SOCIAL DEVELOPMENTS IN THE EUROPEAN UNION

EDITED BY CHRISTOPHE DEGRYSE AND PHILIPPE POCHET

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THE NATIONAL INSTITUTE FOR WORKING LIFE AND THE SWEDISH TRADE UNIONS IN CO-OPERATION

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edited by
Christophe Degryse and Philippe Pochet

Fourth annual report

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Preface

The phrase "Europe is at a turning-point in its history" may seem dated and even hackneyed, having been repeated so many times in recent years whenever the founding treaties have undergone a revision. And yet now, at the start of the 21st century, the European Union really is facing its destiny. It is preparing for enlargement to include the Central and Eastern European countries as well as Cyprus and Malta. In order to guarantee the efficiency of its decision-making mechanisms, it is preparing a root-and-branch overhaul of its method of operation, an overhaul which also implies an unprecedented desire to clarify the political aims of this hybrid entity. Whatever the outcome of the European Convention and the ensuing Intergovernmental Conference, a hitherto unknown degree of participatory democracy will have been attained: never before, without a doubt, has European debate been nourished by such a wide range of political, economic, social and trade union players, be it at European level or at national, regional and local level.

Whereas this "Europe of debate" has the merit of comparing divergent views of the reunified continent's political future, it nonetheless throws Europe's divisions into sharp focus. As far as political union is concerned, this was amply demonstrated by the diplomatic crisis over Iraq. In socio-economic terms, the European Convention has revealed all the limitations of the undertaking: even though monetary union has now been achieved, there is still a lack of economic and social policy co-ordination owing to different interpretations of what constitutes ideal co-ordination. It goes without saying that Social Europe is the number one victim of this absence of co-ordination. Although new working methods are currently being implemented in this sphere, the key question of how they should interact with economic policy seems unlikely to be answered in the short term.

It would appear more necessary than ever, in this context of open-ended challenges, to disseminate information and to analyse the changes affecting Social Europe. There seems to us to be an increasing need to create transnational forums of dialogue, not only to feed into the debate but also to attempt to shed light on the weighty developments taking place at present, with a view to influencing policy directions. To this end, the European Trade Union Institute and the Swedish trade union research programme SALTSA have once again joined forces with the Observatoire social européen to produce an assessment of European social policy for the year 2002. This co-operative venture follows on from various joint projects on the part of these partners, and is indicative of their wish to work together as a network. This volume, published in English, French and German, is aimed at a wide readership and seeks to prompt reflection and debate about the state of Social Europe and its prospects. We hope you will enjoy reading it.

Reiner Hoffman (ETUI), Lars Magnusson (SALTSA),
Philippe Pochet (OSE), Christophe Degryse.

Christophe Degryse and Philippe Pochet

Foreword

The year 2002 saw a profusion of political debate about Europe. As far as "social Europe" is concerned, the proceedings of the European Convention, which began in February, fed into the reflection, discussion and often controversy about the nature and purpose of the Union on a daily basis. These debates made perfectly plain – especially during the second half of the year – the extent to which social issues are inseparable from political issues. Indeed, as opinion polls are showing day by day, it is impossible to isolate the prime concerns of citizens: employment and job stability, the fight against social exclusion and discrimination, the smooth operation of public services, etc. But social policy is also closely connected with economic policy. In the words of Jean-Paul Fitoussi (2000), this demonstrates (as if there were a need) that social policy cannot be a mere adjunct of economic policy, but is part and parcel of democracy([1]).

Consequently, we believe that there can be no genuine political Europe without a social Europe. Nor, of course, can there be a real social Europe without a political Europe. And yet social affairs did not originally feature in the discussions on the future of Europe within the Convention. It was not until October that, following many differences of opinion, the Convention finally resolved to establish a Working Group on Social Europe. But this illustrates the intrinsic link between social policy issues and the debates on the goals of the European Union.

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1 Fitoussi, J.-P., *Le Monde*, 19 July 2000.

Whereas the Convention has helped to clarify the basic values of the Union in the social sphere, as well as its fundamental objectives, the key question of economic policy co-ordination has still not begun to be answered satisfactorily. This question is in fact closely bound up with social priorities. Economic and monetary policy decisions – be they those of the European Central Bank, tax reforms embarked on or pursued randomly by several of the Member States' governments, investment policies or wage policies – all have an impact on social affairs. Failing to acknowledge this link means confining social policy to an adjustment policy with no bearing on the choice of economic and social model. It is not so much a matter of "reconciling" the economic and social spheres, as proclaimed by the Lisbon summit, but of them both working in concert towards joint objectives.

Europe still seems not to have found its way from this point of view. Thus the marked economic slowdown experienced in 2002 revealed, among other things, the limitations of a European Employment Strategy which is disconnected from the Broad Economic Policy Guidelines, the inadequacy of the monetary priorities and the lack of a concerted policy of revival. The cries of victory over unemployment, uttered at the end of the 1990s and at the turn of the millennium, suddenly abated. They have since been overriden by weightier debates about the stability pact, economic policy co-ordination and monetary policy guidelines. This may yet prove to be an interesting development, of course, since questions which were thought to have been buried beneath the millstone of neo-liberal "single-track thinking" have resurfaced: what is "good" public expenditure? Should public investment be factored into the calculation of budgetary deficits? Should account be taken of a nominal deficit, or should it be adjusted for economic cycles? And so on. But, at the same time, there are new dangers lurking in the longer term, since in a decentralised monetary union common rules must be accepted and complied with by everyone. Otherwise the slightest crisis (and there are plenty of those looming) may have disastrous effects, where each individual government attempts to cope alone by taking its own decisions without considering their impact on neighbouring countries.

These questions, which go to the very core of economic and monetary union, have so far not been answered, no doubt because they are so highly sensitive. The abortive attempts of both the European Parliament and the Convention to tackle them head-on are tangible evidence of that (see article by Cécile Barbier).

Two shifts

Let us now turn to Community developments more specifically related to social policy matters. 2002 was an important year in terms of recognition for the role of the social partners as front-line players. The Barcelona European Council in March underscored this role and called for them to be more involved in seeking a balance between job flexibility and security, anticipating and managing change, and improving quality in work. The Convention has likewise taken steps towards enshrining recognition of the specific contribution made by employers and trade union organisations in the forthcoming Treaty. This increasingly official recognition is not however devoid of ambiguities. We shall highlight two. Whilst social policy in the Community was long dependent on initiatives from the European Commission, one gains the impression nowadays that the Commission is in a sense taking a back seat behind the Member States and the social partners.

This "shift" in protagonists is intimately connected with a change in the instruments used to develop social policy. Over the years, the classic legislative approach has been supplemented by a multidimensional approach drawing on a series of new tools for co-operation/co-ordination among Member States. The most illuminating example is the Open Method of Co-ordination. Little by little, this method takes us away from the classic pattern: a Commission proposal for a directive, adoption by the Council and Parliament, transposition into national law, and judicial scrutiny by the Court of Justice of the European Communities. This pattern is gradually being replaced in the social sphere by the definition of common objectives (or "guidelines"), the implementation of national action plans, the evaluation of these plans and, where appropriate, the adoption of recommendations. Under this

new procedure, the role of Member States becomes preponderant and that of the Commission less visible, even though in actual fact the latter does continue to "manage the agenda", lay down technical requirements and ensure continuity of the processes underway. (Its permanence contrasts with the six-monthly rotation of presidencies and with changes of the guard in national capitals.) Since the Open Method of Co-ordination contains no elements that could be challenged in court, the role of the Court of Justice becomes virtually irrelevant. It does nevertheless play a historically important part in the gradual emergence of social Europe (see article by Dalila Ghailani). Lastly, the European Parliament too finds itself sidelined. Its proposals for a better linkage between the Broad Economic Policy Guidelines and the European Employment Strategy are of course an attempt to acquire a place in the process. Inasmuch as co-ordination depends first and foremost on implementation by the Member States, national parliaments constitute the weak link for the time being. The Commission acknowledged this difficulty in its Communication for the 2003 spring European Council. How can national parliaments, as well as all the other relevant players, be more closely involved in making European strategic decisions and in defining and implementing common objectives? This, in our opinion, is the most pressing question at present. It is, in other words, a matter of ensuring that these flexible, adaptable processes reinforce democracy and public deliberation.

In parallel with these developments, another trend, occurring especially since Maastricht, has brought the social partners into the foreground (see articles by Christophe Degryse and Pierre Walthéry). In 1991 the two sides of industry were granted the right to negotiate, at the Commission's initiative, framework agreements liable to be turned into directives by the Council. Although it was thought during the second half of the 1990s that this new procedure may be able to launch a "legislative" social Europe, it has to be admitted that after three fully-fledged cross-industry framework agreements the process ran out of steam (see the edition 2001 of Social Developments). Despite recent difficulties, the social partners have been endeavouring since the Laeken summit to boost their independence from the Commission. In this spirit they adopted a multi-annual work programme in November 2002

aimed at laying down their own negotiating agenda. The Commission was delighted. If the autonomous work programme is put into practice, two fundamental questions will arise. First, will the employers assume their role of social interlocutor in a dynamic fashion? It should be remembered here that, in the past, it was external pressure – in particular the prospect of Treaty reform – that convinced UNICE to negotiate with the trade unions, as pointed out by two seasoned observers of the employers' movement.

Second, how can a more autonomous course be charted unless the negotiating hand of the trade union side is strengthened at the same time? Aside from some recent important but isolated demonstrations by the trade unions, the balance of power in European social negotiations operates to the detriment of the unions, as has already been pointed out.

Ultimately, the new relationship between the social partners will pose questions about the interaction between the European and national levels. This interaction is likely to be intensified, in that voluntary agreements signed at Community level will be implemented nationally, the obvious risk being that implementation will be uneven, depending on the strength of the national players concerned. What is more, this new momentum could mean that the social dialogue is burdened with full responsibility for social Europe by the world of politics which then, as it were, washes its hands of the matter. After all, some members of the Convention objected to reinforcing the social provisions of the Treaty on the pretext that it was now up to the two sides of industry to deal with social affairs independently.

The first clear-cut effect of this twofold shift, in players and in instruments, was to reopen political debate about issues which seemed to have become taboo. Here is Europe beginning to talk about pensions, healthcare, combating social exclusion, migration policy, etc.: all subjects that have been painstakingly avoided until now. Questions can however be asked about the momentum behind these different processes, their relevance, their coherence and their legitimacy. If the Open Method of Co-ordination is to be extended, its scope should at

least first be clarified. As we shall read in the following pages, such questions cut right across the processes underway in the field of employment (see article by Philippe Pochet), healthcare (see article by Rita Baeten) and pensions (see article by Caroline de la Porte). These studies reveal that there is not just one method of co-ordination but several, and that they vary especially in terms of intensity and implementation.

Another major theme of 2002 was services of general interest. Our assessment of EU action in this area is equivocal. On the one hand, some headway has been made thanks to an active minority within the European Council and the Council of Ministers, which has gone to great lengths to safeguard the durability of public services. But, on the other, liberalisation is progressing inexorably and eating away day by day at the foundations of public service, replacing it with universal service, a derivative and inferior variant of public service. As for the Commission, its actions show little evidence of consistency. One moment it champions services of general interest; the next moment it argues for a very restrictive notion of State aid and refuses to establish a watertight distinction between non-market services of general interest and market service of general economic interest.

A "social model"?

The three main pillars of our national social models are now clearly at the very heart of European debate: the social dialogue – including trade union rights – social protection and public services. This raises two questions. Firstly, assuming of course that we rule out the hypothesis of merely transferring what happens nationally to the European level, how are these matters to be handled at this level? There will undoubtedly be no cut-and-dried answer. The social dialogue has developed patchily at Community level, and it remains to be seen what will come of the new phase of autonomous development in social partner negotiations. As far as social security is concerned, unanimous voting remains the rule for all legislative activity, but the new co-ordination processes pave the way for Member States to set themselves convergent national objectives; these give an indication of what may become common principles

throughout the European Union. In the case of services of general interest, even in spite of recent occurrences we are still a long way from defining a European service of general interest, all the more so since efforts to do so are thwarted by the unwavering pursuit of liberalisation.

Our second question is this: what impact are these various developments likely to have on national social models? Any impact may as yet seem somewhat limited in the case of the social dialogue, even though the probable signing of voluntary agreements, and their implementation by national confederations, will lead to greater involvement of the national social partners. One might therefore expect a strengthening – albeit an uneven one – of the interplay between national and European social negotiations in the years ahead. In respect of pensions and healthcare, it has to be admitted that the European debate has not yet percolated through to national political debate (in fact the opposite is more apparent). Conversely, the issue of services of general interest, which are scheduled to open up to competition over the next ten years, is making a strong impact on national priorities.

Finally, as we stressed at the start of this Foreword, the economic sphere is keeping its distance from the social sphere at Community level. Even now there is still no structural link between the European Central Bank and the social partners. Indeed, the latter are almost the only stakeholders to have no say on wage policy, a topic about which the Commission, Ecofin Council and European Central Bank are prone to speak at length.

Brussels, February 2003

Cécile Barbier

The European Convention: establishment and initial results in the field of economic and social policy

Introduction

The European Convention instituted in February 2002 represents a new method of preparing for the next Intergovernmental Conference (IGC) responsible for revising the European Treaties. Whereas it is not a substitute for the rules laid down in the EU Treaty for such a revision, the Convention does nonetheless aspire to draw up a "constitutional Treaty", according to the objectives assigned to it by the Chairman, Valéry Giscard d'Estaing, at the inaugural session on 28 February. This objective is all the more ambitious in that the text will have no real status unless it is officially endorsed by the Heads of State and Government at the IGC in 2004 and then "ratified by all the Member States in conformity with their respective constitutional rules" (parliamentary ratification or referendum). In the following pages we shall describe the way in which the Convention's proceedings were organised in 2002 and highlight the results of the working groups that addressed the issue of social policy in the European Union (EU) either directly or indirectly.

Early amendments to some articles of the Working Methods allayed the misgivings of certain members of the Convention – including some high-ranking ones – about holding a debate on the "European social model" in the context of drafting a constitutional Treaty. However, the social dimension only came to feature at the Convention because of the failings of the Working Group on Economic Governance. The Working Group on Social Europe was not established until the

analytical work of the Convention was drawing to a close, just before it embarked on drafting the future constitutional Treaty. Despite the inclination in some quarters to dismiss the results of the Social Europe Group as a "side-show", discussions did take place. It is as yet unclear how these will translate into the future constitutional Treaty, but the talks do at least have the merit of pointing up the fact that the European Union is based on social values and that one of its aims should be to promote these values both within and outside of the EU.

1. Operation and organisation of proceedings

The Laeken European Council in December 2001 laid down the structure of the Convention: the Praesidium (its Chairman and Vice-Chairmen, its composition and functions), the number of representatives of the four components of the Convention, the number of observers, the Forum and the Secretariat. The Convention has a total of 105 members, each of whom may be replaced by an alternate ([1]).

The Praesidium, at the apex of the structure, is composed of twelve prominent individuals. It directs and prepares the business of the Convention. One of its members chaired each of the eleven working groups formed from May 2002 onwards, enabling it to keep a degree of control. The Praesidium is also the principal author of the constitutional Treaty, basing itself on the working groups' results and the plenary debates, but also acting on its own initiative.

The candidate countries were not allocated a seat on the Praesidium. In response to pressure exerted by them, Alojz Peterle (Slovene parliament, PPE-DE), who was elected by parliamentary representatives from the candidate countries, attends as an invited guest. This status of invited guest enabled him to chair one of the "contact groups" established prior to the hearing with civil society.

Furthermore, the granting of observer status to representatives of the Economic and Social Committee, the Committee of the Regions and

1 For a more detailed analysis of the structure and operation of the Convention, see Barbier (2002).

the social partners is one of the notable differences between the European Convention and the previous Convention, responsible for formulating the Charter of Fundamental Rights. These representatives have been able to play an active part in the working groups.

1.1 Important aspects of the working method

The Laeken European Council did not carry its attention to detail so far as to lay down the *modus operandi* of the Convention. Following the inaugural session, the Praesidium submitted its draft rules of procedure, known thereafter as its "working methods"([2]). Members called for their content to be amended, on the grounds that they conferred too powerful a role on the Praesidium and its Chairman. Another demand was for working groups to be created not only at the behest of the Chairman but also when requested by a significant number of Convention members. This route was followed from June onwards and became the main centre of gravity of the Convention's proceedings.

