The Soft Law of the Covenant: Making Governance Instrumental

Korver, Ton; Oeij, Peter R.A.

European Journal of Industrial Relations

Volume 11 Number 3 pp 367–384 www.sagepublications.com

Ton Korver and Peter R.A. Oeij
TNO Quality of Life, THE NETHERLANDS

The Soft Law of the Covenant: Making Governance Instrumental

ABSTRACT ▪ Covenants are agreements between the government and social partners to implement public policy. They are a form of soft law, guiding the regulation of self-regulation, and are specifically relevant in bridging the macro and meso levels of society. Covenants prove effective where actors share goals, and learn to advance policy-making by monitoring efforts, effects and possible risks, and by subsequently fine-tuning follow-up actions. Positive-sum outcomes often result. We describe successful examples of this method of cooperation in the realm of working conditions and employment, and claim that covenants can be helpful in facilitating collective-bargaining framework agreements. In terms of EU policies, covenants are an instance of so-called European Governance Arrangements, the political and institutional foundations of which are still to be developed.

Introduction

Discussion of EU regulation has given increasing attention to 'soft law', targeted at influencing the behaviour of organizations, systems and even whole polities, in contrast to 'hard law', which is most effective in regulating the behaviour of individuals. Covenants (in Dutch, *convenanten*) are a new variant of soft law in the field of industrial relations, covering public goals, the operationalization and execution of which is delegated to social partners and organizations ('self-regulation'). Because the government initiates or facilitates the process, or both, it can be described as 'regulation of self-regulation'.

In this article, we sketch some applications of covenants, mainly on matters of working conditions and employment. They have proved effective for issues where goals are shared, but where the path towards achieving them is uncertain and therefore risky. The method of 'learning by monitoring' is shown to be helpful in tackling the risks involved.

In certain respects, covenants have the same function as collective-bargaining framework agreements. The difference is that they explicitly

DOI: 10.1177/0959680105057216

address public policy and thus include an active 'governance' role for the government. Nevertheless, once covenants result in applicable procedures, such results may become part and parcel of a collective agreement. We claim that covenants are a specific and rather unique form of cooperation, distinct from initiatives such as social dialogue, social pacts, territorial employment pacts, pacts for employment and competitiveness (PECs) and the like. The social dialogue is heavily influenced by the European Commission and has, consequently, mainly proved effective when the social partners have negotiated and bargained 'under the shadow of law'; as an autonomous process, it still has to prove its worth. Social pacts actually embrace two developments: a resumption of national consultation between governments and social partners, on the one hand, and the decentralization of collective bargaining, on the other. In the latter context, we note a growing integration of distributive and integrative issues; in the former, a renewed emphasis on wage moderation, in conjunction with ever vaguer projects for employment creation. So far, the net employment effect of these pacts is a matter for polite speculation, both in terms of the quality and quantity of jobs. The territorial employment pacts consist in a growing number of pilot projects, sometimes effective, but deficient in conception, design and delivery.

To be sure, 'soft' elements can be detected in all these forms (Sisson and Marginson, 2001). Yet the covenant is not readily comparable because public goods (employment and health and safety at work) are both produced and implemented according to a procedure in which the government is integrated, but in which the social partners take the actual lead in delivering the goods. The specificity of the covenant is that the route to success is discovered only along the way, by the same parties who will actually have to implement the results. Those who learn, monitor at the same time. The social partners can participate at all levels, depending on the issue, but the sectoral and industry level, together with the company level, are the most conspicuous. Participation is voluntary and, of course, depends on the issue at hand.

Since covenants bridge the differences between public authorities and social partners in the pursuit of publicly relevant tasks, they presuppose both a credible government (the 'regulation' aspect) and a credible level of self-organization (the 'self-regulation' aspect). Both conditions are met nationally, at least in some countries, but at present not at the level of the EU.[1]

Covenants and European Regulation: Opportunities and Pitfalls

Two types of EU decision influence national policies. First, some legislation is directly applicable, prescribing what to do and how to do it. Second, most directives prescribe what to do, but not how to do it: this is the prerogative of the member states. The doctrine of 'subsidiarity' is relevant for an increasing number of themes and issues, employment and social inclusion among them, that are defined as 'common concerns' of both the EU and its member states.

Covenants, as defined in the Netherlands, are 'signed written agreements of the government with one or more other parties in order to effectuate governmental policy' (Van Ommeren, 1993: 29). They regulate 'how' themes and issues of common concern can be tackled, and like most soft law are procedural rather than substantive. Declarations of intent, 'gentlemen's agreements' or simply 'agreements' are functionally equivalent to covenants, if they entail the mutual commitment to publicly relevant common concerns and public involvement as such.

