

**Social developments**  
in the European Union

2006

edited by Christophe Degryse and Philippe Pochet

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Eighth annual report



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European Trade Union Institute  
for Research, Education and Health and Safety (ETUI-REHS)  
Observatoire social européen, asbl (OSE)  
The National Institute for Working Life and  
The Swedish Trade Unions in Co-operation (SALTSA)

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## Preface

Developments on the European level during 2006 were marked by two opposing trends in the form of a strengthening of European economic integration and inertia with regard to the development of Europe as a political project. This opposition can be illustrated by, on the one hand, the final adoption by the Council of two widely discussed and highly controversial directives – the directive on services and the REACH directive on chemicals – and, on the other hand, the seemingly endless prolongation of the period of reflection on the European constitution, the effects of which seem to be to inhibit any progress and, to a certain extent, to provoke action by guaranteeing non-action. This contradiction of moving forward the economic agenda while putting the brakes on political progress is also very evident in the tension continuously arising between the need to build on previously achieved social rights and the drive towards deregulation in order to meet the challenge of globalisation. The coming years will be decisive for the European project. Will it rise to the challenge of reconfirming its commitment to Social Europe, and thereby live up to European citizens' expectations, or will it head towards a flatter and less ambitious horizon?

This eighth edition of *Social Developments in the European Union* is marked by both continuity – in the reporting of important social developments at EU level – and impending change, as this will be the last year in which SALTSA – the joint research programme run by the Swedish confederations of employees and Sweden's National Institute for Working Life (NIWL) – will be a co-publisher of this annual publication. Due to a decision by the Swedish government in December 2006 to close down the NIWL by July 2007, the SALTSA research programme will be discontinued after June 2007. This closure represents

a great loss for the research community, as well as for practitioners concerned with labour market issues. Both the NIWL and SALTSA have contributed enormously to the gathering of evidence on labour market conditions, not only in Sweden but also on a European level, and helped not only to increase knowledge but also to raise the quality of the evidence that can then be used to underpin policy- and decision-making. The ETUI-REHS and OSE will greatly miss this valuable partner as they pursue their endeavours to conduct high-quality problem-oriented research on issues of strategic importance for labour market issues across Europe.

Maria Jepsen (ETUI-REHS), Christophe Degryse,  
Lars Magnusson (SALTSA) and Philippe Pochet (OSE)

## Foreword

Although the European Union seemed to become bogged down in constitutional crisis during 2006, the world around it continued to turn. Europe has a straightforward choice in the face of globalisation: to consolidate its prior achievements – fundamental rights, social and environmental standards – in an enlarged Union, or else to sacrifice them in the global race to be competitive. This tension lies beneath the surface of all the contributions to this review of social developments in Europe. Whether it be socially responsible management of corporate restructuring, the affirmation of fundamental rights or social dialogue and workplace health and safety standards, two opposing forces are ever-present in this volume: to champion all that is specific about the European model of economic and social development, or to jettison the ‘burdens’ and ‘obstacles’ to international competitiveness.

From an international perspective, one might – despite a lack of hindsight – venture the hypothesis that 2006 was a year of upsets. The (temporary) suspension of the World Trade Organisation (WTO) negotiations in July puts the much-discussed Doha Development Round on hold; most importantly, however, it highlights the deep divisions between groups of nations on the principles, scope and intensity of international trade liberalisation. The ascendancy of China, no longer just as a trading power but as a diplomatic giant, has been remarkable. China was a presence on all fronts in 2006: drawing up a new cooperation agreement with the European Union, bolstering its economic cooperation in Africa, consolidating its energy partnership with Russia, laying down its diplomatic priorities to the United States, especially on the subject of Iran’s nuclear power – and so the list goes on. Russia seems equally inclined to flex its muscles, not only in its own

'back yard' but also as an inescapable Eurasian player, not hesitating for a moment to use its vast energy resources to exert leverage. In the United States, on the other hand, the triumphalism of the Neoconservatives came to an end in 2006: they have been greatly weakened by the quagmire of Iraq (Baker report) and at the mid-term elections. The US is having to reconsider some of its policies, including on the sensitive topic of global warming.

Therefore, owing to the emergence of new world players, as well as what is now the inevitability of global challenges linked to neo-liberal logic (growing social inequalities, global warming, degradation of natural resources and the ecosystem), the model of triumphant neo-liberalism is revealing its limitations and, no doubt, starting to wane. In November 2006, in a bid to rise to the challenges of globalisation, the two former international trade union confederations united in a new organisation, the International Trade Union Confederation (ITUC). At its founding conference in Vienna, the ITUC pledged to 'change globalisation fundamentally, so that it works for working women and men, the unemployed, and the poor'. This undertaking likewise reflects a shared analysis, within the trade union movement worldwide, of the causes to be tackled and the strategies to be deployed in order to attain this goal: 'It is essential [...] that the policies of free market neo-liberalism, and the manifest failings and incoherence of the international community in respect of the current process of globalisation, give way to governance of the global economy' (on the issue of striking a competitive balance on the European market, see the chapter by Marie-Ange Moreau).

Environmental challenges now rank beside social challenges on the international agenda. In 2006 it was no longer only ecologists who were alerting public opinion to the threat of global warming, but a former US presidential candidate. It was no longer non-governmental organisations, but the UK government, which used calculations by the former chief economist at the World Bank to estimate that the effects of climate change would cost € 5,500 billion if nothing is done (Stern report). None other than the Financial Times is now telling us that 'companies

must adapt or die in a changing climate' (1). Meteorologists are no longer alone in speaking out on the climate; they have been joined by entomologists and farmers – since nature, for its part, has already begun to adapt – along with insurance companies and the world of finance. The economic and social damage done by the dominant economic model is now an immediate, quantifiable, concern. In this context, the European Union must opt between upholding its specific form of balanced, fair and sustainable economic, social and environmental development, or continuing to remove the 'barriers' to competitiveness on the international scene, its eyes glued to the short-term performance of its rivals.

Neo-liberalism has been contested in a series of national ballots in EU Member States. However, these protest votes have not solely taken the form of a come-back by the Left; there has also been an upsurge of populist, nationalist and extreme right-wing parties. With the exception of Sweden, all the elections held in 2006 were won either by the Left or by the nationalist, populist Right (or both together, in Slovakia). The formation of the 'Identity, Tradition, Sovereignty' (ITS) political Group in the European Parliament in January 2007 is a reflection and consequence of these results. This trend fully substantiates the need for a proactive European policy on fundamental rights (see, in this volume, the contribution by Olivier De Schutter on the creation of the European Agency for Fundamental Rights).

In Hungary, after a closely-fought campaign against the nationalist Right, the electorate opted for continuity by re-electing Socialist Prime Minister Ferenc Gyurcsany in April (2). At the May legislative elections in the Greek part of Cyprus, the Communist Party Akel retained its position as the largest Greek Cypriot formation, the other parties in the coalition being the social-democratic party Edek, the European party Evroko and the Greens. The June elections in the Czech Republic put the anti-Communist, Eurosceptic, liberal Right in power, and a 'blue-

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1 John Llewellyn, 'Companies must adapt or die in a changing climate', *Financial Times*, 29 January 2007.

2 But the conservative Right was victorious at the local elections in October.

black-green' coalition was eventually established after a political crisis lasting until January 2007. In June, the general election in Slovakia brought victory for the Left and the nationalists, in a reaction to years of liberal reforms. The Social-Democrat Party allied itself with the populist Movement for a Democratic Slovakia and the ultranationalist Slovak National Party, causing the European Parliament to suspend the left-wing party. In Sweden, at the September legislative elections, a coalition of conservative, liberal, centrist and Christian-democrat parties put an end to twelve years of social-democratic government. Social democracy nevertheless remains the principal political force in the country. In October, the Austrian general election resulted in unexpected defeat for the conservatives, victory for the opposition social-democrats and a resurgence of the extreme Right. The elections held in the Netherlands in November saw endorsement for the traditional parties, a breakthrough for anti-liberals and the emergence of an anti-immigrant party. So, whereas there have for some years been hints of a left-wing revival (Spain, Italy, Portugal, Hungary and Austria, as well as in coalition governments: Belgium, Germany etc.), this is accompanied by a rise of the nationalist, populist Right (in the United Kingdom, Poland, Belgium, the Netherlands, Austria, Slovakia, the Czech Republic, Romania etc.).

Turning to the 'usual' large States and their policies on Europe, none of them apart from Germany and Spain seems to have been in a position to help Europe overcome the deadlock in 2006. France, in pre-campaign mode for the 2007 presidential elections, appeared unable either to make sense of the no-vote on the constitutional Treaty or to envisage a way out of the crisis. The disarray of the anti-capitalist Left, the main force behind the no-vote, has made the question of Europe disappear from the radar screen. In the United Kingdom, the failure of Prime Minister Tony Blair's Europe policy and the weariness of the Labour Party (evident at the local elections on 4 May) contributed to the growing popularity of David Cameron's Conservatives and an enduring upsurge in British Euroscepticism. John Major's former political adviser, Lord Blackwell, argued in January 2007 for the United

Kingdom to withdraw from the institutional structures of the Union <sup>(3)</sup>. In Italy, there was of course the electoral victory of Romano Prodi over Silvio Berlusconi and an avowed determination to strengthen European policy-making by relaunching the idea of an integrationist nucleus of countries with France, Germany and Spain. But the considerable political difficulties faced by the new Prime Minister at home have weakened his government. Besides, Italy's budgetary situation is less favourable than predicted. In Spain, Prime Minister José Luis Rodríguez Zapatero supports European integration and ratification of the constitutional Treaty. At the 19<sup>th</sup> Franco-Spanish summit in November, French President Jacques Chirac announced that he now regarded Spain as a 'special strategic partner' in pushing forward European integration, on a par with Germany. But Madrid raised hackles in Paris in January 2007 by jointly holding, with Jean-Claude Juncker of Luxembourg, the 'Friends of the Constitution' conference, a gathering of countries having ratified the text. In Poland, the conservative Law and Justice Party (PiS), which signed an agreement with the anti-liberal populists and the extreme right-wing League of Polish Families in late April, is at odds with its European partners on a whole range of issues: the European Parliament investigation on CIA flights, the freezing of the cooperation agreement with Russia, the lack of effective measures to reduce Poland's deficit, and so on.

As we complete this rapid tour of the major countries, it would seem that only Germany and Angela Merkel's grand coalition are in a position to play a key role in reinvigorating the European Union. Indeed, this state of affairs raised a good many (too many?) expectations at the start of the German presidency on 1 January 2007. Its room for manoeuvre will however depend on the results of the presidential and legislative elections in France, as well as on political developments in the United Kingdom now that Mr Blair has announced his intention to step down during the course of 2007. Just as new players and new global challenges are emerging, therefore, the European Union is running into

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<sup>3</sup> Norman Blackwell, 'The forces pushing us away from European integration', *Financial Times*, 29 January 2007.



the sand and most of its Member States seem to have lost their political vision.

On the 'domestic' policy front, 2006 saw the closure of some important chapters opened under the previous European Commission: the 'services' directive was adopted (see the chapter by Éric Van den Abeele), as was the REACH Regulation on the placing of chemicals on the market. In an upbeat economic climate accompanied by an overall reduction in unemployment, there is little talk any more of the Lisbon Strategy, the alpha and omega of Community policies between 2000 and 2005. Several policy dossiers have been postponed or suspended, which is a sign of tension within the Commission itself and/or between the Commission and the Member States: a delay in the mid-term review of the White Paper on European transport policy for 2010, postponement of the publication of the Green Paper on modernising labour law, postponement of the Commission's action plan on energy efficiency, postponement of the action plan on a policy in respect of patents, suspension of the draft recommendation on private copy levies, postponement of a communication on follow-up to the White Paper on services of general interest, delay in the adoption of the strategy on reducing CO<sub>2</sub> emissions from private cars, etc. In addition, several social dossiers are behind schedule or have been stalled for much too long: reform of the 'working time' directive, the directive on temporary workers, the review of the directive on European works councils, etc. The European Trade Union Confederation points out that: 'while two social directives per year were adopted between 1957 and 2002 [...], in 2005 and 2006 not even one legislative initiative was taken' (ETUC memorandum to the German presidency of the European Union, January 2007).

Concerning environmental policy, the differences of opinion and conflicts between European Commissioners are common knowledge; the Commission responsible for heading up Europe's strategy on climate change is deeply divided. In terms of social affairs, various contributions to this edition of *Social Developments* depict a Commission which is in retreat, providing little input into debate and putting forward few initiatives on matters such as services of general interest and social services (see the chapter by Rita Baeten), health and

safety at work (chapter by Laurent Vogel) and European social dialogue (chapter by Christophe Degryse).

The challenges – both internal and external – confronting the EU, its institutions and its Member States call for imagination and strong political commitment in many fields: these include climate change, social inequality, territorial cohesion, the affirmation of a sustainable model of development, and Europe's role in international diplomacy. In the multi-polar world of the future, where regulation will be more necessary than ever, the European Union is one of the few players capable of fostering an international consensus and garnering the political resources to confront the global challenges. But in 2006 the main question concerning all of those challenges was: does the Union have ambitions to match its resources?



## **Towards a proactive EU policy on fundamental rights**

The question of fundamental rights was high on the agenda in 2006. The single most important development was that a political agreement was reached within the Council on the establishment of a Fundamental Rights Agency, as called for by the Brussels European Council of December 2003. A review of some of the year's main developments will serve to highlight what the future role of the Agency might be. That role has generally been understood, especially among civil society organisations, as monitoring in the sense of 'evaluation': in that view, the primary function of the Agency should be to follow developments in the laws and policies of the European Union, in order to react where fundamental rights as listed in the EU Charter of Fundamental Rights are violated or at risk of being violated; and to ensure that the implementation of Union law by the Member States complies with the Charter. But an examination of the role of fundamental rights in the establishment of the area of freedom, security and justice leads us to emphasise, rather, the guidance function the Agency could fulfil: in addition to reacting to the adoption of certain instruments at EU level and of implementation measures at national level, the Agency should be proactive, identifying areas where further initiatives might be taken in order to ensure that a high level of protection of fundamental rights is ensured within the Union. I argue in this contribution that the Agency will breathe new life into the Charter of Fundamental Rights: not only will it help to ensure that the Charter is respected, as it is now being recognised that it should, being an authoritative codification of the

Union's *acquis* in the field of fundamental rights (!); it will also ensure that the Charter's values will guide the exercise of the competences attributed to the Union, and influence the understanding of the principles of subsidiarity and proportionality which are to be complied with.

## 1. The Fundamental Rights Agency

### 1.1 Background: the purposes of monitoring fundamental rights in the European Union

Even though the formal proposal for the establishment of an Agency of Fundamental Rights of the European Union was presented only in June 2005, the goal of having, within the Union, an institution entitled to monitor fundamental rights developments in the Union and the Member States has been under discussion for some time. A proposal for setting up a human rights monitoring centre within the Union, which could serve to improve coordination of the fundamental rights policies pursued by the Member States, had already been made, in particular in a report prepared for the 'Comité des Sages' responsible for drafting *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000* (Alston and Weiler, 1999: 3). The main argument in favour of the creation of such a body was that it could encourage the Union to adopt a more preventive approach to human rights. 'Systematic, reliable and focused information', it was then argued, 'is the starting point of a clear understanding of the nature, extent, and location of the problems that exist and for the identification of possible solutions'. The proclamation, on 7 December 2000, of the Charter of Fundamental Rights of the European Union at the Nice European Summit as the single most authoritative restatement of the Union's *acquis* in the field of fundamental rights also constituted a decisive step

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<sup>1</sup> See Case C-540/03, *Parliament v. Council*, judgment of 27 June 2006, not yet reported. In this case, the European Court of Justice dismisses the action for annulment filed by the Parliament against certain sections of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (Council of the European Union, 2003a).

in this regard <sup>(2)</sup>. The impact of the adoption of the Charter on the practice of the institutions was immediate. Since 2000, for instance, the European Parliament's annual reports on the fundamental rights situation in the Union have used the Charter as their main source of reference. The establishment in September 2002, by the European Commission at the European Parliament's request, of the EU Network of Independent Experts on Fundamental Rights <sup>(3)</sup> also contributed to the move towards implementing the proposal for a Human Rights Agency (European Parliament, 2001) <sup>(4)</sup>.

Nevertheless, when the Heads of State and Government of the Member States announced at the Brussels European Council of 13 December 2003 their intention to extend the mandate of the EU Monitoring Centre on Racism and Xenophobia (EUMC) so as to create a 'Human Rights Agency' <sup>(5)</sup> entrusted with collecting and analysing data in order to define Union policy in this field, most observers were taken by surprise. The political decision was made without any feasibility study

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<sup>2</sup> Charter of Fundamental Rights of the European Union, OJ C 364 of 18 December 2000, pp.0001-0022 ([http://eur-lex.europa.eu/LexUriServ/site/en/oj/2000/c\\_364/c\\_36420001218en00010022.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2000/c_364/c_36420001218en00010022.pdf)).

<sup>3</sup> The EU Network of Independent Experts on Fundamental Rights is composed of 25 experts and monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the EU Charter of Fundamental Rights. See the website ([http://ec.europa.eu/justice\\_home/cfr\\_cdf/index\\_en.htm](http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm)).

<sup>4</sup> In its Resolution, the European Parliament recommended 'that a network be set up consisting of legal experts who are authorities on human rights and jurists from each of the Member States in order to ensure a high degree of expertise and enable the Parliament to receive an assessment of the implementation of each of the rights laid down in the European Union Charter of Fundamental Rights, taking into account developments in national laws, the case-law of the Luxembourg and Strasbourg Courts and any notable case-law of the Member States' national and constitutional courts' (European Parliament, 2001: point 9).

<sup>5</sup> The expression 'Human Rights Agency' was also used in the Hague Programme on the strengthening of Freedom, Security and Justice in the Union appended to the conclusions of the European Council of 4-5 November 2004.

being carried out, and essentially, it would seem, to reinforce the Union's presence in Vienna and to find a dignified solution to the need to reform the EU Monitoring Centre on Racism and Xenophobia. The European Council's decision to create the Human Rights Agency by expanding the competences of the EU Monitoring Centre on Racism and Xenophobia <sup>(6)</sup> could at first seem surprising. On the basis of an external evaluation of the EUMC's activities between its creation in 1998 and the end of 2001 (CEC, 2002a), the Commission considered, in its Communication of 5 August 2003, that 'the Centre should continue to concentrate on racism and that an extension to other fields would be an unwelcome distraction within the limits of the resources likely to be available to the Centre and that it would lead to a weakening of the emphasis on racism' (CEC, 2003a: 9). Both the specialised nature of the EUMC's activities – a specialisation which, moreover, was regarded as a condition for effectiveness in the fulfilment of its mandate –, and the definition of its main task, which lies in collecting and processing information rather than in preparing legal opinions <sup>(7)</sup>, seemed to clearly distinguish the activities of the EUMC from those of an independent Human Rights Agency for the Union.

In this context, the European Commission chose, prior to making a formal proposal, to organise a wide-ranging consultation in order to identify more precisely where the added value of a Fundamental Rights Agency for the European Union might lie, how it should be structured, and how its mandate should be defined. The Commission presented a public consultation document on 25 October 2004 (CEC, 2004a). In

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<sup>6</sup> This Monitoring Centre, sometimes referred to as the Vienna Observatory, was created by Council Regulation (EC) 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia (Council of the European Union, 1997).

<sup>7</sup> According to Article 2(1) of its instituting Regulation, the EUMC must 'provide the Community and its Member States [...] with objective, reliable and comparable data at European level on the phenomena of racism, xenophobia and anti-Semitism in order to help them when they take measures or formulate courses of action within their respective spheres of competence' (Council of the European Union, 1997).

reply to this consultation document, the Commission received contributions from a wide range of actors and, in order to discuss the modalities of the proposed institution, a public hearing was held on 25 January 2005<sup>(8)</sup>. As illustrated by the different positions expressed in the course of these consultations, expectations varied. Two functions in particular, it was anticipated, could be fulfilled by the Fundamental Rights Agency.

### ***1.1.1 The ‘evaluation’ function of monitoring***

First, the Agency could improve the evaluation of the European Union and its Member States in their implementation of Union law as regards their obligation to comply with the EU Charter of Fundamental Rights. Thus for instance when, on 26 May 2005, the European Parliament called on the Commission to submit a legislative proposal concerning the Agency, it pointed out that ‘establishing the Agency should make a contribution to further enhancing mutual confidence between Member States and constitute a guarantee of continued observance of the principles set out in Articles 6 and 7 of the Treaty on European Union’ (European Parliament, 2005a: point 26). These provisions define human rights, along with democracy and the rule of law, as part of the values on which the Union is founded. They give the Council the possibility both of adopting sanctions against a State which, in its opinion, has seriously and persistently breached the principles set out in Article 6(1) EU<sup>(9)</sup>, and – since the entry into force of the Nice Treaty on 1 February 2003<sup>(10)</sup> – of determining that there is a clear risk of a

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<sup>8</sup> The response from the academic world and from civil society organisations was remarkably high. See, for an overview of the debate, Alston and De Schutter (2005).

<sup>9</sup> Article 7(2) to (4) EU and, for the implementation of these sanctions in the framework of the EC Treaty, Article 309 EC.

<sup>10</sup> Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Nice, 26 February 2001, OJ C 180 of 10 March 2001, pp.0001-0087 ([http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/c\\_080/c\\_08020010310en00010087.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/c_080/c_08020010310en00010087.pdf)).



serious breach by a Member State of the common values on which the Union is based and addressing recommendations on that basis to the Member State concerned. It is on the basis of these provisions that, since 1999, the European Parliament has systematically sought to review the situation of fundamental rights in the Member States, even going so far as to adopt annual reports on the subject during the period 1999-2003. Just as the establishment of the EU Network of Independent Experts was requested by the Parliament as a means to facilitate the exercise of this role, the creation of the Fundamental Rights Agency, through the information it would collect and analyse, should enhance the effectiveness and credibility of such monitoring of the Member States.

This evaluation function should also be exercised vis-à-vis the institutions of the Union. For a few years now, the European Commission has taken the view that the institutions' obligation to act in conformity with the Charter means anticipating that its proposals might violate the Charter. This led the Commission President and Commissioner Vitorino to require in March 2001 that the European Commission services attach to all legislative proposals which could have an impact on fundamental rights an indication that these proposals are compatible with the requirements of the Charter (CEC, 2001). In April 2005, the Commission adopted a Communication whereby it seeks to improve the compliance of its legislative proposals with the requirements of the Charter (CEC, 2005a). On 15 June 2005, it adopted a new set of guidelines for the preparation of impact assessments (CEC, 2005b) which, although they are still based, as in the past (CEC, 2002b), on a division between economic, social and environmental impacts, pay much greater attention to the potential impact of different policy options on the rights, freedoms and principles listed in the Charter of Fundamental Rights <sup>(11)</sup>. The establishment of a Fundamental Rights Agency, it would seem, could further improve this pre-emptive approach to the compliance of EU institutions' activities with the

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<sup>11</sup> Indeed, a specific report was commissioned by the European Commission (DG Justice, Freedom and Security) from the European Policy Evaluation Consortium (EPEC) (see EPEC, 2004).

Charter. As noted in the Explanatory Memorandum appended to the proposals put forward by the European Commission on 30 June 2005: 'Securing fundamental rights depends on appropriate governance mechanisms to ensure that they are taken fully into account in policy setting and decision-making in the Union. Not only an adequate legislative framework but also appropriate structures and adequate resource allocations are needed for that purpose' (CEC, 2005c: 2).

### ***1.1.2 The 'collective learning' function of monitoring***

Second, the Agency could constitute a mechanism to promote collective learning among the Member States, by ensuring that their experiences in the field of fundamental rights are compared and that best practices are identified and their diffusion, perhaps, encouraged. This idea was clearly present in the proposals put forward by the European Commission on 30 June 2005. The Commission proposed both a Council Regulation establishing a European Union Agency for Fundamental Rights on the basis of Article 308 EC (the 'implicit powers' clause), and a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union (i.e. police and judicial cooperation in criminal matters) on the basis of Articles 30, 31 and 34 EU. In the Impact Assessment Report appended to the proposal of 30 June 2005, the establishment of the Agency is justified on the grounds that 'although the Member States have developed various strategies, policies and mechanisms to respect and mainstream fundamental rights when implementing Union law and policies, there is a lack of systematic observation of how the Member States do this. Such a lack represents a missed opportunity, as the potential for sharing of experiences and good practices and mutual learning is not met' (CEC, 2005d: 8).

These 'evaluation' and 'collective learning' functions are not always clearly distinguishable from one another, since the kind of evaluation required to ensure that the Member States mutually trust each other is justified by the need to verify not only that the national authorities comply with certain minimum standards – such as those set forth in the EU Charter of Fundamental Rights, but also those deemed to form part of the general principles of law which the Union must comply with –, but also that the implementation of these common values within each Member State does

not diverge too widely. According to this understanding of what is required for mutual trust to be established between the Member States, such mutual trust may be endangered not only where one Member State violates fundamental rights so as to render impossible cooperation with its judicial, administrative or police authorities, as well as the recognition of its national rules or judicial decisions in areas where mutual recognition is imposed. Mutual trust would furthermore be threatened in the presence of overly divergent approaches, i.e. in situations where the level of protection offered in one Member State would clearly be higher than in another, even though the lower level of protection offered in the latter State may still comply with the minimum requirements of the EU Charter of Fundamental Rights or of other relevant instruments. This is for instance the view implicit in a Communication where the Commission describes its understanding of Article 7 EU and specifies, in this regard, that the EU Network of Independent Experts 'has an essential preventive role in that it can provide ideas for achieving the area of freedom, security and justice or alerting the institutions to divergent trends in standards of protection between Member States which could imperil the mutual trust on which Union policies are founded' (CEC, 2003b: 10).

This goal of monitoring the fundamental rights situation in the Union resembles that which had previously justified attributing a similar function to the Working Party on Data Protection, instituted by Article 29 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (European Parliament and Council of the European Union, 1995) <sup>(12)</sup>. Its

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<sup>12</sup> Article 30(2) of the Data Protection Directive states that 'If the Working Party finds that divergences likely to affect the equivalence of protection for persons with regard to the processing of personal data in the Community are arising between the laws or practices of Member States, it shall inform the Commission accordingly'. The 'Article 29' Working Party also exercises this mission under Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (European Parliament and Council of the European Union, 2002), in accordance with Article 15(3) of this Directive.

originality is that it moves beyond the two roles described above ('evaluation' and 'collective learning' respectively), and that it leads to a form of monitoring which may be called 'orientative', since it may influence the Union's exercise of its powers to realise fundamental rights.

### ***1.1.3 The 'orientative' function of monitoring***

This 'orientative' function of the monitoring of the fundamental rights situation in the Member States, then, sees such monitoring as indispensable for an informed exercise by the Union of its competences in the field of fundamental rights, in conformity with the principle of subsidiarity. A number of competences have been conferred upon the Union which make it possible for the EU to develop a fundamental rights policy. Although there is no authoritatively agreed list of such competences, almost all of them are not exclusive to the Union or the Community, but are shared between the Union or Community and the Member States. Examples of such competences conferred upon the Union or the Community include Article 13 EC which provides that 'the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation', and Article 18 EC which provides that 'every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'. The latter served as a basis for the adoption, by the European Parliament and the Council, of Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (European Parliament and Council of the European Union, 2004). It is pursuant to Articles 63 and 64 EC, which provide for development by the Union of measures on asylum and immigration policy, that the Council adopted Directive 2003/86/EC of 22 September 2003 on the right to family reunification (Council of the European Union, 2003a) and Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers (Council of the European Union, 2003b). And it is on the basis of Article 31 EU regarding common action on judicial cooperation in

criminal matters that the European Commission proposed the adoption of a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union (CEC, 2004b). Many more such examples could be given.

The blurred division of competences between the Union or the Community and the Member States makes it vital to determine, in conformity with the principles of subsidiarity and proportionality <sup>(13)</sup>, *at which level* the need to improve fundamental rights protection may be most effectively addressed. Indeed, the Union's exercise of the competences it shares with the Member States in order to safeguard human rights needs to be guided by information on developments within the Member States, concerning national laws and practices, and by whether such developments might lead to the emergence of diverging standards within the Union, necessitating better coordination. This calls for a monitoring of the fundamental rights situation in the Member States, which would identify, on a systematic basis, in what fields unilateral action by the Member States would fail to achieve the objective of an area of freedom, security and justice where human rights are fully respected, and in what fields an initiative of the Union could better achieve that objective. It should be noted however that such monitoring, if it is to fulfil this third function, obviously cannot apply to the Member States only insofar as they implement Union law. Under the current proposals, both the Fundamental Rights Agency of the Union and the expert networks which it may call upon to provide it with data have a mandate limited to the scope of Union law. A strict division between what is 'within' the purview of EU law and what is 'outside' that purview may be tenable where the objective is to monitor whether the EU institutions, or the Member States acting under Union law, comply with fundamental rights. But when the objective is to identify where the Union may need to take action, and thus potentially expand the scope, this separation simply is not workable. Instead, this boundary should be constantly redefined, according to changing

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<sup>13</sup> See Article 5 EC, which is made applicable with reference to the activities of the European Union by Article 2(2) EU.

circumstances, and according to what is required in order to protect fundamental rights effectively in the Union.

## **1.2 The debate following the proposal for a Fundamental Rights Agency**

According to Article 2 of the Commission's proposal of 30 June 2005, the objective of the Agency will be 'to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights' (CEC, 2005c: 14). The thematic areas of the Agency's activities – which would always include the fight against racism and xenophobia – will be defined in a Multiannual Framework drafted by the European Commission (Article 5 of the proposal). Within these thematic areas, according to Article 4, the tasks and missions of the Agency would essentially consist in collecting, recording, analysing and disseminating relevant, objective, reliable and comparable information and data; developing methods to improve the comparability, objectivity and reliability of data at European level; formulating conclusions and opinions on general subjects, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission; and enhancing cooperation with civil society.

Following the Commission's presentation of its proposals, the debate within the Council's *Ad hoc* Working Party – the European Parliament being consulted through an informal dialogue between the three institutions (14) – revolved around three issues (15). The first was the

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<sup>14</sup> On this issue, see, in particular, the three reports published by the European Parliament (European Parliament, 2005b and 2006a and b).

<sup>15</sup> The following presentation takes into account, as the most recent document available at the time of writing, the Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights in the compromise version prepared by the Finnish presidency of the Council and approved by the COREPER on 29 November 2006 (Council of the European Union, 2006).

structure of the Agency. The Commission had at least two models to borrow from. First of course, it could seek inspiration from the existing European agencies – in particular the European Foundation for the Improvement of Living and Working Conditions (Dublin) <sup>(16)</sup>. But due to the specific mandate of the Fundamental Rights Agency, another source of inspiration was the national human rights institutions (NHRI) based on the United Nations ‘Principles relating to the Status of National Institutions’ (Paris Principles) of 20 December 1993 (United Nations, 1993) <sup>(17)</sup>. There were two ways in which the Paris Principles could have inspired the structure of the Fundamental Rights Agency. A first interpretation of the Principles would have consisted in considering the future Agency as an institution for the protection and promotion of human rights in the legal order of the Union, which could have sought inspiration, for the identification of guarantees of its independence, for the composition of its bodies, and for the definition of its powers and working methods, from the practice of the existing NHRIs in the Member States. A second option could have been to conceive the Agency as a body based on the existing network of European NHRIs, and as a forum in which the existing NHRIs (or equivalent institutions in Member States which have no NHRI in the meaning of the Paris Principles) could exchange their experiences and work together in order to contribute, through reports, recommendations and opinions, to improving the protection of fundamental rights in the Union. The structure of the Agency, as proposed by the European Commission on 30 June 2005 – which comprises a management board, an executive board, a director and a forum – was a form of compromise – or middle way – between these two interpretations. Subsequent discussion in the Council’s *Ad hoc* Working Party led to the inclusion within the Agency of a Scientific Council with 11 Members, whose role it is to ensure that

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<sup>16</sup> <http://www.eurofound.eu.int/>

<sup>17</sup> For an overview of the situation of national human rights institutions in the European Union, see the Opinion of the EU Network of Independent Experts in Fundamental Rights regarding the role of national institutions for the protection of human rights in the Member States of the European Union, Opinion 2004/1, March 2004 ([http://ec.europa.eu/justice\\_home/cfr\\_cdf/doc/avis/2004\\_1\\_en.pdf](http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2004_1_en.pdf)).

the Agency's reports, opinions and recommendations are of high scientific quality and that they reflect a truly independent evaluation of the fundamental rights situation. The other parts of the Commission's proposal were largely retained. In particular, despite a suggestion by certain delegations (France, in particular) that the management board should be composed of representatives of the Member States, the original idea of the Commission – that it should comprise independent persons, for instance heads of national institutions for the promotion and protection of human rights – gained most support. The relationship between the Agency and civil society organisations is to be structured by the establishment of a 'Fundamental Rights Platform', conceived as a 'cooperation network' composed of 'non-governmental organisations dealing with human rights, trade unions and employer's organisations, relevant social and professional organisations, churches, religious, philosophical and non-confessional organisations, universities and other qualified experts of European and international bodies and organisations', and which 'shall constitute a mechanism for the exchange of information and the pooling of knowledge' (Council of the European Union, 2006: 21-22). The Commission's initial proposal was to create a 'Fundamental Rights Forum' which would meet annually; this idea gained little support, and the 'Platform' as defined in the regulation finally adopted represents a clear gain in efficiency. Finally, despite a European Parliament proposal to include a specific reference to the EU Network of Independent Experts on Fundamental Rights in the Regulation establishing the Fundamental Rights Agency, no such reference has been made in the Regulation (18).

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18 The Parliament suggested an amendment to Article 6(1) of the draft Regulation, formulated thus: 'In order to ensure the provision of objective, reliable and comparable information, the Agency shall, drawing on the expertise of a variety of organizations and bodies in each Member State and taking account of the need to involve national authorities in the collection of data:

- (a) set up and co-ordinate information networks, such as the network of independent experts on fundamental rights, and use existing networks;
- (b) organize meetings of external experts; and,
- (c) whenever necessary, set-up ad hoc working parties' (European Parliament, 2006c).



A second issue on which the debate focused concerned the need to avoid duplicating the work of Council of Europe bodies, and more generally to ensure proper cooperation and coordination between all bodies entitled to intervene in the field of fundamental rights on the territory of EU Member States. Partly as a result of certain concerns expressed by the Council of Europe <sup>(19)</sup>, it was decided in the course of the negotiations, first, that the Fundamental Rights Agency would only monitor fundamental rights in European Community law (including the implementation of EC Law by the Member States, but not in other fields), and second, that the General Secretary of the Council of Europe would appoint one independent person to the Agency's management board, who would also be allowed to take part in meetings of the executive board. Moreover, again in order to alleviate certain fears of overlapping mandates, the Agency's authority to examine the fundamental rights situation in third countries was severely restricted. The only countries, apart from the EU Member States, to which the geographical remit of the Agency may extend are the candidate countries (currently Turkey, Croatia and the former Yugoslav Republic of Macedonia), and the so-called pre-candidate countries, i.e. the countries in the Western

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The text agreed to within the Council does not include such an explicit reference to the network. Instead, it provides more flexibility: 'In order to ensure the provision of objective, reliable and comparable information, the Agency shall, drawing on the expertise of a variety of organizations and bodies in each Member State and taking account of the need to involve national authorities in the collection of data:

- (a) set up and co-ordinate information networks as well as use existing networks;
- (b) organize meetings of external experts and,
- (c) whenever necessary, set-up ad hoc working Parties' (Council of the European Union, 2006: 22-23).

<sup>19</sup> On the concerns of the Council of Europe that the European Union Fundamental Rights Agency might duplicate tasks performed by Council of Europe bodies, see, inter alia, Parliamentary Assembly of the Council of Europe, Resolution 1427 (2005) of 18 March 2005; and the Memorandum of 8 September 2005, submitted by the Council of Europe General Secretariat to the Vice-President of the European Commission in charge of justice, freedom and security, Mr F. Frattini.

Balkans whose natural vocation it is, in the future, to accede to the European Union, and for which the conclusion of Stabilisation and Association Agreements is seen as an instrument to prepare themselves as candidate countries <sup>(20)</sup>.

Finally, a third topic of debate concerned the extension of the mandate of the Fundamental Rights Agency to ‘third pillar’ issues, i.e. issues of police cooperation and judicial cooperation in criminal matters which are covered by Title VI EU. Despite the fact that these fields are highly sensitive from the point of view of civil liberties, certain Member States opposed the Commission’s proposal to allow the Agency also to analyse the fundamental rights situation under this Title of the EU Treaty. Instead, a political declaration is attached to the Regulation adopted containing a ‘rendez-vous’ clause allowing the mandate to be re-examined in 2009, ‘with a view to the possibility of extending it to cover the areas of police and judicial cooperation in criminal matters’. In addition, according to another declaration by the Council appended to the Regulation, ‘the Union institutions may, within the framework of the legislative process and with due regard to each others’ powers, each benefit, as appropriate and on a voluntary basis, from [the expertise gained by the Agency in the field of fundamental rights] also within the areas of police and judicial cooperation in criminal matters’; this expertise ‘may also be of use to the Member States that wish to avail themselves thereof when they are implementing legislative acts of the Union in that area’ (Council of the European Union, 2006: 47). Therefore, although the Agency’s remit does not extend beyond Community law, to the domains of police cooperation and judicial cooperation in criminal matters covered by Title VI EU, its future is

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<sup>20</sup> See, in particular, the Declaration adopted in Thessaloniki on 21 June 2003, following the EU-Western Balkans Summit (document 10229/03) (<http://register.consilium.europa.eu/pdf/en/03/st10/st10229en03.pdf>), and the *Thessaloniki agenda for the Western Balkans: Moving towards European Integration*, General Affairs and External Relations Council, 2518<sup>th</sup> Council session, External Relations, Luxembourg, 16 June 2003, adopted by the European Council on 20 June 2003 (<http://register.consilium.europa.eu/pdf/en/03/st10/st10369en03.pdf>). The third countries concerned are Albania, Bosnia and Herzegovina, Montenegro, and Serbia, which are all considered as potential candidates.

secured. Indeed, it can be expected that any sensitive instrument proposed under Title VI EU will be presented to the Agency for it to deliver an opinion, since it might be politically difficult to justify circumventing the Agency, once it has gained sufficient credibility by being truly independent and, especially, through the quality of its reports. Finally, although the Agency will not be tasked with the preparation of regular reports on third pillar issues, the evaluation of policies pursued by the Union and the Member States in this field might be conducted by other means – in particular peer review mechanisms, coordinated and facilitated by the Commission, on the basis of information provided by the Member States –, as was proposed by the Commission in June 2006 (CEC, 2006).

The establishment of the Fundamental Rights Agency, which should be up and running by the end of 2007, does not merely constitute an institutional development. It would be surprising if this institutional innovation did not have a powerful dynamising effect on the exercise by the Union of the competences it has been attributed, in a number of fields, to contribute to implementing the values enshrined in the EU Charter of Fundamental Rights. As the examples below illustrate, the European Union's potential contribution to the promotion and protection of fundamental rights is considerable, if the powers attributed to the Union for the establishment of an area of freedom, security and justice are used with a view to ensuring that fundamental rights are better realised in Europe (21).