Given that the principle of "one person - one vote" could not be applied in a Convention comprised of European and national parliamentarians, representatives of governments and the Commission, as well as representatives from Member States and candidate countries, the Chairman has a pivotal role when it comes to ascertaining the emergence of a consensus in the plenary([3]).

1.2 Listening phase

In his introductory speech, Valéry Giscard d'Estaing put forward a plan of work. The first phase would be one of "listening" and drawing up a "questionnaire" on European integration and Europe's future over the next fifty years (Giscard d'Estaing, 2002a). A second phase would then be devoted to seeking answers to the questions raised in the Laeken declaration. Valéry Giscard d'Estaing grouped these into six categories:

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2 Note on Working Methods, document CONV 09/02, which replaces document CONV 03/02 (European Convention, 2002a).

3 At the November session the Chairman of the Convention defined consensus as follows: "*Consensus does not mean unanimity but consensus means more than majority*".

- fundamental questions on Europe's role;
- the division of competence in the European Union;
- simplification of the Union's instruments;
- how the institutions work, and their democratic legitimacy;
- a single voice for Europe in international affairs;
- and, finally, the approach to a Constitution for European citizens.

Other questions have arisen in no uncertain terms since then: election of the President of the European Council; voluntary withdrawal from the Union; definition of Europe's borders – a spin-off from the question of the EU's relations with its neighbours. Solutions have likewise been sought on the issues of how the future Treaty should enter into force and how to forestall the deadlock liable to occur when the time comes to conclude or ratify the future Treaty.

The third and final phase of the Convention would be to formulate proposals for the Intergovernmental Conference, either in the form of options or as a single recommendation. The latter form would carry considerable weight and open the way towards a "constitutional Treaty" for Europe, according to the foremost hypothesis advanced by the Chairman.

1.2.1 Tasks of the European Union

The first plenary after the inaugural session consisted of a general debate around the question "What do you expect of the European Union?". External action, economic governance, and the area of freedom, security and justice were the political issues uppermost in the minds of members of the Convention. The undoubted importance of these topics should not however mask the demands put forward by several members in respect of social policy. Thus Alain Barrau (France, national parliament, PSE) argued at one of the earliest sessions for social policy to be developed and to become the subject of a "European social treaty". He also backed the idea of an economic government (European Convention, 2002b). The social dimension was subsequently

alluded to on several occasions, and reinstated among the expectations of citizens.

The principle of setting up thematic working groups was agreed at the May plenary session. Initially six groups were proposed, on the following themes: Group I "subsidiarity", Group II "integration of the Charter of Fundamental Rights", Group III "consequences of explicitly recognising the legal personality of the Union", Group IV "role of national parliaments", Group V "complementary competences" and Group VI "economic governance".

In early June a session of the Convention was devoted partly to the area of freedom, security and justice and partly to the role of national parliaments. At the close of that session, Valéry Giscard d'Estaing announced the creation of a new working group on the issues of security and justice. The Chairman omitted to mention immigration and asylum, two subjects raised by members of the Convention; these two aspects were eventually added to the group's mandate. Generally speaking, the Chairman has been reproached for summarising the work of the Convention – or the work it ought to be doing – in a highly personal fashion([4]). His omission of asylum and immigration, but also of the social dimension and, conversely, the possible formation of a Congress, are the most telling examples.

1.2.2 Hearing with civil society

Vice-Chairman Jean-Luc Dehaene was entrusted with the task of organising relations with civil society and ways of listening to its views by setting up a Forum and arranging a hearing at the start of the summer.

In order that they might participate more fully in the proceedings of the Convention as well as those of the accompanying Forum, a "civil society contact group" was established by four European "networks" representing NGOs in the social sector, environmental protection, development co-operation and human rights, as well as the European

4 For an analysis of this first phase of the Convention, see Magnette (2002).

Trade Union Confederation (ETUC). Eight contact groups were formed in the run-up to the hearing, and the topics covered by civil society were expanded to include "democracy and the institutions" and "culture". Another group was dedicated to "academics and think-tanks". The Economic and Social Committee, which has three observers, agreed to facilitate European-level contacts by making its premises available for "sessions of information and discussion" on the work of the European Convention with European civil society organisations and networks. These hearings have been attended by significant numbers of members of the Convention, but it is difficult to determine their impact on the Convention's proceedings.

Several members of the Convention had submitted contributions in the meantime. We would draw particular attention to the one from Anne Van Lancker (Belgian socialist), which contains a wealth of social policy proposals. Van Lancker begins by demanding that the Charter be incorporated into the Treaty, that the Union sign up to the European Convention on Human Rights and that social objectives be promoted in the Treaty. She calls for co-decision and qualified majority voting in respect of social and fiscal matters, and proposes the formulation once a year of broad economic and employment policy guidelines. She also demands a positive interpretation of the principle of subsidiarity, inclusion of the Open Method of Co-ordination in the Treaty and the establishment of a Tripartite Committee for social dialogue on growth, employment and social cohesion, as well as the creation of a European (Bipartite) Labour Council (European Convention, 2002c). The entire European Parliament socialist delegation endorsed the main thrust of her message (European Convention, 2002d). In addition, various members stressed the importance of quality of life and security for citizens (European Convention, 2002e), along with social solidarity and social citizenship (European Convention, 2002f and 2002g). This aspect was likewise backed by Emilio Gabaglio, Secretary General of the European Trade Union Confederation and observer to the Convention, both at the civil society hearing and during the debate following the submission of the report from the Social Europe Working Group.

Klaus Hänsch, chairman of the "contact group", reported on the views expressed by the social sector representatives present at the hearing: "*In particular there had been many calls for incorporation of the Charter on Fundamental Rights into the Treaty, the expectation that the Convention would prepare a draft constitutional treaty, a strong emphasis on the need for wider social and employment issues to be more central objectives of the EU, inclusion of the open coordination method in the Treaty, and a formalisation in the Treaty of the dialogue with civil society. There had also been calls for stronger support for services of general interest*" (European Convention, 2002h: 2).

We would note in passing that the social dimension was similarly a key concern raised by the European Youth Convention.

1.3 Analytical phase: establishment of working groups

The real business of the Convention did not in fact get underway until the working groups were established. These groups had a twofold remit: first, to explore certain precise issues and, second, to engage members of the Convention in substantive work which could not be done in the plenary. The aim was that they would draw up recommendations or options for further examination in plenary session. But the working groups' involvement in the proceedings of the Convention was not fully clarified, in that their conclusions did not take the form of amendments to provisions of the Treaty. Once the conclusions had been examined by the Convention, the different "blocks" of recommendations on which a consensus emerged had to be analysed by the Praesidium before being legally written into the constitutional Treaty. Recommendations provoking divergent comments were subjected to further consideration by the Praesidium, which then put forward proposals aimed at reconciling points of view.

The first six groups, each comprising thirty or so members, began work in June. Their meetings were open to the public, with the notable exception of the Working Groups on Economic Governance and on Defence. Four so-called second-generation groups were subsequently established: on the area of freedom, security and justice, on "simplification of legislative procedures and instruments", on external action of the EU, and on defence.

Other requests were made for the formation of working groups relating most notably to "*democracy, institutions, majority voting, social dimension of the Union, regions and security*" (ETUC, 2002: 10). Nothing came of these requests, apart from the "security" dimension. In respect of social affairs, once it became apparent that the Working Group on Economic Governance did not intend to address itself to the social dimension, several members of the Convention tabled a motion calling for a debate to be held and for a specific working group to be created on this topic (European Convention, 2002i).

1.4 Preliminary draft constitutional Treaty

The Chairman of the Convention put forward his preliminary draft of a constitutional Treaty at the plenary session on 28-29 October 2002 (European Convention, 2002j). Whilst it did reflect the results of some of the original working groups, the draft Treaty nonetheless bears the hallmark of its main author, Valéry Giscard d'Estaing. In view of the agreement reached in Working Group III (conferring of legal personality on the Union), it takes the form of a single text which would replace all the existing Treaties. The draft architecture of the Constitution departs from Group III's recommendation of a Treaty in two parts, and comprises three. The first would set out the institutional structure; the second would relate to policies and actions of the Union; and the third would consist of final clauses and provisions on legal continuity. A number of protocols might be added.

2. The social dimension within the working groups

At the close of the listening phase, Valéry Giscard d'Estaing described the work of the Convention and the challenges facing it in an article published in late July (Giscard d'Estaing, 2002b). His appraisal in respect of social affairs came in for a good deal of criticism from the circles concerned, especially for stating that "no new competences have been sought in the social sphere".

It can scarcely be denied that members of the Convention argued on several occasions for greater account to be taken of the "European social model". Three months later, the Executive Committee of the European Trade Union Confederation (ETUC) forwarded a resolution

to the Convention (ETUC, 2002). It stressed the following aspects: incorporation of the Charter of Fundamental Rights as a cornerstone of the constitutional Treaty; reinforcement of economic governance with the aim of full employment; guarantee of services of general interest; promotion of social dialogue; and a heightened role for Europe in the face of globalisation. The ETUC also came out in favour of a strong Commission and qualified majority voting (QMV) as the general rule, with enhanced powers for the European Parliament. Further, it backed the concept of "horizontal subsidiarity" which should make it easier to draw a dividing line between the responsibilities of the social partners, on the one hand, and those of the Commission-Council-Parliament triangle on the other. The ETUC likewise proposed new provisions on the social partners' role (tripartite dialogue).

As for Europe's employers, with UNICE as their mouthpiece they expressed support for a constitutional Treaty and backed measures aimed at stepping up transparency. The Community method should be preserved, in their opinion (UNICE, 2002a). The employers also argued in favour of a single legal personality for the EU and extended recourse to QMV, except on social policy matters and initiatives in the sphere of taxation (UNICE, 2002b). They think it undesirable to draw up a list of competences. Moreover, a third category of Community instruments should be situated between the first two, to cover co-regulation and self-discipline. These instruments should be better recognised as tools for achieving EU objectives, serving as alternatives to systematic use of the legislative route. As concerns the EU Charter of Fundamental Rights, inasmuch as it contains aspects which fall outside of Community competence it should not become a legally binding instrument, according to UNICE.

The Working Group on the Charter of Fundamental Rights was consequently one of those whose proceedings were followed most attentively. The same applies to the Working Groups on Complementary Competences, Simplification of instruments and procedures, and of course Economic Governance, whose meetings were attended by observers from the ETUC, CEEP and UNICE. The Economic Governance Group did not address itself to the social

dimension despite requests from several members of the Convention. Lastly, the Working Group on Social Europe, established in December 2002, explored the outstanding issues, such as inclusion of the Open Method of Co-ordination in the Treaty, which was to be broached by a total of four working groups without a conclusion having been reached on the manner of its inclusion.

2.1 Working Group II "the Charter"

The question of whether to incorporate the Charter into the Treaty was not answered at Nice. Whether or not the Union should accede to the European Convention on Human Rights (ECHR) was another question arising, even though all the EU Member States are signatories. Accession to the ECHR by the Union as such would require the insertion of an enabling clause into the Treaty([5]).

The Group's task was to ascertain whether incorporation of the Charter and accession to the ECHR would alter the distribution of competence between the EU and its Member States. Independently of these two issues, the Group discussed the specific matter of access to the Court of Justice by individuals. The aim was to determine, firstly, whether Article 230(4) TEC should be amended to extend direct recourse to include individuals and, secondly, whether the competence of the Court of Justice should be broadened to encompass the field of Justice and Internal Affairs from the point of view of safeguarding human rights. The Group's final verdict was that these matters fell outside of its mandate. They will therefore be settled by the Convention itself.

Incorporation of the Charter takes pride of place in the ETUC resolution, because of the crucial role that it is expected to play in redefining the priorities of the European Union. Thus the ETUC recommends that "*the Charter, despite its remaining deficiencies, be incorporated as a cornerstone in the EU Constitutional treaty in a legally binding manner, (i.e.*

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5 In its Opinion 2/94 of 28 March 1996, the European Court of Justice found that "*as Community law stands, the Community is not competent to accede to the Convention*" and that any such accession would require an amendment to the Treaty.

either directly as a building block in the treaty or as a Protocol annexed to the treaty) and that a political monitoring procedure be provided for through a treaty reference, also with a view to its further dynamic evolution" (ETUC, 2002: 4). The call for a monitoring procedure derives from dissatisfaction with the content of the Charter on the part of a number of social players and trade unionists. It should pave the way for improvements in the definition of fundamental rights, above all social rights.

It was rapidly accepted within the Working Group that there was no question of altering the substance of the Charter's articles, so as not to reopen the debate concluded at the previous Convention.

Moreover, just as the Convention refrained from exploring mechanisms for reviewing the constitutional Treaty, so the Charter Working Group did not look at possible ways of improving the Charter. The same cannot be said of the European Parliament and the Commission. The European Parliament resolution on the impact of the Charter of Fundamental Rights of the European Union and its future status, adopted in late October 2002, advocates that the best way forward is to convene a new, specific Convention at a later date (European Parliament, 2002a). Although the "Penelope" document drafted by departments of the Commission does not represent the Commission's official position, it integrates the Charter in its entirety into the second part of the Constitution. This document also contains various methods for revising the Treaty, depending on the parts to be amended. As a general rule, unanimous voting is abandoned for revision of the Constitution. Article 101 inserts the Convention method into the Treaty for the preparation of the Constitution and sets out a "tight" procedure for revising the provisions of the Charter. The same procedure would apply to revision of the first part of the Treaty, which defines the "Principles" of the European Union(6); and also to that of two of the

6 Title I "Foundations"; Title II "Tasks"; Title III "Powers"; Title IV "Institutions"; Title V "Instruments"; Title VI "The democratic life of the Union"; Title VII "Finance"; Title VIII "Miscellaneous provisions"; Title IX "Revision and accession".

four Additional Acts to the Constitution, the first on Defence and the second one the Peaceful Use of Atomic Energy.

The agreement reached in the Working Group on inserting the Charter into the constitutional Treaty received backing from a large majority of speakers during the plenary debate, but the manner of its incorporation was referred back to the Convention (European Convention, 2002k). The working group's agreement only came about thanks to an adaptation of the "horizontal clauses", i.e. the provisions on the scope of the Charter stressing the fact that inclusion of the Charter will not result in an extension of EU competence and that the constitutional traditions of Member States will be preserved. As concerns accession to the ECHR, there were wide-ranging calls for the creation of a "constitutional basis" allowing for accession. A small number of reservations were expressed: in fact, one State – France – objected to accession. But this stance did not jeopardise the principle of inserting an enabling clause, with the final say as to whether or not to sign up to the ECHR dependent on a subsequent decision by the Council.

When he unveiled the first sixteen articles of the future constitutional Treaty at the session on 6-7 February 2003 (European Convention, 2003a), the Chairman of the Convention stated that the question of whether the Charter of Fundamental Rights would be included in the second part of the Constitution or in an annexed protocol. The Chairman regarded this as "*nothing more than a drafting matter*".

The number of amendments tabled on draft Article 5.1 indicates how important it is for the content of the Charter to appear in its entirety in the constitutional Treaty(7). Many of these gave the impression that it

7 See in particular the amendments tabled by the delegation of MEPs belonging to the PSE group and those from the entire group of Belgian Convention members, both full and alternate, calling for the Charter to be included in the second part of the constitutional Treaty. Other such amendments were put down by several Convention members belonging to the PPE, which also takes in members from candidate countries, calling for its inclusion in the first part of the Treaty. The Polish government representative supports integration in part

should be inserted into the first part of the Treaty, which could have the consequence of adding an extra part or a second section of part one. The idea of resorting to a protocol seemed to be running out of steam. The advantage of the former solution would be to give prominence to these rights, which do not expand the Union's competence. This amounts to saying that the present Article 13 on non-discrimination should be preserved, in that it is the only legal basis allowing for the adoption of measures in this field. Another technique suggested would be to incorporate the Charter by means of a reference without reproducing it in full. Finally, the amendment tabled by the UK government representative, Peter Hain, recalled the United Kingdom's opposition to making the Charter an integral part of the Constitution([8]).