In the past 20 years, the language and practice of *convenanten* have gained wide acceptance in the Netherlands. In the building trades, in environmental policy, in education, in health care, and in the field of labour, hundreds have been signed. For the government, the advantage is that covenants may compensate for the defects of traditional legislation, substituting for the declining power of 'command and control'. With the covenant the government enlists the cooperation of non-public parties in order to achieve its goals. For the latter (for example, companies and social partners) the advantage is an enhanced predictability of the behaviour of public authorities: by binding themselves, they also bind the government. Paradoxically, though legally unenforceable the covenant guarantees the non-governmental parties a measure of legal security they would not otherwise have (De Ru, 1993: 27; Van Ommeren and De Ru, 1993: 297).

Covenants have also become common in Belgian Flanders, while in Germany the practice called *informales Verwaltungshandeln*[2] has many similarities (Grijns, 1993). Here, and elsewhere, we find new instruments of public–private cooperation as part and parcel of national policies. Legally, these instruments are hybrid. They are not like regular contracts, nor are they laws: they bind, yet not in a legal sense. Rather than prescribe, they create mutual commitment. They do not stress hierarchy, but emphasize reciprocal dependence, treating dependence not as a weakness to overcome, but as a model for discovering the advantages of cooperation. They spell governance (horizontal relations between governments and other parties) instead of government (vertical relations), but are not a substitute for government. Rather, they complement it.

They presuppose a credible government, capable of assuming credible commitments. By the same token, they presuppose accountable and representative parties. At national level, in the Netherlands with its long history of consultation and negotiation, but also in Flanders and Germany, credible governments and accountable and representative parties can be said to exist. At the level of the EU, on the other hand, they are lacking, at least in the policy domains of employment and social inclusion. European governance of employment and social inclusion is governance by default, rather than by complementarity.

Recognition that the effectiveness of law is limited in the case of organizations and societal (sub-)systems has led to two reactions. One is to import economic and political criteria into law (for example, the idea of an 'efficient breach of contract' or 'optimal regulation') (Teubner, 1989: 128). The other is to 'proceduralize' law: instead of controlling social systems, legal mechanisms are designed to respond to their inner workings (Teubner, 1988: 307–13, 1989: 147). The latter reaction is dubbed 'reflexive' law, geared to the accountability, as distinct from the responsibility, of systems and organizations. If social systems such as law, politics, the economy and organizations in general are 'black boxes' for one another, intervention will predictably produce unforeseen and possibly unwanted effects. However, covenants or other forms of regulating self-regulation can connect the relevant parties, so that black boxes 'become "whitened" in the sense that an interaction relation develops among them which is transparent for them in its regularities' (Teubner, 1988: 320). That is, systems can learn from their interaction, if only because they do not sever the ties between learning and monitoring (Sabel, 1994). What is distinctive about covenants is not that targets are set, but that these lead to a process of identifying and tackling bottlenecks, which once resolved lead to the discovery of new bottlenecks and so on. Covenants connect targets with procedures, generating learning trajectories by and for all the parties that have to perform the actual tasks of implementation. Covenants are most valuable, therefore, when consensus can be reached on the goals and their translation into targets, but when the route to their attainment still has to be discovered.

As such, the open method of coordination (OMC) seems another clear example of reflexive labour law, soft law or the 'regulation of self-regulation'. The promotion of a 'social dialogue' (Supiot, 2000), strengthened by the promise of 'bargaining in the shadow of law' (Teubner, 1985: 336), points in the same direction. Open policy coordination, as distinct from policy competition, is the official creed of the EU. Open coordination is a soft method of influencing the decisions of more or less autonomous systems, from polities and policy domains and industrial relations down to the shop floor. On the other hand, one should not forget that the European level of decision-making in the social domain is strongly

subordinated to national interests, in terms both of voting procedures (qualified majority voting) and of the demarcation of its competence (subsidiarity). The gathering, dissemination and discussion by the European Commission of information from national sources, consolidated in a common format, is still the major instance of open coordination in the field of employment.

How has the OMC fared so far? Its field of application becomes ever broader; here we restrict ourselves to the European Employment Strategy (EES). Applying the OMC means: (1) establishing guidelines for the Union; (2) translating these into national and regional policy; (3) establishing indicators and benchmarks; and (4) periodic monitoring, evaluation and peer review (De La Porte et al., 2001: 293; Jacobsson, 2004: 357). Three key documents in the EES are the guidelines, drawn up by the Commission and finalized by the Council, the National Action Plans (NAPs), in which member states apply the guidelines and report on specific measures and targets, and the Joint Employment Report by the Commission, in which progress is compared to guidelines and new recommendations are announced. According to the Draft Joint Employment Report for 2004/05, much remains to be improved. Crucial for the OMC is the adequacy of the NAPs to promote the objectives and implement the guidelines of the EES. The Commission is hardly enthusiastic about developments on this score: 'The NAPs in general do not reflect the political consensus to focus the EES on implementation and the delivery of policy . . . Important implementation gaps exist in all Member States, in particular regarding employment levels, the effective exit age from the labour market and participation and investment in education and training. One would therefore expect the exchange on good governance practices to be given a higher priority' (EC, 2005: 37).