## **2. Fundamental rights in the area of freedom, security and justice**

One of the objectives of the European Union is that it should 'maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum,

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<sup>21</sup> A similar analysis could be made as regards the exercise of the Community's powers in the establishment of the internal market. For reasons of space, this chapter is confined to the other central aim of European integration.

immigration and the prevention and combating of crime' (Article 2, al. 1, 4<sup>th</sup> indent, EU) The establishment of such an area between the Member States of the European Union is based on the idea that national courts and administrations, as well as law enforcement authorities, should cooperate with one another, in particular by exchanging information and mutually recognising judicial decisions in civil and criminal matters. This in turn presupposes that the Member States share a set of common values, which Article 6(1) EU refers to, and which include fundamental rights. However, where the Member States' approaches to fundamental rights diverge too widely, it may be necessary to approximate the national rules implementing such rights as listed in the Charter or recognised in international instruments ratified by the Member States, in order to ensure that mutual trust will not be threatened by such divergences.

### **2.1 Mutual recognition of judicial decisions in criminal matters and the need to strengthen mutual trust**

The Hague Programme adopted by the European Council of 4-5 November 2004 states that the mutual trust on which mutual recognition of judicial decisions is based could be enhanced by a number of means, including providing 'the certainty that all European citizens have access to a judicial system meeting high standards of quality'; the 'development of equivalent standards for procedural rights in criminal proceedings, based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions'; 'the establishment of minimum rules concerning aspects of procedural law is envisaged by the treaties in order to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension' (European Council, 2004: 36 and 38); and, finally, the approximation of substantive criminal law as regards 'serious crime with cross border dimensions', as provided for in the EU Treaty (European Council, 2004: 38). It is in this spirit that, for instance, the European Commission put forward a proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the

European Union (CEC, 2004b) <sup>(22)</sup>, which the Explanatory Memorandum justifies on the grounds that: ‘to date, the Member States have complied on a national basis with their fair trial obligations, deriving principally from the ECHR, and this has led to discrepancies in the levels of safeguards in operation in the different Member States. It has also led to speculation about standards in other Member States and on occasion, there have been accusations of deficiencies in the criminal justice system of one Member State in the press and media of another. This would be remedied by the adoption of common minimum standards. By definition, the standards can only be common if they are set by the Member States acting in concert, so it is not possible to achieve common standards and rely entirely on action at the national level’ (CEC, 2004b: 6).

More needs to be done, however. The proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union has apparently been met with scepticism by a number of Member States – and is progressing very slowly within the Council. Moreover, other measures may be called for in this area, given that approximation of national legislations in certain fields or improved coordination may be a condition for the establishment of mutual trust between the Member States, for instance in order to allow for the mutual recognition of judicial decisions in criminal matters.

Recent judgments of the European Court of Justice, for example, have highlighted the problems which may result from application of the *ne bis in idem* principle as embodied in Article 54 of the Convention implementing the Schengen Agreement (CISA) of 14 June 1985 on the gradual abolition of checks at the common borders, of 19 June 1990 (Schengen Convention) <sup>(23)</sup>. This provision had already led to the

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<sup>22</sup> For the position of the European Parliament, see its legislative resolution on the proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union (European Parliament, 2005c).

<sup>23</sup> Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239 of 22 September 2000, pp.0019-0062.

judgment delivered on 11 February 2003, in the historic case of *Gözütok and Brügge* where the Court justified giving it a generous reading as ‘a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied’ (24). Article 54 of the CISA provides that a person whose trial has been finally disposed of in one Contracting Party ‘may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party’. In *Gözütok and Brügge*, the Court considered that this provision applies to the procedure for discontinuing criminal proceedings through a settlement proposed by the Public Prosecutor. In the case of *Van Straaten* (25), it has been applied to bar the criminal conviction of a person based on the same material facts in a case where that person had been acquitted in another Contracting State for lack of evidence: the Court took the view that in such a circumstance, ‘the bringing of criminal proceedings in another Contracting State for the same acts would undermine the principles of legal certainty and of the protection of legitimate expectations. The accused would have to fear a fresh prosecution in another Contracting State although a case in respect of the same acts has been finally disposed of’ (paragraph 59). In *Gasparini*, decided on the same day as *Van Straaten*, the European Court of Justice took the view that the *ne bis in idem* principle, enshrined in Article 54 of the CISA, applies in respect of a decision of a court of a Contracting State, made after criminal proceedings have been brought, by which the

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<sup>24</sup> Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, [2003] ECR I-1345, Judgment of 11 February 2003, paragraph 33. This paraphrases the view of the European Commission that ‘Mutual recognition is a principle that is widely understood as being based on the thought that while another state may not deal with a certain matter in the same or even a similar way as one’s own state, the results will be such that they are accepted as equivalent to decisions by one’s own state’ (CEC, 2000: 4).

<sup>25</sup> Case C-150/05, *Van Straaten*, Judgment of 28 September 2006, not yet reported.

accused is finally acquitted because prosecution of the offence is time-barred<sup>(26)</sup>. This decision is even more remarkable, since it would not seem to address the problem of what AG Sharpston called ‘criminal forum-shopping’, which she defined as the situation of an individual ‘deliberately courting prosecution in a Member State where he knew that proceedings would necessarily be declared to be time-barred; and then relying on *ne bis in idem* to move freely within the EU’<sup>(27)</sup>. In a way, then, the Court in *Gasparini* placed the objective of the free movement of persons within the Schengen zone (which would be enhanced by the certainty of the individual that he will not be prosecuted once prosecution for the same facts had led to an acquittal in one Member State) above the objective of ensuring that the establishment of an area of freedom, security and justice among the Member States will provide EU residents with the ‘high level of safety’ also referred to in Article 2 EU as one of its objectives.

These cases highlight an apparent tension between two competing objectives: providing EU citizens with a high level of safety by ensuring that authors of crimes presenting a transnational dimension will not abuse the *ne bis in idem* principle by playing off the criminal system of one Member State against another, on the one hand; and, on the other hand, developing a robust understanding of the *ne bis in idem* rule in a transnational context, by applying this rule between different Member States, *mutatis mutandis*, as it would be applied within one single State. However, such tension is by no means inescapable. It simply results from the Member States’ failure to adopt common rules allocating jurisdiction in criminal cases or procedures for resolving positive conflicts of jurisdiction between EU Member States. In the absence of such rules, crimes presenting a transnational character over which more than one State may exercise jurisdiction will be decided by the jurisdiction where the criminal proceedings are fastest. The allocation of

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<sup>26</sup> Case C-467/04, *Gasparini and Others*, Judgment of 28 September 2006, not yet reported.

<sup>27</sup> Opinion of Advocate General Sharpston delivered in the case C-467/04, *Gasparini and Others* on 15 June 2006, paragraph 104.

jurisdiction should depend, one would think, on the strength of the links the competing jurisdictions have to a case, on the respective locations of the victims, the evidence, or the defendant, or on the outcome of consultations between the different States concerned. Instead, under the current system, this allocation is left to chance, at best; at worst, the authors of crime will exploit the lack of coordination<sup>(28)</sup>. In February 2003, Greece put forward a proposal for a Framework Decision on *ne bis in idem*<sup>(29)</sup>. Later, the Commission adopted a Green Paper on this subject<sup>(30)</sup>. The case of *Gasparini*, which presented the European Court of Justice with a real dilemma, shows the urgency of acting on this matter.

## **2.2 The principle of availability and the need to strengthen personal data protection in third pillar activities**

Personal data protection offers another illustration of the interplay between what might be called ‘negative’ integration, through the abolition of barriers between the Member States, and ‘positive’ integration, through the adoption of common standards, which should be seen as its necessary complement. In this field, the principle of availability plays the role which, in the field of judicial cooperation in criminal matters, is played by the principle of mutual recognition: it is both presupposed by the mutual trust which should exist between the Member States’ national authorities, and, as a technique through which leverage may be

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<sup>28</sup> This is clearly acknowledged by the European Commission: ‘without a system for allocating cases to an appropriate jurisdiction while proceedings are ongoing, *ne bis in idem* can lead to accidental or even arbitrary results: by giving preference to whichever jurisdiction can first take a final decision, its effects amount to a “first come first served” principle. The choice of jurisdiction is currently left to chance [...]’ (CEC, 2005e: 3).

<sup>29</sup> Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the ‘*ne bis in idem*’ principle, OJ C 100 of 26 April 2003, pp.0024-0027 ([http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/c\\_100/c\\_10020030426en00240027.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/c_100/c_10020030426en00240027.pdf)). The proposal included a provision on the need to hold consultations between the States concerned in situations of *lis pendens*, as well as criteria for the determination of jurisdiction.

<sup>30</sup> See above, footnote 29.



exercised in favour of the adoption of common standards, a principle which justifies the adoption of measures aimed at strengthening mutual trust (de Biolley, 2006). As defined in the Hague Programme adopted by the European Council of 4-5 November 2004, the principle of availability ‘means that, throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement of ongoing investigations in that State’ (European Council, 2004: 27). In other words, information available in one Member State should be made available to the authorities of any other Member State, just as if these were authorities of the same State: ‘The mere fact that information crosses borders should no longer be relevant. The underlying assumption is that serious crimes, in particular terrorist attacks, could be better prevented or combated if the information gathered by law enforcement authorities in EU Member States would be more easily, more quickly and more directly available for the law enforcement authorities in all other Member States’ (CEC, 2005f: 7). It is this principle which is currently codified in the proposal for a Framework Decision on the exchange of information under the principle of availability (CEC, 2005g).

But, as was stressed in the Hague Programme itself (paragraph 2.1), the implementation of the principle of availability requires in turn that all Member States ensure a high level of personal data protection, thus justifying the high level of trust which this principle presupposes between the national authorities of different Member States. Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (European Parliament and Council of the European Union, 1995) indeed does not apply to the processing of personal data in the course of an activity which falls outside the scope of Community law, such as the State’s activities in areas of criminal law or matters falling under Title VI EU (Article 3(2) of the Directive). Therefore, almost at the same time as proposing an instrument implementing the principle of availability, the Commission put forward a proposal for a Framework Decision on the protection of personal data processed in the framework

of police and judicial cooperation in criminal matters (CEC, 2005h). This was favoured by the European Parliament<sup>(31)</sup> and welcomed by the European Data Protection Supervisor<sup>(32)</sup>.

## **Conclusion**

The establishment of the Fundamental Rights Agency was not intended, at least explicitly, as a means to promote a more active fundamental rights policy in the Union. The objective pursued in creating such an agency was better evaluation, from the point of view of the fundamental rights recognized in the EU Charter of Fundamental Rights, of the measures adopted by the Union and its Member States in the implementation of Union law, and to promote mutual learning in this field. The intention was not for the Union to exercise its legal competences in this field more dynamically; nor, of course, was it to transfer supplementary powers to the Union. At the same time, it seems almost unavoidable that, just as the adoption of the EU Charter of Fundamental Rights is already influencing the exercise by the Union of the competences it shares with the Member States, the creation of the Agency will lead the Union to move from a reactive approach to fundamental rights – focused on the obligation to avoid violating them – to a proactive approach, asking instead how it may contribute to promoting them. This is all the more necessary in the current context, at a time when harmonisation has become difficult to achieve due to enlargement and the diverse sensibilities which coexist within the

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<sup>31</sup> See its recommendation to the European Council and the Council on the exchange of information and cooperation concerning terrorist offences (2005/2046(INI)), adopted on 7 June 2005, in favour of harmonising existing rules on the protection of personal data in the instruments of the current third pillar, bringing them together in a single instrument that guarantees the same level of data protection as provided for under the first pillar.

<sup>32</sup> See his Opinion on the Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters (COM (2005) 475 final), OJ C 47 of 25 February 2006, pp.0027-0047 ([http://eur-lex.europa.eu/LexUriServ/site/fr/oj/2006/c\\_047/c\\_04720060225fr00270047.pdf](http://eur-lex.europa.eu/LexUriServ/site/fr/oj/2006/c_047/c_04720060225fr00270047.pdf)).

Council, and when, as a result, mutual recognition (in its many incarnations) appears as a potential substitute. Not only compliance with the minimum standards imposed by fundamental rights but also the absence of excessively large divergences between the Member States in implementing fundamental rights should define the limit – or the precondition – for authorising the development of such mutual recognition techniques and enabling them to function without strain. There are signs that the need for the Union to actively promote a high level of protection of fundamental rights in the Union is being recognised (De Schutter, 2004). It is the hope of this author that this development – the gradual transformation of the European Union into an organisation dedicated to the realisation of fundamental rights, within the limits of its powers – will continue in the future.

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## **Restructuring in the European Union: recent developments (2005-2006)**

Restructuring in the European Union is a highly sensitive issue owing to the complexity of the political and social implications of decisions made by companies about organising and reorganising their business and manufacturing operations. This is especially the case now that the European Union consists - since 1 January 2007 - of 27 Member States. Such complexity derives first and foremost from the astonishing diversity of cases of restructuring, which makes it hard to construct a typology, and from the variety of stakeholders in the different countries, regions and sites, who do not fit neatly into uniform categories. It also results from the specific nature of sectors confronting the accelerating pace of technological change, as well as from 'financiarisation' and international competitiveness. Another factor is the obvious interaction between restructuring and matters as diverse as European monetary policy, economic guidelines, industrial policy, competition rules, the expansion of the internal market since enlargement, international trade negotiations and, of course, employment policy, social policy etc. – to mention only the most important.

Consequently, decisions made in the field of European governance, at the various levels of regulation, have a direct or indirect effect on the scale and pace of restructuring in the EU. They also explain the contradictions we find in the ways restructuring is managed in terms of industrial relations as soon as we look at aspects such as competitiveness and quality of work, protection of fundamental rights and the removal of labour market rigidity. If we accept that restructuring is a symptom of globalisation and an expression of the deep-seated changes pervading

the Union, it becomes even more understandable that modes of regulation must be determined locally and regionally as well as at European level (Petrovsky and Gazier, 2006; Moreau, 2006a).

The recent developments to be outlined below demonstrate that restructuring has become a matter of prime concern for politicians, not just locally, where the restructured site is located, but likewise at regional and European level. A gradual process of action and reaction is underway, aimed at formulating new responses that can take into account not only the complexity of restructuring as a phenomenon, but also the need to provide multi-faceted responses at many different levels. The emergence of a European-level policy on restructuring shows that the local level has been superseded, because of the role played by European rules on restructuring as well as the mobility of companies and their operations within the European Union due to the global strategies of firms operating on the European market. The principal change consists of increased activity on the part of the European institutions and the establishment of new operational structures (1), which prompt several lines of thought and action. These illustrate the difficulty of elaborating a fully-fledged European policy in this area (2).

## **1. Elements of change**

The first element of change is an intensification of activity by the European institutions around restructuring, the main reason being the political impact caused by the restructuring of large companies and by enlargement; but there are other causes too (1.1). This EU interest initially resulted in the establishment of coordinating bodies and think-tanks (1.2), and thereafter in the creation of funding streams as part of the European Social Fund (1.3).

### **1.1 Increased activity by the European institutions around restructuring**

Several phenomena lie behind the enthusiasm of the European institutions to address themselves to restructuring. The first is without a doubt linked to the huge transformation in business activity connected with enlargement and the fears generated by a proliferation of many kinds of operations in the 'old' EU countries: mergers, take over,

outsourcing, relocation, plant and site closures, redundancy plans and huge job losses <sup>(1)</sup>. In 2006, there was a fresh round of mergers in key sectors of the economy, on a larger scale than during the period 2000-2001 (Sachs-Durand, 2004). However, the lack of a consensus on how to quantify all the various forms of restructuring still poses a problem <sup>(2)</sup>. An observatory has been created at the Dublin Foundation within the EMCC (European Monitoring Centre on Change) <sup>(3)</sup>. The ERM (European Restructuring Monitor) establishes a quantitative record of restructuring operations based on data gleaned from the press and media. Even though these data are not reliable in scientific terms, since they originate from the economic and financial press and their quality varies from one EU country to another, the trends revealed are of interest <sup>(4)</sup>. Indeed, 1.555 million jobs were lost in the 15 old EU countries in 2002-2005, representing 0.6% of total employment or 0.15% per year on average. It also emerges that the most widely affected sectors are telecommunications, transport, banking and insurance, public administration, and then the automobile industry. Germany and the United Kingdom appear to be much more severely affected than France and Italy. The populations of the UK, Sweden, Ireland and Belgium (1.2% to 0.9%) are hit harder than those of France, Spain and Italy (0.2% to 0.4%). In France, the 176,000 job losses fell mostly in telecoms, transport, electronic equipment, metalworking and also the automobile industry and financial services (53% in these six sectors). There is evidence too that certain sectors are expanding in both the old and (especially) the new Member States, which explains why the impact

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<sup>1</sup> Hence the demand for the report on relocation by Fontagné and Lorenzi (2004).

<sup>2</sup> Starkly evident in France in 2005 owing to extensive media coverage of restructuring based on very different assessments.

<sup>3</sup> <http://www.emcc.eurofound.eu.int/erm/>

<sup>4</sup> The ERM publishes a bulletin every three months. The information given here can likewise be obtained from the AgirE project ([www.fse-agire.com](http://www.fse-agire.com)), funded under Article 6 of the European Social Fund (ESF) and processed by Alphametrics.

of restructuring is assessed differently at local/regional, national and European level. By the same token, it is interesting that almost 9% of the work outsourced beyond the European Union emanates from the new countries. These figures clearly show the need for a reliable quantitative database in the EU in order to provide public policy-makers with a more sophisticated evaluation than what is available in the media <sup>(5)</sup>.

The second phenomenon consists of an explicit call for EU-level intervention addressed to the European Commission by several Member States' governments but coming likewise from trade union organisations and business managers (e.g. Hewlett Packard, Volkswagen). The purpose of these requests is not always obvious from a strategic point of view, since they are prompted both by local protest movements, an offloading of responsibility for the social consequences of restructuring onto the Commission <sup>(6)</sup>, and a realisation of the extent to which Europe can be a useful level of intervention. This 'useful' level may be taken to mean the one at which a competitive balance can be struck on the European market – on account of the obligation to notify mergers – but it is also the level at which structural and regional aid is disbursed in the context of overseeing State aids and aid from the European Social Fund (ESF). More often, in recent months, it has been a matter of obliging the European institutions to devise a proper policy to cope with restructuring and help find novel solutions to the problems caused by labour market transition.

Finally, of course, the French and Dutch no-votes in the referendums on the European constitutional Treaty, which have caused deadlock in

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<sup>5</sup> The amount of media interest in large and small companies differs; it varies enormously from one country to another.

<sup>6</sup> Community powers are in fact contingent on the subsidiarity principle: the Union can act only in the areas laid down by the Treaty. In the social policy sphere a body of common rules, applicable to restructuring, has been built up by the directives on transfers of undertakings, collective redundancies, employee information and consultation, and the European works council. On this point, see below.

the constitutional process since 2005, served to mobilise all the relevant players around restructuring. These votes reveal the gulf between Europe's economic and financial policies, the employment guidelines centring on corporate competitiveness and labour market flexibility on the one hand and, on the other, the life of ordinary people dogged by job losses, relocations, redundancy plans etc. and the resulting fears. At the time of the referendums on the constitution, it became all too apparent that people had not understood how the Charter of Fundamental Rights could act as a bulwark against deregulation (Moreau, 2006a). In France, in particular, there is an alarming gap between the proclamation of fundamental rights and their observance in practice when restructuring occurs. Thus the Commission is motivated by a whole set of factors to rally support from players at European level and in the Member States around the issue of restructuring.

## **1.2 The establishment of new coordinating bodies at European level**

New coordinating bodies have been established gradually. The Communication on restructuring and employment published by the European Commission on 31 March 2005 (CEC, 2005) demonstrated that institution's desire to pursue a policy of adapting and adjusting Europe's economy to global change. The Communication is predicated on the need for horizontal coordination of European policies in order to achieve a synergy contributing constructively to change. Central to this approach is coordination between the aims of the European Employment Strategy (EES), the EU's financial instruments – above all ESF aid – and EU industrial policy (now that it has been relaunched on a sectoral basis with the formation of observatories and an innovation and development programme to create new jobs). There are also links with competition policy so as to ensure that employee representatives' opinions are factored into merger or State aid procedures, and involvement in the Doha Round trade negotiations at the World Trade Organization (WTO). The Commission has set up a task force responsible for this coordination, comprising officials from all the Commission's directorates-general. In 2005, the coordination was headed up by a 'Mr Restructuring' answerable to the Directorate

General for Employment and Social Affairs. But owing to the highly complex issues raised by the European policies affecting the strategies of companies that restructure their operations, it proved essential during the course of 2006 to create a specialist restructuring unit within DG Employment and Social Affairs.

The Commission has likewise set up a Forum tasked with bringing together the main players in political, social and institutional circles with a view to holding high-level deliberations on restructuring. The three forum meetings held since 2005 (7) have drawn attention to the areas of conflict surrounding potential EU responses. These forums have fostered a new political consciousness about restructuring and created a link between the social and political players. The relevance of Europe as a level of intervention has been highlighted, but so has the need for coordination and interaction between the social partners and the public authorities at local and regional level. If change is to be anticipated effectively, it appears vital to make provision for complementary levels of regulation and for building active partnerships.

### 1.3 Financial aid and the new aims of the ESF

Following a good deal of opposition to the creation of an ‘anti-shock fund’, it was eventually decided at the Hampton Court summit (end of 2005) to endow the European Social Fund with a budget specifically intended to facilitate adaptation to change. The sum allocated would be €500 million (8) and its purpose would be to finance social adjustment measures. This ‘anti-shock fund’ is designed to assist companies with their transition and adaptation to the economic environment dictated by globalisation. The fund’s *raison d’être* is to ease the transition connected with the new distribution of economic activity in the Union and the accelerating pace of change. Thus the idea behind this initiative is to take the first step towards organising a transitional labour market (9).

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7 The minutes can be found on the Commission’s website [http://ec.europa.eu/employment\\_social/restructuring/forum\\_en.htm](http://ec.europa.eu/employment_social/restructuring/forum_en.htm).

8 Statement made in March 2006.

9 On the formation of transitional markets, see Gazier (2005).

The objective of the European Social Fund programme for the period 2007-2013 may be to assist with the anticipation of restructuring and the management of economic change. A recently published Note gives an overview of the Commission's future intentions (CEC, 2006) <sup>(10)</sup>. The framework programme will make funding available to help achieve the aims of the European Employment Strategy (the convergence objective 'adaptability to economic and social changes' – Article 3.2) in order to enhance competitiveness at regional level.

The ESF is therefore part of the proposed approach of combining flexibility and security while reducing labour market rigidity. Explicit reference is made to stepping up aid for boosting the adaptability of labour while taking account of demographic developments in the Union. Thus the framework programme will prioritise measures serving to strengthen national systems geared to anticipation, innovation and structural reforms: these measures should promote flexibility of the labour market, tailored measures for individuals and outplacement as a potential tool in the area of redeployment. The aid will be used both to finance bodies such as specialist observatories on labour markets, skills and qualifications - be they national or regional - as well as the setting up of instruments needed to anticipate restructuring, such as indicators and benchmarking systems, stakeholder consultation mechanisms and exchanges of good practice. The ESF likewise earmarks aid for the social partners and for establishing links between them and the public authorities. As far as companies are concerned, funding is geared towards early warning mechanisms and sectoral assistance. Finally, aid is set aside for individuals to promote training, retraining, long-term career development, mobility and redeployment. The foundation-stone for this programme is past experience, taken as a point of reference to justify new spheres of ESF action on restructuring.

This framework programme, as reflected in the Note, is ambitious and seemingly tailored to the requirements of those countries hardest hit by restructuring. Its interest lies in the fact that the policy decision to finance transition and adjustment at European level represents a

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<sup>10</sup> The final decisions do not appear on the website as yet.



turning-point, since the concept of social cohesion is now being revisited in view of the mobility of economic activity. But the programme also follows the EES line and so could in fact serve to increase still further the inequality and insecurity existing among 'adaptable' groups as well as among vulnerable and excluded people. The political decisions taken when laying down the funding criteria for this aid will therefore be critical.

## **2. Contradictory and confusing thoughts and actions**

The European institutions' chosen method of taking action on restructuring is a perfect illustration of the contradictions which have bedevilled the building of Europe for the past ten years: on the one hand, the need for a mode of regulation and governance built around binding social standards that give basic protection to all workers and restrict labour competition and social dumping; on the other, the desire to bolster flexibility by means of deregulation based on guidelines, common orientations and various 'soft-law' commitments. The hard-law/soft-law dichotomy masks not just a normative debate about the true impact of Community-level standards and their effectiveness in the short and long term, but also political differences of opinion between the governments of EU Member States, along with the divergent interests of the social partners.

In practical terms, the adoption of directives in the social policy field or with social policy objectives <sup>(11)</sup> no longer seems to be on the agenda because of the stance taken by the President of the Commission, Mr Barroso, and also owing to the difficulty of winning a vote – even by a qualified majority. The new Member States are grappling with the awkward task of transposing the existing body of Community legislation and transforming their systems of labour relations into proper industrial relations systems. Some of them are outspokenly ultra-liberal in their attitudes, thus reinforcing the stance taken by the United Kingdom (in particular) against binding standards. The deadlock over

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<sup>11</sup> Thus the 1996 directive on the posting of workers was adopted in the context of freedom to provide services but concerns workers.

the amendment of the ‘working time’ directive reveals the full extent of this opposition (see the contribution by Laurent Vogel in this volume).

It is highly unlikely, in this context, that an amended directive on the European works council (EWC) will ever see the light of day, however essential it may be in ensuring that restructuring is handled in a concerted fashion in Community-scale undertakings. Indeed, studies based on the experience of European works councils (Béthoux, 2006) make it perfectly plain that the transnational structure of EWCs means that they are ideally suited to dealing with crisis situations:

- to disseminate information about the real state of the transnational corporation and facilitate action at local level;
- to mobilise support for collective action across the corporation, and in cases where the management agrees to negotiate;
- to negotiate transnational agreements or facilitate their negotiation with international trade union federations (Moreau, 2006a; Daugareilh, 2005; Descolonges and Saincy, 2006).

A considerable improvement in the powers and responsibilities of EWCs is necessary, however, since the obstacles confronting them are frequently such that they cannot do a meaningful job of work (Moreau, 2006b).

Even though there can be no hope of any directives being adopted, the Commission advocates a resumption of social dialogue as a possible means of Community involvement. It is also in favour of corporate social responsibility. Yet both of these approaches themselves mask the impossibility of making any fresh progress (2.1) and leave many awkward, sensitive questions unanswered (2.2).

## **2.1 Social dialogue and corporate social responsibility**

The advantage of these two methods of regulation is that they involve the social partners in both drawing up and implementing standards. However, in the case of restructuring operations, which result from strategic decisions made by businesses and hence by employers, they function more as discussion forums than as regulatory instruments.

The Commission is in favour of relaunching social dialogue on the subject of restructuring. The first round of negotiations resulted in 2003 in a set of 'reference guidelines' (ETUC, UNICE/UEAPME and CEEP, 2003), which were not adopted by the ETUC Executive Committee (see the contribution by Christophe Degryse in this volume). The philosophy behind the guidelines is that of the open method of coordination (OMC); they work on the assumption that the existing social directives provide an adequate common set of regulations and allow for the introduction of 'good practices' identified on the basis of 'innovative' case studies. This document came in for sharp criticism within the ETUC and triggered fresh debate about the usefulness of 'soft law' negotiated at Community level.

The spread of good practice across the Community has affected the ways in which large corporations handle restructuring where social dialogue has been possible<sup>(12)</sup>, but such 'good practices' allow companies considerable leeway in choosing how to deal with restructuring. Most cases of restructuring are still resolved by means of early retirement and other age-related schemes<sup>(13)</sup>, which are the most significant statistically. Alternative strategies are rarely deployed, except when employee representatives are assisted by experts and when local partnerships can be established. Restructuring in multinational corporations is almost always handled in accordance with national legislation and local power politics, with no transnational coordination and no harmonisation of

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<sup>12</sup> Various models can be cited, in particular GM (negotiation of a remarkable agreement which was ultimately not observed when a site in Portugal was closed down), Arcelor until a few months ago (after the takeover bid from Mittal Steel), Erickson, Saab (these two companies being heavily influenced by the Swedish model of industrial relations but also particularly innovative), see above-mentioned Note on the ESF. It has in fact become plain that, even in situations where the social partners are party to information that reveals the existence of a crisis situation likely to lead to restructuring, the response of both management and employee representatives is a collective silence.

<sup>13</sup> The first clear findings from case studies carried out as part of the AgirE project and the MIRE project (Monitoring Innovative Restructuring in Europe - [www.mire-restructurations.eu](http://www.mire-restructurations.eu)).

the way in which employees' rights are treated, nor even of consultation or bargaining practices<sup>(14)</sup>.

Even despite that setback, the Commission attempted to revive the social dialogue in 2005. Its initiative was staunchly opposed by UNICE, given that a second round of negotiations would in effect establish a European policy and no longer merely list good practices left up to the goodwill of companies. The ETUC has no means of holding negotiations on restructuring 'in the shadow of the law'<sup>(15)</sup>, and therefore lacks any leverage to encourage UNICE to reopen negotiations on European arrangements for tackling the awkward questions posed by restructuring operations.

Corporate social responsibility (CSR) is the second strand proposed by both UNICE and the Commission. The adoption of codes of conduct, charters and guidelines is a means of creating employment standards and ensuring job retention in Community-scale companies and corporations. Their voluntary nature is in itself a guarantee that any commitments made will be respected. Real guarantees can be obtained, not only nationally but also at transnational level, where such instruments are negotiated or drawn up in conjunction with employee representatives.

Studies (Moreau, 2006a; Daugareilh, 2005b) have nevertheless shown that, in many instances, CSR is never actually put into practice or else the difficulties of monitoring it and making it work effectively prove insurmountable. Not only do very few rules apply to restructuring but they are also very vague, even when the standards have been negotiated (Moreau, 2006b; Daugareilh, 2005a). Companies refuse to have their hands tied in the long term on matters of key importance to their future

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<sup>14</sup> A good illustration being the enormous difficulty of extending to corporation level the method agreements negotiated in France, even when other sites are scheduled for restructuring in the very near future.

<sup>15</sup> Brian Bercusson in particular has in fact shown that the 'risk' of a directive being adopted has spurred on negotiations between the European social partners, so it can be said that the talks take place 'in the shadow of the law'.

development, owing to the accelerating pace of economic change brought about by the speed of innovation and market transformation.

It would therefore seem that there is a huge discrepancy between the magnitude of the economic and social consequences of restructuring in the EU and the power of the regulatory instruments utilised thus far or able to be utilised at present. Furthermore, a number of extremely awkward questions are still in need of answers.

## **2.2 Some particularly awkward questions**

There is a long list of tricky questions at EU level (Petrovsky and Gazier, 2006). They justify the pursuit of research in the Union despite the multidisciplinary and international/European nature of the answers required<sup>(16)</sup>. Case studies have the advantage of highlighting ‘good practices’ which are highly dependent on the institutional, legal and sociological context of each restructuring operation in each country of the Union. It is considered good form at Community level, in the discourse of both the Commission and the social partners, to play up the ‘transferability’ of such practices. The obstacles to transferability became perfectly apparent in the EQUAL project<sup>(17)</sup> funded by the European Social Fund, which examined experiences of restructuring regarded as original, novel, socially useful and built on partnerships between employers and trade union organisations to facilitate industrial conversion<sup>(18)</sup>. The problems encountered had to do with the significance of the institutional context, i.e. the labour market, in each EU country as well as the way in which the stakeholders availed themselves of the opportunities opened up locally. Thus there is good reason to be sceptical as to the impact of good practices in respect of restructuring.

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<sup>16</sup> See in particular the studies carried out by the Dublin Foundation and its voluminous bibliography on restructuring.

<sup>17</sup> 2006 final report drawn up by GHK Consulting Ltd., seminar on the EQUAL project held on 30 May 2006.

<sup>18</sup> And hence ‘innovative’ in Community jargon.

What is more, the conclusion of the EQUAL report emphasises the complexity of the issues and interactions thrown up by restructuring, which necessarily call for multi-level, multi-faceted responses. These require the formation of well-constructed partnerships, in turn necessitating long-term funding. The duration and timing of action taken by the players before, during and after restructuring (short term/long-term) is a recurring theme.

It is worth pointing out that the key words here are anticipation (of restructuring) and innovation (of responses at EU level): two concepts that, in reality, are neither straightforward nor well-defined – rather like restructuring, in fact.

Despite some valuable research (Petrovski and Gazier, 2006), there is still no authoritative definition of restructuring. Case studies would demand that the definition be centred on the crisis period generally triggered by the announcement of reorganisation measures. Serial crises ever more often turn into loops that can be interpreted as permanent change (Fayolle, 2005). The industrial conversion measures following on from a restructuring operation can then become measures which anticipate the social consequences of the next phase of restructuring. Such serial changes, initiated by a succession of restructuring operations, therefore lead companies to introduce structures of change which avoid initiating a crisis. Thus the interplay between the handling of change over time and the definition of restructuring contributes to obscuring the very notion, lost in the space between a one-off crisis and permanent change.

The same applies to the much-dreaded phenomenon of relocation, and to ways of assessing it numerically. The approach here differs depending on whether the issue is addressed at national level – the sites affected – or at that of the European corporation as a whole<sup>19</sup>. Definitions of restructuring based on the description of operations (subcontracting, asset sales, relocations, mergers, take over, changes of ownership, redundancies etc.) lend themselves to the creation of

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<sup>19</sup> On different approaches, see the report by Fontagné and Lorenzi (2005).

statistical categories <sup>(20)</sup>, but correspond to legal definitions which are not identical in all Member States and are often difficult to reconcile with certain concepts in Community law <sup>(21)</sup>.

Identifying the causes is equally difficult, since they cannot be viewed solely in objective terms: they are, in part, the outcome of a decision taken by the employer <sup>(22)</sup>. A broad definition can however be envisaged <sup>(23)</sup>, to the effect that restructuring is a complex multi-factor, multi-dimensional process comprising changes in the company's organisation, form, size and activities, dictated by causes both outside and inside of the company and resulting in operations such as cessation of business, flexibilisation, rationalisation of activity and outsourcing, either nationally or internationally, but also an extension and diversification of its structures and functions.

Alternatively, restructuring – as a complex process of corporate transformation – may simply be deemed an aspect of the sophisticated strategies that companies deploy on the European market when confronted by globalisation. What flows from this approach is the thesis that anticipation no longer centres exclusively on the company and collective resistance from players within it and in the local environment,

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<sup>20</sup> Which aim to avoid concepts. For instance, restructuring operations are often viewed in the light of the job losses they cause.

<sup>21</sup> See for example the concepts of amalgamation and transfer of undertakings, where the concept exists in Community legislation; but there is the added difficulty of defining relocation owing to the freedom of movement for capital.

<sup>22</sup> In particular decisions to rationalise and to transfer business abroad. See, more generally, Boyer (2005).

<sup>23</sup> 'Restructuring refers to all changes in companies' activities and assets. These may take the form of either a cessation of business or a transfer of acquisitions or merger, or else outsourcing or relocation. Restructuring results in changes in the company's size and business location, in organisational transformations and in alterations to the legal status. According to this view, therefore, it may not necessarily result in reduced activity and employment, but in structural adjustments inside and outside of the company' (Raveyre, 2005: 10). The definition used here is fairly similar.

but focuses on the events and policies which directly or indirectly govern corporate strategies. Naturally, the question of a slowdown or acceleration in the pace of change and process of restructuring still remains highly controversial, since it determines the synchronisation of anticipation with the mobilisation of the relevant players and the rights they may be granted (24).

Should anticipation occur at corporate and/or at sectoral level? Case studies would appear to argue for a sectoral approach, on account of the marked differences in the transformations underway from one sector to another (25): this applies in terms of innovative research and development, the use of technology and regulation, for purposes of creating observatories of developments in Europe. The links between such observatories of European sectoral developments and the regional and local levels are still a matter of lively debate, as are the most suitable mechanisms for circulating to company staff information that is useful to anticipate restructuring and its social consequences. Maria João Rodriguez, in proposing proactive measures, suggests the introduction of 'industrial platforms' bringing together all the stakeholders (26) in

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24 Especially as concerns the right to notification. On the question of collective silence, however, see Beaujolin-Bellet *et al.* (2007) and Dares report, February 2006.

25 There are major differences as to the possible use of time and space from one sector to another (e.g. metalworking v. pharmacy). The sectoral approach is central to the EU's recently revamped industrial policies. Yet at the Forum meeting in July, the Finnish Minister of Employment maintained that a sectoral approach was unnecessary because the principal problems were universal: the importance of education and training at all levels, the need to devise new forms of work organisation, the need to bolster research and development as well as productivity, the requirement to simplify regulation and fiscal pressure, and the requirement for new managerial skills.

26 The EQUAL project clearly demonstrated the need to link (multi-disciplinary) research developments to such observatories. The proposal is that strategic platforms should be established by way of a team effort (by building 'clusters', research and development, and work in high-level think-tanks), but without excluding the regional and local levels.



order to set up centres to carry out observations and actions tailored to an individual sector.

Finally, innovation is by no means an easy concept to pin down, since it comprises all the facets of European diversity in respect of 'innovative practices'. These are very relative, in that they are linked to the specific context of a region, local area or company, and may be limited in time or else designed for the long term. It seems fairly clear, however, that innovation characteristically emerges out of sound partnerships established around a common goal, which may be employee retraining and/or local redevelopment; this calls for a long-term strategic vision and sustainable structures (27).

Restructuring is often handled in a short-term perspective as a one-off crisis (sometimes using innovative strategies, especially in respect of negotiations). Such an approach is unsuited to the redevelopment of a local area. The links between restructuring and the local area have largely remained unexplored and certainly pose difficult questions concerning synergies in local labour markets, competitive 'clusters' or industrial zones, and concerning the interaction between the social partners (and their own levels of action and representation, which differ from one country or public authority to another). Lastly, there is strong opposition to the introduction of a European transition and adjustment policy to help workers access, and remain in, the labour market - even if the method used is 'flexicurity'. The quest for 'flexicurity' appears to produce a consensus at European level as long as it remains a talking point and no one tries to define the concept or determine how flexibility can be smoothly combined with security. Few Member States are prepared to follow the Danish model to the letter (Lefebvre and Méda, 2006; Méda and Minault, 2006). Furthermore, European comparisons have by no means proved that security also requires flexibility (28). Even so, the Commission published a Green Paper in

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27 The best conditions for establishing solid partnerships have not yet been identified. The MIRE project has set up networks for this purpose.

28 See the contribution by Philippe Pochet for the AgirE project (unpublished).

November 2006, launching a broad-based consultation on altering labour legislation and promoting 'flexicurity'.

## **Conclusion**

This brief overview demonstrates that restructuring has become a crucially important issue at European level, in view of its impact on economic change and corporate competitiveness within the EU. Popular movements by local stakeholders and employees, coupled with the magnitude of the social consequences of restructuring, are such that the Union simply has to devise a coherent policy. Recent developments have shown that the European institutions are attempting to put in place some useful policy coordination and to rally support from all concerned so as to sow the seeds of a new response. The adoption of an adjustment fund constitutes one initial policy approach, its aim being to incorporate restructuring into the policy on social cohesion.

It is also evident that the complexity of restructuring in the EU is such that action must be taken at many levels, encompassing sectors, local areas and companies; the formation of partnerships bringing together a variety of players is equally necessary. However, there is still a need to determine not only a European-level strategy, but also the ways in which different policies in the field of restructuring will interact.