2.2 "Economic Governance"

Since they were first written into the Treaty on European Union (Maastricht Treaty), the provisions concerning economic and monetary union have remained unaffected by the various Treaty revisions. During the weeks leading up to the introduction of euro coins and notes, a debate lying dormant since 1999 resurfaced: namely, shortcomings in the field of economic governance. Current events in 2002 again brought about a certain reappraisal of the EMU parameters, including budgetary

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two. The Italian government representative, Gianfranco Fini, backs the option of integration by means of a protocol.

8 The draft Constitution presented by Peter Hain last October, produced by Professor Alan Dashwood of Cambridge University, is perfectly clear. See Draft Constitutional Treaty of the European Union and related documents, Article 2, Basic values of the Union (European Convention, 2002l). Whereas the question as to including the Charter is left open, Article 2(2) on Values refers to EU compliance with the rights protected by the European Convention on Human Rights and with those "identified" by the Charter of Fundamental Rights. As evidenced by the comments on the text, the term "identified" is used on the assumption that the Charter will be included among the Union's constitutional instruments only inasmuch as it is mentioned among the sources of inspiration for human rights guarantees.

stability, a parameter originally championed by Germany whose economy was now experiencing hard times.

In institutional terms, the Eurogroup, established by the European Council in 1997, is an informal consultative body which meets prior to each Ecofin Council (EU Ministers for Economics and Finance). This body brings together all the Member States belonging to the euro zone, i.e. the Fifteen minus Sweden, Denmark and the United Kingdom. The Eurogroup's informal status is reflected in the fact that the Commission and the European Central Bank (the ECB, which has exclusive competence for implementing monetary policy within the euro zone) are simply issued with invitations. After enlargement, the Eurogroup will comprise only just over half of the total number of Member States. At present all decisions, including those relating solely to the euro zone countries, are taken by the Ecofin Council, which is attended by all Member States. Such a situation is untenable in the long term and makes it essential to clearly identify a body responsible for decisions concerning the euro zone. The question arising here, consequently, is whether or not the Eurogroup should be put on an official footing, and if so, by what means.

Two instruments are used to co-ordinate economic and budgetary policy. The first is the Stability and Growth Pact, some elements of which are binding: it is forbidden to exceed the 3% budgetary deficit limit, and the twelve euro zone countries are obliged to balance their budgets by 2004. The second instrument, described as "flexible" or "soft" co-ordination, takes the form of the Broad Economic Policy Guidelines (BEPGs). These Guidelines are becoming the benchmark for co-ordination not just of economic but also social policies (see conclusions of the Lisbon and Barcelona European Councils). However, as was found by a study conducted by the Trans-European Policy Studies Association (TEPSA), the impact of the recommendations made appears to be very uneven, from one Member State to another and from one field to another (TEPSA, 2002).

Various Member States – Germany, France, Italy and Portugal – found in 2002 that circumstances prevented them from maintaining their public deficits within the limits set by the Stability and Growth Pact;

achieving budgetary equilibrium by 2004 seems an even more unlikely proposition. The European Commission's reaction to this state of affairs is ambiguous: it has been accused of adopting a different approach depending on the size of the country concerned (differential implementation of the Stability Pact's early warning system). The Commission also considered postponing until 2006 the cut-off date for achieving balanced budgets. A number of calls have been made for a more flexible interpretation of the Stability Pact([9]), with the President of the Commission himself having described the Pact as "stupid" (Prodi, 2002a). When invited to justify his words before the European Parliament, Romano Prodi explained that under the circumstances what was required was compliance with "the spirit and not the letter of the Pact" (Prodi, 2000b). At the end of 2002, the Commission adopted two documents aimed at strengthening budgetary co-ordination, first with a view to improving implementation of the Stability and Growth Pact and, second, by upgrading the quality of budgetary statistics (CEC, 2002a and 2002b). Proposals for improving co-ordination of economic policies were likewise to be put forward in 2003.

Working Group on Economic Governance

According to the mandate drawn up by the Praesidium, the introduction of the single currency implies closer economic and financial co-operation. The task of the Working Group chaired by Klaus Hänsch was to contemplate what form such co-operation might take. Unlike the other working groups, the one on economic governance was not able to distil a consensus (European Convention, 2002m). Most of the topics addressed resulted in majority or minority "options". The Group was divided in particular over any and all amendments to the Treaty, including those aimed at strengthening

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[9] Some economists challenge the foundations of European economic policy. This is for example the case of the group European Economists for an Alternative Economic Policy in Europe, which in 2002 adopted a memorandum entitled "Better institutions, rules and tools for full employment and social welfare in Europe".

economic policy co-ordination and institutionalising an Ecofin Council for the euro zone.

It will also be remembered that the European Parliament's Committee on Economic And Monetary Affairs took the initiative of producing a report on the development of and new prospects for the European economic union. The rapporteur, Christa Randzio Plath (PSE), was acting in step with the mandate of the Working Group on Economic Governance (European Parliament, 2002b), her aim being to help redress the balance between the economic and social dimensions. One key component of this report was a proposal to amend Article 2 of the EC Treaty: "*a reference should be added to full employment, social inclusion and the promotion of investments able to guarantee a high level of sustainable and non-inflationary growth*" (European Parliament, 2002b: 7). There was likewise a proposal to amend Article 3, where it was thought advisable to underline "*the contribution of services of general interest to the competitiveness of European industry and the strengthening of social and territorial cohesion in the European Union*" (European Parliament, 2002b: 7). Given the number of amendments tabled, especially by the PPE, which would have distorted the message, the rapporteur saw fit to withdraw her text([10]).

Following this setback, the strategy pursued by several MEPs belonging to the European Parliament delegation to the Convention was to table a motion calling for a debate to be held on social matters and for a working group to be set up on this topic (European Convention, 2002i).

A further explanation for this decision is the fact that, despite requests from several members of the Convention, the Economic Governance Group had resolved not to examine the social dimension. The Group was split into two camps: on one side, advocates of a model based on growth and competitiveness and, on the other, those who backed full employment, economic and social cohesion, progress, and a better balance between competition and public services in a social market economy (European Convention, 2002n). Moreover, Klaus Hänsch confirmed that the idea of putting a reference to public services in the

10 *Bulletin quotidien Europe*, No.8291, 6 September 2002.

Treaty (of which there was no mention in the final report of the Economic Governance Group) was supported by only a minority of members of the Working Group(11).

Consensus emerged on just one point: to maintain the *status quo* concerning the distribution of competence between Community bodies (European Central Bank) for monetary policy and the Member States for economic, social and fiscal policies. During the debate, a number of speakers came out in favour of incorporating the Open Method of Co-ordination into the Treaty, but there was no consensus. The issue was forwarded to the Working Group on Simplification. Several members of the Convention likewise called for the role of the social partners to be stepped up. When this point came up at the plenary session, members were invited to comment on the formation of a working group on the social dimension. Everyone who spoke supported the idea.

Following the plenary discussion, proposals were put forward by the Praesidium on the basis of the consensus which "*was reached on the Commission being able to issue an initial warning on the implementation of the Broad Economic Policy Guidelines (BEPGs) directly to the Member State concerned. Several members also supported the suggestion that the Council should take its decisions on the basis of a Commission proposal and should exclude the vote of the Member State concerned*" (European Convention, 2002o: 4). Lastly, it is worth noting that the joint Franco-German proposals do not envisage altering the Commission's responsibilities in respect of the BEPGs and the procedure for coping with excessive public deficits (European Convention, 2002p).

2.3 Working Group V "Complementary Competences"

It was decided after the May plenary session to establish a Working Group on Complementary Competences. Before that session the

11 Fourth session of information and dialogue on the European Convention with European civil society organisations and networks, held at the Economic and Social Committee on 9 October 2002.

Secretariat had drawn up a memorandum on the present delimitation of competence, "*established according to objectives to be achieved and means for achieving those objectives*" (European Convention, 2002q: 2)([12]). According to this paper, complementary competences concern "*areas in which the competence of the Union/Community is limited to supplementing or supporting the action of the Member States, adopting measures of encouragement or coordinating the action of the Member States. The bulk of the power to adopt legislative rules in these areas remains in the hands of the Member States and intervention by the Community cannot have the effect of excluding intervention by them. This category includes economic policy; employment; customs cooperation; education, vocational training and youth; culture; public health; trans-European networks (except for interoperability and standards); industry; research and development; development cooperation; common defence policy (Title V of the TEU)*" (European Convention, 2002q: 10). These competences relate in most cases to new fields of Community action introduced by the Maastricht Treaty (education, training, youth, civil protection, culture, sport, health, industry and tourism) and by the Amsterdam Treaty, which instituted the European employment strategy. In addition, the Open Method of Co-ordination, which is outside of the Treaties, was laid down by the Lisbon European Council (2000) on the basis of the mechanisms for employment policy co-ordination and of Article 137(2) TEC.

Two questions were asked of the Convention members belonging to this Group: how should "complementary" competence be treated in future? Should Member States be accorded full competence for matters in which the Union at present has complementary competence, or should the limits of the Union's complementary competence be spelled out (European Convention, 2002r)?

The Group's first recommendation was to replace the term "complementary competences" with "supporting measures" (European Convention, 2002s). It also found that no legislation should be

[12] "Delimitation of competence between the European Union and the Member States – Existing system, problems and avenues to be explored", European Convention (2002q), document CONV 47/02 which replaces document CONV 17/02 taking account of the plenary debate.

permitted in these areas unless explicitly provided for in the Treaty. The future Treaty should contain "*a separate title covering all issues of competence*", and "*a separate Article would make clear that the competence in each policy area should be exercised in accordance with the provisions of the relevant Treaty Articles for each policy area*". Furthermore, the reference to "an ever closer Union" in Article 1 of the Treaty on European Union should be rephrased in order to avoid the impression that future transfers of competence to the Union represent an end in themselves.

As concerns the Open Method of Co-ordination, although several members called for it to be written into the Treaty, the Group as a whole recommended to the plenary that this matter be examined by the Working Group on Simplification as a non-binding legal method or instrument.

The Group likewise called for Article 308 to be reinforced and advocated retaining unanimous voting, while suggesting substantial involvement of the European Parliament, perhaps through an assent procedure. This article should not, however, provide grounds for extending fields of competence, and there should moreover be *ex ante* judicial scrutiny. It should be possible to repeal acts adopted in this matter by a qualified majority vote.

In the ensuing debate, several members of the Convention took issue with the Working Group's recommendation to change the designation "complementary competences" into "supporting measures". More significantly still, however, the content of the report was opposed by Alain Lamassoure on behalf of PPE members of that Group and by Klaus Hänsch on behalf of social-democrat MEPs. The speech by Hänsch was then endorsed by Pervenche Béres (EP, alternate, PSE) in the name of a large majority of socialists and virtually all the socialists in the European Parliament delegation. Various Convention members came out in support of keeping Article 308 flexible. Others viewed the content of the report as an attempt to reintroduce a list of competences, according not to the intended objectives but to the instruments used. The exclusion of any possibility of passing legislation also came in for a good deal of criticism. It was furthermore pointed out that, since the European Parliament has the right of co-decision, abolishing the

possibility of adopting regulations or directives on these matters would be tantamount to suspending the rights of Parliament, which it would not accept.

When presenting the draft of Article 15, which lists "supporting actions", Valéry Giscard d'Estaing made reference to the outcome of the Working Group chaired by Henning Christophersen. At least three articles are based on this report and on the discussion following its submission: draft Article 1, from which the reference to "an ever closer union" has disappeared, draft Article 15 setting out "areas for supporting action", and draft Article 16 laying down a flexibility clause to replace Article 308.

It is worth recalling what happens under the Convention's working methods once it has studied the results of the working groups. The Praesidium chose to operate by means of summary documents. The one drawn up following discussion of the Christophersen report states that "*during the ensuing debate, a large number of members took issue with the approach adopted in the Group's report*" (European Convention, 2002o: 12) *[…]* and that "*many felt that the proposed new name 'supporting measures' was confusing in that it did not make clear that the reference was to 'areas' in which the Union was empowered to act*" (European Convention, 2002o: 12). Draft Article 15 relates to "areas for supporting action" (European Convention, 2002o: 10). It also says that "*no one called into question the recommendation to include in the new Constitutional Treaty a separate title covering all matters relating to competence, including the definition of categories of competence and principles applicable to the exercise of Union competences*" (European Convention, 2002o: 12). Finally, in respect of Article 308, "*there was broad consensus on the need to retain a 'flexibility clause' with tight decision-making procedures, in particular unanimity in the Council. Members were more critical of the safeguard mechanisms of the 'flexibility clause'. Many were opposed to the break with the parallelism of forms, enabling an act adopted by unanimity to be repealed by a qualified majority, and to preliminary rulings*" (European Convention, 2002o: 13).

Draft Article 16 did not follow this approach. It was subject to a large number of amendments advocating the use of qualified or "superqualified" majority voting rather than unanimity. Some members

of the Convention took issue with the use of an assent procedure, preferring a superqualified majority vote or application of the co-decision procedure, or else to leave open the manner of EP involvement depending on the matter under consideration. The amendments tabled on draft Article 1 were more numerous and called in particular for the notion of "an ever closer Union" to be reinstated. As to the "areas for supporting action" set out in draft Article 15.2, these cover employment, industry, education, vocational training and youth, culture, sport and protection against disasters. Article 15.3 stipulates moreover that "*the Member States shall co-ordinate their national employment policies within the Union*". Several amendments were tabled with a view to replacing the term "areas for supporting action" with "complementary competences" or "supporting competences". The importance of abiding by the notion of "complementary competences" is thereby highlighted: it is a better reflection of reality in these fields, where Member States will retain primary competence but the adoption of certain measures by the Union is not ruled out. Of the fields cited, employment is the one which many members of the Convention would like to see disappear.

2.4 Working Group IX "Simplification of instruments and procedures"

The subject of simplification was addressed at two sessions of the Convention (23-24 May and 12-13 September). Several of the Group's recommendations received unanimous backing from the Convention (European Convention, 2002t). Some of these will apply to social affairs. The Chairman of the Convention noted in respect of the proposals from Group IX that "*there was consensus on a radical cut in the Union's legal instruments, from the present fifteen down to six*" (European Convention, 2002u: 7). These instruments would be as follows:

- *"two binding instruments, the 'law' and the 'framework law', which would replace the 'Regulation' and the 'Directive' and would also be used in areas covered by Titles V (Common Foreign and Security Policy) and VI (Police and Judicial Cooperation in Criminal Matters) of the Union Treaty, while safeguarding the special character of these areas should the need arise.*

- *'Regulations' and 'Decisions', which would be reserved for binding acts adopted by the executive as delegated acts or as implementing acts.*
- *non-binding instruments, 'Recommendations' and 'Opinions, which would remain as at present"* (European Convention, 2002u: 7).

As concerns delegated acts, Giuliano Amato pointed out when presenting the report that "*in some cases, particularly those likely to come under possible executive formations of the Council (Ecofin, Foreign Affairs or Police Cooperation), delegated acts could also be adopted by the Council*" (European Convention, 2002u: 2). The Group's proposal to extend qualified majority voting in the Council to all cases where the co-decision procedure is in place was backed by a large number of Convention members. Exemptions should however continue to exist.

The Praesidium was to submit further new proposals. It is interesting that the Chairman of the Convention did not mention the Open Method of Co-ordination in his conclusions. The Working Group had recommended assigning "constitutional status" to the OMC, while recalling that it "*involves concerted action by the Member States outside the competences attributed to the Union by the treaties. […] This should not be confused with the coordination competences conferred upon the Union by various legal bases, notably in the economic and employment fields*" (European Convention, 2002t: 7). The summary by the Secretariat states: "*lastly, there were some misgivings on the inclusion of the open method of coordination in the Constitutional Treaty"* (European Convention, 2002u: 4).

2.5 Working Group XI "Social Europe"

The Laeken declaration refers explicitly to citizens and their expectations in the field of employment and combating poverty and social exclusion, as well as in the field of economic and social cohesion. The declaration also raises the issue of intensifying co-operation in the fields of social inclusion, the environment, health and food safety.

