

# **Social developments in the European Union 2008**

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Edited by  
Christophe Degryse

**etui.**

## Social developments in the European Union 2008



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**Tenth annual report**

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edited by  
Christophe Degryse

European Trade Union Institute (ETUI)  
Observatoire social européen (OSE) asbl

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## Preface

2008 will, without a doubt, go down in the annals of world economic history. What neither ideology, nor the political balance of power, nor even 'people power' had been able to bring about has been triggered by the excesses of financial capitalism itself: a radical reappraisal of the 'casino economy' which has evolved over the past thirty years. Although 2009 is opening on a scene of devastation, as amply demonstrated by this edition of 'Social Developments in the EU', the year is at the same time opening on new debates, unthinkable until very recently.

This new scope for debate contains great potential for change in the European Union. The rediscovery of a public role in the economy should help to stabilise and revitalise the economy, but in other ways than before. For the credit crunch must not be allowed to mask today's other major challenge: the much-needed transition to sustainable development and measures to combat climate disruption.

Politics – national, European and international – is therefore (back) at the centre of a game that is wide open, in which it has to redefine its own role. The challenges confronting us in this context, where there is everything to play for and certainties no longer exist, are immense and unprecedented – and hence fascinating. Two risks arise, however: firstly, that the 'return of the State' might be synonymous with national navel-gazing and, secondly, that this 'each to their own' attitude, pursued in haste, might focus on unsustainable activities. Thus, although the new scope for debate contains great potential for change, the changes made will not necessarily lend themselves to the type of sustainable development made essential by climate change.

The European Union has an important part to play in this context: not only because it is in essence an exercise in cooperation, and cooperation is what the Member States need now, but also because the EU is the appropriate level at which to determine the content, thrust and meaning of this new model of growth.

Above all, finally, it is undoubtedly at European level that the most valid contribution can be made to an often neglected aspect of the transition to a low-carbon economy: its social dimension. It has to be admitted, in fact, that this issue has not yet come into its own. The social parts of the European initiatives underpinning this transition – whether it be the energy/climate package or the Action Plan for sustainable consumption, production and industry – are anything but a priority at present. It is to be feared that, unless the social dimension gains greater prominence, Europe's population will not lend its support to the transition.

This tenth edition of 'Social Developments in the EU' aims to concentrate attention on this specific aspect of the fundamental issues confronting the European Union.

Maria Jepsen, Philippe Pochet and Christophe Degryse

# Foreword

**Christophe Degryse**

On the international scene, 2008 saw the economic trends observed in last year's edition of this volume gather pace dramatically and even reach breaking-point. The first part of the year was extremely eventful: rising energy and raw materials prices, a global food crisis and rioting caused by hunger (see article by Olivier De Schutter). But in the autumn it was financial capitalism that was plunged into crisis, with the collapse of the US bank Lehman Brothers and the public bail-out of major banking and financial institutions in both the United States and Europe (see article by Jacques Sapir). A domino effect gradually brought down the whole of the 'real' world economy. The winter of 2008-2009 opened on a scene of devastation. All the indicators were red: growth forecasts had been revised sharply downwards and the traditional 'engines' were entering a recession, government deficits were going through the roof, deflation loomed, exports were plummeting, whole branches of industry were on the verge of bankruptcy (see article by Patrick Loire and Jean-Jacques Paris), and ever more jobs were being axed.

We do not intend to recapitulate on the causes of the crisis, as they were amply covered in *Social Developments in the European Union 2007*<sup>1</sup>. To our minds, the main breaking-point of 2008 had to do not with the nature of the crisis, which had been predicted and analysed by many experts even before it occurred, but with the political response given to the social dimension of the crisis – both before and after – and its implications for policies to promote sustainable development and combat climate change.

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1. See in particular the contribution by Pierre Defraigne: 'The need for capital regulation in Europe'.

## Some political aspects of the crisis

What changed fundamentally in 2008 was the role of the State and of public regulation, a role asserted by one western government after another as the year progressed. From the partial nationalisation of UK financial institutions announced by London in October, to the creation by Madrid of a special fund intended to ‘support the financing of the financial system’, via the gigantic financial and industrial bail-outs in countries such as the United States, France and Germany, governments everywhere decided to roll up their sleeves.

This emergency public intervention in the economy was accompanied by intense political activity – national and European – to ‘regulate’ the system, improve its governance and transparency, clamp down on hedge funds, revise the rules on capital requirements for banks, review the operation of ratings agencies and guarantee individual savers’ bank deposits, but also, in some countries at least, to curb executive pay packets and limit, if not eliminate, golden parachutes. The Financial Times economic columnist Martin Wolf even went so far as to praise ‘Keynes’s genius – a very English one’, and to enumerate lessons we should learn about market inefficiencies, pointing out in passing that nowadays ‘nobody believes in the monetary targeting proposed by (...) Milton Friedman’<sup>2</sup>. Herein lies the major ideological about-turn of 2008, and without doubt of the last three or four decades.

But the full effects of this rapid about-turn have certainly not been felt yet, and the European Commission seems to have been suddenly caught unawares by the new course of events. The Commission, one of whose duties is to contest State aid and distortions of competition, had to transform itself into a virtuoso of casuistry to give its blessing to the bail-out plans and other State aids, without viewing them either as distortions of competition or as public assistance for lame ducks<sup>3</sup>. This

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2. ‘Keynes offers us the best way to think about the financial crisis’, *Financial Times*, 23 December 2008.

3. ‘Competition policy provides a vital contribution to a coordinated reaction, whilst preserving the possibility for Member States to intervene where necessary according to national conditions’, Communication from the Commission ‘From financial crisis to recovery: A European framework for action’, COM (2008) 706 final of 29 October 2008. According to its own interpretation, the Commission is ‘saved’ by Article 87(3b) of the EC Treaty, which

caused economists such as Elie Cohen<sup>4</sup> to say that the usual competition rules have now become a 'laughing stock'. By the same token, the Commission has gingerly joined in the debate about the systemic risks posed by hedge funds and the need for an 'appropriate regulatory initiative' at European level, while Commissioner McCreevy is backpedalling furiously.

Moreover, the economic recovery plans put forward by the EU Member States will create significant public deficits and increase government debt, a move which, in normal times, would have attracted criticism from the Community institutions under the Stability and Growth Pact. Of course, it is said, this is a temporary state of affairs and a response to exceptional circumstances. The fact still remains that in 2008 rules hitherto presented as imprescriptible began to appear flexible. Similarly, notions such as 'too big to fail' have cast an odd light on the orthodoxy of pure and perfect competition. Ultimately, this crisis would seem to be a reason for tearing up whole sections of the economic policy theory books.

### Some social aspects of the crisis

The social aspects of the financial and economic crisis became a subject of discussion as from the autumn of 2008. We began to read, see and hear interviews with the first traders to lose their jobs in the City or on Wall Street. The crisis was spreading to the real economy, and at that stage we started seeing reports of redundancy schemes and empty order books, followed by bankruptcies and lay-offs. All of these after-effects are likely to prove disastrous in 2009, if the forecasts are to be believed.

It is however necessary to stress one particular aspect, which predated the subprime mortgage crisis and is often overlooked by most observers: the crisis concerning methods of distribution. Two reports

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authorises State aid intended 'to remedy a serious disturbance in the economy of a Member State'.

4. Director of research at the CNRS (France), in *Le Monde*, 19 November 2008.

published in October 2008, one by the ILO and the other by the OECD<sup>5</sup>, demonstrate that pay inequality worldwide has been growing for more than twenty years, poverty is on the rise, and we are witnessing a well-documented decline in earnings as a share of added value. Whereas high salaries are rising, middle incomes are stagnating or even falling. This trend has been particularly marked in the United States ever since the Reagan era, when wage-cutting policies led to the emergence of large numbers of working poor. And there is a link between this impoverishment and the proliferation of ‘toxic’ financial products: basically, products which damage the solvency of the final debtor (see Jacques Sapir’s contribution to this volume).

The avalanche of financial analyses produced throughout the year has devoted very little coverage to this social aspect from a political perspective. If it is accepted that the roots of the financial – and now economic – crisis lie in a crisis of employment and methods of distribution, then the political responses must be adapted accordingly. The regulation, transparency and oversight of financial institutions must of course be stepped up, but in doing that we are addressing only technical and operational problems, not the social imbalances which helped to make this crisis possible (in addition to a series of other factors, of course). Let us ask ourselves a question: were the day to come when the banks were fully transparent and properly supervised, would they grant mortgages to working-poor families in need of somewhere to live? If the answer is no (because it would be too risky), it means that the banks are being bailed out at the cost of plainly and simply abandoning those workers at the bottom of the social scale, who will no longer be able to count on either wages or loans to put a roof over their heads. So should the answer be yes? In actual fact, the political response should be to ensure that the working poor no longer exist. Everyone should be able, through work and social protection, to obtain sufficient resources to house, feed and look after themselves. The fact that this simple statement still needs to be made in the 21<sup>st</sup> century shows just how urgent it is for us to shake off the past 30 or 40 years of extreme liberalism.

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5. ‘Growing Unequal?’, report by the Organisation for Economic Co-operation and Development, 21 October 2008 ([www.oecd.org/els/social/inequality](http://www.oecd.org/els/social/inequality)) and ‘World of Work Report 2008’ by the International Labour Organisation, 16 October 2008 ([www.ilo.org](http://www.ilo.org)).

But how are we to do this? None other than the very liberal-minded Financial Times published an editorial in January 2009 entitled 'Reinventing the European left'<sup>6</sup>, showing the extent to which the political battle-lines are now breaking down. Its view, in short, is that all of the European left's traditional demands (public investment, recovery plans, support for jobs, etc.) have now been taken up by liberals and conservatives as a way of extricating the economy from the deep crisis into which financial capitalism has plunged it. By putting these demands into practice, the right has, paradoxically, considerably weakened the left – as is clear from the situation in France after Mr Sarkozy's 'super-presidency' of the EU during the second half of 2008. Indeed, almost all the old slogans of the left are now being chanted by a chorus of European leaders, including the liberals among them: controls on financial speculation, market regulation, Keynesianism and a stronger role for government in the economy, lower interest rates, abolishing tax havens, safeguarding households' purchasing power, curtailing excessive executive pay and golden parachutes, and so the list goes on. In sum, the left's platform is being put into practice by right-wingers who until now tirelessly vaunted the merits of totally unfettered capitalism but are today bent on switching from *laissez-faire* economics to restraint and cooperation. We shall see what comes of it – especially as the aim is not so much to improve the lot of the working poor, of people in casual jobs or on the margins of society, of working families, pensioners, the unemployed and people who are sick or disabled, as to bail out a system which has itself become 'too big to fail'.

In this bizarre game of political musical chairs, Europe's social-democrats are offering few truly credible alternatives that are built on and backed by robust alliances. The most urgent task right now is of course to revive the economy and preserve jobs. But, at a time when we are struggling with climate change, are there no other options than to revive a former model which has proved incapable of adjusting to social and environmental requirements? We have here what is undoubtedly one of the major differences from the Depression of the 1930s: over and above a financial, economic and social crisis, humanity is now having to grapple with an incipient climate crisis whose long-term outcomes will be unprecedented.

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6. 'Reinventing the European left', *Financial Times*, 6 January 2009.



## Some environmental aspects of the crisis

Climate concerns are making progressive thinkers wonder how best to overcome the crisis. Some of them see this crisis as an opportunity for a large-scale purge, enabling the system – cleansed and stabilised – to return to normal and resume its creation of growth and jobs. Others would like this purge to be accompanied by a redirection of the real economy, giving rise to green capitalism based on climate concerns. Others still see it as the collapse of one system and the beginning of its replacement by another (but by what system?).

If humanity is to survive, it now faces an entirely new obligation: that of managing the delicate equilibrium of its own biotope. This radical change of context will without doubt be the biggest political challenge of the years ahead. The problem is that, whereas the characteristics of green capitalism are easily identifiable ('clean' cars, energy saving, etc.), it is much more difficult to determine the characteristics of a 'new European model of sustainable development'. Its basic outlines are obvious, of course: preserving and re-establishing the quality of the environment in agriculture, industry and services. But is this really a new model, or is it a greening of the old one? In other words, are we going to see highly competitive green businesses fighting for a share of burgeoning green markets and publishing fine reports about sustainable development on glossy paper? (By way of example, the first hedge fund devoted to speculating on the carbon market was due to be launched in London in January 2009.) Or should we be putting an end to this headlong pursuit of progress, however green it may be, in favour of development centring on cooperation – as opposed to competition – and on long-term benefits – as opposed to instant profit – so as to preserve the environment in a broad sense and promote social cohesion? Such development would of course be reflected by indicators other than GDP, a very narrow gauge. The characteristics of such a model still remain vague, unfortunately, and the time does not yet seem ripe to firm it up (radical changes in paradigms and indicators, and in international alliances and accords, for example). But we should surely be directing our attention to these matters as of now.

Just as the Great Depression made it possible to inject a dose of social policy into the capitalism of the next 30 or 40 years, the question today is whether the recession the world is entering in 2009 will make it

possible to inject a dose of green policy into the capitalism of the forthcoming 30 or 40 years. Or else whether the political, economic, social and environmental players will be capable of building this new European model of sustainable, credible and solid development on the ruins of the present day.

Be that as it may, the European Union will need to learn the lesson that it is no longer economic ‘growth’ that will contribute to protecting the environment and promoting social policy, as the Kok report asserted in 2004. No; ‘growth’ – or rather sustainable development – will in future be created by measures to combat climate change, protect the environment and promote social cohesion (health, education, aid for individuals, public transport, housing etc.)<sup>7</sup>. This way of thinking takes us away from green capitalism and its efforts to adapt to the new climate constraints; what is needed, more broadly, is a paradigm shift away from competition to cooperation, from short-term growth to long-term development<sup>8</sup>.

The growing significance of international concerns has prompted us to devote the first part of this edition to ‘Europe in the world’. Given the way in which certainties were shattered in 2008, we have chosen to open up a general debate through contributions which do not necessarily reflect the editors’ opinions. Part One deals with the following topics:

- the global food crisis and European policy-making (agriculture, trade and development), by Olivier De Schutter;
- the international financial crisis and methods of distribution, by Jacques Sapir;
- the impact of climate change policies on the automotive industry, by Patrick Loire and Jean-Jacques Paris.

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7. See the report *Green Jobs – Towards Decent Work in a Sustainable, Low-Carbon World*, UNEP/ILO/IOE/ITUC, September 2008.

8. For a discussion of these issues, see C. Degryse and Pochet, P. (2009) “Changer de paradigme : la justice sociale comme prérequis au développement durable”, *Working Paper*, WP 2009.02, ETUI, Brussels.

In Part Two we shall look more specifically at social affairs in Europe in 2008, with the following contributions:

- the new social agenda and the directives on working time and temporary work, by Philippe Pochet and Christophe Degryse;
- European Works Councils, by Romuald Jagodziński;
- the cross-industry social dialogue, by Isabelle Schömann;
- the draft healthcare directive, by Rita Baeten;
- the question of establishing a specialist social affairs tribunal within the ECJ, by Marie-Ange Moreau;
- the European Court of Justice and the Ruffert and Luxembourg judgments, by Dalila Ghailani.

The two most striking social policy developments of 2008 in Europe were, firstly, the evolving case-law of the ECJ in a series of cases related to the posting of workers and, secondly, the revival of a legislation-centred social agenda: the directives on temporary work, working time and European Works Councils.

The contributions by Marie-Ange Moreau and Dalila Ghailani concern judgments of the ECJ seeking to determine the balance between freedom to provide services in the EU and the protection of workers' social rights. These judgments, coolly received in national and European trade union circles, caused us to wonder whether it would be useful and worthwhile to create a sort of labour court at European level, along the lines of those existing in various forms in several Member States, to rule specifically in labour disputes. The obstacles are many and varied, but it would in any event seem 'useful to continue thinking not only about the procedural implications of a specialisation in EU social law, but also about the method of construction that the social dimension of the European Union will require in the future', as Marie-Ange Moreau puts it.

With respect to the social agenda, the main events in 2008 were the adoption of the directive on temporary work, the accelerating pace of

negotiations on the ‘working time’ directive (see Philippe Pochet and Christophe Degryse) and the revision of the directive on European Works Councils (see Romuald Jagodziński). The ‘temporary work’ directive introduces the principle of equal treatment for temporary workers as from the very day of their recruitment, with limited possibilities for derogation from that principle provided that the social partners are involved. The ‘working time’ directive was discussed throughout the year: the limitation of working time to 48 hours per week and the abolition of the opt-out three years from now are two particularly contentious issues in the dialogue between the European Parliament and the Council. The outcome will become known in 2009. Lastly, as concerns the revision of the European Works Councils directive, a final agreement was reached in the Council on 17 December 2008. The new directive, replacing that of 1994, will enter into force two years from now.

2008 also marked the end of the European cross-industry social partners’ work programme (2006-2008). The time has therefore come to take stock (see Isabelle Schömann). To complete this overview, it only remains for us to mention the draft directive on healthcare, certain to be a subject of debate throughout 2009 (see Rita Baeten).

Turning to national political life in Europe, in 2008, it was marked in **Italy** by the resignation of Prime Minister Romano Prodi in January. An early general election was called for 13 and 14 April. The left-wing coalition collapsed, and Silvio Berlusconi was victorious. For the first time in the history of the Italian Republic, Socialists, Communists and Greens alike disappeared from Parliament. At the presidential elections held in **Cyprus** on 17 and 24 February, the success of the Communist candidate, Demetris Christofias, revived hopes of a negotiated solution with the Turkish Cypriots. In **Spain**, Mr Zapatero’s Socialists won a narrow victory at the general election held on 9 March. Also on 9 March, in **Malta**, the Nationalist Party, in power for the past twenty years, defeated the Labour Party in a general election. In **Austria**, an early general election was called for 28 September. The far right achieved a historic victory; after eight weeks of negotiations, the People’s Party and the Social-Democrat Party reached an agreement on the renewal of the ‘grand coalition’. A general election held in **Lithuania** on 26 October resulted in strong gains for populist parties. The Conservative opposition party led by Andrius Kubilius gained the

most votes and was tasked with forming a new government. At the general election which took place in **Romania** on 30 November, the Social-Democrat Party defeated the Democratic-Liberal Party of President Trajan Basescu. The new Romanian Prime Minister, Emil Boc, heads a centre-left government formed at the end of December.

Of these six general elections, only three resulted in a change of administration (Italy, Lithuania and Romania), which makes 2008 a remarkably stable year politically in a Europe of 27 (with the notable exception of Belgium which, amidst a never-ending period of instability, went through three changes of prime minister during the course of the year). The overall balance of power within the EU continues to lie with liberals and conservatives: 18 governments out of 27, or two thirds, are on the right or centre-right; nine are on the left or centre-left. What is more, populist parties are still gaining ground in various countries (e.g. Austria, Lithuania and Belgium).

Nevertheless, the most important election of the year for Europe was indisputably the US presidential election. That poll stood out in sharp contrast with the political landscape of the 'old continent': a record voter turn-out, especially among ethnic minorities, a reinvigoration of politics and, finally, the election of the first ever black man, Barack Obama, to the country's highest office. As *Le Monde* put it, who would have believed the American people capable of taking such a free and mature decision, after having elected George Bush, the Republican from Texas, twice over?<sup>9</sup>.

This new US administration gives the European Union grounds to hope for a strengthening of transatlantic cooperation on a range of subjects dear to the EU: measures to combat global warming, conflict and diplomacy in the Middle East, economic recovery, financial governance, human rights (the Guantánamo Bay detention camp), etc. Expectations are running high, and many observers predict at least partial disappointment. It is however a fact that similar political agendas on both sides of the Atlantic cannot fail to strengthen not only the aims but also the means of achieving them. In that sense, Barack Obama's election is good news for the European Union.

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9. *Le Monde*, 9 January 2009.

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## National social affairs

Social policy matters featured prominently within the Member States in 2008. Following the violence in French suburbs, violent demonstrations erupted in Denmark in February. A combination of discrimination, idleness and exclusion brought young people of immigrant origin out onto the streets of Copenhagen. Protests also erupted among university and school students in Italy, against the new Berlusconi government. At the end of the year, it was the turn of young people in Greece to vent their anger, in rioting that lasted several long days. European youngsters seem increasingly to be expressing deep-seated disquiet about education, social integration, the future (unemployment, insecure jobs and low pay), the establishment and politics. Our societies should sit up and listen. What do they have to offer?

Last year likewise saw a number of labour demonstrations in favour of purchasing power (Belgium), against the rise in oil prices (fishermen and road hauliers in France and Italy), a general strike (Greece), a teachers' strike (United Kingdom), wage demands in central and eastern European countries, simmering discontent among German civil servants, and so the list goes on. Workers at Dacia (a subsidiary of Renault) in Romania, no longer wanting to be 'slaves in the European Union'<sup>10</sup>, obtained a 28 % increase in their basic pay. Teachers in Bulgaria mounted one of the longest-lasting protest actions<sup>11</sup>. In Denmark it was nursery nurses, health workers and educationalists who engaged in one of the longest ever labour disputes in the public sector<sup>12</sup>. In April, some 35,000 trade unionists from across Europe responded to a call from the European Trade Union Confederation (ETUC) and held a demonstration in Ljubljana (Slovenia), to demand an increase in wages and purchasing power and a fairer distribution of profits. More than 50 union organisations from 30 or so countries joined the march.

In the second half of the year, however, the fear of unemployment came to the fore. A very sudden economic downturn, and a rise in unemployment, occurred particularly in the United Kingdom, Ireland and Spain. Between

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10. *Le Monde*, 13 April 2008.

11. <http://www.eurofound.europa.eu/eiro/2007/09/articles/bgo709039i.htm>.

12. <http://www.eurofound.europa.eu/eiro/2008/04/articles/dko804029i.htm>.

August and October, the number of British people out of work rose by 137,000, 40 % of them young workers. Unemployment in Ireland, having stayed below 5 % since 2001, had already climbed to 7.8 % by the end of November. In Spain, according to end-of-year government estimates, having fallen below 8 % in 2007 the jobless figure was heading for 12.5 %. In October and November alone, Spain registered more than 360,000 additional jobseekers. Already in August, Eurostat announced the first rise in unemployment for four years for the euro zone as a whole. One after another, the economic indicators nosedived. The IMF was called to the rescue in October, first by Iceland, then by Ukraine, then Hungary and then Latvia which, after years of exceptional growth, was compelled to cut public sector workers' pay by around 15 %, freeze pensions and raise VAT. Eurostat reported in November that 17.466 million men and women were out of work in the EU 27, 12.180 million of them in the euro zone (that is, one million more than in November 2007). During the first few weeks of 2009, Greece, then Spain and then Portugal were downgraded by the main financial ratings agency. As we said at the start, 2009 opened on a scene of devastation.

January 2009.

# **The global food crisis and the EU: how to rescue a system that failed**

**Olivier De Schutter**

## **1. The global food crisis: a diagnosis**

The world has experienced during the past year the dramatic consequences of the volatility of food prices on the international markets. During the first three months of 2008, international nominal prices for all major food commodities reached their highest levels in nearly 50 years, while prices in real terms were the highest in nearly 30 years. Social unrest developed in over forty countries as a result. The number of people going hungry has dramatically increased in 2007-2008: approximately 970 million people are hungry in the world today, compared with 848 million in 2003-2005. And this number will very probably not diminish as a result of lower prices in the immediate future, especially since a return to lower prices means that one of the most vulnerable categories – small-scale farmers, who constitute 50 % of the hungry – will be even further marginalised and, in some cases, forced to abandon farming.

The policies pursued by OECD countries, both in the past and today, are directly responsible for this state of affairs. The global food crisis should have led us to fundamentally rethink a system of agricultural production and distribution which has failed to alleviate hunger. But, as the reactions of the EU have shown, it has not. We seem unable not only to think outside the dominant paradigm, but even to understand certain basic facts about hunger and where it stems from. We seem unable to see food as human right: instead, we believe that seeing it as a commodity will solve the problem. It will not.

The EU has responded actively, and with impressive means, to the challenge of the global food crisis. But its answers, like those of the international community as a whole, are based on an incomplete diagnosis. The standard approach is to consider that the crisis confronts us with the



question of whether, in the future, agriculture will be able to feed the planet. Population growth, combined with the switch to more protein-rich diets in a large proportion of developing countries which are succeeding in their fight against poverty, increases the pressure on the supply side of the global equation. Climate change is, in addition, threatening the ability of entire regions, particularly regions living from rainfed agriculture, to maintain current levels of agricultural production. In sub-Saharan Africa, as well as in Eastern Asia and South Asia, climate change will affect rainfall, increase the frequency of droughts and average temperatures, and threaten the availability of fresh water for agricultural production. The UNDP reports an estimate according to which, by 2080, the number of additional people at risk of hunger could reach 600 million, as a direct result of climate change (UNDP, 2007: 90; citing Warren *et al.*, 2006). In sub-Saharan Africa, arid and semi-arid areas are projected to increase by 60–90 million hectares, and the Intergovernmental Panel on Climate Change has estimated that in southern Africa yields from rainfed agriculture could be reduced by up to 50 % between 2000 and 2020 (IPCC, 2007: Chapter 9). Another study estimates that, while losses in agricultural production in a number of developing countries, particularly in sub-Saharan Africa, could be partially compensated by gains in other regions, the overall result could be a decrease of at least 3 % in productive capacity by the 2080s. But the losses could be 16 % if the anticipated carbon fertilisation effects fail to materialise, so that ‘a prudent range for impact on global agricultural capacity by the 2080s (...) [could] lie in the range of reductions of 10 to 25 %’, with the most severe losses in agricultural productivity being located in developing countries, particularly in Africa and Latin America (Cline, 2007: 96)<sup>1</sup>.

The first challenge, then, is to produce more to meet growing needs. There is no doubt that considerable efforts must be made in this direction. We cannot stop here, however. For another and equally important challenge has to do with accessibility of food for the poor and the marginalised. Producing more food will not assist them in purchasing food if their incomes remain too low.

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1. See also Lobell *et al.* (2008) showing, on the basis of an analysis of climate risks for crops in 12 food-insecure regions, that South Asia and southern Africa are two regions which, without sufficient adaptation measures, will likely suffer negative impacts on several crops that are important to large food-insecure human populations.

Who are the hungry? The majority of hungry people in the world are located in developing countries, live in rural areas, and depend on agriculture directly or indirectly for their livelihoods. They are hungry because they are poor: they are mostly net buyers of food<sup>2</sup>, and their incomes, which are on average significantly lower than those of non-rural populations<sup>3</sup>, are insufficient to buy food which they do not produce themselves. 50 % of the hungry are smallholders, living off 2 hectares of cropland or less. 20 % are landless labourers. 10 % are pastoralists, fisherfolk and forest users. The remaining 20 % are the urban poor (UN Millennium Project, 2005: 6). Any reform to the food system which does not benefit these categories is likely, far from solving it, to lead to further violations of the right to food.

Our challenge today is not simply to produce more food. It is to produce it in a way which preserves the environment, particularly by reducing the amount of greenhouse gas emissions which contribute to global warming; and it is to organise such production so that it raises the incomes of those who are, today, most food insecure – smallscale farmers and agricultural labourers in developing countries –, and so that it allows States to adequately protect the urban poor. Nothing short of a fundamental revision of the current system of food production and distribution is required. Commendable as they are, the answers provided by the EU remain short-term. They strengthen the existing system, when what is needed is to revise it. And they are guided by technocratic approaches, which ignore the need to treat hunger as the result of social inequalities and North-South imbalances.

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2. The World Bank (2007: 109, box 4.7.) compares the representation among poor smallholders of net buyers of food, people who are self-sufficient, and net sellers: in all seven countries surveyed (Bolivia, Ethiopia, Bangladesh, Zambia, Cambodia, Madagascar and Vietnam), the first two categories are a strong majority among poor smallholders.
  3. Aksoy (2005: 17-19) noting that '[o]n average, farmers are poorer than nonfarmers in developing countries (...). In all developing countries, rural households have lower average incomes than nonrural households. The ratio of rural incomes to nonrural incomes ranges from 40 to 75 %, a relationship that remains consistent across groups of developing countries'.

## **2. The EU's answers**

The EU's initial responses to the sharp increases in food prices on the international markets consisted in seeking to limit price volatility on agricultural markets by alleviating the tension between supply and demand. This led to the adoption of measures such as the sale of intervention stocks, the reduction in export refunds, the removal of the set-aside requirement for 2008 – a measure which is predicted to free up around 2.9 million hectares for grain production and increase this year's harvest by around 10 million tonnes –, the increase in milk quotas, and the suspension of import duties on cereals. In June 2008, the European Council announced its intention to continue to move towards a more 'market-oriented' Common Agricultural Policy, making farmers more responsive to price changes (European Council, 2008). These reactions were premised on the idea that the volatile prices are the result of an inability of supply to react to market signals; and that, by freeing up supply, the underlying tensions would be removed.

A similar diagnosis guided the initiatives adopted by the EU in order to help developing countries cope with the global food crisis. These initiatives relate to three main issues, which were central to international discussions on the global food crisis in 2008. They are: the development of bio- or agrofuels, i.e., the use of plants such as palm oil, rapeseed, maize or sugar cane, to produce bio-ethanol or bio-diesel, particularly for transport; the attempt to complete successfully the Doha round of negotiations within the World Trade Organisation; and the establishment of a new fund to support agriculture in developing countries.

These are welcome initiatives. But they all stop short of putting forward structural solutions to the crisis. They avoid tackling the real imbalances of power in the food production and distribution chain, between large economic actors and small-scale producers, and between industrialised and developing countries. They do not question existing consumption patterns. In sum, they seek to rescue a system which has failed and will fail again, stopping short of addressing the structural causes of the crisis and changing the dominant paradigm.

### 3. Towards sustainability in the production and consumption of agrofuels

The promotion of an increased use of agrofuels as a substitute for fossil fuels in the transport sector has played a significant role in the global food crisis<sup>4</sup>, by contributing significantly to raising the prices of certain agricultural commodities on international markets<sup>5</sup>. The IMF has estimated that the increased demand for biofuels accounted for 70 % of the increase in maize prices and 40 % of the increase in soybean prices (Lipsky, 2008). A July 2008 study on the factors having led to the increase in internationally traded food prices from January 2002 to June 2008 concluded that ‘the most important’ of these was the large increase in biofuels production from grains and oilseeds in the US and the EU: it estimated that, while energy prices and related increases in fertiliser prices as well as the weak dollar could explain 25-30 % of the increase in food commodity prices, the remaining 70-75 % could be attributed to agrofuels production, taking into account the fact that increased demand for agrofuels has attracted speculative investment by non-commercial investors in food commodities (Mitchell, 2008).

The consequences of the price impacts of the sudden increase in demand for agrofuels should not be underestimated. For each percentage point increase in the real price of staple foods, the number of people suffering from undernourishment increases by 16 million (Rosegrant *et al.*, 2006). Indeed, the food crops currently used to produce ethanol are also the crops that form the largest part of the diet of poor people, as maize, sugarcane, soy, cassava, palm oil and sorghum provide around 30 % of mean calorie consumption by people living in chronic hunger (Naylor *et al.*, 2007: 41). It is true that, if they can

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4. A detailed analysis is presented in my report to the Human Rights Council on the global food crisis: see ‘Building resilience: a human rights framework for world food and nutrition security’, report to the Human Rights Council in accordance with Resolution S-7/1, adopted by the Human Rights Council on 22 May 2008 at its Special Session on the global food crisis (UN doc.A/HRC/9/23, 8 September 2008). See also Eide (2008).
  5. An IFPRI study suggests price increases of between 16 and 43 % at best and between 30 and 76 % at worst, depending upon the commodity (Rosegrant *et al.*, 2006; see also Cohen *et al.*, 2008). Others consider that in the medium term, when markets operate well, the impact on prices will be lower, averaging 5 % for most crops, although with significantly higher increases for certain feedstock crops like oilseeds, maize and sugar cane (*The Gallagher Review of the indirect effects of biofuels production*, The Renewable Fuels Agency, July 2008, pp.57-58).

benefit rural households which are net food sellers and if net food buyers are protected by targeted measures aimed at increasing their purchasing power, an increase in the demand for primary agricultural commodities and the resulting increase in prices may have benevolent effects, particularly in a dynamic perspective. Under current conditions however, the negative impacts far outweigh the positive ones. There are three reasons for this.

First, in many developing countries, governments were unprepared to face the sudden price rises, whose impact could not be cushioned in the absence of sufficiently robust safety nets shielding net food buyers from higher prices. Second, the production of agrofuels (particularly of bioethanol, which currently constitutes the largest proportion) tends to reinforce land concentration and the development of large-scale agricultural holdings, it places additional pressure on smallholders, and is a threat to the use of land by indigenous peoples. It increases the competition for cropland and for water resources, and represents a threat to biodiversity. Though it may create employment (although this should be weighed against the risk of livelihoods being destroyed as a result of the development of agrofuels production), labour conditions in the large plantations which are typical of the agrofuels industry are often exploitative. Third, while the demand for agrofuels is in the industrialised countries, the production of agrofuels is more efficient and cost-effective in developing countries, given their natural comparative advantage of producing them in the absence of market-distorting measures. In these countries, agrofuels encourage a form of economic development based on the expansion of cash crops for export. This may further pit the interests of a small minority of actors producing such export crops against the interests both of other agricultural producers and of other population groups, the result of which may be further inflation of food prices.

Under current conditions therefore, the development of agrofuels for transport is not sustainable. Yet this development takes various forms and it would be irresponsible to condemn them out of hand. Bioenergy production to meet domestic needs and limit dependency on expensive oil imports cannot be likened to large-scale agrofuel production for export purposes; bioethanol produced from sugarcane cannot be likened to bioethanol produced from maize, or from other crops such as cassava, wheat, sweet sorghum and sugar beet, and biodiesel produced

from rapeseed oil cannot be treated on a par with biodiesel from palm oil or from soybean oil. Indeed, not only should distinctions be made between different plants used as feed for fuel; in order to evaluate the impacts on the right to food, the production methods used in each industry should be taken into account, since they have different impacts on the creation of employment, on the environment, and on food security.

Therefore, rather than dismissing outright the use of liquid agrofuels in the transport sector (or even that of energy from biomass as a whole, as an alternative to reliance on fossil fuels), I propose that we seek to achieve a consensus on international guidelines covering the production and consumption of agrofuels. In addition to environmental standards, such guidelines should incorporate the requirements of human rights instruments, particularly as regards the right to adequate food, the right to adequate housing – given the risks of forced evictions and displacements for the production of agrofuels –, the rights of workers (including in particular the right to fair pay and to a healthy working environment), the rights of indigenous peoples, and women's rights. The international community has recognised the need to make progress towards such a consensus at international level, particularly in the Final Declaration of the High-Level Conference on World Food Security: The Challenges of Climate Change and Bioenergy, convened in Rome on 3-5 June 2008<sup>6</sup>.

It is in this broader context that the reactions of the EU should be evaluated. In June 2008, at the height of the global food crisis, the European Council recognised the need to evaluate the environmental and social impacts of the production and consumption of agrofuels, and to develop sustainability criteria for the production of first-generation agrofuels (European Council, 2008: para. 30). At the time, the European Commission had already proposed the adoption of a directive on the use of energy from renewable sources, to establish an overall binding target of a 20 % share of renewable energy sources in energy consumption and a 10 % binding minimum target for biofuels in

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**6.** See para. 7(f), of the Declaration, calling upon 'relevant inter-governmental organizations, including FAO, within their mandates and areas of expertise, with the involvement of national governments, partnerships, the private sector, and civil society, to foster a coherent, effective and results-oriented international dialogue on biofuels in the context of food security and sustainable development needs'.

transport to be achieved by each Member State (CEC, 2008). This was seen as a contribution to restricting emissions of greenhouse gases, responsible for climate change, as well as a way to enhance the energy security of the EU, since it would become less dependent on increasingly volatile conventional sources of energy. A 2003 directive (European Parliament and Council of the European Union, 2003) had already sought to promote the use of biofuels or other renewable fuels for transport, setting a target of 5.75 % of biofuels in all petrol and diesel for transport placed on the market by 31 December 2010. But that target was considered unlikely to be achieved: the expectations were for a share of about 4.2 %, which made it necessary to renew and strengthen this commitment. The 2008 proposal included binding obligations on Member States regarding the sustainability of biofuels and other bioliquids. The harmonisation of such criteria would ensure at the same time that no criteria adopted individually by Member States would result in obstacles to trade between Member States.

A compromise was reached on the proposal of the European Commission in December 2008. The compromise confirms the target of at least 10 % of renewables in the transport sector by 2020. The so-called ‘second-generation’ biofuels produced from waste, residues, or non-food cellulosic and ligno-cellulosic biomass will be double-credited towards that target. In addition, in order to be counted, biofuels must save at least 35 % of greenhouse gas emissions compared to fossil fuels<sup>7</sup>; biofuels produced from certain types of land are excluded, because they result in direct land-use change, i.e. rainforest destruction; and the Commission should develop a methodology by 2010 to measure the greenhouse gas emissions caused by indirect land use changes<sup>8</sup>. Corporate environmental impact reporting requirements, addressing other effects on the environment, such as on the soil, water and air, will also be introduced. There will also be reports on the recovery of depleted land, social aspects, food prices and land use rights.

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7. From 2017 the greenhouse gas emission savings of existing installations must be at least 50 %, those of new installations at least 60 %.

8. Indirect land changes occur when crops for biofuels production are grown in areas which have previously been used to grow a food crop and this food crop production then moves to other areas which were not in use before, thus leading to conversion of forests to agriculture.

This compromise anticipates on the development of criteria set at global level, which – since they would be negotiated with developing countries, particularly agrofuels-producing countries – would avoid the accusation of protectionism. Whether it will prove satisfactory remains to be seen. Monitoring of the macro-economic impacts of the increased demand for agrofuels, as provided for in the compromise reached in the renewable energy directive, is particularly weak and may prove ineffective. The hopes put in second-generation agrofuels may be misplaced, given the substantial water volumes required for these agrofuels, as well as the usefulness of agricultural residues or ‘waste’ for the fertilisation of soils. Even more importantly, from the point of view of the impact of the development of agrofuels production on food security, what matters is not only food prices – i.e. the higher prices for food commodities on the international markets which may result from increased demand for certain crops, particularly when stocks are low, as they were during the last quarter of 2007 and the first quarter of 2008. It is equally crucial to monitor the impact on the structure of revenues in the agricultural sector of developing countries. Due to weather conditions and lower wages, developing countries in principle have a strong comparative advantage in the production of agrofuels. As a rule, however, crops for fuel are produced by large agricultural producers, or by multinational companies owning or renting land in developing countries, and smallscale farmers are not involved in such production. But, as explained above, it is this segment of the population which is most food insecure. If we wish to combat climate change by encouraging a shift away from the use of fossil fuels and towards renewable energy sources, while at the same time combating food insecurity, a priority should be to increase the incomes of smallholders in developing countries. Simply encouraging the development of monocultures for export, when this will benefit primarily large-scale producers who already reap most of the benefits from improved access to the markets of industrialised countries, may in fact increase inequalities in developing countries, rather than reducing them.

The review of the renewable energy directive is illustrative of a tendency within the EU to avoid making hard choices, which would entail revising our current modes of consumption in order to move towards other, more sustainable modes of development. Devising a sustainable response to our energy needs should begin by asking how to reduce these needs; how to discourage the use of individual cars instead of



public transportation, and of road transport instead of rail. Similarly, if we intend to encourage poverty-reducing strategies in developing countries, we should not simply see them as providers of raw materials for our high-value markets, resulting in a system of international trade which locks them into the production of low-value-added commodities and results in increased inequalities at local level: we should take seriously the impacts of international trade on those inequalities, and develop forms of trade which can reduce them, instead of taking the risk that they will worsen further.

#### **4. International trade negotiations and the 'Global Europe' agenda**

As the global food crisis unfolded in the first quarter of 2008, a number of governments called for swift completion of the Doha round of trade negotiations, launched in November 2001 under the auspices of the World Trade Organisation. This, it was suggested, would constitute a powerful incentive to boost the supply of agricultural products, thus alleviating the tensions on the international markets which led to the price spikes of late 2007 and early 2008.

This will only be the case, however, if the final agreement reached at the WTO fully takes into account the specific needs of developing countries, and is combined with measures addressing the non-trade concerns which, all too often, trade negotiators neglect to take into consideration. In its resolution of 22 May 2009 on the global food crisis, the European Parliament stressed that 'the opening up of agricultural markets needs to be progressive, in accordance with the development progress of each individual developing country and based on socially fair and environmentally sound trade rules'; it further noted that 'sensitive products that are basic needs for people in developing countries or of particular importance to food security and rural development in developing countries should be excluded from full liberalisation in order to prevent irreversible damage to local producers', and that 'the EU must promote a preferential and asymmetric system in trade negotiations with developing countries in order to allow them to keep certain supply-management and other development tools in their markets' (European Parliament, 2008: para. 34).

In order to grasp the importance of this recommendation, we need to understand the relationship between trade liberalisation in agriculture and food security. There should be no doubt that the existing distortions in the global trading system are responsible for much of the current imbalance. Tariff and non-tariff barriers to the access of developing countries' agricultural products to the markets of industrialised countries, coupled with heavily distorting subsidies benefiting agricultural producers in the OECD countries, have artificially lowered agricultural commodity prices on the international markets – which have been structurally declining since the early 1980s – and have discouraged investment in the agricultural sector of developing countries.

Yet it does not follow that a deepening of the reform programme under the WTO Agreement on Agriculture constitutes a solution to the current widespread food insecurity<sup>9</sup>. That reform programme rests on three pillars: increased market access for agricultural products, through the removal of all quantitative restrictions or other non-tariff measures except those justified by health and safety reasons, and the subsequent lowering of tariffs; a reduction in the level of domestic support [calculated through the 'Aggregate Measure of Support' (AMS) concept], although 'blue box' measures (direct payments made against production-reducing commitments) and 'green box' measures (publicly-funded government programmes not involving transfers from consumers or price support to farmers) are exempted from such reduction commitments; and the reduction of export subsidies, with a view to their phasing out by 2013.

At the time of writing, the Doha round of trade negotiations still has not been concluded. It is stumbling in particular over the discussions around the trade-distorting impacts of various forms of domestic support provided by developed countries to their farmers, and over the special safeguard measure which a number of developing countries insist on including in the agreement. Yet one might question whether or not the successful completion of these talks will result in a sustainable answer to the global food crisis. It is clear that agricultural production

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9. For details, see my report presented to the Human Rights Council session of March 2009, following my mission to the World Trade Organisation (A/HRC/10/005/Add.2).

needs to be encouraged, particularly in sub-Saharan Africa, where productivity has stagnated in recent years and where – largely as a result of the inequitable multilateral trade rules – too little has been invested in this sector. But incentivising agricultural production through more international trade has a number of hidden social costs which should be taken into account in future reforms: only if these costs are minimised can its net impact on food security be positive.

The deepening of the Doha reform programme in respect of agriculture will only be compatible with the need to ensure food security if developing countries are allowed more flexibility, particularly in order to shield their agricultural producers from competition from industrialised countries' farmers. Even after the removal of existing trade-distorting measures, which currently are disproportionately benefiting developed countries, the productivity per active labourer in agriculture will remain much lower in developing countries, on average, than in developed countries. In 2006, agricultural labour productivity in LDCs was just 46 % of the level in other developing countries and below 1 % of the level in developed countries. In addition, these massive differences in productivity are increasing: labour productivity grew by only 18 % in LDCs between 1983 and 2003, by 41 % in other developing countries and by 62 % in developed countries (United Nations, 2006: 137). In agriculture even more than in other sectors, therefore, developing countries should benefit from special and differential treatment.

But even this will not suffice. In a regime with lower trade barriers, States may find that it may be cheaper to import certain goods, such as processed foods, than to produce them locally, and they may therefore increase their dependency on imports for feeding their populations. This not only creates a risk that the arrival of cheap imports on domestic markets will threaten the livelihoods of local producers, when they are unable to compete. It may also adversely affect the ability of developing countries to ensure that food is available at affordable prices for their populations when prices undergo increases on international markets. In such circumstances, net food-importing countries may experience balance of payments problems: the difficulties these countries encountered through the period of 2007-2008, when these prices rose significantly, provided a vivid illustration of this risk.

This vulnerability of net food-importing countries is not offset by the ability of these countries to export commodities in order to acquire the foreign currency required to finance their imports: on the contrary, the increased specialisation of each country in the international division of labour may make them more vulnerable to price fluctuations. The example of sub-Saharan Africa is illustrative. Due in part to the highly penalising structure of tariffs in OECD countries through tariff peaks and tariff escalation and, in part, to the presence on international markets of highly subsidised foods produced in industrial countries, sub-Saharan Africa has remained dependent on traditional non-fuel primary commodity exports such as coffee, cotton, cocoa, tobacco, tea and sugar, and has been fundamentally unable to develop into an exporter of processed food<sup>10</sup>. The result is that the dependency of these countries on imports for the food they consume increased, just as their export revenues declined.

Specialisation according to comparative advantage thus leads to two forms of dependency: first, for the acquisition of foreign currency, on the value of exports; second, for the ability of countries to feed their populations, on the price of imports. As long as primary commodity prices remain volatile, therefore, it is particularly risky to encourage countries to achieve food security by means of international trade – by recommending that they produce whichever commodity in which they have a comparative advantage, and that they buy on international markets what they do not consequently produce themselves. As regards food commodities, price volatility is expected to further worsen in the future, particularly as a result of climate change. In the absence of commodity stabilisation agreements or other insurance mechanisms, developing countries should be warned against sacrificing their long-term interest in building a robust agricultural sector able to feed their own populations, to their short-term interest in buying cheap food on international markets.

Nor are the risks associated with increased price volatility the only negative effect of seeking to achieve food security by relying on international trade. There are also consequences at the micro-economic level, due to

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**10.** South Africa, the largest African exporter of processed food, had a global market share of only 1 % in the period 2000-2005 (OECD, 2008).

the shape of global food supply chains. Increased cross-border trade in agricultural products implies that, as food production is reorientated towards serving foreign rather than domestic markets, the role of transnational corporations – commodity traders, food processors and global retailers – increases. This constitutes a source of dependency for the farmers who supply them. That dependency is further heightened by the fact that, in order to comply with the standards of global retailers, farmers wishing to be included in global supply chains must use external inputs, including improved varieties of seeds, often owned by companies which occupy an oligopolistic position on the market. As a result, the farming sector is increasingly divided between one segment which has access to high-value markets and therefore to the best technologies, inputs, credit, public support and political influence, and another segment which is left to serve only low-value domestic markets, and is comparatively neglected and marginalised, particularly as new tastes are introduced through international trade which they cannot satisfy.