Nevertheless, issues as important as the quantitative analysis of restructuring and the definition of restructuring by means of a typology are in abeyance, owing to the complexity of restructuring and the need to contemplate it in a Europe-wide, multi-disciplinary fashion. By the same token, certain key concepts have not yet been properly thought through or defined. One example is flexibility - or 'flexicurity' - a definition of which is vital to the formulation of transition policies at European level and to ensuring high-quality employment by anticipating events from an employee perspective. The question of how to anticipate restructuring in the EU poses as yet unresolved theoretical and practical problems, especially given the links with the tenor of all European policies.

This interdependence between analyses of restructuring and economic and social policies both nationally and at European level therefore

combines with the complexity of the phenomenon itself and contributes, at least for the time being, to a lack of transparency about what steps should be taken next.

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## **Cross-industry social dialogue in 2006**

2006 was an interesting year for European social dialogue, since it afforded an opportunity to assess not only the overall attitudes of the players involved in European cross-industry dialogue – as evident from the new work programme adopted by the social partners – but also the tools used to conduct the process. 2006 was in fact the year scheduled for an evaluation of the first so-called ‘autonomous’ agreement, signed in 2002 and relating to telework. When that agreement was signed, many questions were asked about the social partners’ chosen method of implementation; some of those questions now have answers. Similarly, as concerns lifelong learning, the social partners launched in 2002 a framework of actions deriving its main activation methods from the open method of coordination (OMC) <sup>(1)</sup>. Here too, 2006 was a year of evaluation. This is therefore a good point in time to begin debating the development of the players and instruments involved in social dialogue. Such a debate may of course appear to be an exercise in nit-picking but is in fact essential, in that it concerns the effectiveness of the outcomes of European social dialogue. As one of our interviewees put it, ‘unless

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<sup>1</sup> We might briefly recall that the OMC consists in laying down ‘guidelines’ for the EU and its Member States (containing objectives to be met), establishing indicators and evaluation criteria so as to be able to compare best practice (benchmarking), transposing these guidelines into national and regional policies, and lastly undertaking periodical monitoring, evaluation and peer reviews in order to learn lessons. In certain cases, recommendations may be forwarded to countries which have strayed from the objectives set. However, all that the European social dialogue borrows from the OMC is the definition of guidelines, national implementation and evaluation reports.

the European social dialogue texts change the lives of workers and companies in practice, what is the point of carrying on?'. Thus we see the importance of attempting to analyse the true impact of the various documents.

In addition to these evaluations, the end of 2006 saw a last-minute conclusion of the negotiations concerning an autonomous agreement on harassment and violence at work. This agreement would not be signed officially until 2007, but its content and the conduct of the negotiations are analysed in this volume. In the following pages, then, we shall examine in turn:

1. the social partners' work programme for 2006-2008;
2. the agreement on harassment and violence at work;
3. the report evaluating the implementation of the autonomous agreement on telework;
4. the final evaluation report on the framework of actions on lifelong learning.

Although it was not an outcome of social dialogue, we shall look in addition at the report by the European employers' confederation (UNICE) on social aspects of restructuring. This chapter will conclude with an overall review of trends affecting the social dialogue and its players. We shall not look here at sectoral social dialogue, which has made some progress over the past few years and will be analysed in detail in the next edition of *Social Developments in the European Union*.

## **1. Work programme for 2006-2008**

In December 2001 the European social partners announced for the first time their intention to produce independently a multiannual work programme for European cross-industry social dialogue. That was a real innovation at the time: until then the European Commission had taken the lead in drawing up the agenda. Pursuant to the Treaty establishing the European Community, it is in fact the Commission which consults the social partners on topics of its choice, based on its own legislative programme. Thus the decision of the social partners to plan their work

themselves reflected a desire to be autonomous of the Commission's legislative programme – and of its political and strategic priorities. The first programme covered the period 2003-2005 (see Degryse, 2006: 211-216). Apart from organising joint seminars, studies and reports, it made provision for negotiations on three topics: the social consequences of industrial restructuring (2003), work-related stress (2004) and gender equality (2005). Only work-related stress took the form of an 'agreement' in the meaning of Article 139(2) of the EC Treaty.

Preparing the second work programme, for 2006-2008, was no easy matter. It was not finalised until late January 2006 (ETUC, UNICE/UEAPME and CEEP, 2006a). A preliminary draft programme had initially been formulated and put to the Social Dialogue Committee at its meeting on 8 November 2005. The gulf between its content and the proposals discussed internally at the European Trade Union Confederation in June 2005 (ETUC, 2005) was such that the draft soon became a damp squib. Indeed, whereas the ETUC had hoped to see procedural initiatives (clarification and monitoring of social dialogue instruments, a mediation and arbitration system etc.) as well as substantive negotiations (employee mobility, equal opportunities, measures to combat exclusion and poverty, disability, sustainable development, trade union rights etc.), the initial draft of the programme was extremely lacking in ambition. It basically viewed the main purpose of social dialogue as lobbying the European institutions, rather than negotiating reciprocal commitments between employers and employees. The draft likewise focused more on what had already been achieved – evaluating previously adopted joint documents – than on new topics.

That initial draft having rapidly been rejected, the social partners returned to the negotiating table and finally reached a compromise at the Social Dialogue Committee meeting of 25 January 2006. The compromise was a programme covering a three-year period (2006-2008), which was officially unveiled on 23 March 2006 at the tripartite social summit. It contains a joint analysis of the challenges confronting Europe's labour markets, as well as an undertaking to negotiate a framework of actions on employment and an autonomous framework agreement on either the integration of disadvantaged groups on the labour market or lifelong learning.



**Principal instruments of social dialogue:  
framework agreements and frameworks of actions**

The EC Treaty [Article 139(1) and (2)] stipulates that the European social partners may adopt 'framework agreements' which are then transposed in the Member States, either via a directive or 'in accordance with the procedures and practices specific to management and labour and the Member States': collective agreements, reform of the Labour Code etc. In the latter case, reference is made to 'autonomous framework agreements' (a label replacing the term 'voluntary framework agreement', preferred by the employers).

In addition to framework agreements, the social partners devised a new type of instrument in 2002: the 'framework of actions'. No provision is made for these in the Treaty; they derive from the open method of coordination and their main difference from framework agreements is that they are not binding. The scope and content of a 'framework of actions' may be open to varying interpretations by the employers and trade unions (as in the case of the framework of actions on employment, to be negotiated in the 2006-2008 work programme).

The programme for 2006-2008 also makes provision for studies on restructuring in the EU (2), capacity building for social dialogue in the new Member States and candidate countries, and the development of a common understanding of the instruments of social dialogue. The programme almost failed to hold out any hope of a framework agreement, but the ETUC made this a precondition for its adoption. Thus there is an undertaking to negotiate such an agreement by 2008, but its subject matter has not been finalised.

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<sup>2</sup> The previous work programme arranged for joint studies on restructuring in the new Member States. These studies resulted in the publication of the summary report entitled 'Study on restructuring in new Member States' (ARITAKE-WILD, 2006). The new work programme therefore relates to the 'old' Member States.

## **1.1 Content of the 2006-2008 work programme**

The social dialogue work programme for 2006-2008 is explicitly centred on the Lisbon Strategy <sup>(3)</sup>. Although the European Union deemed the mid-term review of that Strategy disappointing, to put it mildly, the social partners wish to make their own contribution to it. They undertake to carry out a joint analysis of the key challenges facing Europe's labour markets, looking at issues such as:

- macro-economic and labour market policies;
- demographic change, active ageing, youth integration, mobility and migration;
- lifelong learning, competitiveness, innovation and the integration of disadvantaged groups on the labour market;
- the balance between flexibility and security;
- undeclared work.

These joint analyses, conducted by a working group of the Social Dialogue Committee set up on 28 June 2006 <sup>(4)</sup>, will serve as a basis for the adoption of joint recommendations to be made to EU and national institutions, but also for the negotiation of reciprocal commitments (a framework of actions on employment and an autonomous framework agreement on either the integration of disadvantaged groups on the labour market or lifelong learning). Also in the context of this work programme they embarked on – and have concluded – the negotiation of an autonomous framework agreement on harassment and violence (see below). Finally, the social partners undertake to:

- complete the national studies on economic and social change and on that basis promote and assess the 'reference guidelines' on managing change and its social consequences (this is a document adopted on

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<sup>3</sup> Aimed at turning Europe into the most competitive knowledge-based economy in the world, capable of sustainable economic growth, with more and better jobs and greater social cohesion.

<sup>4</sup> This working group was replaced in December 2006 by a 'drafting group', scheduled to meet during the first quarter of 2007.

16 October 2003 containing guidance and good practice for managing restructuring in a socially acceptable manner, but which has not been formally adopted by the ETUC Executive Committee – see section 5 below), as well as the joint lessons learned on European works councils (adopted on 7 April 2005);

- continue their work of capacity building for the social dialogue in the new Member States, extend it to candidate countries, and examine how to strengthen the employers' and trade union resource centres (these centres provide technical assistance to the social partners in EU countries);
- report on the implementation of the 'telework' and 'work-related stress' agreements (adopted on 16 July 2002 and 8 October 2004 respectively) and on the follow-up to the framework of actions on gender equality (22 March 2005) <sup>(5)</sup>.

Basing themselves on these reports, the social partners undertake to further develop their common understanding of these instruments and how they can have a positive impact at the various levels of social dialogue. At the request of the ETUC, this work programme does not constitute an exhaustive list. The social partners may in principle decide to update it as time goes by; nor does it in any sense prejudge whatever formal consultations the Commission may open on European social initiatives.

## **1.2 A partial assessment**

Over the past ten years, the social dialogue has tended to generate an increasing number of joint initiatives (agreements, frameworks of actions, joint analyses, joint recommendations, national studies, seminars, implementation reports, initiatives to assist the development of social dialogue etc.). There has in addition been an expansion in the range of topics covered (gender equality, stress, harassment and violence,

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<sup>5</sup> A report was drawn up on the implementation of the 'stress' agreement in 2006 (ETUC, UNICE/UEAPME and CEEP, 2006b). As for the framework of actions on gender equality, its first follow-up report was adopted by the Social Dialogue Committee at its meeting on 7 November 2006. It is to be published in 2007.

lifelong learning, integration of vulnerable groups etc.). What is also noticeable is a decline in – or even the demise of – framework agreements transformed into directives, coupled with the affirmation by players in the social dialogue of a desire for autonomy. Yet that autonomy still appears somewhat formal: the work programme is entirely inspired by the strategic priorities of the EU. At this stage, it is hard to identify precisely what new room for manoeuvre this autonomy has created.

As concerns the new instruments devised since the early years of this decade (frameworks of actions and autonomous agreements), the 2006-2008 work programme identifies a need to develop a common understanding of them. Thus the social partners are still at the stage of needing to agree on the precise scope of documents which they have negotiated and adopted. The adoption of the implementation report on telework (see below) testifies to this desire for clarification.

Even though the trade union side very much wants to tackle more substantive issues by means of more binding instruments, there is nothing pushing the cross-industry social dialogue in that direction at present. Having published an interesting communication in 2004 on clarifying the fruits of social dialogue (CEC, 2004), the Commission appears to have listened to the criticism from UNICE, which accused it of being ‘excessively administrative and interventionist’ (UNICE, 2004: 1). Since then, the Barroso Commission has withdrawn to the sidelines, not so much out of a desire to respect the autonomy of the social partners as due to its political priorities: economic competitiveness is now at the top of its agenda.

## **2. Agreement on harassment and violence at work**

Harassment and violence in the workplace is a subject on which there is a high degree of consensus between European employers’ organisations and trade unions <sup>(6)</sup>. This consensus rests on the principle that mutual

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<sup>6</sup> We would recall the signature in 1995, at sectoral level, of the ‘EuroCommerce and EURO-FIET statement on combating violence in commerce’ (9 March 1995). Commerce is a sector particularly vulnerable to violence in the workplace, but it is mostly a matter of so-called ‘external’ violence (crime, theft, hold-ups etc.).

respect and the dignity of employees are social values and also necessary economic conditions for the smooth operation and productivity of companies. So, in the name of employee well-being and competitiveness, labour and management share the belief that joint measures are needed to counter harassment and violence.

A recent study by the International Labour Office (ILO) reveals that new forms of violence have arisen in the workplace (Chappell and Di Martino, 2006; see also ILO, 2004). This study shows in particular that pressure, harassment and intimidation at work are very widespread in the EU 15. In Germany, for instance, the number of workers who are victims of 'mobbing' (psychological violence often involving a group of workers targeting a colleague) is estimated at more than 800,000. In Spain, 22% of civil servants are thought to fall prey to mobbing. In France, there is a growing number of assaults on transport sector workers, including taxi drivers. According to Maria Helena André, the principal ETUC negotiator for the European social dialogue, this phenomenon is especially significant because we are witnessing an increase in instances of harassment and violence due, in her opinion, to 'the worsening of working conditions and the workplace environment' (ETUC, 2006: 11).

The purpose of the European negotiations was to determine a Community context for combating such phenomena. The 2003-2005 work programme included the holding of a joint seminar on harassment at work, possibly with a view to an autonomous framework agreement. In spite of this, the Commission opened an initial round of social partner consultations on this topic on 17 January 2005, thereby placing the negotiation of the agreement into the framework of the procedures laid down by the Treaty. The social partners held their joint seminar in Brussels on 12 May 2005. Their aim was to examine together the ways in which violence at work is handled in national practice, and to decide whether or not there was a basis for tackling the problem at European level (for more details on this preliminary phase, see Degryse, 2006).

## **2.1 Starting positions**

The ETUC expressed a preference for joint action at European level to complement existing collective agreements, legislation and national

regulations. It insisted from the outset on the definition of ‘violence’ to be used: physical violence, bullying and/or psychological abuse, and sexual harassment. Violence in the workplace, according to the ETUC, is connected with aspects of work organisation – colleagues or superiors –, the working environment and the type of work performed, but it can also be external and come from clients, visitors to the company etc. (particularly in certain sectors such as Horeca, transport, public administration and commerce). While insisting on preventive measures, the trade unions wanted the question of violence at work to be linked to health and safety legislation, as well as to gender equality and anti-discrimination legislation. After all, the commonest victims of harassment and violence are specific groups: women, young people, immigrants etc.

UNICE, for its part, did not see the point of drawing up specific European legislation in this field. Workplace violence, in its opinion, is connected not with health and safety but with human resource management, an area over which the EU has no authority. Furthermore, the employers believed the scope and diversity of European and national legal systems to be adequate to cover the issue of violence at work, either directly or indirectly (7). They nevertheless thought that it might be useful to discuss with the trade unions the various forms of violence at work, their sources and frequency, but also false accusations and how to deal with them.

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<sup>7</sup> The relevant directives are: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Council of the European Union, 2000a); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Council of the European Union, 2000b); Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (European Parliament and Council of the European Union, 2002); Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (Council of the European Communities, 1989).

## **2.2 The negotiations**

Thus it was that, armed with a consensus on the need to combat violence at work but divided on the legal bases and instruments to be used, the social partners decided in late 2005 to embark on negotiations with a view to an autonomous framework agreement. The talks began on 7 February 2006. It took about ten meetings, between then and December, to reach a compromise. On the whole, the content of the agreement poses no problem to either side, apart from one specific point: 'external' violence, i.e. perpetrated outside of the workplace or by third parties (clients of the company etc.). The ETUC's negotiating mandate was absolutely clear in this regard: there would be no agreement at all unless external violence was covered. UNICE found itself in exactly the opposite situation: the employers categorically refused to include external violence in a cross-industry agreement, believing that this matter could if necessary be dealt with at sectoral level, as was the case in the commerce sector in 1995.

Each side was under strict instructions, and the negotiating sessions ground to a complete halt at the meeting on 25-27 October. The most likely scenario throughout the month of November and into early December was outright failure. But such a prospect was equally unsatisfactory for the ETUC negotiators and for those of UNICE, neither side wanting to scupper the agreement on this one point. So they returned to their respective bodies – the Executive Committee and the Committee of Presidents – to report back on the situation and investigate a possible change of mandate. That was not granted, but the negotiators were allowed a broader margin of interpretation. Contrary to all expectations, a sufficiently vague form of words was found in mid-December, on which all parties finally managed to agree: 'Where appropriate, the provisions of this chapter can be applied to deal with cases of external violence'. One of our interviewees believes that drafting the text in English (the working language having previously been French) made it possible to avoid being too precise. How then will 'where appropriate' be translated into other languages?

Be that as it may, the agreement was finalised on 14 December 2006. Following approval by the relevant bodies, it was to be officially signed in March 2007 despite a lack of support from the German confederation.

The DGB thought the compromise less ambitious than the existing directives and too remote from the negotiating mandate. (Let us not forget that the DGB - for the same reasons - also withheld its backing from the agreement on work-related stress, concluded in 2004).

### **2.3 Content of the agreement**

The introduction to the agreement states that all the signatories condemn all forms of harassment and violence. Those forms may be physical, psychological and/or sexual; they may be one-off incidents or more systematic patterns of behaviour. Incidences may occur amongst colleagues, between superiors and subordinates or be caused by third parties such as clients, customers, patients, etc. The stated aim of the agreement is two-fold: first, to increase awareness and understanding of this phenomenon among employers, workers and their representatives; second, to provide those same parties with an action-oriented framework to identify, prevent and manage problems of harassment and violence at work.

The text goes on to describe harassment and violence in two states (facts and effects). A distinction is drawn between harassment (repeated and deliberate abuse, threats and/or humiliation in circumstances relating to work) and violence (assault in circumstances relating to work). The second part of the description concerns the purpose or effect of harassment and violence: violating a worker's dignity, affecting his/her health and/or creating a hostile work environment.

The agreement then examines methods of preventing, identifying and managing these problems. Reference is made to raising awareness and appropriate training of managers and workers, a clear company statement outlining that harassment and violence will not be tolerated, and specifying procedures to be followed where cases do nevertheless arise (in particular the appointment of a contact person to give advice and assistance). The employers and employees also agreed suitable procedures, which will include but not be confined to the following:

- proceeding with discretion to protect the dignity and privacy of all;
- no information to be disclosed to parties not involved in the case;
- complaints to be investigated and dealt with without undue delay;



- all parties involved to get an impartial hearing and fair treatment;
- complaints should be backed up by detailed information;
- false accusations should not be tolerated and may result in disciplinary action
- external assistance may help.

If it is established that harassment and violence has occurred, ‘appropriate’ measures will be taken in relation to the perpetrator. This may include disciplinary action up to and including dismissal. The victim will receive support and, if necessary, help with reintegration. These procedures will be periodically reviewed and monitored to ensure that they are effective. Finally, ‘where appropriate’ (see above), the provisions of this chapter may be applied to deal with cases of external violence.

#### **2.4 Implementation and follow-up**

The implementation and follow-up provisions contained in the agreement are as follows:

- in the context of Article 139 of the Treaty, the agreement will be implemented in accordance with the procedures and practices specific to management and labour in the Member States (and in the countries of the European Economic Area: Norway, Iceland, Switzerland and Liechtenstein). The countries applying for EU accession (Turkey, Croatia and Macedonia) are also invited to implement the agreement;
- the timeframe for implementation of the agreement is three years after the date of its signature (2010). Organisations affiliated to the European social partners will report on the implementation of this agreement to the Social Dialogue Committee. During the first three years, the Social Dialogue Committee will prepare and adopt a yearly table summarising the ongoing implementation of the agreement;
- a full report on the implementation actions taken will be prepared and adopted by the Social Dialogue Committee during the fourth year (in 2011);
- after 2012, the signatory parties may review the agreement at any time, if requested by one of them;

- in case of questions at national level on the content of the agreement, member organisations of the ETUC, UNICE or the other signatories may jointly or separately refer to the signatory parties, who will jointly or separately reply;
- when implementing the agreement, the national organisations will avoid placing 'unnecessary burdens' on SMEs.

The agreement concludes with a non-regression clause stating that implementation of the agreement does not constitute valid grounds to reduce the general level of protection afforded to workers in the field of the agreement. Nor does it prejudice the right of social partners to conclude, at any level, agreements adapting and/or complementing this agreement in a manner which will take note of the specific (e.g. sectoral) needs of the social partners concerned.

## **2.5 A partial assessment**

We shall attempt below to carry out a partial assessment in respect of a) the procedure whereby the agreement was negotiated, b) the choice of instrument used and c) the content of the agreement itself.

a) Concerning the negotiating procedure, the main question relates to the role that the Commission chose to play in this regard. Let us not forget first of all that the social partners' 2003-2005 work programme included the holding of a joint seminar on harassment at work with a view to a possible autonomous agreement. This topic, therefore, was one which the two sides of industry were preparing to address autonomously. The Commission, pre-empting the start of those talks, initiated a preliminary round of formal consultations on this very same topic on 17 January 2005. Presumably, by so doing, the Commission wished to bring these negotiations into the realm of the procedures laid down by the Treaty - which is indeed what then happened. But these procedures imply that the Commission must have in reserve a Community action plan on the topic in case the negotiations are unsuccessful. However, when in November 2006 it became plain that the negotiations were about to break down, the Commission - according to our information - had no alternative plan. So what was the reason for the formal consultation in January 2005? One cynical answer

to this question would be that the social partners were, indirectly, giving the Commission an opportunity to launch a (rare) initiative in the field of social affairs without risking anything politically. This was the second time that a Commission ‘consultation’ had not been accompanied by a Community action plan (the first being the consultation in 2005 on restructuring and European works councils; see on this subject Degryse, 2006). When the guardian of the Treaties takes liberties with the provisions of those Treaties, it serves to weaken the European social dialogue which, as several authors have shown, needs to take place ‘in the shadow of the law’ if it is to be fully effective.

b) Concerning the choice of instrument, i.e. an autonomous agreement, we find ourselves here with an arrangement that is less binding than a framework agreement intended to have legal force (transformed into a directive), but more binding than a mere ‘framework of actions’ (linked to the open method of coordination). The choice of this instrument can no doubt be explained by the fact that certain countries have already adopted specific legislation on violence at work; others cover this issue in non-specific legal texts (criminal law, civil law, legislation on health and safety in the workplace, non-discrimination); still others have collective agreements or regulations on the topic. Presumably it was not a matter of priority to add a European directive on this subject, but rather to contribute to identifying, preventing and managing the phenomenon in practice, in the workplace. From this point of view, the choice of an autonomous agreement would appear justifiable in this particular instance.

c) Finally, concerning the content of the agreement itself, this posed hardly any problems apart from the question of external violence. The social partners agreed on the definitions of harassment and of violence, on refusing to tolerate such phenomena, and on the procedures to be implemented - including in SMEs - to prevent, identify and manage the problems arising from them. External violence is included too, but in a sufficiently vague form to make a compromise achievable. Everything will no doubt depend on the (re-)interpretation given to this paragraph when it is translated into the various EU languages. The implementation and follow-up provisions, for their part, are absolutely identical to those laid down in the ‘work-related stress’ agreement of 2004. Last of all, we

cannot fail to mention the fact that Europe's most powerful trade union confederation, the DGB, refrained from backing the final compromise because of its lack of ambition. The real impact of this document on the situation of employees in the workplace will need to be assessed four years from now.

### **3. First joint report on implementation of the 'telework' agreement**

The development of information technology and networks (e-mail, videoconferencing, internet telephony etc.) has had a considerable impact on the labour market. The number of teleworkers in Europe is estimated to have risen from 4.5 million in 2002 to almost 15 million today<sup>(8)</sup>. This trend poses a number of questions: what is being done about teleworkers' working conditions and health and safety standards? Who is responsible for providing, installing and maintaining equipment? And so on. To try and find a joint answer to these questions, the European social partners began in October 2001 to negotiate a framework agreement on telework. The agreement was signed on 16 July 2002, and its content is generally regarded as impressive. Indeed, the text sets out the parties' rights and obligations as concerns data protection, respect for the privacy of the teleworker, equipment (provision, installation, maintenance and technical support), communication costs, health and safety, organisation of work, training, and also teleworkers' collective rights.

Above and beyond its content, however, the very nature of the 'telework' agreement began to raise questions as from 2002. Owing to pressure from UNICE, this is not in fact a classic *erga omnes* agreement, transformed by the European institutions into a binding directive subject to legal scrutiny. Rather, it was the first 'voluntary' agreement in accordance with the social provisions of the Treaty. As stated above, framework agreements signed by the European social partners may be

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<sup>8</sup> Although telework is more widespread in some sectors, such as telecommunications, 6% of all European workers are believed to telework for at least 10% of their working time.

implemented 'either in accordance with the procedures and practices specific to management and labour and the Member States or, [...], at the joint request of the signatory parties, by a Council decision on a proposal from the Commission' (Article 139(2) EC). After three framework agreements had been implemented by decisions of the Council (on parental leave in 1995, on part-time work in 1997, and on fixed-term work in 1999) <sup>9</sup>, the method chosen for the telework agreement was 'procedures and practices specific to management and labour and the Member States'. In other words, implementation of the text is a matter for the member organisations of UNICE, ETUC, CEEP and UEAPME. The unknown quantity was whether the provisions of the agreement would be observed, monitored and followed up in the same way in all Member States, and for all workers. The national social partners do of course bear the main responsibility for proper enforcement of such measures, yet they are not as strong or as representative in all countries (especially in the new Member States, where trade union membership rates are still low and where in some cases the employers' organisations are very fragmented).

At the meeting of the Social Dialogue Committee on 28 June 2006, the social partners adopted their first report on the implementation of the 'telework' agreement. The report was presented to Commissioner Špidla on 11 October (ETUC, UNICE/UEAPME and CEEP, 2006c). Although everyone was delighted that virtually all the Member States (apart from Cyprus, Slovakia, Estonia and Lithuania), as well as Iceland and Norway, had implemented the agreement in accordance with their respective traditions, several questions remained unanswered. For instance, in Belgium the European agreement has been transformed

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<sup>9</sup> Respectively: Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (Council of the European Union, 1996); Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: framework agreement on part-time work (Council of the European Union, 1997) and Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (Council of the European Union, 1999).

into a collective agreement (No. 85), signed on 9 November 2005. It lays down the principles governing telework in Belgium, spelling out the voluntary nature of the agreement and the fact that a written contract is required. Other provisions cover working conditions and aspects relating to work organisation, equipment, data protection, health and safety, training, collective rights etc. Seven other countries likewise chose to go down the road of national and sectoral collective agreements: France, Italy, Luxembourg, Greece, Iceland, Denmark and Sweden. Certain countries chose to bring in the agreement by means of legal texts. This was the case above all in eastern European countries – the Czech Republic, Hungary and Poland – where new provisions were introduced into the Labour Code. Finally, in other countries (United Kingdom, Ireland, Norway, Latvia), the European agreement was transposed by means of ‘guides’, ‘guidelines’ or ‘codes of conduct’. It should be noted that this follow-up report relates only to the method of transposition selected at national level, and not to the quality or effectiveness of implementation of the provisions contained in the agreement.

### **A partial assessment**

Entrusting the national social partners with responsibility for implementing the ‘telework’ agreement has led to three main methods of transposition at national level: collective agreements, legal texts and codes of conduct (the fourth scenario being no transposition at all, as has happened in four countries). Whereas the desire to respect the Member States’ national traditions and practices may be welcomed, assurances are needed that, whatever those traditions may be, the provisions of the agreement are fully complied with in all Member States and for all workers. Differences in the method of achieving objectives are all very well, but the objectives themselves must be the same. And there can be no denying that one of the three methods of transposition provides no such formal guarantee. Over and above the great difficulty, if not the impossibility, of ensuring that a code of conduct or guide is complied with, such an instrument cannot be enforced by the courts. Thus the application of the agreement does not have the same legal force everywhere. Given that the implementation of the agreement’s provisions has not been evaluated, it is too soon to

assess the true impact of the agreement on the situation of teleworkers in Europe. In any event, several questions still remain open-ended; they will in principle be examined under the European social partners' work programme for 2006-2008. That will be a particularly useful investigation, in that other autonomous agreements have been signed in the meantime: in 2004 on work-related stress, in 2006 on the protection of workers exposed to crystalline silica, and in 2007 on violence at work.

#### **4. Final evaluation report on the lifelong development of competencies and qualifications**

The choice of lifelong learning as a topic is linked to the fact that 80 million people in Europe are regarded as being low-skilled. Besides, companies fear that owing to population ageing they will be confronted with a skills shortage in the future. Skills enhancement is therefore in the interest of both employers and employees. The social partners decided in 2002, at the request of the Council and Commission, to broach this issue experimentally in the social dialogue, and, for the first time, to do so via the open method of coordination. Thus the cross-industry social partners adopted in 2002 a 'framework of actions for the lifelong development of competencies and qualifications'. The document sets out guidelines addressed to companies and to the national social partners, in an effort to help them incorporate four priorities defined at European level into their national practices:

- identify and anticipate the competencies and the qualifications needed at enterprise level (human resources, social dialogue, management, individual development plans etc.) and at national and/or sectoral level;
- recognise and validate competencies and qualifications (improving transparency and transferability, both for the employee and for the enterprise, in order to facilitate geographical and occupational mobility and to increase the efficiency of labour markets);
- informing, supporting and providing guidance to support employees and enterprises in their choices of learning lifelong, opportunities for career evaluation, learning possibilities etc.;

- mobilising resources at the level of public authorities, enterprises and employees (via company and personal taxation, and the European Structural Funds).

The framework of actions is not a binding text, but rather an invitation to abide by the same referents throughout the EU. The social partners nevertheless decided that the actual scope of the document would be analysed in four evaluation reports, for the purpose of assessing follow-up procedures between 2003 and 2006 (informing the relevant players at European and national level, initiatives taken in this context etc.). The fourth report (2006) is intended in addition to gauge the impact of the framework of actions on companies and on employees, so as to update the priorities where appropriate.

This fourth and final report, written in January 2006, was presented on 19 May to the troika of Education Ministers and to the European Commissioner responsible for Education <sup>(10)</sup>. Its 128 pages review the actions carried out in 21 Member States (the 25 minus Malta, Latvia, Estonia and Slovakia), as well as making an overall evaluation of the main trends (ETUC, UNICE/UEAPME and CEEP, 2006d). In the report, the social partners study the impact of some 350 initiatives conducted at national level, 108 of them geared to identifying skills requirements, 89 to finding ways of validating competencies, 53 to informing and guiding companies and workers, and 100 to mobilising resources. More than 70 of the initiatives analysed relate to examples of corporate good practice and 280 concern social partner initiatives at sectoral or national level.

### **A partial assessment**

One of the benefits customarily associated with using the open method of coordination in the social dialogue is that it strengthens the links between the European and national, sectoral and cross-industry levels. Thus the Commission notes in its *Industrial Relations in Europe* report for 2006 (CEC, 2006: 111) that ‘strengthening the links with other levels of social dialogue, mainly national and sectoral, but also in companies’

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<sup>10</sup> See <http://www.etuc.org/r/662> and <http://www.etuc.org/a/2320>.



should make it possible to ensure ‘proper implementation of the so-called ‘new generation texts’, i.e. instruments used by social partners which they undertake to follow-up themselves, rather than relying on the EU institutions and Member States’.

In principle, frameworks of actions involve all the players in an exercise they have jointly framed at European level. Exchanging information, experiences and ‘innovative’ practices can in fact contribute to shared learning - especially, no doubt, in the new Member States which generally speaking have less experience of bipartite social dialogue. It would appear, however, that to view all these initiatives as outcomes of the framework of actions would be going too far <sup>(11)</sup>. So it would seem hard to assess the precise impact of this exercise in all the different countries. Would there have been fewer initiatives if the European text had not existed? Finally, this method is very procedural (framework of actions, guidelines, evaluation reports etc.) and demonstrative (reporting back to the European institutions on the social partners’ commitment to make their contribution to pursuing the Lisbon objectives). Whether or not its added value is truly substantial or else hypothetical is another matter.

## **5. UNICE report on social partners’ activities on restructuring and managing change**

There has been a recent revival of interest in the debate about restructuring in Europe (on this subject, see the chapter by Marie-Ange Moreau in this volume). In 2002, an initial round of social partner consultations was launched by the Commission: it resulted in 2003 in the drawing up of a set of joint ‘reference guidelines’ by the social partners, i.e. a document setting out guidance, factors of success and good practice to be used in managing the social consequences of company restructuring (for the content, see Degryse, 2003). The document was not formally adopted by the ETUC Executive Committee, however, and so cannot be regarded as a joint text - still less as an

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<sup>11</sup> For example, one ‘national’ player we interviewed explained that what they did, when drafting the reports, was to see which of the initiatives taken (in any case) could be ‘tied into’ to the European guidelines.

agreement between the social partners. Consequently its status remains uncertain, to say the least.

In March 2005, the Commission adopted a communication on restructuring and employment, which also constituted the second phase of its social partner consultation on company restructuring and European works councils, pursuant to Article 138 of the TEC (CEC, 2005). The communication calls on the European social partners - particularly at sectoral level - to examine the issue of anticipating structural change, and to play a part in informing and warning the public authorities at all levels. In addition, it encourages the social partners to adopt the 'reference guidelines' (CEC, 2005: 12). The ETUC Executive Committee immediately levelled criticism at this communication because, contrary to the stipulations of the Treaty, the Commission was not in fact 'consulting' the social partners on a legislative initiative; it was merely encouraging them to adopt a document they had drawn up themselves and to promote best practice. The Commission's initiative enabled UNICE, for its part, to believe that its duty had been done in terms of managing the social consequences of restructuring. The reference guidelines, in its opinion, were a satisfactory instrument (UNICE, 2005).

Thus, on 23 March 2006, UNICE alone adopted a report on managing change. The report makes explicit reference to the 2003 document not adopted by the ETUC Executive Committee, and to the joint 'lessons learned' on European works councils in 2005 <sup>(12)</sup> (ETUC, UNICE/UEAPME and CEEP, 2005). According to the European employers, 'Even if these two joint texts do not contain specific follow-up provisions, their adoption by UNICE and its member federations included a commitment to promote them across the European Union. The purpose of the present report is to show how the factors for success identified were integrated in the social partners' activities at European, national, sectoral or company level. UNICE believes that the Work Programme of the European Social Dialogue 2006-2008 offers an

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<sup>12</sup> The social partners adopted on 7 April 2005 a joint document entitled 'Lessons learned on European Works Councils' (see Degryse, 2006).

opportunity for ETUC and its members to join in this exercise of identification of good social partners' practices for change management and for promotion of the joint European social partners' texts' (UNICE, 2006: 3).

This report also constitute a partial response from the employers to the Commission's second consultation. UNICE states that, 'The aim of the present report is to show how social partners at national, regional, sectoral and company level have made use of the key success factors identified in these two texts. Almost thirty good practice examples in twenty-three countries have been selected amongst the most relevant social partners' initiatives. These examples illustrate:

- how social partners have raised awareness of the European social dialogue texts at national, sectoral and company levels, and
- how they have promoted the key success factors identified through different initiatives. Social partners' actions aiming at explaining the reasons for change and enhancing its acceptance, at managing change processes and their social consequences as well as at developing the employability of workers are described.

[...] The report demonstrates the commitment of UNICE and its member federations to promote the results of the European Social Dialogue across the European Union' (UNICE, 2006: 2).

### **A partial assessment**

We therefore find ourselves in the odd situation where the employers' side is calling on its trade union counterparts to participate in implementing and following up a document on restructuring to which it alone has signed up. It is an odd situation, but also an uncomfortable one for the ETUC which, in the absence of any initiative from the Commission, has no means whatsoever of engaging the employers in more substantive negotiations. The case of restructuring is symptomatic of the fragile balance between the players in the social dialogue: the Commission stops playing the role assigned to it by the Treaties, and the equilibrium of the social dialogue is destroyed. In this instance, the weakness in the social dialogue has been caused by the Commission's dereliction of its duties.

## **Conclusion**

2006 has given us an opportunity to step back a little and examine the recent outcomes of cross-industry social dialogue: work programmes, autonomous agreements, the open method of coordination etc. We have attempted in this chapter to make a partial assessment of each of the live issues arising in 2006. On this basis, we shall now try to produce a more general appraisal of European cross-industry social dialogue. Our appraisal encompasses five elements: the overall political climate in which the dialogue takes place; the role of the Commission and autonomy of the social partners; progress made in the subject areas concerned; the instruments selected; and, last of all, the initial practical effects of enlargement.

1) As far as the overall political climate is concerned, it is no longer favourable either to the development of a dynamic social dialogue or to the production of collective agreements - or even to the output of social legislation in general. Now that the political priority is corporate competitiveness in connection with the economic part of the Lisbon Strategy, it has to be admitted that social legislation is regarded as a hindrance, a cost, a burden, and no longer as a complement to the expansion of the internal market (the debate about the revision of the 'working time' directive is symptomatic in this regard – see the contribution by Laurent Vogel in this volume). Whereas the European institutions originally sought to encourage social dialogue as an alternative to social legislation at a time when the British Conservatives were blocking all legislative initiatives, nowadays the institutions seem not to want to promote either the one or the other. Of course, some will say, in view of enlargement it is advisable first of all to consolidate the existing directives before proposing new ones. But within the Commission it is becoming increasingly apparent that the opponents of legislation have rushed into the breach. As one of our interviewees put it, '[the Commission] has nothing left up its sleeve!' in the field of social affairs. And when it does propose initiatives, they tend to be one-sided preliminary compromises, close to the employers' position, devised in the name of European competitiveness. This general environment has a detrimental effect on social dialogue: given that the 'shadow of the law' is absent, the employers' side 'is sitting pretty', according to one of our

interviewees. There is no pressure at all on UNICE. The agreement on violence was essentially concluded, on the employers' side, thanks to a few individuals without whom, probably, no compromise would have been reached. There can be no certainty that these circumstances – the presence of those individuals – will last. Let us not forget that the ETUC had to insist that the negotiation of at least one framework agreement (over three years) be included in the new work programme.

2) With regard to the Commission's evolving role and the autonomy of the social partners, the players have been visibly distancing themselves from one another. Although the Commission is to a certain extent exercising its role as facilitator of the social dialogue, it no longer has any meaningful input. At the very most, in our opinion, the Commission uses social dialogue as a talking-point to mask its own indigence in the field of social affairs. The social partners quite naturally wish to be more 'autonomous' of the Commission and to set their own negotiating agenda. But such autonomy in respect of planning must not cause the Commission to take a back seat in negotiations on the topics addressed. We should remember that the Treaty stipulates: 'the Commission shall have the task of promoting the consultation of management and labour at Community level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties' (Article 138(1) EC). But nowadays, some observers believe, the Commission 'no longer has any impact on the substance of negotiations; it is totally out of the loop'.

3) It follows from the above that the topics addressed in the social dialogue are increasingly peripheral. Whereas in the 1990s, various aspects of labour market flexibility were dealt with in a win-win perspective (part-time work, fixed-term contracts etc.), the topics now being addressed (stress, violence etc.) – regardless of their intrinsic interest and topicality – seem to be out of sync with the social issues of specific concern in Europe, such as 'flexicurity', restructuring and relocation. And when more substantive topics are indeed broached, such as restructuring, the results of the talks are so lacking in ambition that the ETUC's affiliates pour scorn on them.

4) Not since 1999 has European social dialogue produced a framework agreement that has been extended *erga omnes*. This phenomenon is

connected with the previous points: an overall climate unfavourable to a strengthening of social legislation, a balance of power unfavourable to the trade union side, a retreat by the Commission, and so the list goes on. Much use is now being made of the new instruments of social dialogue (especially autonomous agreements and the open method of coordination), but confusion still remains as to their true scope, not least from a legal point of view. Does an autonomous agreement form part of the *acquis communautaire*? How would the European Court of Justice rule if a national court were to consult it about compliance with the provisions of such an agreement? The question as to the scope of autonomous agreements and frameworks of actions also arises in practice, of course: what is the state of play concerning their implementation and follow-up, not in terms of transposition procedures but as regards compliance with their provisions? Do Europe's employees benefit on a daily basis from the joint texts on lifelong learning, stress, gender equality, and harassment and violence? The ETUC in particular is wondering whether, if no tangible benefits are achieved for employees, there is any point in continuing. Why carry on negotiating documents which do not even go as far as the 'joint opinions' of the 1980s?