This judgement by the Commission is not the first one in this vein. In 2002, it identified four key issues for improvement: clear objectives; simplification of guidelines; governance and partnership; and consistency and complementarity. Progress has been made in the simplification of the guidelines, the one issue on which the Commission itself has the main initiative. On the other issues, progress is still slow, at best. This may not be the final verdict: we find in the literature on the OMC many assertions of the potentiality of this mode of soft governance, and the optimists might well prove right in the future (one example, representative of many, is Trubek and Trubek, 2003). On the other hand, if the OMC is to become a success, several design requirements are in order. Among these is political muscle at European level, capable of mandating the authority at stake, and therefore relying on effective European government. For here as well, governance is no substitute for government. Also required are representative and accountable societal stakeholders. Time and again, however, the actual involvement of the social partners in the making of

NAPs is judged inadequate (Goetschy, 1999; De La Porte and Pochet, 2004: 74). Also, the organizational leverage of the social partners at the EU level is weak (Dølvik, 1997; Jensen et al., 1997). In order to empower the OMC, a series of what Schmitter (2001) calls European Governance Arrangements (EGAs) may prove necessary. The NAPs could figure among these, provided that these plans shed their governmental slant and are, indeed, transformed into instruments of multi-party governance. The covenant may suggest the way to proceed, in a future yet to arrive.

Covenants and Working Conditions

Sickness and disability are key issues in the Netherlands, because the proportion of the workforce registered for benefits on these grounds is exceptionally high by comparison with other European countries. In 1989, legislation was introduced to improve workplaces and to reduce sick leave, disability risks, work stress and other work-related problems. This legislation was not successful, for the country faced substantial costs for the care and rehabilitation of workers suffering from stress, musculoskeletal disorders and other physical disabilities. The law failed both because of the complexity of its enforcement and monitoring, and of organizational weaknesses in preventing work risks and reintegrating employees. The responsibility for improving working conditions was therefore delegated to the social partners, with the government retaining the role of initiation and facilitation. Here covenants proved instrumental, for they offered a new procedure to bring the interested parties together.

Covenants on working conditions are agreements (51 of which were reached between 1999 and the beginning of 2004) between the Ministry for Employment and Social Affairs and the social partners, setting quantifiable targets (Peters, 2001: 14) and designed to help employers and workers to improve working conditions. Individual companies, especially small and medium-sized enterprises (SMEs), simply lack the scale and scope to organize a thorough working-conditions policy, but can learn from one another and from the other parties gathered under the covenant. All covenants feature agreements on early reintegration into the company after sick leave, and on reduction of stress, physical workload and repetitive strain injuries. Such covenants now cover 46 percent of the Dutch working population (3.3 million workers), and about half of them have been incorporated in sectoral collective agreements.

A recent evaluation (Veerman et al., 2004) compared sectors with and without a covenant on working conditions. Those without a covenant are not inactive in the realm of working-conditions policies: they also have

to reduce risks and costs. Sectors that have concluded covenants may well be self-selected, with above average problems in this area. Organizations that have pursued their own policies may indeed be in the vanguard; yet we also find sectors where the degree of self-organization is too low to permit any collective action, in the shape of covenants or otherwise. A third remark is that differences between sectors with and without a covenant cannot be exclusively explained by covenants alone. Nevertheless, there is a growing consensus as to the efficacy of the covenants.

The estimated yearly financial savings for employers are substantial (Ministerie SZW, 2004: 28). The Ministry and the social partners made a one-off investment of €275 million, not taking into account the costs of companies in implementing the measures. The estimated yearly savings (on costs for sickness leave and disability insurance benefits) are more than €650 million. Total yield cannot be assessed yet, because of the number of covenants still in the making.

For successful covenants, a number of elements are of importance: goal consensus, specific and measurable goals, commitment and actual implementation at the level of the individual organization (Tweede Kamer der Staten-Generaal, 1999: 16). We focus on a consensus concerning goals. It is with respect to this that the major changes can be observed.

Where the market and prescriptive law both fail, two consequences (not mutually exclusive) may result. The first consists in negative external effects and the shifting of costs and risks from the microlevel of organizations to sectors or society at large; the second in the underutilization of opportunities and capabilities not reached. Both may be tackled by covenants: the first is exemplified by covenants on working conditions, sickness absence and disability; the second by covenants on employment and the labour market.

During the 1980s and 1990s, the Dutch government succeeded in pushing back part of the financial burden of the social risks of inadequate working conditions to the industry and organizational level (thus transforming social into organizational risks). The expectation was that when organizations had to foot the bill, they would change their behaviour. The result at first was, not surprisingly, that working conditions became a matter of cost comparisons. Where the law prescribed specific working conditions, non-compliance might pay if the probable penalties were less than the costs of improving conditions. But with a covenant, the shared goal was a reduction of absence and disability, and the covenant brought together the expertise for designing ways and means of making reductions feasible and manageable. Also, the covenant brought the interested parties together by enlisting the cooperation of the organizations and systems ('stakeholders') involved.