Finally, reliance on international trade in order to achieve food security cannot ignore its impact on the environment. Long production chains imply long transport distances. Intensive modes of agricultural production also lead to accelerated soil depletion, groundwater pollution, and adverse impacts on human and animal health. While the gradual switch to more intensive forms of agricultural production cannot be attributed directly to increased global trade in agricultural commodities, this is nevertheless a trend which is encouraged when countries specialise in cash crops for export. In addition, there are public health aspects to this transformation. Partly as a result of tariff escalation in developed countries, developing countries mostly export commodities, including fresh fruit and vegetables, and they import processed foods from developed countries. This has led to shifts in dietary habits in developing countries, whose populations increasingly consume ‘western’ diets rich in salt, sugar and fat. Higher rates of obesity have resulted, as well as diseases such as heart disease and type 2 diabetes.

In sum, specialisation by countries according to the opportunities created by international trade liberalisation will only result in enhanced food security if certain preconditions are created. Affirmative measures should be taken to ensure that smallscale farmers, who are the most vulnerable to food insecurity, will benefit from such reforms – otherwise

their marginalisation will increase. Industrialised countries should regulate the activities of the large food processors and retailers – or the imbalances in the global food supply chain will worsen, and even as consumer prices go up, the farm gate prices unorganised smallscale producers receive for their crops will remain too low even to make farming affordable, not to mention to ensure a decent livelihood for farmers<sup>11</sup>. Measures should be taken to limit the volatility of prices on the agricultural markets, and to ensure that prices are both sufficiently remunerative for producers and affordable for consumers. Only by being more adequately regulated can international trade work for development and for food security.

As Paul Collier writes, it serves no useful purpose to label a round of trade negotiations a ‘development round’ if the partners still continue to push forward their own interests in their bargaining positions: ‘You might as well label tomorrow’s trading on eBay a “development round”’ (Collier, 2007: 171). For the moment, the positions adopted by the EU in trade negotiations – and the same could be said for the Economic Partnership Agreements it is proposing to the ACP countries in order to move towards more reciprocity, as required under the GATT rules – have been driven less by the need to contribute to a sustainable multilateral international trade regime than by the need to reap maximum benefits for the European economy. The Global Europe strategy is explicit about this goal. Opening up the EU to imports from abroad is desirable, not as a means to promote a reduction of poverty and hunger in developing countries, but as a means to enhance the competitiveness of EU firms: ‘Any obstacle to global supply chains could be damaging to our industry since raising the cost of intermediary goods and raw materials would make the EU industry less competitive. More than ever, we need to import to export’ (CEC, 2006: para. 1.2). It is urgent to understand, though, that we will not achieve sustainable development if we allow the marginalisation of 500 million households – 2 billion individuals – who live from smallscale, family farming in developing countries to continue. The majority of the hungry come

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**11.** In its 22 May 2008 resolution on the global food crisis, the European Parliament ‘emphasises that the raw material cost is a relatively minor component of the total cost of many food products; calls on the Commission and the Member States to analyse the discrepancies between farm gate prices and those charged by the major retailers’ (European Parliament, 2008: para. 9).

from their ranks. Any encouragement for international trade which does not explicitly address their needs may lead to economic growth, benefit large agricultural producers and even have positive effects for certain developing countries – but it will not alleviate hunger, nor address the structural causes of the global food crisis.

## **5. The Facility for a rapid response to soaring food prices in developing countries**

Probably the most spectacular EU initiative in the face of the global food crisis was the establishment of a new Facility for a rapid response to soaring food prices. In July 2008, the Commission proposed using one billion euros in leftover agricultural subsidy money to relieve the situation in developing countries through the financing of agricultural inputs and services and emergency safety nets. The money was expected to be wholly additional to existing development funds.

The regulation establishing the new Facility was adopted in December 2008 (European Parliament and Council of the European Union, 2008: 62). It provides that the resources available – one billion euros over the 2008-2010 period – will be concentrated on a limited list of high-priority target countries, in coordination with other donors and other development partners through relevant needs-assessments made available by specialised and international organisations such as those of the UN system, in consultation with partner countries (Art. 1(4)).

In general, the Facility aims at supporting a rapid and direct response to volatile food prices in developing countries, addressing primarily the period between emergency aid and medium- to long-term development cooperation (Art. 1(1)). Consistent with this overall objective, the measures eligible for support are measures to improve access to agricultural inputs and services including fertilisers and seeds; safety net measures aimed at maintaining or improving agricultural productive capacity, and at addressing the basic food needs of the most vulnerable populations, including children; and other small-scale measures aimed at increasing production based on country needs: microcredit, investment, equipment, infrastructure and storage; as well as vocational training and support for professional groups in the agriculture sector (Art. 3(2)).

In December 2009 the Commission must provide the European Parliament and the Council with an initial interim report on the measures undertaken. A more extensive report on the implementation of the measures, including on the main outcomes and impacts of the assistance provided under the new Facility, should be submitted before the end of 2012. These follow-up reports are to pay particular attention to the requirements of the Paris Declaration on Aid Effectiveness and the Accra Agenda for Action (Art. 11).

This new Facility is important not only because of the level of support provided, but also because of how it is targeted and how it is organised. The reference to the Paris Declaration on Aid Effectiveness and the Accra Agenda for Action is particularly welcome. All too often, development cooperation has been mainly donor-driven and top-down, and therefore insufficiently informed by the views of the ultimate beneficiaries (see e.g. Easterly, 2001, 2002 and 2006). The tendency of donors – whether governments, intergovernmental agencies or private non-governmental organisations – to impose various demands on recipients, without coordination, has also often imposed a heavy burden on the partner government's administrative capacities, and has led to sub-optimal results. The Paris Declaration on Aid Effectiveness was adopted in 2005 as an attempt to define a number of commitments which should improve the quality of aid<sup>12</sup>. The 56 commitments it contains are organised around the five principles of ownership, alignment, harmonisation, managing for results, and mutual accountability. These principles mark a shift from donor-driven to needs-driven aid strategies, and emphasise the need for evaluation of the performance of both donors, particularly as regards harmonisation and predictability of aid, and their partners.

It is also noteworthy that, according to the regulation providing for the establishment of the new Facility, the action programmes implemented by the entities benefiting from funding are to be drawn up, to the fullest extent possible, in consultation with civil society organisations, and that the implementation of projects funded through this financing Facility is

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**12.** The Declaration has been endorsed by 122 governments and the European Commission, 27 international organisations including six regional development banks, the World Bank and the OECD, and a number of non-governmental organisations.



to involve such organisations (Art. 1(3)). This too marks an important shift, towards what more closely resembles the implementation of aid guided by a human rights framework. Such a framework requires that we deepen the principles of ownership, alignment and mutual accountability, by shifting our attention to the role of national parliaments, civil society organisations and the ultimate beneficiaries of aid – the rights-holders – in the implementation and evaluation of foreign aid. It is this triangulation, away from a purely bilateral relationship between governments, which is characteristic of human rights approaches to development<sup>13</sup>.

## Conclusion

For too many years, the agricultural sector has been neglected by both development aid policies and public budgets. The global food crisis is a result of this neglect: it is a wake-up call. As food commodity prices on the international markets peaked during the first five months of 2008, leading to threats to the political stability of a number of developing countries, the international community reacted with remarkable swiftness. It sought to provide a coordinated response, and to encourage policies – and sometimes to provide funds – aimed at boosting agricultural production. It understood the urgent need to reverse past policies.

The EU made an important contribution to this global effort. But whether we will go beyond short-term responses, and address the structural causes behind the crisis, remains to be seen. The EU did create a financial Facility which will significantly support the efforts to boost agriculture in developing countries. At the same time, it still encourages the production of agrofuels – and therefore of cash crops for export instead of food crops for local consumption –, without taking into account that this will most likely exacerbate the dualisation of the farming sector in producing countries and will lead in many cases to more evictions from land and land concentration. And the EU does not

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**13.** For further indications as to the implications of such a shift, see my report presented to the Human Rights Council session of March 2009, 'The role of development cooperation and food aid in realizing the right to adequate food: moving from charity to obligation' (A/HRC/10/005).

seem willing to significantly undo the dominant imbalances in the global trading system, which generally still disproportionately benefit developed countries in general and certain export sectors in developing countries, with very few of these gains percolating through to the poorest and most marginalised people.

Consistency is a precondition for long-term sustainability. Smallscale farmers in developing countries will be helped not only by being provided with seeds and fertilisers, and through improved infrastructure; the global environment in which they operate also needs to be transformed. Important as it is, producing more food is not enough: it is at least as important to ensure that the incomes of the poorest, particularly smallholders, are increased; that non-food-producers are helped by adequate social safety nets; and that we mitigate the impact of agriculture on climate change by encouraging agro-ecological forms of production. Nothing short of a radical shift in perspective is required if we want to achieve these ambitious goals.

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# **The social roots of the financial crisis: implications for Europe**

**Jacques Sapir**

The financial crisis, which erupted in the mortgage market in the United States in spring 2007 has gradually spread across the entire global banking and financial system. Prompting first a contraction of lending, then the violent crisis in international liquidity witnessed between 15 September and late November 2008, it has turned into a major economic crisis. In specific ways, this crisis constitutes the equivalent of the 1929 crash. Although its effects have been relatively limited for the moment, this is due to the survival of state-controlled mechanisms not yet undermined by the neo-liberal globalisation we have experienced since the 1990s.

It may look like a financial crisis, but in essence this crisis is in fact one of income distribution. The unleashing of the ‘conservative revolution’ instigated by Ronald Reagan and Margaret Thatcher, but imitated by certain strands of European social democracy (from Jacques Delors via Tony Blair to Gerhard Schröder) led to a fall in the proportion of national income represented by earnings. The unleashing of globalisation via international financial liberalisation measures and the introduction of a widespread free-trade system has lent a new and decisive violence to this income distribution crisis. Thus the forms taken by the crisis are closely linked to the very mechanisms of globalisation, and these are likely to be abruptly called into question if we wish to prevent the already perceptible rise in unemployment turning into a tidal wave.

## **1. Households burdened with debt and struggling to make ends meet**

It is now clear that the most immediate and visible cause of the crisis, both in the United States’ economy and within the European Union, has been a steady deterioration in the solvency of households and a rise in

their debt levels. Consumers' incomes lagged behind rising output in the 1980s and 1990s to a growing extent. Consumption only managed to hold up by virtue of household debt, but the latter could not continue to grow indefinitely. The deterioration in the quality of households' debt, and their growing inability to cope with the burden of paying back both the principal and interest on these debts is the root cause of the banking crisis.

### 1.1. The United States: an archetype?

As has been stated many times, the crisis began in the US mortgage market. Yet the US mortgage market crisis is a complex phenomenon, which extends well beyond the confines of this market alone (d'Arvisenet, 2007). It combines a real-estate speculation mechanism, which is fairly traditional in terms of its nature and operation, with a more fundamental imbalance in the distribution of national income in the United States, all in a context of unfettered financial innovation.

In point of fact, the trend in household incomes in the United States began showing worrying signs from the start of George W. Bush's presidency. For instance, average earnings have increased on average by 3 % per annum, but median earnings by just 0.1 %<sup>1</sup>. As for the income of the median household, this actually fell in real terms between 2000 and 2006<sup>2</sup>. In fact, if we look at the distribution of households, we find that the poorest quintile saw its income fall by 4.5 % between 2000 and 2006, the second quintile fell by 3.1 %, and the third by 2.5 %. Only the fifth quintile, i.e. the wealthiest one, saw its income increase by 1.0 % over the same period. Over the period 1997-2004, counting deciles from the poorest upwards, the cumulative income of the second decile fell by 12 % in the United States, whereas it rose by 10 % in the case of the 9<sup>th</sup>. In France, there is an increase of 6.8 % and 12 % respectively, and 8 % for each decile in Germany<sup>3</sup>.

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1. JEC, US Senate, 26 August 2008. See also US Congress, 'State Median Wages and Unemployment Rates, prepared by the Joint Economic Committee', Table released by the US-JEC, June 2008.

2. Sources: US Department of Commerce, Bureau of the Census, May 2008 and Joint Economic Committee, US Congress, 6 June 2008.

3. Data supplied by UBS.

This trend reflects a sharp increase in inequalities of wealth, which has become concentrated on a very small minority. In 1980, the wealthiest 1 % accumulated 8.2 % of the national income, while the wealthiest 0.1 % accumulated approximately 2.2 %. These proportions had been stable since the mid-1950s. In 2005, they rose respectively to 17.4 % and 7.5 % of the national income (Piketty and Saez, 2006), a level corresponding to that of the years immediately prior to the 1929 crisis. Thus the Gini Coefficient, which measures the inequality of the distribution of a sample, for incomes rose from 0.415 in 1980 to 0.466 in 2001<sup>4</sup>. This increase in inequality, which has been developing since 1980 also corresponds to a significant trend in the share represented by profits as a proportion of national income (Figure 1). Although compromised for some years by the recession triggered by the *Saving and Loans* crisis, this trend resumed from 1992 onwards and, following the double blow of the 1998 financial crisis and the terrorist attacks of 11 September 2001, reached a peak in 2006.

Household debt developed strongly, as it was the only way to maintain consumption. It was facilitated by financial innovations, which allowed financial institutions to pursue increasingly aggressive policies. It is economically significant that the level of indebtedness then tended to dissociate itself from that of GDP. This is one of the major differences between the cycle of debt and economic activity witnessed in the United States since 2001 and those observed since the late 1960s. This disconnection has also been mirrored by the way in which mortgage lending has become detached from the growth rate of GDP.

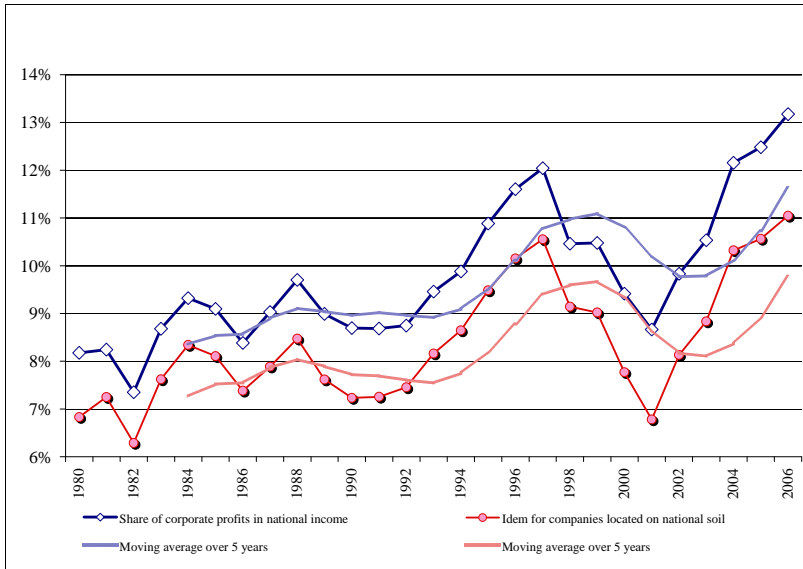
The first of these disconnections has been spectacular. Mortgage lending has traditionally served as a lever for household debt in the United States. In fact we find a strong correlation between the annual growth of mortgage debt and that of non-mortgage debt between 1966 and 1993. On the other hand, from 1993 onwards and especially from 1998, mortgage lending tends to oust non-mortgage lending, i.e. the traditional forms of consumer lending.

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4. US Census Bureau, Housing and Household Economic Statistics Division, 'Historical Income Tables – Income Inequality, Table IE-1', US Department of Commerce, Washington DC, 13 May 2005.



Figure 1 Trend in profits as a share of the economy



Source: US Bureau of Economic Analysis.

Actually, households are no longer using their mortgage loans as an indirect indicator of their solvency vis-à-vis the banks or finance companies to which they apply for new loans. Households are using mortgage lending *directly* as a global source of financing, relying on the underlying rise in value of the mortgaged property (resulting from the general rise in property prices).

When the value of a property rises, the borrower can harness the difference between its theoretical market value and the amount of the mortgage. This process is known as 'home equity extraction'. The banks grant renewable loans based on this difference in value ('Home Equity Line Of Credit' or HELOC), which explains the explosive rise in the debt levels of US households. However, this rise has also been based on the readiness of organisations providing loans to increase the amount of debt owed by households in return for a given property pledged as collateral security. This behaviour on the part of the loan provider can be explained firstly by a speculation effect (they anticipate a rise in the

potential value of the mortgaged property) and, secondly, by these institutions having the option of using new financial instruments.

The logic of household debt has deeply changed in the United States since the late 1990s. Consumer credit and real-estate credit were mechanisms typical of the so-called 'Fordist' accumulation regime<sup>5</sup>. Here, money was borrowed in anticipation of a rise in real incomes and, through its effect on the level of economic activity it helped to make this anticipation self-fulfilling. In the late 1990s, debt became a survival mechanism for households which were no longer seeking to raise their standard of living but simply to maintain it, at a time when real incomes had ceased to grow or even gone into decline for the vast majority of Americans.

This raises the question of the macroeconomic impact of this debt. There are two constraints here: one concerning the repayment capacities of the debtors concerned, and the other linked to asset values in relation to the value of the stock of debts. As long as the value of their assets is on a par with the stock of debt, assuming full liquidity of the assets concerned, the agents involved are permanently solvent. The problem, which arises when assets are primarily constituted by real estate, is that their value may fluctuate sharply, and the degree of liquidity of the assets is dependent on the trend in this value. Thus here we have a pro-cyclical mechanism which keeps households solvent as long as property prices continue to rise, but makes them appear insolvent (they are *equity-negative* with an excess of debt over assets) in the event of a sharp fall in prices, when the fall in value is accompanied by more serious difficulties in liquidating assets.

This passes on the strain to the capacity of annual incomes to cope with the flow of repayments. Here, the concomitant rise in debt as a percentage of GDP and the decline of earnings as a proportion of national income indicates that this capacity has been weaker since the 1980s. This situation has been masked by America's distinctive system of mortgage lending, which needs to be explained in detail to permit a better understanding of the underlying dynamics of the crisis.

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5. The Fordist model in the United States was analysed in Aglietta (1976).

In the United States, mortgage lending dominates housing finance, but it has also become an instrument of global lending, taking the place of traditional forms of consumer credit to some extent. The market is structured into several segments, with mortgage loans benefiting from guarantees (Fannie Mae and Freddie Mac), but also a number of much higher-risk segments. The latter include:

- ‘Subprime loans’. These mortgage loans are granted to borrowers whose debt-to-income ratio is over 55 % or whose loan-to-asset value ratio exceeds 85 %;
- ‘Alt-A’ loans. These loans are granted to borrowers who are below subprime ratios, but for whom only incomplete references are available. Nevertheless, these loans still receive an ‘A’ rating;
- ‘Jumbo’ loans. These are mortgage loans covering large amounts of money (US\$ 500,000 and subsequently \$1 million).

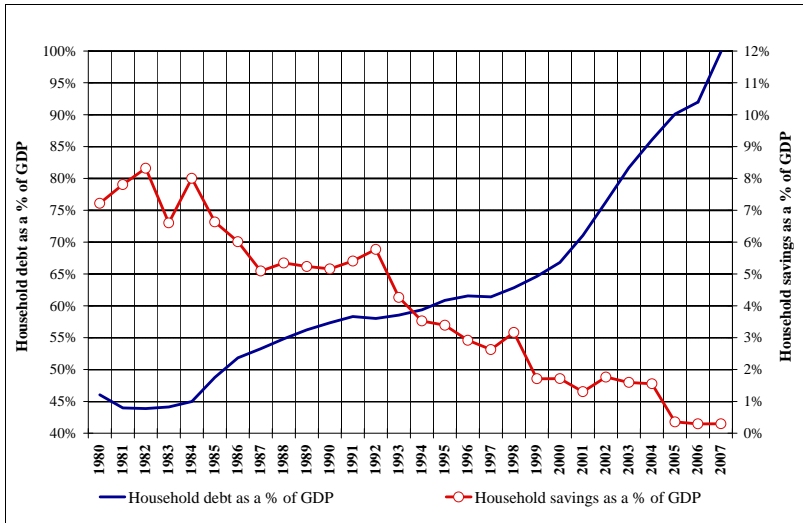
In March 2007, the value of subprime mortgages was estimated at more than \$1,300 billion<sup>6</sup>. Subprime loan agreements, which in 1994 represented approximately 4 % of the annual volume of mortgage loans issued, reached levels of around 20 % in 2006. Many of these agreements contained interest-rate adjustment clauses (Adjustable-Rate Mortgages or ARM). As early as October 2007, it was estimated that 16 % of subprime agreements under ARM clauses were either experiencing payment delays of more than 90 days or were in liquidation, i.e. 3 times more than in 2005 (Bernanke, 2007). This explosion of lending led to a sharp rise in the debt levels of US households, and was accompanied by a spectacular drop in savings.

Household debt levels remained constant in relative terms during the 1960s and 1970s, at between 40 % and 45 % of GDP. The so-called ‘supply-side’ policies pursued under Ronald Reagan’s presidency resulted, from 1984 onwards, in an initial rise. This gathered pace from 1998 onwards, i.e. under the Clinton administration, before becoming truly explosive under George W. Bush’s presidency from 2001 onwards, when the household savings ratio plummeted to 0.3 % of GDP.

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6. *Associated Press*, 13 March 2007.

Figure 2 Comparison of household debt and savings in the United States



Source: US Department of Commerce, Bureau of the Census.

## 1.2. The phenomenon spreads to Europe

While the explosion in household debt in the United States, in the wake of the stagnation of incomes among the majority, is undeniably spectacular, this phenomenon is also to be found, to greater or lesser degrees, in several European Union countries. Thus, on the basis of 2006 data, we find a marked difference between the household debt situations in the European Union major countries.

The United Kingdom and Spain actually have debt levels very comparable to those of the United States. Ireland was reaching similar levels. In these countries, we see the introduction of financial mechanisms very similar to those across the Atlantic, notably where the borrower has the option of using the rise in the market value of his property to increase the level of his debt. This mechanism, known as the 'rechargeable mortgage', opens up very high debt-carrying capacities for households during the expansion phase of a property bubble. Its effect is clearly apparent in Spain, where property prices rose by 247%

between 1997 and 2005<sup>7</sup>. As a result the Spanish households debt level leapt from 84 % to more than 100 % of GDP between 2006 and 2007. However, as soon as prices start to stagnate, or even to fall, households come under increasing pressure as they are required either to make an early repayment of some of the additional tranches of the mortgage loan, or to deposit a sum offsetting the fall in value of the mortgaged property with the bank, which issued the loan. The phenomenon may be aggravated by variable-rate mechanisms (which apply to 97 % of Spanish agreements)<sup>8</sup> or delayed interest-rate mechanisms (where the borrower pays interest only for the first 24 or 36 months of the loan, then faces a sharp rise in repayments when he starts to pay off the principal).

Table 1 Household debt as a % of GDP for 2006

France	Germany	Spain	United Kingdom	Italy
45 %	68 %	84 %	107 %	39 %

Source: National data.

While the British mortgage market has been better regulated than in the United States, the mechanisms here are the same. Household debt stands at 107 % of GDP, and ‘home equity loans’ play the same role as ‘home equity lines of credit’. The mortgage crisis in the UK unfolds in parallel to the figures for the US (IMF, 2008a: 8). Likewise, the household savings ratio is very low and cannot be reduced any further. British households, with their position weakened by liberal policies and much of the population deprived of social protection (Brewer *et al.*, 2005; Paxton and Dixon, 2004), are in fact particularly vulnerable.

Unlike those countries imitating the US system, in both France and Italy we find that household debt remains at much more moderate levels. Nevertheless it should be pointed out that in these two countries, inequality has increased less markedly than elsewhere, and they do not have the strongly ‘pro-cyclical’ mortgage systems based on the US

7. Spanish Housing Ministry (<http://www.spainrei.com/MiV-Spain-Property-Prises-95-07-yearly.htm>).

8. <http://www.mviv.es/es/xls/estadisticas/parque/pv21/XLS>.

model; systems which have proved to be real ‘debt traps’ for the lowest-income households. Here, it should be borne in mind that as UMP president, Nicolas Sarkozy established himself as the champion of the principle of rechargeable mortgages in France<sup>9</sup>.

However, while household debt levels remain low, we are witnessing an undeniable upward trend, demonstrating that a weakening of the financial position of households is a reality here too, even though it is less marked than in those economies, which have adopted a blatantly very inegalitarian model. The case of France is instructive here. Household debt, which was around 33 % of GDP until 1998, leapt by 12 points in 7 years, to 45 % of GDP in 2006. This degradation in the situation of households in France is also reflected in growing anxiety on the part of the middle classes, who now view their situation as increasingly comparable to that of the underprivileged classes (Bigot, 2007).

Table 2 Trend in the breakdown of added value in France

	Gross wages and salaries	Gross operating surplus	Operating surplus less tax on production plus operating subsidies
1982	46.5 %	22.7 %	20.3 %
1987	42.4 %	29.1 %	27.0 %
1992	41.7 %	30.4 %	27.4 %
1997	41.9 %	30.4 %	26.5 %
2002	43.0 %	30.3 %	26.9 %
2007	42.3 %	31.7 %	28.3 %

Source: INSEE.

This phenomenon is part of a downward trend in the proportion of global added value represented by earnings. In this sense, the experience of France from 1983 onwards, when Finance Minister Jacques Delors imposed the ‘austerity policy shift’ on the socialist government of the day, can be compared very closely with that of the United States under Reagan. Delors, a pro-European socialist, imposed a policy shift on France identical to that which the hard-line conservative Reagan had imposed on the United States, and whose

9. See his declaration at a UMP meeting on 17 March 2005 ([http://www.u-m-p.org/site/index.php/ump/s\\_informer/discours/intervention\\_de\\_nicolas\\_sarkozy\\_president\\_de\\_l\\_ump](http://www.u-m-p.org/site/index.php/ump/s_informer/discours/intervention_de_nicolas_sarkozy_president_de_l_ump)).

consequences – in terms of dampening demand and hence increasing unemployment – were felt for many years to come.

Thus between 1982 and 2007, the gross operating surplus rose by 9 points, of which 5.4 are accounted for by the period 1982-1987 alone. A second, less spectacular rise occurred between 1987 and 1992. While the statistical aggregates are not fully comparable between France and the United States, the similarity of the changes taking place over the same period is striking.

We therefore find that in the main industrialised countries, the situation of the majority of households, and especially those with the lowest incomes, has deteriorated. The degradation was first of all relative, in the 1980s, under the influence of ‘supply-side policies’ and the US example. It then became absolute in a number of countries from the late 1990s onwards. This led to an explosion in household debt which, coupled with growing insolvency among households, produced chains of poor quality or ‘toxic’ debt. These then contaminated the balance sheets of banks and financial institutions. Thus it is important to understand what provoked the sudden deterioration witnessed in the late 1990s, which transformed a latent crisis into an open crisis during the course of 2007.

## **2. The crisis, an effect of globalisation**

The change experienced in the 1990s, which unleashed all its consequences at the end of the decade, has a name: globalisation. This word conceals two important realities: the spread of free trade and the financialisation of economies, made possible by a liberalisation and deregulation of the financial markets now taking place in the main developed countries.

### 2.1. The role of free trade

The contraction of wage incomes in industry, which used to act as a benchmark for global trends in earnings, is linked to wage deflation imported via free trade. This process has played an important role, as pressure on wage levels is much stronger in sectors open to competition

from the developing countries (mainly China and the Far Eastern countries, but also the ‘new Member States’ in the context of the EU, and Mexico within NAFTA) (Bivens, 2007). The correlation between downward pressure on wages and free trade is now well established. Even Paul Krugman, who only a few years ago was still telling us that ‘globalisation is not guilty’, now has to admit it (Krugman, 2007).

Clearly, the most spectacular form is the phenomenon of industrial activities relocating to countries with low wage costs and light-touch social or environmental regulations. Even so, this spectacular form is not the most significant one. Pressure on wage levels in companies, which have not relocated, and blackmail applied to workers and their unions in an attempt to force them to give up social gains, constitute the most significant forms of wage deflation.

The origin of this deflation lies in predatory policies in international trade, which have been implemented in the Far Eastern countries since 1998-2000. These policies, via the context of widespread free trade promoted by the WTO – and which the G-20 summit participants just plan to maintain – have triggered a powerful effect of wage deflation in the developed countries. Imported wage deflation has also taken on a particular dimension in the context of the EU, with the enlargement process. The countries newly admitted to the EU are characterised by less restrictive social and environmental systems, and low levels of pay, which are frequently lower still due to the under-valuation of their currencies in relation to the euro.

In point of fact, even before it was completed, the accession process gave rise to significant inward investment in these countries, enabling them to achieve major productivity gains. In these circumstances, and in the absence of alignment with the social and environmental standards of the countries making up the EU’s ‘historical core’, the convergence between productivity levels in industry generated by the direct investment flows before and after the accession process has been accompanied by a phenomenon of social and environmental dumping on a massive scale. This has a particularly severe effect in terms of exacerbating wage deflation.

This wage deflation has also been strongly exacerbated by the sudden emergence and domination of financial logic within companies making



up the real sector of the economy, via leveraged buy-out (LBO) procedures. These procedures have seen financial logic, with its requirement for very high rates of return, take precedence over other criteria within the real economy. Companies subject to LBOs find themselves under pressure to achieve profitability levels of 10 % or more per annum. However, other than in exceptional circumstances, it is impossible to secure such high returns in industry without exerting growing pressure on the wage levels and working conditions of employees. This has significant consequences for the trend in both direct and indirect earnings, as well as for the health and well-being of employees.

One of the effects of wage deflation, whether due to the effects of free trade or financialisation, is in fact an increase in the number of illnesses caused by stress in the work-place, resulting from employees coming under growing pressure, exerted via a combination of financial logic and blackmail based on the threat of relocation (DARES, 2000 and Legeron, 2001).

While it has been confirmed that these illnesses have a medical cost of 3 % of GDP<sup>10</sup>, the link between the logic of wage deflation – derived from a combination of the effects of free trade and financialisation – and the deterioration in the social accounts of France and the main European countries appears to be well established. This has a major macroeconomic dimension. In point of fact, it is the drift (or apparent drift) in the social accounts which various governments have used as a pretext to row back on a number of rights, thus transferring the costs onto employees. Hence demand is squeezed even further and the conditions for depressed levels of economic activity are reproduced.

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**10.** The figure put forward for Sweden and Switzerland on the basis of extensive epidemiological investigations (which are tragically lacking in France): Niedhammer *et al.* (1998). As far as France is concerned, a limited investigation provides convincing results regarding the scale of the phenomenon: Bejean *et al.* (2004).

## 2.2. The specific role played by financialisation in the crisis

The financialisation of economies has not just been a national-level phenomenon. In essence, it has been a global change in the rules of the game at international level imposed by the United States, to which the European Union has capitulated, via European directives on financial services, with astounding ease. The EU, far from being a protective mechanism, has been an aggravating factor here.

It was the United States which put pressure on the IMF to include in its Articles of Agreement an obligation covering capital account convertibility (Polak, 1998), where previously there had only been current account convertibility – which Keynes had fought with all his failing strength to defend. Yet the difference between the two notions is a critical one. In the second case, the emphasis is placed on currency flows covering genuine transactions, trade in goods and services, flows relating to tourism or corresponding to the repatriation of migrants' income. Under the first notion, all portfolio operations and all possible speculative instruments become authorised. The IMF now acknowledges that these financial flows do not in any way favour the growth of developing countries (Prasad, 2007).

Ten years earlier Dani Rodrik, whose voice was neither heard nor even listened to (Rodrik, 1998), demonstrated it. Similarly, the IMF promoted the idea of opening up all financial markets to financial innovations, which in its view justified the total liberalisation of capital movements recently blessed once more by the G-20 summit held on 15 November. In 2008, here too, the IMF acknowledged its error – somewhat late in the day – and its annual report on the stability of the financial system states the following: ‘... certain complex and multi-level products have added little economic value to the financial system. What is more, in all likelihood they have exacerbated both the depth and the length of the crisis’ (IMF, 2008b: 54).

In the United States itself, financial liberalisation played a key role in the development of subprime and Alt-A mortgages, which, as we have seen, were the products that triggered off the crisis. The role played by these ‘at risk’ segments in the US financial structure has developed strongly because of one particular financial innovation: the Credit Default Swap or CDS. The purchaser of a CDS pays a regular (annual or

monthly) premium in return for a guarantee covering a credit risk on a given amount. The seller thus assumes the risk, in return for income, and bears a loss in the event of default on the loan, which he has agreed to insure. Thus the CDS is akin to an insurance policy, but it may be provided by other financial entities than insurance companies, as technically it is a financial instrument comparable to an option contract. It corresponds to a securitisation of a risk outside the normal framework of insurance markets.

CDS lead to a marked reduction in agents' perception of risk. Their rapid development was accompanied by that of financial instruments based on a similar logic, such as Collateralised Debt Obligations or CDO, and Collateralised Loan Obligations or CLO, which associate a debt with a particular item of collateral security and thus reduce the credit risk, to the extent that the asset used as security is reliable. These instruments have enabled banks and various financial operators to accept increasingly high-risk positions within their portfolios. The development of Mortgage Based Securities or MBS has made a powerful contribution to the development of the mortgage market since 1998, but also to growing risk-taking. In 2007, the risks 'insured' by CDS reached the equivalent of \$45.5 trillion, with an increase of 9 to 1 for the past 3 years<sup>11</sup>. The role played by rating agencies, which were very lax in the way they awarded an AAA rating to these instruments, also enabled the latter to be disseminated extremely rapidly. The explosion in credit derivative instruments has been spectacular indeed<sup>12</sup>. From a virtually non-existent level in 1998, they reached 1,500 billion in 2002, 8,500 billion in 2004, 17,000 billion in 2005 and 34,500 billion in 2006. They reached a level of around 46,000 billion in 2007.

CDS were used on a massive scale to 'insure' risks in the subprime, Alt-A and Jumbo segments, and as a result the mechanics of mortgage lending raced out of control. In order to meet the demands of their customers, the banks developed CDO (with real-estate products as collateral covering securities operations). The result was a 'transformation

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**11.** JP Morgan Corporate Quantitative Research, *Credit Derivatives Handbook*, JP Morgan, New York, December 2006, p. 6

**12.** See J.P. Morgan Credit Derivatives and Quantitative Research, 'Credit Derivative: A Primer', JP Morgan, New York, January 2005.

of base metal into gold', or more precisely high-risk loans into financial instruments which were ostensibly risk-free and offered high rates of return. This created an acute lack of transparency between the initial risk-taking (mortgage lending to borrowers on relatively low incomes) and the ultimate owner of the financial instruments.

### 2.3. The logic underlying the crisis

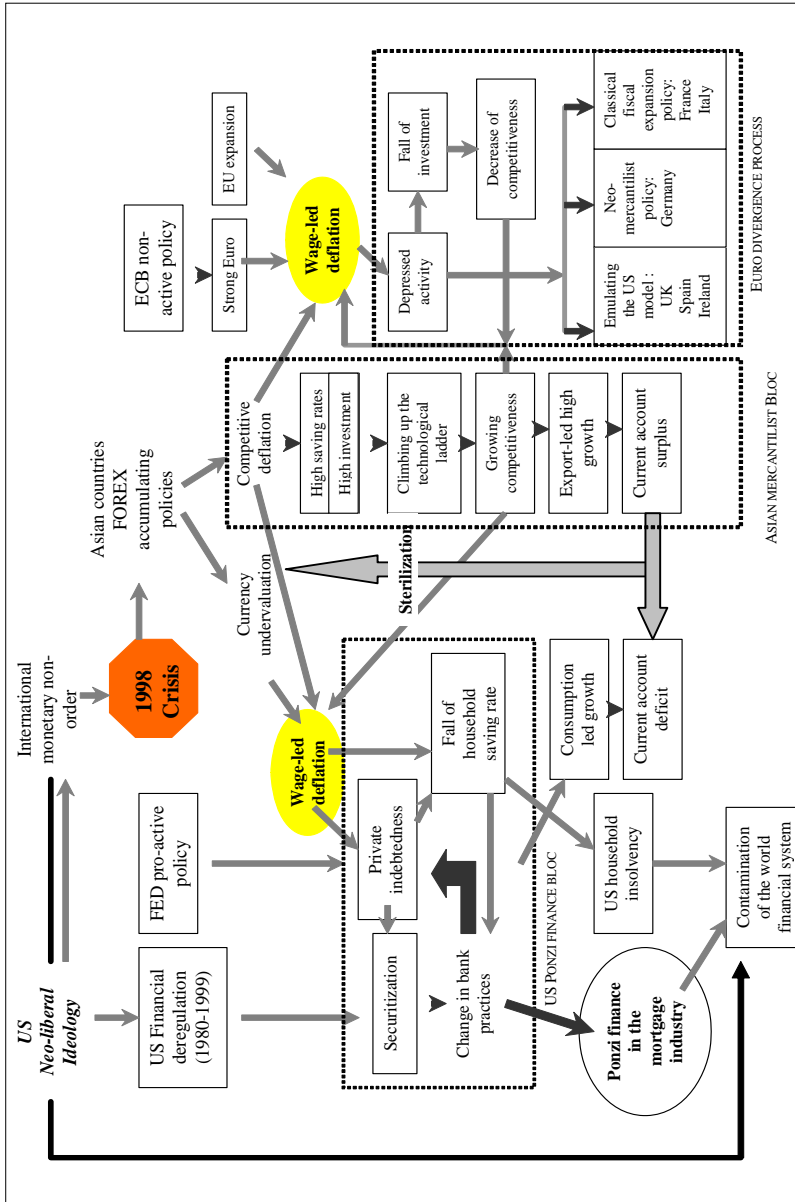
We can now establish the link extending from international chaos to the deterioration in the situation of employees in the developed countries (wage deflation), and from there to the international financial crisis, which was to result, sadly, in a further worsening of the social situation.

The 1997-1999 crisis, which ravaged emerging countries, from Korea via Russia to Brazil, was one of the consequences of financial liberalisation at global level. It was the outcome of the application of neo-liberal policies derived from the United States to the international financial system, and marked a regime change in the international financial order (Sapir, 2008).

The IMF's inability to deal with the crisis left many countries powerless. This led them, especially in the Far East, where the crisis hit particularly hard, to build up excessive hard currency reserves in order to protect themselves against this instability. This policy has a significant internal cost, which could be avoided if we had a less dysfunctional international financial system (Rodrik, 2006). The growth of the countries committed to this strategy could have been balanced more effectively, on both a social and environmental level. However, there is also a cost to the system as a whole, and it is this that leads us to the present crisis, as can be seen in Figure 3, summarising the series of interlinked factors which produced it.

To enable them to accumulate hard currency in the desired quantities, these countries would develop predatory policies in international trade, implemented by way of drastic devaluations, competitive deflation policies and by limiting their domestic consumption. In so doing, they set in motion the process of wage deflation in the developed countries and suddenly worsened the American trade deficit.

Figure 3 The international crisis: a series of interlinked factors



As with the trend in mortgage debt, 1998 marks a turning point between two distinct ways of economic thinking. The trade deficit, which on average used to be -1 % of GDP, suddenly leapt to -5.5 % of GDP on average between 2003 and 2007.

Table 3 Exchange reserves at 31 August 2008

	Amount in \$ billions
People's Republic of China	1884
Hong Kong (*)	158
Taiwan	282
South Korea	240
Singapore	170
Total Far East emerging countries	<b>2734</b>
Japan	972
Total Far East	<b>3706</b>
India	286
Brazil	206
Russia	581
Total BRIC	<b>2957</b>
People's Republic of China	555

\* Hong Kong is accounted for separately from the PRC here. Source: IMF.

The strategy of growth powered by internal debt thus logically generates external debt as a consequence. The circulation of US debts among non-resident players becomes the operating condition on which the system relies: it speeds up the process of spreading the risks contained in these debts. The US trade deficit constitutes one of the foundations on which the surplus of the Asian countries is built. The inflow of hard currency should prompt a rise in the exchange rates of the currencies of the countries concerned. In order to maintain their predatory policies, these countries have no alternative but to sterilise many of their gains. The central banks of the countries in question then purchase dollars (and euros) on a huge scale and their hard currency reserves increase massively (see Table 3), which was indeed the initial objective.

Thus the exchange reserves in place on the eve of the shock caused by the international liquidity crisis of September-October 2008 were substantial. China held 69 % of the total reserves of the emerging economies of South-East Asia and 3.4 times the reserves of the euro zone. Some of the other gains would be sterilised through taxation. The budget surplus would then fuel the emergence of sovereign funds.

The pressure of wage deflation has also been felt in Europe. Here, for the countries of the euro zone, it was combined with the high-interest-rate policy pursued by the ECB, which added its weight to the imported forces depressing the economy (Bibow, 2007). Faced with this situation, we see a fragmentation of the European 'model' around three directions, which we shall call here the eurodivergence process.

Some countries followed the US example (Spain, United Kingdom, Ireland). They adopted the neo-liberal model of an open financialised economy, and tried to maintain growth through recourse to high levels of household debt. In 2007, this exceeded 100 % of GDP in Spain and the UK. This economic model triggered a sharp rise in social inequality. This model was just as unsustainable in the long term as the US model, and countries one can regard as 'clones' of this model are now suffering from the same ills. The United Kingdom and Ireland have experienced a mortgage crisis whose violence was comparable to that of the US crisis, and this crisis immediately contaminated the entire banking system of these countries. The UK was forced to nationalise some of its banks in order to prevent a collapse. These two countries look set to experience a very severe recession in 2009 and probably 2010.

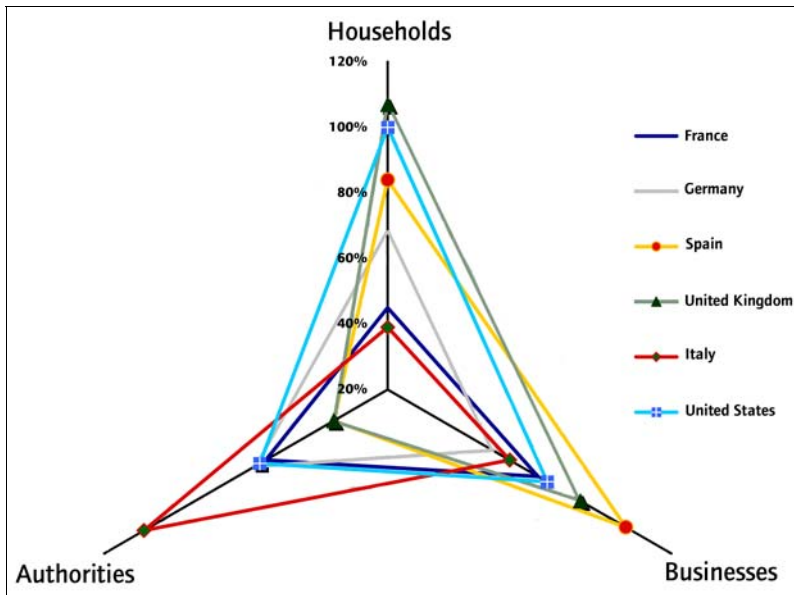
Germany, for its part, reacted with a neo-mercantilist policy, characterised by a massive relocation of subcontracting, while maintaining assembly work in Germany. Thus the opening up of the European Union to the countries of Central and Eastern Europe has resulted in a transition from the logic of 'Made in Germany' to that of 'Made by Germany'. At the same time, the German government has transferred some of the charges burdening companies onto households (via VAT).

This strategy has made it possible to maintain a large trade surplus at the cost of low growth, due to depressed domestic demand. Germany's growth would have been lower still without a worrying rise, here too, in household debt, which reached 68 % of GDP. The German 'model' thus combines elements of the US model (pressure on household incomes and a significant degree of financialisation of the economy) and elements of the Asian model (a mercantilist approach based on cutting costs and domestic demand). It is by no means certain that this combination will actually be coherent in the medium and long term. Germany, as we now see, has suddenly been caught up in the crisis. German banks are among those suffering the most in Europe from the

financial crisis and incurring the heaviest losses. The contraction in economic activity looks set to be severe, as heralded by the collapse in business leaders' confidence since spring 2008.

This explains why debt structures differ so much in Europe, with those of Spain and the United Kingdom being comparable to the United States, while those of France and Italy are significantly different, and Germany occupies an intermediate position.

Figure 4 Comparison of European and US debt models  
(2006 data as a % GDP)



Clearly, in these circumstances, seeking to devise a common policy at European Union level is to attempt the impossible. The fact that the process of eurodivergence is gaining ground, even and including within the euro zone (Angeloni and Ehrmann, 2007: 31; Gali *et al.*, 2001; Conrad and Karanasos, 2005), should prompt us to think seriously about the effectiveness and pertinence of the European institutions, in their current state. While joining the EU has permitted some forms of convergence primarily triggered by capital movements, the economic dynamics of the countries in question often remain sharply divergent.



Table 4 Comparison of total debt in 2006

	France	Germany	Spain	United Kingdom	Italy
Total debt as a % of GDP	181 %	192 %	227 %	224 %	208 %
Including: public debt as a % of GDP	63 %	67 %	39 %	39 %	106 %

Source: ECB and national accounts.

Thus the euro is not eliminating national divergences (de Lucia, 2008), nor is it slowing down the disintegration of the European social model. This is not because the euro was a bad idea in itself right from the outset, but above all because it was a mistake to apply the principle of the single currency to a group of economies with widely differing structures – and hence economic situations – without having the means to rapidly harmonise these structures (Sapir, 2006). In point of fact, no such means exist. It follows that there cannot be a single monetary policy for all of the countries concerned. Thus, the strong euro is already heavily penalising the French economy<sup>13</sup>, a situation confirmed by a recent INSEE study which estimated the net cost of the overvaluation of the euro at 0.6 %-1 % of GDP growth (Cachia, 2008).

In the context of the current crisis, the euro has prevented erratic exchange rates fluctuations in Europe and, as a consequence, equally erratic movements in interest rates. It is clear that if the euro had not existed in a context of total liberalisation of capital flows, the acute phase of the autumn 2008 financial crisis would have been accompanied by violent speculation on exchange rates. To combat this, the monetary authorities in some countries would have been forced either to raise interest rates in a way which would have been at odds with the needs of banks and the real economy, or to accept substantial falls in exchange rates. The advocates of the euro are right about this point.

