative to law, is at least of a nature to remedy failures or absence of legal standards. Claude Didry reminds us in Chapter 10 that the ILO (Tripartite Declaration, 1977), the UN (Global Compact, late 1990s) and the OECD (1976 Guidelines, revised in 2000) all preceded the European Union on this path. CSR was, in the first instance, aimed at multinational corporations and intended to accompany and 'moralise' the growing wave of job displacement and transfers to countries with weak legislation, low labour costs and working conditions reminiscent of the first industrial revolution. Data compiled by the ILO on codes of conduct reveal that very different motives guided multinational corporations in adopting CSR.

Didry distinguishes four firm strategies in using CSR: an integrative approach that aims at addressing a whole range of actors internal to the company as well as in the business or other environment; a merchant firm approach that focuses on observance of fundamental rights in outsourced manufacturing facilities; a supervisor firm approach that encourages employees to take part in the implementation of CSR; and a knowledge firm approach that pays particular attention to intellectual property and protection of immaterial assets. Didry emphasises a number of weaknesses associated with CSR: codes of conduct do not have the effectiveness of legally binding standards; multinational corporations rarely draw up codes of conduct on their own initiative; strong motivating factors have to be labour unrest and action of movements in civil society that base their campaigns on national and international law or case law. The contribution of CSR to employment policy is marginal; it will never be able to compensate for the absence of political will and sufficient resources to maintain and develop employment throughout the European Union.

The last two contributions, Chapter 11 by Simon Deakin and Ralf Rogowski and Chapter 12 by Robert Salais, share the view that the one-sided turn towards a neoclassical market approach since the Maastricht Treaty of 1992 has broken the previous compact of a balance between the economic and social dimensions of the European project and that pursuing the construction of Europe calls for new foundations which uphold this compromise. The two chapters propose methods that provide new solutions for foundational challenges. They introduce reflexive law as an alternative method of governance and conventions as alternative to the neoclassical theory of the perfect market. Although far from encompassing, these alternative approaches indicate directions and open a discussion of new agendas for both research and action. They are based on a combined capabilities and transitional labour market approach which is suited to address issues that go beyond the labour market.¹⁵

Simon Deakin and Ralf Rogowski discuss in Chapter 11 how the approach of reflexive labour law can be applied to the study of European law. Reflexive law is both an empirical and a normative project. Deakin and Rogowski discuss the theoretical basis of reflexive law in the concept of autopoietic law developed by Niklas Luhmann and Gunther Teubner and propose as particularly relevant for an analysis of European law the insights of reflexive law on regulation. They detect a number of reflexive processes in European law and suggest a programme to implement the orientations and substance of the capabilities approach through the mechanisms of reflexive law. Although the emphasis is on procedure and the methods of reflexive law do not make assumptions about the content to

which they apply, reflexive law is nevertheless compatible with the capabilities approach. If the capabilities approach is chosen as a European orientation, application of the methods of reflexive law would mean that the potential ramifications in terms of justice and democracy that underpin the approach would have to be allowed to freely develop.

European labour law is currently at an important turning point. With the economic crisis hopes of convergence between the economic, political and social structures of European countries have largely vanished. The original project of introducing a floor of rights at the level of the European Union associated with the 1989 Community Charter of the Fundamental Social Rights of Workers has largely been substituted by a new focus on employment and measures to combat unemployment. Article 151 of the current Treaty on the Functioning of the European Union (TFEU) (ex Article 136 TEC) still contains an impressive programme for European labour law.¹⁶ However, implementation of these objectives through legislation, which in any case does not imply homogenisation of national labour laws,¹⁷ has largely come to a standstill. Opponents of European labour law like the United Kingdom insist on using opt-outs. Finally, the CJEU has turned in the notorious *Laval* and *Viking* rulings against social freedom in support of economic freedom of companies. In short, employment protection for workers has been replaced at the European level by measures that favour employment promotion and support for companies in the hope that these measures lead to job creation.

The recent trend of using New Public Management governance mechanisms in employment policies, such as the open method of coordination, should make us particularly wary. This governance mechanism has little in common with reflexive law. These methods use batteries of aggregated indicators (such as the employment rate) to guide action in member states. The quantitative targets to be pursued, and if possible attained, are set by the European Commission on the basis of performance indicators. The Commission uses targets to evaluate national strategies and pit them one against the other. National governments are in fact given incentives, not to attempt to actually apply the underlying goals recommended by European policies, but to seek measures that directly boost their scores on evaluation scales. In addition, goals for social justice and democratic deliberation are shunted aside in favour of a top-down steering process.¹⁸ For those with a bit of memory, this unhappily recalls the techniques employed by Soviet planners, with the results we have seen (perfect on paper but in fact masking a deteriorating situation in reality).