5) The negotiations on the 'harassment' agreement are the first ones in which the social partners from the new Member States have been fully involved. Enlargement would seem at first sight to have had two effects: firstly, negotiations among 25 (or 27) countries are more cumbersome and more complex to conduct; secondly, the trade union partners from some of the new countries (e.g. Poland and Hungary) have brought a fresh impetus. On the former aspect, negotiations with 25 participants are quite a different matter from negotiations with 12 or 15, where everyone knows each other and where it is possible to work in a well-established spirit - even tradition - of negotiation. With 25 parties, it is no longer possible to go into the details of an agreement, so that the agreement itself can do no more than set out a general framework. As concerns the working method, there is less negotiation in the true sense of the term, and more presentation of respective positions. There is no longer a select forum where issues and problems can be discussed down to the last detail. 'It is more a matter of role-play', one witness told us, and that applies in respect of both the opposite side and his/her

own troops. What is lacking is an impartial third party, the role previously played by the European Commission. It would surely be useful in this regard to consider once again the possibility of setting up a permanent secretariat for European social dialogue, along the lines of the Belgian National Labour Council (CNT), to act as arbiter and notary, keeping a record of agreements.

With respect to the impact of enlargement on the social partners themselves, it seems in particular that UNICE is less well organised than the ETUC vis-à-vis its new members. While UNICE's new members are still somewhat passive, if not dominated by the old members, the new ETUC affiliates are active, feeding in their expertise, insisting on high-quality, ambitious texts, demanding procedures for implementation and follow-up in their countries, etc. Thus the Polish, Hungarian and Baltic trade union movements have thrown themselves into the negotiations with enthusiasm. This is the first agreement where enlargement has really brought something new to the negotiations. Conversely, European social dialogue can lay the foundations for developing and strengthening bipartite social dialogue in the new Member States, by means of autonomous agreements and the open method of coordination.

We should mention, in closing this chapter, that even though European social dialogue is in crisis, it is nevertheless the source of all the major social initiatives of the past few years. The Barroso Commission appears to have downed tools on social legislation; the Member States no longer have faith in the open methods of coordination launched in the wake of the Lisbon Strategy, which have certainly not proved their worth. If social dialogue were to cease, in a context such as this, Social Europe would undoubtedly lose the only driving-force it still has left.

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## **Is health and safety policy being hijacked in the drive for competitiveness?**

Life, health and love are all insecure; why should work be any different?

Laurence Parisot (President of MEDEF), *Le Figaro*, 30 August 2005

### **Introduction**

2006 is a good year in which to take stock of the situation regarding health and safety at work. It marks the end of the EU strategy for the period 2002-2006, which means that we can attempt to think beyond the very short-term horizon of an annual review. 2006 also saw the publication of the first results from the fourth European Working Conditions Survey, carried out by the Dublin Foundation. We therefore have access to data measuring developments over a fifteen-year period, which can help us debate the priorities for Community policies.

In attempting to summarise the situation, it is important to emphasise the contrast between the relative inertia shown by the EU legislator in the area of social directives, and the large amount of legislative change relating to market rules. The revision of the 'machinery' directive and, most importantly, the final agreement on REACH, represent major changes. This might be a welcome development, if these rules were sufficient in themselves to ensure high levels of protection for health and safety at work. But sadly, this is not the case.

The main problem lies in the conflict that exists between health and safety and the private interests of employers, who are concerned to maximise profits. The European Union's activities have been hampered

by a constant concern not to jeopardise these private interests, which for the purposes of the cause have been invested with a kind of public virtue dubbed 'competitiveness'. All the Community's action has had to be squeezed into an essentially financial and short-term concept of competitiveness. Within the Commission, we have seen the rapid rise of Directorate-General (DG) Enterprise, which under the leadership of its Commissioner, Günter Verheugen, is seeking to exert a kind of general oversight over the other Directorates-General. This has led to a real feeling of unease, especially in the debate about REACH. The Vice-President of the Commission, Margot Wallström, has publicly condemned the breach of collegiate responsibility within the Commission, and the fact that some Commissioners were involved in negotiations, questioning some aspects of REACH, without consulting their colleagues (McLauchlin, 2005).

### **1. First findings of the Working Conditions Survey by the Dublin Foundation: stagnation and inequality**

The first findings of the European Working Conditions Survey were presented on 7 November 2006. Organised for the fourth time since 1990 by the Dublin Foundation for the Improvement of Living and Working Conditions, this survey was carried out in late 2005, covering 30,000 workers in the European Union and in Bulgaria, Romania, Croatia, Turkey, Switzerland and Norway.

For the past fifteen years, exposure to occupational risks appears to have remained stable or to have increased slightly. This is a worrying trend if one considers the knock-on effects of a sectoral redistribution that has seen a reduction in the share of heavy industry and agriculture. The survey emphasises the fact that the intensification of work is a strong tendency, with more and more workers being subjected to high work-rates and tight deadlines. Thus 46% of European workers have to work at very high speeds for at least three-quarters of their working time. This represents an increase of 11% compared with the survey carried out in 1990.

The survey shows the importance of more determined action by the European Union in the area of musculoskeletal disorders. Repetitive movements of the hand and arm are the most frequently cited physical

risk, with 62% of European workers reporting exposure to it during at least a quarter of their working time. This represents an increase of 4% compared with the survey conducted in 2000. In second place, workers mention painful and tiring postures: 50% of workers are exposed to these during at least a quarter of their working time. Nearly a third of the European working population reports suffering from backache, muscular pains and stress.

The perception of violence and harassment at work varies with the cultural environment. Generally speaking, it is higher in the northern European countries than in countries surrounding the Mediterranean. For example, the number of workers who report having been the victims of harassment at work ranges from 2% in Italy to 17% in Finland. There is however a consistent relationship observed between subjective perception and state of health: workers who are exposed to psychosocial risks are much more frequently absent from work for reasons of ill health than the average.

For the first time, the survey also contained a question about worker satisfaction. 80% of European workers are 'satisfied' or 'very satisfied' with their jobs. It seems that the most important satisfaction factors are not working conditions as such, but rather job security and work as a place for social contact. The main dissatisfaction factors are linked to excessively long or non-standard working hours, work intensity, lack of control over one's work, and exposure to physical or psychological health risks.

One of the conclusions to emerge from the survey is the extreme degree of inequality in situations: among countries, different sectors, socio-professional groups, and between the sexes.

Increased competition on the labour market does seem to produce or aggravate significant inequalities. Around 35% of workers interviewed reported that work affected their health. This percentage varies by more than 25% between the ten new Member States (55.8%) and the fifteen existing Member States (30.6%).

Inequalities between men and women are particularly striking. With markedly lower incomes, women spend more time working, when paid

employment and unpaid domestic work are added together. Women in full-time employment work, on average, 63 hours per week (40 hours paid work and 23 hours unpaid domestic work). Those employed part-time work 54 hours per week (21.3 hours paid work and 32.7 hours unpaid domestic work). For men, full-time employment involves an average of 51 hours' work per week (43.1 hours paid work and 7.9 hours unpaid domestic work); part-time work involves 30.8 hours' work per week (23.5 hours paid work and 7.3 hours unpaid domestic work).

## **2. The Community strategy**

### **2.1 The 2002-2006 strategy ends with a whimper**

In March 2002, the European Commission adopted a communication dealing with the Community strategy on health and safety at work for the period 2002-2006 (CEC, 2002). This communication was based on an analysis which was broadly correct, but remained very vague on actual initiatives and a timetable. Far from being a precise schedule of work, the strategy preferred to make sweeping statements about the need to combine all kinds of different approaches and instruments. This deficiency was made worse by the serious reduction in human resources available to the Commission's unit responsible for health and safety issues. With the benefit of five years' hindsight, it appears that the term 'strategy' was perhaps the wrong word to describe the content of the communication and the EU's action in the field of health and safety at work between 2002 and 2006. There have been scattered, one-off initiatives; some of these produced results, while others simply became bogged down.

Real legislative progress has been made in relation to asbestos and physical agents. Collective negotiations led to an agreement on stress in October 2004, but its transposition into national legislation has raised a number of problems. Negotiations on violence and bullying were due to be concluded in the first half of 2007. A draft agreement is to be ratified by ETUC, UNICE and CEEP.

Legislative deadlocks have been much more numerous, and concern priority issues: revision of the directive on carcinogenic substances, revision of the directive on pregnant workers, setting mandatory limit

values for the main carcinogens, and the drafting of a directive on musculoskeletal disorders. A very worrying signal was sent by the Commission with the revision of the 'working time' directive, an unprecedented example of regression in social policy (Vogel, 2004b).

A major weakness of the actions that have been taken is the way in which social relationships and changes in the labour market have been dealt with. On three essential questions, we may use the word 'failure':

- Despite the commitment to integrate the gender dimension into initiatives relating to health and safety, the policies actually pursued have in practice scarcely evolved at all, and the question of equality remains largely ignored in relation to health and safety at work. The report by the Commission on the implementation of the framework directive and five specific directives illustrates this trend (CEC, 2004a). In the debates on REACH, the gender dimension of exposure to chemical substances was hardly raised at all.
- Job insecurity has not been considered as a priority issue. Although ignored in the inner circles of the institutions, it was at the forefront of a number of social mobilisation campaigns: demonstrations and strikes in France in spring 2006 against 'first employment contracts', a mass demonstration in Rome in November 2006 against job insecurity, etc.
- The issue of working time has been approached principally from the point of view of the employers' demands for greater flexibility. The devastating impact of the Commission's proposals on health and safety has not been seriously discussed.

## **2.2 'Military secrecy' surrounds the 2007-2012 strategy**

There have been Community 'action programmes' for almost thirty years. The earliest goes back to 1978. In 2002 the terminology changed, and what had been an 'action programme' became a 'strategy'. The adoption of these programmes had always been preceded by a broad, informal process of consultation. The Commission circulated a preliminary draft around national authorities, trade unions and employers' organisations. Their responses were collected; the draft was



amended and was then submitted to an internal, inter-departmental consultation procedure.

For the first time, the preparation of the 2007-2012 strategy took place in an atmosphere of military secrecy. Even the heads of the EU's specialised agencies in the field were sidelined, not to mention trade union organisations and, one assumes, the European employers' organisation UNICE. This absence of transparency is doubtless to be explained by heightened internal tensions within the Commission. The mandate of the Treaty (harmonisation by means of directives while maintaining improvements made) has been called into question by campaigns for 'better regulation' or legislative simplification. The Commission wants to 'simplify' EU legislation in such a way as to reduce by 25% the administrative burden it is said to place on businesses (CEC, 2006a). The 1989 framework directive is flagged in this connection on the basis of Dutch and Danish research, which has never been independently verified (Vogel, 2004a).

An obsession with secrecy rarely goes hand in hand with efficiency. Although the content of the document has always been shrouded in mystery, its date of presentation was the one reliable piece of information available. The Commission was to have adopted its communication by 20 December 2006 at the latest. At the time of writing (8 January 2007) the strategy document has not yet appeared.

### **2.3 Input from trade union and employers' organisations**

The trade union organisations of the 25 European Union countries agreed on the prospects for a new strategy. The debate took place within the framework of the 'workers' group of the Advisory Committee on Safety and Health at Work (ACSH). A statement issued in June 2006 set four central axes and was supported by the European Trade Union Confederation (ETUC) (Vogel and Paoli, 2006). The unions expressed support for a reduced number of priorities, coupled with a specific plan of work. The priority axes proposed are:

- a) consolidation of systems of prevention and a guarantee of equal access for all workers to the relevant instruments;
- b) ensuring the success of enlargement in the field of health and safety at work;

- c) a more coherent policy on chemical hazards;
- d) intervention on work organisation, especially with a view to preventing musculoskeletal disorders.

In a position paper dated 7 June 2006, UNICE pleads mainly in favour of a halt to the development of European legislation in the area of health and safety at work (UNICE, 2006). The European employers' organisation does not mention a single concrete health and safety issue that should be the subject of new EU initiatives. It repeats the usual arguments in favour of deregulation. Improvements in the field of health and safety at work depend mainly on leaving it to the initiative of employers to set up ways of managing working conditions and on the espousal by workers of a 'prevention culture', which is not properly defined.

### **3. Legislative developments: social directives**

#### **3.1 Deadlock in the revision of the 'working time' directive**

The proposed revision of the 'working time directive' <sup>(1)</sup>, currently under discussion, was presented by the Commission in September 2004 (CEC, 2004b). Its main provisions cover the following aspects:

- the ceiling of 48 hours' work per week is made more flexible. The reference period for calculating the length of the working week can be extended to one year;
- Member States may continue to provide for individual derogations (known as 'opt-outs') to the limit of 48 hours' work per week. In some cases these opt-outs may be enshrined in collective bargaining agreements, but this is not mandatory. The proposal actually anticipates abuse of this arrangement, to the extent that it feels compelled to set a second maximum limit of 65 hours per week. This limit is not absolute: opt-outs will still be possible by means of collective agreements or agreements between the two sides of industry.

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<sup>1</sup> The first Working Time Directive was adopted on 23 November 1993. It was amended in 2000. A new Directive, codifying the provisions in force, was adopted on 4 November 2003.

- a new definition of ‘on-call time’ makes it possible to require staff to be present at the workplace and at the disposal of the employer without this time being considered as working time. This provision breaches international labour standards drawn up by the International Labour Organisation as long ago as 1930! In fact Convention No.30 on hours of work in commerce and offices states that ‘the term hours of work means the time during which the persons employed are at the disposal of the employer’.

If a check-out assistant in a large store is required to remain on the premises from 9 a.m. until 8 p.m., but only actually performs any duties for five and a half hours during that time, then under the proposed new rules she could be considered to have worked for only half the time that she effectively had to spend at her place of work and at the disposal of her employer. Fluctuations in patterns of work due to customer demand or the flow of production might thus have to be borne entirely by the workers.

Fighting this proposal became a priority for the trade union movement, which managed to convince a majority of MEPs to oppose it. At the first reading, on 11 May 2005, the European Parliament voted to end individual opt-outs. Yet although there was a comfortable majority in the Parliament on the majority of amendments, the Commission’s modified proposal still fell far short of Parliament’s wishes (CEC, 2005).

In the Council the debate has become polarised. The United Kingdom, supported by Estonia, Germany, Latvia, Lithuania, Poland and Slovenia, insists on retaining an opt-out clause. Belgium, Cyprus, France, Greece, Italy, Luxembourg and Spain oppose this, and on this issue support the European Parliament’s position. An attempt by the Finnish Presidency to reach a compromise that would have maintained individual opt-outs came to nothing. On 7 November 2006, the ‘Social Affairs’ Council could only note a failure to reach agreement. It will fall to the German presidency to take the matter up again in 2007.

### **3.2 The guardian turns a blind eye**

The lengthy negotiations around the issue of working time have drawn attention to an institutional problem. Among the different functions entrusted to the Commission under the Treaty are those of providing

political impetus through its monopoly over legislative initiatives, and maintaining the rule of law in its capacity as 'guardian of the Treaty'. Can the Commission opt out of its role of ensuring respect for Community law, on the basis of its political options or the advantages it might gain in political negotiations?

The problem is not really new. For some twenty years, the Commission has been refusing to bring proceedings for failure to act against Member States that were in breach of Article 119 of the Treaty of Rome, which guarantees equal pay for men and women.

The issue arises in the case of the 'working time directive'. Since its adoption in 1993, failures to act on the part of various Member States have been frequent and evident. According to the Commission, the directive has not been correctly transposed in 23 out of 25 countries. Some of these failures have been brought before the Court of Justice in the form of requests for a preliminary ruling, but the correct transposition of the directive has been of only minor concern to the Commission (2).

The political desire to re-examine the terms of a directive should not preclude ensuring its correct application so long as it remains in force. The Commission needs to distinguish between defending its political options to revise Community legislation and its role as guardian of the Treaties, whereby it has to ensure that all Member States respect all the Community rules. Exercising judgment on the usefulness of pursuing a certain course should not be used as an excuse for inactivity that threatens fundamental social rights. This, in essence, is the problem raised in the draft recommendation by the European Ombudsman on 12 September 2006 (The European Ombudsman, 2006). The Ombudsman had been approached by a German doctor, who since November 2001

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<sup>2</sup> Two rulings of the Court of Justice in the context of proceedings for failure to fulfil obligations can be mentioned. One concerns the total absence of transposition and notice thereof in Italy (Case C-386/98, *Commission c/ Italy*, judgement of the Court of 9 March 2000). The other relates to the United Kingdom's 'guidelines', which encouraged employers not to observe the provisions of the Directive (Case C-484/04, *Commission c/ United Kingdom*, judgement of the Court of 7 September 2006).

had been doggedly attempting to convince the Commission that it had to ensure respect for the implementation of Community legislation on working time. In the meantime the Commission has changed tack, by announcing that proceedings for failure to fulfil obligations could be brought against States which have not correctly transposed the directive. This change of direction, while positive, continues to be motivated by political opportunism: the Commission is putting pressure on Member States in order to force through a compromise on the revision of the directive <sup>(3)</sup>.

### **3.3 MEPs more concerned about barmaids' bare shoulders than about skin cancer**

The adoption of the directive on optical radiation brought to an end the long saga about regulating the principal physical agents in the field of health and safety at work (European Parliament and Council of the European Union, 2006a). This directive is the last in a series of four directives designed to protect workers against the dangers of various physical agents (the other three cover exposure to noise, vibrations and electromagnetic fields). The Council laid down a common position on 18 April 2005. The debate snowballed in the context of the German general election in September 2005. 'You can't legislate for sunshine', 'Europe to ban Oktoberfest barmaids from baring their shoulders' the Bavarian Christian Democrats proclaimed indignantly, as did a large part of the German sensationalist press <sup>(4)</sup>. The directive was certainly

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<sup>3</sup> An Agence Europe article on 8 November 2006 reports: 'EU Social Affairs Commissioner Vladimír Špidla said that as foreseen in the event agreement could not be reached [author's emphasis], the Commission would be launching a series of infringement proceedings in the very near future against the 23 Member States not meeting the requirements of the current directive' (*Bulletin of the European Union*, No.9301 of 8 November 2006, page 11).

<sup>4</sup> The case for bare shoulders was taken up by German MEP Thomas Mann (EPP) in the debate in the plenary of the Parliament on 13 February 2006. His Liberal colleague Elizabeth Lynne added a further twist: 'Imagine the language from some builders, for instance, if they were told to cover up when they were trying to get a sun tan for their holidays!' This debate, which is worthy of inclusion in an anthology of black humour, can be found on the European Parliament website

not intended to modify the activity of the sun, or to prohibit daytime working in the open air. It restricted itself to providing an assessment of risks and corresponding preventive measures.

The draft directive was amended by the Parliament on 7 September 2005. The main amendment sought to remove from the text the provisions relating to natural optical radiation. This amendment deprived the directive of much of its content. Both in terms of the number of workers affected and in terms of the seriousness of the possible consequences of exposure to optical radiation, the main problem is naturally occurring radiation emanating from the sun.

Parliament's amendment received the enthusiastic support of the Commissioner for Social Affairs. For Mr Špidla, it proved that the Commission was standing by its commitment to 'better regulation'!

The new directive does nothing to enhance the consistency of a policy on health and safety at work that is supposed to deal, as a matter of priority, with the most serious hazards. About 60,000 fresh cases of skin melanoma are diagnosed every year in Europe, representing 1% of all cancers. Some of these melanomas are caused by occupational exposure. Workers exposed to the sun's rays are those whose occupation involves performing duties out of doors. These include construction workers, opencast mineworkers, fishermen, farmers, outdoor sports coaches, etc.

### **3.4 Spotlight on simplification**

The process of drafting a directive on simplifying reports by Member States concerning the implementation of EU directives in the field of health and safety at work proved to be a curious episode.

The practical point at issue in the debate is relatively insignificant. Instead of producing some twenty separate reports on the health and safety directives every four or five years, Member States would draft a single, co-ordinated report. Such a directive represents a minimal effort

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(<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20060213+ITEM-016+DOC+XML+V0//EN>).

at administrative rationalisation. One can only express surprise, therefore, at the political importance attached to it by the Commission.

How is this elaborate staging of a minor event to be explained? In 2004 the then Dutch Presidency waged a doughty battle in favour of deregulation in the field of health and safety at work (Vogel, 2004a). One of its key proposals was the simplification of the framework directive. The principal issue at stake was risk assessment, which was thought to be an excessive burden on businesses. Faced with this question, the 'Competitiveness' Council meeting on 25-26 November 2004 twirled its way neatly out of trouble. It recognised the need to simplify the 1989 framework directive, but limited this simplification to an extremely secondary provision of the directive: the need for Member States to produce a report on implementation. The Council stated: 'yearly information requirements with regard to all of the individual measures impose a disproportionate burden on the Member States' (Council of the European Union, 2004: 13). It appears that the ministers in charge of competitiveness had not read the directive, which calls for a report every four years, nor had they appreciated that the cost of producing such a report was not exactly exorbitant. The Commission was keen to give the impression that the initiative was terribly important. With great determination it proceeded to conduct a two-stage consultation process with the social partners. The draft directive has yet to be officially adopted. It is unlikely to encounter any obstacles.

There are two possible interpretations of the way this proposal was stage-managed. Both may be correct.

- a) The Commission was playing for time. It made an insignificant proposal, as a gesture of goodwill towards the 'deregulationist' camp of Member States, while making it clear that there was no serious simplification proposal on the agenda.
- b) The Commission was seeking to create a precedent. In Community policy-making, the search for consensus often involves exercises in semantics. It is all about finding relatively vague forms of wording, in order to guide the various parties towards political positions that they would probably have rejected if they had been put to them straight away. Transforming public services into 'services of general

interest' was a semantic battle before becoming a live political issue. By linking the notions of 'simplification' and 'reduction of administrative burdens' to such an anodyne proposal, the Commission might be trying to influence the positions adopted later by the various parties when discussing weightier matters.

The ETUC tried to avoid the trap by stating: 'ETUC's support for the rationalisation of reports is the result of a very different line of thinking to that expressed in the majority of calls for legislative simplification or for better regulation. [...] There are no real reasons for drawing up a programme designed to simplify health and safety legislation' (ETUC, 2005: 2).

### **3.5 Paralysis in two major areas of work**

#### ***3.5.1 Protecting workers against carcinogens***

The 2002-2006 strategy was weak on chemical hazards. The only development envisaged was a revision of the directive on carcinogenic substances. In 2002 the Commission launched the first phase of consultation on the revision of this directive. Since then, the revision process has been stalled. The opening of the second phase of consultation has indeed been announced several times, but has yet to materialise. The proposal is supposed to involve broadening the scope of the directive to include substances that are toxic to reproduction, and defining limit values for exposure to carcinogens. Until now, the majority of these substances have not been subject to mandatory EU limit values. This creates major disparities in the level of health protection afforded to workers in Europe. Both Parliament and Council have rightly expressed concern about this situation.

This hold-up has contributed to a situation which creates huge social inequalities in relation to health. According to the CAREX database, in the 15 states which were members of the European Union in 2000, some 32 million workers are exposed to carcinogens in the course of their work, i.e. nearly a quarter of the working population. Each year there are between 35,000 and 45,000 cases of work-related fatal cancers (Musu, 2006).



### **3.5.2 Preparing a directive on musculoskeletal disorders**

The 2002-2006 strategy identified musculoskeletal disorders (MSD) as a priority. There is consensus on the fact that the current legislative framework is insufficient to provide effective prevention (Gauthy, 2005). The Working Conditions Survey produced by the Dublin Foundation agrees with all the national data in identifying MSD as the most widespread health and safety problem in Europe. Over five years, progress has been at a snail's pace. The Commission conducted the first phase of consultation with the social partners in 2004. The process has been deadlocked ever since. The Commission constantly announces that the launch of the second phase is 'imminent'... A recent Commission document suggests that the drafting of the new directive will take place within the context of the exercise aimed at legislative simplification (CEC, 2006b). This might simply be a codification of existing provisions, or even a 'watering-down' of these, even though their insufficiency has been amply demonstrated.

## **4. Market rules for chemical substances: REACH**

### **4.1 Influence in high places**

Reforming the market rules on chemical substances has been the major legislative development in the field of health and safety at work since the framework directive was adopted in 1989.

The stakes, as far as health and safety are concerned, are enormous. Exposure of workers to hazardous chemical substances causes far more deaths than industrial accidents. At the workplace, the level of prevention against chemical hazards is clearly insufficient. One of the factors contributing to this situation is the inadequacy of regulations concerning the production and marketing of chemicals. The information made available by the chemical industry is incomplete. Sometimes it is deliberately inaccurate, in order to mask the seriousness of the risks faced (Markowitz and Rosner, 2002).

The need for reform in the market for chemical substances is a matter of consensus, even though the solutions proposed may differ. The rules currently in force have been drafted in successive layers since 1967. The legislation is extremely diffuse, and the multiplicity of amendments has

led to a complex and confusing *corpus*. Day-to-day practice reveals huge gaps in the safety of chemicals.

In political terms, reform in this area was expressed as a condition during the enlargement negotiations in 1995 by Sweden and Finland, whose own regulations provided a better level of protection for health and the environment.

The first attempt at reform in this area appeared in a White Paper published by the Commission in 2001 (CEC, 2001). The reaction of the multinational companies involved in the chemical industry was extremely violent. REACH was seen as a kind of apocalypse for the European economy. 2.35 million jobs would be lost in Germany, according to a study by a firm of consultants (Arthur D. Little) funded by the employers' organisation, while a French study (Cabinet Mercier) funded by the *Union des industries chimiques* forecast up to 670,000 job losses in that country (ChemSec, 2004). Lobbying on an unprecedented scale took place in order to remove the most innovative features of the proposed reform (Lind, 2004; Contiero, 2006). The history of REACH looks set to become a classic in political science for studying the role of lobbying by industry. Guido Sacconi, the MEP responsible for the main reports on REACH, even intends to re-capture the atmosphere of the debates in the form of a thriller. The chemical industry received support from the Bush administration, which could not refrain from what it saw as its duty to interfere (Waxman, 2004).

The draft regulation adopted by the Commission in 2003 represented a step backwards compared with the White Paper. At its first reading, the European Parliament tried to defend the consistency and ambitiousness of the proposed reform. The Council's joint position was a clear watering-down of the scope of REACH. In September 2006, the Environment Committee of the European Parliament set out the terms of a compromise on which the main political groupings could agree. Parliament's amendments enjoyed a comfortable majority (42 votes in favour, 12 against and 6 abstentions). But once informal negotiations (the 'trilogue') began between Parliament, Council and Commission in November 2006, the EPP delegation broke ranks with the compromise

position. This breach in the unity of the Parliamentary delegation reduced its negotiating capacity to very little.

## **4.2 The content of REACH**

REACH is an acronym for *Registration, Evaluation and Authorisation of Chemicals*. The new system in fact rests on three pillars.

### **4.2.1 Registration**

To be marketed in the European Union, the 30,000 substances produced in quantities of more than one tonne per annum will have to be registered with the European Chemicals Agency according to a timetable phased in over eleven years. The manufacturer or importer of a substance will be required to provide a registration dossier containing information on the identity, toxicological and eco-toxicological properties of the substance, to identify its possible uses, to supply a safety data sheet, and in some cases to undertake a chemical safety assessment, to implement and recommend risk reduction measures.

Downstream users will also be required to meet certain obligations concerning chemical safety assessment, depending on whether or not they choose to keep the use they intend to make of the substance supplied to them confidential. If they decide to inform the manufacturer, the latter must carry out the chemical safety assessment. If not, it is the responsibility of the downstream users.

Manufacturers will be encouraged to get together and share the data they hold, in order to avoid unnecessary testing and reduce the costs of registration.

### **4.2.2 Evaluation**

The evaluation procedure will enable the competent authorities of the Member States where the manufacturer or importer is established to inspect some of their registration dossiers. Additional information may be required if necessary.

The European Chemicals Agency will develop guidelines for defining an order of priority for assessing substances.

### **4.2.3 Authorisation**

The use of substances causing serious concern (CMRs, PBTs, vPvBs) <sup>(5)</sup> will be subject to authorisation on a case-by-case basis. Such authorisation may involve some 1,400 substances.

### **4.2.4 The final compromise**

The final compromise, approved by the European Parliament on 13 December 2006, naturally received immediate support from Council. The final version of REACH was therefore officially approved on 18 December 2006. The text will come into force on 1 June 2007. Analysis of the text shows just how much the chemical industry has managed to water down the provisions of REACH with the support of a majority of Member State representatives. The Commission has played a strange hand, not always defending its own positions throughout the course of negotiations. The principal victims of this backtracking will be workers. Indeed, one of the main concessions obtained by the chemical industry is the removal of the requirement for chemical safety reports on substances whose annual production volume is between one and ten tonnes. Of the 30,000 chemical safety reports that would have had to be produced if the Parliament's position had been followed, only some 10,000 to 12,000 will be required. For around two-thirds of substances, the information will be more rudimentary. Thus the final text eliminates information that is essential for the use of the majority of substances covered by REACH. The final compromise also lays down less stringent rules concerning authorisation procedures for the most dangerous substances.

In spite of these setbacks, REACH does, in broad terms, represent an improvement when compared with the rules currently in force. It may lead to an improvement in the prevention of chemical hazards. If this opportunity is to be seized, certain conditions have to be met:

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<sup>5</sup> CMRs: carcinogenic, mutagenic, toxic to the reproductive system; PBTs: persistent, bioaccumulative and toxic; vPvBs: very persistent and very bioaccumulative, i.e. toxic substances which are likely to accumulate in an irreversible way in the body and in the environment.

1. improvements to Community legislation on prevention of chemical hazards in the workplace;
2. strengthening the load-bearing structures of risk prevention (worker representation, health and safety inspections, preventive services, public research institutes);
3. political willingness on the part of Member States to maintain or adopt rules that go beyond the minimum requirements of EU legislation on the workplace.

The first condition operates mainly at EU level; the second is more a question of national strategies; the third requires interaction between the national and the EU level to ensure that rules protecting health and the environment are not attacked as barriers to the market.

These conditions also raise a more general question: how best to develop the social evaluation (and monitoring) of technological developments.

## **5. Revision of the ‘machinery’ directive**

The revision of the ‘machinery’ directive has been adopted (European Parliament and Council of the European Union, 2006b). The reform it involves is useful, though modest. It is not a response to all of the problems raised by the implementation of the ‘machinery directive’. The definition of ‘machinery’ has been revised with a view to ensuring legal certainty for users. Thus the concept of ‘partly completed machinery’ has been introduced into the new text. The directive also emphasises the key role played by risk assessment in the design of safe machinery. Requirements concerning the contents of instructions for use have also been made more stringent.

Three major problems remain to be addressed.

Market surveillance is organised in a national context in each Member State. Only measures to prohibit certain types of machinery are the subject of harmonised Community rules. Such a situation gives rise to numerous legal and practical difficulties. In practical terms, market surveillance is ineffective. Many kinds of workplace equipment carry CE marking, without meeting the requirements of the directive. In legal terms, both manufacturers and importers try to use the principle

of free movement of goods in order to oppose market surveillance (Vogel, 2006).

Technical standards have a vital role to play. They continue to be drawn up in a context that is unfavourable to the different interests involved. In practice, industry has a dominant position in the standardisation process. Any account that is taken of the experience and needs of workers remains only marginal.

The directive accords great importance to the notified bodies, which have to certify the most dangerous forms of equipment. Competition between these bodies may lead to situations where, as a favour, dangerous machinery is certified even though it does not comply with safety requirements. To date, no notified body has been penalised for such practices.

## **6. Personal protective equipment**

The problems raised by technical standardisation have been illustrated by a case involving personal protective equipment. On 16 March 2006 the European Commission adopted a decision stating that technical standard EN 143: 2000 fails to ensure compliance with the basic health and safety requirements set out in Directive 89/686 in respect of certain forms of respiratory protective equipment (CEC, 2006c). The point at issue is an important one. Equipment using electrostatic filtering is commonly used in a wide range of industries such as construction, chemicals, the food industry, etc. The danger posed by bird flu has made this a particularly attractive market.

The effective lifespan of certain filters is abnormally low, even though the models in question conform to European standards (Huré and Iotti, 2004). These standards require a test lasting only three minutes. Such a short time span has proved totally inappropriate for electrostatic models. In fact the efficiency of these filters decreases very rapidly, because the electric charge is progressively neutralised by captive dust. The loss of efficiency of the filters is not visibly obvious. Workers wearing these devices think they are protected when in fact they are not. Developing more effective filters does not present any technical difficulty. In the United States, tests are more demanding, and

numerous producers have adapted their production lines to meet the requirements of the market.

For the past three years, the French government has been insisting that the Commission must shoulder its responsibilities (Mahiou, 2006). France has adopted measures to restrict marketing of these products, and has imposed additional tests, going beyond the European standards, on manufacturers or importers. The French government's action has come up against a lobbying campaign by certain producers such as the '3M' company. The decision of 16 March 2006 came rather late in the day. It put an end to an absurd situation: the Commission should logically have initiated infringement proceedings against France, which was in breach of its obligations. But such an initiative would have shown up the Commission's own dysfunctions and its reluctance to stand up to pressure from industry. For a number of years it turned a blind eye to the French government's formal failure to fulfil obligations, but could not bring itself to revise the status of 'harmonised standard' for the technical standard in question. The decision of 16 March means that certain items of respiratory protective equipment are no longer presumed to conform. Unfortunately the decision was not accompanied by an awareness campaign on the risks of electrostatic filters.

## **7. European collective bargaining: the agreement on crystalline silica**

The agreement reached on 25 April 2006 on crystalline silica is a rare species in the taxonomy of the Community social dialogue (APFE *et al.*, 2006). It is a multi-sector voluntary agreement signed by two European trade union federations, both of which have long been recognised as partners in the European social dialogue, and fifteen employers' associations. Most of the latter are sub-sectoral pressure groups, which had never previously taken part in any form of social dialogue. The Commission in fact had to grant them *ad hoc* status as Community social partners.

On the trade union side, the European Trade Union Confederation was not involved in negotiating the agreement. The European Federation of Building and Woodworkers (EFBWW) rejected the invitation to take part in the negotiations. Workers in the building industry make up the

largest group of workers exposed to crystalline silica. The agreement has been signed by the European Mine, Chemical and Energy Workers' Federation (EMCEF) and also by the European Metalworkers' Federation (EMF).

Crystalline silica is one of the most widespread carcinogens in the working environment. According to the CAREX database, in the Europe of fifteen countries, more than three million workers were exposed in the early 1990s. Available national data confirm that the numbers of workers exposed to crystalline silica are very high. Exposure to silica can, amongst other things, cause pulmonary fibrosis (silicosis) and lung cancer.

Community legislation has ignored this occupational risk. Crystalline silica is not classified as a carcinogenic substance in Community rules governing the internal market, even though the International Agency for Research on Cancer has since 1997 considered it a Group 1 carcinogen (i.e. a substance found to be carcinogenic for humans). It is therefore being produced and marketed without any adequate information being supplied. No limit value for exposure has been set at Community level. National legislation provides very variable levels of protection.

The majority of trade union organisations have come out in favour of silica being classified as a carcinogen, stronger preventive measures to take account of this fact, and the determination of a mandatory limit value at Community level. Two factors have helped create a more favourable climate for these demands:

- a) a recommendation by SCOEL <sup>(6)</sup> for an exposure limit value of 0.05 mg/m<sup>3</sup> to be adopted;
- b) the announcement of a revision to the directive on carcinogenic substances.

It was against this background that the sectoral employers' organisations proposed the conclusion of an agreement on silica. The

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<sup>6</sup> The Scientific Committee on Occupational Exposure Limits.



inspiration behind this move was the organisations' fear of future EU legislation. They had a precedent to rely on. In 2003, four employers' organisations adopted a 'joint position' with EMCEF on nitrogen monoxide (NO) within the framework of the social dialogue (EMCEF *et al.*, 2003). The declaration presumed to give a lesson in epidemiology to SCOEL's scientific experts, who had proposed a limit value for this substance. It stated that SCOEL's position was 'not scientific'. The basis for this peremptory judgment was a typographical one: it was written in bold characters, without the slightest attempt at scientific demonstration. Such an episode ought not to have had any consequences. NO was on the list of limit values that the Commission was preparing to adopt. But when the Commission's directive was finally adopted, it was noted with surprise that NO had disappeared from the list (as had NO<sub>2</sub>) (CEC, 2006d). This was a very grave precedent: the industry had managed to impose its veto, and had weakened the level of prevention offered against respiratory diseases of occupational origin.

The implications of the agreement on silica are contradictory (Musu and Sapir, 2006). The definition of 'good practice' may contribute to an improvement in prevention if the agreement is broadly implemented. But the agreement does not draw the necessary consequences from the carcinogenic nature of crystalline silica in terms of substitution, informing workers, or post-employment health monitoring. The agreement could thus be used to oppose further developments in Community regulation.

### **Conclusion: in praise of 'gold plating'**

Recently a new expression has been all the rage in the narrow world of Community decision-makers. Not a press conference by Commissioner Verheugen goes by without this term being trotted out, accompanied by a wry smile or an expression of disgust. The new enemy is 'gold plating'. Gold plating describes the bad habit some Member States have of going beyond the minimum level of Community regulation. This bad habit is often prompted by trade unions, environmental protection bodies, and other disruptive elements. Gold plating occurs when governments adopt measures to provide better protection for health and safety at

work, or for the environment, in areas where Community legislation has already taken effect.

The argument over gold plating is part of a more thoroughgoing debate about the role of public authorities and of legal regulation in relation to the market. Is it necessary and is it possible to go beyond the minimum *corpus* of rules which are essential for the market to operate?

Those who denigrate gold plating pour scorn on the timorous attitude of those governments which set out to protect everyone and end up discouraging their citizens from taking risks. They see this as a quasi-anthropological danger threatening the capitalist system: fearful, molly-coddled citizens who are afraid of becoming involved in big adventures.

The issue of asbestos enables us to re-situate gold plating in its proper context. The European Union had the necessary legal powers to ban asbestos from 1976 onwards. Yet this carcinogenic substance was not prohibited until 1 January 2005, because the asbestos industry had been predicting the direst consequences for the competitiveness of the European economy. According to the epidemiologist Julian Peto, 500,000 persons could die in western Europe from an asbestos-related disease between 2000 and 2030 (Peto *et al.*, 1999). Taking account of the latency period between exposure and the appearance of the disease, it is reasonable to suppose that a large number of these deaths could have been avoided if asbestos had been banned by the European Union as early as 1976.

Some governments have practised gold plating. Beginning in the late 1970s, a number of European countries decided to ban asbestos at a time when Community policy on the issue relied on 'good practice' and self-regulation by industry, together with a few compulsory rules on industrial hygiene.

In the field of health and safety at work, there is nothing frivolous about gold plating. It is not a luxury but, rather, a key factor in the fight against inequality. If it is accepted that politics and the law have a higher vocation than merely ensuring that the market can operate, then long live gold plating!