However, the euro’s advocates should acknowledge that a similar result could have been obtained by policies implementing exchange controls

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13. P. Artus, in a CDC-Ixis study distributed in early July 2005 and quoted by P-A. Delhommais, ‘A study asks whether France and Italy will be forced to abandon the euro’, in *Le Monde*, 9 July 2005; Marc Touati in *Lettre des Etudes Economiques*, 9 March 2006. S. Federbusch, ‘The overvaluation of the single currency is exacting a heavy price on growth’ in *Libération*, in the *Rebonds* [‘Rebounds’] section, 26 April 2006.

and control over short-term circulation of capital. The current means of supervising electronic settlement and transaction operations provide much more effective control than was the case a few decades ago. Moreover, the regulations and legislation aimed at combating organised crime and money-laundering have created a legal framework which strictly limits any transactions taking place outside the scope of electronic systems which can be placed under supervision. We must therefore conclude that an alternative institutional framework could have played the very protective role euro played.

The view should also now be taken that the absence of flexibility implied by a single currency, which denies participant countries the option of devaluation even when the dynamics of inflation are excessively divergent for structural reasons, could prove to be an insurmountable obstacle if the recession were to deepen during 2009 and early 2010. The euro single currency system implies that the global inflation rate should be low, in order not to provoke excessive distortions between member countries. In this sense, the obsession of the ECB and its president with combating inflation is not without justification. If the economies of the euro zone were to switch over to a more inflationary logic than is the case today, the inflation differentials between member countries would certainly be greater and might become intolerable. The lower inflation is overall, the more any potential differentials are reduced, limiting the risk of damage to competitiveness.

Any such damage will be all the greater in that the economic structures of the euro zone countries vary significantly and, as already indicated, are experiencing a phenomenon of divergence. Contrary to the hopes of its promoters, the euro has not succeeded in harmonising economic structures. Even advocates of the euro should acknowledge this fact<sup>14</sup>.

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**14.** It should be emphasised here that Michel Aglietta is one advocate of the euro who has had the courage to acknowledge that the single currency has not led to an alignment of the member countries' economies (Aglietta, 2004: 237 and 240).

## Conclusion

There should consequently be no doubt that the crisis we are passing through will be a profound one. It is illusory to believe that we will be able to emerge from it simply by cutting interest rates – a move that is necessary but not sufficient – and through limited recovery plans. Both in Europe and in the United States, unemployment is set to rise sharply.

Table 5 Trend in unemployment rates as a % of the working population

	Germany	France	Italy	Spain	United States
2007	8.38 %	8.31 %	6.15 %	8.26 %	4.70 %
2008 (estimates)	9.10 %	8.90 %	7.10 %	11.40 %	7.20 %
2009 (forecasts)	10.40 %	9.90 %	8.10 %	15.00 %	9.50 %
Estimated increase from 2007 to 2009	24.10 %	19.20 %	31.70 %	56.10 %	102.10 %

Sources: Eurostat, US Dept of Labor and ECB data for 2007; estimates published by the authorities in November and December 2008 for 2008, except for the United States, where the figure is that given on 9 January 2009 by the US Bureau of Labor Statistics; 'pooling' of forecasts among a panel of experts for 2009.

Note: In the case of Italy, Spain and the United States, the existence in 2007 of a substantial amount of 'undeclared' labour, especially in the construction sector, means that the rise in unemployment is underestimated. It is a fact that 'undeclared' workers are the first to lose their jobs during the crisis, but this cannot be taken into account in the official data.

The international monetary and financial chaos, which resulted from the breakdown of the framework derived from Bretton Woods thus bears a significant degree of responsibility for the accumulation of factors bringing about the current crisis. From the switch made by the Asian countries (referred to in Figure 3 as the 'Asian mercantilist bloc') to predatory policies in reaction to the 1998 crisis, to the deployment of a purely speculative approach to finance in the United States and finally to the process of eurodivergence provoked by the impact of wage deflation, interlinked events are both unfolding in parallel and tending to reinforce one another.

The crisis we are living through is like a mutant virus. It was the product of a crisis in wealth distribution in the developed countries, and in the first instance within US and UK neo-liberal capitalism, and it then mutated into a banking crisis. This in turn mutated into a financial crisis and subsequently into a liquidity crisis during the crazy weeks of autumn 2008. The crisis then underwent a further mutation, as it evolved into a serious crisis for the real economy, notably in the

construction industry and the car industry. From the real economy, this crisis is set to mutate once more and return to the world of finance. As major companies go into bankruptcy, chains of credit default swaps will be activated, and those companies' debts will lose their value. This development will further weaken the situation of the banks and financial institutions purchasing and securitising those debts.

We shall only emerge from the crisis by putting an end to factors generating the wage deflation, i.e. by re-establishing modes of distribution more favourable to employees. This means re-introducing protectionist measures and banning social and environmental dumping practices within the EU, and if necessary re-introducing monetary compensatory amounts to deal with countries which have such practices. However, to ensure that predatory practices are no longer needed in international trade, we shall have to put an end to the systemic instability of the international monetary system. Doing so will inevitably involve the re-instatement of measures to control capital movements and exchange controls. Any other policy would be either feckless or hypocritical.

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# Case study: the impact of climate change policies on the automotive industry

Patrick Loire and Jean-Jacques Paris

## Introduction

The automotive industry makes a crucial contribution to Europe's economic and social dynamism. It accounts for approximately 1.5 % of EU GDP, 8.5 % of European industrial added value, and 8.5 % of net exports. It employs just under 2.4 million workers, representing some 6.5 % of manufacturing jobs and almost 1 % of total employment within the EU. The number of jobs is three or four times higher if indirect employment (services, subcontracting) is taken into account, namely – depending on the country – between 4 and 12 % of total employment. In addition, the automotive industry is one of the greatest contributors to research and development (R&D) in the European Union, more so in some Member States than others<sup>1</sup>. In social terms it meets the need for mobility and economic development, and is a major vector of innovation and social dialogue.

How can this industry remain a driver of sustainable growth for the European economy in a climate of international competition? One of the many aspects of this question – the impact on the automotive industry of European policies related to climate change – is a subject of sometimes heated debate among stakeholders in the sector: industry, the Member States, the Commission, employees, and so on. But the severe crisis which began to bedevil the global automotive industry as from 2008 is undoubtedly bringing about a rapid change in the terms of this debate, and doing so at four levels:

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1. In Germany, for instance, the automotive industry accounts for an astonishing 75 % of net exports. For a statistical analysis of the different EU Member States, see Groupe Alpha (2008 *et al.*).



- the realisation that the ‘green’ dimension (emissions, energy consumption, a pleasant urban environment) can lend dynamism to the sector;
- the appropriateness of ‘outside’ public intervention in the sector;
- issues around the multi-stakeholder model of development in the European automotive industry;
- the need to create the social conditions necessary for this development.

### Is the ‘green’ dimension a source of dynamism in the sector?

The current crisis is first and foremost financial, a point made by Carlos Ghosn, CEO of Renault and chairman of the European Automobile Manufacturers’ Association (ACEA)<sup>2</sup>. Nevertheless, since 1 January 2009 the crisis has been opening up a more structural gap between motor vehicle supply and demand, especially in respect of constraints around energy and CO<sub>2</sub> emissions. The ability to cope with global warming constraints probably already constituted a factor of change in the automotive industry, a hypothesis we shall explore in our first section by comparing the evolving dynamic of the industry in North America, Europe and Asia. We shall see how Europe has managed in recent times to maintain a high level of competitiveness in its automotive industry, and how the existence of national and Community policies laying down (fiscal or monetary) incentives or disincentives relating to CO<sub>2</sub> emissions has affected the point in time at which the countries concerned went into crisis.

### How appropriate is public intervention?

The economic and social consequences of the financial crisis for automobile-manufacturing countries are substantial, given the knock-

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**2.** See his interview in *Le Monde*: ‘The automotive industry is an avid consumer of credit. Two out of every three cars are purchased on credit [...]’, *Le Monde*, 14-15 December 2008.

on effects of this sector on their economy as a whole. This situation – compounded by the fear of seeing ‘national champions of industry’ go under – is the justification for national and European support plans which are every bit as historic as the crisis itself. These numerous plans combine emergency aid to stave off bankruptcy, support for demand and incentives for innovation, particularly in the field of energy consumption and CO<sub>2</sub> emissions. In our second section we shall look at the background to this intervention within the European Union (EU), particularly in terms of climate change, and at the discussion generated, drawing attention to what these recent ‘recovery plans’ entail. There can be no doubt that the question of public intervention in the sector is being reassessed.

### How can Europe’s automotive industry develop ‘sustainably’?

The scale and duration of the crisis are still largely unknown. It would be interesting to envisage ways not just of overcoming the crisis but also of bringing about a sustainable revival of Europe’s automotive industry. Climate change policies are clearly not the sole precondition but do have a part to play. Most of the crisis-hit countries, and the United States in particular, have indicated their determination to speed up the development of more environmentally friendly motor vehicles. Amidst this new and mounting competition, Europe has developed what might prove to be lasting assets; the question is how to dovetail the ‘green’ dimension with other factors of change. Section three will examine a highly innovative scenario for the European automotive industry (based on intelligent vehicles as part of a multi-modal transport mix), resulting from interaction between these different factors of change.

### What implications are there for the social stakeholders?

The introduction of an innovation-centred scenario requires of necessity that all social and also local stakeholders be involved in effecting change. This will be the subject of our last section.

## 1. Evolution of the automotive industry before the crisis: emergence of the 'green dimension' as a source of dynamism

Before turning our attention to the fall-out of the 2008 economic crisis, let us take stock of earlier developments in the world's major vehicle manufacturing areas.

Table 1 Trend in the output of light vehicles (LV) (\*) by broad geographical area, 2000–2006

in 000 units	2000			2006			% variation 2000/2006		
	PC	LUV	Total LV	PC	LUV	Total LV	PC	LUV	Total LV
Asia	13478	3603	17081	22203	3841	26044	64.7 %	6.6 %	52.5 %
Europe	17582	2066	19648	18109	2480	20589	3.0 %	20.0 %	4.8 %
North America	8372	8772	17144	6853	8402	15255	-18.1 %	-4.2 %	-11.0 %
South America	1646	323	1969	2478	571	3049	50.5 %	76.8 %	54.9 %
Africa	221	95	316	339	191	530	53.4 %	101.1 %	67.7 %
World	41299	14859	56158	49982	15485	65467	21.0 %	4.2 %	16.6 %

(\*) Light vehicles (LV) = passenger cars (PC) + light utility vehicles (LUV). NPC = new passenger cars. See Annex 1 for examples of segments of the motor vehicle market

Source: OICA (2007).

Between 2000 and 2006, Asia became the world's number-one manufacturing area, accounting for international growth in vehicle output virtually in its entirety, owing to the volume of demand on its emerging markets. During that same period, European production held up by wresting second place from the United States, where overall output declined. Thus the slowdown in US output was already well underway prior to 2006, thereby putting US manufacturers in a vulnerable position. The decline began to affect the highly prized LUV sector (pick-ups, light trucks etc.) as from 2000: light utility vehicles are especially fuel-hungry and heavy on CO<sub>2</sub> emissions. This gradual erosion gathered pace in early 2008 when the economic crisis began to loom on the horizon. Thus in the United States, in the first half of 2008 by comparison with the first half of 2007:

- passenger car sales fell by 1.7 %: only the 'small models' segment (A & B) grew (+9.7 %), while all others shrank. The higher the segment and the larger its 'ecological footprint', the greater the

decline (medium category -1.9 %; family saloons -9.4 %; sports cars -20 %);

- LUV sales slumped by 18.3 %: pick-ups by 22.5 % and SUVs by 31 %.

The US automotive industry therefore seems to have been unable to adapt to growing demand, over time, for less polluting, less gas-guzzling and less expensive vehicles – a phenomenon inevitably accentuated by the financial crisis.

Europe's automotive sector has fared quite differently. When the crisis hit, Europe managed to marry sustained growth in central Europe with weaker, but positive, growth on the mature markets of western Europe. Nevertheless, the crisis has obviously not spared Europe:

- sales within the EU 27 were down by 10.7 % in the third quarter of 2008 compared with the same period of 2007, with this trend gradually spreading to all Member States including the new ones. It is worth noting the relative resilience of France and Germany, where the slide has been less pronounced: each of them has found a way of legitimising its policy on the automotive industry, namely the environmentally friendly 'bonus/malus' scheme in the case of France, and a top-of-the-range strategy in Germany;
- a structural change in consumption patterns appears to be gathering pace, that is, a bipolarisation of European markets: the huge middle segment – namely family models of the Monospace type (Scenic, Touran, Picasso, Multipla etc.) – is losing ground to the 'greener' A and B segments. At the other end of the spectrum, we are seeing a decline in the premium (H1 and H2) segments – very comfortable, top-of-the-range models which are generally less environmentally friendly – but this trend is more directly connected with the economic downturn.

The broad diversification of supply in Europe therefore affords the EU greater relative protection from the international crisis in the automotive industry. Over time, moreover, Europe has demonstrated considerable ability to adapt to major changes: two oil shocks, numerous EU regulations, technological progress, EU enlargement and international competition

(especially from Japan)<sup>3</sup>. The European regulatory framework and policies connected with climate change are not in themselves sufficient to explain this relative resilience, but they do play a part. This raises two questions:

- in what way are these policies designed to shake up the European motor vehicle sector?
- how likely are these policies to lead us out of the crisis?

## **2. The appropriateness of European policies on climate change: is the glass half empty or half full?**

### 2.1. A constant tightening of Europe's climate change policies in respect of motor vehicles

Curbing CO<sub>2</sub> emissions from passenger cars is a major component of Europe's commitment to combating climate change, as reasserted by the Commission in January 2008 in its 'energy/climate package'<sup>4</sup>. The priority attached to the 'motor vehicles' component derives from a threefold diagnosis:

- the relative contribution of passenger cars<sup>5</sup> to total CO<sub>2</sub> emissions: 12 % of emissions in Europe, according to the Commission;
- non-compliance with 'voluntary' commitments prior to 2008. Whereas in 1999 the Commission's target for '2005 or at the latest 2010' was set by recommendation at 120g/km (the average emissions level of new passenger cars was roughly 185g/km at that time), the ACEA gave a voluntary undertaking, postponing this

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3. For a brief overview of competitiveness in the European automotive sector, see the Final Report by Daniel Traca (2007).
  4. The 'energy/climate package' adopted by the Commission in January 2008 relates to the emissions trading system, to curbing greenhouse gas emissions, promoting renewable energy and investing in low-carbon energy technologies. The package also reaffirms the Commission's commitment to a 20 % overall reduction in greenhouse gas emissions by 2020.
  5. The other main sources are deforestation, agriculture, home heating and cooling, and the commercial sector.

limit until 2012 while committing itself to an interim CO<sub>2</sub> emissions target of 140g/km by 2008. These targets will be missed: after an average reduction achieved in the early 1990s, progress has slowed considerably during the second half of the current decade (see Annex 2);

- the growth in emissions owing to the expansion in the motor vehicle fleet and traffic: the fall in the average level of CO<sub>2</sub> emissions has been more than offset by the increase in the vehicle fleet and, by corollary, the growth in passenger car traffic. Few analysts believe that this broad trend will ease off spontaneously in the medium term (see Annex 3). What is more, this verdict puts into perspective the (environmental) effectiveness of regulating average vehicle emissions without thinking about modes of transport in the round. This point will be addressed in section three.

The Commission therefore put forward a new regulation in 2008, on which the Council and Parliament have reached a compromise (see Annex 4). Simplified to the extreme, the new provisions have two main strands:

- a normative strand: the draft standard for passenger car emissions is set at 120g CO<sub>2</sub>/km by 2012. This level is to be reached by limiting direct emissions to 130g/km and by achieving an additional 10g cut thanks to ancillary measures (tyres, air-conditioning, etc.). It is important to note that the 130g/km standard is an average, to be spread across a manufacturer's entire range (and not vehicle by vehicle) depending on the characteristics of the vehicles produced, especially in terms of weight and power. Finally, manufacturers may group together in 'pools', in which case the threshold is calculated for the pool as a whole, and not for each individual manufacturer;
- financial penalties (see Annex 4).

As we saw in section one, by international standards Europe has survived the past decade in reasonably good shape to confront the crisis and mounting competition from Asia, in that it adjusted to the new environmental constraints more rapidly than its north American

competitors. Until recently, however, this relatively satisfactory state of affairs did not result in an unreserved endorsement of the new regulatory provisions on CO<sub>2</sub> emissions by European industrialists and Member States. Far from it.

## 2.2. Risks and opportunities arising from the new provisions

The main criticisms levelled at the draft provisions highlight three considerable risks:

- that of a distortion of competition between manufacturers, owing to unequal treatment of specialist and generalist manufacturers within the EU. The principle of allocating an average threshold to each manufacturer could ease the burden on manufacturers of heavier vehicles, especially in Germany<sup>6</sup>. This risk has been hotly debated, with lighter vehicle manufacturers/manufacturing countries advocating an alternative scheme, namely the 'bonus/malus' scheme for greener cars<sup>7</sup>. As well as pointing out the injustice inherent in the calculation of the thresholds, countries/manufacturers producing medium/light vehicles add that they are less able to pass on to customers the cost of adapting vehicles and the penalties;
- distortions of competition vis-à-vis international competitors. All non-European manufacturers would be subject to the same constraints for the passenger cars they sell in Europe, but the measures obviously do not affect passenger cars sold by those manufacturers in their own countries or anywhere outside of Europe. Manufacturers' costs might be quite different according to how dependent they are on the European market, which would jeopardise the alleged neutrality of the scheme from the point of

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**6.** The threshold applied to each manufacturer depends on the volume of vehicles they produce, based on a sliding scale calculated according to a vehicle's level of authorised emissions and its weight. The lighter the vehicle, the lower the threshold, and *vice versa*. This phenomenon of a 'sliding scale of emissions rights' results for example in a requirement of around 128g/km for Renault, compared with 145g/km for certain German manufacturers.

**7.** The bonus/malus scheme applies across-the-board, to all manufacturers. It operates by granting financial rewards (bonus) for low carbon-emitting vehicles below a certain threshold, and financial penalties (malus) for CO<sub>2</sub> emissions above a certain threshold. France introduced this scheme in the wake of the Grenelle Environment Forum.

view of international competition. The greater the globalisation of the automobile market, the more significant this risk;

- a delaying effect on the renewal of vehicle fleets and hence on the ultimate goal of reducing emissions. The draft regulation aims to make new passenger cars more environmentally friendly, not the existing car fleet. A ‘green’ surcharge on new passenger cars could therefore act as a disincentive to new car purchases: a significant risk at present, in view of the financial crisis. That is why, in order to support demand, several countries have introduced the bonus/malus principle or rewards for motorists who sell their old cars for scrap and buy new ones. Such schemes clearly result in a much faster renewal of vehicle fleets.

These are no mean criticisms. Advocates of the draft regulation, for their part, headed up by the Commission, emphasise the lessons of the recent past and enumerate three historic opportunities:

- in terms of ‘greening’ Europe: the need to take vital steps towards lowering CO<sub>2</sub> emissions from passenger cars. Given that mere recommendations and voluntary action have, to date, been insufficient to cancel out the rise in emissions, the draft regulation sets out to achieve its aims through a stringent tightening the rules (thresholds and penalties) right across the world’s number-two market. In the past, oil price rises were what made Europe’s automotive industry, then the world leader, adjust its behaviour;
- in terms of technology: ‘an opportunity for innovation’ is how Günter Verheugen, the Commissioner for enterprise and industry, describes the draft regulation. The proliferation of announcements about scheduled product launches of carbon-free or low-carbon models during the period 2012-2015<sup>8</sup> would seem to prove his point – as long as those plans come to fruition, of course;

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**8.** For example the announcement by Renault and the French government of an all-electric car for 2012, and that by German manufacturers intending to step up their efforts to develop hybrid engines.



- in terms of international leadership: the draft text is binding on manufacturers but could under certain circumstances, paradoxically, confer a significant competitive advantage on European manufacturers in the long-term. This is already evident from the robust performance of some of them in the United States, even in the midst of the present crisis.

All three opportunities are closely connected, because the world market is unlikely to be convinced by a 'green' European model of development in the automotive industry unless action on the emissions front is effective, which requires a mastery of new technology. And that cannot happen without a high commercial profile. We have come full circle.

Will the risks outweigh the opportunities? Behind this debate lie fierce industrial rivalry and divergent views of the automotive industry, in particular pitting countries which produce small and medium-sized cars (France, Italy, Spain, etc.) against those producing medium and large cars (Germany, Sweden, etc.). But surely the scale of the crisis, on the one hand, and the very real opportunities afforded by potential intervention on the part of governments and the EU, on the other, alter the terms of the debate?

### **3. A 'new European car for safe and sustainable transport' as a response to the crisis**

The crisis may well be long-lasting. Analysts nevertheless agree that there is considerable potential for growth in the automobile sector both worldwide and within Europe: there is a growing need for mobility thanks to the improved economic fortunes of the countries with emerging economies, and motor vehicles continue to offer major comparative advantages as a mode of transport. However, new players – spurred on by the needs of emerging economies (China, India, Russia) – are entering the global market and intensifying competition on both mature and new markets. This is why the European automotive industry must rally round: it must do so by demonstrating its ability to cope with factors of change which are not solely climate-related.

Table 2 The four main factors of change in the automobile sector<sup>9</sup>

Changing society and evolution of demand	Emerging technology	Company strategies
Need for mobility	ICT (incl. nanotechnology)	Internationalisation
Need for diversity	New materials	Mergers and acquisitions
'Rich vs. poor' polarisation		Marketing choices (premium, low cost, etc.)
Urbanisation, Ageing	New methods of propulsion (hydrogen, fuel cells, etc.)	Innovation vs. cost-oriented policy
Energy prices		Relocation
<b>Changing regulation (fiscal, R&amp;D policy, regulatory framework)</b>		

Such action will probably not assuage rivalry within the EU in the short term, but it should make Member States agree to take three issues into account:

- the importance of innovation in overcoming the crisis, especially around environmental issues. The radical changes being promoted in this area by the new Obama administration in the United States testify to the new competition lying ahead: as far as private cars are concerned, the EU – like Japan – will have to reckon with competition from the US in its bid to recapture the automobile sector;
- the importance of a European-level response. This, at least, is the strongly held opinion of the French and Italian governments;
- the importance of reassessing motor vehicles as part of a broader debate about transport modes and infrastructure. We should bear in mind, at this stage, the above-mentioned limitations of policies based solely on reducing CO<sub>2</sub> emissions in a context of traffic growth.

Furthermore, the very proactive statements about the introduction of new electric vehicles will be credible only if they are followed up by large-scale infrastructure projects and by standardisation, at least at European level. Lastly, the issue of climate policies as related to the automotive industry goes beyond consumption (and hence CO<sub>2</sub>

9. For a comprehensive presentation of the factors of change and scenarios for the future, see Groupe Alpha (2008).

emissions): it touches on manufacturing (traceability to ensure all components are environmentally friendly) and on the entire life-cycle of vehicles. Amidst the mounting international competition to be 'green', a 'new car for safe and sustainable transport' scenario<sup>10</sup> illustrates the opportunities for the industry to innovate in a big way and to successfully export its innovations.

Table 3 A 'new car for safe and sustainable transport'

Changing society and evolution of demand	Emerging technology	Company strategies
High environmental and safety consideration	New technologies (materials, electronics, propulsion)	Internationalisation
Increasing prosperity in new Member States	New design	Partnership of car manufacturers / equipment suppliers
Demand for new technology, design and services	New services (including transport)	Investment in R&D
		High level of segmentation
		Growth in services activity
<b>Changing regulation (fiscal, R&amp;D policy, regulatory framework)</b>		
High level of coordination of environmental, safety and transport policies		
Investment in R&D and new technology but also in transport infrastructure		
Coordinated fiscal policies		

This scenario is dependent on various types of policy above and beyond those related to climate change: on innovation, regulation, transport, regional infrastructure and human resources.

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10. *Idem.*

Table 4 Principal recommendations in each area (\*)

Area	Stakeholders	Examples of action
A policy for major innovation	Manufacturers, equipment suppliers, research centres, EU authorities, universities, Member States	<ul style="list-style-type: none"> <li>- better cooperation between manufacturers and equipment suppliers</li> <li>- a European research programme</li> <li>- support for innovation clusters and SMEs</li> </ul>
A coherent regulation policy	EU authorities, Member States	<ul style="list-style-type: none"> <li>- conduct of an integrated trade and regulation policy</li> <li>- coordinated tax incentives across all EU Member States</li> </ul>
An infrastructure policy	EU authorities, Member States	<ul style="list-style-type: none"> <li>- a new intelligent road infrastructure</li> <li>- public/private partnerships</li> <li>- financial support for SMEs</li> </ul>
Education, training and social policy	Manufacturers, equipment suppliers, schools and educational institutions, EU authorities, Member States, trade unions	<ul style="list-style-type: none"> <li>- make the sector more attractive</li> <li>- bring companies into contact with schools and universities and involve them in curricula</li> <li>- courses for older workers</li> <li>- improve working conditions</li> <li>- set up local and sectoral observatories</li> <li>- establish proper social dialogue in companies; promote European Works Councils and company agreements</li> </ul>

(\*) For a comprehensive presentation of the factors of change and scenarios for the future, see Groupe Alpha *et al.* (2008).

It is, however, worth emphasising that this scenario goes beyond the question of how to adapt the automobile sector in the short term: it poses questions about ‘sustainable transport’ over the longer term. For, in fact, even though efforts to curb CO<sub>2</sub> emissions from individual motor vehicles go in the right direction, they leave the conception of a car-centred transport system almost totally intact. Yet, as we saw in section two, the headway made on vehicle emissions is being wiped out by traffic growth. What is more, the increasing intensity of efforts to curb CO<sub>2</sub> emissions also conflicts with the need to reduce vehicle ‘usage costs’

in an era of rising oil prices. No sooner do oil prices fall again than the economic arguments for electric vehicles are regarded as a little less clear-cut.

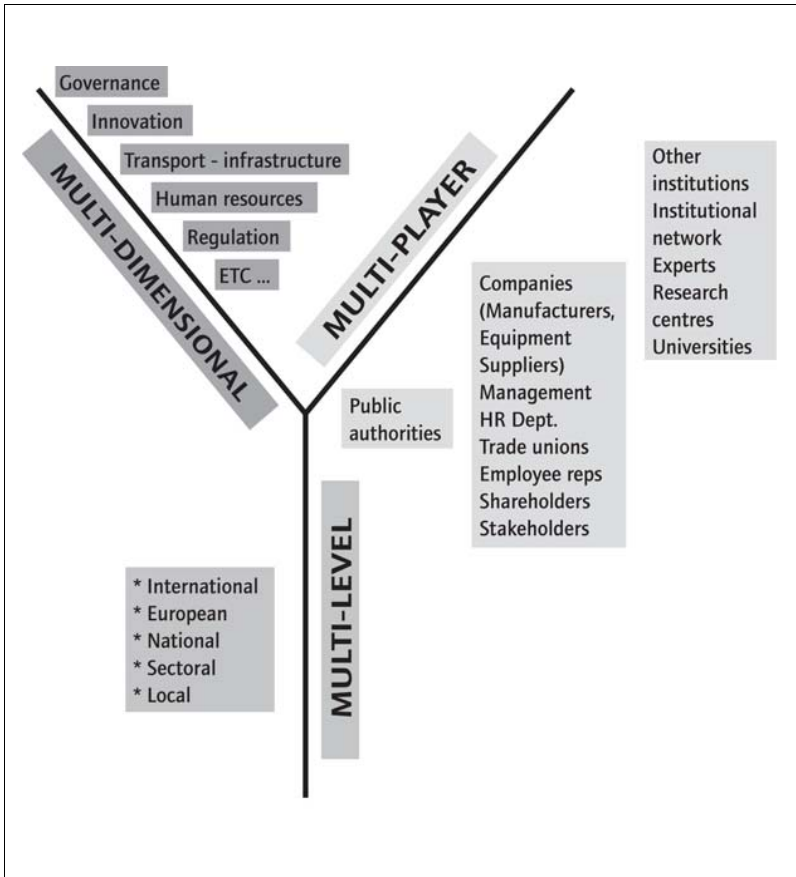
But the impact of cars on our climate and on fossil fuel consumption is not the only reason why we need to take a fresh look at their role. A question mark even hangs over the viability of cars as a means of transport. Urban road traffic growth and congestion has become a major factor: since 2008 there have been more people worldwide living in built-up areas than in rural areas, and all the indications are that this phenomenon will gather pace in the long term<sup>11</sup>. A response based merely on improving the efficiency of cars is therefore no longer adequate. As far as traffic congestion is concerned, the obvious question is how the number of private cars can be reduced; this means there is a need for new multi-modal forms of transport, where individual and collective modes complement each other rather than competing.

#### **4. Mobilising stakeholders to bring about change**

Corporate strategies are not the only variant determining the prospects for the automotive industry. Nor is this the only level at which restructuring is occurring and impacting on employment nowadays. The effects are likewise felt elsewhere, such as in local communities and at other levels of action and regulation (local, national, European and global). This necessitates interaction between players at different levels and presupposes that they will take a proactive attitude to change. Such a mobilisation of stakeholders is a response to three key methods of anticipating change which underpin what we have referred to, in the European AgirE project<sup>12</sup>, as the '3M rule'. It is illustrated in the following figure:

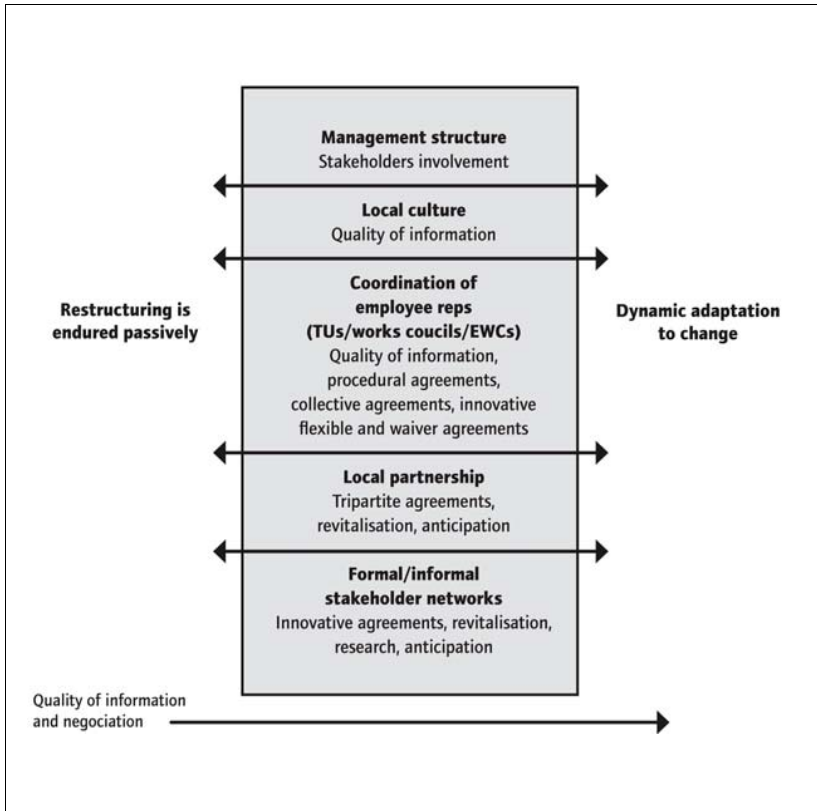
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11. According to a study by Oliver Wyman (2007), in 2015, 40 % of the world's population will be concentrated in cities with more than 1 million inhabitants; 17 % in cities with more than 5 million inhabitants. And the average speed of motor vehicles in these cities will be roughly 10 km/hour, with average daily journey times of 3 hours!
  12. See the AgirE website: <http://www.fse-agire.com>

Figure 1 The 3 M rule



Of course, such a positioning of the various players' interests poses significant challenges in terms of industrial relations, since it is a matter not so much of passively enduring restructuring as of actively bringing about change, by operating to the greatest extent possible all the levers of action shown in the figure below.

Figure 2 Variables for adapting to change



Several conditions must of course be met in order to drive forward this agenda, which involves a variety of players. The AgirE project has identified four essential preconditions:

- **the creation of a space for action**, participation and dialogue at all levels. In other words, scope for social dialogue is crucial to generating the necessary momentum, and could therefore form part of a partnership for anticipating change, as proposed by the European Commission. It was with that in mind that the Commission held a Restructuring Forum in Brussels on 17-18 October 2008, devoted entirely to the automobile sector. One of its aims was to promote a joint declaration on a 'European partnership for anticipation of

change' in the automotive industry, setting out the responsibilities of each and every player (EU, governments, companies, trade unions and regions). The Forum was the point of departure for bringing together all the relevant players so as to monitor developments in the automobile sector and promote a dialogue among the different players in order to manage change in the best possible way.

The general secretary of the European Metalworkers' Federation (EMF) recently pointed out<sup>13</sup> that in these times of crisis the automotive industry should agree to enter into an 'open, institutionalised social dialogue'. His appeal was directed in particular at the ACEA, which has expressed serious reservations about establishing a European social dialogue. Under these circumstances, European Works Councils (EWCs) – a relatively new method of collective employee representation – may well have an important part to play. Indeed, EWCs are turning their attention with increasing frequency to environmental protection issues. EWCs should also be able to have their say when the European Social Funds are drawn upon in the event of company restructuring operations, so as to ensure for example that the monies are properly used in the workers' interest:

- **the quality and relevance of information**, in order to look to the future and identify needs in terms of skills, qualifications and occupations, and in order to carry out 'cognitive mapping' for the purpose of establishing a shared diagnosis;
- **setting aside sufficient time for pre-emptive management of change**, with a view to utilising all available tools and resources for anticipation (e.g. a precautionary adaptation of jobs and skills);
- **creating a social climate favourable to action**, which of course depends on the degree of trust inherent in relations among the players and on the industrial relations culture at company level, but also at local level.

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13. At a conference held under the auspices of the high-level group CARS 21 (Competitive Automotive Regulatory Systems for the 21<sup>st</sup> century).



Whereas active, forward-looking policies need to be promoted, the current crisis demonstrates that they should nonetheless be accompanied by other, more defensive, measures which – although not taking effect until after restructuring has occurred – provide much-needed reassurance that the workers affected can find new jobs. On this point, the European Globalisation adjustment Fund (EGF) has been used several times since January 2007 to assist workers affected by restructuring in the automotive industry<sup>14</sup>. It is however clear that, in view of the current economic crisis, some would like to see a reform of the various European Funds: in particular, the € 500 million budget allocated to the EGF is regarded as insufficient and the threshold of 1,000 employees<sup>15</sup> too restrictive. This European Fund is currently undergoing a reform. The Commission announced on 26 November 2008 that it wished to turn the Fund into an ‘early intervention instrument’ and to ‘make the EGF a more effective crisis response instrument’.

In a more general sense, it really would be beneficial to involve both social dialogue and public policy-making in the pre-emptive handling of change, by ensuring – as demanded by Europe’s trade unions, especially the EMF – that, where aid is granted, it be granted subject to specific conditions, such as no lay-offs and compliance with collective agreements and wage deals. The Groupe Alpha has recently put forward a proposal<sup>16</sup> along these lines, making the award of Community funds contingent on the negotiation of a forward-looking agreement on employment and skills management. The Community funds granted would be subject to the following set of conditions:

- prior notice of restructuring (a reasonable period, such as 6 to 12 months, depending on the scale of the restructuring operation, ranging from 100 to more than 500 lay-offs);

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**14.** In particular, in the case of redundancies in the French automotive industry in 2007 (for subcontractors of PSA Peugeot-Citroën and Renault) and in June 2008 to help cope with 1,549 redundancies in the Portuguese automotive industry.

**15.** Restructuring must affect at least 1,000 jobs in a region where unemployment is higher than the national and Community average. The sector concerned must account for at least 1 % of jobs in that region.

**16.** ‘*Mieux anticiper et conduire les restructurations en Europe*’, a brochure issued by the Groupe Alpha, 2008.

- a social agreement on ‘methods and procedures’ (an already existing framework agreement on forward-looking management meets this condition), testifying to efforts to anticipate events at least operationally;
- immediate implementation of the analytical and operational flanking measures set out in the agreement concerned.

The crisis plaguing the automobile sector must not be used as a pretext for shunning pre-emptive measures, which in most cases rely on procedures involving workers or their representatives (information, consultation, participation and negotiation), but also other players (public authorities, clusters, voluntary bodies, etc.), in social innovation initiatives that prioritise active employment policies (training, careers guidance, etc.). Such initiatives must not however rule out a firming-up – where necessary – of social policy measures to assist workers, most notably by harnessing the European Social Funds.

## **Conclusion**

Whether one considers the glass to be half empty or half full, it would seem hard to deny the long-term impact of policies related to climate change in Europe. An examination of international competitive positions leads to the conclusion that incentives to innovate and adapt have favourable results, as has happened in the European automotive industry.

The worldwide economic crisis has dealt a new deal. Japan has already provided competition by bringing out new environmentally friendly cars (hybrid models); now it is the turn of the United States to reveal their hand. And there is no reason to believe that the emerging Asian economies will stay out of the game.

Europe must therefore manage a complex agenda of adaptation. It must redouble its efforts to place a clean, innovative mode of transport on the international market, while acting pragmatically so as not to weaken its industry at a time of enhanced international and intra-European competition. (The risk that EU Member States may fall back on their

own national policies for the automotive industry can by no means be ruled out.)

The current crisis clearly demonstrates that developing the automotive industry means more than merely defending the champions of industry: the issue of jobs and skills in the sector as a whole is crucial. In this sense, the preconditions for making a success of the 'new car for safe and sustainable transport' scenario depend on the stakeholders' ability to act at different levels, according to a multi-player logic requiring action on several fronts.

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## Annexes

### Annex 1 Segments of the automobile market: examples of vehicles

Segment	Examples of current models
A	Agila, Aygo, Fox, 107, C1, Twingo, Panda
B	Corsa, Yaris, Fiesta, Polo, 207, Clio, C3, Punto
M1	Astra, Auris, Focus, Golf, 308, Mégane, C4, Bravo
M2	Vectra, Avensis, Mondeo, Passat, C5, Laguna, 407
MPV	Zafira, Verso, C-Max, Touran, Scenic, Picasso, C4
H1	A4, Series 3, 607, Class C
H2	Series 5, Series 6, Class E
SUV	Rav 4, Touareg, X5

### Annex 2 Trend in the average rate of CO<sub>2</sub> emissions from new vehicles in Europe since 1995

in g of CO <sub>2</sub> /km	1995	1997	2000	2005	2006
Austria	184	175	162	160	161
Belgium	181	176	163	153	152
Denmark	190	189	178	163	162
France	176	175	162	152	149
Germany	194	189	178	169	171
Ireland	180	173	165	166	165
Italy	179	169	159	148	148
Netherlands	189	186	174	168	165
Portugal	171	164	156	143	143
Spain	175	170	162	149	155
Sweden	224	213	200	193	188
United Kingdom	190	188	179	168	166
EU average	185	180	169	160	160

Source: ADEME (2008).

### Annex 3 Passenger transport by mode within the EU 25, 1995-2004 (in billions of km)

	Car	Bus	Train	Tram and metro	Total
1995	3.787	474	324	65	4.650
1996	3.852	479	322	65	4.718
1997	3.927	478	326	66	4.797
1998	4.021	484	329	67	4.901
1999	4.119	485	339	69	5.012
2000	4.196	492	353	71	5.112
2001	4.277	493	355	71	5.196
2002	4.370	489	351	72	5.282
2003	4.399	493	347	73	5.312
2004	4.458	502	352	75	5.387
1995-2004	+18 %	+6 %	+9 %	+15 %	+16 %
Per year	+2.1 %	+0.7 %	+1 %	+1.8 %	+1.9 %

Source: ERF-IRF (2007).

#### Annex 4 Key elements of the compromise between the European Parliament and the Council on the draft regulation concerning emissions from new passenger cars in the EU

'Long term target: the compromise introduces a long term target for 2020 for the new car fleet of average emissions of 95g CO<sub>2</sub>/km;

phase in: the compromise says that manufacturers will be given interim targets of ensuring that average CO<sub>2</sub> emissions of 65 % of their fleets in January 2012, 75 % in January 2013, 80 % in January 2014 and 100 % from 2015, comply with the car manufacturer's specific CO<sub>2</sub> emissions target;

excess emissions premiums: the compromise provides that manufacturers exceeding the carbon dioxide targets set by the regulation will have to pay the following fines (so called excess emissions premiums): from 2012 until 2018: 5 euro for the first gram of CO<sub>2</sub>, 15 euro for the second gram of CO<sub>2</sub>, 25 euro for the third gram of CO<sub>2</sub>, 95 euro from the fourth gram of CO<sub>2</sub> onwards, from 2019 manufacturers will have to pay 95 euro for each gram exceeding the target'.

Source: European Parliament (2008), 'MEPs and Council Presidency reach deal on CO<sub>2</sub> emissions from cars', *Press Release*, 2 December 2008.

# The Social Agenda: is 'hard law' making a come-back?

Philippe Pochet and Christophe Degryse

## Introduction

Social affairs in Europe were characterised, in 2008, by debate about the revision of the European Works Councils directive (see article by Jagodziński in this volume), the revision of the working time directive, and the adoption of the directive on temporary work almost ten years after the process was launched. At sectoral level, furthermore, preparatory work lasted throughout the second half of the year on transforming into a directive a collective agreement based on an International Labour Organisation (ILO) Convention for seafarers<sup>1</sup>. Following several years when European initiatives in the field of social legislation were weak, or even non-existent, are we now witnessing a come-back of 'hard law' to the detriment of those 'new forms of governance' – or 'soft law' – generated in particular by the open method of coordination (OMC)? If this trend were to be confirmed, would it be connected with the mixed results of the Lisbon strategy (Pochet and Boulin, 2009; ETUI and ETUC, 2009) and with the come-back of an agenda of re-regulation dictated by the credit crunch? Or is the timing purely coincidental?

Closer analysis reveals that what is happening is without doubt more complex and cannot be ascribed to a straightforward alternative: hard law vs. soft law. On the one hand, and contrary to received opinion, the number of directives adopted in the social policy field never did plummet – except between 2005 and 2007. This will form the subject of

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1. It was officially adopted on 16 February 2009: Council Directive implementing the agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC.

our first section, consisting of a quantitative analysis of legislative output since 1975.

On the other hand, this persistence (resistance) of hard law has to be seen in parallel with the European Commission's new Social Agenda, which is hardly any more inspirational than its predecessors, but attempts above all to move from a social to a societal agenda. It is noticeable, by way of example, that the term 'worker' has all but disappeared (except concerning the issues of mobility and health & safety at work), replaced by 'individuals', 'persons', 'people', 'Europeans', 'citizens', 'young people', and so on. Instead of 'labour' we have 'human resources', and where the Treaty of Rome made it a task of the European Community 'to promote improved working conditions and an improved standard of living for workers' (Art. 117), the Commission now refers to 'empowering and enabling individuals to realise their potential while at the same time helping those who are unable to do so' (CEC, 2008a: 3). These few semantic observations do not of course constitute an analysis, still less proof, but in our opinion they do reflect the resolve of certain players to cast aside the traditional definition of social policy and move into other fields where, moreover, Community competence is marginal. This is the subject of our second section.

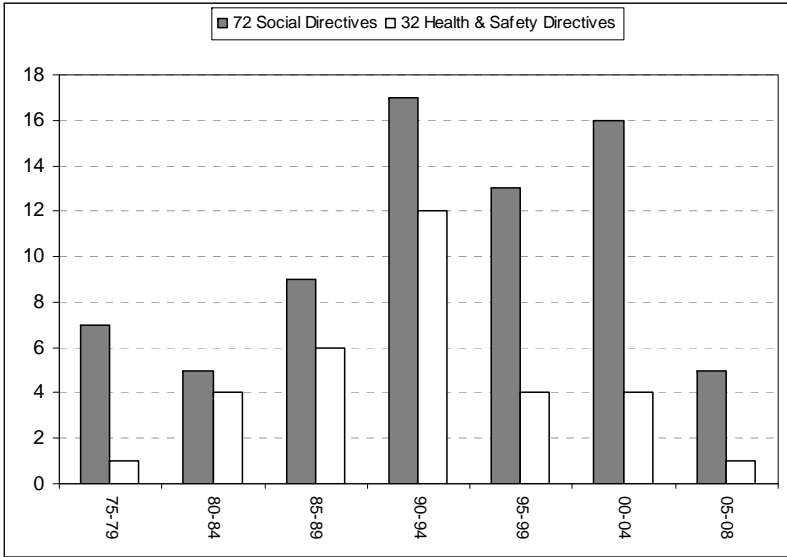
Our third and final section will comprise a detailed presentation of the proposal for a (revised) directive on working time and the directive on temporary work. For, above and beyond the debate about whether hard law is undergoing a revival or a decline, it is worth assessing the content of the acts adopted.

## **1. The evolution of European social legislation since 1975**

It is generally accepted by most members of the academic community that there are fewer and fewer social directives, and that when such directives are adopted their content is (very) minimalist. Consequently, the OMC may have been considered by many – even by people not supportive of such an approach – as a possible response to the lack of political support for the development of EU social legislation. The conventional wisdom in this sphere can be verified empirically by examining the data on the number of directives and regulations adopted. Figures 1 (per five-year period) and 2 (per year) show, in black, the total number of

social directives/regulations (including health and safety directives) and, in white, the number of health and safety directives as a share of the total.

Figure 1 Number of social directives per 5 year period (1975-2008)



Quite clearly, and contrary to received opinion, the number of directives adopted did not fall during the second half of the 1990s and the first years of the new millennium. On the contrary, a rather comparable picture emerges for the periods 1988-1995 and 1996-2004. It is hardly possible, in the light of these numbers, to claim that the Community method is in crisis, at least up until enlargement in 2004.