Robert Salais, in Chapter 12, argues that the capabilities approach places these two fundamental principles of justice and democracy at the centre of employment policy and ensures that they are truly taken into account in the

economy, in law and in social protection. Justice holds that employment, its content and evolution, favours the development of each individual's capabilities, understood as the space of effective freedom of choice and action. The principle of democracy is to ensure that decisions that have an effect on employment, whatever they may be and at whatever level, must be subject to the procedures of democratic deliberation.

Although not central for the early construction of the European Union, the Treaty of Rome nonetheless introduced a rudimentary social dimension, centred on the principle of equality of treatment between men and women. What is at work here is a principle of justice, and not a question of distortion of competition. Furthermore this principle can be interpreted as seeking to establish equality of capabilities between men and women. Recognition of the need for democratic deliberation, both inside and outside of companies, on economic decisions affecting employment was introduced into the European debate in the 1970s, with the prospect of European works councils (leading to a directive more than 30 years down the line).¹⁹ The outline of a principle of democracy glimpsed here should be brought in full into the debate in Europe.

What is the main obstacle blocking the way forward to implementation of these principles of justice and democracy? It is less an absence of political determination than poor choices in terms of constitutive market conventions, with effects that have accumulated over the course of time. In Chapter 12 'market convention' is defined as the interpretative framework that is applied to the functioning of actual markets and that serves as the basis for economic and social legislation, and subsequently for jurisprudence. The European Union never put the principles of justice and democracy high on the agenda in the construction of Europe, neither at the beginning in the 1950s nor in the 1980s with the institution of the single market. The *ordo-liberal* market convention kept questions of social justice at the national level and held that the creation of an efficient economic order did not require democratic legitimacy. By contrast, this convention was much more favourable to efficient economic integration of growth and employment than was the neoclassical convention of the perfect market introduced by the Single European Act and the Maastricht Treaty. For, unlike the neoclassical convention, *ordo-liberalism* (particularly at the time of its origin) does not seek to render the economy homogenous by considering that diversity and the quest for advantages in terms of quality and innovation, and not just price advantage, are obstacles to competition (on the contrary they are a driving force in the economy). The jurisprudence of the European Court of Justice since 2000 demonstrates the harmfulness of this neoclassical market convention. It deems national law and social protection systems to be obstacles to economic freedom, and as such to be

eliminated, or at the very least deprived of their sustenance. From indifference at the European level we now encounter hostility to the principles of justice and democracy. The tendency is to see national sovereignty as an obstacle to European economic integration. To recreate a positive feedback loop between the economic and social spheres, each benefiting the other, and thus contribute to the progression of the European project, Chapter 12 proposes that the European Union undertakes to find a synthesis between *ordo-liberalism* (economic efficiency) and the *capabilities approach* (justice and democracy). In sum the European Union should return to its original sources, updated and inspired by a vision of the future. This would involve engaging in a wide-ranging and profound revision of the interpretation of fundamental economic freedoms, linked to an enrichment of the social sections of the Treaty, through integration of the capabilities development objective, so that economic freedoms and capabilities for all become mutually reinforcing. This would ensure a solid political status for the Charter of Fundamental Rights and would spearhead the move to adopt binding requirements for justice and democracy within the European Union.

TOWARDS AN INTEGRATED AND SITUATED APPROACH TO EMPLOYMENT

We end this introduction by expressing our collective astonishment at the inaction of the political classes, not least the European Commission, in the face of the financial crisis of 2008. The collapse of the banks and their subsequent bailout has transformed private into public debt. Were the catastrophe to be repeated (and, at the time of writing there is no reason why it should not) these vast pre-existing public debts would mean that, far from being too big to fail, some banks could be too big to rescue. In the meantime, the financial sector has little incentive to resist the more problematic and risky transactions that caused the problem in the first place, as taxpayers underwrite any unforeseen consequences.

Public debt has generated unprecedented cuts in public expenditure, creating widespread redundancy in all sectors of employment. Subsequent crises in the Eurozone have fostered further retrenchment, reducing the security and incomes of current and future working generations for decades to come. No European authority has put forward any new initiatives with which to tackle this emergency – or to prevent its recurrence. Instead we are offered more of the same. Recent EC proposals to reform economic governance to restore confidence in the financial system demand yet further public sector retrenchment, more privatisation of services, ever less support or protection for those seeking work or in precarious jobs. Europe's

employment strategies and their targets for 2020 – their training requirements and other employment integration mechanisms – lie stranded in the backwaters of Europe's political agenda. The cure for a crisis created by the market apparently lies in a further extension of market disciplines and market mechanisms.