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## **Adoption of the Services Directive: a Community big bang or a velvet reform?**

On 27 December 2006, amidst general indifference, the text of Directive 123/2006/EC on services in the internal market was published in the Official Journal (OJ) of the European Union (European Parliament and Council of the European Union, 2006). After three years of work, the saga of the so-called ‘Bolkestein’ Directive came to an end and an important legislative part of the Lisbon Strategy was complete (1). Whereas the Directive was roundly criticised at the time of its first reading in the European Parliament, in February 2006 (2), the mood surrounding the second reading was a mix of enthusiasm and resignation. Does this mean that a balance has been struck and that ‘all is for the best in the best of all possible worlds’? What really happened in the time between the Commission’s initial draft and the adoption of the final version as an A point by the Transport Council on 11-12 December 2006? In the following pages we shall attempt to piece together the jigsaw, dwelling on some of the events that occurred in the institutional dialogue - and, in some cases, their repercussions. We shall endeavour to present an overall - but

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<sup>1</sup> For the record, the credo justifying the Services Directive is that it should bolster the trade in services by between 30 and 60% and increase growth by 0.3 to 0.7% (in support of this much-debated hypothesis, see in particular de Bruijn *et al.*, 2006).

<sup>2</sup> We should not forget that 15,000 people gathered for a demonstration in Strasbourg on the day of the vote on the European Parliament’s first reading; furthermore, a ‘Stop Bolkestein’ petition amassed 50,000 signatures.



inevitably incomplete - appraisal of the 'headway' which became possible thanks above all to the input of the European Parliament, and to outline the main developments worthy of our attention.

## **1. Genesis of the Directive**

The gestation period for the Directive lasted almost three years. It is helpful to recall the procedure whereby the dossier went backwards and forwards between the Commission, Parliament and Council.

**Table 1: The various stages in the procedure and implementation of the Directive**

Adoption of the initial proposal by the College of Commissioners	13/01/2004
Commission proposal forwarded to Parliament and Council	06/02/2004
Opinion of the Economic and Social Committee	09/02/2005
Opinion of the Committee of the Regions	29/09/2004
Opinion of the European Parliament (first reading)	16/02/2006
Proposal amended by the Commission (3)	04/04/2006
Political agreement in the Competitiveness Council	29/05/2006
Common position adopted by the Council	24/07/2006
Opinion of the European Parliament (second reading)	15/11/2006
Adoption of the Directive as an A point at the Transport/Telecommunications/Energy Council	12/12/2006
Publication in the Official Journal of the European Union	27/12/2006
Entry into force of the Directive	28/12/2006
Deadline for transposition of the Directive	28/12/2009
Review of the Directive and possible modifications by the Commission	28/12/2011

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<sup>3</sup> Pursuant to Article 251 of the Treaty, in fact, the Commission normally acts as a filter for Parliament's amendments before the Council expresses its view. The Council must give a unanimous decision on amendments which are not taken over by the Commission.

## **1.1 Left-wing criticism of the draft text**

The justification for the draft text produced by Dutch Commissioner Frits Bolkestein and approved by the College of Commissioners on 13 January 2004 was twofold: economic and legal. First of all, the Commission regards services as the touchstone of the Lisbon Strategy aimed at making the European Union into the most competitive region of the world. According to the Commission, the service sector, representing 70% of the EU economy, is hamstrung by regulations which prevent it from developing to the full. Secondly, the Commission argues that Articles 43 and 49 of the EC Treaty, as well as the case law of the European Court of Justice (ECJ), compel it to act against legislation in the Member States which, in the guise of supervision and protection, has erected 'barriers' to the free movement of services. Rapidly dubbed 'ultraliberal' by some on the Left <sup>(4)</sup>, who believed that it would open the floodgates to extensive liberalisation and deregulation, the draft text had four main characteristics:

- the scope of the Directive was extremely broad <sup>(5)</sup>;
- the principle of freedom of movement - centring on the country of origin principle (COP) - took precedence over other freedoms and fundamental rights <sup>(6)</sup>;
- systematic evaluation and monitoring of national legislation was to be conducted by the Member States and the Commission;
- 'soft law' (codes of conduct and voluntary agreements) was to be used to the detriment of harmonisation, regarded as a bedrock of common principles.

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<sup>4</sup> A demonstration called by the European Trade Union Confederation and held in Brussels on 19 March 2005 was attended by more than 70,000 people.

<sup>5</sup> All services are covered apart from non-economic services of general interest and those explicitly excluded from the Directive (transport services, electronic communications, taxation etc.).

<sup>6</sup> It should however be noted that ECJ case law has both attenuated and safeguarded the principle of free movement.

## **1.2 First reading in the European Parliament: a courageous vote**

Although the Council working group did a huge amount of work <sup>(7)</sup> on the draft Directive and served as a testing ground for the European Parliament between February 2004 and February 2006, there can be no doubt that the high-point in the inter-institutional dialogue came on 16 February 2006, when the Parliament held its first reading. Parliament made far-reaching changes to the Commission's initial draft, excising from it the most controversial provisions.

- 1) Most importantly, at the initiative of Anne Van Lancker <sup>(8)</sup>, Parliament introduced a number of 'safeguard clauses' into Article 1 of the Directive. Thus the text now clearly states that the Directive does not deal with the liberalisation of services of general economic interest (paragraph 2), nor with the abolition of monopolies providing services, nor with aids granted by Member States (paragraph 3). It does not affect measures taken at Community level or at national level, in conformity with Community law, to protect or promote cultural or linguistic diversity or media pluralism (paragraph 4). It does not affect Member States' rules of criminal law (paragraph 5). The Directive does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects Community law. Equally, this Directive does not affect social security legislation (paragraph 6). Finally, it does not affect the exercise of fundamental rights as recognised in the Member States and by Community law or the right to negotiate, conclude and enforce collective agreements and to take industrial action [...] (paragraph 7).
- 2) A not insignificant number of fields or sectors are excluded from the scope of the draft Directive: temporary work agencies, all transport services including port services, legal services, audiovisual services,

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<sup>7</sup> The Council working group devoted more than 30 meetings to this issue, giving the European Parliament many arguments for amending the text.

<sup>8</sup> A Belgian Socialist MEP (PES), rapporteur for the EP Committee on Employment.

gambling activities, activities connected with the exercise of official authority, social services relating to social housing, childcare and support of families and persons in need, and security services. Healthcare services are likewise excluded (see the contribution by Rita Baeten in this volume).

- 3) The Parliament acted to ensure that sectoral directives would take precedence over the *lex generalis*, which will therefore intervene only as a complement to existing Community legislation. This is a key point, since it protects the ‘inviolability’ of important Community instruments affording protection against any watering-down of standards (<sup>9</sup>).
- 4) In the chapter on freedom of establishment, the Commission wished, following certain rulings by the Court, to restrict the prerogatives of public authorities with regard to the authorisations and requirements applying to service providers. Here too, Parliament stood in the way of broader deregulation.
- 5) Lastly, Parliament replaced the country of origin principle (COP) with the principle of freedom to provide services. Member States must respect the right of providers to provide services in a Member State other than that in which they are established. The Member State in which the service is provided must ensure free access to and free exercise of a service activity within its territory.

Member States must not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:

- a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;

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<sup>9</sup> The Services Directive will in particular apply ‘without prejudice’ to Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, Regulation (EEC) No.1408/71 on the application of social security schemes to employed persons and their families moving within the Community, Directive 89/552/EC on the pursuit of television broadcasting activities and Directive 2005/36/EC on the recognition of professional qualifications.

- b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;
- c) proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.

The disappearance of the COP is without doubt the European Parliament's greatest achievement. But, above and beyond this 'emasculat[i]on', the general philosophy underlying the original proposal still remains that of removing all regulatory barriers to services <sup>(10)</sup> and subjecting the action of Member States to requirements which are 'duly justified'. Member States are therefore placed on the defensive and will be unable to legislate unless they show due regard for the principles of non-discrimination, necessity and proportionality.

### **1.3 The Commission's amended proposal: salvaging the basics**

The Commission adopted an amended proposal for a Directive on 4 April 2006. Although it took over most of Parliament's amendments, the Commission reintroduced several of the disputed elements here or vowed to do so in other - existing or future - Community instruments.

- 1) The Commission agreed to exclude a number of sectors (services of general interest – SGI – 'as defined by the Member States', temporary work agencies, audiovisual services, activities connected with the exercise of official authority, gambling activities, private security services etc.). However, it retained in the scope of the Directive services of general economic interest – SGEI <sup>(11)</sup>, educational, cultural and social services in general, with the exception of four particular social services (see above).

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<sup>10</sup> In this context it is worth reminding ourselves of Article 53 of the Treaty: 'The Member States declare their readiness to undertake the liberalisation of services beyond the extent required by the directives issued pursuant to Article 52(1), if their general economic situation and the situation of the economic sector concerned so permit'.

<sup>11</sup> It should however be noted that Article 17 of the Directive stipulates that Article 16 (freedom to provide services) does not apply to SGEI provided in another Member State.

- 2) The Commission excluded healthcare but, in the wake of the *Watts* judgment<sup>(12)</sup>, announced that it was drawing up a directive on patient mobility that will go further than Article 23 of the Directive, which it agreed to delete.
- 3) It agreed to delete Articles 24 and 25 regarding the posting of workers, but stated its intention to produce guidelines incorporating the principle and to be more expeditious in handling complaints from companies about ‘barriers’ to freedom of movement. The Commission likewise announced plans to modify Directive 96/71.
- 4) It agreed to delete the guiding principle behind Article 16 – the COP – albeit while restricting the Member States’ prerogatives in terms of the requirements for performing service activities.

In removing the most controversial provisions from its proposal, the Commission was seeking to ‘get the Directive back on its feet’, quipped Guido Berardis, director of the unit within the Internal Market Directorate-General which drew up the draft Directive. The Commission’s main goal was to preserve the principle of freedom of movement and limit the likelihood of Member States evading peer review by the other Member States and oversight by the Commission.

#### **1.4 The Council’s common position of 24 July 2006**

After numerous meetings and bilateral caucuses, the Council managed to achieve, unanimously<sup>(13)</sup>, first a political agreement and then a common position on the draft Directive, based on a compromise text

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<sup>12</sup> This is the 9<sup>th</sup> judgment on the matter following the *Kholl and Decker*, *Smits and Pereboom*, *Van Brackel*, *Muller-Fauré*, *Inizan*, *Leishtle* and other judgments. In this sense, *Watts* says nothing fundamentally new that was not said in the earlier judgments. Some (the Commission) believe that the Court is ‘fine-tuning’ its point of view, while others (in particular EPSU, the European Federation of Public Service Unions) believe that the Court is becoming more radical.

<sup>13</sup> Two delegations abstained for opposing reasons: Belgium, pleading ‘difficulties’ with certain provisions of the Directive, and Lithuania, disappointed that the Directive did not go further towards greater liberalisation of the service sector. Abstention is not of course an obstacle to unanimity.

of the Finnish presidency <sup>(14)</sup>. Generally speaking, this common position incorporates - either in full or in substance - all of the European Parliament's amendments that were taken over by the Commission. It contains new provisions bolstering transparency and cooperation between the Member States and the Commission, thereby helping to ensure proper implementation of the Directive. The principal aspects of the common position are described below:

- Specific fields of law (Article 1 of the Directive). With respect to the subject matter of the Directive and its relationship with specific fields of law (fundamental rights, labour law, criminal law, protection or promotion of cultural and linguistic diversity and media pluralism), the common position basically incorporates Parliament's amendments and the amended proposal.
- Scope (Article 2). In essence, the common position takes into account the amendments adopted by Parliament at first reading. As far as services of general interest are concerned, it reflects in full the content of the Parliamentary amendments. The common position spells out even more clearly than the amended proposal the fact that the Directive does not apply to non-economic services of general interest. It confirms the exclusion of all transport services, including port services. It slightly rewords the text to make plain that the exclusion of audiovisual services covers cinematographic services too; this was accepted by the Commission. With regard to the exclusion of social services, the common position refers to social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State <sup>(15)</sup>. The Council also pointed out that the Directive should not affect the principle of universal service

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<sup>14</sup> The political agreement of May 2006 was in fact achieved on the basis of a text put forward by the Austrian presidency, but Finland transformed it into a common position in July 2006.

<sup>15</sup> Thus the Council and the Commission construe the four social services referred to by the European Parliament by way of example as an exhaustive list.

as applied by the Member States' social services. Finally, the common position confirms that temporary work agencies and, in particular, healthcare services are excluded from the scope of the Directive.

- Relationship of the Directive with other provisions of Community law (Article 3). The common position takes the same approach as the European Parliament and the Commission: it states clearly that the Directive does not affect other Community instruments and that, in the case of conflict with another Community act governing specific aspects of access to or exercise of a service activity, the provision of the other Community act will prevail. In addition, the common position confirms that the Directive does not concern rules of private international law, in particular rules which guarantee that consumers benefit from the protection granted to them by the consumer protection rules laid down in the consumer legislation in force in their Member State.
- Principle of 'freedom to provide services' (Article 16). The Council agreed not to alter Article 16 of the Directive as formulated by the Parliament and taken over by the Commission. But, under pressure from the 'new' Member States (Poland, Hungary, Czech Republic, Estonia etc.), it added to Article 39(5) a provision reading as follows: 'By 28 December 2009 at the latest, Member States shall present a report to the Commission on the national requirements whose application could fall under [...] Article 16, providing reasons why they consider that the application of those requirements fulfil the criteria referred to in [...] Article 16'. The effect of this clause will be to put Member States even more on the defensive.
- The posting of workers and nationals of third countries (Articles 24 and 25 of the original proposal). The common position accepted the approach of the European Parliament and the Commission, and consequently deleted Articles 24 and 25.
- Responsibility for healthcare costs (Article 23). Here too, the Council went along with the approach of Parliament and the Commission, thus confirming the deletion of Article 23.



One can only conclude that the Council went along with the Commission's amended proposal by default. Indeed, the Council needed to act unanimously if it was to reject the Commission proposals, and that was not possible owing to the diversity of views around the table. What happened in practice was that the Commission allied itself with Parliament against a divided, impotent Council (16).

### **1.5 The Parliament's recommendation for second reading: maturity or abdication?**

The second reading in the European Parliament was characterised by two very different political attitudes: on the one hand, that of some members of the PES, GUE and Green/ALE Groups, who believed that the Directive should be further improved, especially given the outcome of the first reading; on the other, the attitude of those on the Right (EPP-DE, ALDE), who felt that an appropriate balance had been struck and that the Council's common position, itself very close to the first reading, was a suitable basis for agreement. The Left tabled the majority of the 39 amendments relating to aspects not included by the Commission in its amended proposal, concerning in particular:

- a better definition of, and more legal certainty for, social services (17);
- an explicit reference to Article 28 of the Charter of Fundamental Rights, referring to respect for rules governing the relations between social partners in the Member States;
- more attention to illegal practices on the part of service providers, particularly concerning the problem of undeclared work and the 'pseudo-self employed';

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<sup>16</sup> Each institution was evidently determined to produce an incomplete Directive rather than nothing at all.

<sup>17</sup> On 26 April 2006, between the first and second readings, the Commission published a communication on social services of general interest (CEC, 2006), following on from Parliament's exclusion of all social services at first reading (see the chapter by Rita Baeten in this volume).

- a clearer statement of the rights and obligations of Member States of establishment and those of the Member States where the service is provided <sup>(18)</sup>;
- deletion of the Commission's 'analyses and guidelines' concerning the mutual evaluation of national requirements on freedom of movement for service providers, on the grounds that these would jeopardise the joint legislative powers of the Council and Parliament and might create excessive red-tape and administrative chaos in the Member States (Art. 39(5));
- the need to examine the advisability of harmonisation measures on the service activities covered by the Directive.

On the other side of the political divide, most speakers highlighted the 'balanced overall outcome' (Marianne Thyssen, EPP – BE). Even though she had defended Parliament's right to enter amendments at second reading, the rapporteur, Evelyne Gebhardt, stated in summing up that the positive cooperation within Parliament and among the institutions was reflected in the text, which constituted 'a symbiosis between the interests of workers, consumers and economic operators'. In her opinion, this balance was evident particularly in the deletion of the country of origin principle and of the provisions on the posting of workers, the exclusion of services of general interest such as social and healthcare services, and the inclusion in the text of the principle of freedom of movement for services, which would oblige Member States to lift restrictions.

In an attempt to avert conflict, Commissioner McCreevy made a statement at the start of the plenary sitting on 15 November 2006 to clarify the Commission's position. His aim was both to forestall the vote of hostile MEPs and to explain, in a favourable light, the compromises put forward by the rapporteur on the Directive. Mr McCreevy signalled the Commission's plan to draw up guidelines and suggestions to assist

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<sup>18</sup> Under this amendment, the Member State of establishment would be responsible for supervising the provider on its territory, whereas the Member State where the service is provided would supervise the provider when services are being provided on its territory.

Member States in implementing the Directive (within three years). These would be neither legal interpretations (the responsibility of the ECJ) nor amendments to the Directive (co-decision with Parliament). The Commissioner also stressed that the Directive ‘does indeed not affect labour law laid down in national legislation and established practices in the Member States and that it does not affect collective rights [...]’. The Services Directive is neutral as to the different models in the Member States regarding the role of the social partners’. He did however recall that Community law, and in particular the Treaty, continue to apply in this field <sup>(19)</sup>. Ms Gebhardt said that ‘with the Commission’s official statement, the final uncertainties have been removed’. She therefore advised her colleagues to vote in favour of the Council’s common position without amending it. That second reading, ‘inevitable’ to some MEPs, ‘botched’ to others, leaves a bitter taste in the mouths of those who champion a strong role for Parliament in the co-decision procedure: they would have liked Parliament to go as far as it did at first reading, where more had been achieved.

In the opinion of Pierre Jonckheer (Greens/ALE – BE), ‘this can be seen as either political maturity <sup>(20)</sup> or a capitulation’. He added that a majority of MEPs had opted out; he was shocked that the rejection of amendments had left the Directive without any reference to the provisions of the European Charter of Fundamental Rights or to labour law; he and his colleagues had doubts as to the value of the Commissioner’s statement on labour law and whether future Commissions would abide by the text. One must surely conclude that the Council and a majority in Parliament were refusing to give labour law and social services adequate protection in the face of the Services Directive.

The European Parliament finally completed its second reading of the Directive at the plenary sitting on 15 November 2006. Apart from three

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<sup>19</sup> The Green/ALE and GUE Groups immediately responded that statements by the Commission are all well and good but have no binding force and commit only the current Commission.

<sup>20</sup> Thus Ms Gebhardt, in her closing remarks, emphasised the maturity of Parliament, ‘which has not tabled hundreds of amendments’.

technical amendments reflecting the interinstitutional agreement on comitology, no other amendments – most of them put forward by MEPs from the Greens/ALE, GUE and PES Groups – got through. A motion calling for the Directive to be rejected out of hand was itself rejected by 405 votes to 105, with two abstentions.

By declining to exercise its right to amend the Council's common position, Parliament demonstrated that it had won out over the Commission and the Council, even though a not insignificant minority of MEPs had put forward 39 amendments seeking to improve the content of the Directive - or purely and simply to reject it. To this extent, 'maturity or abdication?' is the wrong question to ask. It was clear from the outset that the EPP-DE and ALDE Groups would not tolerate a radical reappraisal of the proposal. What was more surprising - albeit predictable - was that members of the PES Group would split into opposing factions on some of the disputed provisions of the Directive. And that was without factoring in the tacit agreement between Commission and Council on the basic political thrust of the Directive.

### **1.6 The Council's second common position: divergent approaches**

The Directive on services in the internal market was formally adopted by the Council, as an A point, on 12 December 2006. The vote was unanimous (with abstentions from Lithuania and Belgium). However, the apparent unanimity in the Council masks some subtle divergences of approach. Some Member States, on the one hand, sought to prioritise a balanced approach, respect for the Community method - including through harmonisation - and a bedrock of solid guarantees for citizens (workers and consumers); on the other hand, there was the 'free-trade' tendency headed up by the United Kingdom and the Netherlands, keen on a more business-oriented approach. At the insistence of several eastern European countries, the Council agreed to tighten up the provisions on reporting and mutual evaluation with respect to the national requirements retained by Member States in their national legislation. This point was presented by the new Member States as a necessary concession in return for the disappearance of the COP. Furthermore, the Council, with the agreement of the Commission, approved a transposition deadline of three years rather than two.

## **2. An assessment of the Directive's outcomes**

### **2.1 Positive aspects**

This point is rarely made, but the Services Directive does contain some undeniable steps forward which we should have the courage to welcome, even if the headway is partly cosmetic or merely pre-empts natural moves to update information and administrative cooperation structures. For instance, Chapter II of the Directive comprises four operational articles (Articles 5, 6, 7 and 8) which are innovative in that they simplify administrative procedures.

- a) Simplification of the procedures and formalities applicable to access to a service activity and to the exercise thereof (the possibility of introducing harmonised forms at Community level etc.).
- b) The creation of points of single contact, designated by a Member State to liaise with service providers from other Member States. They will play a role in giving assistance to providers either as the authority directly competent or as an intermediary.
- c) The possibility of completing all procedures and formalities relating to access to a service activity and to the exercise thereof by electronic means (speeding up the general introduction of e-government).

This chapter has seldom been contested, and no political Group in Parliament tabled any amendments opposing it.

### **2.2 Disputed elements**

Dispute centred on four main elements:

- the assessment and scope of the principle of freedom to provide services;
- the chapter on freedom of establishment;
- the treatment of services of general interest (including social services);
- the 'posting of workers' issue.

These four elements will be examined in more detail below.

### **2.2.1 The country of origin principle (COP)**

From the very outset, Article 16 of the Services Directive generated more debate than any other in the political Groups. Under the original wording of paragraph 16(1), Member States were to ensure that service providers were subject solely to the national provisions of their Member State of origin. This provision caused a huge amount of concern, especially since the COP imposed a form of automatic mutual recognition, without prior harmonisation and – above all – without a minimum threshold of protection for workers/consumers having been laid down. Even so, the Commission regarded the COP as the ‘legal keystone’ of the Directive and wished to allow all providers to export their own business models without conforming to the systems in place in each Member State of activity.

However, the Court of Justice has never explicitly established the country of origin rule <sup>(21)</sup> as a general principle for services. It has often confined itself to pointing out that a Member State is in breach of Article 49 of the Treaty if it requires an economic operator to obtain an authorisation to carry out a particular activity, ‘without account being taken of the evidence or guarantees already presented in the Member State of origin’ <sup>(22)</sup>. The COP was the Commission’s way of guaranteeing the full effect of Article 49 <sup>(23)</sup> and bringing about a step-change by taking a teleological view: it introduced the rule that compelling a service provider established in another Member State to obtain authorisation in the State of destination is no longer admissible *per se*, unconditionally, without specific derogations <sup>(24)</sup>.

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<sup>21</sup> For a discussion of the COP and its antecedents, see Van den Abeele (2005).

<sup>22</sup> See the judgment *Commission vs. Portugal* of 29 April 2004, Case C-171/02 concerning private security services.

<sup>23</sup> Article 49 stipulates that ‘[...] restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended’.

<sup>24</sup> Oddly enough, the COP has been praised to the skies by some and lambasted by others. One senior official with a doctorate in public law even asserted that ‘the COP is a pillar of the common European house’ (Garabiol-Furet, 2006).

Thus the legislation of the country of origin becomes the legal norm in the country of destination, at least as concerns the coordinated sphere. The door to competitive deregulation is thrown open, in that companies may be tempted to establish themselves in less demanding countries and offer their services from there ('legal shopping'). Under such circumstances, better regulated countries could find themselves penalised, which may lead to competitive deregulation predicated on the lowest common denominator. What is more, the COP provision contravened Article 50, third sub-paragraph, of the Treaty <sup>(25)</sup>.

What does the new Article 16 say <sup>(26)</sup>? The country of origin principle has been replaced by the principle of freedom to provide services. However, the new Article 16(1) sets out in two parts a general principle with very powerful effects:

- Member States shall respect the right of providers to provide services in a Member State other than that in which they are established;
- The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

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<sup>25</sup> Article 50, third sub-paragraph, of the Treaty stipulates that 'the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions [author's emphasis] as are imposed by that State on its own nationals'.

<sup>26</sup> The new version of Article 16 was revised by the European Parliament on four occasions in the days leading up to the vote at first reading. This Article was at the heart of talks between, but also within, the political Groups for more than three days. Most of the Socialist MEPs found it unacceptable to keep the spirit of the country of origin principle in the text, a point of view not shared by the Socialist MEPs from the new Member States. The EPP side wanted the principle to remain such in the text as. Total deadlock prevailed for more than two weeks. Various compromises were talked through by a high-level group headed up by the chairmen of the two political groupings: Martin Schulz and Hans-Gert Pöttering. Before signing up to the compromise deal, the EPP-DE Group insisted at the last minute on deleting from the text the words 'protection of consumers and social policy', which can therefore no longer be invoked to restrict the service activity of a foreign operator. Although this concept has been included in one of the recitals, the fact of having removed it from the legal stipulations constitutes a political symbol and is the price that the PES Group had to pay to secure the overall compromise deal.

Next, Article 16 lists restrictions which the host State (or State of destination) is barred from imposing, as well as the particular requirements that may be imposed with regard to the exercise of a service activity. The scope of these particular requirements (public policy, public security, public health or the protection of the environment) is in fact limited and has been circumscribed by the Court of Justice in several judgments.

Lastly, Article 16 stipulates that, by 28 December 2011, the Commission will submit a report on the application of this Article, in which it will consider the need to propose harmonisation measures regarding service activities covered by this Directive.

It is worth noting one particular improvement, introduced at the Parliament's initiative, namely that the requirements which a Member State may impose must not prevent Member States 'from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements' (16(3)). Article 16 should be read in the light of Article 17, which lays down additional derogations <sup>(27)</sup> from the freedom to provide services, and Article 18 <sup>(28)</sup>, which establishes derogations in individual cases. But the new Article 16 must also be seen in conjunction with three other provisions which circumscribe and, in a way, constrict the requirements that a Member State may impose on a service provider.

- First of all, Article 16 needs to be read in connection with Article 31 stating that 'With respect to national requirements which may be imposed pursuant to Articles 16 or 17, the Member State where the service is provided is responsible for the supervision of the activity of the provider in its territory'. The requirements must be justified

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<sup>27</sup> For instance, the principle of freedom to provide services excludes SGEE, matters covered by Directive 96/71/EC (the posting of workers), by Regulation (EEC) No.1408/71 (coordination of social security schemes), the provisions regarding contractual and non-contractual obligations, etc.

<sup>28</sup> 'In exceptional circumstances only, a Member State may, in respect of a provider established in another Member State, take measures relating to the safety of services'.



on grounds of public order, public security, public safety, public health and protection of the environment. The checks, inspections or investigations must not be discriminatory or ‘motivated by the fact that the provider is established in another Member State [...]’. Two remarks are called for here. First of all, supervision by the State of destination is circumscribed by stringent criteria which will allow for few preventive checks. Such checks will have to be sufficiently well motivated by reasons of public order or public security to be valid. In the light of this provision, will it still be possible to allege that labour legislation has been infringed or to take preventive measures against undeclared work? Secondly, given that the requirements connected with consumer protection and social policy were removed by the Right in the European Parliament, there can be no certainty that the work of labour inspectorates will be facilitated. In this respect, the Belgian National Labour Council (CNT) <sup>(29)</sup> expressed the view in 2005 that the European institutions should go further in setting out specific procedures for cooperation with inspection services since, in its opinion, the terms of the Directive were too general on this point. It believed moreover that minimum guarantees should have been laid down concerning the work of inspection services, especially in respect of their human and material resources, procedures and effective cooperation.

- Article 39(5) stipulates that ‘By 28 December 2009 at the latest, Member States shall present a report to the Commission on the national requirements whose application could fall under the third subparagraph of Article 16(1) and the first sentence of Article 16(3), providing reasons why they consider that the application of those requirements fulfil the criteria referred to in the third subparagraph of Article 16(1) and the first sentence of Article 16(3)’. Thus the Member State of destination is put under pressure, being obliged on every occasion to substantiate the reasons behind certain national requirements. This plays into the hands of the ‘less law-making’ lobby. Besides, the risk of additional red-tape is ever-present.

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<sup>29</sup> ‘Proposition de directive relative aux services dans le marché intérieur’, *CNT Opinion*, No.1.463, Belgian National Labour Council, 5 May 2004 (<http://www.cnt-nar.be/AVIS/avis-1463.pdf>).

- Article 41 states that ‘the Commission, by 28 December 2011 [...] shall present to the European Parliament and to the Council a comprehensive report on the application of this Directive. This report shall [...] address in particular the application of Article 16. [...] It shall be accompanied, where appropriate, by proposals for amendment of this Directive with a view to completing the Internal Market for services’. In addition to the already-mentioned risk of bureaucracy, this last provision could pave the way towards a return of the country of origin principle. The Commission has in fact declared its strong attachment to the COP which, it believes, constitutes ‘the only viable alternative to complete (and hence unachievable) harmonisation so as to enable providers, especially SMEs, to offer their services on a cross-border scale without having to face up to the prohibitive and dissuasive costs associated with the obligation to comply with the cumulative rules of several, or even all, of the 27 national systems’ (D’Acunto, 2004: 220).

The final wording of the new Article 16, reached by means of inter-institutional compromise, does not entirely preclude the hypothesis that something akin to the original COP might be reintroduced in 2011 under the review of the Directive referred to in Article 41. The national requirements that the State of destination may still impose will have to meet such a broad set of conditions, and to undergo such prior scrutiny by the Commission, that they are likely to be greatly scaled down or even to disappear over time.

### ***2.2.2 The chapter on freedom of establishment: an illustration of what deregulation means?***

The section of the Directive linked to freedom of establishment has consequences that are probably just as far-reaching as the COP in terms of the ‘better law-making’ agenda. Even though Parliament amended the ‘Establishment’ part of the draft Directive at its first reading on 16 February 2006, this part continues to bear the stamp of ‘less law-making’.

Article 10 sets out the conditions for authorisation schemes on the basis of criteria to ensure that the competent authorities shall not exercise their power of assessment in an arbitrary or discretionary manner.

These criteria are to be non-discriminatory, justified by an overriding reason relating to the public interest, proportionate to that public interest objective, clear and unambiguous, objective, and made public in advance. Put briefly, the cumulative effect of all these conditions will be to reduce substantially the use made of the authorisation schemes.

Article 13(4), which deals with authorisation procedures, provides specifically that, failing a response within a reasonable time period set or made public in advance, authorisation shall be deemed to have been granted. On this point, Parliament, with the help of Council, has succeeded in limiting the scope of the tacit authorisation scheme <sup>(30)</sup>.

Article 15 requires Member States to run a fine-tooth comb through their legal systems to check that they comply with the principles of non-discrimination, necessity (requirements must be objectively justified by an overriding reason relating to the public interest) and proportionality. In this connection it is worth noting that Article 15(7) requires Member States to 'notify the Commission of any new laws, regulations or administrative provisions' which set requirements such as compulsory minimum or maximum tariffs, requirements fixing a minimum number of employees, or an obligation on a provider to take a specific legal form, including being a legal person, a non-profit-making entity, etc.

### ***2.2.3 The treatment of SGI in the Directive***

#### *Services of general economic interest (SGEI)*

Since this was a draft Directive designed to apply to the whole of the service sector, the question inevitably arose as to how it fitted in with Community law relating to services of general economic interest (SGEI). In this respect, the discussion on SGEI was one of the major political debates with Parliament. The final outcome, however, is rather low-key. SGEI, other than those mentioned in Article 2(1), remain

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<sup>30</sup> Tacit authorisation is a questionable principle insofar as it states that, failing a response from the administration within the requisite time period, the decision is deemed to have taken effect. The new wording takes better account of the principle of good governance: different arrangements [from tacit authorisation] may nevertheless be put in place, where justified by overriding reasons relating to the public interest, including a legitimate interest of third parties.

within the scope of the Directive. This is particularly the case for energy (gas and electricity), postal services, transport, distribution and treatment of water and waste management, as well as environmental services, water distribution and purification services, storage of dangerous goods, etc.

Thus the text approved by Parliament recognises that ‘the Directive should not apply to non-economic services of general interest <sup>(31)</sup> [...] The Directive applies only to services of general economic interest, i.e. to services that correspond to an economic activity and are open to competition’. On this point, it should be noted that the Commission distanced itself from Parliament’s vote calling for the exclusion of ‘services of general interest as defined by the Member States’ in Article 2. More importantly, it did not uphold the exclusion of services of general economic interest <sup>(32)</sup> from the scope of the Directive, a demand which nonetheless had a certain degree of internal logic to it,

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<sup>31</sup> The term ‘services of general interest’ refers to those service activities, whether commercial or not, that are considered to be of general interest by public authorities, and for this reason are subject to specific public service obligations. As mentioned in Article 86(2) of the EC Treaty, services of general economic interest are commercial service activities that fulfil purposes of general interest. This is particularly the case for network services (transport, energy, telecommunications, postal services). There remains, however, a ‘grey area’ in which the economic nature of the service is not, in the final analysis, a reliable criterion for distinguishing certain activities (non-profit making, traditional, no price paid by the beneficiary, compulsory or essential nature of the services supplied, etc.). This is the case, for example, when there is an economic activity involved but the nature of the service is clearly non-economic.

<sup>32</sup> All amendments relating to the call for services of general economic interest to be excluded were rejected by margins of around 60% (against) and 40% (in favour). Thus Amendment 251 by the PES, calling for SGEI and SGI to be excluded from the scope of the Directive was rejected by 365 votes to 269 with 3 abstentions. A similar amendment from the Green Group was rejected with 154 votes in favour, 483 against and 3 abstentions. Amendments 372 and 390, by the GUE Group, calling for SGEI which the Member State responsible or the Community subjects to specific public service obligations to be excluded from the scope of the Directive, were rejected by 381 votes to 262 with 4 abstentions.

given that transport and electronic communications (telecommunications) had from the outset been excluded by the Commission in its original draft.

It should be noted, however, that several amendments prompted by the European Parliament do limit the impact of the proposal on SGEI:

- Article 1 states: ‘This Directive does not deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor with the privatisation of public entities providing services’ (paragraph 2). Nor does it affect the freedom of Member States to define, in conformity with Community law, what they consider to be services of general economic interest, how those services should be organised and financed in conformity with the rules on State aid, and what specific obligations they should be subject to (paragraph 3);
- Article 2(2) also excludes certain SGEI: port services, healthcare services (‘regardless of the ways in which they are organised and financed at national level or whether they are public or private’), audiovisual services, social services such as social housing, childcare, family support services, security services;
- SGEI are excluded from certain provisions of Article 15(1) to (4) concerning the requirements for public authorities; the Commission wants an evaluation of these in order to judge how relevant the measure is (minimum tariff, requirements relating to shareholdings and specific legal form, quantitative or territorial restrictions, etc.). Thanks to Parliament’s intervention, SGEI will have a little more elbow-room to carry out their public service obligations without having to justify certain authorisations previously granted to them by public authorities;
- SGEI are exempt from Article 16 (relating to the country of origin principle, see below): ‘Article 16 shall not apply to services of general economic interest which are provided in another Member State, *inter alia* in the postal sector, the transport, distribution and supply of electricity, the transport, supply and storage of gas, water distribution and supply services and waste water services, and the treatment of waste’.

*Social services of general interest (SSGI)*

Motivated by reasons going beyond purely commercial considerations, SSGI<sup>(33)</sup> are a response to various specific objectives: solidarity, territorial cohesion, prevention (against exclusion, etc.), combating social vulnerability, effective implementation of fundamental rights (the right to health, social integration, etc.). For the most part, SSGI are supplied by solidarity-based organisations (associations, mutual funds, co-operatives, private bodies with a public service remit, etc.). Their origins are often very diverse (national, private, public, charitable, etc.). The underlying idea is, by definition, flexible and evolutionary in the sense that their content adapts to the particular features of a given sector and to changes within society. The general principles of Community legislation and case-law apply to SSGI insofar as they are economic in nature (when they can be referred to as SSGEI). Given their social purpose, there are two issues at stake: to define the boundary between SSGI and SSGEI, and to clarify the situation of SSGEI in relation to the rules of the internal market.

SSGI were the object of a struggle for influence within the European Parliament, which lasted throughout the two readings. In the end, a restrictive list of social services of general interest (social housing, family support, youth services, assistance to persons in need) were excluded from the scope of the Directive. The Commission, for its part, sought to take account of the specific features of social services by means of an open consultation process (CEC, 2006) leading to a two-yearly report. The Commission will decide on the follow-up to this process and the best approach to pursue, taking into account among other things the need for, and legal possibility of, a legislative proposal.

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<sup>33</sup> On this subject, see in particular 'Les services sociaux et de santé d'intérêt général: droits fondamentaux *versus* marché intérieur?', Collectif SSIG-FR, Bruylant, 2006.

*Non-economic services of general interest (NESGI)*

Surprisingly, the motion to exclude a number of NESGI was rejected by the Parliament. These included, in particular, education services<sup>(34)</sup> and cultural services<sup>(35)</sup>. We should note especially the apparent contradiction involved in refusing to exclude the former category, i.e. education services. This amendment, which was proposed by the left-wing coalition (but supported by the UDF), was roundly rejected at a time when the Commission is constantly citing education as one of the few non-economic services of general interest (along with pension and social security schemes). This vote came as a surprise and a cause for anxiety, the possible consequences of which have yet to be assessed. Will the tuition fees paid by university and college students one day be assimilated to an 'economic consideration' in terms of Article 4 of the Services Directive?<sup>(36)</sup> An answer in the negative to this question would serve to reassure the world of education.

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<sup>34</sup> Amendment 236 was lost by 154 votes to 483, Amendment 356 by 145 votes to 499, Amendment 253 by 291 votes to 352, and Amendment 326 by 283 votes to 358.

<sup>35</sup> The Commission tends to recognise cultural services as being services of an economic nature.

<sup>36</sup> The Court's judgment of 27 September 1988 (*Belgian State vs. René Humbel and Marie-Thérèse Edel*), Case C-263/86 (European Court Reports 1988 page 05365) rules that courses taught in a technical institute which form part of the secondary education provided under the national education system cannot be regarded as services within the meaning of Article 59 of the EEC Treaty. In fact, according to Article 60, first paragraph, of the Treaty, only services 'provided normally for consideration' are included in the chapter on Services. The essential characteristic of remuneration, which lies in the fact that it constitutes consideration for the service in question, is absent in the case of courses provided under the national education system because, first of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields and, secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents.

*The framework directive on SGI: a battle lost?*

The request made by Belgium ‘to supplement the draft Directive on services with a draft Directive on services of general interest’<sup>(37)</sup> was a sensible one. Given the importance of SGI (both economic and non-economic) and their impact on the citizen, this was a legitimate request, following on as it did from two resolutions approved by the European Parliament calling for just such an initiative. Unfortunately there was no support forthcoming for this request from within the Council.

In the Parliament, the amendment tabled by the PES MEPs Bernard Poinant (FR), Benoît Hamon (FR) and Philippe Busquin (BE), making approval of the Services Directive dependent on the adoption of a framework directive on services of general interest, was noisily rejected<sup>(38)</sup> by 495 votes to 128<sup>(39)</sup> with 15 abstentions. Within the Commission, it is no secret that this clear parliamentary signal militates strongly against any initiative in this direction being taken by the Community executive, which in any case questions the effectiveness of such a move. This very bad signal was confirmed in the vote on the Rapkay resolution<sup>(40)</sup> on SGI. In the end, Parliament’s resolution – approved on a right-left split – confirmed that:

- ‘SGEI contribute to competitiveness’ (meaning: social and territorial cohesion is subordinated to this new objective);
- ‘competition is a substantive democratic right, which limits not only state power but also, and above all, abuses of dominant market

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<sup>37</sup> Position of the Belgian federal government, 13 March 2004.