Dividing the data into 'social' and 'health & safety' directives allows us to examine whether the overall numerical stability is attributable to the growing number of health and safety directives<sup>2</sup>. In fact, we see that most of the new directives relating to health and safety were adopted in

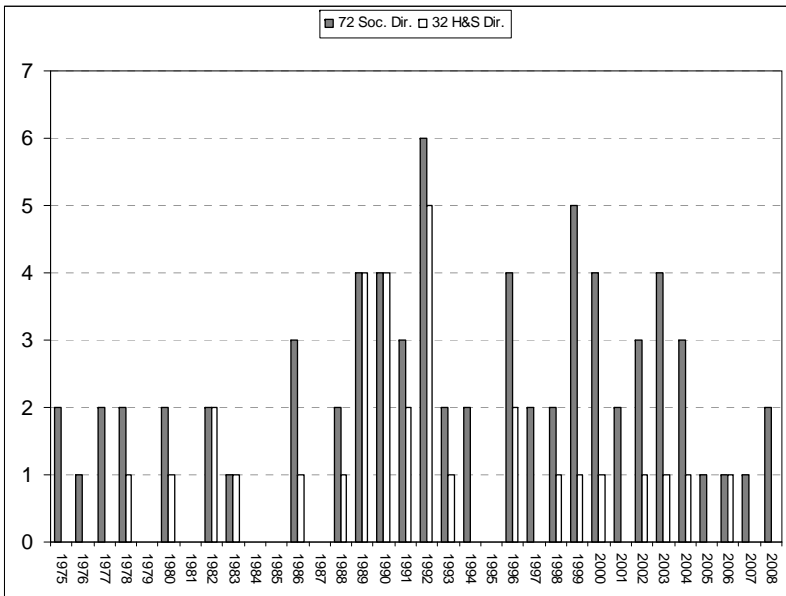
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2. A small number directives have been adopted under Article 118 (health and safety) in order to benefit from the qualified majority associated with this legal basis, but they are broader in scope than health and safety (Directives 93/104 on working time, 92/85 on pregnant workers and 94/33 on young workers). These have been classified as general social directives.



the first half of the 1990s in the wake of the 1989 health and safety framework directive. Moreover, the four directives adopted between 2002 and 2006 derived from the same parent directive, dating from 1993, which was split into four different proposals in the late 1990s. The relative stability in the number of directives adopted cannot consequently be explained by a surge in health and safety legislation.

Figure 2 Number of social directives per year (1975-2008)



Source: Observatoire social européen, own database, 2008.

Another possible way of explaining this stability is to look at the texts adopted by the social partners and subsequently transposed into directives. As from 1995, seven framework agreements have been turned into directives, three of them deriving from the cross-industry level (parental leave in 1995, part-time work in 1997 and fixed-term work in 1999). The other four arose at sectoral level: two are adaptations of the working time directive to transport sectors (seafarers in 1998 and civil aviation in 2000); the other two are agreements concluded in the railways sector in 2004 (one fully transposed into a directive in 2005 and the other partially so in 2007). These data fit with

the conclusions of research we carried out on sectoral social dialogue (Dufresne *et al.*, 2005), which showed that the social partners in these sectors had a clear preference for negotiating binding agreements. On average, one text emanating from the social partners is extended *erga omnes* by a directive every two years. Thus the issuing of sectoral directives clearly does contribute to explaining the overall legislative stability.

In terms of subject matter, the directives adopted since 1997 relate to traditional social fields, such as the statute for a European company (2001), information and consultation at national level (2002), the statute for a European cooperative society (2003), non-discrimination (2000), gender equality (2004), free movement (2004), and so on. Thus stability can likewise be detected in the thematic continuity and the extension of the traditional social agenda.

Admittedly, there was a marked reduction of the use of hard law measures in the years 2005, 2006 and 2007. One might however wonder, in the light of recent social partner consultations, whether this will be a lasting trend. In 2007 the social partners were consulted on six topics: active inclusion; employment in maritime occupations in the EU; cross-border transfers of undertakings; reconciliation of working and family life; musculoskeletal disorders; needlestick injuries. These consultations are intended to lead to the presentation of formal draft directives by the Commission or to a decision by the social partners to negotiate together.

In 2008, the Commission put forward a draft directive on the revision of the European Works Council directive. Meanwhile, the Social Affairs Council of June 2008 reached a common position on the working time and temporary agency directives, the latter being adopted on 19 November 2008 (see below). A new proposal was put forward in July 2008 on non-discrimination outside the field of employment (CEC, 2008b). Also in July, the Commission proposed transforming into a directive the framework agreement concluded in 2006 by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention. The directive was officially adopted on 16 February 2009<sup>3</sup>.

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3. The above table, and our analysis, takes no account of directives adopted during the year whose purpose is to introduce purely technical (not substantive) amendments to existing

This flurry of activity would seem to indicate the likelihood of a continuing flow of hard-law measures in the coming years.

Of course, the above quantitative data tell us nothing about the potential impact of EU social legislation. The key question is whether these texts will have a significant and structural influence (at least for some Member States) or whether they are minimalist directives establishing a very low threshold of protection at EU level and making little change to national rules. By structural influence, we mean measures which call into question some fundamental aspects of the national approach to social legislation.

## **2. The Renewed Social Agenda**

The new Social Agenda came about in a rather odd manner, beginning life as a ‘non-paper’ on Europe’s social reality (March 2007) which was put out for consultation. The document was drawn up by Roger Liddle and Frédéric Lerais of the BEPA (Bureau of European Policy Advisers) (Liddle and Lerais, 2007), linked to the President of the Commission, Mr Barroso. It begins by describing various trends and changes in European society and then, in a second section, addresses itself to well-being in post-industrial societies. Over and above the usual themes – inequality, demography, education, poverty, etc. – the issues covered include quality of life, rising crime and insecurity, and family life.

Thereafter the Commission took over responsibility for the consultation and, in November 2007, adopted a communication on ‘opportunities, access and solidarity’ (CEC, 2007) based on its initial conclusions drawn from that consultation. The aim was to modify the traditional agenda

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texts (e.g. an amended annex, a change of deadline for transposition, codification on the basis of established law, etc.). Such amendments were made, in 2008, to the following: Regulation No.592/2008 of the European Parliament and of the Council of 17 June 2008 amending Council Regulation (EEC) No.1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community; Directive 2008/46/EC amending Directive 2004/40/EC on minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields); Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer (codified version); and Directive 2008/106/EC on the minimum level of training of seafarers (recast).

and deal henceforth with quality of life, rather than with social issues in the narrow sense as before.

The Renewed Social Agenda adopted in July 2008 (CEC, 2008a) forms part of this new dynamic. Another imperative had to be borne in mind: namely, not to tie the hand of the next Commission which will take up office in November 2009. This is therefore a provisional exercise pending the adoption (or not) of a fully fledged social programme by the next Commission.

A resolutely optimistic note is struck by the Renewed Social Agenda, as is evident from the very first paragraph of the communication: 'Technological advances, globalisation and an ageing population are changing European societies. In recent years the pace of change has accelerated. Europeans are living longer, healthier lives in new family configurations and working patterns. Values and relationships between generations are changing. Europeans face unprecedented opportunities, more choice and improved living conditions. The European Union, notably through the Lisbon Strategy for growth and jobs, greater market integration and macro-economic stability, has been instrumental in creating those opportunities, by stimulating employment and mobility.'

The priorities of the Social Agenda hinge on three terms already highlighted in the previous communication: opportunities, access and solidarity. Seven major themes are outlined.

- 1) Children and youth – tomorrow's Europe. Included here are efforts to improve the quality of education systems and achieve targets regarding early school leavers, as well as child poverty. Since Europe does not have legislative powers in this area, it is a matter of offering incentives, exchanging ideas and implementing the open method of coordination.
- 2) Investing in people, more and better jobs, new skills. This includes the proposal for amending the Works Councils directive, a working document on anticipating and managing structural change and another on company-based transnational agreements (the previous Agenda had mentioned developing an optional legal framework but the employers objected).

- 3) Mobility. It is well known that the *Laval*, *Viking*, *Rüffert* and *Luxembourg* cases (see article by Dalila Ghailani; see also the collection of articles at [www.etui.org](http://www.etui.org)) highlighted the tensions between social rights, collective bargaining and equal treatment on the one hand, and free movement for workers on the other. The ETUC and national organisations voiced strong objections to judgments they regarded as imbalanced and dangerous for workers. Mobility is a crucial issue, in that it shapes the vision and direction of European integration, yet the Commission confined itself to proposing a Forum 'to promote debate and exchange of good practice'. In addition, it plans to develop a 'fifth freedom', i.e. free movement of knowledge, by promoting the mobility of researchers, young entrepreneurs, young people and volunteers.
- 4) Longer and healthier lives. The main proposal concerns patient mobility (see article by Rita Baeten), with fresh attention being paid to the impact on public finances. There will be a communication on health inequalities, building on work under the Social Inclusion and Social Protection OMC. Patient safety and the quality of health services will be addressed, as will the EU health workforce. It is striking to note the extent to which this area, which only a few years ago was marginal and received only sporadic consideration at European level, has now become important and covers different facets of healthcare.
- 5) Combating poverty and social exclusion. Very superficial treatment is given to this theme. The digital divide and extending the food aid programme will be on the Agenda, as will active inclusion and social services of general interest.
- 6) Fighting discrimination. This theme has been fleshed out in more detail, with a proposal for a directive to combat discrimination outside the field of employment. There will be several proposals related to reconciling private and professional life (parental leave – revision, new forms of leave, and protection for pregnant women – revision). Various other actions are envisaged, ranging from childcare to poverty among women, to the gender pay gap.
- 7) Opportunities, access and solidarity on the global scene. Included here is corporate social responsibility, now something of a cliché, but also the more serious issue of decent work.

The second part of the communication deals with instruments. As is evident from our presentation of its themes, the Social Agenda contains few proposals for directives, and many of those are revisions of existing texts. Even that, however, is still an improvement on the previous social programme. But the question now is how much improvement – or regression – can be expected from revisions of existing directives. As Janine Goetschy has quite rightly pointed out, the main characteristic of the European level was to afford protection which was initially relatively low but has remained unchanged, while deregulation has taken place at national level. It remains to be seen, then, whether this will still be the case once the existing directives have been revised.

The two proposals for directives under discussion in 2008 will be examined in our next section, focusing on their content as well as the underlying political dynamic. We are referring to the revision of the working time directive, and to the newly adopted directive on temporary agency work.

### **3. The proposal for a directive on working time and the agreement on temporary agency work**

#### 3.1. The working time directive

##### **3.1.1. Background**

In the wake of the 1989 action programme accompanying the Community Charter of the Fundamental Social Rights of Workers, a directive restricting weekly working time to 48 hours throughout Europe was adopted in 1993. This directive is based on the Treaty article concerning workers' health and safety (thus requiring a qualified majority to be adopted). The United Kingdom immediately objected to the directive and called for it to be repealed on the grounds that the wrong legal basis had been used by the Council (health & safety). The UK also based its case on the principle of subsidiarity, claiming that the Community legislator had not established that the goals of the directive would be better served at EU level than nationally. The European Court

of Justice nevertheless dismissed London's arguments in its judgment of 12 November 1996<sup>4</sup>.

The then Conservative government obtained an 'opt-out' for the UK, i.e. a (theoretically) temporary provision authorising it not to apply the 48 hour per week rule under certain circumstances, namely subject to an individual worker's prior agreement in writing. Abusive practices on the part of British companies very soon came to light, whereby employers were making recruits sign the contract of employment at the same time as the agreement waiving the restriction of working time. Since both documents were presented simultaneously, it was in the interest of the job applicant to sign both – or risk signing neither. The upshot is that around 3.7 million British employees are working more than 48 hours per week, which represents a proportion three and a half times higher than the European average.

Pressure began to mount for this 'temporary' provision to be terminated once the 1993 directive came up for revision. But London proved intractable. Attempts to reach a compromise failed on no fewer than seven occasions between 2004 and 2008. The UK's position did however begin to weaken under pressure from the trade unions, the European Parliament and the group of Member States in favour of a more socially-oriented Europe. London therefore decided to embark on a large-scale diplomatic offensive, aimed at making this social dossier part of a wider package where other countries might be interested in negotiating compromises. It then became clear that the working time and temporary work directives would have to be linked together, and that their fate would depend on a series of trade-offs among Member States.

The UK and Germany began to work together on certain sensitive dossiers in 2003. A sort of agreement was reached: London would back Berlin in its efforts to amend a draft directive on take-over bids (Germany was seeking at the time to protect car producer VW from hostile take-over bids); in exchange, the UK sought Germany's support on temporary workers' rights, a dossier related to that of working time.

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4. Case C-84/94, *United-Kingdom/Council*, 12 November 1996.

Another agreement followed, this one between London and Paris. France had until then belonged to the group of countries demanding that the UK abandon its opt-out. To mollify Paris, the UK government agreed to be flexible on the full liberalisation of electricity and gas<sup>5</sup>. France agreed in return to abandon its own demands on the opt-out, thereby turning its back on the coalition of socially-oriented countries. The final piece of the jigsaw was fitted when the UK government persuaded the employers (the Confederation of British Industry, CBI) to give ground on the rights of temporary workers, in exchange for which the CBI could rest assured that the opt-out from the working time directive would be maintained. The Trades Union Congress (TUC) and the CBI then signed an agreement on temporary work, breaking the deadlock on this dossier. And so it was that the UK government could return to Brussels in early June 2008 with a green light on the temporary work directive, and a red light – but accepted by (almost) all – on abandoning its opt-out from the working time directive.

### **3.1.2. Content of the Council's common position**

The Council agreement concluded in June 2008 contains three main strands:

- the opt-out clause, allowing employers to arrange individually with workers not to apply the maximum working hours, would be maintained;
- what are known as the 'inactive' parts of on-call time would not count as working time, even when the worker must be available at the workplace;
- the reference period for calculating average maximum weekly working time (48 hours) would be extended from four to twelve months, without a safeguard clause.

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5. By means of unbundling, i.e. separating electricity and gas generation from their transmission, so as to open up the European energy market, which in practice meant dismantling the large French and German energy groups.



The agreement stipulates that the maximum limit on weekly working time remains at 48 hours, unless a worker requests an individual opt-out. In that case, he/she may work at most 60 hours per week provided that the social partners have not decided otherwise. Other conditions are laid down: no opt-out agreements to be signed during the first month of work, and no penalties for workers not signing one.

Furthermore, the Council agreement defines what is to be understood by 'on-call' time (for hospital doctors, firefighters, police, etc.). It is divided into two aspects: 'active' on-call time, regarded as real working time, and 'inactive' on-call time, which can only be counted as working time if authorised under national legislation or by agreement with the social partners. A worker requesting an opt-out in respect of on-call time would be able to work at most 65 hours per week.

### **3.1.3. Reactions**

Criticism poured in from countries supportive of an ambitious compromise (Belgium, Cyprus, Greece, Spain, Portugal, Hungary and Malta), in justification of their abstention at the vote. They abstained, apparently, because a bad compromise is better than no compromise at all.

The reaction from the trade unions was hostile: on-call time is no longer systematically considered as working time, even when the worker is available to his/her employer; the opt-out is maintained whereas it should have been abolished; negotiation between the social partners has been circumvented in that the opt-out is to be requested individually. In short, it is still possible in principle for one Member State to compete with others via a form of social dumping. It is interesting that the British TUC nonetheless identifies some positive aspects in this compromise: in particular, the 60 hour limit for workers subject to an opt-out (65 hours in the case of on-call time), the fact that the worker's opt-out agreement must be renewed annually, and the fact that the opt-out can no longer be requested at the time of signing the contract. The TUC would have liked to see the UK opt-out abolished, of course, but its application is now governed by more stringent rules. Last of all, the TUC notes that London failed to obtain a definitive opt-out: the draft directive in fact specifies that the clause will be revised once again at a future date.

The European Trade Union Confederation (ETUC), for its part, had sought to keep separate two dossiers which have nevertheless been linked together. It organised a demonstration in Strasbourg in December 2008 to coincide with the sitting of the European Parliament, with a view to influencing the vote there. The ETUC put forward five demands, which attracted support from a large majority of MEPs. The demands had to garner an absolute majority of at least 393 votes in order to be accepted.

They were as follows:

- on-call work including inactive time is working time: 576 votes (and compensatory rest must follow after on-call duties: 514 votes)
- putting an end to the opt-out: 421 votes (and deletion of the conditions for the opt-out including the maximum 60 and 65 hours: 544 votes)
- proper conditions for annualisation: 536 votes
- strengthening reconciliation of work and family life: 539 votes
- limiting the exclusion of higher and managerial staff: 422 votes.

The MEPs therefore overwhelmingly rejected the Council's common position. The points of discord are substantial and relate above all to the opt-out clause, which Parliament wishes to abolish, and on-call time, all of which must in its opinion be regarded as working time (although the inactive parts thereof may be calculated in a specific way). Following on from that vote, a conciliation procedure between Parliament and Council was to be initiated in 2009. No doubt it will not be plain sailing.

## 3.2. Temporary work

### 3.2.1. Background

The directive on temporary work has a long history. The European Parliament and the Council of the EU already adopted resolutions in favour of action to protect temporary workers more than twenty years ago, while the European Commission put forward a draft directive in

1982 but it was not adopted. In 1990, as part of the action programme accompanying the Community Charter of the Fundamental Social Rights of Workers<sup>6</sup>, the Commission proposed legislating in three areas: part-time work, fixed-term contracts and temporary work. This second attempt failed too, but that did not prevent the adoption of a directive to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship (Council of the European Communities, 1991). The directive did not, however, cover other important aspects of temporary work, such as the duration and renewal of contracts, the circumstances under which user undertakings may have recourse to temporary work, parity between temporary staff and equivalent permanent employees in user undertakings as concerns pay and working conditions, and lastly trade union rights and collective representation for temporary staff.

It should be pointed out immediately that temporary work is a far more complex issue than either part-time work or fixed-term contracts. A whole host of divergent practices and rules exist in the Member States concerning the status of temporary workers (some countries do not even have a definition of temporary work or any specific regulations governing it). Moreover, it was a highly sensitive matter politically at the time, given the upsurge in this type of work in all Member States from the mid 1990s onwards.

In 1995 the Commission launched a round of consultations with the European social partners which led to the start of negotiations between them one year later. The social partners reached agreements on part-time work and fixed-term contracts, both of which were transformed into directives, in 1997 and 1999 respectively. As for the third element, temporary work, the two sides began talks in May 2000. It became perfectly plain after a year of negotiations that UNICE (now BusinessEurope) was not prepared to accept agency workers being put on the same footing as direct employees of the user undertaking. Opinions also differed on the trade union side (Degryse, 2002). The two

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**6.** The Charter sets out the need for an 'improvement in the living and working conditions of workers', including temporary workers. There must be an alignment of these conditions, and 'the improvement must cover, where necessary, the development of certain aspects of employment regulations' (Article 7).

main reasons why the negotiations became deadlocked had to do with equal treatment for agency workers and the conditions under which companies may have recourse to temporary staff.

Concerning equal treatment, the ETUC believed that the user undertaking should be recognised as the first point of reference when comparing basic working conditions (wages, working time, health and safety). It pointed out in support of its argument that this principle had already been accepted in the other social partner negotiations on atypical work (part-time work and fixed-term contracts), adding that the principle was already being applied in most countries. The ETUC's insistence that comparable workers in the user undertaking should be the first point of reference was regarded by UNICE as unjustified, in that agency workers in some countries are permanently under contract to the agency and are paid by their employer even when not on assignment at a user undertaking. This point of view was shared by the European Association of Craft, Small and Medium-sized Enterprises (UEAPME).

In the ETUC's opinion, furthermore, it was also necessary to regulate the conditions for using agency staff, and in particular to establish measures for preventing abuses of this form of labour. (The employers refused to do so.) The trade unions were concerned that agency staff would be treated as second-rate workers by companies trying to make them do the same work as their own 'real' workers but at lower cost and with less stringent statutory and regulatory constraints. According to the unions, agency workers have less control than other employees over the type of work they do and the way in which they do it, receive less training, have a higher rate of accidents at work and are less well-informed about health and safety, are more likely to perform shift work and have less time to complete a job.

The ETUC Executive Committee decided on 22 March 2001 to break off negotiations with the employers. It then called upon the Commission to put forward a directive aimed at regulating temporary agency work, which the Commission duly did on 20 March 2002. This return to the legislative method took the whole affair back to the state of affairs prevailing some ten years earlier, albeit in a different political context (most notably with the Labour Party having come to power in the UK).

### **3.2.2. Content**

Thus the European Commission put forward a proposal for a directive on working conditions for temporary workers in 2002 (European Parliament and Council of the EU, 2002). But it soon became bogged down in the Council, giving the impression that if the social partners themselves had failed to reach an agreement it would be difficult to obtain the Council's endorsement. That did indeed prove to be the case, at least for a period of six years.

After a good deal of horse-trading (described above in section 3.1), the Member States, meeting in the Council, reached a qualified majority agreement on the proposal on 10 June 2008. Following its approval by the European Parliament on 22 October 2008, the directive was officially adopted by the Council on 19 November 2008 and will enter into force in three years' time (European Parliament and Council of the EU, 2008). The Commission and the social partners – both cross-industry and sectoral – gave their backing to this agreement.

The directive rests on the principle that the three million or so temporary agency workers in Europe will enjoy equal treatment. It addresses the following questions: the reasons for prohibitions or restrictions on the use of temporary agency work (Art. 4), the principle of equal treatment (Art. 5), access to employment, collective facilities and vocational training (Art. 6), representation of temporary agency workers (Art. 7) and information of workers' representatives (Art. 8).

Any existing restrictions or prohibitions on the use of temporary agency work must be justified by Member States by December 2011. Only where they can be explained on grounds of general interest – subject to verification by the Commission – may such measures be maintained.

The directive guarantees equal treatment for temporary agency workers as from the first day of their assignment in respect of basic working conditions and employment (including pay, leave, working time, rest periods and maternity leave). It is possible to deviate from this rule provided that a collective agreement or specific agreement has been signed by the national social partners. What is more, agency workers must be kept informed of opportunities arising for employees of the company, and must benefit from the same collective facilities (canteen, childcare facilities, transport services etc.) as workers directly employed

by the company. Finally, the directive aims to improve temporary agency workers' access to training, even in the periods between their assignments.

### **3.2.3. Reactions**

Eurociett, the European Confederation of Private Employment Agencies (which represents the profession as a whole in Europe) reacted positively. According to its Managing Director, Denis Pennel, the agreement 'will, by aligning the protection granted to temporary agency workers, improve the image of a sector that is still all too often discredited'<sup>7</sup>.

The response from the trade unions was equally favourable. The ETUC welcomed the way in which the Council had solved the most contentious issue in the directive, namely equal treatment between agency workers and employees of the user undertaking. The directive will not any more introduce a general qualifying period before the equal treatment principle would apply, as was proposed previously, but instead only allows for derogation by collective agreement or – under specific conditions – by agreement between the national social partners. John Monks, General Secretary of the ETUC, stated that 'the directive also gives an important role to social partners to deal with the implementation and application of this principle in practice, which allows for flexibility while ensuring the protection of workers' (ETUC, 2008).

## **Conclusion**

We have shown in this article that, contrary to received opinion, the European Commission is still feeding into the legislative process in the field of European social legislation. With the exception of the period 2005-2007, 'hard law' does not really seem to have given ground to 'soft law'. The Commission's Renewed Social Agenda of 2008 contains a few legislative proposals but, more significantly, it attempts to broaden the notion of social policy to take in new or related fields. In this wider

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7. Interview with Denis Pennel, Managing Director of Eurociett, the European Confederation of Private Employment Agencies, by Frédéric Rey. See the Métis website: [http://www.metiseurope.eu/directive-int-eacute-rim---l-avis-des-employeurs-europ-eacute-ens\\_fr\\_70\\_art\\_28063.html](http://www.metiseurope.eu/directive-int-eacute-rim---l-avis-des-employeurs-europ-eacute-ens_fr_70_art_28063.html).

conceptual framework, 'workers' are often replaced by 'individuals', 'people', 'persons' and 'Europeans' in policy areas where Community competence is often only marginal.

As for the development of European social law in the strict sense of the term, it often consists of revisions of existing directives (working time, European Works Councils, etc.), as well as some new legislative initiatives (temporary agency work). It is also reflected in the implementation, via directives, of agreements concluded between the European social partners at either cross-industry or sectoral level.

It is nevertheless apparent that the adoption of social directives in the Council and the European Parliament has become more complex than in the past. The cases of the working time and temporary agency work directives demonstrate that, when adoption is not dependent on the social partners (or when their negotiations have failed), the political decision-making is influenced by a series of factors which may have little to do with the actual content of the directive, such as political momentum, bilateral diplomacy, the creation of negotiating 'packages', etc. In principle, none of these factors play a part when the social partners negotiate among themselves. Do these external factors have a negative impact on the quality of the texts adopted? The answer to that question in 2008 seems to have been 'yes' in the case of working time, and 'no' in the case of temporary agency work.

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# Review, revision or recast? The quest for an amended EWC Directive

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## Introduction

Overdue by nine years, contested by employers and awaited by trade unions, a review of the European Works Council (EWC) Directive 94/45/EC finally became reality. This chapter aims at presenting background information about the positions of the European social partners and other institutional EU actors in order to provide the reader with a better understanding of the outcome of the events of 2008 in this field. First of all we cast our minds back to the 1990s, focusing on the then controversies and approaches of the stakeholders involved in the adoption of the EWC directive. Interestingly, some circumstances and developments before and during 1994 seem very similar to those of 2008. Next, we analyse the main arguments and claims of the European employers' and trade union organisations, with a view to discerning their evolutions and the reasons for some changed stances in 2008.

The focus of the chapter is on analysing the events of the ten months since the European Commission's communication of February 2008 on opening the second stage of consultation with the social partners. In this respect an important question about the nature of the process, whether it was a review, revision or a recast<sup>1</sup>, is posed and analysed. It is followed by a general overview of the new elements in the final recast directive on EWCs adopted by the Council on 17 December 2008.

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1. The three terms referring to formal amendments to the Directive on European Works Councils (review, recast and revision) have been used interchangeably in the debate. In this paper (and in the general debate) the term 'revision' has been used as the default word describing the process of introducing changes to the directive. 'Review' is the legal term used in Art. 15 of Directive 94/45/EC, whereas 'recast' did not appear, in the context of the EWC Directive, until mid 2008 in the text of the Commission's proposal to the European Parliament. The differences are discussed in one of the paragraphs of this chapter.

## 1. The prelude to the EWC directive of 1994

When, after several attempts to adopt a directive on European Works Councils, the consensus among the European social partners turned out to be a moving target, and, in fact, so fragile that a single organisation could swing the pendulum (e.g. the Confederation of British Industry (CBI) in March 1994; see Falkner, 1998: 106), the European Commission, based on new prerogatives set out in the Social Protocol of 31 October 1991, decided to pursue its role of legislator. On 22 September 1994 the Commission adopted Directive 94/45/EC, which was the culmination of political bargaining lasting more than a decade. The fact that each of the social partners attempted to put blame on the other (Ross, 1995: 75) reveals how strained the issue of institutionalising EWCs has been from the very beginning. Interestingly, the fact that the European Commission's new proposal<sup>2</sup> to the European Parliament was transmitted in a great hurry, as well as that the political acceptance of the Council was ranked much higher than substantial contributions from the European Parliament (Falkner, 1998: 107), opened a parenthesis that was, unexpectedly, to be closed in a very similar way as the events of 2008 leading to the revision (recast).

Since there had been no legislative precedent and only a limited record of voluntary 'pioneering' practices in the form of bodies for transnational information and consultation in some international companies since the mid 1980s (Kerckhofs, 2002: 10-13; Kowalsky, 1999: 174) the legislator foresaw a deadline by which this innovative instrument would be examined and refined where necessary. In Art. 15 of the EWC Directive (94/45/EC) the European Commission undertook to pursue, 'in consultation with the Member States and with management and labour at European level', a review of the directive by September 1999.

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2. Proposal for a Council Directive on the establishment of European committees or procedures in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, COM (1994) 134 final, OJ C 135 of 18 May 1994, page 8.

## **2. The first missed deadline for revision**

The year 1999 was supposed to mark an important turning point in the timeline of EWCs, when the first review of their operation according to Art. 15 of the EWC directive would be undertaken.

Ahead of the deadline for commencing formal steps aiming at satisfying the obligation included in Art. 15 of Directive 94/45/EC, the European social partners (ETUC, UNICE and CEEP), with the support of the European Commission, held a conference on 28-30 April 1999 entitled 'European works councils: practice and development' (Hall, 2000). This event revealed the diverging views of labour and employers on the idea of amending legislation on EWCs.

## **3. Position of the European Trade Union Confederation**

Even though the differences between the social partners may not yet have been crystal clear at the April conference, they were soon clarified, at least by the unions. When the European Commission had not undertaken any action in relation to the review by September 1999, the European Trade Union Confederation issued a resolution in December 1999 calling upon the Commission to fulfil its self-imposed obligation (ETUC, 2000: 16-22). The meaning of the ETUC's 1999 position was significant as it included core arguments brought up by the trade unions in the years to come. Contrary to UNICE (EIRO, 1999), the ETUC argued that the then existing 600 EWC agreements represented a sufficient basis for conducting an assessment and undertaking the measures necessary to improve the very right to information and consultation, as well as the working conditions of EWCs. On the former point, according to the ETUC, what required special attention in view of earlier experiences (especially the Renault Vilvoorde case of 1997) was the crucial question of the timing of information and consultation. The ETUC demanded that information 'must be comprehensive, provided in good time and given on an ongoing basis' and that its 'timing, form and content must enable employee representatives to examine in detail repercussions of a proposed measure, allowing consultations' (ETUC, 2000: 17). It was stressed in this regard that workers' representatives on EWCs were often not consulted, but simply presented with a *fait accompli*, especially in respect of poor information about restructuring measures (EWCs had been finding out mainly from the

press). The ETUC also called for the right of EWCs to be informed of management opinions on *planned* measures (i.e. communicated before being implemented) as a part of a meaningful consultation. It was, however, not only the legal criteria defining information and consultation that were in the spotlight, but also guarantees on how to make these entitlements practicable. Therefore the European trade unions also insisted on guaranteeing that information was disseminated in writing and in all languages in order to avoid obstacles to understanding on the part of representatives from different countries.

Concerning improvements to other facilities at the disposal of EWCs, the ETUC asked, among other things, for the recognition and inclusion of representatives of European Industry Federations (EIFs) in Special Negotiating Bodies (SNBs), and a lowering of the thresholds (of employees) governing the application of the EWC directive (*ibidem*). Moreover, access to company sites for EWC members was considered a necessary improvement for EWCs. It was also argued that EWCs should be guaranteed the right to preparatory and follow-up meetings and better access to trade union experts.

Finally, based on the infamous court case concerning Renault Vilvoorde<sup>3</sup>, the ETUC argued that the Commission should officially recognise the most important sanction, stemming from the body of the directive: namely that business decisions taken without consultation were null and void.

#### **4. The employers' organisations**

Contrary to the ETUC's approach in terms of campaigning for the revision of EWCs as from 1999, initially until roughly 2004 the European-level employers' organisations were much more unforthcoming about adopting official political resolutions. At the same time the employers' views on EWCs have been evolving over the years: back in 1994 the directive was adopted against their will, whereas finally in 2007 (BusinessEurope, 2007) EWCs were recognised by them as a useful instrument.

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3. Interim ruling 4 April 1997 in B.O. 97/00992 of the Tribunal de Grande Instance of Nanterre, Cour d'Appel de Versailles, 7 May 1997.

In general, until the beginning of 2008, the attitude of the employers' organisations towards the revision had been consistently negative and critical. First of all, in 2003 UNICE announced its official response (UNICE, 2003a) to the 'Commission Communication on the Mid-Term Review of the Social Policy Agenda' (CEC, 2003). In this document the European employers' organisation declared itself 'strongly opposed to (...) consulting the social partners on possible revisions of existing directives or amending and complementing EU social directives as is envisaged for the directives on European Works Councils (...) ' since it 'would send the wrong signal at a time where new member states' efforts should focus on effective implementation of the existing legal *acquis*'. This stance was reaffirmed several times: two months later by Jacques Schraven, Vice-President of UNICE, at the Tripartite Social Summit (UNICE, 2003b) and by Dr Jürgen Strube, President of UNICE, one year later during the Tripartite Social Summit in Brussels (25 March 2004; UNICE, 2004a)<sup>4</sup>. In UNICE's Answer (UNICE, 2004b) to the First-Stage Consultation of the European Social Partners on the Review of the European Works Councils Directive (CEC, 2004), the opening remark states that 'UNICE is strongly opposed to a revision of the EWC directive' and considers 'the best way to develop worker information and consultation in Community-scale undertakings is through dialogue at the level of the companies concerned'. According to UNICE the main challenge for EWCs was not restructuring (as stated by the Commission in its communication of 2004), but EU enlargement and the integration of representatives from the New Member States. This line of argument was also sustained in the years thereafter: in 2005 UNICE's response (UNICE, 2005) to the Commission communication on Restructuring and Employment (CEC, 2005), the organisation remained 'convinced that launching it was neither desirable, nor necessary'.

As steps by the European Commission towards a formal legislative revision of the EWC directive were becoming more concrete and decisive, the language of the employers' organisations was becoming more and more radical. In UNICE's response (UNICE, 2005) to the communication opening the second stage of public consultation (CEC, 2005), the

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4. 'The EU institutions should avoid proposing (...) unnecessary revisions of existing legislation such as the European Works Council directive or new legislation such as the directive on data protection'.

employers stated that since ‘dealing with consequences of restructuring operations is by definition a matter for local players (...) trying to prevent or limit restructuring by tightening the regulatory straitjacket around the business would be counterproductive’. Since EWCs were considered part of the proposed ‘regulatory straitjacket’, UNICE reaffirmed that it remained ‘convinced that launching it was neither desirable, nor necessary’. Equally indicative in this regard was a motion of Group 1, representing the employers, at the European Economic and Social Committee (EESC), submitted in 2006 on the occasion of a plenary vote concerning an opinion on European Works Councils (EESC, 2006): the employers stated, among other things, that ‘the potential of European Works Councils cannot be increased by modifying the EWC directive and extending its scope. Rather, the parties involved at company level must be left free to address their individual requirements on a customised basis. Hereby they adapt European Works Councils to new developments and globalisation. This is only possible in the existing flexible framework, not through further restrictive legislative provisions’.

Similarly, after the change of name from UNICE to BusinessEurope in 2006, its President Ernest-Antoine Seillière<sup>5</sup> assessed the Commission’s possible re-launch of the EWC revision as ‘pretty worthless’ and said that such an approach of ‘forcing things or speeding things up in this area is a waste of time’. The same year, BusinessEurope General Secretary Philippe de Buck described revision of the EWC directive as potentially harmful to the Lisbon Agenda’s goals of growth and employment (BusinessEurope, 2007). He furthermore expressed approval of his organisation’s ‘successful (...) avoiding [of] a revision of the EU legislative framework’ in this area.

## **5. 2008: the final phase in the quest for an EWC revision**

After so many years of waiting and in view of such widely differing positions between the European social partners, the European Commission was torn between, on the one hand, a clear expectation or obligation imposed by the European Parliament and the EESC and, on

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5. *Bulletin of the European Union*, No.9524, 16 October 2007.

the other, the stance of representatives of the European business world, who objected to any new legislative burdens being imposed on them.

Despite the contradictory expectations, the Commission announced in October 2007 in its *Work Programme for 2008* (CEC, 2008a) that a revision was scheduled for 2008 to bring the EWC provisions into line with other acts, with the aim of reinforcing the role of EWCs in anticipating and monitoring restructuring operations. The motive behind this decision was most probably political and pragmatic: the Commission presumably spotted that at the end of its term of office its performance in the social field will be assessed.

Whatever the reasons for it, this announcement augured well and gave renewed hope to advocates of the EWC revision.

### **The ETUC's reviewed position**

In view of the modified circumstances the ETUC's Executive Committee swiftly, in December 2007, adopted a document on its reaffirmed strategy for the revision. The main goal in the existing political scenario was to push for the directive to be revised before the end of 2008. This particular deadline was calculated based on the fact that after December 2008<sup>6</sup> it would not be possible to reintroduce the revision into the Commission's agenda (as June 2009 will be the end of the Commission's term of office and the date of new EP elections). Another important realisation, based on earlier statements by BusinessEurope, was that the employers might want to play for time and delay the process, so that it would not be feasible to complete the revision by December 2008. In this context the ETUC reaffirmed its demands, focusing the revision strategy around four key political priorities:

- a) better definitions of information and consultation rights, upgraded to the same level as guaranteed in other existing acts of the *acquis communautaire*;
- b) increasing the number of EWCs by means of *i*) reduction of the employment size thresholds for application of the EWC directive

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6. EU Council meeting on 15-18 December 2008; second half of 2008 under the French Presidency of the EU.



(from 1000/150 workers to 500/100) and *ii*) elimination, or at least reduction, of the barriers to setting up EWCs. The latter claim covered demands to resolve legal uncertainties and inconsistencies (shorter period for negotiations, better definition of a controlling undertaking, procedure for renegotiations of agreements);

- c) improvement of working tools and conditions for EWCs and SNBs (training, two meetings a year, better provisions for expert assistance, provisions for exceptional meetings, interpretation and translation of documents, gender balance, new topics for EWCs and access to workplaces);
- d) recognition of the role of trade unions.

Additionally, the implications of the Charter of Fundamental Rights, recognising entitlement to information and consultation as fundamental rights, and EU Directives 2001/86 and 2002/14 offering higher standards of information and consultation, as well as the consequences of ECJ and national jurisprudence for EWCs were highlighted as the main factors making the revision indispensable.

On the employers' side no similar document presenting a renewed position on the forthcoming EWC revision was made public until they issued their official response to the Commission's communication (CEC, 2008b).

### **The European Commission's proposal for a revised EWC directive**

In February 2008 the Commission finally published a communication (CEC, 2008b) opening the second stage of consultation on the revision of the EWC directive<sup>7</sup>. The European Commission's leading motive for revisiting the revision was the 'renewed Lisbon strategy' as well as the 'better regulation' programme, in that 'it emphasises the need to adapt legislation on European works councils to take account of the new economic and social necessities, particularly in the light of the increase in the number and scale of transnational restructuring operations' (CEC, 2008b: 3).

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7. In fact, by publishing the above Communication the EC indirectly recognised its earlier legal error committed in March 2005, when the Commission claimed to have opened the second stage of consultation on EWCs in a legally appropriate manner by means of publishing the Communication 'Employment and Restructuring' (see above in this chapter).

All in all, from the perspective of progress in terms of objectively better rights for EWCs, the proposal was a small step, but it was a step forward and in the right direction. Generally, it aimed at better defining the core of EWCs' operations, i.e. information and consultation rights, as well as at equipping these bodies with better facilities to ensure a more effective representation of employee interests. On the other hand, though, reading through the preamble to the directive and seeing the expectations and tasks laid upon EWCs in terms of contributing to company policies on handling restructuring in a socially responsible way, one gains the impression of a serious mismatch with the tools and facilities guaranteed for these bodies. Obviously, the proposal corresponded to and also mirrored the political state of affairs and the lack of agreement between the social partners, described above. Therefore it seems self-evident that it was drafted in a moderate and balanced way to enable further compromise between the social partners.

### **Review, revision or recast?**

The three terms referring to formal amendments to the Directive on European Works Councils (review, recast and revision) being used interchangeably in the debate are not synonymous. In fact, each of them bears a slightly different legal meaning, which in 2008, when the much discussed and eagerly expected 'revision' (used even by the Commission in its communication of February 2008; CEC, 2008b) was downgraded to a 'recast', turned out to have serious implications for the process of adopting the amendments and its final outcome.

The most important differentiation is between 'recast' and 'revision'. The latter is a more comprehensive term indicating the possibility of all the eligible EU institutional actors without any restrictions making amendments to an unlimited number of provisions of the EWC directive. 'Recast', on the other hand, is a strictly defined category of legislative proceedings that imposes certain limitations on the European Parliament (and the Council), by committing it to work only on those provisions which the Commission had changed and debarring the Parliament from consideration of those not amended in the proposal. According to the Interinstitutional Agreement of 28 November 2001<sup>8</sup> and Rule 80(a) of

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**8.** Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts, OJ C 77, 28 March 2002, pp.1-3.

the European Parliament's Rules of Procedure, a recast procedure is applied if several acts regulating the same matters overlap and need to be integrated into one single regulation:

'In that context, where a substantive amendment has to be made to an earlier legal act, the recasting technique permits the adoption of a single legislative text which simultaneously makes the desired amendment, codifies that amendment with the unchanged provisions of the earlier act, and repeals that act' (Interinstitutional Agreement, Recital 5).

With regard to the EWC legislation this was the case only to a limited extent, as just Directive 94/45/EC<sup>9</sup> and one short, technical amendment (Council Directive 2006/109/EC of 20 November 2006) comprise content-related acts regulating the field.

Apart from the formal suitability of the recast procedure, more importantly, it had serious implications for the scope of the legislative competence of other European institutions involved in the process. In this context, the move by the Commission to change a standard revision procedure into a recast was, from a political and pragmatic point of view, a smart and effective approach aimed at cramming the whole complex process into a limited timeframe. For the Commission the benefits were twofold: a) a recast limited the scope of new amendments that could be proposed in the European Parliament; b) it excluded any possibility that the Council may backtrack or weaken the original proposal.

Formally, the European Commission was entitled to opt for the recast procedure, as it is possible to argue that the changes considered by the Commission were 'substantive amendments'. Additionally, according to Art. 15 of the EWC directive, the Commission was not bound by any specific procedure following the 'review', but was merely committed to proposing amendments where it deemed them necessary. Since the Commission abided by this obligation within the recast procedure, there is little basis for criticism of its approach on formal grounds. Nonetheless, this serious constraint on the powers of the European

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**9.** Since Directive 97/74/EC merely extends Directive 94/45/EC to the UK and Ireland, it does not represent a different act in terms of content.

Parliament triggered a wave of disapproval from MEPs<sup>10</sup> feeling that the recast could not be considered as satisfying the requirement of Art. 15 of the EWC directive, and thus a full revision should still follow in the years to come. On the other hand, none of the other political actors involved in the process decided to openly express doubts concerning the legality of the recast replacing a much hoped-for revision.

Finally, what remains to be settled is the discrepancy between ‘review’ and ‘revision’. Already in 1999, when only a revision was being considered, a rather substantial ambiguity of the text of Directive 94/45/EC concerning the nature of the ‘review’ surfaced.

Art. 15 of the said act mentions a review of the operations of EWCs (with a particular focus on thresholds of applicability for the act) ‘with a view to proposing suitable amendments to the Council’. As a consequence of the reference to possible rectifications to the legal text, the term ‘review (...) with a view to proposing (...) amendments’ was soon replaced by ‘revision’. This evolution was justified to a certain extent, though not exactly right in legal terms according to the Better Regulation Glossary (CEC, 2008a). The ambiguity of both the true nature of Art. 15 as well as the rather hazy distinction between ‘review’ and ‘revision’ contributed to the latter term coming into common parlance and gradually ousting the form of words originally used in the directive.

In this way the linguistic juggling with terms at the end of the 1990s and the conversion of the original relatively modest term ‘review’ into a somewhat inflated ‘revision’ finally resulted in the downgrading to a ‘recast’, with all the attendant legal consequences.

## **6. Reactions of the social partners**

The key question contained in the February 2008 communication was whether the European employers’ and trade unions’ organisations

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**10.** This criticism was to be found in some speeches made during the debate on 15 December 2008 preceding the final voting in the plenary of the European Parliament on its report on the EWC recast, e.g. those by MEPs Elisabeth Schroedter (Group of the Greens/European Free Alliance), Jean Louis Cottigny (PSE), Harald Ettl (PSE) and Steven Hughes (PSE) during the debate in the European Parliament, 15 December 2008.

wished to embark on negotiations. Within the prescribed six weeks, i.e. on 2 April 2008, BusinessEurope notified the Commission in a short letter that it was looking forward to commencing negotiations with the ETUC (BusinessEurope, 2008a).

Most probably, just like the trade unions belonging to the ETUC, employers' organisations affiliated to BusinessEurope engaged in heated internal debates about the official response, as various views on the right strategy were surfacing. For instance, the CBI, representing British business interests in Brussels, announced in its Lobbying Brief (CBI, 2008) that 'The [Commission's] consultation document contains a number of potentially unwelcome proposals (...)'. Similarly, the German Employers' Confederation (BDA) sent a letter to Commissioner Špidla on 10 October 2007, signed by BDA President Dr. Dieter Hund, attempting to block any progress with the revision of the directive. Finally, however, by means of a consensus (a qualified majority vote), it proved possible for the authorities of BusinessEurope to adopt a common response.

As regards the ETUC, it welcomed the European Commission's proposal for the long overdue revision of the EWC directive. The Confederation also expressed its hope that the revision process would be successfully completed under the French Presidency of the Council of the European Union, i.e. by 31 December 2008.

However, as for BusinessEurope, the reply was not straightforward for the European unions' organisation either. The main question for the trade unions was how to react to BusinessEurope's change of position on the EWC revision. The ETUC feared that BusinessEurope's willingness to enter into negotiations might have been just an attempt to play for time and prolong the negotiations beyond December 2008 and the term of the French Presidency, favourable to this dossier (ETUC, 2008a). Therefore the ETUC responded that its 'main objective is to see action to revise the directive during the lifetime of this European Commission and this Parliament', and thus the European trade unions were 'ready to negotiate but only on a basis which includes a tight timetable and a quick conclusion to the negotiations' (ETUC, 2008b). In plain language the latter formulation meant negotiations with a set of preconditions. This was a rather unexpected move from an organisation which has always called for a revision: at a decisive moment it decided to engage in negotiations only on certain initial

conditions. Consequently, the ETUC, BusinessEurope and the Commission met several times to agree upon the method of negotiation (e.g. Euractiv, 2008), but it proved impossible to reach a compromise, as the ETUC's conditions appeared unacceptable to BusinessEurope (ETUC, 2008a).

Not having initially managed to arrive at a formal agreement on commencing negotiations in line with the procedure set out in Art. 138 of the EC Treaty, on 29 August 2008 the European social partners – namely ETUC, BusinessEurope, the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME) and the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP) – following suggestions from the French Labour Minister Xavier Bertrand in charge of social issues under the French Presidency of the EU, decided to issue some Joint Advice to the Council (29 August 2008). This document represented a common position on the following points:

- improved definition of information and consultation upgrading the existing wording to the standards of the SE directive (2001/86/EC);
- recognition of the right of 'representatives of competent recognised Community-level trade union organisations' to assist negotiations for establishment of EWCs within the Special Negotiating Body (SNB);
- entitlement of EWCs 'to collectively represent the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings';
- guarantees of training without loss of wages for members of EWCs and SNBs;
- simultaneous information and consultation with EWCs and with national employee representation bodies in cases of substantial changes in work organisation;
- exceptional<sup>11</sup> status of the pre-directive agreements (so-called Art. 13 agreements) and its continuation under the revised directive.

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**11.** Art. 13 agreements signed before 22 September 1996 (and in the case of the UK and Ireland before 15 December 1999) are exempt from the scope of Directive 94/45/EC.