However, working conditions are only one of the causes of absence from work. Consequently, the scope of the covenant widened, to include,

for example, the effects of dead-end jobs, of limited opportunities for occupational mobility and more generally, of limited employability. Here again, the goal (improving employability) is a shared one, and again the problem is to design the ways and means of getting there. A few covenants to this effect are now in progress.

One final caveat: covenants are no substitute for self-regulation. Although the problems tackled are of general interest, the parties actually participating must have passed some threshold of self-organization. Only those parties who have 'in effect declared their strategic intentions but not so far as to have assured their own success' fall within the ambit of the public effort 'of convening and moderating groups of firms [and other parties] that want to cooperate' (Sabel, 1995: 14–16). The scale of the covenant is therefore limited and such is recognized also in Dutch practice: covenants have only flourished in sectors that possess self-organization (Korver, 2002). Scale, by this token, does not signal the urgency of the problems, but the readiness of the partners to tackle them. If, however, the problem is such that the government feels (or is pressured to feel) that the public interest is at stake (for example, the viability of the welfare state, the boosting of participation and preparation for the knowledge economy) it may indeed move into action to convene a covenant.

Covenants and the Labour Market

We distinguish two types of labour market covenant. The first concerns the employment opportunities for categories with a weak labour market situation; the second, the employment situation in specific sectors.

As an example of the former, in May 2002 a covenant was concluded for women re-entering the labour market. Though it is still in process, the initial results are disappointing: despite a target of 50,000 jobs by 2005, only 2900 have been created. The low growth rate of the economy, and in consequence increased unemployment, are blamed for this.

Another covenant, signed by the Ministry of Social Affairs and Employment, the organization of SMEs (MKB Nederland) and the central organization of the Dutch Public Employment Service (PES), addressed the position of ethnic minorities in the labour market. It commenced in early 2000 and lasted until the end of 2002 (before the economic slowdown). The target was to create more than 60,000 jobs over the three years, half of which were to involve employment of a duration of at least six months. These targets were indeed achieved. At the start of the covenant period, the SMEs had 180,000 vacancies and had to compete in a then very tight labour market. The covenant was therefore welcome, especially since it promised to tap relatively unused

reservoirs of labour. Next to satisfaction over the results, the three parties voiced their satisfaction with this form of mutual cooperation.

A further covenant, directed at the employment of ethnic minorities in large companies and again concluded with the Ministry, started in 2002 and continued through 2004. It had no specific targets, but created an enhanced sense of urgency within the companies involved, and improved collaboration between companies and other parties in the labour market, such as the PES. This covenant is first and foremost a learning experience and its criteria of success are the creation of new networks in which 'best practices' spread the initiative, improved procedures to reduce unnecessary bureaucracy and harmonizing labour market opportunities with social security constraints (Ministerie SZW, 2003).

We now turn to covenants in sectors with specific labour market problems. The Dutch Ministry of Education, Culture and the Sciences and the Sector Administration for the Educational Labour Market (SBO) concluded a covenant in 2000 on the labour market situation in the education sector; this was renewed at the end of 2002. Labour market improvements were necessary, for employees constituted an ageing workforce, sickness and absence rates were high, and the sector faced considerable difficulties in recruiting new personnel and in retaining new recruits.

The covenant had two targets: to identify the bottlenecks in the educational labour market and to promote activities for their reduction. Administratively, the covenant was complex: it both symbolized and formalized the new separation between the SBO and the minister, who until 2000 was a member of its board. Also, the SBO was dependent on the social partners as these had to be involved in the identification of, and the activities to reduce, the bottlenecks in the labour market. Moreover, the covenant was a framework, to be subdivided into a number of regional covenants. That is good policy, since labour markets have a strong regional accent and most school boards are organized, if at all, on a local or regional basis. Again, however, it exacerbates the administrative complexity of the covenant as the number of projects, parties, goals and targets also multiplied. The covenant is still in the process of execution, but its renewal shows that for the many parties concerned the balance so far has been more positive than negative.

Two covenants were concluded in the care sector, one for health care proper (1998) and the other for youth welfare (1999). The convening partners were the Ministry of Public Health, Welfare and Sports, the social partners and the PES. The main goal of the two covenants was a reduction in the shortage of personnel, by enlarging the inflow of trainees and increasing the training effort for present personnel, reducing sickness and disability absence and stimulating reintegration, by reducing turnover and by the recruitment and selection of ethnic minorities. Here,

too, the shortages were intensified by the general shortage of labour at the time.

Overall, the targets have been met, without completely solving the problem of the shortage of personnel. Again, the latter could very well be the condition for the former, especially in a sector where the demand for personnel today is matched by growing unemployment in the rest of the labour market (OSA, 2003: 13–16). A side-effect of the covenants has been better information on organizational and labour market trends, strengthening the basis for policy. Some of the same administrative difficulties that plague the education sector can be found here, with roughly the same causes. Though the case for covenants looks good, its course has not yet run.