The ever-increasing belief in the merits of markets has been accompanied by growing faith in corporate management strategies in recent years; this has eaten into the heart of the European project. New Public Management (NPM) and its associated systems have been derived from business practices designed to meet short-term targets in order to secure shareholder value and, with this, the corporate bonus for successful executives. This does not represent a sound blueprint to secure Europe's future. The corporate executive aims at short-term success to win promotion to a higher position elsewhere; the shareholder is free to withdraw investment and the worker to change job, but the taxpayer cannot refuse to pay her taxes, nor can the citizen easily change her domicile. Devoid of any long-term objective or vision, NPM's top-down approach is necessarily autocratic and oligarchic. It understands citizens as customers, consumers or clients – not political beings capable of participating in democratic deliberation about how Europe can or should develop. The European Commission is not a management board and cannot run Europe's affairs as if it were one.

The tension between state sovereignty (reflecting the sovereignty of the citizenry) and what is seen as the growing encroachment of the EU's managerial authority lies at the heart of the problems with securing political acceptance of the EU in the member states. The economic crisis has revealed this contradiction. The legitimacy of the continual corrosion of state prerogatives is increasingly called into question, notably in respect to its democratic justification (which is indeed very weak). The major and almost sole instrument of this advance – the extension of economic freedoms in a perfect market to all domains of public action – has seriously disturbed Europe's construction, weakening it economically as well as politically and socially.²⁰ This encroachment tends to be seen as a threat. It increasingly rules out any positive cooperation between member states, as well as between European authorities and member states. The ruling of the German Federal Constitutional Court on 30 June 2009 on the constitutionality of the Lisbon Treaty addresses the problem head on. It states forcefully the limits of the European project: 'If in the framework of the evolution of European integration, a disproportion were to appear between the nature and scope of sovereign rights on the one hand, and the degree of democratic legitimacy on the other hand, it would be incumbent on Germany to change this situation and as a last recourse refuse to continue to participate in the European Union.'²¹

The purpose of our book is to demonstrate how successful integration of working people into viable and meaningful working lives requires proper co-ordination – real public action and clear pathways – if it is to be effective. The continuing policy freefall towards preference for markets above all else fosters general austerity programmes, increasingly transfers social protection (notably pensions) to commercial agencies and weakens the authority of public actors. In other words, it fractures social and economic development. These changes, to a greater or lesser extent, are provoking resistance in the vast majority of European countries. As like causes produce like effects, Europe is purely and simply facing a threat of economic, social and political decline. The reawakening of the European project, if not its very reconstruction, has to be addressed now. This reawakening is not going to come from either the Commission or from the European Central Bank in their current composition and orientation.²² It is up to researchers and actors in the civil, economic and social spheres to take responsibility for opening up new paths and publicising them so that fellow citizens can appropriate them.

More specific commitments are beyond the scope of this book; here the aim is to show that other paths are possible, first and foremost to make readers aware of the urgent need to shake off the drowsiness induced by dogmatic thinking and to abandon the well-trodden route that is leading us nowhere. It is not as difficult as one might think to achieve this awakening. Our collective work enables us to go a bit further, because it makes us aware that a head-on contradiction is developing between two principles of action within the European Union.

The first principle, dominant at present and outlined above, is present in the ongoing crisis. It is reflected in the obstinate recourse to methods of governance that are increasingly disconnected from social reality. These refuse to acknowledge the impact that the financial crisis and the ways it has been handled have had on the degradation of working and living conditions experienced by Europe's citizens. The second principle stems from a diametrically opposite system of evaluation, to create an integrated approach to employment founded on entirely new assumptions compared to current policy. The effectiveness of a policy is evaluated not on the basis of abstract aggregated indicators defined at the European level, but on the basis of observation of its concrete effects on the life and work trajectories of each individual. Does the policy put the individual in a situation of capability? In other words, does this policy improve or degrade individual and collective itineraries, in terms of realising desired accomplishments and aspirations to participate in public affairs? How should current policies be modified, and using what methods? The idea is not to transfer responsibility for the vagaries of economic and social circumstances to individuals,

who must then struggle along by whatever means they can in a battle of all against all. Placing people in situations of capability implies a profound change in the criteria and implementation of public policies, whether with respect to individuals, employment and enterprises, the economy or society. This also involves finding new dynamics for the development of the European project. Let us look briefly at this scenario and its step-by-step progression towards a general policy.

