

Reflexive Governance and European Company Law

*Simon Deakin**

Abstract: *The use of reflexive forms of governance is growing within the EU, in particular as the open method of coordination (OMC) is applied to a wider range of contexts. Reflexive approaches view diversity of laws and practices across the Member States as the basis for experimentation and mutual learning within the overall process of European integration. Company law, however, seems to be an exception to this trend: recent activity in this area has mostly taken the form of ‘hard law’ harmonisation through directives, coupled with the stimulation of regulatory competition through judgments of the European Court of Justice concerning freedom of movement, most notably the Centros case. The deliberations of the European Corporate Governance Forum barely qualify as a ‘company law OMC’ because of the limited space allowed for ‘learning from diversity’; instead, differences in the laws of the Member States are seen, in the discourse of the Forum, as ‘distortions of competition’. In the area of labour law, by contrast, a degree of functional convergence and a coordinated raising of standards have recently been achieved by the dovetailing of the OMC with social policy directives. The contrasting experiences of labour law and company law suggest that reflexive or experimentalist approaches to European governance can be effective when they operate so as to complement mechanisms of harmonisation and regulatory competition, rather than being presented as alternatives to them.*

I Introduction

There has recently been considerable interest in the emergence of distinctive forms of governance in the EU, of which the open method of coordination (OMC) is the best known, which involve the use of reflexive or responsive techniques of regulation. ‘Reflexive governance’, in this sense, implies that diversity of practice among the Member States is a resource which, when coupled with open coordination methods such as benchmarking and mutual monitoring, provides a basis for experimentation and mutual learning. This approach has been contrasted to more traditional forms of harmonisation of laws through directives, on the one hand, and to court-led regulatory

* Faculty of Law and Centre for Business Research, University of Cambridge. This article is based on research carried out under the auspices of the ‘REFGOV’ project (‘Reflexive Governance in the Public Interest’), which is funded by the EU’s Sixth Framework Programme. An early draft was presented at the Irish European Law Forum’s Tenth Annual Conference, *Regulating Liberalising Markets and Social Europe: New Governance in the EU*, held at University College, Dublin, on 19 January 2007. I am grateful to participants in the Forum for comments received.