The more successful labour market covenants were where labour shortages could be overcome by tapping unused reservoirs of labour: as in the care sector, in SMEs and, to a certain extent, in education. The covenant for women re-entering the labour market fared less well. The employment market for their services was actually shrinking and the initiative soon lost momentum. Critical, then, is the joining of publicly relevant goals (such as participation and employability) with the goals of societal actors. The covenant offers a procedure for getting the parties together and for initiating processes of mutual information, learning and communication, in the sense of identifying bottlenecks and designing ways and means to overcome them. At the same time, the actual processes of joining forces show considerable complexity. Goals, bottlenecks, procedures, processes and outcomes are related, distinct and also inextricably intertwined, and this may hamper the development of cooperative efforts precisely when they are most needed.

New forms of cooperation are always accompanied by risks. One aspect of learning by monitoring is that the actors recognize their involvement in 'the kind of high-risk situation where public action can matter most' (Sabel, 1995: 14). Covenants meet that criterion: the government has stakes in participation and employability, and in the quality of care and education. The social actors had stakes as well, for which they needed adequate forms of cooperation. All parties believed in the promise of the covenant since it mapped and institutionalized support for a common endeavour which could not otherwise have come about.

On a more general plane, covenants imply specific roles for both state and civil society. Succinctly put, the 'state should encourage or require civil society actors to supervise themselves in the provision of services and rules, and limit its own intervention to monitoring the self-supervision of civil society actors' (Sabel, 2004: 173). This, to be sure, is a programme for soft law, for accountable social and political actors and for processes of learning where those who learn supervise themselves. The latter is 'learning by monitoring'.

Learning, related to employment and employability, means acquiring the knowledge to make and do the things that (labour) markets value (and thereby unlearning the things not so valued). Monitoring means the assessment by the partners in learning of whether the gains from learning are distributed acceptably. Yet learning may lead to outcomes that favour some parties more than others, and the very possibility of this may hamper the effort of learning itself. The dilemma is that learning puts existing relations of distribution at risk, that it 'undermines the stability of relations normally required for monitoring' (Sabel, 1994: 231).

Coupling learning and monitoring can thus lead to blockages. Learning produces winners and losers. On a micro-scale, new processes will lead to an upgrading of some positions and a downgrading of others. Nevertheless, to guarantee the progress of learning, one may have to enlist the endeavours of both prospective winners and eventual losers. Also, it is likely that we do not know beforehand where gains are going to accrue and losses be incurred. On a macro-scale, the present prediction is that the advancing knowledge economy will exacerbate the inequality of incomes. If uncorrected, this development might end in jeopardizing the attempt to enhance rates of participation and employability.

Learning by monitoring attempts to evade such blockages. It does not sever the relations between learning and monitoring; rather, it strengthens them. In so doing, it puts the idea of accountable self-regulation to the test. The concept as such is an elaboration of several insights of Hirschman's studies on the economics and politics of economic development, where the idea of sequence assumes centre stage. Instead of a master plan pre-empting all further decisions, the emphasis is on induced decision-making, in which one action leads to the next problem (or 'bottleneck'), where learning by doing is prominent and is continuously fed back into the decisions and planning of new moves and actions. Instead of given resources and optimal allocation, induced decision-making focuses on 'calling forth and enlisting ... resources that are hidden, scattered, or badly utilized' and on the process of combining them. Tapping such resources depends on the presence or construction of 'pressure mechanisms' or 'pacing devices' (Hirschman, 1958: 5, 25–6). Resources are not the final constraint; nor is optimal allocation known beforehand. What is optimal and which combinations work is a matter of finding out in a process of 'muddling through' (Hirschman, 1971: 63–84). Instead of planning, we have exploring, and the need for an adequate pacing device. Learning by monitoring is such a device, and the covenant is the instrumental shape it can assume.

Covenants and Transitions

Covenants are needed most to handle issues for which it is not yet clear what exactly is required of the participants to achieve commonly set and publicly valued goals and targets. Successful covenants reduce the risks of projects which are necessary, but uncertain in terms of process, outcome and the distribution of costs and benefits. If the subject transcends the scope of collective bargaining (as with the integration of new or non-participants in the labour market), the results of covenants can be consolidated in PECs (Freyssinet and Seifert, 2001: 619). Even when the subject matter of the covenant is within the scope of collective bargaining, such bargaining is to no avail when the definition, the magnitude and the distribution of risks are themselves unknown. Such situations require governmental initiative or support to facilitate interaction between the social actors. Collective bargaining may, of course, lead to socially and publicly valued outcomes, but this is not its purpose. The public dimension is, however, one of the defining characteristics of a covenant, and if need be, the 'task of convening and moderating' falls to the public authorities 'by default' (Sabel, 1995: 16).

How do covenants relate to socio-economic transitions? In order to secure the durable participation of men and women in the emerging knowledge economy, new arrangements for combining work, care and lifelong learning are needed. Also, the erstwhile separate spheres of working, caring for one's family and education need bridges for two-way transitions between these spheres. According to Schmid (2002), such transitions are the prime target for the reform of social security and the labour market: the slogan is to make transitions pay rather than to make work pay. The latter is still emphasized in the latest Draft Joint Employment Report; the former is conspicuously absent.