Let us start with people who are out of work. Currently, as attested in their practices, the agencies that are active in the labour market, whether in social assistance, placement or training, seek above all to attain quantitative performance targets that are constantly being modified or raised to higher levels, in keeping with NPM practices. Consequently an unemployed person must contribute to meeting a target: she must accept whatever job is offered or at the very least be removed from the claimant count (disqualified because she has a live-in lover, or misses an appointment with the agency concerned). The more costly the assistance claimed, the more severe her reception becomes. This goes hand in hand with the abandonment of job quality objectives, and more broadly of the goal of full employment. Using a contrasting approach, the main objective of these agencies should be to make each jobseeker capable of long-term placement in work. Attention should focus closely on the individual, and evaluation must consider her aspirations. This supposes entirely new management rules, a genuine dialogue between the jobseeker and the agency, more substantial and better calibrated resources.

But what is the point if there are no jobs or only poor ones? To create good jobs companies must take the potential of their employees and their local environment into consideration when developing their economic strategies. Their internal organisation should go to great lengths to give all employees a job and work situation that fosters progress in capabilities, participation and freedom of choice. In consequence, companies will gain in quality, motivation and efficiency. Economic choices must look to the future, in terms of sectors, products and services, knowledge and know-how. How can this be achieved if the member states and the European Union do nothing to oppose job displacement, and offer no policy measures in favour of industry and innovation to support and develop the economic foundations of Europe? Work groups and communities at different levels and with different competencies must have the rights, resources and means for intervention that enable them to influence corporate decision-making. There is no lack of money for sufficient employment (given the rate at which currency is produced) but it must be put into productive investment in Europe, not into speculation on stock markets. It must be devoted to renewal of traditional activities and to new activities: to

promote a more environmentally sustainable society, for example. Thus a simple but fundamental requirement that public policy at all levels should enhance capabilities would lead, step by step to a new model of economic, social and political development.

This basis for evaluation works just as well as the other model. But it would be derived through different instruments, namely a social survey in which the various groups involved should be invited to participate, at different levels of aggregation, to elaborate the enquiry and interpret its results. In some senses, this offers a framework for assessing social well-being and happiness, recently a pre-occupation among politicians who have discovered that simple wealth does not achieve this objective. This second principle of action underlies the proposals elaborated in the chapters of this book. It accommodates the expectations of the beneficiaries of the measures studied and of the personnel in the institutions that implement them. Its implementation is supported by deliberative democracy at all levels that extends to the process of apprehending what collective problems need to be resolved and who should be charged with their resolution. Noel Whiteside reminds us how, at the end of the nineteenth century, this multi-faceted political problem was tackled by European metropolitan elites – coming to grips with social reality, reaching agreement on the issues, discovering appropriate ways to treat them, implementing solutions, a set of problems the author summarises in the concept of an informational basis for judgement in justice, borrowed from Amartya Sen.

The crisis has made the contradiction between the two modes of policy action and evaluation outlined above more visible, one abstract and disembodied, the other situated and democratic. The widening gap between these two modes can only augment collective awareness of the tensions they generate. The distant governance that is light-years away from people's urgent needs for social protection and employment is a source of incomprehension and growing hostility to European authorities and national governments alike.

Making situated evaluation an absolute priority does not mean that public actors must disappear and be replaced by self-assessment carried out by the actors themselves in the absence of guidelines or benchmarks. On the contrary, it means first and foremost that all responsibility for decisions affecting employment will be transferred to the level that is closest to the actual economic and social situations where the future of employment hangs in the balance. This will have a positive effect on the outcome of this action. For demands for employment will be more clearly heard. More importantly, local deliberation allows decision-making to be informed on all sides: people become better acquainted with constraints and feasible options; methods will be decided with total autonomy by actors at all levels;

stakeholders will be more easily and more fully included in deliberative procedures. Depending on circumstances the proper echelon may be the company, the territory, the corporate group, the economic sector. This same downward movement towards actors best acquainted with a given situation inspires the suggestion to adopt the techniques of reflexive law in European law.

Giving priority to situated evaluation entails a true commitment to responsibility at central level. Far from disengaging itself, the central authority must take the initiative to define major orientations, to assign effective rights of deliberation to actors at intermediate levels, to make sufficient resources available to support effective use of these rights. The European Union has more techniques available to achieve these goals than one might think. If the political philosophy of subsidiarity were taken seriously, and not reduced to a bureaucratic refinement, we would see that this principle encompasses all that is needed to implement situated evaluation based on needs and legitimate claims at the levels at which they are expressed.