Moreover, the establishment of a new strategic objective for the European Union at the Lisbon European Council is interpreted by supporters of the European social model as a desire to redress the balance between the economic and social dimensions. Two methods of

doing so have become apparent. The first forms part of the mandate given to the Commission by the Barcelona European Council, namely to envisage procedures for better co-ordination of economic and employment policies (see article by Philippe Pochet) (CEC, 2002c). The second is the attempt to anchor in Europe's social agenda the informal social summits bringing together the Member States, Commission and social partners on the eve of the Spring European Councils (see article by Christophe Degryse) (CEC, 2002d). Indeed, the joint contribution by the social partners to the Working Group on Social Europe proposes that the new Treaty should refer explicitly to the Tripartite Social Summit (ETUC *et al.*, 2003).

In the wake of the plenary discussion on the report from the Working Group on Economic Governance, the Convention debated the motion proposed by the three MEPs. Whereas the decision to establish a Working Group on Social Europe did not find favour with the Chairman of the Convention, it did rally substantial support following discussion of the conclusions reached by the Economic Governance Group at the session on 3-4 October 2002. The Group was founded at the session on 5-6 December. Of all the eleven working groups formed, this one was the largest in membership terms, with a total of 70 participants including nine representatives of the "government" component (full members for Austria, Belgium, the Czech Republic, Ireland and the United Kingdom; alternates for Germany, Spain, Estonia and France).

The Group published its report on 4 February, just a few days after the entry into force of the Treaty of Nice. Since some of the Treaty provisions relating to social affairs have been modified, it is worth recalling that the adoption of measures aimed at encouraging the fight against exclusion and the modernisation of social protection systems fall within the scope of co-decision (and, consequently, QMV). However, these measures exclude any harmonisation of the laws and regulations of the Member States. In addition, the Council, acting unanimously – on a proposal from the Commission and after consulting the European Parliament – may decide to move to co-decision for matters relating to protection of workers where their employment contract is terminated;

representation and collective defence of the interests of workers and employers, including co-determination; and conditions of employment for third-country nationals legally residing in Community territory. This does not affect the provisions on social security and social protection for workers, to which the unanimity rule still applies. Article 137 still contains certain exclusions, despite calls for their removal from some members of the Working Group: pay, the right of association, the right to strike and the right to impose lock-outs.

The Treaty of Nice also contains a more direct link between the Economic and Social Committee and civil society, in that according to Article 257 of the EC Treaty the latter consists of "*representatives of the various economic and social components of organised civil society […]*".

We shall look below at the Group's responses to the different questions comprising its mandate.

2.5.1 Social values (Article 2)

The Group recommended that the following values be added to Article 2 of the constitutional Treaty: social justice, solidarity and equality, in particular equality between men and women. According to draft Article 2 as penned by the Praesidium (values of the Union), "*the Union is founded on the values of respect for human dignity, liberty, democracy, the rule of law and respect for human rights, values which are common to the Member States. Its aim is a society at peace, through the practice of tolerance, justice and solidarity*" (European Convention, 2003a: 2).

2.5.2 Inclusion of social objectives in Article 3 (the Union's general objectives)

There was a consensus in the Working Group to recommend that Article 3 of the future constitutional Treaty should specify the promotion of: full employment; social justice and social peace; sustainable development; economic, social and territorial cohesion; social market economy; quality of work; lifelong learning; social inclusion; a high degree of social protection; equality between men and women; non-discrimination on the basis of racial or ethnic origin, religious or sexual orientation, disability and age; children's rights; a high

level of health; efficient and high quality social services and services of general interest.

The draft of Article 3 on the Union's objectives, as presented by the Praesidium, reads as follows:

"*1. The Union's aim is to promote peace, its values and the well-being of its peoples.*

2. The Union shall work for a Europe of sustainable development based on balanced economic growth and social justice, with a free single market, and economic and monetary union, aiming at full employment and generating high levels of competitiveness and living standards. It shall promote economic and social cohesion, equality between women and men, and environmental and social protection, and shall develop scientific and technological advance including the discovery of space. It shall encourage solidarity between generations and between States, and equal opportunities for all.

3. The Union shall constitute an area of freedom, security and justice, in which its shared values are developed and the richness of its cultural diversity is respected.

4. In defending Europe's independence and interests, the Union shall seek to advance its values in the wider world. It shall contribute to the sustainable development of the earth, solidarity and mutual respect among peoples, eradication of poverty and protection of children's rights, strict observance of internationally accepted legal commitments, and peace between States.

5. These objectives shall be pursued by appropriate means, depending on the extent to which the relevant competences are attributed to the Union by this Constitution" (European Convention, 2003a: 2-3).

The first sixteen articles of the future constitutional Treaty were unveiled at the plenary session on 6 February. Even though Jean-Luc Dehaene promised that the Praesidium would await the report from the Social Europe Group before finalising draft Article 3([13]), no reference to that Group was made in the introduction to the sixteen draft articles. Thus, whereas the Praesidium's proposals did match the Social Europe

[13] Sixth session of information and dialogue on the work of the Convention, Economic and Social Committee, 4 February 2003.

Group's proposals in some cases, in others they fell short of the mark. For instance, the Group's call for a "high degree of social protection" appears in Article 3 of the Praesidium's text as the "promotion" of social security. The same applies to equality. Nor did draft Article 3 contain the Group's proposed reference to high quality social services and services of general interest.

In addition, Article 3 as advocated by the Working Group contained the objective of "full employment" (the present Treaty refers to "a high level of employment"), a form of words likely to disappoint public opinion, according to Valéry Giscard d'Estaing at the close of discussion.

Draft Articles 2 and 3 were subject to more amendments than any others. These included some tabled on behalf of the PPE working group with a view to inserting a reference to God into Article 3.

2.5.3 Competence

"*The Group considered that, in general, the range of competences available at European level were adequate. However, better clarification of the scope of European action could be envisaged, which in turn might make it easier to extend the use of qualified-majority voting. In this regard, the group believes that European action, which should support and supplement the activities of the Member States, should primarily concern areas of action closely linked to the functioning of the internal market, preventing distortions of competition, and/or areas with a considerable cross-border impact. Consideration should also be given in the final structuring of the Constitution to ensuring the visibility of articles relating to social policy. Furthermore, current Article 152 should be enlarged so as to give the Union more competences in the field of public health and cover matters such as grave cross-border threat, communicable diseases, bioterrorism and WHO Agreements. The question as to whether current Article 16 TEC should be amended to become a legal basis concerning services of general interest should be considered by the Convention*" (European Convention, 2003b: 17).

The Group concluded from the outset that competence should not be extended. Some members of the Convention did nonetheless call for more extensive competence in respect of social affairs, proposing the establishment of a European minimum income and later a minimum

wage, wage policy co-ordination, the determination of minimum requirements on the right to strike and the right to impose lock-outs, as well as the definition of minimum requirements in respect of public health (European Convention, 2003c). Ultimately, the Group confined itself to calling for a modification of the present Article 152 (public health) in order to extend its coverage to matters such as grave cross-border threat, communicable diseases, bioterrorism and WHO Agreements.

The question of whether or not to alter the essentially declaratory content of Article 16 of the present Treaty, on services of general interest, was put to the Convention. The idea was to envisage broadening the legal basis while at the same time allowing for derogations to the rules on competition, as had been suggested by certain members of the Convention (European Convention, 2002v and 2002w). A joint proposal was in fact tabled by the representatives (full and alternate) of the Belgian and French governments (European Convention, 2003d). On this point the Chairman of the Convention noted a lack of consensus but the existence of proposals.

2.5.4 The Open Method of Co-ordination and its place in the constitutional Treaty

As for the "constitutional question" *par excellence* – whether or not to insert the Open Method of Co-ordination into the Treaty – a consensus did seem to emerge in an initial version of the draft report (European Convention, 2003e), "*with the exception of some members, who remained sceptical*". This agreement proved illusory, however: a careful reading of contributions submitted to the Working Group, and in particular the one from Hans Bury, (alternate) representative of the German government (European Convention, 2003f), indicated that a minority opposed the idea. This was the case not only of Hans Bury but also Sylvia Kaufmann (PE, DE), Joachim Wuermeling (EP substitute, DE), and two Finnish alternates Piia-Noora Kauppi (EP) and Riitta Liisa Korhonen (NP) (European Convention, 2003g).

What is more, the report did not opt for either of the two possible ways of incorporating the OMC (a reference within the "supporting

measures", accompanied by a case-by-case description in the second part of the Treaty, or alternatively inclusion of the procedure in the second part).

The European Commission's draft Constitution, known as the "Penelope" document, contains a reference to a "*dynamic coordination method*" in Article 83(2) on non-legislative acts. This article stipulates that "*a Recommendation may be directed to encouraging a dynamic coordination method between the Member States in specific areas covered by different Union policies and action*" (CEC, 2002e: 25). Among the Union's tasks and powers, the draft lists "*complementary actions which support national policies*". Some such cases are covered in Title VI "Social and employment policy" (especially in Chapter 3 on social protection, where co-ordination mechanisms are proposed; Article III 42, 43 and 44), Article III 52 of Title VIII "Research and technological development"; Article III 55 of Title X "Trans-European networks"; and Article III 56 of Title XI "Health"). Title XII "Complementary action" contains the chapters for which co-operation among the Member States is envisaged (Article III 59: Education and youth; Article III 60: Vocational training, Article III 61: cultural and audiovisual media). Co-ordination is foreseen for industrial competitiveness (Article III 62) and for space exploration and utilisation (Article III 64).

This variant corresponds to the one promoted by the Belgian Minister for Social Affairs, Frank Vandenbroucke, who elaborated on his ideas in a speech at the Max-Planck-Institut für Gesellschaftsforschung in Cologne (Vandenbroucke, 2002) and had an opportunity to highlight the specifics of social security during a hearing in the Working Group.

The Belgian government representative to the Convention, Louis Michel, suggested another way of addressing this issue. His proposal was to define the Open Method of Co-ordination "*by identifying it in the hard core of this Treaty as a methodology, alongside the Union's instruments of action and perhaps alongside other methods of co-ordination*" (European Convention, 2003h: 2). In Michel's view this method "*consists in the Member States, at their own initiative or that of the Commission, jointly laying down objectives and indicators in a given field, with due respect for national and regional diversity, and in enabling these States, on the basis of national reports, to*

improve their knowledge, develop exchanges of information, views, experience and practice, and, according to the objectives set, to promote new approaches resulting, where appropriate, in guidelines, recommendations or other forms of European legislation" (European Convention, 2003h: 3).

The report produced by the chairman of the Social Europe Group, George Katiforis, offered encouragement: "*the Group broadly supports the inclusion of the open method of coordination in the Treaty, in such a manner as to clarify the procedures and respective roles of those involved. This provision should indicate clearly that the open method of coordination cannot be used to undermine existing Union or Member State competence*" (European Convention, 2003b: 2).

Thus the Open Method of Co-ordination could be inserted into the chapter on instruments of the Union which constitute non-legislative measures. "*This provision should define the aims of the open method of coordination and the basic elements to be applied*" (European Convention, 2003b: 19). However, "*the precise nature of any Open Method of Coordination procedure would be guided by the nature of the issue involved, rather than be specified in detail in the Treaty"* (European Convention, 2003b: 19). "*Although some members expressed doubts, most members requested the insertion into the Treaty of a horizontal provision defining the open method of coordination and its procedure, and specifying that the method can be applied only where no Union legislative competence is enshrined in the Treaty and in areas other than those where the coordination of national policies is governed by a special provision of the Treaty defining such coordination (in economic matters (Article 99) and in the area of employment (Article 128), in particular)*" (European Convention, 2003b: 18).

The Group concurred not to establish a list of the subjects to which the OMC might apply. It could however cover "*areas where coordination of national policies is provided for in the Treaty, but where the detailed arrangements are not laid down, such as trans-European networks (Article 155 TEC), enterprise policy (Article 157 TEC) and research and technological development (Article 165 TEC)*" (European Convention, 2003b: 18). Other fields were mentioned, most notably education, tax harmonisation and minimum social standards. Members of the Group felt that "*social protection and inclusion was particularly well suited to this approach, and considered that a specific reference as to how the open method could be applied in this case could be inserted*

into the Constitution, building on the description of the role and functioning of the Social Protection Committee" (European Convention, 2003b: 20).

Finally, "w*hile allowing for the flexibility of the instrument to be retained, incorporation of the open method of coordination in the Treaty would improve its transparency and democratic character, and clarify its procedure by designating the actors and their respective roles." "The method would in principle be implemented each time by a decision of the Member States meeting within the Council on the basis of the Conclusions of the European Council on the initiative of the European Commission, with notification of the European Parliament. National parliaments and regional or local authorities could be consulted during implementation, as could the social partners when the open method of coordination is applied to the social field. Civil society could possibly be consulted when the matter under coordination lends itself to that*" (European Convention, 2003b: 19-20).

"*The Commission would be responsible for analysing and evaluating the action plans. The outcome of the Commission's analysis could be discussed within the European Parliament and national parliaments. The Commission would have the power to make recommendations to Member States' governments and to inform national parliaments directly of their opinions in order to trigger a 'peer review' procedure and a national debate, the aim being to allow Member States, within the Union framework, to set themselves common objectives while retaining national flexibility in their implementation"* (European Convention, 2003b: 20).

The complexity of the situation became plain at the plenary session when several members of the Convention argued for the Open Method of Co-ordination to be written into the future constitutional Treaty. The Austrian government representative, Hannes Farnleitner (PPE-DE), argued against formalising the OMC in the Treaty, since its flexibility would thereby be lost. Joachim Wuermeling (EP, substitute, PPE-DE, DE) confirmed his opposition and was followed by Elmar Brok (EP, PPE-DE, DE). Other speakers stressed the need to preserve a degree of flexibility (Peter Hain and Gijs De Vrijs, Dutch government representative, ELDR). In conclusion, Valéry Giscard d'Estaing noted that some had called for the OMC to be placed on a firmer footing, but that to do so could compromise its flexibility – which might lead to rejection by certain Member States. Consequently, he requested that Vice-Chairman Guiliano Amato, who chaired the Working Group on

Simplification of procedures and instruments, look into the "advantages and drawbacks" of incorporating the Open Method of Co-ordination into the Constitution.

2.5.5 Economic and social co-ordination

According to its conclusions, "*the Group agrees on the need to streamline the various economic and social coordination processes, with the Spring European Council having responsibility for ensuring coherence. It is recommended that the procedures needed to ensure this be formalised in the Treaty*" (European Convention, 2003b: 3). As far as co-ordination of economic and social policies is concerned, the Working Group agreed on "*the need to streamline the various economic and social coordination processes*" in the mould of the procedures being adopted to streamline the annual economic and employment policy co-ordination cycles([14]). The Group agreed in addition that preparation of the different aspects of economic and social policy should be handled within the appropriate sectoral configurations of the Council. "*Responsibility for ensuring coherence of all the policy strands should lie formally with the Spring European Council, and (that) the General Affairs Council should prepare the outcome of the European Council, based on the different contributions from the sectoral Councils*" (European Convention, 2003b: 21). These contributions should comprise not only the Broad Economic Policy Guidelines and the Employment Guidelines, but also all other aspects of social policy to which the Open Method of Co-ordination applies.

Furthermore, most members of the Group believe that "*there should be a presumption in the preparatory stages that no specific policy area should be*

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[14] Communication from the Commission on streamlining the Sixth session of information and dialogue on the work of the Convention, Economic and Social Committee, 4 February 2003. Communication from the Commission on streamlining the annual economic and employment policy co-ordination cycles (CEC, 2002c), and "report on the streamlining of the annual economic and employment policy co-ordination cycles" adopted jointly on 3 December 2002 by the Council in its "Employment, Social Policy, Health and Consumers" and its "Economic and Financial Affairs" configurations. This report was scheduled for adoption at the Brussels European Council on 21 March 2003.

subordinate to another. This was not clear in the current wording of Article 128(2), which refers to the Employment Guidelines being 'consistent' with the BEPGs" (European Convention, 2003b: 21). Those members therefore sought an amendment to this article, whilst others deemed the existing text satisfactory.