Instituting a system of transitional labour markets requires a radical reorientation in the matter of risks. Risks can be of two kinds. Many traditional labour risks involve danger: involuntary unemployment, work accidents, ill-health and disability. Though coverage for these risks is essential, they are not the risks we emphasize in the present context: our focus is not on risks which are largely involuntary, but on those which are to a greater extent chosen. What were once dangers may have become, and may be helped to become, risks that can be managed. In the context of transitional labour markets, one needs to discuss risks that we choose to take, for instance when moving from one job to the next, from one employer to the next, from one combination of activities in work, care and education to the next and so forth. Here the issue involved in risk is not danger, but trust. Not only do we need to insure against accidents, ill-health, unavoidable old age or other contingencies, we want assurance in moves we choose to make during our career and, indeed, in

our chosen life-course trajectories. And as we make such moves in the expectation that they conform to the general goals of more mobility, more transitions and more training, we want to be able to cash in on our insurance when these expectations are disappointed (Luhmann, 1988). The opportunities for covenants in the framework of transitional labour markets are in the transformation of risks: from danger to trust.

Trust is a two-way process. One needs to trust one's partner and the partner has to trust us. In bargaining, trust may be obtained by binding oneself: it is a device for coping with the freedom of others, and for others to cope with our own freedom. If our partner believes our 'credible commitment', then she or he may accept reciprocal commitments. Reputation (and the damage it may suffer) is an assurance for commitments. While a contractual commitment is also possible, private contracts have the disadvantage that keeping them depends on a cost/benefit calculation. In other words, in order for contracts to be trusted, they depend in their turn on other kinds of commitment (collateral, a confession or a promise) (Frank, 1988; Schelling, 1963: 22–8). In that respect, covenants may perform better. On the other hand and for the very same reason, it will prove harder to muster the commitment of parties to enter into such contracts.

We lack an adequate theory of the genesis of trust (Elster and Moene, 1989: 4–5; Gambetta, 1988: 231). In the learning-by-monitoring example, trust is sort of a 'by-product' of cooperating, but *how* is it generated? Under what conditions do we need trust in order to achieve and maintain cooperation? Trusting someone means 'believing that when offered the chance he or she is not likely to behave in a way that is damaging to us, and trust will be typically relevant when at least one party is free to disappoint the other, free enough to avoid a risky relationship, and constrained enough to consider that relationship an attractive option' (Gambetta, 1988: 219). That is, trust presupposes exit (avoiding a risky relationship is viable only if functional equivalents for that relationship are available), and it requires for its growth and maintenance both voice (demanding safeguards (monitoring devices, for example) against disappointment, otherwise the relationship will not be upheld) and loyalty (combining attractions and constraints). Exit requires competing possibilities; voice requires modes of communication; and loyalty requires binding oneself.

Trust is like knowledge: it grows when used, and depletes when unused. The covenants on working conditions match the requirements of trusting cooperation. The agreements are not legally binding, the voice of the parties concerned is enlisted, and the performance standards and supporting timetables are included. However, there has been no similar advance in the case of covenants on labour market issues, at least those for weak categories in the labour market. Again, the agreements are not legally binding, but the commitment of the parties enlisted is much more

restricted. Nevertheless, in one evaluation of the covenant on improving the opportunities for ethnic minorities, gains are reported in improved relationships between the government and the participating companies, in improved cooperation between the enlisted parties, in organizations learning from one another and in the emergence of networks of organizations (Ministerie SZW, 2003). The improved record in cooperation may in time produce enough trust for stronger performance standards and the enlistment of more partners, needed to effect the performance goals.

However, our case concerning the build-up of transitional labour markets is more complex than the examples given so far. The goals, enhancing the possibilities for durable participation and improving employability, are widely shared. Yet before these can be made operational, clarity as to the accountability of governments and social partners is required. In our view, the government should take the lead; subsequently, the other questions (what cooperation is needed, with what partners, in which timeframe, and towards what targets) can be approached. Learning by monitoring, and developing accurate and acceptable standards along the way, is the only way to proceed here: in particular, if as we have hypothesized, the development of standards will also produce the trust needed to continue cooperating. We emphasize at this point that cooperation does not and should not exclude competition. The possibility of not joining is important for covenants to work, as is the possibility of opting out after joining. Competition is its own method of learning and monitoring and it may contribute to better performance.

Concluding Remarks

The grand design for soft law is in combining 'covenant and commonwealth', as Selznick puts it. Covenants are 'prepolitical, foundational, and consensual', while a commonwealth is 'a going concern that must balance interests and harmonize functions' (Selznick, 1992: 477–8). The task of governments is indeed to balance interests and harmonize functions, and to do so in a lawful and democratic manner. To fulfil this task, governments rely, and today must rely more and more, on the self-regulating capacity of civil society. The covenant depends on a commonwealth, the commonwealth on the covenant. The commonwealth presupposes effective government, the covenant presupposes and expresses the promise of effective governance.