Despite appearances, apparent unanimity in favour of maintaining the current course can unravel at the European level. A conflict focusing on political and democratic legitimacy is developing between three bodies of opinion: the Commission and the European Central Bank (ECB) on one side, the European Council and its Presidency on another and lastly the European Parliament. Since Maastricht the Commission and the ECB have been primarily responsible for the drift towards abstract, distant and quantitative methods of governance: seeing in these methods a way to compensate for their lack of democratic legitimacy. The political failure of these methods, if it is confirmed, spells defeat for the Commission and the ECB. The return to an intergovernmental mode, visible in the increasing weight carried by the European Council, is a return to haggling between national interests and allows certain countries to mark their Euro-scepticism. But at the same time it testifies to the renewed attention, although still inadequate, that is now being paid to economic and social reality on the ground, expressed at national level. As for the European Parliament, it could, as is in its interest, bolster the legitimacy bequeathed to it by the direct democratic process (legitimacy contested by the European Council which retains an indirect and fuzzy claim) by acting as a spokesperson for the expectations of European citizens on the issues of employment and social protection. From the complex interplay between these institutions, from the pressure of reality and of Europe's citizens may emerge a situation that is more open and propitious for the new ideas espoused in this book.

NOTES

1. See Rogowski, 2008.
2. Jørgensen and Madsen, 2007, and Burroni and Keune, 2011.
3. In his 1998 seminal WZB working paper, Günther Schmid advocated a new policy of full employment which goes beyond traditional labour market policy that idealises permanent dependent full-time employment and integrates various types of employment and social inclusion (Schmid, 1998). The capabilities approach advocated by Robert Salais constitutes, for the most part, the subject matter of Chapter 7 of the Supiot report, entitled 'Law and economic performance' (Supiot, 2001 [1999]). Salais' presentation was the first appearance of the concept of capabilities in the European debate.
4. Rogowski, 2008. See also Gazier, 2003 and Barbier, 2008.
5. See De Leonardis, 2009.
6. For example, Anxo and Boulin, 2006. The Supiot report (Supiot 2001 [1999]) takes these time accounts as an example of a broader move to social drawing rights.
7. This group was the first initiative of the New Trans-Atlantic Agenda (NTA), signed in December 1995 between the President of the United States, the Prime Minister of Spain in his capacity as European Council President and the European Commission President. See the document 'History of the US-EU Working Group on Employment and Labor-Related Issues 1996–2008', available at www.dol.gov/ilab/programs/oir/PDF/2008EU-History.pdf (accessed 15 August 2011).
8. Supiot, 2001 [1999].
9. A number of research centres are engaged in applying the capabilities approach to European policies. These include the Bielefeld Centre for Education and Capability Research (University of Bielefeld, Germany); Centre for Business Research (University of Cambridge, UK); Centre de Recherches sur l'Emploi et les Qualifications (CEREQ, France); Centre de Recherches Interdisciplinaires sur l'Allemagne (CRIA, EHES, France); CriDIS (University of Louvain-la-Neuve, Belgium); Centre 'Institutions et Dynamiques Historiques de l'Economie' (IDHE, CNRS, France); Soziologisches Forschungsinstitut Göttingen (SOFI, University of Göttingen); and the research team led by Jean-Michel Bonvin at the University of Lausanne (Switzerland).
10. A point that is also emphasised by Philip Wotschack in Chapter 5.
11. See also Chatel, 2001.
12. A detailed discussion of 'employee quality' can be found in Chapter 6 by Zimmermann.
13. See for details Salais and Storper, 1993, part IV.
14. Salais, 2005.
15. Chapter 12 makes the proposal that the transitional labour markets approach could be integrated into the capabilities approach, the first one moving focus from employability to capability, the second one adopting an expanded approach including transitions.
16. *Article 151 TFEU* (ex Article 136 TEC): The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.
17. See Syrpis, 2007.
18. For a critical analysis of the open method of coordination as applied to the European Employment Strategy, Salais, 2006.
19. Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council; Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.

- ^{20.} For suggestions of a new approach in economic governance see Jabko, 2011.
- ^{21.} BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. 264; BVerfGE 123, 267 (381 f.).
- ^{22.} The term 'reawakening' is borrowed from Alain Supiot, 2010, 'Réveiller l'Europe', *Lecture introductive*, final conference, 'Remettre l'Etat dans le jeu? Promouvoir le développement des capacités pour tous en Europe', CAPRIGHT, Nantes, 2–3 December 2010.

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