Not all members of the Group supported the idea of achieving greater consistency between the different cycles by extending the scope of the Broad Economic Policy Guidelines to social issues and renaming them "Broad Economic and Social Policy Guidelines". In similar vein, the proposal to ensure better coherence through the appointment of a Vice-President of the Commission with specific responsibility for economic and social issues was backed by only a "small number of members" of the Group. Finally, a majority of them recommended that the European Parliament should be given a greater role in economic and social policy co-ordination.

2.5.6 Co-decision procedure and QMV

On the subject of whether or not to extend qualified majority voting (QMV), there was a consensus in the Group to abide by the compromise position established at Nice. The possibility of amending these provisions along the lines of the conclusions reached in the Amato report was discussed at length. However, "*an active minority, comprising, among others, a number of government representatives*" (European Convention, 2003b: 23 and European Convention, 2003i) spoke out against any move towards this form of voting and made reference to the existing scope offered by Article 137 of the Treaty of Nice for moving to QMV after a unanimous decision by the Council.

This inclination was borne out in the plenary debate, where attention was drawn to the risk of not reaching agreement at the Intergovernmental Conference (IGC). The UK government representative, Peter Hain, repeated his objection to extending QMV, and the same view was expressed by the government representatives of Latvia (Robert Zile) and Portugal (Ernani Lopes). Ultimately, according to Peter Hain, the debate demonstrated the Convention's opposition to any greater recourse to QMV and to amendment of Article 16 (public

services), which would increase competence in a manner rejected by the Convention. His assessment was contested by Anne Van Lancker, in whose opinion no progress would ever be made on certain issues if unanimous voting were retained, one example being technical co-ordination of social protection systems (Article 42): no headway has been achieved here for the past five years. Some went so far as to question the very definition of qualified majority voting, while others argued for a compromise solution, namely a "superqualified majority". Valéry Giscard d'Estaing deemed that there were a number of reservations about moving to QMV and that the matter merited further debate.

2.5.7 Role of the social partners

The Working Group reached a consensus on recognising the role of the social partners in Title VI of the preliminary draft Treaty relating to the "democratic life of the Union". A consensus likewise emerged on the following points:

"*- in the treaty the management-labour process of negotiation on social agreements should be recognised, facilitated and enhanced,*

- the procedure concerning collective agreements as set out in Article 139 TEU should be maintained,

- distinguishing it from the role of management and labour in the field of collective bargaining, the treaty should recognise a certain consultative role for the relevant stakeholders and the civil society, especially in view of the increasingly active involvement of NGOs in combating social exclusion as also in most areas of social policy" (European Convention, 2003b: 29).

The Secretary General of the European Trade Union Confederation, Emilio Gabaglio, stressed how much importance the values and objectives would assume if they were incorporated into the Constitution, but asserted as well that the necessary consequences must be drawn to put them into practice. He also insisted on recognition of

the trade unions' transnational role (European Convention, 2003j)([15]). This is a significant demand on the part of the ETUC: recognition of transnational trade union rights would require an amendment to Article 137(5). In order to turn such rights into reality, the ETUC advocates the establishment of a "*permanent European social partner structure*" geared to ensuring and effectively developing consultation, social dialogue and institutionalised negotiations among the European social partners.

Conclusion

The discussion following the submission from the Working Group on Social Europe brought to light the conflicts which regularly surface whenever the social dimension is on the agenda. The objections to extending QMV to cover social affairs are a typical illustration. The Convention was to return to the ways and means of applying qualified, or "superqualified", majority voting in legislative but also executive fields. The reorganisation of configurations of the Council – with a view to reflecting the difference between its executive and legislative functions – did perhaps help to clarify the picture. Proposals were also likely to made on services of general interest, without it being possible to know whether or not exemptions would be allowed for in the Treaty articles relating to competition. The difficulty of envisaging how best to incorporate the Open Method of Co-ordination into the Treaty – a topic already addressed by the Convention on three previous occasions – certainly confirms the need to redress the balance between economic policy and social policy. It also lends added weight to the words of Valéry Giscard d'Estaing, who emphasised that "*the legislative part will remain important in future but less so than in the past, and that other*

[15] See also the contribution submitted by Ms. Lena Hjelm-Wallén (Swedish government representative), Mr Kimmo Kiljunen (Swedish parliament), Mr Henrik Dam Kristensen (Danish parliament), Mr Sören Lekberg (Swedish parliament) and Ms. Helle Thorning-Schmidt (alternate, European Parliament) to the discussion on a Constitutional Treaty: right to trade union actions across the borders and securing of services of general interest in the interest of the Welfare Society (European Convention, 2003k).

forms of activity will gradually take on increasing importance". There was still no certainty at the time of writing that the provisions of the EU Charter of Fundamental Rights would be inserted, in a prominent position, into the future constitutional Treaty, owing to the United Kingdom's opposition to its being included in full in the future Treaty.

Finally, the growing "political clout" of the Convention is signalled by the arrival of the German Minister for Foreign Affairs, Joschka Fischer, joined first by his French counterpart Dominique de Villepin and then by the Foreign Ministers of Latvia, Sandra Kalniete, and Slovenia, Dimitrij Rupel, as well as Georges Papandreou. Yet the contributions from some of these members of the Convention, whose position is ambiguous given their status as future members of the Intergovernmental Conference, have gradually transformed the nature of deliberations within the Convention, where negotiating positions had begun to be distilled for the purposes of the IGC. In addition, the Iraq crisis has demonstrated how difficult it is to arrive at a consensus among the Fifteen, and the substantial differences of opinion with the candidate countries. Iraq was casting its shadow over the Convention and over the IGC, in which the acceding countries are to participate fully. It has also served as a reminder that, in awkward situations, certain Heads of State and Government pay very little heed to public opinion in their countries.

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Philippe Pochet

The European Employment Strategy at a crossroads

Introduction ([1])

2002 was a particularly important year for the European Employment Strategy (EES). Five years after the EES was established in Luxembourg, an appraisal was conducted to assess its achievements with a view to improving its performance (Goetschy, 2002; for the outcomes see http://www.europa.eu.int/comm/employment_social/news/2002/may/eval_en.html). This review took place during a period of economic slowdown in the world and in Europe. Elections in several countries led to a rightward shift in Europe's centre of gravity. At the same time, what had been regarded as the model for the EES, namely economic policy co-ordination, revealed its limitations, and an important but – at the time of writing – inconclusive debate is exploring how best to improve economic governance (see article by Cécile Barbier in this volume). Moreover, four Member States had exceeded or come dangerously close to the 3% budget deficit limit (Portugal, Germany, France and Italy). Finally, enlargement, confirmed at the December 2002 Copenhagen summit, will widen the range of social issues to be addressed (on this point see the 2001 edition of Social Developments in the EU). A key moment has therefore been reached, where the Union is being enlarged while questions are being asked about deepening it. The economic climate is mediocre, the political environment more liberal.

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1 I am grateful to Amparo Serrano Pascual for her judicious comments.

Before analysing the discussions and debates which took place in 2002 and the changes proposed by the Commission in January 2003, let us briefly recall a few essential features of the past five years. The Employment chapter, as included in the Treaty of Amsterdam, imitated certain aspects of political co-ordination: it stated that the European Employment Strategy must be consistent with the Broad Economic Policy Guidelines (BEPGs). Thus the latter remained the main instrument of co-ordination (Goetschy and Pochet, 1997; Pochet, 1999). Since the Stockholm summit (March 2001), the BEPGs have gained even more political significance for the EU in that they set the overall policy framework for the Union, and not just the economic policy framework. On the other hand, the EES has, particularly in content terms, to some extent evolved into an autonomous policy process (de la Porte and Pochet, 2003). It started out with four pillars – employability (on which there has been the most political focus), adaptability, entrepreneurship and equal opportunities. As a whole, the structure has remained stable, but other key social concerns, such as quality in work and lifelong learning, have progressively been added.

The EES has also been intensified in quantitative terms throughout its lifetime. When the EES was first introduced in 1997 there were just nine indicators, which increased to over sixty indicators in 2001 (de la Porte and Pochet, 2002a: 291). This quantitative intensification is also reflected in the new themes introduced in the Strategy. For quality in work, for example, there are approximately thirty indicators, on which a group of experts is constantly working.

In addition to these developments, essentially within the Strategy, the whole issue of employment policy has moved up the political agenda of the European Union through agreement on quantitative, overarching employment policy objectives to be reached by 2010. These aims are to achieve a 70% overall employment rate and a 60% female employment rate (Lisbon, March 2000), as well as a 50% employment rate for workers aged 55 years plus (Stockholm, March 2001).

In terms of the institutional set up, an Employment Committee – made up principally of Member State representatives but also Commission members – plays the same role for the Employment and Social Affairs

Council as the Economic Policy Committee plays for the Ecofin Council. But the EES also embodies specific institutional innovations, for example the peer review programme that sets out to facilitate the exchange of experiences among experts around a particular policy issue (http://peerreview.almp.org). More significantly, it has also developed a sophisticated and politically coherent *ex-post* evaluation process, through the Joint Report on Employment and a series of bilateral institutional contacts between the European Commission and the Member States. Since 1999, non-binding recommendations have been issued by the Commission (endorsed by the Employment and Social Affairs Council) to Member States, encouraging them to improve their actions in certain areas.

The first section of this article will describe and analyse this evaluation of implementation of the Strategy in the Member States. At first sight, this should have been a key moment in the preparation of the new EES. Yet, instead of an open debate about the merits and limitations of the EES, debate has been confined to networks of experts, on the one hand; on the other, the Member States and the Commission have approached the subject from a political perspective. As we shall see, policy has been renegotiated in a context where right-wing governments now dominate the political landscape affecting employment priorities. It is, in a sense, a remake of the Luxembourg strategy, where dozens of meetings were needed to reach a consensus on the guidelines (see van Riel and van der Meer, 2002). We do nevertheless believe that this evaluation has enabled some headway to be made, both in finding out about national mechanisms for implementation of the Strategy and in critically assessing the policies pursued. We shall highlight certain aspects likely to be of relevance in further discussion.

Our second section will outline the new plan to streamline the co-ordination processes concerning mainly the Broad Economic Policy Guidelines and the European Employment Strategy. As we shall see, the various players have sought to turn the process to their own advantage. More emphasis is now placed on implementation and verification at national level. This marks a turning-point in two senses, and it will in future challenge head-on the different views as to what

form employment policy should take in a monetary union (for a reminder of the standard discourse of traditional economists, see Jenson and Pochet, 2002). This political/technical confrontation also goes a long way to explaining why the review of the Strategy succumbed to political horse-trading. The second modification – greater emphasis on implementation – is equally significant, since this calls for firmer agreement on the objectives (they may only be modified every three years except in exceptional circumstances) and, above all, it highlights the present weaknesses in implementation of both the BEPGs and the Employment Strategy.

The third and final section will look at the Commission proposal of January 2003 setting out new objectives for the EES. This document aims to draw together the different views expressed during the year. Even though the text is liable to be amended, it probably approximates quite closely to the final version of the new European Employment Strategy.

1. Evaluation process

The evaluation process conducted throughout 2002 can be divided into two parts. The first consisted of an analysis – more or less rigorous depending on the Member State – of the impact of the EES at national level. The purpose of this process was to feed into the European debate, thereby helping to improve the new EES. As we shall demonstrate below, however, the European debate has been completely disconnected from the national evaluations, not only in the Social Affairs Council but also in the Ecofin Council and the European Council. Whereas the various national evaluations and the Commission's EU-wide performance assessment were posted on the Commission website during the summer, in September the Commission presented a more political text which seemed quite remote from the technical evaluation process (CEC, 2002a). We shall describe the technical evaluation process before looking at the political process.

1.1 Technical evaluation

Ten topics formed part of the evaluation. The Member States were free to choose their own way of conducting this review:

- prevention and policies of activation to employment;
- tax reforms and benefits;
- lifelong learning;
- social inclusion;
- administrative simplification and the self-employed;
- creation of jobs in services, at local level and in the social economy;
- taxation;
- modernising work organisation;
- equal opportunities;
- changes in policy-making.

The technical part sought to analyse the successes and failures of the EES, as far as implementation at national level is concerned. To this end, academic researchers (see for example Barbier and Samba Sylla, 2001, Raveaud, 2001, for France; Ferrera and Gualmini, 2002 for Italy; and Zijl *et al.*, 2002 for the Netherlands), consultants, and administrations were mobilised at national level, in varying degrees depending on the country. The quality of the evaluations varies from country to country. The different methods used across the Member States, combined with the political spin, help to explain why the results of the national evaluations are mixed and unclear. The UK evaluation is one of the least interesting, from this point of view, since all it does is list the main policies of New Labour. At the other end of the scale, a good deal can be learnt from the Dutch evaluation: it was conducted by a team of researchers at Amsterdam University and seeks to combine empirical analysis with a theoretical approach. A number of Member States did not wish to make available the findings of the studies they had commissioned. The Commission nonetheless decided to post on its website all the studies for which it received authorisation, and pressure on the most reluctant governments gradually mounted.

Given the methodological differences and variations in the thoroughness of evaluations, it is not possible to make a systematic assessment of the overall impact of the EES. A certain amount of new information does however emerge. The Commission has in addition produced an EU-wide assessment of the national reports based on the above-mentioned ten topics, as well as a summary in two versions, one long (300 pages) and the other short (30 or so pages). It has furthermore commissioned a voluminous report on implementation of pillar 4: equal opportunities (Optem, 2002; on this subject see also Rubery, 2002).

A number of aspects are worth singling out here. For instance, an improvement in the statistical tools used in several Member States, which constitutes a precondition for any attempt at evaluation. Similarly, the diffusion of an evaluation culture previously absent from many Member States, and a prioritisation of certain individual groups: women, migrants, older workers, etc. (for other points see also Zeitlin, 2002). For reasons of space, we shall confine ourselves here to four aspects: the role of economic growth, compatibility between national and European agendas, co-ordination between administrations and, lastly, the evaluation of the findings on employability.

First of all, most of the national evaluations underscore the role of growth in job creation. They likewise point out that the intensity of job creation attributable to growth has increased: in other words, more jobs are being created with the same level of growth. This applies in particular to the evaluations carried out in Belgium, Finland, France, the Netherlands and Germany. In the Finnish evaluation of the EES, it has been noted that between 1998 and 2000 there was a 10% increase in employment. In giving the principal explanatory factors, the report states that *"rapid economic growth and the macro-economic policy that supported it were both important background factors in this improvement"* (National Evaluation of the EES: Finland, 2002: 42). Hence the policy attitude whereby the Lisbon strategy is characterised as taking account of the changes in the economic environment and "making sure that the European social model has a sound financial base" (Lipponen, 2001). The French evaluation has highlighted that French employment policy

relies on strong economic growth, which is in turn supported by a policy to stimulate innovation, to encourage new activity and to help create enterprises and, above all, by an appropriate macro-economic dialogue (National Evaluation of the EES: France, 2002: 30). The Dutch and the Belgian evaluations have underlined that active employment policies, taken single-handedly, have little impact, and that these policies should be integrated into an overall macro-economic policy favouring growth and competitiveness. As indicated by Visser (2002: 28-29) "*[…] the (scarce) existing national evidence, combined with international research results, leads us to the conclusion that the improvement of the macro labour market performance is primarily the result of the positive development in the economic environment*". He also pointed out that "*we do not know how these measures would work in a less beneficial environment". The Irish evaluation indicates that "there should be a greater focus on the demand side of labour market*". As many authors have highlighted (Pochet, 1999; Visser, 2002; Scharpf, 2002), the EES is clearly a supply-side approach, mainly compatible with the requirements of EMU and the internal market, as well as with the dominant economic approach. The first lesson from the national evaluations is that demand-side policies matter. However, as illustrated by several studies, a reinforcement of training and skills can play a major role especially during growth phases. Having said that, job creation varied markedly from country to country (see for example the varying achievements of France and Germany, or of Spain and Italy). Making growth a key element in job creation in this way brings us back to the fundamental question of the linkage between monetary, budgetary and wage policies. This subject in fact remains the major blind spot of DG Employment and the Social Affairs Council.