<sup>38</sup> Studying the roll-call votes, we find that on this issue the Parliament divided along a right-left fault-line (60% - 40%). An *ad hoc* alliance between the EPP-ALDE (Liberals) and MEPs from central and eastern European countries thwarted the progressive section of the European Parliament on this question.

<sup>39</sup> Within the PES, only the Belgian, French and Greek delegations supported the Amendment. In the end, within the Liberal family, three French members came out in favour of the text.

<sup>40</sup> European Parliament resolution on the Commission White Paper on services of general interest, based on the Rapkay report of 14 September 2006.



- positions and protects consumer rights' (competition is the real protection);
- 'sectoral Directives on SGEI have been successful in providing better services at lower prices and provide a reliable framework' (the framework directive is not needed; the sectoral Directives are sufficient);
  - 'it is not important who provides SGI, but rather ... to maintain high-quality standards and an equitable social balance, based on reliability and continuity of supply' (privatisation of SGEI is a good thing);
  - 'legitimate requirements of the general interest must not be used as a pretext for the improper closure of services markets as regards international providers' (freedom of movement takes precedence over the general interest).

Cross-reading the Services Directive against the Rapkay report on SGI has resulted in the cohesiveness of SGI (SGEI and NESGI) being blown apart. There are at least seven different types of status for SGI in the Services Directive:

- a) NESGI which are excluded as such from the scope insofar as they do not fall under the category of services supplied for an economic consideration. The example cited by the Commission in its 2000 communication is compulsory education <sup>(41)</sup>;
- b) NESGI which are not explicitly excluded from the scope of the Directive: cultural services, vocational training, etc.;
- c) SSGI, some of which fall under the category of NESGI – excluded from the scope of the Directive (social security schemes, pension schemes, etc.) – and others under the category of SSGEI, which are likewise excluded: social housing, childcare, family support and support for persons in need;

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<sup>41</sup> Nevertheless, the European Parliament's vote against excluding educational services from the scope of the Services Directive sends a bad signal to the world of education.

- d) SSGEI which are included in the scope of the Directive by virtue of their economic nature;
- e) SGEI which are explicitly excluded from the scope of the Directive: transport and electronic communication services, audiovisual services, port services;
- f) SGEI which are included in the Directive by virtue of the right of establishment (except for Article 15(1) to (3) and Article 16 on the principle of freedom to provide services: postal services, energy, water, waste);
- g) SGEI which comply with the Directive as a whole (apart from Art. 15(1) to (3)): environmental protection services, external services for the protection of employment, etc.

This makes it easier to understand why the new debate <sup>(42)</sup> centres around whether mobilisation in support of a framework directive on SSGI has become tomorrow's battle <sup>(43)</sup>, now that the general framework directive on SGI has been politically buried, at least until 2009, the date of the next European elections.

### ***2.2.4 The posting of workers***

Two problems arose in connection with the posting of workers. Firstly, there was the issue of the relationship between the Services Directive and the 'Posting' Directive. The fact that the Commission exempted the Posting Directive from the country of origin principle brought with it the risk that the Posting Directive would henceforth be seen as

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<sup>42</sup> Conducted most notably by the PES MEP Joël Hasse Fererra, rapporteur on social services of general interest for the European Parliament's Committee on Employment and Social Affairs, who has argued in favour of 'a legal framework of reference, specifically through the adoption of legislative instruments, including the possibility of a framework directive'. (See paragraph 9 of the European Parliament's motion for a resolution – provisional document 2006/2134 of 7 November 2006).

<sup>43</sup> This, incidentally, is what paragraph 17 of the Rapkay resolution is asking for when it argues for a sector-specific directive in the area of social and healthcare SGI.

containing the maximum standard of protection for posted workers, whereas the Directive currently provides for a minimum level of protection, allowing Member States the freedom to take more far-reaching measures. Moreover, the Posting Directive did not cover all posting scenarios (for example ‘very short-term’ posting). This problem was solved by introducing the ‘*lex specialis*’ rule (Article 3) and the social safeguard clause (Article 1).

Secondly, there is the problem of how the State authorities are to monitor working conditions; this would be made very difficult under Article 24 (see in this connection the list of prohibitions contained in Article 24). The Commission also envisaged a system for the exchange of information and assistance from the country of origin, but this raised too many issues and uncertainties. The European Parliament, and in particular its EMPL Committee, took the initiative in deleting these articles, which led the Commission to publish specific guidelines. In substance, the proposal (Article 24) was for a distribution of roles between the Member State of posting (i.e. of destination) and that of origin.

At first reading, a large majority in the Parliament – 494 votes to 124<sup>(44)</sup> with 6 abstentions – supported the amendment suggested by the European Trade Union Confederation (ETUC) stipulating that this Directive did not affect labour law, including collective agreements, the right to strike and the right to carry on trade union activities. Parliament also voted to exclude the temporary work agencies sector from the scope of the Directive. Finally, a majority almost identical to that on the previous vote (493 votes to 137 with 9 abstentions) supported the amendment calling for the Directive not to threaten the exercise of fundamental rights as recognised in Member States and in the European Union’s Charter of Fundamental Rights, including the right to engage in trade union activity. On this last point, unfortunately, there was no

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<sup>44</sup> The British Conservatives and those from central and eastern European countries voted against the amendment; they were joined by Eastern European members of the UEN (defenders of national sovereignty) and a large majority of ALDE (European Liberal) MEPs. All the Socialists and the GUE members came out in favour of the text.

qualified majority in the Council to support this, because of opposition from the United Kingdom, which refused to accept any such provision.

To enable the rapporteur of the text, German Social Democrat Evelyne Gebhardt, to refrain from tabling any amendments at second reading, the Commission agreed to set out in black and white that the Directive would not affect 'labour law ... in accordance with national law', or the 'practices' of Member States in this regard, or the 'collective rights' of the social partners. These stipulations were particularly important for Nordic countries such as Sweden, where labour law is not enshrined in statute, but is based on collective agreements.

### **2.3 Four areas of progress preserved from the original draft**

The scope of the Directive, though restricted, remains broad. It covers a very large majority of the overall service sector. The principle of freedom of establishment has been considerably strengthened. From now on it will be very difficult for a Member State to set conditions for the establishment of a service provider on its territory. Overriding reasons relating to the public interest <sup>(45)</sup>, which will constantly have to be invoked in order to challenge operations carried out by a national of

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<sup>45</sup> The notion of overriding reasons relating to the public interest is a construction of the case-law of the European Court of Justice. It was first developed in the context of free movement of goods and services, and was subsequently applied to the right of establishment. The Court, however, has never given a definition of this term, which it wished to see continue to evolve. The Court has nevertheless specified the strict conditions which national measures pursuing an overriding reason relating to the public interest must fulfil in order to form a valid objection. The Court requires that, for a national measure validly to hinder or limit the exercise of the right of establishment and the freedom to provide services, it must satisfy the following requirements:

- fall under an area that is not harmonised;
- pursue an objective of general interest;
- be non-discriminatory;
- be objectively necessary;
- be proportionate to the objective pursued.

another Member State, are a restrictive principle which leaves Member States very little margin of appreciation <sup>(46)</sup>.

National regulatory arrangements have been brought under the guardianship of the Commission in respect of a whole series of requirements that a Member State might wish to see observed <sup>(47)</sup>. Any new regulations will have to run the gauntlet of the Commission, which will judge as to the validity of the measures and may ask the Member State to refrain from adopting them, or to repeal them.

The COP remains a latent presence, in trace amounts. It remains to be seen how the Court will read the provisions of Article 16 and the other articles that refer to it. Faced with the optimism of Commissioner McCreevy, who forecast few difficulties of interpretation, the lawyer-linguists, who translated the Directive into 21 EU languages, responded <sup>(48)</sup> by emphasising that the Directive was particularly abstruse and badly drafted. A brake has been put on the harmonisation approach in favour of ‘codes of conduct and voluntary agreements’.

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<sup>46</sup> Cf. the Gebhard judgment, where the Court held that ‘national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it’. This case-law was subsequently confirmed by the Court in its judgments in cases C-415/93 *Bosman*, ECR 1995, I-4921 and C-250/95 *Futura*, ECR 1997, I-2471.

<sup>47</sup> See Article 15(2): requirements concerning quantitative or territorial restrictions, the obligation on a provider to take a specific legal form, shareholdings, certain requirements concerning the specific nature of the activity, the minimum number of employees, minimum and/or maximum tariffs, and the obligation on the provider to supply other specific services jointly with his service.

<sup>48</sup> In a fairly exceptional case in the annals of the corps of lawyer-linguists, they were unwilling to acknowledge the linguistic paternity of the English version, which served as a model for the other language versions, merely indicating XXX by way of reference.

## **Conclusion: a Pyrrhic victory for the European Parliament or an illusory triumph?**

The true outcome, welcomed by certain MEPs as substantial 'headway', would appear rather to be a delayed effect of the wider move towards liberalisation. The rejection of the country of origin principle is a victory for the Left and for everyone who fought against the Bolkestein Directive. However, fuzzy legal logic still prevails in the adapted version of Article 16 as concerns the law applicable with regard to consumer protection, social protection or disputes in cases of breach of contract. This legal uncertainty creates dangerous potential for arbitration by the European Court of Justice in areas where the legislator ought to have established clear rules.

Some MEPs believed the compromise reached on this controversial Directive <sup>(49)</sup> to be a success for the Parliament. The rapporteur, for instance, prided herself on the fact that Parliament had achieved 90% of its demands. Others celebrated the great maturity of Parliament, which had once and for all earned its spurs as a legislative body. But among the ranks of the GUE and the Belgian and French ecologists and socialists, the feeling was rather that Parliament had capitulated at second reading by rejecting all the amendments and aligning itself with the Council's common position 'without a fight'.

Who is right and who is wrong? The truth, as ever, is not so clear-cut. At first reading, a combative and resolute Parliament stood up to the Commission, not hesitating to propose formulations designed to reconcile antagonistic positions. But one must bow to the obvious: the political balance of power does not favour the Left in any of the three institutions. That is a truism. The Commission is clearly on the Right, Parliament's centre of gravity is on the centre-right, while the Council sits indisputably on the Right. In addition, a majority of MEPs (including some in the PES Group coming from the new Member States) and Member States are convinced that freedom of movement

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<sup>49</sup> According to some, the Directive was one of the reasons for the French no-vote in the referendum on the draft constitutional Treaty.

for services assists the smooth operation of the large, frontier-free market and can contribute to economic growth. Parliament's actions must be judged in the light of this balance of power, unfavourable to those on the Left. In this context it did, for the most part, manage to uphold its point of view before the Commission and Council - even in spite of its misgivings about many aspects.

At the same time, the 'services affair' is far from over. For the Commission and some of the political Groups in Parliament, the current Directive does not take liberalisation far enough. For others, on the contrary, it goes too far towards deregulation and the dismantling of social protection (especially in respect of labour law); nor does it adequately protect services of general interest (both economic and non-economic) or social services. The European Trade Union Confederation, for its part, vaunts a 'success for the European trade union movement' and expresses delight that the country of origin principle has been abandoned. Nevertheless, it is critical of 'somewhat ambiguous language' on the exclusion of labour law and respect for fundamental rights.

Even if it shifts into a lower gear, the battle will continue, especially since the current Directive by no means gives a clear answer to all the questions. The compromises struck on controversial aspects lend themselves to differing interpretations, with the risk of divergent implementation and then intervention by the Court of Justice. For the time being, the focus of attention and concern is transposition of the Directive into national legislation in all the Member States, in time for its entry into force across the board in 2010. That is the new challenge, and it is a substantial one.

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## **Health and social services in the internal market**

### **Introduction**

In 2006, health and social services were withdrawn from the scope of application of the services directive. However, in spite of this withdrawal, and probably also due to the initial inclusion of these services in the directive, stakeholders became aware, more than ever, that these services are not sheltered from the application of the internal market rules. The call from Member States, the European Parliament and concerned stakeholder organisations for more legal certainty and for a legal initiative by the Commission became louder and louder. These actors want rules on the specific application of the free movement provisions to their sector. Despite this, the European Commission is reluctant to launch clear legal proposals, and seems unable to find a consensus among the different DGs on the scope and content of such an initiative. The Commission services responsible for the internal market continue to favour an approach that creates as few specific rules or criteria as possible for the application of internal market rules. Their main concern is to oblige Member States to comply with the European Court of Justice's judgements. They are supported by right-wing Members of the European Parliament and some of the new Member States, hoping to create more room for commercial actors in the field of health and social care.

## **1. Health and social services excluded from the scope of the services directive**

As discussed in the chapter by Éric Van den Abeele in this volume, one of the most controversial aspects of the initial proposal for a Directive on Services in the internal market was its scope, applying general rules on the free movement of services and the freedom of establishment, without any distinction, to services of general (economic) interest and more specifically to social and health services, just as to any commercial service. It soon became clear that there was no public and political support to keep health services in the Directive. In spring 2005, the European Council and the European Commission announced that the proposal should be readjusted in order to safeguard the European Social Model.

After two years of lively policy debate, the European Parliament at its first reading in February 2006 excluded healthcare services from the scope of the Directive (European Parliament, 2006a). The European Commission incorporated this parliamentary amendment into its amended proposal in April 2006 (CEC, 2006a). At the same moment, the Commission announced that it would come forward with a separate legal initiative on the health sector.

Regarding social services, the Commission did not completely follow the position of Parliament at first reading. Whereas the Parliament excluded social services from the scope of the Directive and for purposes of clarity provided an indicative list of social services, the European Commission adopted this as a definitive list. Thus the Commission in its amended proposal excluded only social services relating to social housing, childcare and support of families and persons in need (CEC, 2006a).

In the next steps of the decision-making process, no further changes were made with regard to the exclusion of these two sectors from the scope of the Directive. The Council adopted its common position in July 2006 (Council of the European Union, 2006a). Amendments tabled by rapporteur Evelyne Gebhardt (PSE, Germany) in the European Parliament's Internal Market and Consumer Protection Committee at second reading, to broaden out once again the definition of the social

services to be excluded from the scope of the Directive, were rejected together with all the other proposed amendments. These amendments were aimed mainly at excluding legal and complementary social protection regimes (European Parliament, 2006b). A wider exclusion of social services was not acceptable for the conservatives in the European Parliament; furthermore, the Finnish presidency and Commissioner McCreevy had insisted on not jeopardising the Council compromise. Evelyne Gebhardt refrained from reintroducing her amendments in the plenary session after a commitment from Commissioner McCreevy to make a declaration clarifying the main issues that Ms Gebhardt thought needed to be amended, such as consequences for social services. This declaration was presented in a speech by Commissioner McCreevy preceding the final vote on 15 November. With regard to social services the Commissioner declared, 'Concerning the impact of the Services Directive on Social Service, social services relating to social housing, childcare and support of families and persons in need are a manifestation of the principle of social cohesion and solidarity in society and are provided by the State, by service providers on behalf of the State or by acknowledged charitable organisations. These services have thus been excluded from the scope of application of the Services Directive. It is clear that this exclusion also covers services provided by churches and church organisations which serve charitable and benevolent purposes' (CEC, 2006b: 5).

The exclusion of these two sectors from the scope of the Directive finally reads as follows:

Article 2 - Scope

2. 'This directive shall not apply to the following activities:

[...]

- (f) Healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private;

[...]

- (j) Social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State' (European Parliament, 2006c: 52).

In the recitals it is made clear that healthcare covers 'healthcare and pharmaceutical services provided by health professionals to patients to assess, maintain or restore their state of health where those activities are reserved to a regulated health profession in the Member State in which the services are provided' (Recital 22).

With regard to social services, a recital clarifies that these concern services 'with the objective of ensuring support for those who are permanently or temporarily in a particular state of need because of their insufficient family income or total or partial lack of independence and for those who risk being marginalised' (Recital 27). This recital refers in addition to the fundamental right to human dignity and integrity and the principles of social cohesion and solidarity.

We can thus conclude that the exclusion of healthcare services from the scope of the services directive is defined very broadly and covers all services in this field. For social services the picture is somehow less clear. It has proved problematic to give a clear definition of social services. Whereas the European Parliament proposed a wide and open definition, the European Commission imposed a narrow definition. It is feared that the notion '*persons in need*' in the definition might not include services provided to the whole population. Furthermore, there seems to be a major concern about the inclusion of complementary social protection regimes. It is not clear how Commissioner McCreevy's declaration in the European Parliament could alleviate these concerns for social services.

## **2. Policy initiatives following the exclusion of health and social services**

Since the launch of the proposal for a services directive, in January 2004, several ongoing processes, initiatives and debates concerning the relationship between health and social services and the internal market

had been blocked. The European Commission was awaiting the outcome of the European Parliament's vote at first reading and the Council's opinion on the scope of the Directive before taking any new steps. Once this corner was turned, in spring 2006, there was a surge of activity in this respect.

## **2.1 Social Services of general interest**

In April 2006, the European Commission released its long-awaited Communication on social services of general interest. This Communication had been promised in the 2004 White Paper on services of general interest. In the White Paper, the Commission stressed that the personal nature of many social and health services leads to requirements that are significantly different from those in networked industries (such as the distribution of gas, electricity, postal services, telecommunications). The Commission argued for a systematic approach in order to identify and recognise the specific characteristics of social and health services of general interest, and to clarify the framework in which they operate and can be modernised. It proposed setting out this approach in a Communication on health and social services of general interest, to be adopted in the course of 2005.

As a contribution to the drafting of the Communication, Member States reported at the end of 2004 on the situation of social and health services in their countries through a questionnaire prepared in the Social Protection Committee (SPC) (1). This questionnaire concerned the following sectors: statutory and supplementary social protection schemes; health and social services; support for families: child care; services to promote social integration and to support people in difficulties (e.g. homelessness, drug dependence, disability, mental or physical illness); social housing; other services such as employment services, access to placement and education and training). The questionnaire included questions concerning the characteristics of these

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<sup>1</sup> 'Social Services of General Interest', Questionnaire ([http://ec.europa.eu/employment\\_social/social\\_protection/docs/questionnaire\\_en.pdf](http://ec.europa.eu/employment_social/social_protection/docs/questionnaire_en.pdf)); and Member States that replied to the SSGI questionnaire ([http://ec.europa.eu/employment\\_social/social\\_protection/answers\\_en.htm](http://ec.europa.eu/employment_social/social_protection/answers_en.htm)).

services, their definition and specificity; the impact of EC internal market rules or competition rules on them, and what further steps should be taken at European level.

The publication of the Commission's Communication was delayed several times. It seems that it proved extremely difficult to reach an agreement between the Commission's different DGs on the content of the Communication. Finally, the European Commission awaited the outcome of the first reading of the services directive in the European Parliament and in particular the decision on the Directive's scope of application. If health and social services had not been excluded from the services directive, this might have removed some important arguments in favour of a specific approach for this sector.

According to the Communication, social services can include statutory and complementary social security schemes and essential services provided to persons that consist of customised assistance to facilitate social inclusion and safeguard fundamental rights. It clarifies the sectors, including services for persons faced by personal challenges or crises; activities aiming at reintegration in society and labour market; support for families in caring for younger and older members; activities to integrate persons with long-term health or disability problems, and finally social housing.

The Communication does not deal with health services. This is rather surprising, since for two years it had been announced as a Communication on health and social services. Apparently the decision to exclude healthcare services was the result of last-minute negotiations within the European Commission and is linked to the fact that the Commission intends to bring forward a specific legal proposal on health services. Illustrative in this respect is the fact that the Annexes to the Communication still include comments on health services.

The Communication aims to consider how the specific characteristics of social services of general interest can be taken into account at European level, and to clarify the Community rules applicable to them. It presents an open list of specific characteristics of social services of general interest (SSGI). In addition to the traditional general interest criteria (universality, transparency, continuity, accessibility, etc.)

recognised for social service activities, these characteristics refer to the organisational conditions and modalities applying to them. These characteristics include the services being personalised and their aims being directly connected with access to fundamental social rights and the achievement of social cohesion. To achieve those aims, social services of general interest are based on solidarity and frequently require the voluntary participation of citizens and of not-for-profit organisations. They also need to be developed as close as possible to the users, which explains why local authorities play an important role in ensuring that development. Finally, they are characterised by an asymmetric relationship (relationship of dependency and need) between providers and beneficiaries that cannot be likened to a 'normal' supplier/consumer relationship and requires the participation of a financing third party.

The Communication then describes how SSGI can modernise, open up and diversify across the EU, thus operating in a more competitive environment. In a second section, the application of Community rules to these services is analysed. The Communication states that 'almost all services offered in the social field can be considered 'economic activities' within the meaning [...] of the EC Treaty' (CEC, 2006c: 6). In this section the Communication is rather didactic, explaining how Court rulings and Community legislation apply in this sector, with regard to state aid, the principles of freedom to provide services and freedom of establishment, and public procurement rules. It sets out suggestions for specific application in certain fields.

To gain a clearer picture of each EU country's approach to social services of general interest, the Commission launched a study to look at the situation in each Member State<sup>(2)</sup>. The scope of this study, although defined in the initial tender as a study on 'The Situation of Social and Health Services of General Interest in the European Union', was limited soon after the launch of the Commission Communication to social services only (although including long-term care). This study aims to analyse the functioning of the sector and its socio-economic importance, as well as the implications of the application of Community law.

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<sup>2</sup> <http://www.euro.centre.org/shsgi>.



Additionally, the Commission announces in the Communication a consultation of all the actors concerned: Member States, service providers and users. On the basis of the results of this study, as well as the consultation, the Commission intends to launch a monitoring and dialogue procedure in the form of biennial reports, describing the latest modernisation trends, case law and developments. The first report is due to be published at the end of 2007.

The Communication ends by concluding that ‘in the light of this experience, the Commission will decide how to follow up this process and identify the best approach to take, including giving consideration to the need and legal possibility for a legislative proposal’ (CEC, 2006c: 10). The question as to whether a legal proposal will be presented in the future has thus been left open. It seems that DG Employment and Social Affairs, which has the lead over initiatives concerning social services of general interest, did not receive endorsement from the College of Commissioners to start preparing a legal framework. At a conference organised by the Austrian presidency, only few days before the draft Communication was discussed and approved by the College of Commissioners<sup>3</sup>, Commissioner Špidla launched the idea of a legal framework. This suggests that he proposed the establishment of a legal framework to the College of Commissioners but did not get backing.

With respect to the consultation process, a new questionnaire has been sent out to Member States. The scope of the questionnaire encompasses:

- ‘basic compulsory social security schemes based on the principle of national solidarity that do not carry out economic activities;
- other schemes, especially complementary social security schemes, organised in various ways (mutual or occupational organisations), covering the main risks of life, such as those linked to health, ageing, occupational accidents, unemployment, retirement and disability;

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<sup>3</sup> Conference on ‘Social Services’, co-financed by the European Commission, Vienna, 20 April 2006 (<http://eu2006.bmsg.gv.at/cms/eu2006EN/liste.html?channel=CH0608>).

- other essential services provided directly to the person as assistance in case of personal challenges or crisis, to support social integration, to tackle long-term health or disability problems, or to support housing’.

The questionnaire further states that ‘although health issues are not directly covered by the scope of this exercise it is not always easy to distinguish social from health services’.

The questionnaire broadly tackles the same issues as the 2004 questionnaire of the Social Protection Committee. However, the 2006 questionnaire takes the Commission’s spring 2006 Communication as its starting point and asks for clarification, assessment and additions to the points made in the Communication. Answers are due by early 2007.

In a reaction, the Social Platform (the Platform of European Social NGOs) welcomed the Communication, but said that the Commission should have taken bolder steps towards proposing legal instruments on social SGI, to clarify how they are treated in EU rules in a context of urgent modernisation of social services in Member States (Social Platform, 2006). The ETUC likewise considers that the Commission must go further with its proposals in this regard, in order to establish greater legal certainty, through a framework directive on services of general interest, which should also make it possible to take account of the specific character of social services. The ETUC pointed out that social services were not provided only to the poor or the excluded, but often had to meet the needs and expectations of all individuals; hence the need to expand the definition given by the Commission (ETUC, 2006). The European Centre of Enterprises with Public Participation (CEEP) and the European Federation of Public Service Unions (EPSU) similarly expressed disappointment. Most of these stakeholders also regretted the fact that health services were excluded. The Committee of the Regions, in its opinion on the Communication, also questions the decision not to include health services in the Communication; it asks the Commission to clarify the nature of the legislative proposals on SSGI as soon as possible, and urges the Commission to deliver on its commitment to give consideration to the need and legal possibility for a legislative proposal on SSGI at the end of the open process of consultation (Committee of the Regions, 2006).

The European Parliament has not yet delivered its opinion on this Communication, but in its resolution on the Commission White Paper of services of general interest, it 'calls on the Commission to create more legal certainty in the area of social and healthcare SGIs and to formulate a proposal for a sector-specific directive of the Council and the Parliament in those fields in which it is appropriate to do so' (European Parliament, 2006d: point 17). On the eve of the vote on the report, José Manuel Barroso announced that, following approval of the Rapkay report, the Commission would adopt a Communication by the end of 2006 and propose sectoral initiatives (<sup>4</sup>).

Why has healthcare been excluded from the scope of this Communication? The European Commission seems to favour a different approach for the two sectors: on the one hand a legally binding initiative for the healthcare sector (see below), and on the other hand clarificatory Communications with vague principles for the social services, and this in spite of the fact that Commissioner Špidla was in favour of a legal initiative for social services as well. Several factors have probably played a role in this decision for a different approach for health and social services. Firstly, one important difference between the two sectors is that the European Court of Justice has issued a series of rulings with regard to healthcare services, making plain that these services are to be considered as an economic activity and laying down rules on the reimbursement of care received in another Member State. The Commission services responsible for the internal market want to force Member States to comply with these rulings through a legally binding instrument, comparable with the initial Article 23 of the services directive. For social services, however, there are no Court rulings (yet). Therefore, it might well be that these Commission services prefer to await further Court rulings before issuing a legal proposal on social services. Another factor that probably played a role is the competition between the Commission services responsible for social affairs on the one hand and public health on the other to claim the lead in this debate. A Communication on health and social services would imply close cooperation between both DGs and a common approach in solving the

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<sup>4</sup> *Bulletin of the European Union*, No.9274, 28 September 2006.

problems. DG Sanco (the Commission services responsible for public health) announced long ago a specific initiative on the health sector after a wide consultation of all the stakeholders. A joint Communication might slow down this process and might make it more difficult to have a specific approach, including a subsequent legal proposal on healthcare. By excluding health services from the scope of the Communication, the situation is avoided whereby the DG responsible for social affairs would have its say on the initiative on health services. The debate on social services of general interest would on the other hand become the exclusive domain of the social affairs actors and has in the meantime been integrated in the Social Protection Committee.

With respect to the definition of the services included in the Communication and the subsequent consultation, it is striking that complementary social security schemes are included, even though they are not excluded from the scope of the services directive. With respect to the content of the Communication, it remains very much a descriptive and analytical document, with limited possibility to create more clarity for stakeholders on how internal market rules should be applied in their sector. As to the process of Commission initiatives on social services of general interest, we are seeing a proliferation of questionnaires and consultations. It might well be that the Commission services responsible for social policy hope to raise even more awareness of the issues at stake through these consultations, thus increasing `pressure on the Commission services responsible for internal market to accept the idea of a legal proposal.

## **2.2 A legal initiative on health services?**

The European Commission announced in April 2006, in its amended proposal for a services directive, when it accepted the exclusion of healthcare services from the scope of the directive, that it would come forward with a separate legal initiative on healthcare services (CEC, 2006a). Since the making of this pledge, speculation about the scope of this initiative has been rife. The main question is whether such an initiative would be limited to the rules applicable for the funding of care received in another Member State (former Article 23 of the services directive) or whether such an initiative should also include other issues related to the interaction between internal market rules and healthcare

services, concerning freedom of establishment and the freedom to provide services.

Several initiatives were taken with the aim of guiding the debate.

### ***2.2.1 Council Conclusions on common values and principles***

The Ministers of Health of the 25 Member States adopted, at the Council of 1-2 June 2006, Conclusions on common values and principles which guide EU health systems (Council of the European Union, 2006b). In their declaration, the Ministers agreed that health services are underpinned by a set of values shared across Europe. These are the values of universality, access to good quality care, equity and solidarity. The Ministers stated that different Member States have different approaches to realising these values, but that all systems aim to make them financially sustainable in a way which safeguards the values for the future.

Besides values, they outlined a set of operational principles that are shared across the European Union, in the sense that all EU citizens would expect to find them, and structures to support them, anywhere in the EU. These include quality; safety; care that is based on evidence and ethics; patient involvement; redress and privacy and confidentiality.

The Ministers concluded that health systems are a fundamental part of Europe's social infrastructure. In discussing further strategies, the shared concern should be to protect these values and principles. They invite the European institutions to ensure that their policies will protect these values as work develops to explore the implications of the European Union for health systems as well as the integration of health aspects into all policies.

The Council invites the European Commission to ensure that the common values and principles contained in the Statement are respected when drafting specific proposals concerning health services.

### ***2.2.2 Proposal launched by the Belgian Health Minister***

In the meantime, after close consultation with some like minded colleagues from other Member States, the Belgian Minister of Social Affairs and Public Health, Rudy Demotte, launched a 'non-paper'

stressing the need for a specific approach for the healthcare sector and proposing a specific directive on healthcare services<sup>5</sup>). The basic presumption of this paper is that, in order to organise their healthcare systems, Member States need a steering capacity and some genuine regulatory responsibilities. The paper proposes a directive that:

- describes the common values and principles that underpin European healthcare systems;
- outlines their objectives;
- defines the different types of instruments public authorities use to properly manage their systems (such as planning, tariff setting mechanisms, authorisation schemes for providers etc.);
- identifies the conditions under which the use of these instruments is in conformity with the Treaty provisions.

The document suggests that, if such instruments are used by Member States to safeguard the common values and principles, and to achieve the objectives and redress market imperfections in this sector, their use should be regarded as justified as this constitutes an overriding reason relating to the public interest. Furthermore, the directive should clarify how the principles of non-discrimination and proportionality should be applied in this sector. The paper proposes the inclusion of rules with regard to reimbursement of care provided for within another country. Finally, the paper argues for closer cooperation and exchange between Member States on issues such as patient rights, quality of healthcare, patient safety and liability.

This paper obtained the support of eight Member States with social-democrat health ministers which regularly meet to discuss problems of European legislation interfering with their countries' health systems. These countries, Germany, Spain, Belgium, Luxembourg, Portugal, Sweden, Italy and the UK which form the so called 'Aachen group' – after the location of their first session in Germany last year – presented their views at an informal meeting of health ministers in July. They

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<sup>5</sup> Non paper, presented at the Informal Council Meeting of the Employment, Social and Health Ministers, Helsinki, 6-8 July 2006.

argue cogently for a legislative proposal that goes beyond the issue of patient mobility, and for the establishment of a legal framework that provides a basis to justify the use of management tools needed by health authorities to steer their health systems and to guarantee the quality, accessibility and financial sustainability thereof.

### **2.2.3 Commission consultation**

At the end of September 2006 the European Commission launched a public consultation document with regard to EU action on health services (CEC, 2006d).

The Communication seeks input in two areas:

- how to ensure legal certainty regarding cross-border healthcare under Community law;
- whether and how to support cooperation between the health systems of the Member States.

According to the Communication, cross-border care includes a healthcare provider who moves temporarily or permanently to another Member State, a patient who moves, or a service that moves such as in the case of telemedicine. The Communication highlights the fact that cross-border care has consequences for all health services, whether provided across borders or not. It stresses that Community action in this field does not mean harmonising national health or social security systems.

The consultation contains questions on issues such as:

- the current impact of cross-border healthcare on accessibility, quality and financial sustainability of healthcare systems, both for 'sending' and 'receiving' countries;
- where greater legal certainty is required to facilitate cross-border healthcare in practice (including issues such as terms and conditions under which cross-border healthcare must be authorised and paid for; whose rules apply; and what happens when things go wrong);
- areas where European action can support Member States such as networks of centres of reference, health innovation and impact assessment of EU policies on health systems. In this context the

Communication also suggests initiatives on ‘improving the availability and comparability of healthcare data and indicators’ with the aim of comparing outcomes across Europe, monitoring and cooperating;

- what tools would be appropriate to tackle these different issues at EU level – whether binding legal instruments, ‘soft law’ or other means;

The Communication indicates some options for these tools:

- a legal binding instrument through a regulation or a directive, which could be based on Article 95 of the EC Treaty is put forward as the best option to ensure legal certainty;
- the proposal for a regulation on the coordination of social security systems (CEC, 2006e);
- an interpretative Communication on the case law could provide additional clarification;
- practical cooperation through the High Level Group on health services and medical care (on issues such as networking of centres of reference) and the Open Method of Coordination in the field of health and long-term care.

Although the Communication claims to deal with all forms of cross-border care, the focus of the questions lies in particular on patient mobility, i.e. the patient who seeks care in another Member State.

Based on the responses to this consultation, which are sought for early 2007, the Commission plans to bring forward proposals later in 2007.

At an informal ministerial meeting held by the European Commission on 29 November 2006, in the context of this consultation, all Member States except the Netherlands were in favour of a legal instrument. Many health ministers expressed the wish to encompass issues ranging beyond patient mobility. They hoped that a legal instrument would bring more legal certainty and ensure legal stability of healthcare systems. With regard to reimbursement of care provided abroad, countries such as the UK and Sweden argued for reimbursement to be based on prices of the country where the care is given. Central and Eastern European countries saw patient mobility rather as an opportunity to attract patients, thus developing a health services



economy. With regard to other issues, such as quality of care, Member States tend to prefer intergovernmental cooperation <sup>(6)</sup>.

This Communication, although focusing very much on the issue of patient mobility, leaves all doors open with regard to a subsequent (legal) initiative from the Commission. The Commission probably wants to see how strongly the stakeholders will make their point on the scope of a legal proposal. A consultation is also a tool to legitimise further initiatives and to generate ownership of the final proposal among the stakeholders.

### **2.3 Infringement procedures of the European Commission**

Once it was clear that healthcare would be excluded from the services directive, the European Commission's DG Internal Market became particularly active in launching infringement procedures against Member States.

The Commission started infringement procedures against three Member States, with regard to legislation that would limit the opening and running of pharmacies, just a few days after the Council reached a political agreement on the exclusion of healthcare services from the services directive. For details of these cases see Box 1.

It is striking that the legislation under scrutiny in these infringement procedures includes several authorisation procedures and conditions that were listed in Article 15 of the services directive and that Member States would have had to screen for compliance with the requirements of non-discrimination, necessity and proportionality; these should have been abolished or changed if they did not comply. As a reminder, the restrictions listed in Article 15 of the services directive included:

- ⁶- quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum geographical distance between service-providers;

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<sup>6</sup> *Bulletin of the European Union*, No.9320, 5 December 2006.

- an obligation on a provider to take a specific legal form, in particular to be a legal person, to be a company with individual ownership, to be a non-profit making organisation or a company owned exclusively by natural persons;
- requirements, other than those concerning professional qualifications or provided for in other Community instruments, which reserve access to the service activity in question to particular providers by virtue of the specific nature of the activity' (CEC, 2004: 53).

Thus, whereas the European Commission stated during the debate on the services directive that healthcare regulators should not bother about Article 15, as they would in principle be able to justify restrictions in the healthcare sector as being in the general interest, these infringement procedures show a different picture. The infringement procedures thus give a good illustration of the legal uncertainty in which health authorities and regulators find themselves, even after the exclusion of healthcare from the services directive.

It is felt that, after having failed to oblige Member States to comply with the rules on freedom of establishment through the inclusion of healthcare in the services directive, the European Commission wants to realise this aim through Court rulings and to make clear that the withdrawal of these services from the services directive does not change much. These initiatives illustrate once again the paradoxes within which the European Commission operates. Whereas its internal market services start legal proceedings against Member States which are considered not to comply with the EU rules, the Health DG tries to launch a debate on more legal certainty for the regulatory authorities. Some Member States consequently called on the Commission services to block the infringement procedures until more clarity about a political initiative could be achieved. The refusal of the Commission services to take this political process into account suggests that they will not approve a legal initiative that would shelter this kind of national legislation from internal market provisions.

## Infringement procedures started by the European Commission

Italian legislation prevents companies active in the distribution of medicines (or having links with companies active in this area) from acquiring holdings in private pharmaceutical companies or community pharmacies. The legislation also prevents individuals who do not hold a pharmacist's diploma from having holdings in pharmacies, thus reserving ownership of pharmacies to pharmacists or legal entities consisting of pharmacists. The Commission considers that the restrictions in question go beyond what is necessary to achieve the objective of health protection. According to the European Commission the Italian rules are incompatible with the freedom of establishment (Art. 43 of the EC Treaty) and the freedom of movement of capital (Art. 56 of the EC Treaty). Therefore the Commission has taken the matter to the Court of Justice.

Austria has been sent a reasoned opinion because its national legislation restricts freedom of establishment as a pharmacist. The Commission is challenging the following restrictions, among others: discrimination on the basis of nationality, which prevents non-Austrian nationals from operating a pharmacy that has been open for less than three years; the ban on opening a pharmacy in areas without a doctor's surgery; limiting the choice of legal form for a pharmacy (no companies are allowed); the ban on operating more than one pharmacy and limitations on the number of pharmacies according to a minimum number of inhabitants and a minimum distance between the pharmacies.

Another reasoned opinion has been sent to Spain because of the following national restrictions on the setting-up of pharmacies: territorial planning rules based on a minimum number of inhabitants (minimum module between 2,800 and 4,000 inhabitants) and a minimum distance (250 metres) between community pharmacies; giving priority in certain Autonomous Communities, such as Valencia, to pharmacists with professional experience in the same community in the administrative licensing procedure; and ownership rules whereby only pharmacists can hold a pharmacy. The European Commission considers these restrictions to be either disproportionate or discriminatory. (CEC, 2006f)

An infringement procedure was opened against Belgium for its legislation on PET Scans (medical imagery system particularly used to detect cancers). Belgian legislation defines criteria of approval limiting the number of services in which a PET scan can be installed on Belgian territory to 13 for a 10.5 million population. A complaint was submitted to the European Commission against the Belgian measure on the grounds that it creates an obstacle to the free movement of goods, lodged by the non-approved hospitals and the scanner manufacturers.

Belgium received a formal request to submit its observations on Belgian sickness funds that provide supplementary health insurance (i.e. on top of the basic social security cover) in competition with commercial insurance providers. In Belgium, sickness funds operate under specific national rules and are not subject to EU rules relating to the solvency, supervision and funding of insurance providers. The Commission is concerned that this could result in differing levels of policyholder protection and market distortions. Belgium is asked to send its reply within two months. Depending on the analysis of this reply, the Commission will decide whether or not to issue a 'reasoned opinion' formally calling on the Belgian Government to amend the relevant legislation (CEC, 2006g)

## **Concluding remarks**

Whereas in the past we described a picture of action and reaction between the economic players and the social players in the field of healthcare at EU level, with the economic players in the driving seat and the social players not able to reach a consensus on an appropriate political response (Baeten, 2003 and 2005), in 2006 the dividing-line seems rather to run between the different EU institutions. The European Parliament and the Council are largely in favour of a legally binding initiative to clarify the relationship between the internal market and health and social services (of general interest), and thus to generate more legal certainty for the players concerned. Most players in the relevant services sector are also calling for a legal initiative. The Commission however remains very cautious in this respect and takes a different approach for health and for social services. As only the Commission has the right of initiative for legal proposals, however, the European Parliament and Council are dependent on its willingness to act.

