

Indirect legislation in EU policy making - The case of the open method of coordination

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The present paper presents the joint research of Anne Brunon-Ernst and Arnaud van Waeyenberge. It arises from the intuition that Bentham could offer fitting theoretical tools to think the way in which the European Union produces norms in areas where it has no competence to legislate. One specific instance of this is the open method of coordination (OMC). The aim is prove that this mechanism is akin to indirect legislation, as defined by Bentham.

The open method of coordination is defined by the EU as ‘a voluntary process for political cooperation based on agreeing common objectives and common indicators, which show how progress towards these goals can be measured.’¹ It belongs to a form of power called ‘new mode of governance’ and relies on peer-review or, in other terms, peer pressure, to disseminate good practices.

Bentham conceived of legal control mechanisms, which could fall both within and without the scope of direct legislation. Direct legislation is thus opposed to indirect legislation. The first deals with prohibitions, which are followed with legal (or political) sanctions in case of transgression; the second with influence. The latter is a subtle engineering of conduct based on the understanding of the motives for action, in order to arrange counterforces to manipulate desire; desire being an individual’s perception of what is his or her best interest. Bentham uses indirect legislation to study the circulation of power in society, which spreads to the whole of the community through the medium of interests used to influence behavior.

Bentham’s theorization of indirect legislation gives form and content to the OMC practice, which has been used for more than a decade with increasing effectiveness in the EU policy-making process. In this paper, Anne Brunon-Ernst and Arnaud van Waeyenberge will prove that OMC needs to be understood as a form of influence falling within the scope of indirect legislation.

¹ www.europa.eu