Further, most of the + 5 EES national analyses seek to clarify the possible effects of the EES by taking into account the national social and employment history. It is of interest to note that all the evaluations, to different degrees, indicate that the EES was in step with the policy line that was followed by the Member States prior to EES. The United Kingdom, Denmark, Sweden and Finland highlight almost total compatibility. The Danish evaluation, for example, underlines that "*as Danish employment policies also before 1998 were very much in line with what*

became the objectives of the European Employment Strategy, the implementation of the Strategy has not led to a significant shift in Danish policies" (National Evaluation of the EES: Denmark, 2002: 6). For Sweden, "*the general view among the Ministry and agency officials and the representatives for the social partners is that the European Employment Strategy has not influenced Sweden's policy to any significant extent and that the Strategy is relatively unheard of outside the group of people directly involved*" (National Evaluation of the EES: Sweden, 2002: 70). Other countries (Spain, Italy) insist that the EES reinforces pre-existing tendencies. However, a similarity between the pre-existing national policies and the EES process does not mean that the EES has no impact. Some countries highlight the pressure that the EES has put on specific policy areas. Finland has notably reported an impact in the area of equal opportunities: "*[…] equality policy has been made more transparent. The various sectors of government now take this consideration into account more systematically […] Finland would not have given it such emphasis without the EES*" (Ministry of Labour, 2002: 38). Finland also reports that, in the framework of the 1999 Finnish programme to stabilise the economy, one important measure was the decision to raise the employment rate, which was not only consistent with but was "*partly influenced by the Strategy*" (Ministry of Labour, 2002: 41-42). The Swedish report recognises that the EES has reopened channels of communication between social partners. On the other hand, according to the Italian report, the Strategy has not allowed for greater flexibility in the labour market and labour market conditions (North/South division) or for an improvement in the performance of public employment services. This being the case, from a European point of view the EES has helped to disseminate common paradigms (even if they have been differently interpreted at national level, see Barbier, 2003), and some form of common language and terminology has facilitated the exchange of information among participants.

Thirdly, there is an upbeat assessment of better co-ordination within each Employment Ministry and with other Ministries (Finance, Education, etc.), which is pointed out in most national evaluations (but not all – see the Austrian, Italian and Spanish reports). The Belgian case indicates that the preparation of the NAP has had the effect of improving co-ordination between players at different levels, and a

representative from the Ministry of the Budget and Finance has also been included in the preparatory process (Pochet, 2002a). In the Finnish case, co-operation between sectors of the administration at central government level has been improved in specific thematic areas – fighting unemployment through activation policies and preventing discrimination on the labour market – as a result of the EES. The Portuguese evaluation underlines that progress has been made even "*in traditionally difficult areas, such as a closer relationship with budgetary and economic policies*" (National Evaluation of the EES – Portugal, 2002: 5). The Greek case illustrates the organisational influence of the EES: "*The launch of the Luxembourg process by the Jobs Summit of November 1997 changed radically the framework for employment policy design and implementation in Greece. The need for change has been enhanced by the process requirements to identify measures, quantify targets and record performance of the employment policy on an annual basis*" (National Evaluation of the EES – Greece, 2002: 6).

The fourth and last interesting element to highlight is that, according to the national evaluations, not all the different employability programmes have had the same degree of success (Barbier and Samba Sylla, 2002; Bonvin, 2002). Some Member States report mediocre outcomes or even, in the case of Sweden, negative ones. But the programmes have not all had the same impact (see for example the Netherlands' analysis).

The first point worth making here is that the Commission has prepared two reports on this issue. The first, by DG Ecfin, drafted by the Economic Policy Committee (EPC), presents a series of numerical tables and various considerations. The headings in the summary note emanating from those economic-minded players are revealing and render lengthy comment unnecessary: "micro economic evaluations: (only) some ALMP programmes improve participants' employment or income prospects". "Macro economic evaluations: no clear-cut results on the functioning of the labour market – at least in the short term". "Longer term effects of ALMPs might be more promising" (2).

2 It should be noted that the evaluation process also opened a debate on the effects of the lifelong learning strategy. This clearly indicates that the challenges

DG Ecfin bases many of its analyses on recent work by the OECD, which has developed recognised comprehensive expertise on national economic and employment trends. The data are used to validate a somewhat sceptical vision. As indicated by Visser (2002: 4) "*the EES has much more embraced the discourse of activating social and labour market policy, whereas the OECD is more reserved about the cost effectiveness of many active labour market policies*" (see for example Martin and Grubb, 2001). DG Empl, on the other hand, seeks to produce a more positive discourse, but does not have the same comprehensive data on which to base its analysis, which explains why it uses the tables from the DG Ecfin document.

It emerges from the DG Ecfin document that the evaluations (of net effects) are rarely available. "*So far, only a few MSs provide some information on the outcome of ALMPs that could give some indication of the effectiveness of the various programmes and ensure an efficient use of public spending. In the 2001 NAPs, only three Member States (DK, FIN and S) provided information about the participant's labour market status three or six months after participation in a programme*" (CEC, 2002b). The Member States have presented the results of their evaluations without common or agreed methodology, so that strictly speaking the results cannot be compared. However, the DG Ecfin summary table provides some interesting information. The results may be slightly or markedly different depending whether one looks at subsidised jobs or assistance for job-seekers (see table 1 below on the differences in national evaluation techniques).

have not been met. The problems cited are inequity in take-up of education and training opportunities, increasing polarisation impacting negatively on social inclusion, the continuing problem of school drop-out, rising skill gaps, stagnation of public investment levels. These conclusions are not new but, if taken seriously, should lead to some re-structuring of the objectives.

Table 1: ALMPs – Training and Qualification

Country	Evaluation method	Assessment in the country study
B	Descriptive only	Limited evidence of positive impact on job opportunities
DK	Descriptive (summary report)	Mostly used for young unemployed persons; an obligation primarily to vocational education, and secondly to labour market training, is linked to entitlement to benefits. Very positive results.
D	a) integration quota b) multivariate regression	a) 76% of participants in Western D, and 56% in Eastern D no longer unemployed 6 months after a qualification measure. b) No significant effect on unemployment.
E	Quasi experiment (*) adjusted for selection bias	Small positive effect (probability of finding a job increases by 2.3%), and the cost is high.
NL	Quasi experiment (*) adjusted for selection bias, and review of international literature.	No significant positive effect, and high costs. Performance particularly bad for youth and low-skilled. Better results if programmes are of a small scale and targeted at women re-entering the labour market or immigrants with good educational background from their country of origin.
A	Quasi experiment (*), not adjusted for selection bias	Significant positive effect. Strongest for those unemployed for less than 12 months and women. Contributes to easing skills shortages.

P	Output indicator, flow into long-term unemployment	Activation programmes for young unemployed increase the employability of the target group, but the result is very sensitive to the business cycle.
FIN	Descriptive	In general, not effective. No detailed reporting.
S	Literature survey (mostly quasi-experiments adjusted for selection bias)	No positive, or even negative, effects in the 1990s. Explanations: low labour demand following recession, incentive to participate in order to regain eligibility for benefits; increased scale of programmes reduced their effectiveness. Outcome may be more positive 2-3 years after the measure than immediately after the measure.
Data not available: EL, F, IRL, I LUX, UK		

(*) "*quasi experiment*" refers to an evaluation where the employment (or income) situation for a group of ALMP participants is compared *ex post* with the situation for a group of non participants. "*Adjusted for selection bias*" refers to an evaluation taking into account differences in unobserved characteristics between the ALMP participants and the control group.

Source: Evaluation studies from (some of) the Member States as reported to the European Commission in the first quarter of 2002, contributing to the impact evaluation of the European Employment Strategy.

The problem of this evaluation, like other comparable wide-scale evaluations, is that of the net effect of the EES (i.e. how many new jobs were created). The Commission's EU-wide assessment indicates that "*beyond the impact on beneficiaries, limited evidence is given on* the cost-effectiveness *of these measures, and even less on their macro economic effects*" (CEC, 2002c: 20).

One of the results worth highlighting is that some measures seem to be more effective than others. According to the Commission, analysis of the national evaluations reveals that the effectiveness of specific

measures – in terms of the likelihood that beneficiaries will find an ordinary job – depends on several contextual and individual factors such as the characteristics of the target groups, the quality and level of the programme, the labour market situation, etc. It draws some general conclusions which we reproduce below in full:

- training measures prove to be effective for particular target groups (e.g. women re-entering the labour market and educated immigrants, but less for low-skilled workers); experience shows that the effects of large scale programmes (e.g. for youth) are less convincing, reflecting the fact that such programmes may suffer from inadequate targeting;
- subsidised employment shows mixed results and the risk of undesired effects (dead-weight, substitution); subsidised employment in the private sector is more effective than job creation in the public sector;
- self-employment grants show positive results, although the scope for wide application of such formula may be limited;
- results from job-search assistance seem generally positive;
- the profile and individual motivation (including the benefit situation) of the job-seekers should be taken into account when designing ALMP measures.

This critical evaluation of the effects of ALMP has contributed, as we shall see below, to pushing the reduction of labour costs higher up the European agenda. This forms part of the standard discourse of documents penned by Ecofin. On the other hand, the vital question posed by the evaluations – under what circumstances are training policies effective? – is scarcely entered into.

Besides the general evaluation, there was in addition a self-assessment of the programme for exchange of good practice. The peer review programme based on good practice in Member States is of a more voluntary nature, seeking to involve national experts who wish to respond to a specific and targeted problem that has successfully been

combated elsewhere through a particular initiative (Bisopoulos, 2003). A first assessment of the peer review programme reveals certain limitations, due in particular to significant structural and practical differences. The programme has nonetheless sparked national level discussions on certain aspects of active labour market policies (http://peerreview.almp.org/pdf/evaluation-report-10-01.pdf).

1.2 Political evaluation

There has been a weak link between the political process and both the national evaluations and the more technical EU-wide assessments by the Commission. The more political part of the evaluation, mobilising players at European level, notably the Commission departments, the EU Presidency and the Council of Ministers, sought to redefine politically the objectives of the EES and the link between the EES and the BEPGs. It is partially unrelated to the day-to-day EES process.

The process of reviewing the objectives began long before the outcomes of the evaluations became available. The informal Social Affairs Council of 19 January 2002 reached a consensus on the need for "*a simplification of the process […], particularly by reducing the number of employment guidelines*". Further, "*there needs to be closer co-ordination of all the strategies launched in the social sphere, making the process more agile, enhancing its simplification and preventing duplication*". This position is supported by most Member States, as the NAPs that they have to submit on a yearly basis represent an increasingly heavy workload. There is also a consensus on the need to render the Strategy less technical and more political. The Member States are also calling for a longer-term perspective to be taken into account in order to be able to detect any effects of national policy changes made in the framework of the EES.

The key moment, however, was the Barcelona Spring summit (March 2002), at which both the Social Affairs Council and the Ecofin Council presented their evaluations of the Strategy and put forward their political priorities for the European Council.

In its contribution to the Barcelona Council, Ecofin devoted three whole pages to its employment priorities. It cites seven areas where efforts must continue: a) tax measures, b) benefit systems, c) wage

formation systems, d) improvement in labour market efficiency, e) active ageing, f) removing barriers and disincentives for female labour force participation, and g) labour legislation. On this point it is worth quoting the document verbatim so as to properly appreciate its spirit: "*Candidates for reform would be: the conditionality of benefits, eligibility, duration, the replacement rate, the availability of in-work benefits, the use of tax credits, administrative systems and management rigour*" (European Council, 2002: 42). In conclusion, these "*key elements […] should be addressed in both the Broad Economic Policy Guidelines and the Employment Guidelines*" (European Council, 2002: 44).

The Presidency of the Social Affairs Council, for its part, emphasises the following points in its conclusions: the importance of full employment and quality, strengthening the role of the social partners, bolstering measures to combat exclusion, a crucial element of which is employment, and finally gender equality. As far as participation rates for older workers are concerned, flexible, gradual retirement is recommended. This document does not in fact add anything new to the debate but is, rather, a continuation of former arguments.

Under the new arrangements agreed in Lisbon, the role of the Spring European Council is to draw together the different contributions, balance the economic and the social dimensions, and map out future strategy. Its conclusions were however heavily influenced by Ecofin's social agenda. For example, two points are emphasised: tax cuts, particularly on low earnings, and an adjustment of fiscal and social systems to make work pay. The European Council entirely took on board the Ecofin Council's list on the conditionality of benefits etc. (see above). The Ecofin paragraph on wage bargaining is likewise included. Let us dwell on this point for a moment: it is especially striking that both Ecofin and the European Council (not to mention the European Central Bank) refer to wages and wage bargaining (finding the appropriate level, "reasonable" increases). They seem here to be overlooking the Treaty provisions which exclude wages from Community competence. The employers, on the other hand, object to any talk of wages at European level on the grounds of subsidiarity and diversity of national systems. As to the Social Affairs Council, anyone

would think this did not form part of its mandate (on this issue see Pochet, 2002b and Yakubovich, 2002).

The next point covered in the European Council conclusions is establishing a balance between flexibility and security. But once again the form of words used resembles that of Ecofin. Lastly, mention is also made of female participation – along with childcare facilities – and increased participation by older workers.

To sum up briefly, the European Council presided over by the conservative/liberal Spanish leader Jose Maria Aznar basically adopted the Ecofin agenda in respect of social policy. In actual fact, under the new post-Lisbon decision-making arrangements, it is now the Spring European Council that is primarily responsible for drawing together all the different conflicting positions and laying down priorities; these are then largely taken up by the Commission (see section three).

The Commission Communication of September 2002 (CEC, 2002d), for its part, took on board the priorities adopted at the Barcelona European Council ([3]) concerning the main elements of the Strategy

3 *"The Strategy must:*

- *be simplified, in particular by reducing the number of guidelines, without undermining their effectiveness;*
- *align the time frame with the Lisbon deadline of 2010, including an intermediate evaluation in 2006 to monitor achievement of the Stockholm intermediate objectives, as defined by subsequent European Councils;*
- *reinforce the role and responsibility of social partners in implementation and monitoring of the guidelines*" (European Council, 2002: 10-11).

Furthermore, the European Council "*urges the Council and the Commission to streamline the relevant processes: the focus must be on action for implementation, rather than on the annual elaboration of guidelines. With a view to the European Council giving the key political impetus to the actions crucial to the achievement of the Union's long-term objectives, it has decided that the calendars for the adoption of the Broad Economic Policy Guidelines and of the annual Employment Package should be synchronised as soon as feasible. Thus, at its Spring meeting, the European Council will review and, where necessary, adjust the Community's economic, social and environment policies as a whole*" (European Council, 2002: 21).

reform. In its opinion, what needs to be done is to: a) meet the medium-term challenges by bringing the EES into line with the Lisbon objectives. As we pointed out last year, in the latest versions of the EES there were horizontal objectives (linked to European Council outcomes) co-existing with the Guidelines, which are redefined and rewritten according to a separate dynamic; b) simplify the Guidelines without detracting from their effectiveness. The Guidelines had gradually become increasingly complex as time went by. Also, several Member States were calling for a more stable, scaled-down set of objectives; c) improve governance and partnership and the role of the social partners; and d) improve coherence and complementarity between the relevant Community processes. This will be dealt with in our next section.

2. Institutional aspects

Content is important, of course, but procedural aspects are equally important, in that they give more or less extensive institutional resources to the different political players, each of whom would like to gain the upper hand. But institutional issues go further than that. New players (e.g. national parliaments) are entering the scene now that closer attention is being paid to following up implementation at national level, which poses more forcefully than ever the question of legitimacy, democracy and open participation. Let us now trace the course of events.

One change rapidly accepted by everyone was the principle of synchronising the timing of the Broad Economic Policy Guidelines, for which the most intensive activity occurred from January to June, with that of the European Employment Strategy, where the main documents were issued and decisions taken from September to January. This shift did not go without saying, however: some argued in favour of keeping the asymmetry, on the grounds that the EES was still too fragile and might be totally overshadowed by the interests of the Economics and Finance Ministers and their committees (the Economic Policy Committee and the Economic and Financial Committee).