Covenants, thus, are all about the relation between state and civil society. In that respect, they resemble the regulation of industrial relations, though industrial relations pertain to collective interests, as distinct from public interests.[3] Indeed, covenants are a mechanism for bridging the public and the collective spheres of interest. As such, they are highly demanding, on

the quality of government and on the quality of civil society. Covenants are not all-purpose tools: they are specific and even 'dedicated' investments of viable states and civil societies, and their actual application can be fraught with difficulties. Much more knowledge is needed of the factors critical for success in order to make the most of the instrument and to test its scale and scope. As it stands, we feel confident that in the Dutch context the covenant has been useful and should be pursued, in particular in developing the potential of transitional labour markets (Korver and Oeij, 2004a). In the broader European context, the reality of both commonwealth and covenant seems, to date, a bridge too far. On the other hand, furthering the interests of the OMC might very well profit from a better insight into the conditions and results of the covenant and of its many functional equivalents in regulating self-regulation.

NOTES

1 For a case study at the EU level, where employability policy is hampered by the absence of credible and accountable government, see Korver and Oeij (2004b).
2 This expression (literally, 'informal administrative action') is difficult to translate meaningfully. For, '*informales*' does not mean 'informal' in its English sense: it denotes the implementation of public policy through non- or extra-juridical mechanisms, which can take a multitude of forms. The key feature is that government prepares the basis for implementing policies of common concern (environmental to employment policies) in close cooperation with those directly involved.
3 By 'collective interests' we denote those specific to particular groups and organizations as against those that are general and societal.

REFERENCES

De La Porte, C. and Pochet, P. (2004) 'The European Employment Strategy: Existing Research and Remaining Questions', *Journal of European Social Policy* 14(1): 71–8.

De La Porte, C., Pochet, P. and Room, G. (2001) 'Social Benchmarking, Policy Making and New Governance in the EU', *Journal of European Social Policy* 11(4): 291–307.

De Ru, H.J. (1993) 'Convenanten tussen maatschappelijke organisaties en overheid, behoefte en rechtvaardiging', in F.J. Van Ommeren and H.J. De Ru (eds) *Convenanten tussen Overheid en maatschappelijke organisaties*, pp. 1–28. Den Haag: SDU J&F.

Dølvik, J.E. (1997) 'Redrawing Boundaries of Solidarity? Paper presented to the fifth regional congress of the Industrial Relations Research Association, Dublin.

EC (European Commission) (2005) *Draft Joint Employment Report 2004/2005*, COM(2005)13 final. Brussels: EC.

Elster, J. and Moene, K.O. (1989) 'Introduction', in J. Elster and K.O. Moene (eds) *Alternatives to Capitalism*, pp. 1–35. Cambridge: Cambridge University Press.
Frank, R.H. (1988) *Passions within Reason*. New York: Norton.
Freyssinet, J. and Seifert, H. (2001) 'Pacts for Employment and Competitiveness in Europe', *Transfer* 7(4): 616–28.
Gambetta, D. (1988) 'Can We Trust Trust?' in D. Gambetta (ed.) *Trust: Making and Breaking Cooperative Relationships*, pp. 212–37. Oxford: Blackwell.
Goetschy, J. (1999) 'The European Employment Strategy: Genesis and Development', *European Journal of Industrial Relations* 5(2): 117–38.
Grijns, A. (1993) 'Convenanten in Duitsland', in F.J. Van Ommeren and H.J. De Ru (eds) *Convenanten tussen Overheid en maatschappelijke organisaties*, pp. 167–87. Den Haag: SDU J&F.
Hirschman, A.O. (1958) *The Strategy of Economic Development*. New Haven, CT: Yale University Press.
Hirschman, A.O. (1971) *A Bias for Hope*. New Haven, CT: Yale University Press.
Jacobsson, K. (2004) 'Soft Regulation and the Subtle Transformation of States: The Case of EU Employment Policy', *Journal of European Social Policy* 14(4): 355–70.
Jensen, C.S., Madsen, J.S. and Due, J. (1997) 'The Voice of European Business and Industry — The Case of UNICE', in P. Flood, N. Heraty and M. Morley (eds) *The European Union and the Employment Relationship*, pp. 37–54. Dublin: Oak Tree Press.
Korver, T. (2002) 'De grenzen van het poldermodel. Arboconvenant voor loonconfectie (nog) niet haalbaar', *Arbeidsomstandigheden* 78(6): 10–13.
Korver, T. and Oeij, P.R.A. (2004a) 'From Job to Career: Designing Transitional Labour Markets', in N. Van Den Heuvel, P. Van Der Hallen, T. Van Der Lippe and J. Schippers (eds) *Diversity in Life Courses: Consequences for the Labour Market*, pp. 61–82. Tilburg: OSA, Institute for Labour Studies.
Korver, T. and Oeij, P.R.A. (2004b) 'Employability Through Covenants'. Paper presented to the TLM.NET conference Quality in Labour Market Transition: A European Challenge, Amsterdam, November. URL: http://tno-arbeid.adlibsoft.com/adlib/docs/tnoP0418593.pdf
Luhmann, N. (1988) 'Familiarity, Confidence, Trust: Problems and Alternatives', in D. Gambetta (ed.) *Trust: Making and Breaking Cooperative Relationships*, pp. 94–107. Oxford: Blackwell.
Ministerie SZW (Sociale Zaken en Werkgelegenheid) (2003) Brief aan het parlement, kenmerk ABG/DB/03/27296. Den Haag: Ministerie SZW.
Ministerie SZW (2004) *Jaarrapportage Arboconvenanten 2003*. Den Haag: Ministerie SZW.
OSA (2003) *Arbeid in Zorg en Welzijn*, OSA rapport ZW 47. Tilburg: OSA.
Peters, S. (2001) 'Duwtje in de rug', *Arbo Magazine* 17(2): 13–15.
Sabel, C.F. (1994) 'Learning by Monitoring: The Institutions of Economic Development', in L. Rodwin and D.A. Schön (eds) *Rethinking the Development Experience: Essays Provoked by the Work of Albert O. Hirschman*, pp. 231–74. Washington, DC: Brookings.