This document drawn up by the social partners, even though voluntary and by no means binding in that it was not conceived within the legal framework of Art. 138 EC Treaty, was an important contribution to the revision. It not only facilitated a fast-track procedure at the European Parliament, but has also probably been crucial for coalition building in the Council. Finally, even if the points agreed upon by BusinessEurope and the ETUC were a modest compromise, they represented unquestionable progress in comparison to the current text of Directive 94/45/EC and might help in improving the functioning and establishment of new EWCs.

## 7. The new EWC directive

Less than a year after the launch of the legislative process in February 2008 (CEC, 2008b) the recast directive was adopted by the Council of the European Union on 17 December 2008<sup>12</sup>. Its approval on the very next day after the adoption of the report by the European Parliament (2008/0141(COD)) was possible thanks to an agreement reached during a trilogue meeting on 4 December 2008 (European Parliament, European Commission, Council) and based on the Joint Advice of the social partners.

Even though the changes to the Commission's proposal put forward by the European Parliament and adopted by the Council were limited in scope due to the application of the recast procedure and, indirectly, by the Joint Advice, they were not meaningless. Firstly, an explanation to Recital 16 was added, shedding light on how to interpret the key definition of the 'transnationality' of EWCs' competence and entitling employee representatives themselves to assess it. Secondly, the MEPs also added at their own initiative recital 36, referring to the contentious sanctions for breaches of the directive, as well as a guarantee in Art. 10 ensuring the '*means [for EWCs] required to apply the rights stemming from this directive*'. Importantly, it furthermore clarified the obligation of management to provide EWC members with training (Art 10.4). In this way the Parliament managed to make its own distinctive contribution

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12. Provisional reference of the new recast directive: P6\_TA-PROV(2008)0602 (European Parliament, 2008).

beyond the political agreement imposed on it by the Joint Advice of the social partners.

All in all, the new directive represents major progress in some areas in comparison with the present legislation.

First, the motives for the recast are given in Recital 7, comprising ‘ensuring the effectiveness of employees’ transnational information and consultation rights, increasing the proportion of European Works Councils established while enabling the continuous functioning of existing agreements, resolving the problems encountered in the practical application (...) and remedying the lack of legal certainty resulting from some of its provisions or the absence of certain provisions’ as well as a better link with other EU acts on information and consultation (see also Recital 21). These aims will also represent the criteria for assessing the efficacy of the recast directive.

Furthermore, the core competences and *raison d’être* of EWCs, information and consultation, are addressed and amended by the new directive. Altogether 8 recitals and Art. 2 refer to these key concepts highlighting, above all, the need to ensure the timely nature of information and consultation, as well as the need to ensure that they neither limit nor hamper the management’s competences nor slow down decision making processes in companies (e.g. Recital 22, Arts. 1.2, 2.1(g)). Most importantly, however, the definitions have been changed. With regard to information, the stress is laid, on the one hand, on its comprehensiveness and quality, enabling employee representatives appropriate scope for examination, and, on the other, on the timing (*proposed* measures, i.e. not decisions already taken) and the means of allowing for preparation for consultations. The definition of consultation has been supplemented by the entitlement for employee representatives to present opinions to management. These important changes, and especially the addition of the emphasis on timely information and consultation, should be analysed in the context of the general principle of shunning unnecessary delays in companies’ decision-making processes. These two elements together seem to put even greater emphasis on the timely conveying of information by management, which is obliged to transmit it to the EWC at a stage early enough for employee representatives to analyse and prepare for consultations. The supreme rule of avoiding hold-ups in decision-making means, far more,



an obligation for management to include information sharing at the earliest possible stage, rather than a means to circumvent or disregard information and consultation competences due to the requirement of making quick choices. Only by interpreting the amendments in this way is it possible to ensure that the spirit and *effet utile* of the directive are respected. Last but not least, one should mention that in the Subsidiary Requirements (Annex) a differentiation has been introduced between items on which the EWC should be informed and those which will require consultation (Annex Art. 1(a)).

Another new element in the directive is the obligation of the central management of a Community-scale undertakings and of the local managements (boards) of undertakings to transmit information required for commencing negotiations for an EWC (in particular information about the structure of the undertaking or group and its employees). This is a key upgrade and a facility aimed at raising the number of EWCs. The origin of this amendment is court cases where the European Court of Justice ruled in favour of employee representatives suing managements for withholding of this kind of data<sup>13</sup>.

Additionally, an important provision has been inserted concerning the composition of a Special Negotiating Body (SNB) which now introduces, in fact, a minimum number of ten members (one for each 10 % or fraction thereof of the workforce employed in a Member State). In recognition of the role of trade union (and employers') organisations an obligation to notify their European competent structures was introduced. Their participation in the negotiations will make it possible to monitor the establishment of new EWCs and promote best practice, which they have in fact been doing for many years now (European Industry Federations coordinating existing EWCs and assisting in the establishment of new ones; ETUI and the Social Development Agency compiling databases of EWCs). Apart from these two functions trade union representatives will also have the scope to act in the capacity of experts to SNBs (Art. 5.4).

Further, a new provision has been added in paragraph 4 of Art. 5 empowering EWCs to hold a follow-up meeting without management. This

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13. Court cases: ADS Anker (*Betriebsrat der Firma ADS Anker GmbH v ADS Anker GmbH*; Case C-349/01), Bofrost (Case C-62/99) and *Kühne & Nagel* (Case C-440/00).

important facility will enable EWCs to openly discuss the content and quality of the plenary meeting and draw up strategies and action plans on the basis of information received from management.

As far as the mandatory content of the agreements is concerned, new elements have been added too. Firstly, the representation of employees in an SNB should reflect their various activities, categories and gender (Art. 6.2(b)). This provision clearly aims, on the one hand, to heighten the quota of women in transnational employee representation bodies, but also, on the other, seems to be a response to claims from CEC (the European Managers' Organisation) for the proper inclusion of managers and representation of their interests within EWCs. Furthermore, once the new directive enters into force it will be obligatory to include contractual provisions on linkages with national information and consultation bodies (Art. 12). The legislator chose to respect the principle of subsidiarity and the autonomy of contracting parties in terms of selecting the best arrangements for cooperation between EWCs and national employee representation levels (Art. 6.2(c)). At the same time, however, some doubts arise as to whether this question's EU-wide nature does not make it an issue for a Community-scale instrument such as a directive. The new directive does indeed contain an obligation on the Member States to guarantee proper fall-back provisions that apply by default where no arrangements were adopted in the EWC agreement (Art. 16), but it remains to be seen how this matter will be handled in EWC agreements and how effective these arrangements will prove to be overall. It seems, however, that this area might represent quite a challenge for parties to regulate in a precise way, as various practices and regulations concerning national-level information and consultation bodies (e.g. works councils) are already in place. Last but not least, arrangements for amending or terminating the agreement (Art. 6.2(g)) and the cases in which the agreement should be renegotiated (including changes of structure of undertaking) will need to be an inherent part of the agreements. The latter amendment is important to avoid signing accords not containing any procedures on renegotiation or termination, and thus not allowing (or making it very difficult for) such an agreement to be challenged in cases where its suitability is no longer guaranteed.

In Art. 1.2 an explanation, albeit only of a general nature, of transnationality is given, identifying such matters as ones with relevance for the whole Community-scale undertaking or at least two establishments

or undertakings. Recital 16 extends this scope by stating that transnational character should be determined by taking account of both the scope of potential effects of the matter and the level of management and representation it involves. It would seem very important that the actual potential effect on the entire workforce is also to be taken into account as a criterion for specifying EWC transnational competence. Similarly, Recital 12 suggests that the transnational competence of EWCs should be interpreted extensively by stipulating that 'employees of Community-scale of undertakings (...) are properly informed and consulted when decisions which affect them are taken in a Member State other than that in which they are employed'.

EWCs' competences are not only better defined in the new directive, as in Art. 1.2, but are also extended by Art. 12.1 to the area of collective representation of employees' interests. This provision will help clarify the issue of EWCs' ability to act in court in cases of legal conflict. Hitherto, some EWCs have experienced difficulty (e.g. the case of P & O at the Conciliation Council in the UK) in being recognised as parties entitled to participate in legal or administrative proceedings. The new provision of Art. 12.1 should exclude such a risk in future and allow EWCs better access and a more effective means of defending their rights. It also seems that the EU legislator managed to introduce this competence without granting EWCs a general legal personality, which could cause conflicts in some countries where trade union organisations are often still the traditional representative agent of employees. By that means, however, clarity (i.e. an explicit, EU-wide granting of legal personality to EWCs) was sacrificed to flexibility and the capacity to accommodate different national traditions. From this point of view, the indirectly granted quasi-legal personality of EWCs, subject to national transposition and all the attendant risks connected with it, might in future cause doubts and confusion in practice. Yet it can easily be argued that the trade unions' traditional monopoly (in terms of their unique legal mandate to represent employees' interests) should not hinder the exercising of, and capacity to defend, the fundamental rights to information and consultation by European Works Councils in court. In recognition of the need to realise the aim of the directive as well as to respect its spirit and *effet utile*, the vaguely formulated legal personality of EWCs should be interpreted extensively as in fact granting them the necessary legal capacity to act, not as a collection of individual private persons, but as a fully-fledged 'legal person' collectively representing employees' interests.

Rightly, these new competences have been secured by guaranteeing the means to apply the rights stemming from the new directive (Art. 10.1). The general provision obliges managements to provide such means not only to the EWC as a whole, but to its members. This rule, read in conjunction with Art. 10.2, as well as combined with the obligation to give feedback to employees in constituencies at national level (Art. 12.2 and Recital 33) represents a fairly powerful guarantee and a strengthening of EWC tools. It is not out of place to argue that EWCs (and their members) will now have the right to organise meetings at undertakings they represent, aimed at reporting back about the debates and actions taken during the last EWC meeting. As far as the list of EWC facilities is concerned, it should be noted that a formal entitlement to be *'provided with'* training without loss of pay was also introduced. This represents another important achievement since EWC members often not only suffer from language barriers, but also fall short on understanding and using economic and financial information conveyed by management. In future, where necessary, they will be offered relevant training.

Finally, one of the most controversial elements of the directive, agreements already in force (Art. 13 pre-directive agreements and Art. 6 agreements), was tackled in the new Arts. 13 and 14. Art. 13 now includes the possibility of adapting the structure of an EWC and its agreement in cases where the structure of an undertaking changes significantly. It also covers situations where no such arrangements are in place as well as when conflicting regulations would apply (e.g. in the case of a merger or take-over between companies with EWCs). In the latter case the provisions of Art. 13 represent a guarantee for EWCs of smaller companies taken over that they will not be simply sucked in by the relevant body of the new undertaking, but that they will instead have the possibility to launch new negotiations. Importantly, the directive furthermore guarantees now that EWCs will continue to operate during such negotiations, thereby ensuring their continuity and legal certainty. At last, as far as currently existing agreements (old type Art. 13 and Art. 6) are concerned, the employers' organisations have achieved a guarantee that those agreements will remain untouched and exempted from the scope of the new recast directive. This was one of the employers' priorities, and for the trade unions represented a certain sacrifice or necessary concession in the political horse-trading. It is indeed a pity that all agreements signed before the implementation of the new directive will not be covered by the positive changes it introduces.

On the other hand, however, it is an achievement that those new, more favourable provisions of Arts. 13 and 14 will facilitate renegotiation of the previously exempted agreements. This is a major improvement and a window of opportunity for the ‘pre-directive’ EWCs to renegotiate or revise their agreements, and to either conclude new ones or, in case of failed negotiations, to base their operation directly on the directive.

## **Conclusion**

The positive outcome of the recasting of the EWC directive is, despite all the criticism, an important step forward in comparison to the current Directive 94/45/EC. By setting out the very divergent positions of the European social partners, this chapter has sought to provide background information that might help the reader to make a proper assessment of the recast directive. It has seemed obvious from the very beginning that any compromise between the trade unions and employers on new solutions would be very difficult and that their initial arguments and claims would be exposed to political horse-trading. The process was, however, much more exciting than the mere waiting for subsequent concessions on each of the sides. With BusinessEurope changing its mind about the revision and the ETUC refusing to negotiate, the process took on a fresh momentum which, quite unexpectedly, brought both parties to an informal negotiating table and to agreeing upon their Joint Advice to the Council. On the other hand, the changed status of the initiative from revision to recast, carried out by the Commission, had serious implications for the work of the European Parliament and the Council. Quite extraordinarily, the recast was adopted in a series of legislative acts, with the European Parliament adopting the report on 16 December 2008 and the Council approving the new directive on the next day. Such a pace of legislative activity in EU is not usual, and the fact that the whole process was completed within ten months is definitely to be regarded as a good result.

Of course, as the saying goes, ‘compromise will never win a beauty contest’, but, as the last part of this chapter attempted to briefly show, the legal basis for the operation of EWCs is more solid than the current one. It should not be forgotten, however, that any revision will after all create ‘only’ a framework, an institution of law, which subsequently requires fleshing out with effective solutions in practice. It remains to

be seen what the tangible implications of those provisions will be at the national level and, more importantly, how will they be introduced into the practices of EWCs.

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# European social dialogue: collective autonomy at European level?<sup>1</sup>

**Isabelle Schömann**

The decision of the European social partners to launch an autonomous multiannual work programme<sup>2</sup> emerged from their shared resolve to contribute, in a way which would complement the work being done by the European Commission, to the Lisbon Strategy and EU enlargement. Their intention was to do so by creating a strengthened form of bipartite social dialogue at European level. European social dialogue, which had developed at a rate unprecedented in the history of European social policy, found itself, around the beginning of the twenty-first century, at a crossroads<sup>3</sup> which required it to become more autonomous in nature<sup>4</sup>. Thanks to the success of the first multiannual work programme, for 2003-2005<sup>5</sup>, adopted at the Genval social dialogue summit on 22 November 2002, and which focussed on three major priorities (employment, mobility and enlargement), the social partners drew up and implemented a second work programme covering the period 2006-2008. The purpose of this article, as well as analysing this second work programme, is to examine its implementation, in order to assess its impact, firstly, on social dialogue in Europe, and, secondly, on the

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1. The author would like to thank Stefan Clauwaert, of ETUI, for his comments during the drafting of this article.
  2. Laeken European Council, December 2001; an initiative supported at the Barcelona European Council of March 2002 (European Council, 2002: paragraph 29).
  3. There was a need, in particular, to embark on new negotiating processes, to diversify social dialogue instruments, and to strengthen their implementation at national and sectoral level (ETUI and ETUC, 2009: Chapter 6.1).
  4. See the 2003-2005 multiannual work programme, introduction, paragraph 1, restated in the 2006-2008 multiannual work programme, paragraph 3, as well as in the 2009-2010 multiannual work programme (<http://www.resourcecentre.etuc.org/>).
  5. Two major agreements were signed: the framework agreement on telework, in 2002, and that on work-related stress, in 2004. Moreover, two frameworks of actions were adopted: the framework of actions for the lifelong development of competencies and qualifications, in 2002, and the framework of actions on gender equality, in 2005. Finally, an assistance programme was set up for social partners in the new Member States joining the European social dialogue.

evolution of this European social dialogue, in particular on the strengthening of its collective autonomy.

## **1. The 2003-2005 work programme: a decisive initiative**

In response to a Commission communication of June 2002 on the future of social dialogue (CEC, 2002), the European social partners acted on their wish for a more autonomous type of social dialogue. The underlying idea was to strengthen and expand social dialogue, to diversify its instruments by means, in particular, of the open method of coordination (OMC), and to give greater force to the implementation of the joint agreements, guidelines and other instruments which had not become part of Community social legislation through the legal process.

In general terms, the work programmes have opened up new areas for social dialogue. The European social partners, while respecting the spirit of Article 139 of the EC Treaty, may act together in a more autonomous fashion (ETUI and ETUC, 2005: 85), dealing with issues other than those proposed by the Commission in the consultations referred to in Article 138 of the Treaty. The adoption of multiannual work programmes, moreover, in no way affects the power of the Commission to take social policy initiatives, pursuant to Article 138(1) of the Treaty.

The work programmes consist of a list of actions, grouped into sub-categories<sup>6</sup>. This list is neither exhaustive nor restrictive<sup>7</sup>, as is emphasised, at the request of the European Trade Union Confederation (ETUC), in the last paragraph of the 2006-2008 multiannual work programme ('CEEP, UNICE/UEAPME and ETUC consider that this work programme

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**6.** In the 2003-2005 multiannual work programme, these were employment, mobility and enlargement. In the 2006-2008 programme, there are two sub-categories: one containing initiatives relating to joint analysis of key challenges facing European labour markets (points 1 to 3), and another grouping together more diverse initiatives (points 4 to 8).

**7.** The European employers' organisations interpreted this list, throughout the first work programme, as being exhaustive and not open to modification (ETUI and ETUC, 2004: 88). This unilateral and highly restrictive interpretation was a real obstacle to the development of autonomous social dialogue at European level (ETUI and ETUC, 2006: 104) and was a subject of discussion during preparation of the 2006-2008 work programme.

does not constitute an exhaustive list. The social partners may decide to up-date it in the light of developments in the EU. Furthermore, they will continue to monitor the implementation of the European Growth and Jobs Strategy<sup>8</sup> (ETUC *et al.*, 2006a). The list can be made up of studies, reports and seminars geared to helping the European social partners reach a shared or separate stance, generally expressed in the form of a declaration, with a view – where necessary – to negotiating an agreement on one or more defined topics.

### **Content and assessment of the first work programme**

The first work programme, for 2003-2005, concentrated on three main priorities: employment, enlargement and worker mobility. Under each of these headings a series of themes was agreed upon; then, for each of them, a number of actions was devised and a timetable set. Under the employment heading, for example, the social partners selected 12 themes: the employment guidelines, lifelong learning, stress at work, gender equality, restructuring, disability, young people, racism, the ageing workforce, harassment, telework and undeclared work. One or more actions were listed for each theme, depending on the desired objective. The social partners decided, for instance, to organise a seminar on equal opportunities and gender discrimination. It was held in 2003, and concluded that negotiations should take place on the subject, with a view to drawing up a framework of actions. Negotiations were held, and the framework was signed on 22 March 2005.

At the end of 2005, the first autonomous work programme came to an end and it was possible to make an initial evaluation of its impact (ETUI and ETUC, 2006: 104; Degryse, 2006: 226-230). This was generally positive; most of the actions planned had been carried out<sup>8</sup>. Nevertheless, the outcome of these actions was quite variable and difficult to assess, given, in particular, the uncertainty inherent in the instruments used and the fact that these were not legally binding. Some

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8. Two joint reports on implementation of the guidelines, three follow-up reports and a final report on lifelong learning, a new framework of actions on gender equality, two joint declarations on restructuring and disability, a joint seminar on undeclared work, a series of seminars on industrial relations and restructuring, lifelong learning and implementation of the Community *acquis* in the new Member States, as well as a seminar on mobility and qualifications (ETUI and ETUC, 2006: 105).

actions, including those concerning young people, racism, harassment and violence at work, would have to be finalised under the next work programme. On the basis of these conclusions, a second multiannual work programme was negotiated; quite a task, given the large gap between the (substantial) initiatives proposed by the ETUC and those put forward by the employers' organisations, which were more akin to lobbying activity (Degryse, 2007: 73).

## **2. The 2006-2008 work programme: significant results**

On 23 March 2006, the European social partners adopted a second autonomous work programme, covering the period 2006-2008. In its preamble, this programme confirms the desire of the social partners to plan their work fully in line with the Lisbon Strategy, in order to help turn Europe, through the creation of a more autonomous European social dialogue, into 'the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion' (European Council, 2000). In practical terms, the work programme is intended to contribute to growth, employment and modernisation of the European social model by focussing on two main areas:

- 1) addressing the major economic and social challenges facing the EU, in order to ensure that the social dialogue at European level deals with the major concerns of Europe's workers and employers;
- 2) contributing to enhancing Europe's employment and growth potential and the impact of the European social dialogue, by ensuring proper follow-up and monitoring activities of jointly adopted measures, but also by conducting further negotiations.

### **2.1. European social dialogue as a response to the economic and social challenges facing Europe: spearhead of the 2006-2008 work programme**

In order to help enhance the EU's employment and growth potential and the impact of European social dialogue, the social partners carried out a joint analysis of the key challenges facing Europe's labour markets

(ETUC *et al.*, 2007). They examined 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, as well as the balance between flexibility and security.

This joint study was presented by the social partners at the tripartite social summit of 18 November 2007. Having made a detailed analysis of the issues facing labour markets in Europe, they put forward a series of recommendations to European and national institutions, and specified certain actions to be carried out by the social partners. Their recommendations are structured around the following main themes:

- 1) Active labour market and economic policies. The main need here is to create measures to integrate disadvantaged groups into the labour market, stressing the need to promote access to education, to lifelong learning, to the validation of qualifications acquired, as well as the development of competencies based on the needs of individuals and businesses. Emphasis is also placed once again on the importance of macro-economic social dialogue, as well as on the need to create a favourable business environment;
- 2) Social protection, cohesion and inclusion. These are approached from two angles: taxation and efficient public services. Equal access must, in particular, be ensured to healthcare, education, housing and social security services;
- 3) Compliance with labour law and industrial relations, as established at national and European level. Social dialogue based on mutual trust between the social partners is the key to managing the labour markets. Obstacles to labour mobility must be removed; there must be a strong commitment to combating undeclared work. Labour law and contractual arrangements governing the labour market must be adjusted to achieve a balance between flexibility and job security;
- 4) Flexicurity, with a view to creating more and better jobs, thanks to the right mix of policy measures striking a balance between labour market flexibility and security for workers. The recommendations propose that the social partners be involved in defining and establishing flexicurity principles.

The key aim of these flexicurity recommendations, clinched just before the tripartite social summit of October 2007, was to help national social partners during negotiations on changes affecting labour market regulation. Their success will depend on the extent to which they are used by the Member States and social partners. On the basis of their analysis, the European social partners agreed on two initiatives: to negotiate a framework of actions on employment, which should fall under the 2009-2010 work programme, and to negotiate a European cross-industry framework agreement on the labour market, to promote integration. Negotiations on this last point will focus on integration or reintegration measures to make it easier for individuals to join the labour market, maintain their position and make progress. So far, two meetings of the social partners<sup>9</sup> have decided on a number of main topics for negotiation and on the target population: workers at the margins of the labour market, and those in precarious employment (thus avoiding an excessively rigid approach concentrating only on certain groups such as young people, women and migrants). The major topics selected for discussion are training, re-training and lifelong learning, quality and attractiveness of jobs, access to the labour market with a focus on active integration, and encouraging businesses to take on more staff by promoting financial and partnership incentives. Finally, the social partners agreed on the need for an approach based on partnership, seeking collective solutions, but within the context of a binding framework agreement setting out the role of the social partners. Negotiations are planned to continue until May 2009, with a view to concluding a framework agreement according to the procedure set out in Article 139(2) of the Treaty.

## 2.2. Follow-up to social dialogue outcomes and further negotiations

The 2003-2005 work programme had left some work unfinished, work which was taken up in the 2006-2008 programme: harassment and violence at work (point 4), managing change and its social consequences as well as the joint lessons learned on European Works Councils (point 5), capacity building for the social dialogue in the new Member States

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**9.** Negotiations began on 17 October 2008. Another meeting took place on 2 December 2008.

and candidate countries (point 6), follow-up reporting on the implementation of the framework agreements on telework and work-related stress, and follow-up to the framework of actions on gender equality (point 7). On the basis of this last point, the social partners stated their intention to further develop their common understanding of social dialogue instruments (point 8).

### **Harassment and violence**

The issue of harassment and violence at work had been the subject of a joint seminar held on 12 May 2005, which identified a need for action by the social partners. Since the first work programme was about to come to an end, negotiation of an autonomous agreement was postponed to the 2006-2008 work programme. Negotiation finally led to the signing of a framework agreement on harassment and violence at work, on 26 April 2007. It was the third autonomous framework agreement, following those on telework (2002) and work-related stress (2004). Since the signing of the agreement, the ETUC has done a great deal of work to help its member organisations take ownership of it. Information (a guide to interpreting the agreement) has been provided and disseminated (translations supplied and an interactive resource centre set up) and training organised (two regional seminars). An initial joint report on implementation of the agreement was adopted by the Social Dialogue Committee on 18 June 2008 (ETUC *et al.*, 2008).

### **Managing change**

The next issue was that of managing change and its social consequences, as well as the joint lessons learned about European Works Councils. Thanks to a joint project entitled 'Integrated programme of the EU social dialogue 2006-2008', a study of restructuring processes in 15 Member States was carried out (following on from a similar study in 2004-2006, covering the new Member States). Seminars and national studies were also organised in at least 10 Member States<sup>10</sup>. On this basis, two documents were put forward and assessed: the guidelines on managing change and its social consequences, drawn up jointly in 2003 in the broader context of restructuring processes, and the joint text on

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**10.** Ireland, Italy, Spain, Denmark, Austria, United Kingdom, France, Netherlands, Sweden and Greece. The remaining Member States (Germany, Belgium, Luxembourg, Portugal, Finland, Bulgaria and Romania) will be covered in 2009.



lessons learned about European Works Councils in the context of implementing the Community *acquis* in the new Member States. The main objectives were to give the social partners a detailed overview of the challenges resulting from restructuring in the 27 Member States, and of economic and social developments in each of the European countries, as well as to highlight the involvement of the social partners in complex restructuring processes.

### **Social dialogue in the new Member States**

Following on from the above-mentioned joint project 'Integrated programme of the EU social dialogue 2006-2008', the social partners decided to strengthen social dialogue structures in the new Member States. The resulting initiatives express a desire to pursue the ETUC projects, underway since 2004, on capacity building for social dialogue in these countries. Initially (phase I), regional seminars identified the needs of the social partners in Bulgaria, Croatia, Romania and Turkey. In parallel, as set out in a third phase of the 'Integrated programme', the ETUC set up an electronic platform to give easier access to information on all European social dialogue activities<sup>11</sup>, in order to emphasise what was being done by the social partners and to make social dialogue actions and tools more transparent, with a view to enhancing ownership by all stakeholders.

### **Follow-up to the telework agreement**

Since the signing of the most recent autonomous framework agreement, and drawing on experience gained from implementation of the other autonomous framework agreements, the ETUC has been working together with the European employers' organisations, in line with the 2006-2008 work programme, on follow-up to the implementation of framework agreements not taken up in a Community directive<sup>12</sup>. After regular annual monitoring, the social partners adopted a final implementation report on the telework agreement on 26 June 2006. In

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11. <http://www.resourcecentre.etic.org/>

12. These are framework agreements which have not been the subject of an extension procedure by Council decision, on the basis of a Commission proposal, conferring on them the nature of a Community directive, with legal force. These agreements must 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', according to the wording of Article 138(2) of the EC Treaty.

parallel, the Commission carried out a similar study (CEC, 2008)<sup>13</sup>, in cooperation with the social partners. Generally speaking, implementation of the agreement has been successful, in terms of the transposition instruments used and the level of protection attained. This success has demonstrated the added value of autonomous social dialogue (ETUC *et al.*, 2006b: 29). Some aspects may be revised by the social partners, in particular the concepts of telework and homework, temporary and permanent telework, which require some clarification, as well as the protection of teleworkers, cross-border teleworkers and telework in the public sector, and the link between telework and false self-employment (CEC, 2008: 54-55).

### **Follow-up to the agreement on work-related stress**

The 2006-2008 work programme envisaged a report on implementation of the autonomous framework agreement on work-related stress, finally implemented on 8 October 2007. Thus two joint interim implementation reports were submitted in 2006 and 2007, and a final joint report was presented and adopted by the social partners at the European Social Dialogue Committee of 18 June 2008 (ETUC *et al.*, 2008). Here again, according to the social partners, the social dialogue has made it possible to improve, or even create, the conditions necessary to enable social partners at national, sectoral and company level to identify, prevent and manage problems of work-related stress. This has been done in spite of widely differing situations in the EU Member States, in terms of the legal and/or contractual protection afforded (differences due in part to the variety of instruments used to implement the agreement). The more general lesson drawn from implementation of this second framework agreement, however, is that it is necessary, at an initial stage, to give assistance to national and sectoral social partners in creating an environment conducive to the understanding and ownership of European social dialogue instruments. At a second stage, it is vital to open up a joint discussion on the effectiveness of European social dialogue instruments.

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13. The framework agreement on telework was the result of consultations under Article 138 of the Treaty, which requires the Commission to assess to what extent the agreement contributes to the meeting of Community objectives.

### **Follow-up to the framework of actions on gender equality**

In the same way, the social partners have regularly taken stock of follow-up to the framework of actions on gender equality, ever since its adoption in 2005. Joint implementation reports were produced in 2006, 2007 and 2008. In general terms, the most recent report speaks of the continuity and consistency of the measures taken in 2008. Particular attention has been paid to three main implementation issues: bringing the four main priorities<sup>14</sup> of the framework of actions onto the agenda of national, sectoral, regional and company-level collective bargaining, stepping up tripartite consultations and increasing the number of projects financed by the European Social Fund. The report is largely positive, and concludes that there is a need to develop dissemination measures, via sectoral social dialogue in particular, while supporting the work being done to implement the framework by all member organisations of the signatory parties, with a view to the final report planned for 2009.

### **Improving understanding of European social dialogue instruments**

Point 8 of the 2006-2008 work programme states that, on the basis of implementation of the agreements on telework and work-related stress, and of the frameworks of actions on the lifelong development of competencies and qualifications and on gender equality, the social partners shall 'further develop their common understanding of these instruments and how they can have a positive impact at the various levels of social dialogue'. This very important point of developing understanding of European social dialogue instruments was postponed to the 2009-2010 work programme. The ETUC has already launched a series of four regional information and training seminars on this subject<sup>15</sup> with a view to improving the skills and understanding of union representatives as to European social dialogue procedures and mechanisms. Participants at these seminars not only have the opportunity to receive information concerning the most important developments around implementation of European social dialogue instruments, but also have to give a presentation on how their country or organisation

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14. 1) Addressing gender roles; 2) Promoting women in decision-making; 3) Supporting work-life balance; 4) Tackling the gender pay gap (ETUC *et al.*, 2005a).

15. The first regional seminar took place in Hungary on 26 and 27 January 2009. Others are planned, on dates not yet known at the time of writing this article, in Estonia, Malta and the Czech Republic.

has implemented European social dialogue tools, in order to share their practices and experience. They likewise have a chance to discuss future strategies for strengthening European social dialogue instruments and increasing their impact at national level, as well as pooling their own experiences with those of the other European trade union representatives.

### **3. Impact of the European social partners' 2006-2008 work programme**

The European social partners' 2006-2008 work programme was carried out in a general political climate not conducive to encouraging dynamic autonomous social dialogue at a cross-industry and European level. The same was true for the 2003-2005 work programme. The ETUC's declared aim, to draw up and carry out a work programme emphasising the quality of European social dialogue instruments, had to be revised downwards, without, however, the Commission coming up with any substantial legislative proposals in the area of social policy.

#### **Steps taken towards greater autonomy**

At the end of this 2006-2008 programme, however, the overall outcome is a positive one. Most of the actions planned by the social partners have been carried out, both the follow-up to initiatives carried over from the previous work programme, with successfully completed negotiations on harassment and violence at work, in particular, and also new projects allowing for – again by way of example – the adoption of recommendations on flexicurity. These will represent the first steps towards negotiation of a framework agreement on integration, as well as negotiation of a framework of actions on employment, both planned for 2009-2010.

Major progress has been made over the last three years, of which the following steps are the most significant:

- 1) the systematic development of information and training tools to accompany each new European cross-industry social dialogue instrument, for use by the national and sectoral social partners. These are intended to provide information to the social partners at the relevant level, aid their understanding of the instruments of European autonomous social dialogue, and encourage ownership;

- 2) a more in-depth knowledge of the implementing mechanisms used by the sectoral and national social partners. This is largely due to the systematic organisation of follow-up to European social dialogue instruments;
- 3) the gradual (and as yet incomplete) development of procedures for European cross-industry social dialogue, especially through the use of implementation reports on European social dialogue instruments;
- 4) the declared intention of the ETUC, increasingly shared by the European employers' organisations, to tackle a greater number of subjects directly linked to the key social issues affecting Europe.

These developments undoubtedly mark the steps which will lead the European social partners towards greater collective autonomy, in the absence of a regulatory framework for European collective bargaining.

#### **Obstacles still to be overcome**

There are still, however, obstacles to be overcome. As well as difficulties in obtaining the resources (financial, organisational and human) required at European, national and sectoral level to provide information and training to member organisations, and to ensure implementation of and follow-up to initiatives, one of the main criticisms levelled at European social dialogue concerns its relative effectiveness. The (legal) uncertainty inherent in the texts emerging from this autonomous social dialogue not only affects their implementation, as they lack binding legal force, but also means that they are less readily acknowledged as a source of law, either part of the Community social *acquis* or separate from it.

The point of reference here is the framework agreements negotiated by the European social partners and taken up without change in a Community directive, by decision of the European Council. Such was the case for the 1996 agreement on parental leave, the 1997 agreement on part-time work, and the 1999 agreement on fixed-term work and contracts. This procedure, set out in Article 139(2) of the EC Treaty, requires a joint request to be made to the European Commission by the signatory parties. Since 1999, however, the European employers' organisations have refused to use this procedure for the agreements negotiated on telework (2002), work-related stress (2004) and harassment and violence at work (2007). A great deal is at stake here,

since once the agreement becomes a European directive it is legally binding and must be transposed in the Member States, under the watchful eye of the Commission and European Court of Justice. If there is no joint request, the framework agreement is said to be 'autonomous', and can only really take effect if implemented by the social partners at national and sectoral level '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', following recommendations made by the signatories to the agreement<sup>16</sup>.

Some clarification was provided when implementation of the telework framework agreement was completed at the same time as the annual implementation report by the European social partners, which, in its turn, coincided with an implementation report from the European Commission. It may seem wrong to compare transposition of a framework agreement taken up in a Community directive with the implementation of an autonomous framework agreement, since they result from different procedures and cannot, therefore, have the same effects, in particular in terms of full and mandatory coverage of all workers (CEC, 2008: 48 and 51). It is nevertheless important to examine the procedures and practices specific to management and labour in the Member States, as is set out in Article 139(2) of the Treaty. An initial assessment shows very varied outcomes, reflecting the diversity of industrial relations systems in the EU. This disparity is due, in particular, to the differing existing levels of legal and/or contractual recognition (of telework, for example) in each Member State, the priority attached to the matter by the national and sectoral social partners, and the way in which negotiating agendas are organised (these are sometimes set for a number of years at once). The Commission, however, recalls that although framework agreements resulting from European social dialogue are autonomous, they must nevertheless produce tangible results in the legislation of Member States. It also sounds a warning against the use of so-called 'soft' implementing instruments.

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**16.** The framework agreements have a final clause stating that 'this autonomous European framework agreement commits the members of BusinessEurope, UEAPME, CEEP and ETUC (and the liaison committee EUROCADRES/CEC) to implement it (...) The signatory parties also invite their member organisations in candidate countries to implement this agreement'.

In parallel, the Commission has proposed an indicative typology of the results of social dialogue (CEC, 2004: 16 to 22). The social partners themselves, in their 2006-2008 work programme, had planned to develop further their common understanding of European cross-industry social dialogue instruments, in particular of the autonomous framework agreements and frameworks of actions, with a view to clarifying and enhancing the impact of these at various levels of social dialogue (point 8). This initiative was postponed to the 2009-2010 work programme: 'The European social partners will also further develop their common understanding of the various instruments resulting from their negotiations, determine their impact on the various levels of social dialogue, further coordinate the various levels of social dialogue and negotiations, including the development of better synergies between European inter-professional and sectoral social dialogue'.

Preparatory work is already underway, however, thanks to the regular follow-up reports on implementation of the framework agreements on telework, since 2002, work-related stress, since 2004, and violence and harassment, since 2007, as well as the follow-up to the frameworks of actions on lifelong development of competencies and qualifications, since 2002, and gender equality, since 2005. Moreover, in the context of European Commission consultations on reconciling professional and private life, the social partners have taken a joint decision on the need to revise the 1996 framework agreement on parental leave, incorporated into Community law by means of Directive 96/34/EC. This is an unusual situation in Community-level collective negotiations, since it is the first time in the history of European cross-industry social dialogue that the social partners are revising a Community legal text resulting from their negotiations 12 years earlier, and are intending to base this revision on transpositions of the text made in Member States at national and sectoral level. According to the ETUC mandate, once an agreement is concluded the social partners will make a joint request for it to be implemented as a directive by Council decision, on the basis of a Commission proposal, as was the case for the original agreement.

The social partners are thus attempting to increase their understanding of the instruments resulting from autonomous European cross-industry social dialogue, in order to gauge their real impact on workers' rights in Europe. This is not an easy undertaking, particularly since there is no Community-level system of European industrial relations anchored in

the treaties making it possible most notably to give binding legal effect to autonomous framework agreements.

## **Conclusion: a degree of European collective autonomy**

Does the adoption of work programmes enable the social partners to affirm their collective autonomy vis-à-vis social policy initiatives taken by the European Commission? Some of the answers can be given to this question, and these are analysed in this article.

It is important to take note of the way in which the work programmes have evolved since 2003, and of the more general evolution towards a less restrictive interpretation of these programmes. One important step forward, then, is the clearly expressed shared wish of the ETUC and the European employers' organisations to extend their fields of action, and no longer to restrict their autonomous initiatives to the list contained in each work programme and the instruments referred to. The social partners, moreover, are endeavouring to tackle some of the social challenges faced by the EU, and are choosing substantial topics which are increasingly in line with key European social policy issues, such as flexicurity or restructuring, employment, training and working conditions.

In the same way, the social partners have carried out a number of initiatives on the fundamental issue of the quality of European social dialogue instruments. They have done so in an attempt to improve their knowledge and handling of the implementation and impact of these instruments, but also in order to work on the effectiveness of European autonomous social dialogue, to give it its rightful place among the sources of law in Europe. The fact remains that all these initiatives essentially fall within the scope of the strategic priorities laid down by the Union (Degryse, 2007: 77) and that it is difficult to determine the extent to which collective autonomy at European level provides or encourages greater room for manoeuvre. The political and institutional context remains difficult and not conducive to such an increase in autonomy. On the one hand, the Commission is struggling to act as a facilitator, and now makes very little, if any, contribution to European social dialogue, notably by ensuring follow-up to social policy initiatives (Degryse, 2007: 95). Clearly, however, the existence of an autonomous European social dialogue does not mean that the Commission should



withdraw from social policy, as now seems to be the case for many issues. On the other hand, the restrictions imposed by the European employers' organisations, particularly concerning choice of social dialogue instruments, and especially their refusal, since 2002, to have joint recourse to the Council decision procedure giving binding legal effect to European framework agreements, are holding back the reinforcement of labour law in Europe.

Is it, then, possible to speak of collective autonomy? Although it does still seem premature to describe European social dialogue as autonomous, the work being done by the social partners – including the drawing-up of the 2003-2005, 2006-2008 and 2009-2010 work programmes – is tangible evidence of such autonomy. A gradual process is clearly taking place, whereby the social partners take increasing responsibility for these issues. This process requires time and resources, and its results, as described in this article, are extremely encouraging. For, even if European social dialogue cannot be an alternative to social legislation, it seems that the driving force behind labour law reforms in Europe is still, and has been for at least a decade, European cross-industry social dialogue.

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# The proposal for a directive on patients' rights in cross-border healthcare<sup>1</sup>

Rita Baeten

## Introduction

On 2 July 2008, the European Commission adopted a 'proposal for a directive on the application of patients' rights in cross-border healthcare' (CEC, 2008a). The adoption of this proposal marks the provisional end of a laborious policy process aimed at finding adequate responses to the rulings of the European Court of Justice (ECJ) with regard to patient mobility and health services in the internal market.

In a series of judgments over the last decade, the ECJ has made clear that healthcare provided against remuneration is an economic activity in the meaning of the EC Treaty, irrespective of how and by whom it is funded. As a consequence, the Treaty provisions on the freedom to provide services apply<sup>2</sup>. The Court ruled that making the reimbursement for care received abroad subject to the requirement that the patient must first receive authorisation from his domestic social protection system is an obstacle to freedom of movement, which can be justified for hospital care but not for ambulatory care.

Since then, policy makers have been considering how to cope with this situation and how to strike a balance between the internal market

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1. I would like to thank Marleen Steenbrugghe, Philippe Pochet, Stefan Clauwaert and Anna Safuta for their much-appreciated feedback on this chapter.
  2. Case C-158/96, *Raymond Kohll v. Union des caisses de maladie*, Judgment of 28 April 1998; Case C-120/95, *Nicolas Decker v. Caisse de maladie des employés privés*, Judgment of 28 April 1998; Case C-157/99, *B.S.M. Geraets-Smits v. Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v. Stichting CZ Groep Zorgverzekeringen*, Judgment of 12 July 2001; Case C-385/99, *V.G. Müller-Fauré c/ Onderlinge Waarborgmaatschappij O.Z. Zorgverzekeringen UA and E.E.M. Van Riet c/ Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen*, Judgment of 13 May 2003. Case C-372/04 *Watts*, [2006] ECR I-4325; Case C-444/05 *Stamatelaki* [2007] ECR I-3185.

principle of free movement and the social characteristics of their national healthcare systems. They fear losing control over areas such as healthcare priority setting and capacity planning.

This chapter begins by outlining the developments that led up to this proposal. We will then put the different sections of the proposal under the spotlight and weigh them against the stated objectives and the concerns that led to the proposal. Next we assess whether or not the proposal provides adequate responses to concerns about preserving the social character of healthcare systems. Then the ongoing policy process for the adoption of the proposal is commented on, and finally we will draw some conclusions.

## **1. The laborious path towards a proposal**

Several policy initiatives have been taken at EU level in an attempt to put forward policy responses to the legal uncertainty and the pressure on the regulatory powers of health authorities (see Baeten, 2005 and 2007). A High Level Group on Health Services and Medical Care (HLG), consisting of senior officials of EU Member States and chaired by the European Commission, was set up in 2004 with the aim of supporting European cooperation in the field of healthcare and to monitor the impact of the EU on healthcare systems<sup>3</sup>.

The setting-up of the HLG did not prevent the European Commission from including healthcare services in its proposal for a services directive (CEC, 2004). After two years of heated policy debate, healthcare services were finally excluded from the scope of the directive (European Parliament and Council of the European Union, 2006). This exclusion did not however eliminate the applicability of free movement rules to health services.

The European Commission therefore announced in 2006 that it would put forward a specific legal initiative on the health sector (CEC, 2006a). In order to seek input from stakeholders on a potential legal initiative, the Commission initiated a wide public consultation process (CEC, 2006b).

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3. [http://ec.europa.eu/health/ph\\_overview/co\\_operation/mobility/high\\_level\\_hsmc\\_en.htm](http://ec.europa.eu/health/ph_overview/co_operation/mobility/high_level_hsmc_en.htm).

The European Commission's adoption of the proposal for a directive was the result of a lengthy and painful policy process. It was initially scheduled for the autumn of 2007 but was delayed several times, due to major disagreements within the Commission and severe criticism from Member States and the European Parliament. Systematic leaks from the interdepartmental consultation meant that from early October 2007 onwards, several versions of the proposal have been circulating. The Commissioner for health, Markos Kyprianou, was thus bogged down in an unmanageable communication process which provoked a lot of criticism.

In December 2007 the proposal was withdrawn from the agenda of the college of Commissioners right at the very last minute, due to a 'full agenda'. Nothing was heard of the Directive in early 2008. The Commission had shelved the issue due to a lack of support from several Commissioners. Mindful of their experiences with the services directive, some Commissioners wanted to avoid a painful controversy prior to the ratification of the Lisbon Treaty which could jeopardise – yet again – the EU's institutional reform.

However, with the appointment of the new Commissioner for health, Androulla Vassiliou, the Commission ultimately adopted the proposal for a directive in July 2008 as part of the Renewed Social Agenda (CEC, 2008a and b). The proposal was reworked and reworded, without however changing it fundamentally compared with its earlier versions. The basic structure of the text remained intact. Nevertheless, a general 'clean-up' had been carried out in order to eliminate any notion of 'health services' from the text. Instead, the provisions were presented under the heading of 'patients' rights'. This general tidying up did however not concern the legal basis of the proposal, which remained Art. 95 of the EC Treaty, concerning the internal market.

It is striking that these almost symbolic changes in the text enabled it to be adopted by the Commission. The Irish (no) vote on the Lisbon Treaty in June neutralised the fears that the proposal might affect the approval of the Lisbon Treaty. The removal of all references to 'services' dispelled the concerns that it could be considered as a resurgence of the Bolkestein Directive. By including the text in the social package, the Commission's DG Employment was officially involved, assuaging the disagreements between this DG and the responsible DG, DG Sanco, as

to whether the implementation of the Court's rulings should be incorporated into the existing legal framework on the co-ordination of social security systems (Regulation 1408/71) (Council of the European Communities, 1971) or whether a specific legal instrument was needed. The Swedish Commissioner, Ms Wallström, has perhaps come under pressure from her national government (in which her political group no longer participates) to take a more favourable stance towards the proposal, since Sweden is one of the sole countries backing the Commission's approach.

Furthermore, by presenting the proposal as patients' rights – instead of the right to free movement of services – the Commission certainly hoped to find an objective ally in the European Parliament, defending the rights of European citizens.

Quite surprisingly, even though no radical changes had been made compared with the draft versions, the launch of the proposal did not provoke strong reactions. The timing was of course favourable, at the beginning of the summer holidays. Furthermore, and probably more importantly, there was general relief that a phantom proposal that had been around for so long and was the subject of so many debates and discussions, but did formally not exist, was finally officially on the table and could be the subject of formal negotiations. After many years of policy debates on what political response to give to the Court's rulings, there was at last a legal proposal with which one could agree or disagree, but that at least had the merit of existing. It was generally felt that there was no other way forward than to open political negotiations. Stopping debate on the issue was not an option, as it would re-emerge time and again. Resuscitating soft mechanisms such as the High Level Group, knowing full well that the Commission has a legislative proposal in reserve, was not an option either.

## **2. Analysis of the proposal**

The proposed directive aims to clarify the right of patients to seek healthcare in another EU country, thus implementing and clarifying the rulings by the European Court of Justice.

The proposal is structured around three main areas. It provides a specific framework for reimbursement of care received abroad; it addresses the question as to which Member State, in the case of cross-border care, should be responsible for ensuring quality and safety standards, information, redress and liability as well as privacy protection; and finally it aims to encourage European cooperation on healthcare in specific areas. The creation of an executive committee to implement the proposal is suggested.