The European Commission is indeed in favour of a legally binding initiative for the healthcare sector, most probably to include provisions on the reimbursement of healthcare provided in another Member State. To what extent this legal proposal would go beyond this and also deal with issues related to freedom of establishment and the deregulating effect of the free movement provisions on the healthcare sector is highly questionable. For the social sector the European Commission limits itself to clarificatory Communications.

The different European Commission DGs involved take a different approach. Whereas those DGs responsible for health and social policies and having the closest contacts with the sectors concerned argue for more legal certainty, DG Internal Market is mainly concerned to compel Member States to comply with the Court rulings and the internal market provisions. Although they are willing to accept a specific directive for the healthcare sector, their aim is to exact compliance from Member States with regard to patient mobility. The infringement procedures launched against certain Member States have the same aim. DG Internal Market is not in favour of legislation setting out a specific approach for the application of the internal market provisions to the

health and social sector going beyond the Court rulings. As there are no Court rulings with regard to the social sector, it opposes legal initiatives in this sector. DG Internal Market seems to be in the strongest position to impose its viewpoint and to obstruct further initiatives.

Although the DGs responsible for health and social policies seem to share the same concern, they are proving unable to join forces. The competition to claim leadership over the policy initiatives under discussion keeps them from cooperating effectively. Their approach is mainly to increase awareness from the stakeholder groups concerned through consultation and questionnaires.

Member States and the European Parliament are broadly in favour of a wider initiative, providing clarity on the steering capacity of public authorities and giving more indications on how national regulations can be set in conformity with the internal market rules. The coalition of Member States in favour of such a wider initiative for healthcare might seem surprising. Indeed, countries such as the UK and Sweden, traditionally extremely reluctant to allow EU intervention in their national policies on health and social protection, are among those spearheading the group of Member States calling for a legal initiative going beyond the issue of patient mobility. We have come a long way since the first Court rulings defining healthcare services as an economic activity and the cautious initiation of EU level debates on a policy response to this development. In 2006 there was a judgement in the Watts case (see chapter by Dalila Ghailani in this volume) <sup>(7)</sup> clarifying that when a patient of a National Health Service system (such as the UK and the Swedish healthcare systems) has the right to go abroad to receive treatment, the rules on the free movement of services also apply to these systems, as the care provided abroad is provided against remuneration. It thus became clear that NHS systems are no longer sheltered from internal market rules, which increased pressure in these countries to deal with these issues at EU level.

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<sup>7</sup> CJEC, Case C-372/04, *The Queen on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health*, Judgment of the Court, 16 May 2006.

When we compare the policy debates in the sector of social services on the one hand and of healthcare services on the other, we perceive different accents in the issues discussed. Whereas for the healthcare sector the debate focuses very much on patient mobility and on the deregulating effects of the internal market rules, the debate in the social services sector focuses much more on the application of the rules with regard to state aid, concessions, public procurement and public private partnership. Striking too is the fact that in the social services sector the need to entrust these services formally with a mission of general interest is a more prevalent concern than in the healthcare sector. This can probably be explained by the different angles from which these sectors have been confronted with the impact of EU law. For the healthcare sector these have been the Court rulings on the one hand and the services directive - more particularly Article 15 of this directive on freedom of establishment - on the other. Social services, often more closely linked with local authorities, are more aware of and concerned about the Court rulings on state aid, such as the *Altmark* judgement on public funding as compensation for a mission of general interest<sup>8</sup>, and the Decision of the Commission with regard to state aid in the form of public service compensation granted to undertakings entrusted with the operation of services of general economic interest (CEC, 2005; see also Baeten, 2005). In the social sector the link with services of general interest is made more explicitly. This probably has to do with the fact that in the healthcare sector, in most Member States, there exists a parallel, for-profit, commercial circuit that does not necessarily function with public funding. These providers do have to comply with minimum quality standards, but not with rules on tariff setting, and do not have to guarantee equal access. Although usually these services can thus hardly be seen as services of general interest, Member States are in favour of maintaining their steering capacity for these services too, not least because they are experimenting with opening up their publicly funded systems to these commercial providers. This tendency to open up publicly funded systems to commercial providers also explains the focus

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<sup>8</sup> CJEC, Case C-280/00, *Altmark Trans GmbH, Regierungspräsidium Magdeburg*, Judgment of the Court of 24 July 2003.

in the Council initiative on common values and principles. Whereas the ‘*values*’ refer to the ‘classic’ basics of publicly funded healthcare systems, the ‘*principles*’ focus on characteristics that ‘EU citizens would expect to find and structures to support them anywhere in the EU’. These principles include quality, safety; care that is based on evidence and ethics; patient involvement; redress and privacy and confidentiality. It is not a coincidence that Member States which are opening up their systems to these commercial providers, such as the Netherlands and the UK, have taken the lead in this initiative. The need to create EU level minimum guarantees on these requirements might not only serve patients going abroad, but also patients moving to the domestic private commercial system. These developments push for EU level initiatives guaranteeing basic level standards for patients shopping around as consumers, and this approach coincides very much with the approach of the ‘internal market’ actors in the European Commission.

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***Watts, Richards, Adeneler and others: an overview  
of some judgments delivered by the European  
Court of Justice in 2006***

Owing to the duties assigned to it by the Treaty of Rome and the various types of remedy which it handles, the Court of Justice of the European Communities (ECJ) came to play a constitutional role. Because the treaties founding the Communities assigned various areas of competence to them and allocated powers between the different institutions, it was to fall to the Court to monitor both compliance with the division of responsibilities between the Community and the Member States, and compliance with the power structure within the institutions. Accessible to individuals, the Court also had to develop its role as the guardian of their rights. It therefore had to endow itself with the means of doing so. The definition of general principles of law would enable the Court not only to identify protective rules but also to place them high up in the hierarchy of norms. The Court would then apply itself to reinforcing the legal safeguards offered to individuals in the interests of the proper implementation of Community law. Lastly, it was to afford those individuals the opportunity to assert the rights conferred on them as citizens of the Union. The most significant function of the Court of Justice lies in this dual role as both the driving force and regulator of a Community of law (Mouton and Soulard, 2004). The number of judgments delivered each year amply illustrates, on the one hand, the need for such an institution and, on the other, the real difficulties which national courts experience in applying Community law. To realise this, one only needs to look at the number of questions referred to the Court for preliminary rulings. Community law, in whatever field, has been and remains complex. Since this is a review of

Social Developments in the European Union, we will allude only to a number of judgments made in the various areas of European social policy. In fact, certain cases have particularly caught our attention. We will follow the three-part structure used for this section since 2001. We will explore in turn the notion of disability within the meaning of Directive 2000/78/EC and the pensionable age for transsexuals in the context of equal treatment and non-discrimination, and the reimbursement of the costs of healthcare provided free of charge in a different Member State under Regulation No. 1408/71, concluding with a number of cases on the organisation of working time.

## **1. The principles of equal treatment and non-discrimination**

### **1.1 The concept of disability within the meaning of Directive 2000/78/EC: *Chacon Navas v Eurest Colectividades*, 11 July 2006**

The principle of equal treatment in respect of employment and occupation is safeguarded at European level in the overall context of a Directive of 27 November 2000 (Council of the European Union, 2000). This Directive seeks to establish a general framework for combating discrimination in relation to employment and occupation based on religion or belief, disability, age or sexual orientation, with a view to putting the principle of equal treatment into effect in the Member States. The Directive requires Member States to adopt measures promoting the employment of disabled workers and bars them from discriminating in relation to employment and working conditions, remuneration or dismissal. The wording of the Directive does not, however, give any definition of the concept of disability or make any reference to the powers of national legislatures. According to settled case law of the ECJ, a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must be given an independent and uniform interpretation throughout the Union <sup>(1)</sup>. Accordingly, when a Spanish court brought a case before it to ascertain whether the general framework laid down by the Directive could provide protection for a

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<sup>1</sup> ECJ, Case C-327/82, *E kro*, 18 January 1984, ECR I-107 and Case C-323/03, *Commission v Spain*, 9 March 2006, ECR I-2161.

person dismissed on the grounds of sickness, the Court of Justice had to rule on the notion of ‘disability’, and defined the mechanisms for protecting disabled persons in relation to dismissal (2).

Ms Chacón Navas was employed by Eurest, an undertaking specialising in catering. In October 2003 she was certified as unfit to work on grounds of sickness which would prevent her from returning to work in the short term. In May 2004 Eurest informed Ms Chacón Navas of her dismissal and offered her compensation.

Ms Chacón Navas brought proceedings against Eurest. Since sickness is often capable of causing an irreversible disability, the Spanish court took the view that workers must be protected in a timely manner under the prohibition of discrimination on grounds of disability. It therefore referred to the Court of Justice for a ruling on the interpretation of Directive 2000/78/EC. The Court finds first of all that the framework established by the Directive to combat discrimination on the grounds of disability does apply to dismissal.

Since the Directive does not define ‘disability’ or refer to the laws of the Member States for a definition, the concept must be given an autonomous and uniform interpretation. ‘Disability’ within the meaning of the Directive must be understood as a limitation, which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life. However, by using the concept of ‘disability’ in the Directive, the legislature has deliberately chosen a term which differs from ‘sickness’. The two concepts therefore cannot simply be treated as being the same.

The Court notes that the importance which the Community legislature attaches to measures for adapting the workplace to the disability demonstrates that it envisaged situations in which participation in professional life is hindered over a long period of time. In order for the limitation to fall within the concept of ‘disability’, it must therefore be probable that it will last for a long time.

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<sup>2</sup> ECJ, Case C-13/05, *Chacon Navas v Eurest Colectividades*, 11 July 2006, not yet published.

There is nothing in the Directive to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness.

A person who has been dismissed by an employer solely on account of sickness therefore does not fall within the general framework laid down by the Directive in order to combat discrimination on grounds of disability.

Then, as regards the protection of disabled persons against dismissal, the Court points out that the Directive precludes dismissal on grounds of disability which, bearing in mind the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post.

Lastly, the Court holds that sickness as such cannot be regarded as an additional ground in relation to which the Directive prohibits any discrimination.

## **1.2 Pensionable age for transsexuals: *Richards v Secretary of State for Work and Pensions*, 27 April 2006**

It is only since 1996 that issues of discrimination associated with sexual preference or identity have come before the ECJ, whereas the European Court of Human Rights has been addressing these matters since 1955 (Waldijk *et al.*, 2004). In *P. v S.* <sup>(3)</sup>, the Court had held that the dismissal of a transsexual woman amounted to discrimination on grounds of sex in breach of Directive 76/207/EEC (Council of the European Communities, 1976). More recently, in *K.B.*, the Court had occasion to rule on the survivor's pension for an employee's unmarried transsexual partner. It held that Article 141 EC precluded national legislation which, by denying transsexuals the right to marry in their new identity, denied them the benefit of a widow(er)'s pension <sup>(4)</sup>. In the judgment in *Richards*, delivered this year, the Court reviewed a

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<sup>3</sup> ECJ, Case C-13/94, *P. v S.*, 30 April 1996, ECR 1996, I-2143.

<sup>4</sup> ECJ, Case C-117/01, *K.B.*, 7 January 2004, ECR 2004, I-541.

refusal to award a pension to a male-to-female transsexual at the same age as to a woman.

Under United Kingdom legislation prior to April 2005, a person's sex for the purposes of the Social Security rules is that indicated on their birth certificate. That certificate can only be modified to rectify clerical or material errors. Transsexuals who have undergone gender reassignment surgery therefore cannot change the sex shown on their birth certificate.

The Gender Recognition Act 2004 which came into force on 4 April 2005 allows transsexuals, under certain circumstances, to be issued with a Gender Recognition Certificate. Where such a certificate is issued, the sexual identity of the person concerned is altered for practically all official purposes, although it does not have retroactive effect.

In the United Kingdom men can receive a retirement pension at 65 and women at 60. Sarah Margaret Richards (5) was registered at birth, in 1942, as male. Having been diagnosed as suffering from gender dysphoria, she underwent gender reassignment surgery in 2001. In February 2002 she applied for a retirement pension to be paid as from her sixtieth birthday. The Secretary of State for Work and Pensions refused the application on the ground that it had been made more than four months before the claimant reached age 65. Ms Richards appealed that decision and the Social Security Commissioner, hearing the matter on appeal from the Social Security Appeal Tribunal, enquired of the Court of Justice whether such a refusal infringes the Community Directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Council of the European Communities, 1979). That Directive opens by pointing out that the right not to be discriminated against on grounds of sex is one of the fundamental human rights the observance of which the Court has a duty to ensure. The scope of the Directive therefore cannot be confined simply to discrimination based on belonging to one or other sex. The Directive is in fact designed to apply also to discrimination arising from the gender reassignment of the person concerned.

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<sup>5</sup> ECJ, Case C-423/04, *Richards*, 27 April 2006, not yet published.



The Court then finds that the unequal treatment in this case lay in Ms Richards' inability to obtain recognition of the new gender which she acquired following surgery. Unlike women whose gender is not the result of such surgery, and who are able to receive a retirement pension at the age of 60, Ms Richards is not able to fulfil one of the conditions of eligibility for that pension, in this case that relating to retirement age. As it arises from her gender reassignment, that unequal treatment must therefore be regarded as discrimination precluded by the Directive.

The Court rejects the United Kingdom's argument that this situation falls within the exception to the Directive under which a Member State can set different retirement ages for men and women. It finds that this exception, which must be interpreted strictly, does not cover the question at issue in the case under analysis.

Under those circumstances, the Directive does preclude legislation which denies entitlement to a retirement pension to a person who has undergone male-to-female gender reassignment on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law.

To round off this section, we shall allude briefly to the *Cadman* case. This case raised the question of whether the criterion of length of service, to the extent that it gives rise to disparities in remuneration to the detriment of women, is contrary to the principle of equal pay established by Article 141 EC.

Over the financial year 2000/2001 Ms Cadman<sup>(6)</sup>, an employee of the Health and Safety Executive – HSE, saw her pay rise to GBP 35,219. For four of her colleagues with the same grade, their pay was set at between GBP 39,125 and GBP 44,183, that is to say, a differential of between GBP 4,000 and 9,000 (the difference in the latter case amounting to a quarter of Ms Cadman's pay). She brought the matter before the competent authority claiming that the HSE's remuneration system had 'a disproportionately detrimental impact upon women'. The

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<sup>6</sup> ECJ, Case C-17/05, *Cadman*, 3 October 2006, not yet published.

referring court therefore enquired of the Court of Justice whether, where use of the criterion leads to disparities in pay between the men and women concerned, Article 141 EC requires an employer to provide justification for recourse to that criterion.

Article 141(1) EC lays down the principle that a male or female worker must receive equal pay for equal work or work of equal value. Article 1(1) of Directive 75/117/EEC (Council of the European Communities, 1975) on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women prescribes the elimination of discrimination on grounds of sex for the same work or for work to which equal value is attributed. Where there is evidence of discrimination, it is for the employer to prove that it is justified by 'objective factors unrelated to any discrimination on grounds of sex'. An employer who has recourse to the criterion of length of service to determine pay does not have to justify its use unless the aggrieved worker provides 'evidence capable of raising serious doubts in that regard'. Where there is a job classification system (by grade or category, for example) based on an evaluation of the work to be carried out, the employer does not need to show that a worker has acquired experience during the relevant period which has enabled him to perform his duties better (7).

## **2. The social security of migrant workers**

The articles of the Treaty of Rome which enshrine the freedom of movement for employed workers were very swiftly given practical expression by the adoption of Regulations Nos. 3 and 4 of 1958, passed as emergency measures, which were to be replaced in 1971 by Regulations Nos. 1408/71 (Council of the European Communities, 1971) and 574/72 (Council of the European Communities, 1972) on the application of social security schemes to employed persons and their families moving within the Community. To these should be added Regulation No. 1612/68 (Council of the European Communities, 1968),

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<sup>7</sup> See also the judgment in *Herrero*, ECJ, Case C-294/04, 16 February 2006, ECR 2006, I- 1513.

adopted three years earlier, on freedom of movement for employed workers, which provides for the right of residence, the right to take up employment and above all equal treatment. However, it has frequently been the judgments of the Court of Justice, giving generous or extensive interpretation to the Regulations, which have been the driving force behind real change in the national provisions of the Member States.

## **2.1 Reimbursement of the costs of hospital care provided free of charge in a different Member State: *The Queen v Bedford Primary Care*, 16 May 2006**

The rules applicable where a European Union national goes to a Member State other than their own to receive treatment are laid down by Regulation No. 1408/71 on the harmonisation of social security schemes and by the case law of the Court of Justice <sup>(8)</sup>. The Court has progressively expanded the principle of the freedom for individuals to receive treatment in the country of their choice with reimbursement of the costs by the insurance scheme to which they belong. It has in particular reduced the effect of Article 22 of the Regulation according to which, before going to another country for treatment, the individual must obtain authorisation from their own insurance scheme (E112), the agreement giving rise to reimbursement of the costs of the treatment. The Court of Justice has ruled again on this point in the context of the *Watts* case.

In order to be entitled to refuse authorisation for treatment abroad on the ground of a waiting time for hospital treatment in the State of residence, the NHS (National Health Service) must establish that the waiting time in question does not exceed the period which is acceptable in the light of an objective medical assessment of the clinical needs of the person concerned.

Under Community law, the E112 form arrangements allow a person to request authorisation to go abroad for treatment. That authorisation cannot be refused when the treatment in question is normally available

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<sup>8</sup> ECJ, Case C-157/99, *Smits and Peerbooms*, 12 July 2001, ECR 2001, I-5473; ECJ, Case C-368/98, *Vanbraekel*, 12 July 2001, ECR 2001, I-5363; ECJ, Case C-385/99, *Müller-Fauré and Van Riet*, 13 May 2003, ECR 2003, I-4509.

in the Member State of residence, but in the particular instance cannot be provided without undue delay. The health insurance fund is then obliged to reimburse the cost of the treatment to the patient.

Suffering from arthritis of the hips, Mrs Watts (?) asked the Bedford PCT (Bedford Primary Care Trust) for authorisation to undergo surgery abroad under an E112 form. As part of the processing of that request, in October 2002 she was seen by a consultant who classified her case as 'routine', which meant a one year wait for an operation. Bedford PCT refused to issue Mrs Watts with an E112 form on the ground that she could receive treatment 'within the government's NHS Plan targets' and therefore 'without undue delay'. Mrs Watts issued proceedings before the High Court of Justice seeking to have the refusal set aside. Following a deterioration in her state of health, Mrs Watts was re-examined in January 2003, and it was envisaged that she should be operated on within three or four months. Bedford PCT repeated its refusal. In March 2003, Mrs Watts underwent a hip replacement operation in France at a cost of GBP 3 900, which she paid. She therefore pursued the proceedings before the High Court of Justice, claiming in addition reimbursement of the medical fees incurred in France. The High Court of Justice dismissed the application on the ground that Mrs Watts had not had to face undue delay after her case was reassessed in January 2003. Mrs Watts and the Secretary of State for Health appealed against that judgment. Under those circumstances, the Court of Appeal referred to the Court of Justice of the European Communities questions on the scope of Regulation No. 1408/71 and of the EC Treaty provisions on the freedom to provide services.

### ***2.1.1 The scope of Regulation No. 1408/71***

The Court of Justice points out that under Regulation No. 1408/71 the competent institution only issues the prior authorisation assuming the costs of treatment abroad if that treatment cannot be provided within the time normally necessary for obtaining the treatment in question in the Member State of residence. In order to be entitled to refuse the

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<sup>9</sup> ECJ, Case C-372/04, *The Queen v BPC*, 16 May 2006, ECR 2006, I-4325.

authorisation on the ground of waiting time, that institution must establish that the waiting time, arising from objectives relating to the planning and management of the supply of hospital care, does not exceed the period which is acceptable in the light of an objective medical assessment of the clinical needs of the person concerned in the light of his medical condition and the history and probable course of his illness, the degree of pain he is in and/or the nature of his disability at the time when the authorisation is sought. Furthermore, the setting of waiting times should be done flexibly and dynamically, so that the period initially notified to the person concerned may be reconsidered in the light of any deterioration in his state of health occurring after the first request for authorisation.

In the present case, it is for the referring court to ascertain whether the waiting time invoked by the competent body of the NHS exceeded a medically acceptable period in the light of the particular condition and clinical needs of the person concerned.

### ***2.1.2 Scope of the freedom to provide services***

The Court takes the view that such a situation, where a patient whose state of health requires hospital treatment goes to another Member State where they receive the medical services in question, falls within the scope of the provisions on the freedom to provide services, regardless of the way in which the national system with which that person is registered and from which reimbursement of the cost of those services is subsequently sought operates.

The Court points out that the system of prior authorisation governing payment by the NHS for hospital care available in a different Member State deters, or even prevents, the patients concerned from applying to providers of hospital services established in another Member State and constitutes, both for those patients and for service providers, an obstacle to the freedom to provide services.

However, the Court is of the opinion that a restriction of that nature can be justified by overriding reasons. In order to ensure that there is sufficient and permanent access to high-quality hospital treatment, to control costs and to prevent any wastage of financial, technical and human resources, the requirement that the assumption by the national

system of the costs of hospital treatment provided in another Member State be subject to prior authorisation appears to be a measure which is both necessary and reasonable.

Nevertheless, the conditions attaching to the grant of such authorisation must be justified in the light of the overriding considerations mentioned above and must satisfy the requirement of proportionality. The regulations governing the NHS do not set out the criteria for the grant or refusal of the prior authorisation necessary for reimbursement of the cost of hospital treatment provided in another Member State. They therefore do not circumscribe the exercise of the discretionary power of the national competent authorities in that context. This lack of a legal framework also makes it difficult to exercise judicial review of decisions refusing to grant authorisation.

On this point the Court rules that where the delay arising from such waiting lists exceeds an acceptable period having regard to an objective medical assessment of the clinical needs of the person concerned, the competent institution may not refuse the authorisation on the grounds of the existence of those waiting lists, of a distortion of the normal order of priorities linked to the relative urgency of the cases to be treated, the fact that the hospital treatment is free of charge, the duty to make available specific funds to reimburse the cost of treatment provided in another Member State and/or a comparison between the cost of that treatment and that of equivalent treatment in the Member State of residence.

The competent authorities of a national health service such as the NHS therefore have a duty to provide mechanisms for the reimbursement of the cost of hospital treatment in another Member State to patients to whom that service is not able to provide the treatment required within a medically acceptable period.

### ***2.1.3 Arrangements for reimbursement***

The Court finds that a patient who has been authorised to receive hospital treatment in a different Member State, or who received an unfounded refusal to authorise, is entitled have the cost of the treatment reimbursed by the competent institution in accordance with

the provisions of the legislation of the host State, as if they were a national of that State.

Where the reimbursement is not in full, the requirement to place the patient in the position he would have been in had the national health service with which he was registered been able to provide him free of charge, within a medically acceptable period, with treatment equivalent to that which he received in the host Member State, places a duty on the competent institution to make additional reimbursement to the person concerned of the difference between, on the one hand, the cost of that equivalent treatment in the State of residence, to a maximum of the amount invoiced for the treatment received in the host Member State and, on the other, the amount reimbursed by the institution of that State pursuant to the legislation of that State, where the first amount is greater than the second.

Where the cost invoiced in the host State is greater than the cost of equivalent treatment in the Member State of residence, the competent institution is required to cover the difference in the cost of the hospital treatment between the two Member States only to the extent of the cost of the equivalent treatment in the State of residence. As regards travel and accommodation costs, these are not reimbursed unless the legislation of the competent Member State imposes a corresponding obligation on the national system in respect of treatment provided in a local hospital covered by that system.

The case law of the Court, of which the *Watts* ruling is the most recent development, raises a number of issues as to its practical implications. The decisions give the principle of freedom to provide services priority over the right of Member States freely to organise their health systems. In view of the potential liability which this interpretation implies for social security funds, European governments and Members of Parliament have asked the Commission for a legislative proposal. Numerous questions emerge. Is it necessary to define minimum common standards or rights on which citizens can rely in relation to healthcare, whatever the EU country where that care is provided? What are the conditions for granting or refusing authorisations? How can individual entitlements and collective constraints be reconciled for

patients and practitioners? How should harm caused by medical error be given medical follow-up or compensated? <sup>(10)</sup>

On 26 September 2006 the European Commission issued a communication intended to be the basis for a wide public consultation on how to ensure legal certainty in relation to cross-border healthcare in the context of Community law on the one hand and, on the other, how to support cooperation between the health systems of Member States (CEC, 2006) <sup>(11)</sup>. The consultation aims to gather views on the situations where it is necessary to increase legal certainty in order to facilitate cross-border healthcare in practice, the areas in which European action can help support the health systems of the Member States (such as networks of centres of reference and realising the potential of health innovation), the appropriate tools to address these various issues at European Union level (be they binding or other legal instruments or other means), the current impact of cross-border healthcare on the accessibility of health systems and on the quality and financial sustainability of those systems for both the sending and the host countries. The deadline for response is 31 January 2007. The Commission then expects to put forward proposals in the course of 2007.

Readers interested in the issues raised by the application of Regulation No. 1408/71 are referred to the following cases: *Silvia Hosse* (care allowance granted to the family members of a frontier worker), *Herbosch Kiere* (determination of the legislation applicable to posted workers), *Piatkowski* (activity by a person simultaneously employed in one

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<sup>10</sup> *Bulletin of the European Union*, No.9259, 7 September 2006.

<sup>11</sup> To recap, healthcare services had initially been included in the proposal for a directive on the liberalisation of services in the internal market (based on the Bolkestein proposal). Following the vehement opposition to this proposal, significant amendments were made to the text, one of which was to remove healthcare from its scope. The Commission then announced that it would issue a specific communication on social services of general interest, which it did on 26 April 2006, taking the view that there was no urgency to pass European rules in that field nor on healthcare services.



Member State and self-employed in another Member State) and *Dams-Schipper* (exportability of special non-contributory benefits) <sup>(12)</sup>.

### 3. Rights and obligations of employers and workers

#### 3.1 The organisation of working time: *Federatie Nederlandse Vakbeweging, Robinson-Steel and Commission v United Kingdom*

According to the working time Directive (Council of the European Union, 1993), Member States must take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated. Financial compensation in respect of the minimum period of annual leave carried over would create an incentive for workers not to take leave. It is immaterial in this regard whether such financial compensation is or is not based on a contractual arrangement.

The Netherlands Ministry of Social Affairs and Employment, <sup>(13)</sup> in a brochure, interpreted the Dutch rules on leave as meaning that employers and workers can, during a contract of employment, agree in writing that an employee who, in one year, has not taken his minimum annual leave (in full or in part), may receive financial compensation in respect of that leave in a subsequent year. According to the Ministry, days' leave, statutory as well as non-statutory, saved up from previous years, exceed the minimum leave entitlement and can in principle be eligible for redemption.

The *Federatie Nederlandse Vakbeweging* (FNV) brought an action before the *Rechtbank te 's-Gravenhage* seeking a declaration that the foregoing interpretation is incompatible with the 'working time' Directive.

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<sup>12</sup> ECJ, Case C-286/03, *Silvia Hosse*, 22 February 2006, ECR 2006, I-1771; ECJ, Case C-2/05, *Herbosch Kiere*, 26 January 2006, ECR 2006, I- 1079; ECJ, Case C-493/04, *Piatkowski*, 9 March, ECR 2006, I- 2369; ECJ, 6 July 2006, *Dams-Schipper*, C-154/05, not yet published.

<sup>13</sup> ECJ, Case C-124/05, *Federatie Nederlandse Vakbeweging*, 6 April 2006, ECR 2006, I-3423.

Hearing the matter on appeal, the Netherlands *Gerechtschhof te 's-Gravenhage* referred the matter to the Court of Justice of the European Communities.

That Court notes that entitlement to paid annual leave is an important principle of Community social law. Workers must enjoy actual rest, with a view to ensuring effective protection of their safety and health. It is only where the employment relationship is terminated that an allowance can be paid in lieu of paid annual leave. The Court goes on to say that the positive effect of that leave for the safety and health of the worker is deployed fully if it is taken in the year prescribed for that purpose. However, it does not lose its significance, for the purposes of the protection of workers, if it is taken during a later period. In any event, the possibility of financial compensation in respect of the minimum period of annual leave carried over would create an incentive, incompatible with the objectives of the Directive, not to take leave or to encourage employees not to do so. Consequently, the Directive precludes the replacement, by an allowance in lieu, of the minimum period of paid annual leave, in the case where it is carried over to a subsequent year. It is immaterial in that regard whether financial compensation for paid annual leave is or is not based on a contractual arrangement.

In *Robinson-Steele* <sup>(14)</sup>, the Court of Justice holds that payment for annual leave included in hourly or daily remuneration was contrary to the 'working time' Directive. Such a regime, known as 'rolled-up holiday pay' may lead to situations in which the minimum period of paid annual leave is replaced by financial compensation.

Under the United Kingdom rules transposing the 'working time' Directive, any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period.

Messrs Robinson-Steele, Clarke, J.C. Caulfield, C.F. Caulfield and Barnes, who worked for various undertakings, received payment for annual leave in the form of inclusion of the remuneration for that leave

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<sup>14</sup> ECJ, Cases C-131/04 and C-257/04, *Robinson-Steele*, 16 March 2006, not yet published.

in the hourly rate of pay, a regime known as ‘rolled-up holiday pay’, as opposed to receiving payment in respect of a specific period of leave.

Those workers applied to the Employment Tribunal claiming payment for annual leave. The Leeds Employment Tribunal, in the action brought by Mr Robinson-Steele, and the Court of Appeal, hearing on appeal the applications of Messrs Clarke, Caulfield, Caulfield and Barnes, enquired of the Court of Justice whether the ‘rolled-up holiday pay’ arrangements are compatible with the ‘working time’ Directive.

The Court of Justice observes that the entitlement of every worker to paid annual leave is a particularly important principle of Community social law from which there can be no derogations. Holiday pay is intended to enable the worker actually to take the leave to which he is entitled. The Court notes that the term ‘paid annual leave’ means that remuneration must be maintained for the duration of annual leave within the meaning of the Directive and workers must receive their normal remuneration for that period of rest. It finds that the Directive precludes part of the remuneration payable to a worker for work done from being attributed to payment for annual leave without the worker receiving, in that respect, a payment additional to that for work done. What is more, there can be no derogation from that entitlement by contractual arrangement.

As regards the point at which the payment for annual leave must be made, in the view of the Court there is no provision in the Directive which expressly prescribes that moment. However, the purpose of the requirement of payment for that leave is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work. Accordingly, the point at which the payment for annual leave is made must, as a rule, be fixed in such a way that, during that leave, the worker is, as regards remuneration, put in a position comparable to periods of work.

In addition, the Court finds that ‘rolled-up holiday pay’ arrangements may lead to situations in which the minimum period of paid annual leave is, in effect, replaced by an allowance in lieu, which the Directive prohibits, save where the employment relationship is terminated, in order to ensure that a worker is normally entitled to actual rest. It

follows that payment in respect of minimal annual leave by means of a system of ‘rolled-up holiday pay’, instead of payment in respect of a specific period during which the worker actually takes leave, contravenes the ‘working time’ Directive. As regards sums already paid to workers in respect of leave under the ‘rolled-up holiday pay’ regime, the Court is of the view that sums paid transparently and comprehensibly can, as a rule, be set off against the payment for specific leave. Conversely, such set-off is excluded where there is no transparency or comprehensibility. The burden of proof in that respect is on the employer. The Court holds that Member States are required to take measures appropriate to ensuring that practices incompatible with the provisions of the Directive on entitlement to annual leave are not continued.

In *Commission v United Kingdom* <sup>(15)</sup>, the Court held that the United Kingdom guidelines on working time were in breach of Community law.

These guidelines are liable to render meaningless workers’ entitlement to daily and weekly rest periods because they do not require employers to ensure that workers actually take the minimum rest periods.

Under the ‘working time’ Directive, Member States are required to take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of eleven consecutive hours per 24-hour period and, for each seven-day period, to a minimum uninterrupted rest period of 24 hours plus the eleven hours’ daily rest.

The Directive was transposed into United Kingdom law by regulation (Working Time Regulations 1998 – WTR). To assist understanding of the WTR, the Department of Trade and Industry published a set of guidelines. According to those guidelines, ‘employers must make sure that workers can take their rest, but are not required to make sure they do take their rest’. Taking the view that the guidelines endorse and encourage a practice of non-compliance with the requirements of the Directive, the Commission brought an action before the Court of Justice. The Court points out, first of all, that the purpose of the

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<sup>15</sup> ECJ, Case C-484/04, *Commission v United Kingdom*, 7 September 2006, not yet published.

Directive is to lay down minimum requirements intended to improve the living and working conditions of workers by ensuring that they are entitled to minimum rest periods. These principles are rules of Community social law of particular importance from which every worker must benefit as a minimum requirement necessary to ensure protection of his safety and health.

Ensuring that the rights conferred on workers are effective necessarily means that Member States must guarantee compliance with the entitlement to effective rest periods. A Member State which indicates that the employer is nevertheless not required to ensure that the workers actually exercise such rights, does not guarantee compliance with either the minimum requirements nor the essential objective of the Directive.

By providing that employers must merely give workers the opportunity to take the prescribed minimum rest periods without imposing on them a duty to ensure that those periods are actually taken, the guidelines are clearly liable to render meaningless the rights enshrined in the Directive and are incompatible with its objective. The Court therefore holds that the United Kingdom failed to fulfil its obligations under the 'working time' Directive.

### **3.2 Successive fixed-term employment contracts: *Konstantinos Adeneler*, 4 July 2006**

The Court of Justice has interpreted the framework agreement on fixed-term work by strengthening the protection for workers.

Directive 1999/70 is intended to put into effect the framework agreement on fixed-term work concluded between the general cross-industry organisations (ETUC, UNICE and CEEP) (Council of the European Union, 1999). The agreement aims to establish a general framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships, and provides that 'objective reasons' may justify the renewal of such contracts or relationships. Member States must also determine under what conditions fixed-term employment relationships are regarded as 'successive' and are deemed to be of indefinite duration. The time-limit for transposition of the

Directive expired on 10 July 2001, with an option to extend that period by a maximum of one year.

The Greek legislation transposing the Directive into national law was passed belatedly, during April 2003. For workers in the private sector, it establishes that unlimited renewal of fixed-term employment contracts is permitted if justified by an objective reason, and specifies that such an objective reason exists where, *inter alia*, the conclusion of a fixed-term contract is required by a provision of statute or secondary legislation. Further, the Greek legislation treats as 'successive' any fixed-term employment relationships concluded between the same employer and worker under the same or similar terms of employment, if the contracts are not separated by a period of time longer than 20 working days. The provisions applicable to public sector workers prohibit absolutely the conversion of a fixed-term contract into a contract of indefinite duration.

Mr Adeneler <sup>(16)</sup> and 17 other employees entered into a number of successive fixed-term employment contracts with ELOG, a legal person governed by private law and falling within the public sector, the last of which came to an end without being renewed. Each of those contracts was concluded for a period of eight months and the various contracts were separated by a period of time ranging from a minimum of 22 days to a maximum of 10 months and 26 days. Seeking a declaration that those contracts had to be regarded as employment contracts of indefinite duration, the workers brought proceedings before the *Monomeles Protodikio*, which referred four questions to the European Court of Justice for a preliminary ruling.

The Court of Justice first observed that Directive 1999/70 and the framework agreement are intended to apply also to fixed-term employment contracts and relationships entered into with public sector authorities and other entities, and that the framework agreement proceeds on the premiss that employment contracts of indefinite duration are the general form of employment relationship. It therefore seeks to circumscribe the

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<sup>16</sup> ECJ, Case C-212/04, *Adeneler*, 4 July 2006, not yet published.

use of successive recourse to fixed-term employment contracts, regarded as a potential source of abuse to the disadvantage of workers, by laying down as a minimum a number of protective provisions designed to prevent the status of employees from being insecure. According to the framework agreement, the use of such contracts founded on objective reasons is a way to prevent abuse. Conversely, the use of successive fixed-term employment contracts where such use is based solely on the fact that it is provided for by a general provision of statute or secondary legislation of a Member State is not in line with the protective purpose of the framework agreement. The concept of 'objective reasons' in fact presumes there to be specific factors relating in particular to the activity in question and the conditions under which it is carried out.

The Court then finds that, although under the framework agreement it is left to the Member States to determine whether the contracts are 'successive', their margin of appreciation is not unlimited, because it cannot in any event go so far as to compromise the objective or the practical effect of the framework agreement. The Court holds that a national provision under which only fixed-term contracts that are separated by a period of time shorter than or equal to 20 working days are regarded as successive must be considered to be such as to compromise the object, the aim and the practical effect of the framework agreement. So inflexible and restrictive a definition is liable to have the effect not only of in fact excluding a large number of fixed-term employment relationships from the benefit of the protection of workers sought by the Directive and the framework agreement, but also of permitting the misuse of such relationships by employers.

In the view of the Court, the framework agreement precludes application of a national rule which, in the public sector alone, prohibits absolutely the conversion into an employment contract of indefinite duration of a succession of fixed-term contracts that, in fact, have been intended to cover fixed and permanent needs of the employer and must be regarded as constituting an abuse, to the extent that the domestic law of the Member State does not include, in the sector under consideration, any other effective measure to prevent and, where relevant, punish the misuse of successive fixed-term contracts.

Lastly, the Court points out that, where a directive is transposed belatedly into a Member State's domestic law and the relevant provisions of the directive do not have direct effect, the national courts are bound to interpret domestic law so far as possible, once the period for transposition has expired, in the light of the wording and the purpose of the directive concerned with a view to achieving the results sought by it, favouring the interpretation of the national rules which is the most consistent with that purpose in order thereby to achieve an outcome compatible with the provisions of the directive. The Court nevertheless adds that, from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive.

The curious reader will also look at the rulings in *Marrosu* (17) and *Vassallo* (18) in which the Court held that Directive 1999/70 did not preclude national legislation which, where there is abuse arising from the use of successive fixed-term employment contracts or relationships by a public-sector employer, prohibits their being converted into contracts or relationships of indeterminate duration, where that legislation includes another effective measure to prevent and punish the abuse of successive fixed-term contracts by a public-sector employer (19).

## Conclusion

The Court's activity in 2006 was intense. The questions referred to it for preliminary rulings enable it to fulfil its role as interpreter of Community law. That interpretation ensures uniform application of European texts

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17 ECJ, Case C-53/04, *Marrosu*, 7 September 2006, not yet published.

18 ECJ, Case C-180/04, *Vassallo*, 7 September 2006, not yet published.

19 For issues concerning the protection of workers in the event of redundancy, the reader is referred to the *Alonso* case, ECJ, Case C-81/05, *Cordero Alonso*, 7 September 2006 and *Werhof*, as regards the safeguarding of employees' rights on a transfer of undertakings, ECJ, Case C-499/04, *Werhof*, 9 March 2006, ECR 2006, I-2397.



across all the Member States of the European Union. The Court has defined the concept of disability (*Chacon Navas*), established the pensionable age for transsexuals (*Richards*) and explored the issues associated with healthcare provided in a different Member State (*Watts*). The questions relating to the organisation of working time have been examined afresh (*Robinson-Steel*, *Commission v United Kingdom*, etc.).

Within the case law, the protection of workers' rights is fundamental and will hold centre ground in 2007. The *Viking* case will in that regard be a crucial test of Europe's commitment to workers' rights. The outcome of this case, currently being heard before the Court <sup>(20)</sup>, will have a decisive impact on workers' rights and the ability of trade unions effectively to negotiate for the protection of workers and to defend social rights. According to the European Trade Union Confederation (ETUC), whilst this dispute has arisen in the context of the maritime industry, its resolution will have consequences throughout Europe, and not merely in the maritime sector or the EU Member States most closely concerned (ETUC, 2006).