The arguments in favour of better synchronisation were internal, first of all: decisions in respect of employment were taken at the start of the tax year, when budgetary decisions had already been adopted (normally in July or August). Secondly, the Spring summit had become the prime moment in the European process and the Ministers of Employment were not fully involved (partly, but not only, because employment issues had been settled and the annual decisions taken some months before the summit). But the strongest argument of all was that the Lisbon strategy aimed for greater coherence in Community action, and that could not be achieved without synchronised processes.

The Commission was to propose a far-reaching reorganisation of procedures in September (CEC, 2002d). Its Communication lays down four major objectives but focuses especially on the first two aspects (follow-up and coherence):

a) enhancing the efficiency of policy co-ordination, notably by securing a better follow-up of implementation;

b) improving coherence and complementarity between the various processes and instruments;

c) fostering a wider-shared commitment and "ownership"; including through a stronger involvement of the EP, the national Parliaments and a better consultation of social partners and civil society;

d) increasing the transparency and intelligibility of the policy co-ordination cycle and thereby its visibility and impact (CEC, 2002d: 3).

We shall examine each of these in turn.

- **Follow-up and implementation**

The first change concerning follow-up and implementation is the transition from an annual cycle to a three-yearly cycle. The time had come, it was argued, to move to a new phase. What mattered now was no longer creating new objectives but verifying their implementation at national level, and doing so over a sufficiently long period (three years) for tangible effects to be detected. This would lend the processes a

degree of stability and visibility over time. Furthermore, these objectives would be more clearly linked to the Lisbon agenda and to the 2005 and 2010 deadlines. Efforts would be directed to follow-up and implementation rather than to perpetually redefining objectives. For instance, the Employment Guidelines undergo changes – sometimes minor, sometimes more major – every year. This could confuse the message which itself evolves from year to year. Thus, after dealing with predominantly quantitative targets, the EES has set itself some more qualitative ones. But it could also be argued that the open negotiations about the EES objectives themselves are what have enabled it to adjust flexibly to new political priorities. These priorities sometimes emerged from an analysis (of the weaknesses) of the Strategy, an internal improvement, but more often came from external pressure caused by political changes (left/right axis) or by a winning coalition strategy (such as quality in work).

- **Coherence and complementarity**

As far as complementarity is concerned, one strategic point for the future is that employment will be distinct from the other Open Method of Co-ordination (OMC) processes. On the one hand there are the policy co-ordination processes, i.e. the BEPGs and the EES; on the other, the Open Method of Co-ordination in respect of social affairs: pensions, poverty and social exclusion.

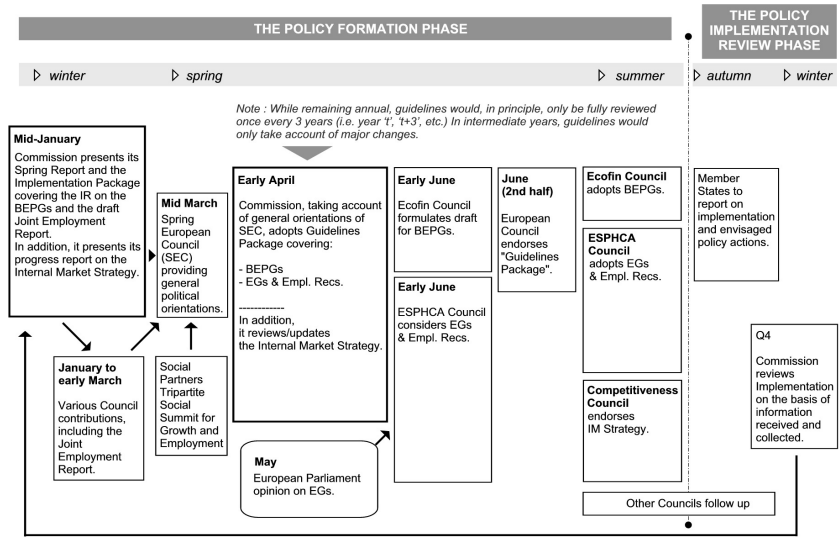
The importance of the Treaty must not be forgotten here. The BEPGs and employment draw their legitimacy from their inclusion in the Treaties. That is not the case for pensions and social exclusion (although they are referred to in one article). The Treaty of Nice did not broach the question of whether to include the OMC as a method in the Treaties. At the current stage of discussion in the Convention on the future of Europe, social protection seems likely to remain subject to unanimous voting and implemented at EU level through the OMC. A horizontal article on the OMC is however being envisaged (for more details see article by Cécile Barbier in this volume). That being the case, the Ministers of Economics and Finance feel free to address the subject of pensions. As we have shown in this case (de la Porte and Pochet,

2002b), there has been a high degree of tension between the proponents of an approach centring on medium-term sustainability of pension systems and those who stress their social function. Whereas the latter group has managed to score some points and influence the Community discourse, the absence of a coherent social package (employment, pensions and exclusion) means *de facto* that the last two themes are relegated to the second league (see article by Caroline de la Porte in this volume).

Just as the OMC falls outside of the new model, the same applies to the Stability and Growth Pact.

Turning more specifically to the re-timing of the annual cycle, the Commission proposes the following course of events:

Flow chart of the streamlined policy co-ordination cycle



Source: CEC 2002d: 9

As can be seen, the process is divided into two phases, the first being policy formation and the second implementation, with two packages: the first, "implementation", is submitted to the Spring Council and the second, "guidelines", is approved by the June European Council.

Following this proposal, the Employment Committee and the Social Protection Committee (for the Social Affairs Council) and the Economic Policy Committee and the Economic and Financial Committee (for Ecofin) set about devising a model whereby "their Council" would play a determining role (see below).

- **Fostering a wider-shared commitment and "ownership"; including through a stronger involvement of the EP, the national Parliaments and a better consultation of social partners and civil society**

This is an ambitious objective. However, streamlining the process will hardly change anything in terms of involving citizens and the media. One condition for doing that is to integrate these debates into national political life. But the Commission has no power at all in this domain; it can only hope that the Member States will involve their national parliaments more closely. This is the purpose of the Commission's third point (see above), but it gives very few precise indications as to how to achieve it. In a strategy paper on social policy co-ordination, I proposed that the Commission should have a fully-fledged five-year work programme, to be debated every year at national level prior to the Spring European Council. This is an important matter, because there are two possible ways of increasing effectiveness: one is to strengthen the role of the Commission and decisions by the Eurogroup. But that would be done in a technocratic manner, without open debate, among people who in the main share the same vision of society and the economy. This is of course the Commission's preferred option (CEC, 2002e). It amounts to giving people who are neither elected nor answerable to a higher authority the capacity and the right to involve themselves in national policy and its subtle trade-offs between competing priorities. Alternatively, the other way is to organise collective decision-making in a more open and more pre-emptive

manner. This means seizing back ownership of the political agenda and strengthening consensus through debate and deliberation. Given that budgets are debated at national level, the idea would be to involve players at that same level.

As far as involvement of the social partners is concerned, the Commission would like to give them increased resources (see Communication on the social dialogue CEC, 2002f). UNICE, however, is still very reluctant to participate fully in the process, even though it has now decided to support the OMC (Pochet and Arcq, 2003). We covered this point in detail last year and would refer the reader to that article.

"Ownership" of the EES evidently takes different forms from one country to another and one player to another. It corresponds better to the agendas of certain political/administrative elites than others, and can bolster their relative weight in national discussion. Some groups in certain countries have moreover been able to turn the Strategy to their advantage, for example to revive the issue of gender equality. Openness is all about achieving a more transparent process, which then allows the European agenda to move forward. Often, what the Commission means by "greater ownership" is the fact that national players should be informed about the Strategy (a top-down, technocratic view). We believe it important to reinforce plurality and diversity, and to promote a bottom-up approach.

- **Increasing transparency and intelligibility**

This last point is especially important because one of the problems posed by these forms of flexible co-ordination is a lack of visibility for citizens and inadequate media coverage. As pointed out by Jacobsson and Vifell (2003: 20) "*Democracy is not conceivable without a public sphere, and for OMC to improve the democratic character of EU governance, its relation to the public sphere, nationally and internationally, must be strengthened*". In the most comprehensive study to date of coverage by the major daily newspapers in the large countries, Meyer (2003: 12) says of the European Employment Strategy: "*In stark contrast to hard co-ordination, its 'softer' counterpart –employment co-ordination– was increasingly less commented and*

reported upon. It almost disappeared from the media agenda. As a result few home-based journalists and even less citizens will know that there is a such thing as the Luxembourg process and the policy impulses and recommendations are lost on all but those directly involved in the review process". This matches our findings for Belgium. On this point, one journalist confided in us that it is extremely difficult to explain comprehensibly a process that takes place once a year, the ins and outs of which are themselves incomprehensible.

3. Proposals for the future

Following this Communication, the Economic Policy Committee (EPC), the Employment Committee and, to a lesser extent, the Social Protection Committee all clarified their stance. An initial EPC draft document was submitted to the Ecofin Council in October 2002. Without going into detail about this interim document, we would draw attention to a few points indicative of the EPC's mindset. It is stated several times over that the BEPGs are provided for in the Treaty, and that this gives them a specific purpose. In this context, the Ecofin Council would agree to listen harder to the opinions of the other configurations, but "*the guidelines or recommendations on structural reforms should remain within the realm of the BEPGs […]*" and "*the (Ecofin) Council should be in position to check the consistency of the employment guidelines with the BEPGs*". In other words, yes to co-ordination but only under the domination of Ecofin. By contrast, the Employment Committee and the Social Affairs Council wished to keep control over "employment" matters.

The agreement finally wrested from the three committees contained the following aims: to concentrate on the medium term (three-yearly cycle), and to focus on implementation and on improving the national reports. The main debate hinged on clarifying the policy co-ordination cycle and on the respective roles of the BEPGs, the EES and the Cardiff process. Contrary to the EPC's initial position, efforts were made to include employment in its own right, on the one hand, and, on the other, to ensure that Ecofin would not have the last word. As always, there is no knowing what the outcome will be (and this will remain the case so long as the Treaty stipulates that the EES must be consistent with the

BEPGs). Thus the text recalls what is stated in the Treaty concerning the roles of the different processes. We shall cite only the passage on employment: "*The Treaty provides for policy co-ordination on employment via the EES which has the leading role in giving direction to and ensuring co-ordination of the employment policy priorities to which Member State should subscribe*". This would seem to constitute progress on the part of the Ministers of Employment, but the text goes straight on to add: "*Under the Treaty the Employment Guidelines are required to be consistent with the BEPGs*".

However, some Member States still distrust guarantees of their autonomy, which led the Social Affairs Council in December to make clear in its conclusions that: "*the delegations welcomed this joint report and emphasised the importance of preserving the autonomy of these two processes, particularly the leading role of the Employment, Social Policy, Health and Consumer Affairs Council in defining the employment guidelines*" (4).

After this phase of technical, political and institutional debate, the Commission unveiled its view of the future EES in mid-January 2003 (CEC, 2003a) (5). This Communication will be subject to comment in various quarters, but it does map out the general direction likely to be followed by the new Employment Strategy (6). In it, the Commission proposes restructuring the Strategy around three overarching objectives:

- achieving full employment;
- raising quality and productivity at work, and
- promoting cohesion and inclusive labour markets.

The four-pillar structure characteristic of the EES ever since the 1997 Luxembourg summit therefore disappears. Instead, some new terminology appears. First of all, "full employment" returns to the

4 Our emphasis.

5 Various Commission departments were also involved in these discussions, with GD Ecfin coming out in strong opposition to the indicators.

6 This proposal should be read in conjunction with the Commission's submission to the Spring summit (CEC, 2003b).

foreground (for the record, Article 2 of the Treaty stipulates that: "The Union shall set itself the following objectives: to promote economic and social progress and a high level of employment…"). Productivity at work is another new element. Lastly, cohesion – a Eurojargon term used mainly in connection with the Structural Funds, also crops up.

As far as productivity is concerned, the Commission's discourse is rather disconcerting. In its view, the form of productivity to be promoted (total productivity of the factors) is that which favours "the degree of competition, the ability to create new ideas and know how and use them to drive innovation and to reorganise work processes, and the overall regulatory environment" (CEC, 2003b: 9). Economists will no doubt have a good deal to say on this matter, but it is hardly likely to mean anything much to ordinary citizens, for whom productivity is generally synonymous with producing more with less labour.

The Commission puts forward eleven priorities to implement these three overarching objectives (for the record, the Guidelines numbered around twenty or so in an average year). We have kept them in the order in which they are presented by the Commission, even though in some cases this order would seem illogical (for example, active measures come top of the list and lifelong learning in eighth place). The order is significant, in our opinion, and is part of the political message that the Commission wishes to convey. What has changed is not so much the topics themselves (many of them were already present in the EES) as their apparent hierarchy and their interaction. The eleven priorities are:

1) active and preventive measures for the unemployed and the inactive;
2) making work pay;
3) fostering entrepreneurship to create more and better jobs;
4) transforming undeclared work into regular employment;
5) promoting active ageing;
6) immigration;

7) promoting adaptability in the labour market;

8) investment in human capital and strategies for lifelong learning;

9) gender equality;

10) supporting integration and combating discrimination in the labour market for people at a disadvantage;

11) addressing regional employment disparities.

Comparing these proposals with those set out by the Barcelona European Council, one is immediately struck by how similar the priorities are.

However, the linkage between the three overarching objectives and the eleven priorities is unclear. Thus, quality in work and productivity may be contradictory objectives. Productivity at any cost can create stressful jobs (a point well illustrated by the automobile industry). But the objectives say virtually nothing about quality in work. Let us return once again to the issue of productivity. If it is to be raised, reducing labour costs is not the right approach because that would serve to create more unproductive, poorly paid jobs. Whereas the Luxembourg EES focused above all on the issue of employability, moving in the direction of lifelong learning and quality in work, the new version put forward by the Commission has many shortcomings and ultimately no strong message.

Is the intention to increase the employment rate or to achieve full employment? It is not quite the same thing. In the first case, the target set is a rate which requires unemployment to fall but also means putting to work people who are outside of the labour market (young people in education, women returning to work, the elderly). Full employment means finding jobs for all those who clearly demonstrate their desire to work.

Raising productivity has more to do with mechanising repetitive tasks, whereas reducing labour costs results in low-productivity jobs becoming competitive again. It is a different development strategy. Reinforcing lifelong learning has more in common with Supiot-style proposals

(CEC, 1999a) or those of markets in transition (Schmidt or Gazier): it is a far more ambitious goal if taken to mean more than just boosting employability which, for its part, focuses on the question of labour market access. Finally, undeclared work can be combated in two ways: 1) by cutting the relative cost of labour. Illegal employment becomes less attractive, at least to those who think it is driven mainly by economic arguments. Or 2) by intensifying surveillance, if one thinks that it is deviant behaviour. As for immigration, even if we take the political point that this issue should be included as a social matter, it is a strange heading for an objective. What is more, it largely overlaps with that of supporting integration and combating discrimination in the labour market for people at a disadvantage. In a word, no clear guidance is given. The same applied to the Luxembourg Guidelines. The crucial difference is that Luxembourg was a process where the objectives themselves could be renegotiated. Here, opting for stability for a minimum of three years prevents any changes being made during that period. What is more, the Luxembourg objectives began as a very moderate "third way" and evolved into more ambitious goals: lifelong learning, including basic education, and quality in work. These aspects are still there, of course, but this time the reduction of labour costs comes in second place, this being an Ecofin priority and a standard reading of labour market problems by economists.

Finally, no link has been established between employment policy and social protection. The issue of making work pay (which is the second priority) likewise appears as the fourth priority in the 1999 Commission Communication on modernising social protection (CEC, 1999b). The 2001-2006 Social Agenda envisaged that this issue would be addressed in 2003. In November 2002 the Social Protection Committee drew up a preliminary strategy document on the linkage between social protection and employment. Remarkably, no consideration is given to this discussion paper in the Communication on the future Strategy. It appears yet again that what should have led to a more open debate about sound macro-economic policy and employment policy is sacrificed on the altar of entrenched power relations between governments, between ministries and within the Commission.

Four elements are put forward with regard to implementation of these priorities: effective and efficient delivery services, a strong involvement of the social partners, mobilisation of all relevant actors and – a new factor – adequate financial allocations. Some proposed indicators are set out in an annex to the Communication. It is worth emphasising here that what the Commission identifies as the preconditions for successful implementation is related to aspects over which it has no power: good administrative interaction, a culture of partnership, openness to non-political players and strategic investment. Content aside, a specific political framework is being constructed here.