In what follows we will assess the most important and sensitive issues in each of the areas of the proposed directive, taking into account the line taken by the Court's rulings. We will not analyse or comment on the ECJ rulings themselves, since this would go too far and has been the subject of many other publications<sup>4</sup>.

## 2.1. Reimbursement of treatment received abroad

The first objective of the proposed framework is to provide clarity about the right to be reimbursed for healthcare provided in another Member State. The proposal aims to codify the ECJ judgments. However, as will be substantiated below, several key aspects of the proposal are seriously debatable in this respect.

Under the proposal, EU citizens have the right to seek care abroad and be reimbursed up to the level of costs that would have been assumed, had the same or similar healthcare been provided in their Member State of affiliation to a social protection scheme. For non-hospital care patients can do so without prior authorisation from their domestic social security system. For hospital care, Member States may put in place a system of prior authorisation for reimbursement for care abroad, if they can provide evidence that the outflow of patients would be such that it puts at risk either the finances of the national social security system or the planning of hospital capacity. If that is the case, authorisation must be limited to what is necessary and proportionate and must not constitute an arbitrary method of discrimination. The criteria according to which

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4. See e.g. Palm *et al.* (2000); Mossialos *et al.* (2002); McKee *et al.* (2002); Jorens *et al.* (2005); Hervey and McHale (2004) and Newdick (2006).



the decision will be made must be set in advance, transparently, and take into account the patient's specific medical condition. Hospital care is defined as care requiring overnight accommodation of the patient for at least one night. Other forms of care that either require highly specialised cost-intensive medical infrastructure and equipment or healthcare involving treatments presenting a particular risk for the patient or the population can however be equated with hospital care, provided that they figure on a list to be drawn up in the executive committee.

The funding authorities may impose on care abroad the same conditions that apply domestically, such as the requirement to consult a general practitioner before consulting a specialist or before receiving hospital care, in so far as they are neither discriminatory nor an obstacle to freedom of movement.

In what follows we will argue with regard to four key aspects of the proposal that, in several major ways, the proposal does not follow the lines set out by the Court, with potentially important consequences.

### **2.1.1. Prior authorisation for hospital care**

The limitations placed on the possibilities for requiring prior authorisation for hospital care are among the most controversial issues of the proposal for a directive. The Court has indeed consistently held that a system of prior authorisation for the assumption of the costs of hospital care provided in another Member State is justified by the need to preserve the financial balance of the social security system and the need for hospital planning<sup>5</sup>. This has never been seriously contested so far, not even by the Commission itself. Even Article 23 of the controversial initial proposal for a services directive in 2004 did not require any justification for maintaining a system of prior authorisation for hospital care, and the Commission communication, launching the consultation process in preparation for the proposed directive in 2006, confirmed that the Court had developed principles according to which 'Any hospital care to which they are entitled in their own Member State they

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5. Case C-157/99, *Geraets-Smits and Peerbooms*; Case C-385/99, *Müller-Fauré*; Case C-372/04, *Watts*.

may also seek in any other Member State provided they first have the authorisation of their own system' (CEC, 2006b: 4).

In the current proposal however – as in all the unofficial versions that preceded it – the threshold for introducing a prior authorisation system for hospital care is very high. In spite of the fact that Commissioner Vassiliou had announced that a 'safeguard clause' would be introduced in the proposal, allowing Member States to maintain a system for prior authorisation, the final version of the proposal did not change fundamentally in this respect and the burden of proof for health authorities to justify a system of prior authorisation is very high. The explanatory memorandum of the proposed directive even states that 'there is no evidence that cross-border hospital care will undermine the financial sustainability of health and social security systems overall or the organisation, planning and delivery of health services' (CEC, 2008a: 16), suggesting that it will be almost impossible to justify a prior authorisation system.

We may wonder why the Commission persists in limiting the possibilities for a Member State to require prior authorisation for hospital care, although well aware of the thrust of the Court's rulings and the fact that this provision is unacceptable to the Member States<sup>6</sup>. Could it be that the Commission intends to use this provision in due course as a bargaining chip during the negotiations, by ceding ground on this point and thus preventing other aspects of the proposal from being watered down?

### **2.1.2. The link with Regulation 1408/71**

Alongside the proposed directive, the existing framework for coordination of social security schemes remains in place. This regulation includes provisions on reimbursement of healthcare which becomes necessary on medical grounds during a temporary stay abroad by the insured person, e.g. based on the European Health Insurance Card. For patients seeking planned cross-border healthcare, this regulation ensures that if the appropriate care for the patient's condition cannot be provided in their own country within medically justifiable time-limits (undue delay), they will be authorised to go abroad.

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**6.** See e.g. section 4 on the policy process.

This procedure puts the patient receiving healthcare in another Member State on an equal footing with the residents of that Member State, and the treatment costs are covered by public funds based on the social security arrangements applicable in the Member State of treatment. According to the proposed directive, whenever the conditions set out in Regulation (EC) No.1408/71 are fulfilled, the authorisation shall be granted and the benefits provided in accordance with that regulation.

Contrary to what is suggested in the proposal, the relationship between the regulation and the proposed directive is not altogether straightforward. *Firstly*, it is not clear whether the patient may choose which of the two mechanisms he prefers<sup>7</sup> or whether the directive does not apply to healthcare becoming necessary during a temporary stay abroad or when the conditions for planned care provided for under the regulation are met<sup>8</sup>. *Secondly*, the proposal does not take into account the Vanbraekel ruling in which it is stated that patients having the right to receive planned hospital treatment in another Member State, based on the regulation, have to be granted reimbursement at least identical to that which they would have been granted if they had been hospitalised in the Member State in which they are socially insured. The Court pointed out that this could result in the payment of additional reimbursement if the rate of reimbursement in the Member State in which the patient is insured is more beneficial than that in the Member State in which the hospital treatment was provided<sup>9</sup>.

The Commission recently decided to bring actions before the Court of Justice against several Member States for not implementing this judgment (CEC, 2007a and 2008c). The Commission even takes the view in these procedures that European citizens must enjoy the same rights whether they are authorised to undergo hospital treatment in another Member State or are hospitalised during a temporary stay in another Member State.

We may thus wonder why the Commission did not include this view in the proposed directive. One explanation might be that it opted not to

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7. Recital 23.

8. Article 3(2) and Recital 20.

9. Case C-368/98, *Vanbraekel*, Judgment of 12 July 2001.

overload its project, well aware that there is still the legal track through which compliance with the Court rulings can be exacted. Furthermore, the Commission possibly wanted to shift part of the task to DG Empl, to integrate it in Regulation 1408/71 on the co-ordination of social security systems. There has indeed been an ongoing struggle for many years between the Commission's DG Sanco, taking the lead on this proposal on the one hand and DG Empl, responsible for the regulation on the coordination of social security systems on the other hand, as to whether the Court rulings should be implemented in a specific directive or in a modification of the regulation. The Commission is however well aware that changing the regulation is much more difficult, since it has to be approved by unanimity within the Council.

Many other questions have been raised with regard to the relationship between the regulation and the proposed directive, e.g. on the differences in the definition of the Member State which should provide the prior authorisation and the Member State of affiliation, as well as the differences in scope of the two legal instruments, which could lead to three methods of assumption of costs existing side by side, based respectively on the Treaty, the directive and the regulation (see e.g. Council of the European Union, 2008).

### **2.1.3. Conditions for reimbursement of care abroad**

The European Commission stresses in its communications that Member States may in any event impose the same conditions on patients seeking cross-border care as they apply domestically, such as the requirement to consult a general practitioner before consulting a specialist or before receiving hospital care (CEC, 2008d). This would indeed be in line with the Court's rulings that make allowance for imposing requirements upon the reimbursement of care provided abroad on condition that the requirements are necessary to protect a general interest objective and proportional to this objective<sup>10</sup>. However, the proposed directive limits these conditions to 'in so far as they are neither discriminatory nor an obstacle to freedom of movement of persons'<sup>11</sup>. No mention is made here of the possibilities of justifying requirements that could form an

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10. Case C-385/99, *Müller-Fauré*.

11. Article 6.3.

obstacle<sup>12</sup>. In the recitals it is added that these conditions should be 'based primarily on medical considerations' and that they do 'not impose any additional burden on patients seeking healthcare in another Member State in comparison with patients being treated in their Member State of affiliation'<sup>13</sup>. Given that almost any condition or requirement can be considered as a potential obstacle to free movement, it will become extremely difficult for Member States to justify requirements for the reimbursement of treatments provided abroad. The criteria and conditions for funding healthcare are however key elements of healthcare policies in all EU countries, aiming to guarantee the most cost-effective use of limited financial resources. The ECJ rulings did challenge national requirements, since it was not clear which domestic conditions could be justified for care provided abroad. This led to considerable legal uncertainty. The current formulation of the proposal, however, does not provide any more clarity as to which requirements can be justified. On the contrary, it becomes questionable whether the directive allows any criteria at all to be imposed on patients going abroad for treatment. However, defining the threshold for treatment is as much a part of the system of controlling access to insured healthcare as the decisions on what treatments to offer (OHE, 2008). As a consequence, patients could circumvent or challenge national rules by going abroad, thus putting pressure on the domestic legal framework.

#### 2.1.4. Reimbursement of 'similar' healthcare

According to the proposal, the care costs that should be reimbursed are those which would have been paid 'had the same or similar healthcare been provided in its territory'<sup>14</sup>. However, the notion introduced by the Court was 'equally effective treatment'<sup>15</sup>, which could invite the authorities to assess, measure and compare the effectiveness of treatments. The notion 'similar healthcare', does not refer to such a potentially scientific objectifiable criterion, which might lead to even more legal uncertainty.

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12. Article 9(1) imposes *additionally* that the requirements should be necessary and proportional, but does not allow for justification of criteria that might be an obstacle to free movement, as does the Court. Given the odd relationship between Art. 6(3) and 9(1), it might be that the Commission did not intentionally formulate Art. 6(3) so stringently.

13. Recital 28.

14. Article 6(1).

15. See e.g. Case C-157/99, *Geraets-Smits and Peerbooms* and Case C-385/99, *Müller-Fauré and Van Riet*.

## 2.2. Quality assurance for cross-border care

The second stated objective of the proposal is to ensure that the necessary requirements for high-quality, safe and efficient healthcare are ensured for cross-border care.

Here the Commission was required to do a very sensitive balancing exercise. The Court held that Member States should rely upon quality controls for healthcare providers and institutions supervised by the Member State of treatment, and thus cannot refuse reimbursement of care provided abroad on the grounds that they are unable to verify the quality of this care<sup>16</sup>. Yet mutual trust is not self-evident, in the absence of minimum rules at EU level. The proposal therefore aims to establish certain minimum guarantees for patients receiving treatment abroad. In fact this is the counterpart of the removal of obstacles to free movement: when nationally set guarantees are removed (negative integration), they are supposed to be replaced by EU level minimum guarantees on important aspects, so as to facilitate free trade and protect citizens (positive integration). However, with regard to healthcare EU level harmonisation is explicitly excluded in the EC Treaty.

According to the proposal, the Member State of treatment is responsible for ensuring that healthcare is provided according to clear standards of quality and safety; that healthcare providers make available relevant information to enable informed choices by patients; that patients have a means of making complaints and obtaining redress if they suffer harm from the healthcare they receive; and that both access to and privacy of medical records is guaranteed. The Commission, in cooperation with the Member States, shall develop guidelines to facilitate the implementation of these provisions. Strikingly, the drafting of these guidelines is not assigned to the executive committee, and it is not clear how they should be set.

The Member States of affiliation in turn will have to establish national contact points to provide information on applicable processes for cross-border healthcare.

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16. C-444/05, *Stamatelaki*, judgment of 19 April 2007, par 36-7.

The provisions with regard to quality guidelines proposed in this section are among the most sensitive for Member States, since they imply EU interference in national health policies. The proposed guidelines on quality and safety standards would indeed apply not only to patients coming from another Member State, but to all care provision.

One final remark concerning the quality of cross-border care is that the proposal pays ample lip service to the importance of continuity of care, but does not provide the necessary tools to ensure the patient's smooth passage throughout the care chain. As shown by several studies on patient mobility, continuity of care and cooperation between the treatment providers domestically and abroad is often weak (Baeten, 2009). Since the proposal is based on the principle of free movement of (individual health) *services*, as opposed to the organisation of integrated health *systems*, the concept of continuity does not really fit into this approach.

### 2.3. Cooperation among Member States

The third section of the proposal obliges Member States to facilitate cooperation in cross-border healthcare provision, without however further specifying what this would entail or how it should be implemented.

Additionally, the proposal makes provision for developing future practical cooperation at European level in some specific areas such as mutual recognition of prescriptions issued in another Member State; the establishment of European reference networks for highly specialised care; the adoption of measures to make healthcare ICT systems interoperable and the pooling of efforts regarding the management of new health technologies (HTA).

#### **2.3.1. European reference networks (ERN)**

The Commission proposes that Member States should cooperate in the establishment of European networks, bringing together centres for specialised healthcare requiring a particular concentration of resources or expertise. Such networks could enable the relevant expertise to be brought to the patient, and could serve as focal points for medical training and research. In some instances patients would need to go to centres in other countries.

This proposal builds on the work of the High Level Group on Health Services and Medical Care (HLG) (*cf. supra*) (CEC, 2005a). It was interesting to see how Member States, traditionally watching jealously lest the EU should interfere in matters pertaining to the quality of care, agreed rather readily in the HLG on a series of criteria with which such reference networks should comply. These criteria could easily be considered as embryonic EU level quality norms for healthcare institutions. The criteria have been largely reproduced in the proposed directive.

The stimulus for establishing these centres seems to come from highly specialised domestic healthcare centres, pushing their national authorities to put this issue on the EU agenda (see e.g. Kostera, 2008). They hope to benefit from it, by gaining an international reputation and attracting patients from abroad. There seems however to be less demand to send patients abroad to centres in another Member State. And where such a need exists, such as in smaller EU countries, procedures guaranteeing patients access to specialised care abroad are already long since in place.

The proposal does not clarify how the care provided to patients coming from another Member State in centres integrated in European reference networks should be funded. According to the explanatory memorandum patients would be funded through the framework provided for by Regulation (EC) No.1408/71, based on the granting of prior authorisation<sup>17</sup>.

Patients will thus in principle either need prior authorisation from their national competent authority to have access to these centres and/or only be reimbursed at the level applicable in their home state. The latter might be very costly for patients, especially for patients from a 'newer' Member State needing care in an 'older' Member State. For these same patients, it might be beneficial if reimbursement levels are set according to the applicable tariffs in the EU 15 Member State of treatment, but this may conversely be very expensive for the funding health authority of the EU 10 Member State concerned; this could put pressure on the financial viability of the funding health system.

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17. Recital 21.



Moreover, there is no intention to establish any kind of EU level planning, nor an EU level agreement for the payment of the centres' investment costs, which is logical since this would considerably encroach on Member States' competencies. As a consequence, it is difficult to see how these centres could acquire a concentration of resources and expertise.

One might therefore question whether these networks will really bring the added value for patients that is claimed and how they will achieve their objective of helping to promote access to high quality and cost-effective healthcare.

### **2.3.2. Data collection**

Member States should also collect and transmit to the Commission statistical data on the provision of cross-border care to enable long-term assessment and management thereof. This implies that Member States will have to set up systems for data collection on the care provided, its providers and patients, the cost and outcomes. This might seem a logical request, yet its implementation could have important consequences. It would mean that authorities have to collect data not only on publicly funded care, but on all care provided on their territory. These data collection systems will apply to all care provided on their territory, since it will not be reasonably practicable to limit this to patients coming from abroad. Furthermore, the European Commission will be able to standardise the national data collection systems and it is not clear what the Commission might do with these data. For instance, publishing treatment outcomes per care institution could have perverse effects in the sense that providers might be encouraged to accept for treatment only low-risk patients. It remains to be seen to what extent Member States will be willing to cooperate in implementing this provision.

## **2.4. The executive committee**

Many unsolved questions in the proposal will be dealt with by a committee set up according to the 'comitology' procedure<sup>18</sup>. This committee, chaired

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**18.** Such committees are forums for discussion, consisting of representatives from Member States and chaired by the Commission. They enable the Commission to establish dialogue with national administrations before adopting implementing measures. A Council Decision sets out the decision-making procedures for these committees. Parliament can object to

by the Commission and made up of representatives from Member States will be responsible for deciding, for example, on the list of costly healthcare to be equated with hospital care; the application of rules on recognition of prescriptions and the criteria; the type of information to be provided to patients; the data collection for monitoring purposes and the conditions to be met by European reference networks.

The Commission is in the driving seat in this committee. By delegating decisions on key issues to this committee, the Commission *de facto* reduces them to technical questions, depoliticises them and keeps better control over the debates; interference from the European Parliament is avoided. The committee may potentially decide on issues that seriously impinge on Member States' health policies, as illustrated above with regard to the networks of centres of reference.

### **3. The social objectives and steering instruments of healthcare systems and the proposal**

Health authorities are concerned about the potential deregulating effect of the internal market principles, obliging them to remove unjustified obstacles to free movement. Member States pleaded for more clarity on the possibilities for justifying regulations forming an obstacle to free movement, in the general interest. Therefore, in 2006, they asked in Council Conclusions on the common values and principles of EU health systems that the overarching social values of universality, access to good quality care, equity and solidarity be protected when drafting an EU level legal proposal (Council of the European Union, 2006).

The proposed directive suggests implementing these overarching social values of healthcare systems and refers to the 2006 Council Conclusions. However, based on Article 95 of the Treaty, with regard to the internal market, the directive ensures the fundamental *freedom* of movement of health services (and patients as consumers of these services) and guarantees minimum levels of quality throughout the EU. These are market based principles. National healthcare systems, on the other

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measures proposed by the Commission or, as the case may be, by the Council if it considers them to be beyond its remit ([http://europa.eu/scadplus/glossary/comitology\\_en.htm](http://europa.eu/scadplus/glossary/comitology_en.htm)).

hand, aim to ensure the fundamental (social) *right* of access to care. For this reason, healthcare systems are mainly publicly funded and highly regulated to redress the market imperfections from which healthcare markets are suffering. Here we encounter the fundamental internal contradictions on which the proposal is built. In spite of the lip service it pays to these social objectives, the proposal can only start from the perspective of the *individual patient*/provider and lacks the legal and financial tools to contemplate coherent health *systems* and their social obligations. Furthermore, where there is potential to address the general interest mission of health services or to confirm the importance of the tools to manage the systems, such as planning, the proposal falls down. We will substantiate these assertions in the paragraphs below.

### 3.1. Mission of general interest

Apart from a very general reference in the recitals recalling that ‘health systems are part of the wider framework of services of general interest<sup>19</sup>, the proposal makes no mention of the general interest mission of health services, which could serve as a basic premise for health authorities to justify regulations. This contrasts with the earliest unofficial version of the proposal in autumn 2007, in which the general interest mission of health services was referred to clearly and explicitly. This initial version did indeed precede the publication of the Commission Communication on Services of General Interest (SGI) in which the Commission tried to conclude the debate on a specific legislative framework for SGI and social SGI, arguing that the Lisbon Treaty includes a protocol on services of general interest (CEC, 2007b).

It is also noteworthy that in this 2007 Communication on SGI, the Commission states that ‘Where an EU sector specific rule is based on the concept of universal service, it should establish the right of everyone to access certain services considered as essential and impose obligations on service providers to offer defined services according to specified conditions, including complete territorial coverage and at an affordable price.’ These principles are however not reproduced in the proposed directive. The directive is thus not based on the concept of universal service obligation.

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**19.** Recital 4.

### 3.2. Overarching social values and equal treatment

The proposed directive states that it is up to the Member States to respect the shared overarching values of universality, access to good quality care, equity and solidarity<sup>20</sup>. Member States have furthermore to ensure 'that these values are respected with regard to patients from other Member States, and that all patients are treated equitably on the basis of their healthcare needs'<sup>21</sup>. Furthermore, 'patients from other Member States shall enjoy equal treatment with the nationals of the Member State of treatment'<sup>22</sup>. However 'Nothing in this Directive requires healthcare providers to accept for planned treatment or to prioritise patients from other Member States to the detriment of other patients with similar health needs, such as through increasing waiting time for treatment'<sup>23</sup>.

It is rather ironic to require Member States to ensure universal access to care for patients whose care is funded by a social security body from another Member State and for whom the possibility of interfering in the price setting for the care has been removed, since these patients receive care as private patients, as opposed to patients integrated in the statutory healthcare systems.

How can the Member State of care provision ensure 'equal treatment' when in the case of foreign patients the care providers act as private – as opposed to statutory – providers who cannot be obliged to accept patients from abroad for planned treatment? Furthermore, how should 'equal treatment' apply to patients from abroad if for instance domestic patients have to register with a GP or if they are not free to choose their hospital of treatment?

The explanatory memorandum explains that patients from within and outside domestic systems have to be treated in a non-discriminatory manner because 'this avoids either perverse incentives to prioritise patients from abroad ahead of domestic patients, or long-term under-

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**20.** Recital 12 and Article 5.

**21.** Recital 12.

**22.** Article 5(1g).

**23.** Recital 12.

mining of capital investment in health. From a health perspective, treating patients equitably is essential to ensure that the health impact of cross-border healthcare on health consequences such as waiting times remains reasonable and manageable' (CEC, 2008a: 12). It is difficult to understand how the non-discrimination clause could provide these guarantees. Nothing in the directive prevents providers from prioritising better paying patients from abroad or selecting the most lucrative pathologies. Whether treatment of foreign patients undermines capital investment depends on whether these costs are incorporated into the treatment tariffs and not on whether foreign patients are treated in a non-discriminatory manner. These assertions of the directive aim to reassure those stakeholders worried about the effects the proposal could have on the social dimension of healthcare systems, but with unfounded arguments. Here the proposal becomes a political document, trying to convince, rather than a legal document.

### 3.3. Controlling the influx of patients and cross-border contracting

The directive does not provide any tools for health authorities to limit the influx of patients when substantial patient flows would put pressure on waiting times, planning policies or investment costs. This could for instance be the case when (semi-)public health purchasers conclude contracts with health providers in another Member State without consulting the health authorities of the receiving Member State. The proposal does not deal with such cross-border contracting practices. This contrasts with the fact that the first document agreed on by the HLG, in 2005, consisted of guidelines on the purchase of treatment abroad, thus illustrating the importance attached to this issue by the members of the HLG (CEC, 2005b). These guidelines were aimed at closer cooperation between the authorities of the Member States responsible for the purchasing and provision of healthcare respectively, and set out guidance for instance on the applicable legislation with regard to price setting and liability.

### 3.4. Freedom of establishment for providers

The implications of the ECJ rulings go far beyond issues related to patient mobility. Regulations limiting access to healthcare services or restricting

the exercise of these activities can form a barrier to the single market<sup>24</sup>. This became particularly clear with the initial proposal of the much debated directive on services in the internal market, which obliged Member States to assess whether their healthcare regulation – e.g. the planning of healthcare services and tariff setting – was necessary and proportionate and, if not, it should be changed or abolished (CEC, 2004). Even though healthcare was finally withdrawn from the scope of the Services Directive, the EC Treaty rules on freedom of establishment still remain applicable to healthcare and this is likely to put even more pressure on the regulatory capacity of Member States than the patient mobility rulings have so far done. This is why the Member States urged the Commission in May 2007 to put forward a broad framework, not just on patient mobility (Council of the European Union, 2007).

Although the proposed directive claims to cover situations in which a patient moves to a healthcare provider in another Member State for treatment, the delivery of services from the territory of one Member State into the territory of another, such as telemedicine services, the permanent establishment of a healthcare provider in another Member State and temporary mobility of health professionals to provide services<sup>25</sup>, in practice the directive only deals with patient mobility.

#### **4. The decision-making process**

At the time of writing, the proposal is being discussed in parallel in the European Parliament and the Council. It is to be adopted through the co-decision procedure with qualified majority voting in the Council of Ministers.

*Stakeholders* involved in statutory healthcare systems (purchasers and providers) support the overall objectives of the proposal but do express serious concerns (ESIP, 2008; HOPE, 2008). On some important aspects their positions correspond with the views taken by the organisations representing both the European employees and employers in the health sector (HOSPEEM, 2008; ETUC, 2008; EPSU, 2008). They stress that

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**24.** For a complete discussion on this point see Gekiere *et al.* (2009).

**25.** Recital 10.

the majority of people wish to be treated as close to home as possible and warn of unintended long-term consequences for the health sector. Their concerns include the risk of creating health inequalities since only mobile, well informed, well-off patients will be able to pay up front and receive treatment abroad; the proportionality of the proposal, generating a heavy bureaucratic burden compared to the limited scale of patient mobility; the need to establish a prior authorisation system for certain types of care and the importance for Member States of retaining the ability to prioritise and manage resources and plan services. The ETUC and EPSU furthermore point to the potential impact on healthcare professionals and the risk that providers could give preference to the more profitable branches, thus accentuating the privatisation and commercialisation of healthcare. These positions contrast with the position of the Standing Committee of European Doctors which welcomes the proposal and congratulates the Commission (CPME, 2004). The European Consumers' Organisation for its part particularly welcomes the establishment of national contact points to provide patients with information on essential aspects of cross-border healthcare, but does also urge further discussion on the system for prior authorisation for hospital care (BEUC, 2008).

In the *Council*, Member States recognise the importance of having a Community legal framework governing patients' rights for 'cross-border care' to codify case law from the European Court of Justice.(Council of the European Union, 2008a). However, the majority of Member States emphasise that their competence over social security and healthcare must be maintained.

In December 2008 the French presidency of the Council drafted a remarkably detailed publicly available progress report on the debates in the Council (Council of the European Union, 2008b). This makes clear that nearly all Member States want to see significant changes to key provisions of the proposed directive. Furthermore, some Member States have substantive reservations on the whole Commission proposal.

Despite the diversity of their healthcare systems, the Member States are reaching a surprising degree of consensus on key aspects of the proposal. They all supported the following principles as formulated by the French presidency:

- Member States should be able to establish a prior authorisation system for hospital and specialised care. (One Member State preferred the Commission proposal). The definition of hospital and specialised care should refer to nationally listed types of care, based on EU criteria;
- Cooperation between Member States (intergovernmental) on quality of care, complemented by a system of information to patients.

Thus, among Member States there is not (any more) an east-west divide, nor a divide based on the different health systems, nor based on the political composition of the respective governments (with the possible exception of Sweden). Initially, some – mainly new – Member States hoped to make money out of incoming patients. But this divide has faded out, ending up in a shared concern to keep control over their healthcare systems.

The *Commission* expressed a general reservation on the compromise text put forward by the French presidency and had major concerns on all the issues on which there is a broad consensus among Member States.

The *European Parliament* takes the perspective of the individual patient/citizen, rather than that of the health system, responsible for ensuring equal access to care for the whole population. The draft report by J. Bowis, tabled in the Environment Committee, mainly focuses on issues related to the costs of care for mobile patients and on the possibilities for patients on waiting lists to receive treatment abroad. The Court's rulings and the proposed directive do indeed only create the right to reimbursement of costs incurred, implying that patients have to pre-finance their treatment and all the additional costs such as travel and translation. The Bowis report moreover further fleshes out the provisions concerning information. It does not question the provisions with regard to (removal of the) prior authorisation system for hospital care. With the elections approaching, MEPs will probably increasingly be inclined to take the perspective of the individual patient/citizen. Therefore it might well be that the European Commission will find an ally in the European Parliament in its confrontation with the Council and is awaiting the vote in Parliament before making concessions to the Member States.



## Conclusion

The proposal for a directive on the application of patients' rights in cross-border healthcare marks the provisional end of a lengthy and laborious policy process aiming to find adequate responses to the rulings of the ECJ with regard to patient mobility and health services in the internal market. It aims to provide legal certainty concerning the implementation of the Court's rulings and to provide flanking measures, more specifically with regard to quality of care. It has been packaged as a document on patients' rights in an attempt to garner support from stakeholders and policy-makers.

However, in many respects the proposal – as it stands now – does not provide the necessary legal clarity on the ECJ rulings or with regard to the steering instruments that health authorities can use to manage their healthcare systems. On the contrary, the proposal removes several important possibilities for justifying obstacles to the free movement of health services which the Court had allowed for.

However, the stakes are high in respect of a legislative initiative in this domain. Indeed, where secondary legislation exists to clarify the application of the free movement rules in a certain field, the European Court of Justice will in principle apply a stricter test to verify the proportionality of the rules and obstacles to the free movement of services than where there is no such piece of secondary legislation<sup>26</sup>. Furthermore, the Court itself is unlikely to search for grounds to justify obstacles in the general interest other than those included in the secondary legislation where such a document exists. As a result, a directive can only have added value on condition that it provides clear guidance, otherwise it risks eroding even further the regulatory capacity of health authorities.

With regard to quality of care an extremely sensitive balancing act was required between respecting the autonomy of Member States to organise their health systems on the one hand and the need to provide

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**26.** See Sauter Wolf (2007): 'In the absence of a Community standard, the applicable proportionality test is whether the infringements of the Treaty rules were 'manifestly disproportionate' or not. Where secondary Community law applies (i.e. pre-emption of national norms by Community norms) a stricter 'least restrictive means' test may be applied'.

some EU level minimum guarantees, when EU law has removed the national guarantees, on the other. It looks as though the result will be that the proposed provisions will be weakened, but that for the first time Member States will accept some EU level soft procedure to discuss quality standards.

The proposal is replete with fine social principles on universal access and non-discrimination. However, these principles, as included in the proposal, do not pass muster in practice. The proposal, based on internal market logic, lacks the means – financial and legal – to pursue a social policy and to take into account the responsibilities and duties of health systems as opposed to the rights/freedoms of individual patients/citizens. As a consequence, concepts such as equity and access are detached from their social policy context. In this respect the document becomes a political declaration of intent rather than a piece of enforceable legislation.

The directive suffers from the contradictions between its stated aims – ensuring patients' rights – on the one hand and its real motivation – the establishment of an internal market for healthcare services – on the other. For instance, the proposal implicitly admits that the established procedures are not suitable for those patients who really need to go abroad for care, such as those requiring highly specialised treatment or on unduly long waiting lists. According to the proposal, such patients should go abroad through the 'classic' procedure, set out in the regulation on the coordination of social security systems, which does indeed provide the necessary guarantees of affordable care that the directive is unable to provide. Also, national contact points have to help protect patients' rights and enable them to seek appropriate redress in the event of harm caused by the use of healthcare in another Member State. Health authorities do provide such guarantees to their domestic patients. For patients going abroad, however, burdensome and costly mechanisms and procedures need to be put in place to guarantee only a fraction of what Member States (can) do at home.

Finally, in an attempt to avoid tough questions, the proposal often remains vague as to its implementation. It refers many key issues to a committee functioning according to the comitology procedure, where political accountability and democratic control are low. Many of the

decisions to be taken by this committee may however have a considerable impact on health systems.

It remains to be seen what the proposal will look like once finally approved. There is certainly potential for positively amending the proposal, and some of the positions set out by the French presidency and many of the amendments tabled in the European Parliament could contribute to that end.

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# Is the European Court of Justice moving towards specialisation in the social field?

**Marie-Ange Moreau**

The Court of Justice of the European Communities (CJEC, or more commonly ECJ) has from the very beginning occupied a central place in the European institutional set-up. Enjoying real authority<sup>1</sup>, it has over the years developed a creative jurisprudence, which forms the cornerstone of the European construction project: whether in crafting the fundamental principles of European law, or in the strength of its case-law on secondary legislation, the Court has an essential part to play. Under the Treaty, the Court is entrusted with ensuring the correct application and interpretation of Community law (Article 220 EC). It therefore fulfils an uncontested regulatory function, leading it to intervene in an extremely wide range of disputes, acting as a constitutional court when interpreting the Treaty of European Union, and as an international court in regard to the interaction between international treaties and EU law.

The ECJ has nevertheless seen its role increase, and its caseload become heavier, as the process of integration has intensified (Azoulai, 2003: 262; on the need for the Court to evolve, see Dashwood and Johnston, 2001), and as a result of the various enlargements. The number of national courts likely to seek interpretations of EU law by submitting a request for a preliminary ruling has increased considerably<sup>2</sup>, as has the number of countries subject to monitoring by the Commission under infringement proceedings. If we add to this ‘the thirst for justice on the part of better-informed litigants, legislative inflation, the Commission’s vigilance in monitoring competition, the emergence of new branches of Community law, and hence of unprecedented sources

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1. Isaac and Blanquet (2006: 349); Mehdi (2007: 110f.); Bergé and Robin-Olivier (2008); and on the role of the Court, Dehousse (1994).

2. There is a large body of literature analysing the reactions of national courts when faced with EU law, and their reluctance to apply the Social Directives; for a comparative approach, see Sciarra (2001) and Rodière (2008).



of disputes' (Mehdi, 2007: 113), we can understand why major debates have arisen about the transformation that the Court has undergone in the last fifteen years or more<sup>3</sup>. The establishment of the Court of First Instance (CFI) in 1989<sup>4</sup> was constitutionally enshrined in the Treaty of Maastricht, and was the subject of revision by the Treaty of Nice in 2000 (Article 220, para. 2 and 225a EC), which opened the way to the establishment of judicial panels.

The EU Civil Service Tribunal, attached to the CFI, came into existence in November 2004. Another specialist panel is being set up to deal with intellectual property issues. It should become operational in 2009 (Lavranos, 2005). The possibility of developing other specialist panels is provided for under the Treaty: thus the idea of one specialising in private international law has been floated, because of the way rules on choice of laws have become an EU matter (Bergé and Robin-Olivier, 2008: 519) (Rome I, Rome II, Regulation 2000/44); and more recently, one specialising in social law.

General considerations arising from the volume of litigation and the degree of specialisation involved are contributing to this process. But there are also fresh anxieties linked to the development of transnational disputes in labour relations, which suggest that the Court is once again having difficulty in understanding the original nature of labour relations in the EU. It is therefore important to ask questions, in the first instance, about the link between these anxieties and the development of protection for European citizens in the social sphere, given the particular nature of labour relations, and then to analyse the risks involved in setting up a court specialising in social issues.

## **1. The particular nature of labour relations in Europe and some anxieties raised by recent case-law**

The development of labour laws in the course of the 20th century has shown that affirming the particular nature of labour relations has led to the setting-up of specialised courts. One may well ask whether, in the

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3. Johnston (2001), Versterdof (2003), Craig (2001).

4. After 15 years of discussion.

light of questions raised by recent case-law of the Court of Justice, such a demand for specialisation should be transposed to the European level.

### 1.1. Autonomy of labour tribunals in Europe and subsidiarity

The question of whether it is appropriate to develop a European court specialising in labour relations builds on the experience of a number of Member States at national level, and on the forms that the distribution of powers currently takes in the EU. The vast majority of Member States have developed avenues of specialisation in the form of labour tribunals and courts specialising in social security matters. The models used are of course very diverse, since they are invariably the result, not only of the ways in which industrial relations have historically evolved in the different countries, but also of the institutional structure of the judicial system, and the part played by the trade unions in forming the concept of social justice. The fact that countries with very different structures of labour law have chosen the path of specialised courts or judicial panels nevertheless suggests that, irrespective of the sources of law (statute, regulation or common law), the legal structure relating to labour relations shows a certain 'particularism', due to the interaction between the sources and actors involved (Villebrun, 1998). Specialised courts are not an obstacle to guaranteeing uniformity of case-law within legal systems, because of possible appeals to supreme courts and/or constitutional courts.

The same reasoning can in some respects be legitimately transposed into European law, since the principle of subsidiarity controls the way in which EU rules operate: Article 137, emanating from the Social Protocol adopted at Maastricht (and not amended since, despite the various re-negotiations of the Treaty), gives a restricted list of the fields in which the Union may intervene by adopting common rules in respect of labour relations<sup>5</sup>. The Commission must demonstrate that 'the

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5. Qualified majority required, Article 137(1): improvement of the working environment to protect workers' health and safety, working conditions, information and consultation of workers, integration of persons excluded from the labour market, equality between men and women with regard to labour market opportunities and treatment at work; Article 137(3), unanimous vote required: social security and social protection, termination of employment contract, representation and collective defence of workers, conditions of employment for third-country nationals.

objectives of the proposed action cannot be sufficiently achieved by the Member States' (Article 5 EC). This demonstration is usually set out in the preamble to the Social Directives. Because of the principle of subsidiarity, and also the difficulty of harmonisation at EU level<sup>6</sup>, the European social Law is currently fragmented, being limited to four essential areas<sup>7</sup>; as a result, the corpus of labour laws remains a matter of national competence. The social partners' institutional participation (Articles 138 and 139 EC) does not substantially change this scenario, because of the limited number of legally binding agreements negotiated in the EU<sup>8</sup>. As a result, the rules and dynamics governing negotiation remain essentially national.

In addition, the Social Directives frequently make reference to 'national practices and legislation' when establishing a link between the Community rule and the diverse models of industrial relations in Europe<sup>9</sup>; this poses a number of tricky problems concerning the scope of harmonisation in the social sphere.

Finally, Article 137 *in fine* excludes from the field of Community competence specific questions involving industrial relations: the exclusion is total in the case of pay – which in many Member States is subject to regulation by collective agreements – the right of association, the right to strike and the right of lock-out. Member States have thus rejected any prospect of harmonisation in those areas of industrial relations by means of the Social Directives.

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6. This is not the place to reiterate the difficulties of voting on the various Directives over time. On this point, see Rodière (2008). We simply observe that the Directives adopted at the end of 2008, on the extension of maternity leave, temporary agency work, the revision of the European Works Council, and the revision of the Working Time Directive, were all negotiated concomitantly, in order to achieve negotiated compromises. The European Parliament adopted the first three Directives, but opposed the Working Time Directive. The Parliament wants to do away with the derogation allowing people to work more than 48 hours per week under an individual contract (a clause demanded by the United Kingdom). It also refused to accept the provision regarding on-call time, which drew a distinction between active and inactive periods, considering that it was all working time, but allowing derogations to be negotiated for inactive periods (*Liaisons sociales Europe*: 215-216, 7 January 2009).
  7. Discrimination, health and safety, information and consultation of workers, and various texts relating to the contract of employment and working conditions (Rodière, 2008).
  8. See however the very detailed studies by Mélanie Schmidt (2007), Ahlberg *et al.* (2008), Mazuyer (2007: 476), Moreau (2008: 73).
  9. Numerous examples can be found in the Directives on the Posting of Workers, the European Works Council, Health and Safety, etc. The most frequent references concern the appointment of worker representatives and the definition of a worker.

Because of the need to respect the rules of democracy in the EU, as proclaimed and instituted in the Treaty, we must also conclude, according to Antoine Lyon-Caen (2008), that by adopting this measure the EU is ruling out any intervention in those fields of collective rights in Europe. The consequences of this are important, as can be seen from an analysis of judgments handed down by the Court at the end of 2007 and in 2008. These judgments, *Laval*, *Viking* and *Rüffert*, which have been much commented on<sup>10</sup>, bring together a number of anxieties about the Court's approach to industrial relations in Europe.

## 1.2. Anxieties

These anxieties are based, firstly, on the fact that the Court is showing great difficulty in apprehending the specific nature of rights relating to collective bargaining, the right to strike, and the rights of trade unions, and secondly on a distressing ignorance of the machinery inherent in the process of harmonisation in the social field, which demands that a distinction be made between the rules on choice of laws and on harmonisation. The latter permit the application of measures favourable to workers by virtue of the social objectives contained in the Treaty.

### 1.2.1. The Court's failure to recognise the singularity of national collective rights

In this series of judgments relating to the freedom of movement of services<sup>11</sup>, the Court has undertaken an extensive analysis of economic freedoms and the notion of 'obstacle', and a restrictive analysis of the social objectives contained in the Posting Workers' Directive, and in the Treaty.

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**10.** A detailed analysis of these judgments appears elsewhere in this edition; this will therefore not be further developed here. Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*, 18 December 2007; Case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti*, 11 December 2007; Case C-346/06, *Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v. Land Niedersachsen*, 3 April 2008. For commentaries, see in particular Chaumette (2008), Lafuma (2008), Laulom (2007), Robin-Olivier and Pataut (2008), Teyssie (2008), Moizard (2008), Robin-Olivier (2008), Jault-Seseke (2008), Lhernoud (2008), Syrpis and Novitz (2008), Malmberg and Sigeman (2008), Joerges and Rödl (2008), Deakin (2008), Bercusson (2007), Blanke (2008).

**11.** For a summary of the case-law relating to the Posting Workers' Directive, see Lernhould (2008).

In these judgments the Court found itself confronting a new kind of conflict; it was no longer simply a matter of interpreting Community rules and testing national law against these<sup>12</sup>. The social situations at issue here were transnational; this pre-supposed that they should be analysed in the light of the co-ordination of laws allowed for under national law, by PIL, taking account of EU law, but at the same time demanding an innovative form of interaction<sup>13</sup> which satisfies the requirements both of the logic underlying fundamental national rights in the social sphere, and of the economic and social objectives inherent in Community integration. The balance struck by the Court in applying the principle of proportionality has given rise to a far-reaching debate at European level, the details of which need not be repeated here. Only those concerns that relate to the Court's approach in terms of internal market, rather than collective labour relations, will be emphasised in what follows.

In *Laval*, the point at issue was the originality of the system of industrial relations existing in Sweden. These are characterised not only by their autonomy, but also by the very high level of organisation displayed by the social players in ensuring respect for collective agreements (Malmberg and Sigeman, 2008). The autonomy of collective relations is ensured by means of the inherent link which is recognised between the trade unions and employers' organisations in the Swedish negotiating system, which excludes any intervention by the law in relation to either minimum rates of pay or the implementation of collective agreements. Industrial relations are organised through the interplay of the negotiating forces on both sides and their ability to marshal coercive collective action. Boycotts are allowed, as are solidarity actions designed to put pressure on the employers, whether or not they are members of the Swedish employers' organisations. The way this system of industrial relations operates reflects a strong concept of autonomy for the social partners, non-intervention by the State, and a high level of trade union membership: in Denmark, Sweden and Finland 70 % of employees are union members.

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**12.** See the comparative studies in Sciarra (2001) and O'Leary (2002). See also Hepple (1986).

**13.** On the specific features of the transnational approach, see Moreau (2006: 401f.).

The Court did not choose to take account of the singularity of the Swedish system, which lay at the very limit of the regulatory framework set up by the Directive. The Court was in fact called upon to interpret the posting workers' Directive adopted on the 16 December 1996<sup>14</sup> with regard to the specific way in which collective agreements are applied in Sweden and the level of wages imposed on all companies operating in Sweden.

Directive 96/71 had the clear objective of instituting a minimum level of protection in the country where services are provided. This 'hard core' is defined in a restrictive and limited way by the list in Article 3(1), covering matters which, with the exception of minimum rates of pay, had been the subject of social harmonisation. The Directive was adopted with some difficulty because of differences of interest – even at the time – between Member States; it succeeded as best it could, with obvious compromises along the way (Moreau, 1996), in establishing a principle of minimum guaranteed protection at the place where the service is provided, under Articles 3(1) and 3(7). The Directive was based on the settled case-law of the Court, as established since 1991 in the *Rush Portuguesa* judgment, concerning the strength of the principle of equal treatment between undertakings operating on the same territory, and served to consolidate both the principle of a minimum level of protection and that of equal protection for workers at the place where services are provided. On collective agreements, because of the extremely diverse nature of national laws, Article 3(8) allowed for either an extension of generally applicable arrangements, as exists in France and Belgium, or a system based on a general declaration, which was not used by Sweden because it had its own system based on the autonomous nature of collective labour relations.

By taking the view that the minimum rate of pay cannot be determined either by Article 3(1) or by Article 3(8), the Court is depriving the Member State of the possibility of imposing negotiation on a case-by-case basis on the service provider; this, however, lies at the heart of the

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**14.** Studies of the context in which the Directive was drafted remain highly relevant for an assessment of current case-law: Moreau (1996), Meyer (1998: 73); for a detailed analysis of the way the issue has developed in France and the relevant legislation, Lernhoud (2005).

system of industrial relations applicable on its territory<sup>15</sup>. Basing itself on a narrow reading of the concept of unfair competition<sup>16</sup>, the judgment gives a strict interpretation of Directive 96/71 which is at variance with the social objectives of protecting workers in the case of mobility of service activities<sup>17</sup>.

This gives rise to a major anxiety: despite the distribution of powers in the collective sphere which is recognised for Member States, the Court did not attempt to find room for the original way in which industrial relations are organised in Sweden when assessing the transnational conflict<sup>18</sup>. There may be several reasons for this: poor knowledge of the diversity of systems in place, the desire to allow the market to operate freely<sup>19</sup> given the new construction placed on this following the enlargements of 2004<sup>20</sup>, or indeed the desire to blank out the particular features of activities linked to labour relations in order to maintain the approach adopted in the *Omega* and *Schmidberger* cases<sup>21</sup>, which did not involve private participants (in this case, trade unions).

In any event, Sweden – like the other Scandinavian countries – probably did not fully realise the risk posed by the singularity of its system of industrial relations, given the stated aim at European level of maintaining national diversity in the social sphere<sup>22</sup>.

The specific nature of trade union activity also appears to have been poorly apprehended by the Court: it is clear that the objective pursued by trade unions, when they go to the extent of organising a strike or other

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**15.** Point 71 of the judgment.

**16.** Point 75 of the judgment, cf. Malmberg and Sigeman (2008: 1137).

**17.** On this matter, Moizard (2008: 869), Laulom (2007) and Lafuma (2008).

**18.** This does not only affect Sweden, but potentially any system of collective relations, see in this connection Syrpis and Novitz (2008: 423).

**19.** See in this connection Lyon-Caen (2008).

**20.** We refer here to the analysis carried out by Brian Bercusson (2007) on the positions adopted by the Member States in the *Viking* case, which showed the older Member States clearly and systematically opposed to the new Member States, thus revealing deep divisions of economic and political interests that go beyond the legal arguments.

**21.** Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 14 October 2004, and Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, 12 June 2003. See especially Syrpis and Novitz (2008).

**22.** One might suppose, therefore, that Sweden and Finland would subscribe to this general declaration, or succeed in modifying Directive 96/71.

form of collective action, is to cause damages to the employer: the modalities of how this is done, as understood in French or Swedish law, may be different (especially with regard to picketing of sites or lock-outs), but the aim of trade union action is always, in the last resort, to exert inordinate economic pressure on the employer. The link between the recognition of a fundamental right and the exercise of that right is so close that some authors take the view that to place restrictions on the exercise of a fundamental right is tantamount to denying its recognition. The right to strike is essentially a right to cause harm which has to be spelt out in terms of the modalities under which it is exercised<sup>23</sup>.