Sabel, C.F. (1995) 'Bootstrapping Reform: Rebuilding Firms, the Welfare State, and Unions', *Politics and Society* 23(1): 5–48.
Sabel, C.F. (2004) 'Beyond Principal-Agent Governance: Experimentalist Organizations, Learning and Accountability', in E.R. Engelen, M. Sie Dhian Ho (eds) *De Staat van de Democratie: De Democratie Voorbij De Staat*, pp. 173–95. Amsterdam: Amsterdam University Press.
Schelling, T.C. (1963) *The Strategy of Conflict*. New York: Galaxy.
Schmid, G. (2002) 'Employment Insurance for Managing Critical Transitions During the Life Cycle', in P. Auer and B. Gazier (eds) *The Future of Work, Employment and Social Protection*, pp. 63–82. Geneva: ILO.
Schmitter, P.C. (2001) *What Is There to Legitimize in the European Union . . . and How Might This Be Accomplished?* Jean Monnet Working Papers No. 6/01. Cambridge, MA: Harvard.
Selznick, P. (1992) *The Moral Commonwealth*. Berkeley, CA: University of California Press.
Sisson, K. and Marginson, P. (2001) *'Soft Regulation' — Travesty of the Real Thing or New Dimension?* IRRU Working Paper 32/01. University of Warwick.
Supiot, A. (2000) *The Evolution of Labour Law and the Tasks of Jurisprudence in the Year 2000*. Amsterdam: HSI/UvA.
Teubner, G. (1985) 'Verrechtlichung — Begriff, Merkmale, Grenzen, Auswege', in F. Kübler (ed.) *Verrechtlichung von Wirtschaft, Arbeit und soziale Solidarität*, pp. 289–344. Frankfurt am Main: Suhrkamp.
Teubner, G. (ed.) (1988) *Dilemmas of Law in the Welfare State*. Berlin: De Gruyter.
Teubner, G. (1989) *Recht als autopoietisches System*. Frankfurt am Main: Suhrkamp.
Trubek, D.M. and Trubek, L.G. (2003) 'Hard and Soft Law in the Construction of Social Europe', Paper. Florence: European University Institute.
Tweede Kamer der Staten-Generaal (1999) *Arboconvenanten nieuwe stijl: beleidsstrategie voor de komende vier jaar (1999–2002), TK, vergaderjaar 1998–1999, 26 375, nrs 1–2*. 's-Gravenhage: Sdu Uitgevers.
Van Ommeren, F.J. (1993) 'Convenanten in soorten en maten. Op weg naar de reguleringsovereenkomst', in F.J. Van Ommeren and H.J. De Ru (eds) *Convenanten tussen overheid en maatschappelijke organisaties*, pp. 29–50. Den Haag: Sdu J&F.
Van Ommeren, F.J. and De Ru, H.J. (1993) 'Slotbeschouwing', in F.J. Van Ommeren and H.J. De Ru (eds) *Convenanten tussen overheid en maatschappelijke organisaties*, pp. 295–307. Den Haag: Sdu J&F.
Veerman, T.J., Molenaar, P.G.M., Van der Burg, C.L. and Hoffius, R. (2004) *De meerwaarde van de arboconvenanten-aanpak. Een eerste evaluatie op basis van beschikbare databronnen*. Den Haag: Ministerie SZW.

TON KORVER is an economist and **PETER OEIJ** a sociologist, both employed as researchers at TNO (Netherlands Organization for Applied Scientific Research), Quality of Life, Department of Work and Employment.
ADDRESS: PO Box 718, 2130 AS Hoofddorp, The Netherlands.
[e-mail: t.korver@arbeid.tno.nl]