The case addresses whether a company can deprive workers of the basic right to collective action, by formally relocating its employees in a country where wages and benefits are lower. In 2003, the Finnish Viking shipping line decided that it could gain a competitive advantage by re-flagging its passenger and cargo ferry *Rosella*, operating between Helsinki and Tallinn in the Baltic Sea, as an Estonian vessel, and replacing the crew with lower-paid seafarers. Dissatisfied with how the situation was resolved in Finland, Viking subsequently went to court in England seeking an injunction to prevent the Finnish Seamen's Union (FSU) from taking industrial action at some time in the future in order to protect its members' jobs. Viking also sought to prevent the International Transport Workers' Federation (ITF) from in the future calling on its affiliate members to show solidarity with the FSU. Viking was able to bring its action in the English court only because the ITF has its Secretariat in London.

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<sup>20</sup> ECJ, Case C-438/05, *Viking*, pending.

This case is a mirror image of the *Laval* case in Sweden <sup>(21)</sup>, which has attracted a lot of public attention and concern. The potential legal, political and social repercussions of these cases go far beyond the Finnish and Swedish social models and will affect labour relations throughout Europe.

The aim of the employers in both these cases was to undermine successful social models and shift the balance of power between the social partners in countries where trade unions have a recognised role in defending workers' interests. The right to collective action lies at the heart of the Nordic social model, a model shared by some of the most competitive economies in the world. A finding in favour of the employers would have a damaging impact in parallel circumstances in Germany, France and many other EU Member States.

The European Commission has endorsed the essential tenets of the Swedish social model against pressure from undertakings based in the enlargement countries. In an opinion sent to the European Court of Justice in the night of Tuesday 31 January and Wednesday 1 February in connection with the *Vaxholm* case, the Commission stated that Sweden was perfectly entitled, within its territory, to require compliance with collective agreements negotiated between employers and trades unions. In the view of the Commission's legal service, a foreign undertaking cannot disregard local collective agreements, since they afford satisfactory transposition of the Directive on the posting of workers, under which the foreign workers used by a non-resident employer must be employed in accordance with local conditions as regards working hours, leave and minimum wages. The Commission nevertheless nuances this view to the effect that there is nothing permitting Sweden to impose constraints which, by virtue of existing collective agreements, go beyond the standards set by the Directive on the posting of workers. This means that collective agreements cannot force employees to belong to a trade union, or their employers to contribute to a training fund <sup>(22)</sup>. The Commission's opinion was not unexpected, given that in

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<sup>21</sup> ECJ, Case C-341/05, *Laval un Parteneri*, pending.

<sup>22</sup> *Le Monde*, 1 February 2006.

October 2005 the Commissioner for the internal market, the Irishman Charlie McCreevy, had taken the liberty of upholding the position of the Latvians. Thomas Ostros, the Swedish Economy Minister, expressed the view at the time that his comments were unacceptable, and threatened to block the forthcoming 'services' Directive. In response to the ensuing uproar, the Commission President, José Manuel Barroso, had to distance himself from his Commissioner, explaining that his remarks had been misinterpreted (Ghailani, 2006).

The judgments to be delivered by the Court in both these cases in the course of 2007 will without the slightest doubt arouse enormous interest in the world of labour relations.

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## **Future prospects**

Europe is in crisis, yet it continues to make headway. This has been our recurrent refrain every year since the turn of the millennium. To explain the apparent paradox, we believe it is necessary to revisit two of the most important issues that Europe has faced over the past few years: the Lisbon Agenda and the constitutional Treaty.

It has long been stressed by many observers that the building of Europe is not a homogeneous process. The Union is not a monolith, but is being constructed ‘chapter by chapter’: monetary union, foreign policy, social policy, judicial cooperation, etc. Accordingly, each sectoral configuration of the Council of the European Union – and they were quite numerous before being grouped together in 2002 – used to follow its own logic and its own agenda, to some extent semi-detached from the overall approach. The Lisbon Strategy was in part a response to this fragmentation, an attempt to join up all the sectoral policies (in particular macro- and micro-economic policies with employment policies) and form a cohesive whole. Coordination of social protection has until now been relatively autonomous. Another feature of the Lisbon Strategy was to confer on the Heads of State and Government, meeting in the European Council, the responsibility for coordination which had previously been exercised *de facto* by the Council of Economic and Finance Ministers (Ecofin). Until 2004-2005, when it was called into question by the Kok Report and by Commission President José Manuel Barroso, the Lisbon Strategy was regarded as the driving-force behind the building of Europe, enabling the EU to avoid institutional crisis by focusing on its ‘core business’.

The paradox can also be explained in terms of the debate about the constitutional Treaty. The accelerating pace of European integration, ever since the Single European Act of 1986, has necessitated continual revisions of the founding treaties: five revisions in the space of twenty years, or a new treaty every four years on average. Some of these revisions have redefined the political objectives of the Union (single market, single currency, political union, etc.); others have sought to rewrite the rules of the game and stabilise the Community edifice. The most recent one – the draft Treaty establishing a Constitution for Europe – was intended above all to bolster a sense of European identity. At a time when the Lisbon agenda was starting to be reconsidered, the drafting of the constitutional Treaty was in a sense seen as proof of the enlarged Europe's ability to overcome its differences. And we all know what became of it.

2006 was therefore characterised by this dual crisis over what should have been two coordination mechanisms: the Lisbon agenda and the constitutional Treaty. The crisis spawned a proliferation of very general talk and references to 'what the citizens really want'. But such declarations have little to do with reality on the ground and certainly do not clarify the overall political project for the European Union.

In the meantime, regardless of this overall crisis, progress is still being made on a sector-by-sector basis: the internal market in services has been launched, as has the REACH Regulation on a more careful use of chemicals (less ambitious than originally planned, admittedly, but it might one day become an international frame of reference). There is more discussion than ever about a common energy policy – a long-standing issue that first arose at the time of the oil crises of the 1970s –; major steps forward have been made in the fields of police and judicial cooperation as well as asylum and immigration; the European Union is taking the lead in global efforts to combat climate change; it also seems likely to become the 'champion of human rights' in the world (1). So, even though 'Europe' as a whole is faltering, its activity in specific areas

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<sup>1</sup> See the annual report of the NGO Human Rights Watch (HRW), published on 11 January 2007.

goes on. This sectoral, pragmatic approach moreover constitutes the *credo* of those who advocate a Europe of projects (as opposed to a project for Europe). From this perspective, one would merely need to await (hypothetical) better times to launch a more global project – especially because in 2006 the economic prospects seemed promising, growth rates were high in most of the new Member States and inflation was falling. Paradoxically, this state of affairs feeds into the pervading wait-and-see climate. Europe as an economic project appears to be functioning; Bulgaria and Romania are being integrated without too much of a fuss. What more could one want?

### **1. Two stumbling-blocks**

Two stumbling-blocks nevertheless stand in the way of this passive approach. The first is that the very heart of the project – monetary union and its symbol, the euro – has been enveloped by disenchantment, eight years after its inauguration. A succession of opinion polls (2) has revealed that a majority of European citizens no longer perceives the benefits of the euro for their country. This shift in public opinion can be seen in conjunction with the setbacks over the constitutional Treaty and Lisbon-style coordination: monetary union requires Europe to be stronger as a political entity and economic policies to be better coordinated. That does not mean creating a European State in the mould of the nation-state but does, at the very least, mean establishing efficient, transparent decision-making systems. One example of a step in the right direction, albeit still minimalistic, is the election of a Eurogroup Chairman for a two-year period. The absence of any tangible institutional prospects is weakening monetary union by failing to situate it within an identifiable political project and hence depriving it of both meaning and direction. Added to that, the European Central Bank is opting out of social and wage policies, thereby strengthening the impression that the project has become an exclusively liberal one.

The second stumbling-block identified by several contributors to this volume is the self-effacing role of the European Commission, both in

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2 See for example the *Financial Times* of 29 January 2007.



general and particularly in the field of social affairs. Yet a vessel with 27 sailors has need of a helmsman – someone to propose, innovate, take risks, and not just go along with preliminary compromises whose only merit is that they faithfully reflect the lowest common denominator. The Commission's absence from policy debate is increasingly noticeable but not in fact new. Previous Commissions, however, were able to benefit from the force of inertia of the internal market and then monetary union. In the social policy field, for instance, the provisions of the Community Charter of Fundamental Social Rights of Workers (1989) made it possible to devise a minimum legislative programme. Thereafter, the European Employment Strategy and the open methods of coordination created an illusion of progress. Since then, for want of any innovative projects, the force of inertia is no longer sufficient. Hardly any legislative proposals are being put forward in the social policy field nowadays, and the European Employment Strategy has been marginalised within a new Lisbon agenda centred on economic concerns. European social dialogue, for its part, has become bogged down. The Ecofin Council has won a 'victory' in this context by managing to appropriate the main elements of the employment debate, coupling it with the subject of 'flexicurity' – in other words, above all else, flexibility <sup>(3)</sup>.

It is hardly surprising, given the lack of political direction and social prospects, that the key project – monetary union – can no longer rally support from EU citizens.

## **2. Breaking the deadlock**

Given these obstacles, and in view of the deadlock at least in the social policy field, would it be a good idea to promote enhanced cooperation revolving around monetary union? This idea was first mooted more or less in parallel with the Maastricht process and has often been regarded as an alternative – perhaps the only alternative – to a Europe which is

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<sup>3</sup> The reason why the Danish example is taken as a model at European level is that it is flexible. Sweden for instance achieves the same results in terms of jobs but with a much less flexible labour market. This other example is of course devoid of all interest for mainstream economists.

still expanding but has almost entirely stopped deepening. Certain conditions would however need to be met in order to achieve enhanced cooperation. All thirteen members of the euro zone would need to take part: thus, the ruling political parties in each of those countries would have to be in favour of deeper cooperation (but the more time passes, the more the euro zone will expand, so that meeting this condition will become ever more difficult). Besides, it would seem impossible to launch any such project without the six founder members and without strong backing from the largest euro zone countries: Germany, France, Italy and Spain. Since monetary union is an open process, enhanced cooperation would furthermore have to cover not only broad principles but also specific goals. That is to say, it is no longer enough to state that taxation must become subject to qualified majority voting in the Council; the precise content and policy objectives of fiscal coordination must be spelled out too.

Furthermore, history teaches us that, without a crisis or the threat of a crisis, inertia often prevails over the desire for change. That is why crisis or breakdown scenarios should not be avoided, even if there is little likelihood that they will actually occur. As we wrote in our introduction, the European Union does not currently have ambitions to match its resources. In other words, its political resources are in theory greater than its current capability to act and exert influence both at home and on the international scene. At the risk of causing a crisis, these resources must be mobilised in full so as to confront the challenges, both internal – economic and social cohesion in an enlarged Europe; convergence in step with progress – and external – international governance in the multi-polar world of the future; definition of a new paradigm of sustainable development which attaches priority to combating growing inequality and global warming. If the Union and its Member States set themselves ambitions to match their resources, institutional or constitutional solutions will follow. But since such ambitions are clearly not shared by all, the EU is compelled to choose between moribund consensus and creative crisis.

Crises, if they are to be creative, must be anticipated and prepared for. In 2006, no one could predict the outcome of the constitutional crisis; all that was obvious was that there would be a new Treaty in the medium

term. 2009 is the date put forward by some, a date corresponding to the next European elections and the inauguration of a new Commission. Talks will then begin on the financial perspectives for the period beyond 2013. In political terms, therefore, the years between 2007 and 2009 may be a period for the clarification of Franco-German ambitions ahead of these events, in the wake of the French elections of 2007. However, if France and Germany (accompanied by Spain and Italy) do manage to propose a positive way out of the constitutional stalemate, the United Kingdom will be put on the spot. The prospects for Europe appear bleak indeed in London: the replacement of Tony Blair by Gordon Brown could stall any attempts to reinvigorate the Union <sup>(4)</sup>. What is more, a comeback by the Conservatives under David Cameron at the next general election would once and for all bury the plan to ‘put the United Kingdom at the heart of Europe’ (i.e. a UK withdrawal from the EU’s institutional structures would become plausible). The options then would be protracted deadlock – diplomatic, institutional and ultimately budgetary – or else a total rethink of the UK’s role within the Union. Many questions would of course remain unanswered in any such scenario: what would the Netherlands do? Would Italy manage to overcome its instability? What attitude would Poland adopt? Would the need to make further headway be shared by a broad majority of the Eurogroup countries? Would the gap between ‘old’ and ‘new’ Member States be bridged on matters of common interest?

Concerning this last fundamental question, one fresh development gives grounds for a degree of optimism. On 14 February 2007, nine Member States – both old and new <sup>(5)</sup> – signed a declaration entitled ‘*Un nouvel élan pour l’Europe sociale*’ [A new lease of life for Social Europe]. In it they state that it is necessary ‘to link the institutional re-launch to a revival of the ‘Social Europe’, to ‘strengthen the European social model’, to attach priority to combating unemployment and to support European social dialogue. It has to be admitted, in fact, that global labour market competition no longer results solely in the caricatured image of the

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<sup>4</sup> See in particular *Le Monde* of 13 February 2007 (‘Mr Blair’s designated successor, Gordon Brown, prepares to block the constitutional revival of the EU’).

<sup>5</sup> Belgium, Bulgaria, Cyprus, France, Greece, Hungary, Italy, Luxembourg and Spain.

Polish plumber in the 'old' Member States; the Ukrainian plumber is likewise moving into Poland. Some of the new States are already facing problems generated by a brain-drain of young skilled workers, with the risk that entire regions will become economic and social wastelands. Relocation no longer affects only the old Member States but also the new ones, where migration flows are both entering and leaving. Optimistic talk about the successes of liberalism in the east is being disproved by new social imbalances for which the European project could eventually pay the price or which could, on the contrary, help consolidate it. For that to be the case, however, old and new alike must reassert with one voice that this project is built on cohesion, regulation and solidarity. The establishment of a European Globalisation Adjustment Fund, on 1 January 2007, is innovative in this respect, especially on account of the discourse underlying it: a discourse which stresses the asymmetry between the overall benefits of globalisation on the one hand and, on the other, its detrimental effects on particular sectors and regions.

If the European Union accepts that European and global integration creates losers, and if it stands by its original goal of solidarity among peoples, then it must set itself ambitions to match its resources. And from this point of view, new windows of opportunity just might be opening up in 2007 – at the risk of triggering an existential crisis.



## **Chronology 2006**

### **Key events in European social policy**

#### **JANUARY**

**13 January:** At the informal Justice and Home Affairs Council, the Justice and Home Affairs Ministers unanimously back a proposal for **European intervention teams** to assist Member States in coping with a sudden influx of illegal immigrants or asylum seekers into their territory. ([http://www.eu2006.at/en/News/Press\\_Releases/January/1301prokop.html?null](http://www.eu2006.at/en/News/Press_Releases/January/1301prokop.html?null)).

**16 January:** Demonstration by **dockers** outside the European Parliament against the new proposal to liberalise **port services**. Proposal for a directive of the European Parliament and of the Council on market access to port services, COM (2004) 654 final of 13 October 2004.

**18 January:** The European Parliament rejects by a large majority the proposal for a directive to liberalise **port services**. COM (2004) 654 final of 13 October 2004.

**18 January:** The European Parliament rejects the European Council's position of 16 December 2005 on the **financial perspectives 2007-2013**, paving the way for new interinstitutional negotiations. European Council, Brussels, *Presidency Conclusions*, 15 and 16 December 2005 (15914/05).

**19 January:** The meeting of the social troika in Villach (European Parliament, European Commission, social partners and NGOs) focuses in particular on the **role of social dialogue** in the context of ‘**flexicurity**’ ([http://ec.europa.eu/employment\\_social/emplweb/news/news\\_en.cfm?id=115](http://ec.europa.eu/employment_social/emplweb/news/news_en.cfm?id=115)).

**25 January:** Presentation of the Commission’s progress report on the **partnership for growth and jobs** (Lisbon strategy). Communication from the Commission to the Spring European Council. ‘Time to move up a gear – The new partnership for growth and jobs’, COM (2006) 30 final of 25 January 2006.

**31 January:** The Commission forwards to the European Court of Justice its opinion on the ‘**Vaxholm**’ case between the Latvian company *Laval un partneri* and the Swedish trade union *Byggnads*. The Swedish collective bargaining system does not, in the Court’s opinion, contravene European legislation. *Bulletin of the European Union*, No.9121 of 1 February 2006.

## FEBRUARY

**2 February:** The European Parliament adopts the agreement on the draft directive concerning **driving time and rest periods for truck drivers** and stepping up checks on trucks. The Council adopts, by written procedure, the agreement reached in conciliation with Parliament. Proposal for a Regulation of the European Parliament and of the Council on the harmonisation of certain social legislation relating to road transport, COM (2001) 573 final of 12 October 2001; Proposal for a Directive of the European Parliament and of the Council on minimum conditions for the implementation of Directive 2002/15/EC and Council Regulations (EEC) No.3820/85 and 3821/85 concerning social legislation relating to road transport activities, COM (2003) 628 final of 21 October 2003.

**9 February:** The Executive Committee of the European Trade Union Confederation approves the **work programme 2006-2008** for the **European social dialogue** ([http://www.etuc.org/IMG/pdf/Depliant\\_EN\\_HD2006-2008-2.pdf](http://www.etuc.org/IMG/pdf/Depliant_EN_HD2006-2008-2.pdf)).

**13 February:** First meeting of the high-level group of experts on the social **inclusion of ethnic minorities**, established under the strategy for tackling discrimination adopted by the European Commission in June 2005 (IP/06/149).

**15 February:** The European Parliament approves by a large majority the agreement with the Council on the directive aimed at protecting workers from risks associated with exposure to **optical radiation**. European Parliament legislative resolution on the joint text approved by the conciliation committee for a directive of the European Parliament and of the Council concerning the minimum health and safety requirements regarding the exposure of workers to risks arising from physical agents (artificial optical radiation) (19<sup>th</sup> individual directive within the meaning of Article 16(1) of Directive 89/391/EEC), P6\_TA(2006)0052.

**16 February:** The European Parliament votes, at first reading, on the proposal for a **'services' directive**. It endorses the compromise reached between the PSE and PPE-DE Groups. Proposal for a directive of the European Parliament and of the Council on services in the internal market, COM (2004) 2 final of 13 January 2004.

**20 February:** Inauguration of the **'European Year of Workers' Mobility'** ([http://ec.europa.eu/employment\\_social/workersmobility\\_2006/index.cfm?language=EN](http://ec.europa.eu/employment_social/workersmobility_2006/index.cfm?language=EN)).

**21 February:** The Justice and Home Affairs Council adopts the Community Code on the **crossing of borders** in the European Union. 2709<sup>th</sup> Council Meeting Justice and Home Affairs, Brussels, 21 February 2006 (6077/06 – Presse 38).

## **MARCH**

**1 March:** The Commission adopts the regulation establishing the **European Globalisation Adjustment Fund**. Proposal for a Regulation of the European Parliament and of the Council establishing the European Globalisation Adjustment Fund, COM (2006) 91 final of 1 March 2006.



**3 March:** The Commission launches its '**Roadmap for equality between women and men 2006-2010**', which provides in particular for the creation of a European Institute for Gender Equality. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions 'A Roadmap for equality between women and men 2006-2010', COM (2006) 92 final of 1 March 2006.

**2 March:** The European Central Bank (ECB) raises interest rates in the euro zone by 25 basis points (0.25%).

**10 March:** 2714<sup>th</sup> Council Meeting Employment, Social Policy, Health and Consumer Affairs, Brussels, 10 March 2006 (6705/06 - Presse 55).

**10 March:** Spain and Portugal announce their decision to lift barriers to the **free movement of workers** from the new Member States. *Bulletin of the European Union*, No.9149 of 11 March 2006.

**13 March:** First **sectoral social dialogue** conference organised by the Commission. Items on the agenda: anticipating and managing change, intensifying social dialogue in an enlarged Europe and responding to demographic challenges (IP/06/299).

**13 March:** France decides to **gradually open up its labour market** to employees from the East in occupations where there is a demand for labour. *Bulletin of the European Union*, No.9150 of 14 March 2006.

**15 March:** The Netherlands announces the **lifting of all restrictions** on access to its labour market by nationals of the new EU Member States in Central and Eastern Europe. *Bulletin of the European Union*, No.9152 of 16 March 2006.

**16 March:** The European Court of Justice, in its **Robinson-Steele judgment**, rules that the British system of 'rolled-up holiday pay' (inclusion of annual holiday pay in the hourly or daily wage) contravenes the working time directive. OJ C 143 of 17 June 2006, page 7, *Press Release*, No.24/06 of 16 March 2006 – Judgment of the Court of Justice in Joined Cases C-131/04 and C-257/04 – Robinson-Steele, Clarke, Caulfield and others.

**17 March:** The report by the United Nations High Commissioner for Refugees (UNHCR) entitled '**Asylum Levels and Trends in Industrialized Countries in 2005**' states that the number of asylum seekers in Europe has reached its lowest level since 1988. *Asylum Levels and Trends in Industrialized Countries in 2005. Overview of Asylum Applications Lodged in Europe and non-European Industrialized Countries in 2005*, United Nations High Commissioner for Refugees, Geneva, 17 March 2006.

**23 March:** The European social partners unveil their new **work programme 2006-2008** at the tripartite social summit.

**23 March:** The German Minister for Employment confirms his intention to keep in place for three years, until 30 April 2009, the **restrictions on access by workers** from the Central and Eastern European Member States to the German labour market. *Bulletin of the European Union*, No.9158 of 24 March 2006.

## APRIL

**4 April:** The European Commission adopts an Amended proposal for a **Directive on services** in the European single market and a Communication on the **posting of workers**. Communication from the Commission, Guidance on the posting of workers in the framework of the provision of services, COM (2006) 159 final of 4 April 2006; and Amended proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM (2006) 160 final of 4 April 2006.

**4 April:** Final agreement between the European Parliament, the Council and the Commission on the **financial perspectives 2007-2013** (20060404IPR07021).

**4 April:** The European Parliament approves the report on the **integrated employment guidelines and the broad economic policy guidelines** (BEPG) (Bulletin EU – 2006-4 fr: 1.6.1).

**6 April:** Luxembourg decides to prolong by 3 years its **restrictions on the free movement of workers** from Central and Eastern European countries. *Bulletin of the European Union*, No.9169 of 7 April 2006.

**7 April:** The Commission launches its consultation of the social partners on the Community strategy concerning **health and safety 2007-2012**.

**25 April:** Signature of the first European '**multi-sector**' agreement on workers' health (crystalline silica), APFE, BIBM, CAEF, CEEMET, CERAME-UNIE, CEMBUREAU, EMCEF, EMF, EMO, EURIMA, EUROMINES, EURO-ROC, ESGA, FEVE, GEPVP, IMA-Europe, UEPG, *Agreement on Workers Health Protection through the Good Handling and Use of Crystalline Silica and Products containing it*, Brussels, 25 April 2006.

**25 April:** The Commission adopts a Communication on **social services**. Communication from the Commission 'Implementing the Community Lisbon programme: Social services of general interest in the European Union', COM (2006) 177 final of 26 April 2006.

## **MAY**

**1 May:** Expiry of the first phase of implementation of transitional measures allowing the Fifteen to restrict **access to workers** from eight new Member States to their labour markets (workers from Malta and Cyprus were not affected by this waiver). Entry into force of the **second phase 2006-2009**. Apart from the United Kingdom, Sweden and Ireland, which had not applied any transitional measures, the following countries decide to lift or ease these measures on 1 May 2006: Portugal, France, Finland, Spain (and Italy on 21 July). Germany, Luxembourg, Austria, Belgium and Denmark keep restrictions in place for the period 2006-2009 (MEMO/06/176 of 28 April 2006).

**17 May:** Official signature of the interinstitutional agreement on the **financial perspectives 2007-2013**, COM (2004) 487 final of 14 July 2004.

**24 May:** The Commission publishes a Communication entitled '**Promoting decent work for all**' in the world. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions 'Promoting decent work for all - The EU contribution to the implementation of the decent work agenda in the world', COM (2006) 249 final of 24 May 2006.

**30 May:** The EU Ministers for Economic Affairs signal their political agreement on the proposal for a **directive on services** in the internal market. 2731<sup>st</sup> Council Meeting Competitiveness (Internal Market, Industry and Research), Brussels, 29 and 30 May 2006 (9334/06 – Presse 136).

## JUNE

**1 June:** The session of the Employment and Social Affairs Council sees a further setback in the negotiations on the **working time directive**. 2733<sup>rd</sup> Council Meeting Employment, Social Policy, Health and Consumer Affairs, Luxembourg, 1-2 June 2006 (9658/06 – Presse 148).

**7 June:** The ETUC Executive Committee adopts a resolution calling for a framework directive on **services of general (economic) interest** (<http://www.etuc.org/a/2477>).

**8 June:** The European Central Bank (ECB) raises the interest rate in the euro zone by 25 basis points (0.25%).

**12 June:** The Commission adopts its **Fourth progress report on cohesion**, which gives an overview of economic and social disparities within the Union. Communication from the Commission ‘Growth and Jobs Strategy and the Reform of European Cohesion Policy’, Fourth progress report on cohesion, COM (2006) 281 of 12 June 2006.

**21 June:** Creation of the 32<sup>nd</sup> **Sectoral Social Dialogue Committee, on Steel**, by Eurofer and the EMF ([http://ec.europa.eu/employment\\_social/speeches/2006/vdp\\_060621\\_fr.pdf](http://ec.europa.eu/employment_social/speeches/2006/vdp_060621_fr.pdf)).

## JULY

**4 July:** The European Court of Justice hands down a judgment (‘**Adelener**’) interpreting Directive 1999/70 and the social partners’ framework agreement of 18 March 1999 on **fixed-term contracts**. *Press Release*, No.54/06 of 4 July 2006 – Judgment of the Court of Justice in Case C-212/04 – Konstantinos Adelener and others / Ellinikos Organismos Galaktos (ELOG).

**11 July:** The Ecofin Council completes the procedure enabling **Slovenia to adopt the euro** on 1 January 2007. On that date, therefore, Slovenia becomes the 13<sup>th</sup> Member State of the Eurogroup. 2741<sup>st</sup> Council Meeting Economic and Financial Affairs, Brussels, 11 July 2006 (11370/06 – Presse 209).

**11 July:** The Council of the European Union adopts the regulation laying down general provisions on the **European Regional Development Fund (ERDF), the European Social Fund (ESF) and the Cohesion Fund for the period 2007-2013**, and also the regulation establishing a Cohesion Fund for 2007-2013. Council Regulation (EC) No.1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No.1260/1999 (OJ L No.210 of 31 July 2006, pp.25-78) and Council Regulation (EC) No.1084/2006 of 11 July 2006 establishing a Cohesion Fund and repealing Regulation (EC) No.1164/94 (OJ L No.210 of 31 July 2006, pp.79-81).

**18 July:** Second meeting of the European Commission's **Restructuring Forum** (MEMO/06/291, Brussels, 18 July 2006).

**19 July:** The Commission adopts a Communication on policy priorities in the fight against **illegal immigration** of third-country nationals; a proposal for a Regulation establishing a **Community Code on Visas** and a proposal for a Regulation on the powers and the financing of **rapid reaction teams of border guards** who are seconded to another Member State in order to provide technical and operational assistance. Proposal for a Regulation of the European Parliament and of the Council establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No.2007/2004 as regards that mechanism, COM (2006) 401 final of 19 July 2006. Communication from the Commission on policy priorities in the fight against illegal immigration of third-country nationals, COM (2006) 402 final of 19 July 2006. Draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas, COM (2006) 403 final of 19 July 2006.

**21 July:** Italy decides to lift its **restrictions on the entry of workers** from the new Member States onto its labour market. *Bulletin of the European Union*, No.9238 of 25 July 2006.

**24 July:** The ministerial negotiations at the World Trade Organization (WTO) on the **Doha Round** are adjourned. ([http://www.wto.org/english/news\\_e/news06\\_e/mod06\\_summary\\_24july\\_e.htm](http://www.wto.org/english/news_e/news06_e/mod06_summary_24july_e.htm)).

**24 July:** The Council of the European Union formally adopts its common position concerning the **Directive on services** in the internal market. Common Position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on services in the internal market, Council of the European Union, Brussels, 17 July 2006 (1003/06).

**27 July:** The General Council of the WTO officially suspends *sine die* the **Doha Round** of trade negotiations ([www.wto.org](http://www.wto.org)).

## AUGUST

**3 August:** The European Central Bank (ECB) announces another quarter-point interest rate rise, bringing it to 3%.

**11 August:** The European Union creates the first European patrol against **illegal immigration**: effective implementation of an action plan under the aegis of the European Agency for the Management of Operational Cooperation at the External Borders (Frontex), aimed at halting the influx of sub-Saharan illegal immigrants into the Spanish Canary Islands.

## SEPTEMBER

**6 September:** The European Parliament adopts the report by José Albino Silva Penada and Proinsias De Rossa **on a European Social Model for the future** (A6-0238/2006 of 13 July 2006).

**7 September:** The European Court of Justice declares that Community law is infringed by the British 'guidelines' on **working time** (a document serving to facilitate understanding of the UK legislation transposing the 1993 European Directive on the organisation of

working time). *Press Release*, No.67/06 of 7 September 2006 – Judgment of the Court of Justice in Case C-484/04.

**20 September:** The ETUC unveils a draft framework directive on services of general economic interest. Annex to the Resolution ‘Towards a framework directive on services of general (economic) interest’ - 06-07/06/2006, Draft European framework to guarantee and develop services of general economic interest, adopted by the ETUC Steering Committee in their meeting held in Brussels on 20 September 2006 (<http://www.etuc.org/a/2829>).

**20 September:** Inaugural session of the 33<sup>rd</sup> **Sectoral Social Dialogue Committee, in the hospital sector.**

**26 September:** In its monitoring reports, the European Commission opens the door to EU accession by **Bulgaria and Romania** on 1 January 2007, whilst allowing for the possibility of safeguard measures (IP 06/1257).

**27 September:** The European Parliament adopts an own-initiative report on **services of general interest** (SGI). This report calls for ‘appropriate legal initiatives’ for SGIs, but without describing the nature of such legal initiatives. Report on the Commission White Paper on services of general interest, Rapporteur: Bernhard Rapkay (A6-0275/2006 of 14 September 2006).

## **OCTOBER**

**4 October:** The Commission adopts a Communication entitled ‘**Global Europe**’, which lays the foundations for the Union’s new commercial policy especially in the wake of the failed WTO trade negotiations (see above). The new strategy seeks to remain faithful to multilateralism while promoting bilateral agreements. Communication from the Commission ‘Global Europe: Competing in the world, A Contribution to the EU’s Growth and Jobs Strategy’, COM (2006) 567 final of 4 October 2006.

**5 October:** The European Central Bank (ECB) decides to raise the interest rate by a quarter of a point, to 3.25%.

**11 October:** The European social partners present their first joint report on the implementation of the **telework** agreement. *Implementation of the European Framework Agreement on Telemwork, Report by the European Social Partners adopted by the Social Dialogue Committee on 28 June 2006*, ETUC, UNICE, CEEP, UEAPME, Brussels, September 2006 (<http://www.etuc.org/a/2915>).

**18 October:** The European Commission proposes full liberalisation of the market in **postal services** by 2009 (IP/06/1419).

**20 October:** At an informal tripartite social summit in Lahti (Finland), the European Union calls on the social partners to take part in the debate about **'flexicurity'** (<http://www.etuc.org/a/2947>).

**24 October:** The United Kingdom and Ireland announce their intention to restrict the **free movement of Romanian and Bulgarian workers** after the two countries accede to the European Union on 1 January 2007. *Bulletin of the European Union*, No.9293 of 25 October 2006.

**24 October:** The European Parliament's Internal Market Committee goes along with the Council's common position on the **'services' directive**, Common position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on services in the internal market, Council of the European Union, Brussels, 17 July 2006 (10003/06).

**24 October:** The European Parliament and the Council establish a Community Programme for Employment and Social Solidarity - **Progress**. Decision No.1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity - Progress (OJ L 315 of 15 November 2006, pp.1-8).

## NOVEMBER

**1 November:** Founding congress of the **International Trade Union Confederation** (ITUC) in Vienna (Austria) (<http://www.ituc-csi.org>).

**6 November:** The European Commission publishes the report **'Employment in Europe 2006'**. *Employment in Europe 2006*, Office for



Official Publications of the European Communities, Luxembourg, 2006.

**7 November:** The Extraordinary Employment, Social Policy, Health and Consumer Affairs Council meeting fails yet again to agree on the revised '**working time directive**' (14634/06 – Presse 298).

**10 November:** The European Trade Union Confederation (ETUC) and the biggest trade union confederation in Russia (FNPR) adopt a joint initiative aimed at incorporating a social dimension, and social dialogue in particular, into relations between **the EU and Russia** (<http://www.etuc.org/a/3027>).

**20 November:** Volkswagen announces the **closure of its Belgian site in Forest**, causing anguish in European trade union circles and reviving the issue of restructuring in the European Union.

**22 November:** The Commission publishes a Green Paper entitled 'Modernising labour law to meet the challenges of the 21<sup>st</sup> century', COM (2006) 708 final of 22 November 2006.

**28 November:** The European Trade Union Confederation (ETUC) launches a Europe-wide petition calling on the Commission to propose a framework directive to protect and strengthen **public services** (<http://petition.etuc.org/>).

## **DECEMBER**

**4 December:** Europe's Ministers of Justice agree on the establishment of a **European Union Agency for Fundamental Rights** (15801/06 – Presse 341).

**5 December:** The European Union launches **Progress**, the new integrated programme for employment and social solidarity, endowed with a budget of some €700 million for the period 2007-2013. This programme aims to support the objectives laid down by the Social Agenda and the Union's wider strategy on jobs and growth (IP/06/1682).

**5 December:** Finland ratifies the **constitutional Treaty** ([http://constitution-europeenne.info/special/finlande\\_resultats\\_an.pdf](http://constitution-europeenne.info/special/finlande_resultats_an.pdf)).

**11 December:** The Transport, Telecommunications and Energy Council formally adopts the directive on **services** in the internal market, 2772<sup>nd</sup> Council Meeting Transport, Telecommunications and Energy, Brussels, 11-12 December 2006. (15900/06 – Presse 343).

**12 December:** The College of Commissioners adopts the Commission's annual report on the **progress of economic reform across Europe**, in the context of the revised Lisbon strategy. Communication from the Commission to the Spring European Council, Implementing the renewed Lisbon Strategy for Growth and Jobs, 'A year of delivery', COM (2006) yyy final (IP/06/1358).

**13 December:** The European Parliament approves the launch of the new **European Globalisation Adjustment Fund**.

**14 December:** The European social partners agree on the draft autonomous framework agreement on **harassment and violence at work**, an outcome of the social dialogue. *Autonomous framework agreement on harassment and violence at work – Joint proposal from the Drafting Group*, 14 December 2006.

**18 December:** the **Reach** legislation on the marketing of chemicals is formally adopted by the Council of Environment Ministers. 2773<sup>rd</sup> Council Meeting Environment, Brussels, 18 December 2006 ( 16164/06 – Presse 349 – provisional version) and (16889/06 – Presse 368).

**Chronology drawn up by Christophe Degryse  
with the assistance of Dominique Jadot.**



## List of abbreviations

<b>ACSH:</b>	Advisory Committee on Safety and Health at Work
<b>ALDE:</b>	Alliance of Liberals and Democrats for Europe
<b>APFE:</b>	European Glass Fibre Producers Association
<b>BEPGs:</b>	Broad Economic Policy Guidelines
<b>CEC:</b>	Commission of the European Communities
<b>CEEC:</b>	Central and Eastern European countries
<b>CEEP:</b>	European Centre of Enterprises with Public Participation
<b>CISA:</b>	Convention implementing the Schengen Agreement
<b>CMR:</b>	Carcinogenic, mutagenic, toxic to the reproductive system
<b>CNT:</b>	National Labour Council (Belgium)
<b>COP:</b>	Country of Origin Principle
<b>CSR:</b>	Corporate social responsibility
<b>DG:</b>	Directorate General (of the European Commission or European Parliament)
<b>DGB:</b>	Deutsche Gewerkschaftsbund
<b>EC:</b>	European Community
<b>ECB:</b>	European Central Bank
<b>ECHR:</b>	European Court of Human Rights
<b>ECJ:</b>	European Court of Justice
<b>ECOFIN:</b>	Economic and Financial Affairs Council
<b>EEC:</b>	European Economic Community

<b>EES:</b>	European Employment Strategy
<b>EESC:</b>	European Economic and Social Committee
<b>EFBWW:</b>	European Federation of Building and Woodworkers
<b>EMCC:</b>	European Monitoring Centre on Change
<b>EMCEF:</b>	European Mine, Chemical and Energy Workers' Federation
<b>EMF:</b>	European Metalworkers' Federation
<b>EP:</b>	European Parliament
<b>EPP:</b>	European People's Party
<b>EPSU:</b>	European Federation of Public Service Unions
<b>ERDF:</b>	European Regional Development Fund
<b>ERM:</b>	European Restructuring Monitor
<b>ESF:</b>	European Social Fund
<b>ETUC:</b>	European Trade Union Confederation
<b>EU:</b>	European Union
<b>EUROGROUP:</b>	Group of 13 Member States having adopted the euro
<b>FNV:</b>	Federatie Nederlandse Vakbeweging
<b>FSU:</b>	Finlands Svenska Ungdomsförbunds (Finnish Seamen's Union)
<b>Greens/EFA:</b>	Group of the Greens/European Free Alliance
<b>GUE:</b>	European United Left Group
<b>HSE:</b>	Health and Safety Executive
<b>ILO:</b>	International Labour Office
<b>ILO:</b>	International Labour Organization
<b>ITF:</b>	International Transport Workers' Federation
<b>ITUC:</b>	International Trade Union Confederation
<b>MEDEF:</b>	Mouvement des entreprises de France
<b>MSD:</b>	Musculoskeletal disorders

<b>NGO:</b>	Non-governmental Organisation
<b>NHS:</b>	National Health Service
<b>NO:</b>	Nitrogen monoxide
<b>OJ:</b>	Official Journal
<b>OMC:</b>	Open Method of Coordination
<b>PBT:</b>	Persistent, bioaccumulative and toxic
<b>PCT:</b>	Primary Care Trust
<b>PES:</b>	Party of European Socialists
<b>REACH:</b>	Registration, Evaluation and Authorisation of Chemicals
<b>SCOEL:</b>	Scientific Committee on Occupational Exposure Limits
<b>SGEI:</b>	Services of General Economic Interest
<b>SGI:</b>	Services of General Interest
<b>SMEs:</b>	Small and Medium-sized Enterprises
<b>SNEGI:</b>	Services of Non-economic General Interest
<b>SPC:</b>	Social Protection Committee
<b>SSGI:</b>	Social Services of General Interest
<b>UDF:</b>	Union pour la démocratie française
<b>UEAPME:</b>	European Association of Craft, Small and Medium-sized Enterprises
<b>UEN:</b>	Union for Europe of the Nations
<b>UNICE:</b>	Union of Industrial and Employers' Confederations of Europe
<b>vPvB:</b>	Very persistent and very bioaccumulative
<b>WTO:</b>	World Trade Organization
<b>WTR:</b>	Working Time Regulations



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