A case-by-case, *a posteriori* examination of the conditions under which the obstacle engendered by the collective movement may be considered legitimate and justified poses an extremely heavy risk for trade union organisations<sup>24</sup>. This contradicts the logic implied in recognising the fundamental right.

Following a line of argument which is far from convincing (Robin-Olivier and Pataut, 2008: 87), the Court is keen to extend the application of economic freedoms across the board to trade unions, in recognition of their normative power. Direct effect is justified on the grounds that States or public bodies, as emanations of States, can compromise economic freedoms<sup>25</sup> by obstructing the development of the internal market. The Advocate General proposed a case-by-case analysis of the various forms of transnational trade union action. As Sophie Robin-Olivier has demonstrated, the Court has not clearly established a satisfactory criterion, but has emphasised the need for economic freedoms to apply across the board, thus disregarding the specific role played by trade union organisations.

The Court has not enabled a general line of conduct for trade unions to be developed for the future at European level: they will systematically have to justify their actions, something which is strongly at variance

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**23.** As Lord Wedderburn observed (2007): 'People who have never been on a picket line tend to think that all industrial action is disproportionate if not indecent'.

**24.** See the majority of writers already cited, especially Blanke (2008: 449).

**25.** In this connection see the Opinion of Advocate General Maduro in Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, 23 May 2007 (points 41-42).



with the context of social relations as these have emerged from the internationalisation of economic activity<sup>26</sup>. We have here a reversal of the burden of justification which runs counter to the logic of collective action.

Finally, the Court, especially in the *Rüffert* case, has altered the logic of the Posting Workers' Directive regarding conflict of laws, by stating that the Directive imposes minimum substantial rules; it clearly refused to take account of the principle posited in Article 3(7) of the Directive, which allows the State where the services are performed to impose measures more favourable to workers, taking the view that the Directive cannot be interpreted as allowing the host Member State to go beyond the 'hard core'. By imposing a logic of minimum harmonisation, the Court is only allowing the possibility of applying more favourable provisions of the State of origin, or those of collective agreements which are universally applicable.

But Directive 96/71 did not have as its direct objective the imposition of a minimum level of protection: rather its aim was to impose beyond the conflict of laws the law of the place where the services are performed for specific issues, which are spelt out in this 'hard core' of protective measures. The Court is therefore moving the goalposts as regards the mandatory provisions of the host country, which must not give rise to unfair competition at the place where services are provided. The Court does not seek to reconcile its case-law with the conflict of laws' rules relating to contractual obligations (Moreau, 1996), not regarding this measure as an enhanced national protection clause<sup>27</sup>.

In this judgment the Court followed the lines of the question posed in the preliminary rulings: Community law is thus being used as an instrument to destabilise domestic law and bring about a clear diminution in protection for workers in Germany (Robin-Olivier, 2008: 487). In this case the aim was to render inoperable the obligation to observe social standards in public procurement. Here the Court is once

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**26.** Especially in the maritime sector; on this point, see the comments of Alexandre Charbonneau (2008).

**27.** Opinion of Advocate General Bot in Case C-346/06, *Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v. Land Niedersachsen*, 20 September 2007 (point 84), Moizard (2008: 869) and (2000).

again shifting its reasoning between examination of a minimum necessary level of protection ('necessary for all') and protection by way of collective agreement in order to improve worker protection in the framework of public procurement. The Court confuses minimum living wage (decent one) with minimum wage ('salaire minimum') (Robin-Olivier, 2008: 489). It is deliberately blocking the operation of the social clause in public procurement, which is seen as a way of improving the lot of workers by affirmative action on the part of the State. The principle of equal treatment nevertheless should have permitted those social clauses, because they spell out the social conditions which are required of all service providers, whatever their origin.

The ECJ, however, has chosen not to move in the direction allowed for in the Directive of 31 March 2004 on coordination of public procurement contracts, which authorises the introduction of social and environmental clauses. It is thus opposing a form of social regulation which positively allows the State to make its public procurement conditional on a policy of social or environmental quality. The concern raised by these judgments is justified, because through them the ECJ is undoubtedly playing an active role in regulating transnational social conflicts. This takes the following forms:

- 1) adopting a general approach to Community law, disregarding the international context inherent in the transnational dimension of these conflicts;
- 2) making a technical choice in favour of the pre-eminence of economic freedoms and restricting the social protection arrangements introduced in the framework of transnational labour relations;
- 3) showing a lack of consideration for the territorial logic of collective relations which underpins the fundamental right.

Is the Court's lack of specialisation in social matters an issue here? The question may well be asked. Should these observations lead to the Court becoming more specialised in functional terms? The answer, nonetheless, does not appear to be self-evident.

## 2. Legal unity and Court's creativity on social disputes

The requirements of maintaining the unity and consistency of the Court's case-law are the chief obstacle to setting up a specialist panel. But it would be wrong to minimise the difficulties raised by the way in which the scope of such specialisation is defined.

### 2.1. The unity of case-law

The Treaty compels the Court to build unity and consistency into its case-law. This objective of unity in building the Community is based on the principle of the primacy of Community law (Pescatore, 2005) as established by the ECJ. Social disputes has given the Court ample opportunity to set out the main issues representing as many stages in the integration of EU law<sup>28</sup>: one need only cite cases such as *Defrenne*<sup>29</sup>, *Johnston*<sup>30</sup>, *Von Colson*<sup>31</sup>, *Marshall*<sup>32</sup> and *Francovich*<sup>33</sup>, followed by *Bosmar*<sup>34</sup>, *Baumbast*<sup>35</sup> and *Martinez Sala*<sup>36</sup> to realise that the contribution made by social case-law is not only important for European citizens in terms of rights, but also for defining the principles of efficiency of Community law, effective judicial protection, State liability, freedom of movement of persons, etc.

Social litigation, although specialised, may at any moment throw up highly sensitive issues of principle, as has been shown in the *Laval* and *Viking* judgments<sup>37</sup>: what is at issue is the concept of the economic and social integration of the EU in terms of the balance struck between

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**28.** Dubouis and Gueydan (2005, see Part 3, sources, case-law, p.403f.); Vesterdorf (2003) draws consequences from the way the Court's case-law has evolved, showing for each period in the last 40 years the fundamental contributions made by case-law, and the volume and significance of litigation.

**29.** Case C-43/75, 8 April 1976.

**30.** Case C-222/84, 15 May 1986.

**31.** Case C-14/83, 10 April 1984.

**32.** Case C-152/84, 26 February 1986.

**33.** Joined Cases C-6/90 and C-9/90, 19 November 1991.

**34.** Case C-415/93, 15 December 1995.

**35.** Case C-413/99, 17 September 2002.

**36.** Case C-85/96, 12 May 1998.

**37.** *Cit. supra*.

economic freedoms and fundamental rights, seen in the context of a narrow interpretation of the principle of proportionality.

It may even be argued that social litigation has a strong tendency to justify evolutions of general principles in Community law. In general terms it is most often concerned with the rights of persons who are acting to preserve subjective rights, either against the State which is not respecting Community law, whether primary or secondary, or in a way which involves the creation in the EU of fundamental freedoms that take account of mobility (essentially, freedom of movement of workers, freedom to provide services, and freedom of establishment).

With regard to the first scenario, the case of *Mangold*<sup>38</sup> involved a challenge to the German law on employment contracts for older workers: on this occasion the Court was able to rule that the principle of non-discrimination on grounds of age was a general principle of Community law, thereby contributing to the assertion of fundamental social rights in Europe. In the *Laval* case, the Court also ruled that the right to strike was a general principle of Community law, thus enabling this fundamental social right to be recognised in Europe.

Clearly the reach of these two judgments goes beyond the social purpose of the litigation, in that it enables the fundamental social rights proclaimed in the Social Charter to be given a legal basis<sup>39</sup>. This case-law thus provides these fundamental rights with their own legal basis in Community law, demonstrating that the Court can find a way of circumventing the controversy surrounding the scope of the Charter. It makes it imperative to re-visit the scope of the United Kingdom opt-out, based on general principles of Community law (Burgogue-Larsen, 2007: 58; Barnard, 2008).

The recognition of the right to strike in the *Laval* case-law is not without its consequences, since it immediately provides a weapon for trade unions to use. In the event of an employer failing to observe provisions derived from Community law, unions are entitled to call a strike and to rely on the fundamental right as recognised by the Court:

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**38.** Case C-144/04, 22 November 2005, *RJS* 4/06, note H. Tissandier: 362-364, Martin (2006).

**39.** The reach of these judgments also causes other difficulties, in relation to the *Mangold* judgment. See the case-law handed down by the Court in the last two years, Martin (2008: 947).

for example, going on strike because of failure to consult workers' representatives, either in the context of a general right to information or of the European Works Council. The conditions required by the Court restricting the exercise of the right to strike must also be met: besides justification, these include necessity, and striking only as a *ultima ratio*. Although these conditions are restrictive, they should not disguise the importance, in terms of constructing fundamental collective social rights at European level, of recognising the right to strike as a general principle of Community law<sup>40</sup>.

Turning to the second scenario, the fact that it is possible, by using the notion of European citizenship, to sidestep the limits set in practice to the free movement of persons also shows the importance of linking social litigation to the actual wording of the Treaty. There are countless examples, drawn from the Court's rulings on the issue of non-discrimination, which also serve to illustrate how the requirement for unity of the Court's case-law goes beyond the specific features of social questions. The recent case *Coleman*<sup>41</sup>, creating the notion of discrimination by association shows this creative capacity of the court for adapting its rules to the evolution of the society (or the internal market). It is to be feared, therefore, that procedural specialisation may limit the creativity of Community case-law in social matters.

## 2.2. Specialisation and the creativity of EU case-law

It might be objected that this requirement for unity and for preserving the creativity of case-law applies in a similar way to questions submitted to the Court of First Instance or to the specialist panels, either existing (EU Civil Service) or yet to be set up (industrial property). The possibility of referring back to the Court of Justice, at the request of the Advocate General, issues involving principles of Community law enables the unity and consistency of Community law to be safeguarded. The use of this channel, like the appeals mechanism, offers procedural options in the interests of unity while allowing for specialisation.

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<sup>40</sup>. Or even as a human right, see in this connection Novitz (2007).

<sup>41</sup>. Case C-303/06, *Coleman v. Attridge Law and Steve Law*, 17 July 2008, RJS 11/08, obs Le barbier Le Bris, p. 883.

The arguments against establishing a specialised judicial panel are also linked to the current logic of the Treaty, which binds specialisation to the CFI (although for every new body set up, appropriate Rules of Procedure have to be put in place).

A more serious difficulty is deciding where to draw the boundaries of social issues: should this line of specialisation include only labour relations, or should social protection be included as well? Questions related to the co-ordination of social security systems can be highly technical, as is universally recognised, and account for a great deal of litigation. Recently, however, it has proved necessary to link the idea of economic freedom to the right to receive care, in the context of the Court's case-law on access to healthcare in establishments situated in European countries other than the state of residence or of affiliation (see cases *Kohl and Dekker*, *Müller and Fauré*, *Lechte*) (Hatzopoulos, 2005; Hervey, 2006 and 2007, and also De Búrca, 2007).

Unlike the shift brought about by the *Laval*, *Viking* and *Rüffert* judgments in the context of free movement of firms and workers within the EU, which led to a reduction in the level of protection afforded to workers and trade unions by strictly monitoring their activity because of the obstacles caused to the exercise of economic freedoms, the Court's case-law on access to healthcare extends the rights of individuals in the field of social protection. It is therefore difficult to argue that the clash between economic freedoms and the rights of individuals or citizens is entirely straightforward. In both cases, however, national models are being challenged by a forced 'opening-up' of the market.

Setting the boundaries for specialisation is by no means impossible, but it is certainly a delicate operation, since many international treaties or association agreements directly or indirectly affect the social rights of individuals, and the increasing Europeanisation of private international law contains provisions affecting labour relations. Cross-cutting issues relating to equality and citizenship are central to the debate, as are those relating to democracy within the European Union<sup>42</sup>.

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**42.** Take for example the questions regarding democratic deficit raised by the Court in the *UEAPME* case (1998) relating to the representativeness of trade union organisations at the negotiating table when concluding European collective agreements.

A brief glance at this difficult issue serves to highlight the difficulty of having a social specialisation within the Court. Nevertheless it appears to be important for new balances to be established so as to reconcile within the current framework of the Treaty fresh caseloads of litigation, the need for specialisation, and the unity of case-law. Successive enlargements and the arrival of 'new judges' are raising fears that the ways in which Community law has been built up will be abandoned in favour of a development which is not in accordance with the Treaty, and that EU values will be jettisoned in favour of market imperatives. These fears cannot however be grounded on the *Laval* and *Rüffert* judgments, given the composition of the Court.

The Court's internal rules are also designed to enable account to be taken of a high degree of technical complexity when cases are allocated (tax cases, or cases about the co-ordination of social security systems, for example)<sup>43</sup>. But it seems that this is not sufficient in present circumstances. It seems urgent for the judges of the Court to have access to detailed knowledge of national law on social issues, and in particular of collective relations as they exist in a number of EU countries<sup>44</sup>. The Court's judges choose their own *conseillers référendaires* (legal secretaries) but do not have any specialist advisers available to them. The creation or appointment of specialist *conseillers référendaires* would undoubtedly facilitate judicial understanding of many thorny issues linked to specific national contexts.

A generalised appeals system or a system of co-ordination for exchanges of information with supreme courts, and the use of the concept of *amicus curiae* have also been proposed (Vesterdorf, 2003: 320ff.). On social matters, it seems important for trade union organisations to be heard. The ETUC for the first time produced a written submission in the *Laval* and *Viking* cases. Active involvement of the ETUC in the judicial process will undoubtedly be essential in the future.

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43. As a general rule, analysis does not focus on social litigation (Jacobs, 2004).

44. This does not appear to be something demanded by the judges; see a recent interview given by Judge Bonnichot, *Conseiller d'État* and judge at the Court of Justice (*Liaisons sociales magazine*, January 2009, p.32). He expresses the view that the Court plays an essential and a protective role in social matters and is confronting new issues, taking as an example the *Mayr* judgment of 26 February 2008 (discrimination on grounds of sex involving dismissal of a woman absent from work while undergoing *in vitro* fertilisation) and the *Coleman* judgment of 17 July 2008, previously cited (harassment of an employee whose child is disabled).

## Conclusion

In conclusion, it seems useful to continue thinking not only about the procedural implications of a specialisation in EU social law, but also about the method of construction that the social dimension of the European Union will require in the future. The fact that the normative power of the European social partners is recognised in the Treaty has not been reflected in any significant extension of social protection for European workers and citizens. Their role remains, nonetheless, crucial if the EU is to make progress in the search for a *real* balance between economic freedoms and fundamental rights. The fundamental concept of economic integration in Europe is at stake, between optimising economic freedoms and seeing harmonisation as a maximum ceiling for protection and construction, integrating both social and economic objectives without implying any downgrading of the latter, and taking into account the diversity of rules that exist, the differences between them (Dogan, 2008; see also Deakin, 2008) and the ‘constitutional asymmetry’ (Sharpf, 2002) that has existed from the outset between the social and economic dimensions of the European Union.

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# The Rüffert and Luxembourg cases: is the European social dimension in retreat?

**Dalila Ghailani**

## **Introduction**

Between December 2007 and June 2008, the Court of Justice of the European Communities (ECJ) delivered several judgments in which it was called upon to rule on the relationship between the economic freedoms guaranteed by the Treaty (freedom of establishment and freedom to provide services), on the one hand, and social protection (application of the rules on minimum rates of pay) and fundamental trade union rights (collective action and collective agreements), on the other. Those judgments have given rise to indignation amongst trade union organisations at such 'judicially imposed European liberalization' (Höpner, 2008) and raised eyebrows in many Member States. In *Social Developments in the EU 2007*, we had the opportunity to explore the *Laval* and *Viking* cases (Ghailani, 2008). We propose now to continue in that vein by focusing this year on the *Rüffert* and *Luxembourg* cases.

The *Rüffert* judgment turned on whether or not the application of minimum pay rules is compatible with Article 49 on the freedom to provide services. We shall see that the judgment delivered on 8 April 2008 falls entirely within the approach adopted by the Court in *Viking* and *Laval* and has already been much written about. A few weeks later, the ECJ delivered a second ruling, this time against Luxembourg, concerning the transposition of Directive 96/71/EC on the posting of workers, in which it found against Luxembourg on all the points at issue. That judgment, concerning the Law of 20 December 2002 transposing Directive 96/71/EC, prompted a wide-ranging debate about its implications for Luxembourg employment law and for Social Europe. The ruling adds a further strand to the definition of national social public policy seen from a European perspective. The question posed was the extent to which national social public policy could call into question application of the fundamental freedoms under the Treaty.

## 1. The *Rüffert v Land Niedersachsen* case<sup>1</sup>

The Law of Land Niedersachsen (Germany) on the award of public contracts<sup>2</sup> provides in paragraph 3(1) that contracts for building work are to be awarded only to companies which undertake in writing to pay their employees at least the remuneration prescribed by the applicable collective agreement. The contractor must also undertake to impose that obligation on all subcontractors (paragraph 4(1)) and to monitor its compliance. Failure to comply with that undertaking triggers payment of a contractual penalty (paragraph 8). Pursuant to those provisions, the company Objekt und Bauregie GmbH undertook to Land Niedersachsen to pay workers employed on the site of the Göttingen-Rosdorf prison the wages laid down in the applicable 'Buildings and public works' collective agreement. It transpired that a Polish undertaking, a subcontractor of Objekt und Bauregie, had paid its 53 workers employed on the site only 46.57 % of the minimum rates of pay set, as indicated in a notice issued against the person primarily responsible for the Polish undertaking. The work contract having been terminated following criminal investigations, a dispute arose between Land Niedersachsen and the liquidator of the assets of Objekt und Bauregie as to whether that company had to pay a contractual penalty of € 84,934.31 (i.e. 1 % of the contract amount) for breach of the wages undertaking. At first instance, the *Landgericht Hannover* (Regional Court, Hanover) held that Objekt und Bauregie's claim under the work contract was offset in full by the contractual penalty in favour of Land Niedersachsen. It dismissed the remainder of the company's action.

Uncertain as to the legality of the provision imposing a contractual penalty, the *Oberlandesgericht Celle* (Higher Regional Court, Celle), hearing the case on appeal, enquired of the ECJ whether or not the fact that a public contracting authority is required by statute to award contracts for building services only to undertakings which, when lodging a tender, undertake in writing to pay their employees, in return

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1. Case C-346/06, *Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen*, 8 April 2008, not yet published in the Court Reports.

2. The preamble to this Law states that it is intended to counteract distortions of competition resulting from the use of cheap labour, particularly in the construction sector, and to minimise costs to social security schemes.

for those services, at least the remuneration prescribed by the collective agreement in force at the place where those services are performed, amounts to an unjustified restriction on the freedom to provide services under the EC Treaty.

It is helpful to note that in Germany, setting the minimum rate of pay in the construction sector is a matter for collective bargaining. The collective agreement of 4 July 2002 (*Bundesrahmentarifvertrag für das Baugewerbe*), which establishes an overall framework for the building industry and is applicable throughout Germany, makes no provision for minimum rates of pay. Those rules are to be found, on the one hand, in a collective agreement declared to be universally applicable which lays down a minimum rate of pay in the construction sector for Germany (*Tarifvertrag zur Regelung der Mindestlöhne im Baugewerbe im Gebiet der Bundesrepublik Deutschland*, known as the ‘*TV Mindestlohn*’) and, on the other, in specific collective agreements. The 2003 *Tarifvertrag zur Regelung der Löhne und Ausbildungsvergütungen* in force in Land Niedersachsen sets a higher rate of pay, but is not universally applicable (ETUC, 2008a).

## The ECJ ruling

The Court of Justice based its reply on Directive 96/71 on the posting of workers (European Parliament and Council of the European Union, 1996), interpreted in turn in the light of Article 49 EC. The Court pointed out that under Article 3(1) of the Directive, Member States must ensure that undertakings which post workers guarantee, in relation to a number of areas including minimum rates of pay, the terms and conditions of employment applicable in their country, fixed by laws, regulations or administrative provisions and/or by collective agreements which have been declared universally applicable. The Court added that the second subparagraph of Article 3(8) of Directive 96/71 allows Member States, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, to rely on collective agreements or arbitration awards which are generally applicable to all similar undertakings in the sector concerned or agreements which have been concluded by the most representative employers’ and labour organisations at national level and which are applied throughout national territory.



The Court noted that the Land legislation, since it did not itself set any minimum rates of pay, cannot be considered to be a law within the meaning of the first indent of the first subparagraph of Article 3(1) of Directive 96/71, which fixed a minimum rate of pay. The Court pointed out that the AEntG, which transposed Directive 96/71 into German national law, extends application of provisions on minimum wages in collective agreements which have been declared universally applicable in Germany to employers established in another Member State which post their workers to Germany. The Land Niedersachsen confirmed however that the 'Buildings and public works' collective agreement was not a collective agreement declared universally applicable within the meaning of the AEntG. In addition, nor can the collective agreement be considered to constitute a collective agreement within the meaning of the second subparagraph of Article 3(8) or, more specifically, a collective agreement 'generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned'. The agreement in fact relates only to public contracts, and has not been declared universally applicable even though that possibility exists in Germany. 'Therefore, such a rate of pay cannot be considered to constitute a minimum rate of pay within the meaning of Article 3(1)(c) of Directive 96/71 which Member States are entitled to impose, pursuant to that Directive, on undertakings established in other Member States, in the framework of the transnational provision of services'.

That reasoning is supported by an analysis of the Directive in the light of Article 49 EC which it is intended to implement. The Court took the view that the restriction on freedom to provide services resulting from the obligation to pay employees the remuneration laid down in the applicable collective agreement is not justified, in the case under analysis, by the objective of worker protection. It has not been established that the protection afforded by such a rate of pay which is, moreover, higher than the minimum rate of pay applicable under the German legislation on the posting of workers, is necessary to a worker employed in the construction sector only when that person is employed under a public works contract and not where they work under a private contract.

## **2. The *Commission v Luxembourg* case<sup>3</sup>**

In April 2004, the European Commission reproached Luxembourg for failing correctly to transpose the Directive on the posting of workers in four respects.

### 2.1. Too extensive interpretation of the 'public policy' provision

According to Art. 3(10) of Directive 96/71, a Member State may guarantee workers posted to their territory terms and conditions of employment other than those expressly listed in the Directive if they constitute public policy provisions. According to the Luxembourg legislation, a certain number of terms and conditions of employment are to be considered public policy provisions, including in particular:

- 1) an obligation to post only personnel linked to the undertaking under a written contract of employment or other document deemed to be analogous in accordance with Directive 91/533 (Council of the European Communities, 1991);
- 2) automatic adjustment of remuneration in line with changes in the cost of living, in relation to which the Commission submitted that the Luxembourg legislation conflicts with Directive 96/71 which provides for regulation of rates of pay by the host Member State only in relation to minimum rates of pay;
- 3) compliance with the rules on part-time and fixed-term working. The Commission asserted that it is not for the host Member State to impose its rules on part-time and fixed-term working on undertakings which post workers to its territory;
- 4) a duty to comply with collective labour agreements, the Commission arguing that they cannot be mandatory provisions forming part of national public policy.

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**3.** Case C-319/06, *Commission of the European Communities v Grand Duchy of Luxembourg*, 19 June 2008, not yet published in the Court Reports.

An employer established outside Luxembourg and posting workers to that country must comply with these prescriptions in addition to the terms and conditions already listed in Article 3(1) of the Directive. The Commission argued that such a construction of public policy provisions goes beyond what is admitted in the Posted Workers Directive. Luxembourg maintained that those rules do fall within public policy since they seek to protect workers.

## 2.2. Minimum rest periods

According to the Directive, the host Member State's rules on minimum rest must be guaranteed to the posted worker. The Commission reproached Luxembourg for having incompletely transposed that provision, since only minimum weekly rest is provided for in national legislation.

## 2.3. Information to be provided to labour inspectorates: uncertainties for businesses

The obligation on all undertakings, prior to commencement of the work, to make available to the Labour and Mines Inspectorate on demand and within as short a period as possible the basic information necessary for monitoring purposes amounts, in the view of the Commission, where there is a posting, to a prior notification procedure incompatible with Article 49 EC. However, even were that not the case, the wording of the contested provision should be amended so as to rule out any legal ambiguity. Luxembourg pleaded that its law is *sufficiently* precise: information can be made available at the beginning of the first day of the service being performed by the worker and only upon request from the labour inspectorates. National employers are also subject to the same requirements.

## 2.4. Requirement to appoint an *ad hoc* agent with residence in Luxembourg

According to the Luxembourg legislation, an agent appointed by the service provider and residing in Luxembourg must retain the documents necessary for labour inspections. The Commission regarded that obligation as a restriction on the freedom to provide services, since the arrangements

for cooperation between public authorities put in place by Article 4 of Directive 96/71 are sufficient. Luxembourg claimed, on the one hand, that the cooperation system is not capable of ensuring adequate controls and, on the other, that the requirement is not excessive since no specific legal form is required for the agent in question. Furthermore, national undertakings are subject to the same requirements.

## 2.5. The Court of Justice judgment

### **The definition of public policy**

The ECJ objected to the manner in which Luxembourg invoked the concept of public policy and stated at the outset that Directive 123/2006 on services in the internal market (Council of the European Union, 2006), on which Luxembourg relied in support of its interpretation, is irrelevant to assessing the scope of Directive 96/71, since the latter prevails over the former where it applies. Referring to its settled case law, the Court pointed out that ‘the classification of national provisions by a Member State as public-order legislation applies to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State’. The Court also mentioned Declaration No.10, added to the minutes of the Council on adoption of Directive 96/71 in order to define public policy. Although the Declaration was not published in the Official Journal, the Court would give it weight for the purposes of interpretation<sup>4</sup>. The Declaration spells out that ‘the expression ‘public policy provisions’ should be construed as covering those mandatory rules from which there can be no derogation and which, by their nature and objective, meet the imperative requirements of the public interest. These may include, in particular, the prohibition of forced labour or the involvement of public authorities in monitoring compliance with legislation on working conditions’. Public policy can only be relied upon therefore where there is a genuine and sufficiently serious threat to a fundamental interest of society. Where a Member State seeks to apply a measure which constitutes a derogation from the principle of freedom to provide services, that measure must be accompanied by an analysis of the

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4. Recital 3 of the judgment.

expediency and proportionality of the restrictive measure being adopted by the State. The Court would therefore examine on a case-by-case basis whether the provisions applied by Luxembourg did in fact satisfy those requirements.

In relation to the obligation to post only workers linked by a written contract to the undertaking in the country of establishment, the Court found that if the written record of the employment relationship in accordance with Directive 91/533 is drawn up and monitored in the posting State in exercise of its monitoring powers under that Directive, there can be no question of the host State having competence under the Directive if it has been ensured in the posting State, as required by the Directive concerned, that the posted worker has previously been given written information about their employment relationship and additional information about the terms and conditions of posting. To add compliance with that Directive to the list of public order provisions is therefore contrary to Directive 96/71.

As regards the requirement for automatic adjustment of remuneration in line with changes in the cost of living, the Court held that ‘the Community legislature intended to limit the possibility of the Member States intervening as regards pay to matters relating to minimum rates of pay’. Here it criticised Luxembourg which, ‘in order to enable the Court to determine whether the measures at issue are necessary and proportionate to the objective of safeguarding public policy, [...] should have submitted evidence to establish whether and to what extent the application to workers posted to Luxembourg of the rule concerning automatic adjustment of rates of pay to the cost of living is capable of contributing to the achievement of that objective’. Luxembourg therefore ‘cannot rely on the public policy exception in order to apply to undertakings posting staff on its territory the requirement relating to the automatic adjustment of wages other than minimum wages to reflect changes in the cost of living’. The Court therefore did not follow the Opinion of the Advocate General who had held that, at variance with the three other requirements in dispute, indexation was indeed a public policy obligation in the interests of protecting good labour relations<sup>5</sup>.

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5. Opinion of Advocate General Trstenjak in Case C-319/06, *Commission of the European Communities v Grand Duchy of Luxembourg*, 13 September 2007.

In relation to the requirement concerning the regulation of part-time and fixed-term working, the Court took the view that the fact that Directive 96/71 did not include regulation of those two kinds of working in the central core of generally applicable provisions supports the thesis that Directives 97/81 (Council of the European Union, 1997) and 1999/70 (Council of the European Union, 1999), which address those forms of working, already, in Community law, safeguard the rights of those workers, that section of Community law not being a matter of Community public policy precisely because it is not included in the main core of the 'posting' Directive. The Community rules on non-typical workers which are therefore transposed by all Member States, therefore apply to service providers from all Member States and accordingly, the Court contended, safeguard workers' interests. Luxembourg cannot therefore rely on overriding general interest grounds in order to classify national rules as public policy provisions.

As regards the requirement relating to imperative provisions of national law concerning collective labour agreements, the Court held that 'there is no reason why provisions concerning collective agreements, namely provisions which encompass their drawing up and implementation, should *per se* and without more clarification fall under the definition of public policy', and that the powers of Member States relate exclusively to the terms and conditions of employment laid down in collective agreements declared universally applicable.

### **Rest periods**

The transposition of the posting Directive had confined the duty relating to minimum rest periods applicable also to posted workers to weekly rest periods. In the meantime, the Luxembourg Law of 19 May 2006<sup>6</sup> rectified the situation by including daily rest periods and breaks in the list of public order provisions. The finding against Luxembourg on that point is a formality although the rectification took place after expiry of the period of two months following the reasoned opinion.

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6. Law of 19 May 2006 transposing Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, Official Journal of the Grand Duchy of Luxembourg, 31 May 2006, pp.1806-1810.

### **Prior information to the Labour and Mines Inspectorate**

According to the Court, the contested provision is not sufficiently clear to guarantee due legal certainty for foreign service providers. The ECJ found that those ambiguities as to the actual meaning of Article 7 'are likely to dissuade undertakings wishing to post workers to Luxembourg from exercising their freedom to provide services. On the one hand, the extent of the rights and obligations of those undertakings is not clearly apparent from that provision. On the other hand, undertakings which have failed to comply with the obligations laid down in that provision incur not inconsiderable penalties' and in its view infringe Article 49 EC. That obligation represents an additional burden on foreign service providers liable to render the posting of workers less attractive. The Court noted that where an employer does not make the requested information available, the Labour Inspectorate may order an immediate cessation of the work until all the documents are available, and that the provision of services is therefore in its view in fact subject to prior administrative authorisation.

### **The requirement to appoint an *ad hoc* agent with residence in Luxembourg and to retain documents**

The Court held that the effective protection of workers may require that certain documents be kept available at the place where the service is provided or, at least, at an accessible and clearly identified place in the host Member State for the authorities of that State responsible for carrying out inspections. However, the Court also held that 'a requirement that a natural person domiciled in the territory of a host Member State should retain documents cannot be justified'. The Court further found that 'the organised system for cooperation and exchanges of information between Member States renders superfluous the retention of the documents in the host Member State after the employer has ceased to employ workers there'. Accordingly, Luxembourg cannot require 'undertakings which post workers to do what is necessary to retain such documents on Luxembourg territory when the provision of services comes to an end'. 'An obligation to retain such documents prior to the commencement of work would constitute an obstacle to freedom to provide services which the Grand Duchy of Luxembourg would have to justify by arguments other than mere doubts as to the effectiveness of the organised system of cooperation or exchanges of information between the Member States provided for in Article 4 of Directive 96/71'.

### 3. Commentary

Both judgments have prompted intense debate and heated reactions in trade union circles on account of their profound implications.

The *Rüffert* judgment plainly concerns the balance to be struck between economic freedoms and social rights, yet the Court went even further than it did in the *Laval* and *Viking* rulings. It did not refer to the Charter of Fundamental Rights which, nonetheless, in Article 31, upholds the right of workers to decent working conditions. Indeed, it interpreted Directive 96/71 restrictively or at least liberally when it found that the Directive sought ‘in particular to bring about the freedom to provide services, which is one of the fundamental freedoms guaranteed by the Treaty’ (paragraph 36 of the judgment). In doing so, the Court overlooked the fact that the Directive declares clearly in its fifth recital that ‘any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers’. The Directive is construed here as a measure which establishes ‘the degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to require those undertakings to observe’ (paragraph 33 of the judgment). In other words, the Directive sets maximum and not minimum social standards (Davies, 2008). The Court also refrained from any mention of Directives 93/37 and 2004/18 on the coordination of procedures for the award of public contracts, which uphold the right of the contracting authority to include social terms when awarding public contracts<sup>7</sup> or of the ‘Services’ Directive which, in Article 16(3), affords the host Member State the possibility of applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements (European Parliament and Council of the European Union, 2006).

The implications of the *Rüffert* judgment are numerous, as Silvia Borelli points out (Borelli, 2008). Article 49 EC supposedly allows the social protection guaranteed in the host State to be circumvented,

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7. Article 23 of Directive 93/37/EEC (Council of the European Union, 1993); Article 26 of Directive 2004/18/EC (European Parliament and Council of the European Union, 2004).



thereby permitting all employers to reduce labour costs by subcontracting abroad. Whilst the phenomenon of companies relocating to poor countries continues, we are seeing an inflow of workers into rich countries where social standards are being progressively revised downwards by dint of an excessively liberal interpretation of Community law. The ruling also casts doubt on the nature of collective agreements and the entire industrial relations system. Where minimum rates of pay are not set by legislation they are generally the subject-matter of collective agreements, even if those agreements are not declared universally applicable. One of the mechanisms which indirectly enable such agreements to be effective is the inclusion of social clauses in public contracts. To classify that type of provision as a hindrance to the freedom to provide services would undermine collective bargaining and deter employers' organisations from participating in it, since employers would no longer be bound to comply with the collective agreements concluded by those organisations.

We would also draw attention to the fact that the judgment rests on a failure to understand the German system of collective bargaining. Collective agreements set minimum standards generally applicable to the employment relationships of the workers they cover. This means that such agreements are not only directly applicable, but they are also binding. Exceptions established by contractual agreement are only allowed where they are more favourable to the workers, never when they are to their detriment. Be that as it may, the judgment will enable the introduction of a statutory minimum wage to be put on the agenda in Germany and other Member States (Blanke, 2008). Lastly, *Rüffert* reveals the importance of social clauses in public contracts, allowing public authorities to guarantee a minimum level of social protection when they intervene to regulate an economic activity. Since the level of European harmonisation is insufficient to ensure adequate rules to preserve workers' rights, it seems crucial to preserve national social standards.

The reactions of both social partners came swiftly once the Court's judgment was announced. According to the European Trade Union Confederation (ETUC), the ruling confirms the ECJ's narrow interpretation of the Posting Directive in the *Laval* case and ignores the Public Procurement Directive of 2004 which explicitly allows for social clauses. It recognises neither the rights of Member States and public

authorities to use public procurement instruments to counter unfair competition on wages and working conditions of workers by cross-border service providers, nor the right of trade unions to demand equal wages and working conditions and the observance of collective standards applying at the place of work for migrant workers, regardless of nationality, beyond the minimum standards recognised by the Posting Directive. The judgment is a clear invitation to social dumping, threatening workers' rights and working conditions and the capacity of local companies to compete on a level playing field with foreign (sub)contractors. This is liable to feed into hostility towards open borders, which are a much stronger obstacle to the development of the single market and free movement (ETUC, 2008b).

Concern has also been felt on the employers' side. The CEEP (European Centre of Enterprises with Public Participation) is particularly affected by these rulings since, on the one hand, authorities and public enterprises are increasingly losing their freedom to include social considerations in public contracts, and, on the other, the autonomy of the social partners in collective bargaining is increasingly constrained. Rainer Plassmann, CEEP Secretary General, has expressed fear that freedom to provide services, representing economic growth and increasing public wellbeing, would become a problem for public authorities and enterprises as contracting bodies and as social partners. Mr Plassmann stated that in many service sectors 'it is of vital importance to work with a motivated, well trained and reliable work force. Decent pay resulting from what the social partners have negotiated independently in each Member State is one of the key factors to get high quality services'<sup>8</sup>.

In his view the *Luxembourg* judgment has shaken both trade union and political circles in Luxembourg. The Luxembourg Minister of Labour and Employment, François Biltgen, in fact made a statement<sup>9</sup> on the day following the judgment, seeking to downplay its effects. He pointed out that two of the complaints tabled by the Commission related to the scope of the mandatory social provisions applicable to all workers,

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8. <http://www.euractiv.com/en/socialeurope/eu-court-ruling-slammed-invitation-social-dumping/article-171350>.

9. Statement of the Minister of Labour and Employment, François Biltgen, on Case C-319/06, *Commission v Grant Duchy of Luxembourg*, 19 June 2008 ([http://www.mte.public.lu/actualites/communiqués/2008/06/20080619\\_arret\\_eje/index.html](http://www.mte.public.lu/actualites/communiqués/2008/06/20080619_arret_eje/index.html)).

including therefore posted workers, whilst the other two related to the mechanisms for monitoring the application of those provisions. According to the Minister, the ECJ called into question neither employment law, nor above all the system of generally binding collective agreements concluded in the Grand Duchy. The judgment did not therefore undermine social legislation, but in fact confirmed its scope. The Court's reproaches did not in truth concern the extent of the Luxembourg social legislation applicable to posted workers, but rather the arrangements for monitoring the application of employment law in relation to posted workers, which the Court found were disproportionate. The Minister stressed that Luxembourg would implement the judgment by means of responses and measures more proportionate than those currently in force and which the ECJ had found to be non-compliant, measures to which the government had already given consideration whilst awaiting the judgment and which it intended to discuss with the social partners. The current monitoring measures were highly effective in the context of 'sting' actions and had enabled numerous cases of social dumping and unfair competition to be curbed. It was therefore necessary to replace them with a new system as quickly as possible. The Minister of Labour and Employment nevertheless sought to move the question of evolving case law on social public policy onto a European level, since recent precedents have aroused fears amongst the population as to the effectiveness of Social Europe. Already the Minister had, at the meeting of European Social Affairs Ministers in Luxembourg on 9 June, asked the Commission to analyse case law developments carefully in terms of the original intention of the European legislature.

The Luxembourg trade unions, for their part, have reacted more virulently. The *Confédération syndicale indépendante du Luxembourg* (OGB-L) and the *Fédération des syndicats chrétiens luxembourgeois* (LCGB) expressed their disagreement with the European verdict at a joint press conference held by their shared European secretariat on 20 June 2008<sup>10</sup>. According to the OGB-L president, Jean-Claude Reding, the ECJ ruling is a severe blow for Social Europe and follows directly on from the *Laval*, *Viking* and *Rüffert* judgments, representing a retreat for the social dimension in Europe. The Luxembourg unions had initially looked kindly upon Directive 96/71, which established minimum

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10. <http://www.europaforum.public.lu/fr/actualites/2008/06/detachement-syndicats/index.html>.

standards for posted workers throughout the EU, whilst leaving Member States the option to set higher standards, a proviso of which Luxembourg had made use. The ruling turns that minimum protection introduced by the Directive into an upper ceiling of protection. What is more, the limitation imposed by the Court consisting of the automatic indexation of only statutory minimum rates of pay was liable to create discrimination against Luxembourg undertakings, which could become victims of social dumping. The judgment is seen as the European Commission meddling in national employment law which is in fact a matter for national competence. The LCGB strongly urged the Luxembourg unions to become involved at European level, even globally vis-à-vis the International Labour Organisation, described as the last bastion of workers' rights under international treaties. The Federation lamented that by means of its ruling, the ECJ was engaging politics and no longer merely delivering judgments. The two union organisations advocated joint government and union action and suggested that the Luxembourg Government should take measures to prevent further similar decisions in the future. In their view, the Commission's decision to mount a challenge against Luxembourg, a country with high social standards, before the ECJ was a political decision which will, by setting a precedent, open the door to numerous actions against higher social standards in all Member States.

At European level, the ETUC criticised the decision in that it reflected attempts by the Court of Justice and the Commission to reduce the ability of Member States and the social partners to ensure the normal functioning of their labour markets where foreign service providers post workers to their countries. John Monks described it as a problematic judgment, asserting the primacy of economic freedoms over fundamental rights and respect for national labour law and collective agreements. In his view, the ruling turns the Posting Directive – designed as an instrument intended to protect workers, companies and labour markets against unfair competition on wages and working conditions – into an aggressive internal market tool. He urged rectification of that tool by the European legislature as soon as possible, notably through a revision of the Posting Directive to clarify and safeguard its original meaning (ETUC, 2008c). The ETUC also called on the European institutions to adopt a “‘Social Progress’ Protocol’ at the time of the next revision of the Treaty, confirming that the foremost objective of the EU is indeed the improvement of living and working conditions for its citizens and

workers, not a levelling down. Such a Protocol would allow for correction of the harmful effects of the judgments in question and restoration of a balance between economic freedoms and fundamental rights (ETUC, 2008d).

By way of conclusion, it should be noted that these various judgments have also aroused concern in the European Parliament. On 22 October 2008, it adopted by a large majority a report written by Jan Andersson (Party of European Socialists) on the challenges to collective agreements in the European Union (European Parliament, 2008a). In approving the report, Parliament expressed its fears about the recent Court of Justice decisions. It pointed out that economic freedoms, such as the freedom to provide services, were not superior to fundamental rights, including the right of trade unions to take collective action. Parliament stressed the right of the social partners to ensure non-discrimination, equal treatment and the improvement of living and working conditions for employees, and called on the Commission to draw up the necessary legislative proposals to help prevent a conflicting interpretation in the future. A partial review of the Posted Workers Directive could be envisaged, after thorough analysis of its current impact in Member States. Parliament also called for a re-assertion in primary law of the balance between fundamental rights and economic freedoms, in order to help avoid a race to lower social standards (European Parliament, 2008b)<sup>11</sup>.

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## Future prospects

**Christophe Degryse**

We could spend 2009 mesmerised by the sheer scale of the economic and social catastrophe generated by the credit crunch of autumn 2008. Alternatively, we could fix our gaze on the good that might come of this crisis, which arrives hard on the heels of the challenges posed by climate change. We might discover that, in a few short weeks, the financial crisis has opened up debates which most progressive thinkers had imagined closed forever. Both of these points of view will be considered in turn below.

A cartoon by Chappatte appearing in the International Herald Tribune of 26 November 2008 illustrated what lies ahead of us more graphically than a lengthy treatise. Against a background of crumbling stock markets and banks, we see an EU political leader, accompanied by an American and an Asian, holding in his hand the text of a speech entitled 'Public Debt'. He proclaims: '*We want to thank our grandchildren, without whom these rescue plans would not have been possible*'. If the budgetary cost of the adjustments needed to combat climate change is added to that of rescuing the banks and whole sectors of industry, as well as the cost of economic recovery plans, it has to be admitted that – as far as future prospects are concerned – the legacy being left to our children by this economic model is extremely onerous. To quote the term coined by the German psycho-sociologist Harald Welzer, this method of burdening future generations with debt constitutes a 'colonisation of the future'<sup>1</sup>, for which intergenerational solidarity will pay the price. We are plundering the resources of the future to correct the errors of the past 30 years.

The legacy is not merely onerous; it is uncertain too. What is striking is not just people's loss of confidence in the elite (Edelman, 2009 Trust

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1. Welzer H., '*Crise: le choc est à venir*' (text translated into French in *Le Monde*, 8 February 2009).



Barometer)<sup>2</sup>, but also the impression that the elite itself has lost control of the economic system. The fourth round of the crisis – after the financial, economic and social rounds – may well therefore be political. A range of protectionist measures are being rolled out at the start of 2009: financial isolationism, public support for national industries, calls for investment and production plants to be kept on home soil, competitive devaluations, encouragement to ‘buy Spanish’ and to ensure ‘British jobs for British workers’, and so on. The often-criticised lack of economic governance and policy coordination in the euro zone could strike at the very heart of European integration: the single market, or even the single currency<sup>3</sup>. Must we worry about not only ‘colonisation of the future’ but also ‘each to their own’? As ETUC General Secretary John Monks told the World Economic Forum in Davos: ‘*We know where protectionism and nationalism lead: history, alas, has shown us. Is that what we want? The answers must not be dispersed, but integrated*’<sup>4</sup>. A protectionist response will not satisfy those who believe in the need for European cooperation to confront the crisis. But protectionist tendencies surely grow in the fertile soil of an ever narrower conception of the single market, as a place for competition, including tax competition, and for a levelling-down of social standards. And such tendencies surely reflect a paring-down of the European project to its bare bones. Mr Monks went on: ‘*At European level, the answer must be a European answer. Yet where are the European proposals and initiatives?*’ As Daniel Cohen points out, rejecting protectionism does not mean advocating ‘crude free trade’<sup>5</sup>. Trade must be organised in such a way as to ensure social and environmental standards for all. Rebuilding the internal market, as well as international trade, on the basis of such standards would be a first step forward.

But the legacy being left to our children does not end there. The International Labour Office predicts in its annual Global Employment

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2. <http://www.edelman.com/trust/2009>. We should point out that this survey was conducted among well-off, highly educated people in 20 countries on five continents. The survey’s findings show the extent to which the crisis has undermined the confidence of those questioned in the economic elite. Only 38 % of interviewees in the United States think that the world of business is taking the right decisions, and just 17 % believe the information they receive from business leaders. Confidence in banking circles plummeted from 68 % in 2008 to 36 % in 2009 in the United States, and from 41 % to 27 % in western Europe’s three largest countries.
  3. ‘Each to their own’ *Financial Times*, 5 February 2009.
  4. ‘Davos: No return to the protectionism of the 1930s’, speech by John Monks, Brussels, 29 January 2009.
  5. *Le Monde*, 7 February 2009.

Trends Report<sup>6</sup> a steep rise in unemployment, the number of working poor and insecure employment. The Report, published at the end of January 2009, states that, as compared with 2007, the number of people out of work around the world could rise from 18 to 30 million, or even 51 million in the worst-case scenario. The number of working poor – people who do not earn enough to lift themselves and their families above the threshold of \$2 per person per day – could reach 1.4 billion, or almost 45 % of the global working population in jobs. A misconception of the economy, based on insane profits and blind faith in the market, will therefore ultimately lead to tens of millions of unemployed people and working poor. Thus, in addition to rescuing the economy and jobs in the short term, it is absolutely vital to think and act in the long term to alter the ethos, substance and direction of the economy. That would be a second step forward.

Over and above the cost of the catastrophe, a hitherto unthinkable transformation has occurred in the political debate. ‘Nationalising the banks’, ‘curbing executive pay’ and ‘investing heavily in recovery plans’: these are no longer blasphemous statements which make the free-trade dogmatists see red. They are decisions taken in the space of a few weeks by a new US President and by certain EU Member States. The crisis, it would seem, has opened up unprecedented scope for debate. Following the uncompromising rule of extreme neo-liberalism, we are now seeing the return of a social debate where anything goes. It is a chance for progressive thinkers and left-wingers in Europe to push for a different – social and sustainable – model of economic development. One might unfortunately wonder how well prepared we are for this window of opportunity, and how capable the EU is politically and institutionally of conducting this fundamental debate; even more, how willing it is to do so.

Yet the objectives of that different type of development are well-known: basically they correspond to the Millennium Development Goals set out by the United Nations Organisation<sup>7</sup>. Everyone should be given a degree of economic and social security, on a sustainable basis, through international cooperation (the financial markets being an almost perfect negative image

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6. ILO, *Global Employment Trends Report 2009*, 28 January 2009.

7. Reduce extreme poverty and hunger, ensure primary schooling for all, promote gender equality and the empowerment of women, reduce infant mortality, improve maternal health, combat HIV/AIDS, malaria and other diseases, safeguard the environment and put in place partnerships for development.

of this objective!). Putting the MDGs at the centre of a new model of development is the task to which political, economic and social players should now buckle down. That means overhauling all the policies being implemented in pursuit of these objectives, especially within Europe.

Such a task goes well beyond the measures being discussed as a way of overcoming the crisis. 'Continuing to pour trillions of dollars into carbon-based infrastructure and fossil-fuel subsidies would be like investing in subprime real estate all over again'<sup>8</sup>. Should we in fact be bailing out the automotive industry while greening it slightly, but without pondering on that sector's chronic overproduction? Will we be placing more 'clean cars' on the market in the near future, merely for them to join the traffic jams in our major cities, or should we radically reconsider cars as a means of transport? In respect of agricultural policy, should we be mounting European campaigns in favour of organic produce at the same time as subsidising exports to developing countries, thereby threatening food security in those countries? Should we be raising consumer awareness of quality labels while the major supermarkets continue to increase the food miles travelled by their products ('*made in monde*', to quote the author Suzanne Berger), without internalising the external costs, and continue to exploit their subcontractors<sup>9</sup>? Turning to social policy, should we still be advocating corporate social responsibility and flexicurity, given that tens of thousands of jobs have been lost every week since the start of 2009 while executive bonuses have remained intact? Should we content ourselves with improving financial transparency and regulation, while investors are still profiting from acts prohibited by international conventions (humanitarian law, ILO conventions, the Universal Declaration of human rights, the Convention on Biological Diversity, etc.)? In short, should we be modifying policies in a purely peripheral manner, or should we be tackling their very essence?

Changing the direction and substance of Europe's economy entails a radical rethink of policy-making with a view to sustainable development, be it in respect of finance, industrial policy, accounting standards (and

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8. Ban Ki-moon, Al Gore, 'Green growth is essential to any stimulus', *Financial Times*, 17 February 2009.

9. See in particular the Clean Clothes Campaign and, specifically, the report 'Cashing In: Giant Retailers, Purchasing Practices, and Working Conditions in the Garment Industry', February 2009.

expertise), transport policy, the modes of production, distribution and consumption, but also fiscal policy, competition, the Stability and Growth Pact, and social cohesion<sup>10</sup>. The crisis has taught us that it is no longer enough to tinker on the periphery; the task ahead is immense.

The transition to this different world must be accompanied by unemployment insurance and compensation schemes whereby redundant workers can be retrained, and by measures to protect pensions from the effect of falling financial markets. Public authorities likewise have a vital role to play in investing in infrastructure and housing, community facilities and green jobs. This transition calls for a reinforcement of social dialogue at company, sectoral, national and European level. In an environment where the industrial fabric is being restructured comprehensively, quality of work must be an issue central to our concerns. The EU's potential role is important not just in the face of restructuring operations, but likewise with a view to handling this transition to a low-carbon economy in a socially acceptable manner. The European Union must at last bring about a harmonisation of the basis for company taxation, and then a harmonisation of tax rates.

All of this requires Europe to flex its political muscles. In absolute terms, the EU's political resources greatly outweigh its current capacity to act and exert influence. But it needs to think outside of the box. Whereas the new US President, Barack Obama, sealed the fate of directors' pay within his first few days, the EU is equivocating and Member States are going it alone. According to the economic columnist Martin Wolf, 'Decisions taken in the next few months will shape the world for a generation. If we get through this crisis without collapse, we will have the time and the chance to construct a better and more stable global order. If we do not, that opportunity may not recur for decades'<sup>11</sup>.

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**10.** For a discussion of these issues, see C. Degryse and Pochet, P. (2009) "Changer de paradigme : la justice sociale comme prérequis au développement durable", *Working Paper*, WP 2009.02, ETUI, Brussels.

**11.** *Financial Times*, 4 February 2009.



# Chronology 2008

## Key events in European social policy

Christophe Degryse

### JANUARY

**1<sup>st</sup> January:** Cyprus and Malta adopt the **euro**, now the common currency of 15 of the 27 EU Member States (IP/08/2 and IP/08/6).

**15 January:** the European Parliament approves the amendments to the regulation on **social security** schemes applicable to workers who move within the Community. Csaba Öry report (A6-0515/2007 of 20 December 2007).

**15 January:** Parliament calls for better protection of workers from **occupational diseases and accidents at work**. Glenis Willmott report on the Community strategy 2007–2012 on health and safety at work (A6-0518/2007 of 20 December 2007).

**23 January:** the European Commission adopts the **energy/climate** package consisting of five legislative proposals to commit Europe to becoming a low-carbon economy. Communication from the Commission '**20 20 by 2020. Europe's climate change opportunity**', COM (2008) 30 final of 23 January 2008.

**23 January:** the European Commission adopts the report 'Equality between women and men – 2008', COM (2008) 10 final, Office for Official Publications of the European Communities, Luxembourg.

**29 January:** mini-summit in London on the international **financial crisis**. UK Prime Minister Gordon Brown, French President Nicolas Sarkozy, German Chancellor Angela Merkel, Italian Prime Minister Romano Prodi and Commission President José Manuel Barroso undertake to tighten up governance of the financial system. *Bulletin of the European Union*, No.9590 of 30 January 2008.

**31 January:** the European Parliament votes on the proposal for a directive which completes the **internal market for postal services** by opening up to competition the handling of mail weighing less than 50 grams. Proposal for a Directive of the European Parliament and of the Council amending Directive 97/67/EC concerning the full accomplishment of the internal market of Community postal services, COM (2006) 594 final of 18 October 2006.

## FEBRUARY

**1<sup>st</sup> February:** conclusions of the informal Employment and Social Affairs Council held in Brdo, Slovenia. *Conclusions of the presiding Member State reached in cooperation with Germany and Portugal* ([http://www.eu2008.si/en/News\\_and\\_Documents/0201EPSCO\\_Cotman.html?](http://www.eu2008.si/en/News_and_Documents/0201EPSCO_Cotman.html?)).

**19 February:** the European Parliament grants an additional period of four years to carry out impact studies on the **exposure of workers** to electromagnetic fields. Jan Andersson report on the proposal for a directive of the European Parliament and of the Council amending Directive 2004/40/EC on minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields) (A6-012/2008 of 28 January 2008).

**20 February:** the ETUC gives the go-ahead for a European campaign on **wages**, including minimum wages (<http://www.etuc.org/a/4599>).

**20 February:** the Commission invites the social partners to negotiate on **European Works Councils** (IP/08/265).

**25 February:** Hungary decides to allow the forint to float.

**29 February:** the Employment Ministers adopt the Joint **Employment** Report. According to this report, unemployment in the EU was likely to dip below the 7 % mark in 2008, the lowest level achieved since the mid 1980s. 2855<sup>th</sup> Council meeting Employment, Social Policy, Health and Consumer Affairs, Brussels, 29 February 2008 (6753/08 - Presse 46).

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## MARCH

**3 March:** the seafarers' trade unions FSU (Finnish Seamen's Union) and ITF (International Transport Workers' Federation) reach an agreement with the ferry company **Viking** before the English Court of Appeal, putting an end to all litigation in this case (C-438/05).

**13 March:** Tripartite Social Summit. The leaders of the European Union and the social partners explore the next steps in the **Lisbon Strategy** for Growth and Jobs (IP/08/441).

**17 March:** the European Commission publishes a communication on reviewing the application in the EU of the directive establishing a general framework for **informing and consulting** employees in the European Community (2002/14/CE). For the time being the Commission does not intend to propose any amendments to the directive on employee information and consultation. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the review of the application of Directive 2002/14/EC in the EU, COM (2008) 146 final of 17 March 2008.

**26 March:** the economy of the **euro zone** is beginning to falter, according to Joaquín Almunia, European Economic Affairs Commissioner, when presenting the Commission's quarterly report on the euro area (IP/08/466). *Quarterly Report on the Euro Area* – Vol.7, No.1 (2008) ([http://ec.europa.eu/economy\\_finance/publications/publication\\_12331\\_en.pdf](http://ec.europa.eu/economy_finance/publications/publication_12331_en.pdf)).

**27-29 March:** the new regional organisation of the International Trade Union Confederation (ITUC) for the Americas is established at a founding congress held in Panama. This new body, named the **Trade Union Confederation of the Americas** (TUCA), brings together 68 affiliates from 26 countries in the region and represents more than 50 million workers (<http://www.ituc-csi.org/spip.php?article1946&lang=en>).



## APRIL

**2 April:** Europe's employers (BusinessEurope) agree, as part of the European social dialogue, to negotiate an agreement on **European works councils**.

**3 April:** the Commission adopts a 'Commission Recommendation of 31 March 2008 on enhanced administrative cooperation in the context of the **posting of workers** in the framework of the provision of services' (OJ C 85 of 4 April 2008, pp.1-4).

**3 April:** the Court of Justice of the European Communities, in the case **Dirk Ruffert** vs. the Land of Lower Saxony (C-346/06), considers that the Land's legislation fails to comply with the directive on the posting of workers. (Press Release No.20/08) (<http://curia.europa.eu/en/actu/communiques/cp08/aff/cp080020en.pdf>) (OJ C 128 of 24 May 2008, p.9).

**4 April:** CEEP (public sector employers) and the ETUC (European Trade Union Confederation) adopt a Joint Declaration on the **EU climate change and energy package** which has a clear link with employment. *Joint declaration on the EU climate change and energy package with a view to employment* (<http://www.etuc.org/a/4828>).

**5 April:** in response to a call from the ETUC, 35,000 trade unionists from all over Europe take part in a demonstration in Ljubljana to demand higher **wages** (<http://www.etuc.org/a/4843>).

**11 April:** the ETUC announces that it will not negotiate with BusinessEurope an agreement on **European Works Councils**. It asks the European Commission to legislate in this area (<http://www.etuc.org/a/4867>).

**14 April:** BusinessEurope asks European Commissioner Vladimír Špidla not to legislate on **European Works Councils**. *Bulletin of the European Union*, No.9642 of 15 April 2008.

**15 April:** an unjustified succession of **fixed-term contracts** is unlawful, considers the European Court of Justice. Its judgment affords fixed-term employees better protection of their rights under European law (Judgment of the Court in Case C-268/06, OJ C 142 of 7 June 2008, page 4).

**24 April:** the European Parliament adopts the own-initiative report of Anne Ferreira on the European Commission's Green Paper on the contribution to **sustainable development** made by market-based instruments. It rejects the plan for a minimum Community tax on CO<sub>2</sub> (A6-0040/2008 of 19 February 2008).

**28 April:** a European Commission report predicts a considerable rise in the demand for **long-term care**, both qualitative and quantitative, by 2050. *Long-Term Care in the European Union* ([http://ec.europa.eu/employment\\_social/spsi/docs/social\\_protection/ltc\\_final\\_2504\\_en.pdf](http://ec.europa.eu/employment_social/spsi/docs/social_protection/ltc_final_2504_en.pdf)).

**28 April:** the Commission's spring forecasts confirm the **slowdown in growth** and the strong inflationary pressure in Europe (IP/08/649).

## MAY

**14 May:** the euro zone Finance Ministers back the Commission's view of the economic situation in the euro zone. **Wage restraint** remains necessary. They also examine the effectiveness of **welfare spending** and adopt two recommendations, one on the Broad Economic Policy Guidelines (**BEPGs**) and the other on country-specific recommendations. 2866<sup>th</sup> Council meeting Financial and Economic Affairs, Brussels, 14 May 2008 (8850/08 – Presse 113).

**20 May:** the European Commission spells out in a communication its analysis of the **world food crisis**, the impact of spiralling food prices in the EU and globally, and possible responses in the medium/long term. Communication from the Commission 'Tackling the challenge of rising food prices – Directions for EU action', COM (2008) 321 final of 20 May 2008.

**20 May:** the European Parliament adopts the Anne Van Lancker report on guidelines for the **employment policies** of the Member States (A6-0172/2008 of 8 May 2008).

**22 May:** the European Commission adopts its report on the **Social Situation** 2007. *The Social Situation in the European Union 2007. Social Cohesion through Equal Opportunities* ([http://ec.europa.eu/employment\\_social/spsi/docs/social\\_situation/ssr2007\\_en.pdf](http://ec.europa.eu/employment_social/spsi/docs/social_situation/ssr2007_en.pdf)).

**22 May:** the Permanent Representatives Committee of the Member States in the EU (COREPER) supports the Slovene Presidency's compromise text on the proposed **'return' directive** laying down detention conditions and expulsion procedures for illegal immigrants.

**23 May:** an informal meeting of EU Ministers responsible for **disability** policy takes place in Kranjska Gora, Slovenia (Memo/08/325).

**28 May:** France opens up its **labour market** to East Europeans (*Le Monde*, 28 May 2008).

**28 May:** according to a Commission report, millions of Europeans are at greater risk of **social exclusion** owing to a lack of access to basic financial services. *Financial Services Provision and Prevention of Financial Exclusion* ([http://ec.europa.eu/employment\\_social/spsi/docs/social\\_inclusion/2008/financial\\_exclusion\\_study\\_en.pdf](http://ec.europa.eu/employment_social/spsi/docs/social_inclusion/2008/financial_exclusion_study_en.pdf)).

**30 May:** France proposes to the other EU Member States a European Pact on Immigration and Asylum for 'managed and concerted' **immigration**. Final version of 24 September 2008 (<http://register.consilium.europa.eu/pdf/en/08/st13/st13440.en08.pdf>).

## JUNE

**3-5 June:** international conference of the FAO (Food and Agriculture Organization of the United Nations) on **food security**, in Rome, to respond to the global crisis. Report: *High-Level Conference on world food security: the challenges of climate change and bioenergy* ([http://www.fao.org/fileadmin/user\\_upload/foodclimate/HLCdocs/HLC08-Rep-E.pdf](http://www.fao.org/fileadmin/user_upload/foodclimate/HLCdocs/HLC08-Rep-E.pdf)).

**4 June:** hundreds of Italian and French fishermen demonstrate in Brussels, protesting against the rise in **diesel prices**.

**5 June:** the EU Member States reach a compromise on the proposed '**return**' **directive** laying down expulsion procedures for illegal immigrants. 2873<sup>th</sup> Council Meeting Justice and Home Affairs, Luxembourg, 5-6 June 2008 (9956/08 – Presse 146).

**5 June:** the European Parliament endorses the reintroduction of a 12 day derogation from the **weekly rest** period for bus and coach drivers as proposed by the social partners. Matthieu Grosch report on the proposal for a regulation of the European Parliament and of the Council on common rules for access to the market for coach and bus services (recast) (A6-0037/2008 of 12 February 2008).

**10 June:** the EU Employment and Social Affairs Ministers adopt conclusions on improving administrative cooperation in relation to the **posting of workers** for the provision of services. They also agree on the draft directive regulating **working time** and on **temporary work**. 2876<sup>th</sup> Council Meeting Employment, Social Policy, Health and Consumer Affairs, Luxembourg, 9-10 June 2008 (10414/08 – Presse 166).

**12 June:** the Irish people reject the **Treaty of Lisbon** by a clear majority in a referendum (53.4 % of no-votes).

**13 June:** The European Agency for **Safety and Health at Work** (EU-OSHA) launches a European information campaign on risk assessment. ([http://osha.europa.eu/en/topics/riskassessment/index\\_html](http://osha.europa.eu/en/topics/riskassessment/index_html)).

**17 June:** the Commission puts forward its action plan for finalising the future **European Asylum System**. Communication from the Commission 'A common immigration policy for Europe: Principles, actions and tools', COM (2008) 359 final of 17 June 2008.

**17 June:** the number of **refugees** in the world (25 million) reaches a new record, according to the UN High Commissioner for Refugees (UNHCR). War, but also the climate and food crises are displacing populations. Report *Global trends 2007: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons* (<http://www.unhcr.org/statistics/STATISTICS/4852366f2.pdf>).

**18 June:** the European Parliament adopts the '**return**' **directive** without amendment, despite a huge campaign of opposition. Weber report on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (A6-0339/2007 of 20 September 2007) and (COM (2005) 391 final of 1<sup>st</sup> September 2005).

**20 June:** the European Court of Justice finds against Luxembourg for its erroneous transposition of Directive 96/71/CE on the **posting of workers**. Case C-319/06 (OJ C 209 of 15 August 2008, p. 4).

**19-20 June:** in the wake of the Irish no-vote on the **Treaty of Lisbon**, the European Council decides to continue the ratification process. Brussels European Council, *Presidency Conclusions*, 19-20 June 2008. Revised version on 17 July 2008 (11018/1/08 - REV1).

**19-20 June:** a report entitled 'Joint study on **restructuring** in the EU-15' is presented at a seminar. This report is the outcome of joint work by the ETUC (trade unions), BusinessEurope, UEAPME (craft and SME sector) and CEEP (public and general interest enterprises) (<http://www.etuc.org/a/5114>). Reports website: <http://resourcecentre.etuc.org/Reports-39.html>.

**25 June:** the European Union Agency for **Fundamental Rights** publishes its first annual report. It notes that racist violence and discriminatory behaviour is on the rise throughout the EU but is being inadequately penalised ([http://fra.europa.eu/fra/material/pub/aro8/aro8\\_en.pdf](http://fra.europa.eu/fra/material/pub/aro8/aro8_en.pdf)).

## JULY

**1<sup>st</sup> July:** establishment of the 36<sup>th</sup> European sectoral social dialogue in the area of professional football.

**2-3 July:** the Commission presents its renewed **social agenda**, which contains in particular a legislative proposal aimed at improving the role of European works councils in informing and consulting employees, a proposal seeking to ensure equal treatment outside of the workplace, a report on social services of general interest, and a proposal for a directive

on patients' rights in respect of cross-border healthcare. Communication from the Commission 'Renewed social agenda: Opportunities, access and solidarity in 21<sup>st</sup> century Europe', COM (2008) 412 final of 2 July 2008.

**3 July:** the Commission puts forward a proposal intended to improve the **working conditions** of European seafarers. This proposal is based on the European agreement concluded by the employers' and trade union organisations in the sector. Proposal for a Council Directive implementing the agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the maritime labour convention, 2006 and amending Directive 1999/63/EC, COM (2008) 422 final of 2 July 2008.

**3 July:** the European Central Bank (ECB) raises the key interest rate by 25 basis points.

**7 July:** the Commission adopts a regulation automatically approving aid for **jobs** and **growth** (IP/08/1110).

**7 July:** the European social partners send a joint letter to Commissioner Špidla telling him that if the EU Member States continue to invest in **childcare** infrastructure at the current pace, they will fail to attain the Barcelona targets for the provision of childcare services which they set in 2002. *Joint letter from the European Social Partners on Childcare* (<http://www.etuc.org/a/5204>).

**8 July:** the Commission unveils a package of measures on '**greening transport**', aimed in particular at internalising external transport costs. Communication from the Commission 'Greening Transport', COM (2008) 433 final of 8 July 2008.

**8 July:** the Ecofin Council adopts the final decisions regarding Slovakia's entry into the **euro zone** on 1<sup>st</sup> January 2009. 2882<sup>nd</sup> Council Meeting Financial and Economic Affairs, Brussels, 8 July (11236/08 – Presse 193).

**8 July:** G8 agreement on reducing **greenhouse gas emissions** by at least 50 % by 2050 ([http://www.mofa.go.jp/policy/economy/summit/2008/doc/doc080714\\_\\_en.html](http://www.mofa.go.jp/policy/economy/summit/2008/doc/doc080714__en.html)).

**8 July:** the European Parliament formally approves the compromise on the European directive aimed at including civil aviation activity in the EU Emissions Trading System (EU ETS) (IP/08/1114).

**8 July:** the United Nations High Commissioner for Refugees (UNHCR) calls on the EU to safeguard the rights of **asylum seekers** and refugees in the context of migration management and border control (<http://www.unhcr.fr/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&id=48735be92>).

**9 July:** the European Parliament adopts the report by Jean Lambert on the procedure for implementing the regulation on the coordination of **social security** systems, and the one by Emine Bozkurt on the annexes. Lambert report on the proposal for a regulation of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No.883/2004 on the coordination of social security systems (A6-0251/2008 of 11 June 2008), and Bozkurt report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No.883/2004 on the coordination of social security systems, and determining the content of Annex XI (A6-0229/2008 of 5 June 2008).

**11 July:** Informal meeting of the Ministers for Labour, Employment and Social Policy in Chantilly.

**15 July:** the EU Council of Ministers adopts guidelines for the **employment policies** of the Member States. Council Decision of 15 July 2008 on guidelines for the employment policies of the Member States (2008/618/EC) (OJ L 198 of 26 July 2008, pp.47-48).

**16 July:** the Commission presents its 'Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan', COM (2008) 397 final of 16 July 2008.

**16 July:** Germany decides to maintain its restrictions on access to its labour market for Eastern European **manpower** until 2011. It does however ease its rules on the admission of skilled workers (university graduates). *Bulletin of the European Union*, No.9706, 18 July 2008.

**24 July:** the Internal Affairs Council is divided over a draft directive containing minimum harmonisation of penal sanctions against **employers** of illegally staying third-country nationals and imposing inspections in various economic sectors. 2887<sup>th</sup> Council Meeting Justice and Home Affairs, Brussels, 24-25 July 2008 (11653/08 – Presse 205).

**31 July:** having risen to 4 % in June, **consumer prices** rose to a record level of 4.1 % in July, according to Eurostat. The unemployment rate rose too. Eurostat, *Press Release*, 1008/2008 of 31 July 2008.

## AUGUST

**20 August:** according to Eurostat, output in the construction sector fell by 0.6 % in the **euro zone** and by 1.5 % in the EU 27 compared with the previous month. The euro zone likewise recorded a foreign trade deficit. The economic indicators were down throughout Europe. Eurostat, Press Releases Nos.116/2008 of 18 August and 117/2008 of 20 August 2008.

**29 August:** the social partners send a joint letter to the European Commission calling for a revision of the '**European works councils' directive** ([http://www.etuc.org/IMG/pdf\\_pdf\\_2008-01528-E.pdf](http://www.etuc.org/IMG/pdf_pdf_2008-01528-E.pdf)).

## SEPTEMBER

**1<sup>st</sup> September:** the European Parliament's Industry Committee postpones by three years the introduction of **CO<sub>2</sub> emission standards** scheduled by the Commission. This vote weakens the proposals aimed at forcing automobile manufacturers to reduce the CO<sub>2</sub> emissions of new cars, COM (2007) 856 final of 19 December 2007.

**3 September:** the European Parliament adopts the own-initiative report by Iratxe García Pérez on **equality between women and men 2008** and the Svensson report on **how marketing and advertising affect equality between women and men** (A6-0325/2008 of 28 July 2008 and A6-0199/2008 of 29 May 2008).



**10 September:** the Commission announces a major scaling-back of the **economic forecasts** for Europe: a slowdown in growth, high inflation and stagnation of the European economy (IP/08/1305).

**11 September:** the European Parliament's Committee on Employment and Social Affairs adopts the Zimmer report 'Promoting **social inclusion** and combating poverty, including child poverty, in the EU' (A6-0364/2008 of 24 September 2008).

**15 September:** the bankruptcy of Lehman Brothers rocks the global **financial system**.

**15 September:** the Council adopts a common position on the **temporary work** directive and a common position with a view to the adoption of a directive amending the 2003 directive concerning certain aspects of the organisation of working time (<http://register.consilium.europa.eu/pdf/en/08/st10/st10583.en08.pdf>).

**16 September:** the first EU summit devoted to the **Roma** and travellers is held in Brussels (MEMO/08/559).

**23-24 September:** the ECB and the Bank of England inject € 54.55 billion of **financial liquidity** in an attempt to calm the markets.

**24 September:** a report entitled '**Green Jobs: Towards Decent Work in a Sustainable, Low-Carbon World**' is published in New York under the aegis of the United Nations Environment Programme (UNEP). *Green Jobs: Towards Decent Work in a Sustainable, Low-Carbon World* ([http://www.unep.org/labour\\_environment/PDFs/Greenjobs/UNEP-Green-Jobs-Report.pdf](http://www.unep.org/labour_environment/PDFs/Greenjobs/UNEP-Green-Jobs-Report.pdf)).

**25 September:** Europe's Ministers for Immigration agree on the final version of the European Pact on **immigration and asylum**. 2890<sup>th</sup> Council Meeting Justice and Internal Affairs, Brussels, 25 September 2008 (12923/08 – Presse 250).

**25 September:** the Competitiveness Council lends its support to the indicative target of 50 % per Member States of **Green Public Procurement**. 2891<sup>st</sup> Council Meeting Competitiveness, Brussels, 25-26 September 2008 (12959/1/05 REV1 – Presse 251).

**25 September:** the European Parliament fails to adopt a resolution on the **social package** put forward by the European Commission in early July. COM (2008) 412 final of 2 July 2008, Resolution B6-0378/2008.

**26 September:** the publication by the Global Carbon Project (GCP) of global data on carbon dioxide (CO<sub>2</sub>) emissions for the year 2007 indicates that **CO<sub>2</sub> emissions** have greatly exceeded forecasts. *Carbon Budget and trends 2007* ([http://www.globalcarbonproject.org/carbon\\_trends/index.htm](http://www.globalcarbonproject.org/carbon_trends/index.htm)).

**27 September:** the ETUC adopts the 'London Declaration: a call for fairness and tough action – Statement by the European Trade Union Confederation (ETUC) on the crisis of casino capitalism' (<http://www.etuc.org/a/5367>).

**27-28 September:** the **financial crisis** tightens its grip in the EU with an emergency bail-out of the Belgian/Dutch bank and insurance house Fortis, through concerted action by the authorities of Belgium, Luxembourg and the Netherlands.

## OCTOBER

**1<sup>st</sup> October:** Eurostat signals a rise in unemployment in the euro zone in August. The **unemployment** rate there goes up to 7.5 %. *Press Release*, No.136/2008 of 1<sup>st</sup> October 2008.

**2 October:** the Council formally adopts the decision of the Parliament and the Council to make 2010 the European year of the fight against **poverty** and social exclusion. 2893<sup>rd</sup> Meeting Council Employment, Social Policy, Health and Consumer Affairs, Luxembourg, 2 October 2008 (13405/08 – Presse 271).

**3 October:** the European Commission proposes extending the minimum length of **maternity leave** from 14 to 18 weeks, and recommends that women receive 100 % of their pay. Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who

have recently given birth or are breastfeeding, COM (2008) 637 final of 3 October 2008 (IP/08/1450).

**3 October:** the European Commission proposes a set of common principles to help EU countries in their strategies to combat **poverty**. Commission Recommendation of 3 October 2008 on the active inclusion of people excluded from the labour market (OJ L 307 of 18 November 2008, pp.11-14).

**4 October:** a mini-summit on the **financial crisis** held at the Élysée Palace in Paris brings together French President Nicolas Sarkozy, German Chancellor Angela Merkel, UK Prime Minister Gordon Brown, Italian Prime Minister Silvio Berlusconi and Commission President José Manuel Barroso.

**8 October:** the Commission presents a report highlighting the need for closer harmonisation of the rules on **family reunification** which benefit third-country nationals legally resident on the territory of Member States. Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification, COM (2008) 610 final of 8 October 2008.

**8 October:** the world's major central banks, including the ECB, decide jointly to lower their **interest rates** by half a percentage point.

**9 October:** the European Parliament adopts the Gabriele Zimmer report and calls for the introduction of a global approach to combating **poverty**. Report on promoting **social inclusion** and combating poverty, including child poverty, in the EU (A6-0364/2008 of 24 September 2008).

**12 October:** at the end of another extraordinary summit devoted to the **financial crisis**, held in Paris, the Heads of State and Government adopt a concerted action plan to ensure that national measures taken to shore up the banking system are consistent. 'Summit of the Euro area countries. Declaration on a concerted European action plan of the Euro area countries' ([http://ec.europa.eu/economy\\_finance/publications/publication13260\\_en.pdf](http://ec.europa.eu/economy_finance/publications/publication13260_en.pdf)).

**13 October:** in its October 2008 report on the World Economic Outlook, the IMF predicts that the global economy is about to enter a

**major recession** (<http://www.imf.org/external/pubs/ft/weo/2008/02/pdf/text.pdf>).

**15 October:** at the Tripartite Social Summit, the ETUC makes its voice heard on the **financial crisis**, as well as on the energy and climate change package (<http://www.etuc.org/a/5432>).

**16 October:** the EU Heads of State and Government definitively adopt the European Pact on **Immigration** and **Asylum** ([http://ec.europa.eu/justice\\_home/news/intro/doc/doc\\_13440\\_08\\_en.pdf](http://ec.europa.eu/justice_home/news/intro/doc/doc_13440_08_en.pdf)).

**16 October:** the Food and Agriculture Organization of the United Nations (FAO) announces that 923 million people are affected by **hunger in the world** in 2008. *The State of Food Insecurity in the World 2008* (<ftp://ftp.fao.org/docrep/fao/011/i0291e/i0291e00.pdf>).

**16 October:** according to a report published by the International Labour Organization (ILO), financial globalisation is exacerbating **income inequalities**. *World of Work Report 2008. Income Inequalities in the Age of Financial Globalization* (<http://www.ilo.org/public/english/bureau/inst/download/world08.pdf>).

**16 October:** an informal meeting of ministers responsible for combating poverty and social exclusion takes place in Marseille. A majority of Member States remain cautious about setting numerical targets for reducing **poverty**. *Conclusions of the informal meeting of ministers responsible for combating poverty and social exclusion* ([http://www.ue2008.fr/webdav/site/PFUE/shared/import/1016\\_Ministerielle\\_Pauvrete/Results\\_informal\\_meeting\\_ministers\\_combating\\_poverty\\_and\\_social\\_exclusion\\_EN.pdf](http://www.ue2008.fr/webdav/site/PFUE/shared/import/1016_Ministerielle_Pauvrete/Results_informal_meeting_ministers_combating_poverty_and_social_exclusion_EN.pdf)).

**20 October:** a study presented by the European Commission confirms an increasing trend towards the use of **private pension schemes** in the European Union, while emphasising the need for comprehensive coverage and adequate levels of pension payouts. *Privately managed funded pension provision and their contribution to adequate and sustainable pensions* ([http://ec.europa.eu/employment\\_social/spsi/docs/social\\_protection\\_committee/final\\_050608\\_en.pdf](http://ec.europa.eu/employment_social/spsi/docs/social_protection_committee/final_050608_en.pdf)).

**20 October:** the Council adopts the directive on the minimum level of **training** of seafarers. Directive 2008/106/EC of the European Parliament and of the Council of 19 November 2008 on the minimum level of training of seafarers (OJ L 323 of 3 December 2008, pp.33-61).

**21 October:** according to a report published by the OECD, **poverty** has risen significantly in OECD countries over the past twenty years. *Growing Unequal? Income Distribution and Poverty in OECD Countries*.

**22 October:** the European Parliament approves without amendment the proposal for a directive on **temporary agency work** (COM (2002) 149 final of 20 March 2002 – Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ L 327 of 5 December 2008, pp.9-14).

**23 October:** the European Parliament adopts the Jan Andersson report on Challenges to **collective agreements** in the EU (A6-0370/2008 of 30 September 2008).

**24 October:** final adoption of the directive on including civil aviation in the Community system for the trading of greenhouse gas **emissions quotas** (ETS). Directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (<http://register.consilium.europa.eu/pdf/en/08/sto3/sto3657.eno8.pdf>).

**28-29 October:** the second forum on **social services of general interest** (SSGI) in Europe takes place in Paris. A roadmap containing the priorities of the French presidency of the EU in the field of SSGIs is forwarded to Member States, the European Commission and the European Parliament.

**29 October:** special meeting of the College of Commissioners to draw up the broad thrust of a recovery plan for the EU 'From financial crisis to recovery: A European framework for action', COM (2008) 706 final of 29 October 2008.

**31 October:** the autumn 2008 report from the European Trade Union Confederation (ETUC) on the economic situation sounds the alarm

regarding the **real economy** (<http://www.etuc.org/a/5506>). *Don't let the real economy down!* ([http://www.etuc.org/IMG/pdf\\_DO\\_NO\\_LET\\_THE\\_REAL\\_ECONOMY\\_DOWN\\_Oct2008.pdf](http://www.etuc.org/IMG/pdf_DO_NO_LET_THE_REAL_ECONOMY_DOWN_Oct2008.pdf)).

## NOVEMBER

**3 November:** in its autumn economic forecast, the European Commission predicts **zero growth** in the three major euro zone economies in 2009. *Economic Forecast – Autumn 2008* ([http://ec.europa.eu/economy\\_finance/publications/publication13290\\_en.pdf](http://ec.europa.eu/economy_finance/publications/publication13290_en.pdf)).

**4 November:** the European Parliament's Committee on Civil Liberties backs the European '**blue card**' project aimed at attracting highly skilled immigrants to the European Union. Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM (2007) 637 final of 23 October 2007.

**5 November:** the European Parliament's Committee on Employment and Social Affairs adopts the Cercas report on the **working time** directive, which repudiates the position taken at the June meeting of the Employment and Social Affairs Council. The report calls for maximum working time to be confined to 48 hours per week, and for the opt-out to be eliminated within three years (A6-0105/2005 of 25 April 2005 and A6/0440/2008 of 11 November 2008 – Recommendation for second reading).

**5 November:** the US Democrats win the presidency and a majority in Congress. Barack Obama becomes the 44<sup>th</sup> President elect of the United States.

**6 November:** for the second time in a month the European Central Bank (ECB) reduces **interest rates** in the euro zone by 50 basis points.

**7 November:** an extraordinary European Council dedicates its attention to the financial and economic crisis, as well as to an overhaul of the **international financial institutions** ([http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/fr/misc/103874.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/fr/misc/103874.pdf)).

**13 November:** Germany goes into **recession**.

**13 November 2008:** on the eve of the G20 crisis summit, the International Trade Union Confederation (ITUC), the TUAC and the Global Unions adopt a '**Global Unions Washington Declaration**' calling for a major economic recovery plan, new financial and economic governance, and a campaign against the explosion of inequality in income distribution 'that lies behind this crisis' ([http://www.ituc-csi.org/IMG/pdf/o811t\\_gf\\_G20.pdf](http://www.ituc-csi.org/IMG/pdf/o811t_gf_G20.pdf)).

**14 November:** the euro zone goes into **recession**.

**14 November:** an informal Council and a conference take place in Lille in order to clarify the challenges of **equal opportunities** for men and women in working life and to define the objectives to be attained (IP/08/1713).

**17 November:** the Secretariat of the Framework Convention on Climate Change (UNFCCC) announces that the growth in **greenhouse gas emissions** is continuing. Emissions in countries having signed up to the Kyoto Protocol grew by 2.3 % between 2000 and 2006 ([http://unfccc.int/files/press/news\\_room/press\\_releases\\_and\\_advisories/application/pdf/o81117\\_ghg\\_press\\_release.pdf](http://unfccc.int/files/press/news_room/press_releases_and_advisories/application/pdf/o81117_ghg_press_release.pdf)).

**17 November:** the European Parliament's Committee on Employment and Social Affairs adopts, with amendments, the recast directive on **European Works Councils**. Bushill-Matthews report (A6-0454/2008 of 19/11/2008) and COM (2008) 419 of 2 July 2008.

**18 November:** the United Kingdom is the first country in the world to adopt a law aimed at achieving an 80 % reduction in its 1990 levels of **greenhouse gas emissions** by 2050.

**20 November:** MEPs approve the European '**blue card**' project geared to attracting foreign skilled workers to the EU. Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM (2007) 637 final of 23 October 2007.

**26 November:** the Commission puts forward a €200 billion **European Economic Recovery Plan** encompassing the recovery plans adopted by Member States, COM (2008) 800 final of 26 November 2008.

**27 November:** the Mixed Committee (EU, Norway, Iceland, Liechtenstein and Switzerland) approves Switzerland's accession to the **Schengen Area** as from 12 December (15698/08 of 14 November 2008 and 16325/08 – Presse 344).

**27 November:** the EU undertakes at a meeting of the Justice and Home Affairs Council to take in approximately 10,000 **Iraqi refugees** located in countries bordering on Iraq. This announcement is welcomed in particular by the UN High Commissioner for Refugees. 2908<sup>th</sup> Council Meeting Justice and Home Affairs, Brussels, 27-28 November 2008 (16325/08 – Presse 344).

**28 November:** the Ministers attending the Justice and Home Affairs Council decide to introduce into their legislation criminal sanctions against **racism**, incitement to racial hatred, and the condoning, denial or gross trivialisation of crimes of genocide. 2908<sup>th</sup> Council Meeting Justice and Home Affairs, Brussels, 27-28 November 2008 (16325/08 – Presse 344). Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (OJ L 328 of 6 December 2008, pp.55-58).

## DECEMBER

**1<sup>st</sup> December:** experts at the National Bureau of Economic Research (NBER) point out that the US economy has been in **recession** since December 2007 and that the recession is continuing. (<http://research.stlouisfed.org/publications/net/20081201/netpub.pdf>)

**2 December:** the Ecofin Council approves the **European Economic Recovery Plan** presented by the Commission. 2911<sup>th</sup> Council Meeting Financial and Economic Affairs, Brussels, 2 December 2008 (16231/08 – Presse 342).

**3 December:** the ETUC warns of **looming deflation** and demands deep cuts in interest rates (<http://www.etuc.org/a/5629>).

**4 December:** the ECB decides to lower **interest rates** in the euro zone by 75 basis points.



**4 December:** according to Eurostat, **GDP** in the euro zone and the EU 27 have fallen by 0.2 % compared with the second quarter, when it had already fallen by 0.2 % in the euro zone and had remained stable in the EU 27 (*Press Release* 171/2008 of 4 December 2008).

**8 December:** Competition Commissioner Neelie Kroes announces the adoption of a communication on **bank recapitalisation** in the current financial crisis (IP/08/1901 and OJ C 270 of 25 October 2008, pp.8-14).

**9 December:** in its annual report on **food insecurity**, the FAO announces that almost a billion people in the world are going hungry. *The State of Food Insecurity in the World 2008* (<ftp://ftp.fao.org/docrep/fao/011/i0291e/i0291e00.pdf>).

**9 December:** the Council of the EU adopts the ‘return’ directive, intended to facilitate the expulsion of illegal immigrants from the EU (<http://register.consilium.europa.eu/pdf/en/08/sto3/sto3653.en08.pdf>).

**12 December:** Switzerland becomes the 25<sup>th</sup> member of the **Schengen Area**.

**12 December:** the European Council reaches a final compromise on the **energy/climate change** package, on the **European economic recovery plan** and on the **Treaty of Lisbon**. The Irish Prime Minister announces that his country will hold a second referendum on the Treaty. European Council, *Presidency Conclusions*, Brussels, 11 and 12 December 2008.

**15 December:** the Commission adopts a communication and a proposal for a Council Recommendation setting out what action can be taken by Member States to improve **patients’ safety**. Communication from the Commission and Proposal for a Council Recommendation on patient safety, including the prevention and control of healthcare-associated infections, COM (2008) 836 and 837 final of 15 December 2008

**15 December:** the European social partners present a report on implementation of the framework agreement on **work-related stress**. *Implementation of the European autonomous framework agreement on work-related stress* ([http://www.etuc.org/IMG/pdf\\_Final\\_Implementation\\_report.pdf](http://www.etuc.org/IMG/pdf_Final_Implementation_report.pdf)).

**15 December:** Montenegro submits its application for EU accession.

**16 December:** the Commission adopts a communication entitled 'New Skills for New Jobs' intended to improve the capacity to predict and anticipate the **skills** needed by workers and businesses. 'New Skills for New Jobs: Anticipating and matching labour market and skills needs', COM (2008) 863/3.

**16 December:** a Euro-demonstration, called by the ETUC, is held in Strasbourg on the revision of the Working Time Directive (<http://www.etuc.org/a/5552>).

**16 December:** the European Parliament approves the compromise text on the recast **European Works Councils** directive. Bushill-Matthews report (A6-0454/2008 of 19 November 2008) and COM (2008) 419 of 2 July 2008.

**16 December:** the Council of the EU adopts the Regulation establishing, from 2008 to 2010, a facility for rapid response to soaring **food prices** in developing countries. Regulation (EC) No.1337/2008 of the European Parliament and of the Council of 16 December 2008 establishing a facility for rapid response to soaring food prices in developing countries (OJ L 354 of 31 December 2008, pp.62-69).

**17 December:** Parliament approves the adoption of the four directives comprising the **climate/energy** package (Proposals for Directives of 21 January 2008 – COM (2008) 16, 17, 18 and 19).

**17 December:** the European Parliament adopts by an absolute majority the common position on the revision of the '**working time**' directive, thereby rejecting the Council common position. European Parliament legislative resolution of 17 December 2008 on the Council common position for adopting a directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time (10597/2/2008 – C6-0324/2008).

*Chronology drawn up by Christophe Degryse,  
with the assistance of Dominique Jadot.*



## List of abbreviations

ACEA	European Automobile Manufacturers' Association
ACP	African, Caribbean and Pacific countries
ARM	Adjustable-rate mortgage
BEPA	Bureau of European Policy Advisers
BEPGs	Broad Economic Policy Guidelines
BEUC	The European Consumers' Organisation
BusinessEurope	Confederation of European Business
CBI	Confederation of British Industry
CEC	Commission of the European Communities
CEC	European Managers' Organisation
CEEC	Central and Eastern European countries
CEEP	European Centre of Enterprises with Public Participation
CFI	Court of First Instance
COREPER	Committee of Permanent Representatives (of the Member States to the EU)
CPME	Standing Committee of European Doctors
DG	Directorate General
EC	European Community
ECB	European Central Bank
ECJ	European Court of Justice
ECSA	European Community Shipowners' Associations
EEA	European Economic Area
EESC	European Economic and Social Committee
EGF	European Globalisation Adjustment Fund
EMF	European Metalworkers' Federation
EP	European Parliament
EPSU	European Federation of Public Service Unions
ERN	European reference network
ESF	European Social Fund
ETF	European Transport Workers' Federation
ETS	Emissions Trading Scheme
ETUC	European Trade Union Confederation
EU	European Union
EU-OSHA	European Agency for Safety and Health at Work
Eurociett	European Confederation of Private Employment Agencies
EWC	European Works Council
FAO	Food and Agriculture Organization of the United Nations
FSU	Finlands Svenska Ungdomsförbunds (Finnish Seamen's Union)
GATT	General Agreement on Tariffs and Trade

List of abbreviations

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<b>GCP</b>	Global Carbon Project
<b>GDP</b>	Gross domestic product
<b>Greens/EFA</b>	Group of the Greens/European Free Alliance
<b>HLG</b>	High Level Group on Health Services and Medical Care
<b>HRD</b>	Human Resources Department
<b>HTA</b>	Health Technology Assessment
<b>IFPRI</b>	International Food Policy Research Institute
<b>ICT</b>	Information and Communication Technologies
<b>ILO</b>	International Labour Office
<b>ILO</b>	International Labour Organization
<b>IMF</b>	International Monetary Fund
<b>INSEE</b>	(French) National Institute of Statistics and Economic Studies
<b>IPCC</b>	Intergovernmental Panel on Climate Change
<b>ITF</b>	International Transport Workers' Federation
<b>ITUC</b>	International Trade Union Confederation
<b>LCGB</b>	Fédération des syndicats chrétiens luxembourgeois
<b>LDC</b>	Least developed countries
<b>NAFTA</b>	North American Free Trade Agreement
<b>NBER</b>	National Bureau of Economic Research
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>OGB-L</b>	Confédération syndicale indépendante du Luxembourg
<b>OJ</b>	Official Journal
<b>OMC</b>	Open method of coordination
<b>OPA</b>	Take-over bid (Offre publique d'achat)
<b>PES</b>	Party of European Socialists
<b>R&amp;D</b>	Research and development
<b>SGI</b>	Services of general interest
<b>SME</b>	Small and medium-sized enterprises
<b>SNB</b>	Special Negotiating Body
<b>SSGI</b>	Social services of general interest
<b>TUAC</b>	Trade Union Advisory Committee (at the OECD)
<b>TUC</b>	Trades Union Congress
<b>TUCA</b>	Trade Union Confederation of the Americas
<b>UEAPME</b>	European Association of Craft, Small and Medium-sized Enterprises
<b>UMP</b>	Union pour un mouvement populaire
<b>UNDP</b>	United Nations Development Programme
<b>UNEP</b>	United Nations Environment Programme
<b>UNFCCC</b>	United Nations Framework Convention on Climate Change
<b>UNHCR</b>	UN High Commissioner for Refugees
<b>UNICE</b>	Union of Industrial and Employers' Confederations of Europe
<b>UN</b>	United Nations Organisation
<b>VAT</b>	Value added tax
<b>WTO</b>	World Trade Organization

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## **Social developments in the European Union 2008**

Edited by  
Christophe Degryse

The urgent problem of global warming was compounded, in 2008, by a proliferation of crises – food, financial, economic, social, etc. – reinforcing the need for the European Union to play a stronger role in building a new model of development, both internationally and at home. The entire range of Community policies is affected here: from agricultural policy to competition policy, via the Stability and Growth Pact, trade, employment, and so on. This tenth edition of *Social developments* examines how the EU can tackle the new challenges assailing it. We find that the specific circumstances of this crisis period considerably broaden the scope for debate.

This edition also looks at the social policy issues that featured on the European agenda in 2008: working time, European Works Councils, social dialogue, the posting of workers, free movement of patients. These issues cannot be dissociated from the global challenges. The EU must in fact contribute more to an often neglected aspect of the transition to a new sustainable form of economic governance: its social dimension. After all, how is that transition to win the support of Europe's population unless its social dimension is enhanced?

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