Concluding remarks

The evaluation exercise was a missed opportunity to initiate a calm, in-depth debate about the strengths and weaknesses of the Member States' employment policies. Instead, it turned into a process of horse-trading: administrative (between the different Directorates General of the Commission), political/administrative (between the Social Affairs and Ecofin Councils and their respective committees), and political/ideological (between more or less liberal versions). Does this then mean that the Strategy should be written off? That is not my opinion. Thinking back to the discussions when the EES was first created in 1997, it will be remembered that political/ideological negotiations took place then too, and that it took dozens of meetings before agreement was reached in Luxembourg. The Strategy should be read on two levels.

Firstly, it is a contribution to the definition of a European economic and social model. Perceptions of this model vary enormously, and Lisbon allows for it to be interpreted in different ways. The Luxembourg Strategy review process forms part of this tension between divergent approaches. This year, the most important aspect in this context is the role of labour costs. According to neo-classical theory, unemployment is attributable to excessive labour costs. As in all markets, it is said, the balance will be redressed as soon as these costs are lowered. Yet no link has been made here with social protection and the thinking of the Social Protection Committee on labour costs. This

will be the next stage of the operation, and the Commission is likely to issue a Communication in late 2003 on how to streamline the social OMCs, locking them into this new package. However, debate around the Stability and Growth Pact is likewise exposing cracks in the dominant economic reasoning. In this sense, the BEPGs, the EES and the OMCs are all relevant to a redefinition of a European economic and social meta-model.

Secondly, a European debate is emerging around national employment policies, and we are seeing a certain Europeanisation of national (and, to a lesser extent, local) public administrations and social stakeholders. Several national studies were commissioned from research groups which have gained in-depth knowledge of European issues. Furthermore, alongside the official evaluation exercise, a growing number of research teams, often acting as networks, have developed their own expertise in respect of the trends underway. The most visible and ambitious project in this respect is the Govecor project (www.govecor.org). Its principal aim is to shed some light on how the European co-ordination of budgetary and employment policies is integrated into national policy processes. But the same applies to the University of Wisconsin-Madison, which makes published and forthcoming articles available to researchers on a website dedicated to the EES and the OMC. The Swedish research team Saltsa, in conjunction with the Observatoire social européen and the University of Wisconsin-Madison, has likewise put together an international research network on this topic, as has the European Trade Union Institute. Even the social partners have attempted to embark on a process of analysis and reflection, under the auspices of Eurexcter (Eurexcter, 2002). From this point of view, then, the aim is to improve the effectiveness of public policy-making through deliberation and participation.

There are two issues at stake here. One is to strengthen the linkage between the political process and the learning processes taking place within committees and amidst independent networks of experts and non-governmental players. The other is to interlink this dynamic with broader-based processes of democratisation, participation and

deliberation. The capacity of the OMC and the EES to respond to these challenges will reveal just how innovative they are as a new form of governance.

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Éric Van den Abeele

Services of general interest in the Community: a mixed performance

Introduction

While part of a continuum, the French and Belgian presidencies of the EU marked a special period in the history of public services. The European Council in Nice (7-9 December 2000) and the Laeken European Council (14-15 December 2001) achieved lasting results in the recognition of services of general interest (SGIs). The Councils stimulated the European institutions' activities a good deal in 2002. The Spanish and Danish presidencies effectively maintained the status quo, without questioning progress already made. While existing achievements were preserved, primarily through the watchfulness of Romano Prodi, President of the European Commission, the liberalisation of essential services of general economic interest (SGEIs) was boosted in 2002, particularly in the energy and transport sectors. At the same time, negotiations on the General Agreement on Trade in Services (GATS) revived fears among those who see the Member States' and Commission's activities as a way of circumventing the Community *acquis* and dismantling one of the essential pillars of the European social model.

The programmes of the Danish, Greek and Italian presidencies have made no mention of services of general interest (SGIs) [1], so what conclusions can we draw about the year 2002, in the run-up to key deadlines [2] for the future of the European Union? First, we will examine the positions of the different Community institutions in 2002, looking in turn at the activities of the European Council, the Council of Ministers, the European Commission, the European Parliament and the Court of Justice of the European Communities (CJEC). Secondly, we will focus on certain key issues in the current debate on the durability of services of general interest. The third part of our study will review three directives and one regulation relating to SGIs. Finally we will try to draw some practical conclusions.

1. Activities of the European institutions in 2002

1.1. European Council

The Barcelona European Council (15-16 March 2002) blew hot and cold about services of general interest. First of all, the Council called on the Commission to:

- consider the guidelines on State aids and if necessary table a proposal for a regulation exempting certain sectors;
- continue its examination with a view to consolidating and clarifying the principles governing services of general economic interest (pursuant to Article 16 of the Treaty) in a draft framework regulation. The Council also asked the Commission to present a report by the end of the year;
- present a communication on the evaluation methods at the Internal Market Council on 21 May 2002 (European Council, 2002a: 18).

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1 This "oversight" is all the more worrying since the Commission highlighted the Green Paper as a key element in its legislative and work programme for 2003 (CEC, 2002a).

2 Notably EU enlargement, the Convention and the Intergovernmental Conference.

The European Council also called on Member States "*to reduce the overall level of State aid as a percentage of GDP by 2003, and onwards, and to redirect such aid towards horizontal objectives of common interest, including economic and social cohesion, and target it to identified market failures. Less and better-targeted State aid is a key part of effective competition*" (European Council, 2002a: 7).

Lastly, the Council overcame French opposition to energy liberalisation and began the final phase of opening up the electricity and gas markets: this entails market liberalisation for all non-domestic European consumers from 2004, or 60% of the market.

Table 1: Liberalisation timetable

Year	Sectors opened to competition
1990	First phase of liberalisation in telecommunications
1994	First phase of liberalisation in postal services
1998	Total liberalisation of telecommunications
2003	Liberalisation of port services? Opening up the rail freight sector on trans-European networks
2004	"Single European sky" Further opening of gas and electricity sectors for business users
2005	Integration of financial markets
2006	Second phase of liberalisation in postal services
2007	Opening up gas and electricity market for domestic users
2008	Total liberalisation of rail
2009	Possible total liberalisation of postal services?

The Seville European Council (21-22 June 2002) settled for reiterating the timetable agreed at Barcelona for opening up the gas and electricity markets. It took note of the Commission Communication on an evaluation methodology for services of general economic interest and called on the Commission to report to the Copenhagen European Council on progress made on the State aid guidelines and, if necessary, to adopt a regulation exempting certain sectors (European Council,

2002b: 16). The European Councils of Brussels (24-25 October 2002) and Copenhagen (12-13 December 2002) did not discuss SGIs.

1.2 Council of Ministers

1.2.1 The Competition Council

Under the Spanish and Danish presidencies, the "Competition" Council ([3]) was fairly modest on the subject of SGEIs, merely reaffirming existing commitments. Neither presidency concealed its lack of interest in the subject which was definitely not considered a priority. More disturbing, however, was the total lack of references to the subject in the traditional programmes of the Danish, Greek and Italian presidencies, despite the Commission having clearly announced plans to table a Green Paper under the Greek presidency. In fact the Belgian delegation specifically raised this matter during the Competition Council of 14 November 2002.

There were two clear references to services of general interest. Firstly, at the Competition Council of 1 March 2002 ([4]), an interesting parallel was drawn between further liberalisation and the achievements of the Belgian presidency: "*a renewed commitment is called for to implement the reforms agreed at Lisbon* (i.e. continuing with liberalisation – ed.) *in order for the internal market to perform more effectively in key sectors, taking due account of the Council Conclusions on services of general interest adopted on 26 November 2001*" (Council of the European Union, 2002a: 8), i.e. continuity of SGIs, the need to evaluate the effects of liberalisation, etc. The Commission was also invited to submit new horizontal evaluations of market performance of infrastructure industries providing services of general interest.

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3 The new "Competition" Council combines the former Internal Market, Industry and Research Councils.

4 Cf. points 16 and 19 in the Council Conclusions on the Cardiff economic process adopted on 1 March 2002 (Council of the European Union, 2002a).

In addition, the Competition Council of 21 May 2002 "*called on the Commission to make similar rapid progress in those areas for which it has responsibility, particularly an evaluation methodology and guidelines for State aids for services of general economic interest, in accordance with paragraph 42 of the Conclusions of the Barcelona European Council*" (Council of the European Union, 2002b: 5) ([5])

1.2.2 Action taken by other Councils

The so-called "technical" Councils confirmed plans for further liberalisation. For example, the Industry and Energy Council of 26 June 2002 discussed the proposed directive aimed at speeding up the liberalisation of the gas and electricity sectors (CEC, 2001a). The discussion mainly focused on protection for the end-user, universal service, the legal separation of different activities, the principles associated with opening up markets, and regulatory tasks. The Transport and Telecommunications Council of 16 July 2002 passed a regulation, in the form of a Joint Position, on the creation of a European Aviation Safety Agency. That Council held an exploratory debate on the proposal for a directive intended to allow complete opening of the gas and electricity markets for all consumers by 1 January 2005, culminating in a political agreement on the timetable for energy market liberalisation. The Council on 5-6 December 2002 held an exploratory discussion of the second package of proposals aimed at liberalising the rail sector in Europe, focusing on two objectives: safety and interoperability of the trans-European railway network. The Transport and Telecommunications Council confirmed plans to start liberalising the postal sector. Several Member States (including Belgium and France) advocated a more gradual approach, a call supported by the European Parliament, and successfully curbed the Commission's

5 Cf. point 9 in the Council Conclusions on updating the Commission's internal market strategy in 2002, adopted on 21 May 2002 (Council of the European Union, 2002b).

ambitions (6). New deadlines were laid down in Directive 97/67/EC of 15 December 1997 (European Parliament and Council of the European Union, 1997). The Council also had to decide whether to go further in anticipation of a third liberalisation directive. Once again, Member States' caution won the day against Commission impatience: the Commission was asked in the first instance to undertake "*a prospective study which will assess, for each Member State, the impact on universal service of the full accomplishment of the postal internal market in 2009*" (European Parliament and Council of the European Union, 2002a: 24).

Based on the conclusions of this study, the Commission will present a report to the European Parliament and the Council by 31 December 2006, with a proposal confirming, if appropriate, 2009 as the target date for completing the postal internal market or defining "any other steps" to be taken in view of the study's conclusions. In the meantime, the Commission should continue to enforce the general competition rules for operators in the sector (7).

1.3 European Parliament

It is difficult to assess the action taken by the Parliament on services of general interest. On the one hand, real progress has been made on protecting financial support for both public and universal services. This is the case, for example, of some suggestions in the Langen report of November 2001 (European Parliament, 2001) (8), which led the

6 Albeit slightly later than planned, the Commission tabled a very ambitious proposal for postal services in 2000 (CEC, 2000a), calling for 20% market liberalisation as of 2003 (for letters over 50 g) with a second wave to start in 2007.

7 Over the last two years, the Commission has begun two abuse of dominant position proceedings (cf. Commission decision of 5 December 2001 against the Belgian postal service for unlawful aid and the Commission decision of 19 June 2002 regarding various state aid payments made to Deutsche Post: CEC, 2001b and 2002b).

8 The report of 17 October 2001 by German MEP Werner Langen (PPE) related to the European Commission Communication of 20 September 2000.

Parliament to ask the Laeken European Council to support the idea of a framework directive on SGIs. The Parliament called for a political discussion on the limits of competition policy when it conflicts with other essential areas of EU national, regional or local activity. It suggested that the impact on economic and social cohesion should be better assessed before proceeding with liberalisation in transport, energy or postal services.

On the other hand, the European Parliament is clearly in favour of increasing competition in a number of specific areas. For example, it advocated liberalising rail transport in 2000, although it blocked the directive opening the market for postal services.

During the plenary session of 14 January 2003, the European Parliament came down in favour of total rail liberalisation ([9]) deciding to open up all international goods and passenger transport services from 1 January 2006, together with national freight services. By 370 votes to 143, with six abstentions, Parliament also called for the liberalisation of national rail passenger services from 1 January 2008, which the Commission had not been seeking.

1.4 European Commission

The Commission was extremely active in 2002, with half a dozen Communications and other reports on services of general interest.

[9] The Lisbon European Council of 28 March 2000 had called on the Commission, the Council and the Member States to "speed up liberalisation in areas such as […] transport". The European authorities therefore decided to open the entire European rail network for freight and combined transport by 2006, instead of 2008 as originally planned in the first rail package (European Council, 2000).

Table 2: Definitions

Dating from the Communications in 1996 (CEC, 1996) and 2000 (CEC, 2000b) to the present, the Commission has always used the following definitions ([10]):

Services of general interest: *market and non-market* services which the public authorities class as being of general interest and subject to specific public service obligations.

Services of general economic interest: *market* services which the Member States subject to specific public service obligations by virtue of a general interest criterion. This would tend to cover such things as transport networks, energy and communications.

Public service: may refer either to the actual body providing the service or to the general interest role assigned to the body concerned. It is with a view to promoting or facilitating the performance of the general interest role that specific public service obligations may be imposed by the public authorities on the body rendering the service, for instance, transport or energy. These obligations can be applied at national or regional level. There is often confusion between the term public service, which relates to the vocation to render a service to the public in terms of what service is to be provided, and the term public sector (including the civil service), which relates to the legal status of those providing the service in terms of who owns the services.

Universal service: the definition of universal service obligations should go hand-in-hand with liberalisation of service sectors in the EU, sectors such as telecommunications. The definition and guarantee of a universal service ensures users and consumers access to services of a high quality during the process of transferring from a monopolistic provision of services to an open market subject to competition. Universal service, in the field of telecommunications, is defined as the minimum range of services of a specified quality to which users and consumers have access at an affordable price, and taking account of the specific national situation.

[10] See annexes to 1996 and 2000 Communications (CEC, 1996 and 2000b).

1.4.1 Note on methodologies for horizontal evaluations of services of general economic interest

The Laeken European Council, the "Internal Market, Consumer Affairs and Tourism" Council, the Barcelona European Council and the European Parliament had all called on the Commission to propose a methodology for evaluating services of general interest and to carry out evaluations on a regular basis. These evaluations are significant because they enable the social, environmental and employment impact to be measured, as well as customer satisfaction. Last of all, the evaluation should be able to measure the process of liberalisation itself (CEC, 2002c).

Horizontal evaluations will look at: *developments in the process of opening the markets* (evolving competition, changes in the supply and demand structure, price variations, degree of market liberalisation, mergers, and the way consumers exercise their freedom of choice); *effect on industrial performance* (in terms of productivity, innovation, employment and growth, but also prices, quality, and access to services of general interest); and *user perception*. Particular attention will be given to consumer perception of sector performance.

The Commission developed the methodology based on five principles:

- The methodology should be suited to the *evolving nature of services of general interest*. These services are subject to constant social, economic and technological change. It is therefore impossible and unhelpful to define a precise and fixed structure at the outset for the horizontal evaluation. Sector coverage and the evaluation's thematic approach should reflect service developments as well as data availability.
- The methodology should be *holistic*, taking into account economic, environmental and social factors contributing to the performance of the infrastructure industries providing services of general interest. SGIs affect economic developments, job creation, social cohesion, well-balanced and stable regional development, sustainable development and other significant social objectives such as security and stable supply of services.

- The methodology will be based on the principle of *subsidiarity*. Impact on the integration and operation of the internal market will be stressed, with both business and consumers' views being taken into account. Different situations in different Member States will be factored in, but the evaluation criteria will be determined by objectives agreed at EU level. However, the analysis will also try to highlight added value and to identify best practice in the Member States.
- The methodology should be *transparent and pluralistic*, in view of the clear social function of these services. The methodology will take on board citizens' opinions, both as consumers and as stakeholders. Citizens, including the social partners, will also be consulted on an *ad hoc* basis (CEC, 2002c: 4-5).

As of autumn 2003, the Commission will produce annual reports using the new methodology. The methodology will be developed and revised in the light of experience and taking into account comments and contributions from Member States, Community institutions and users. In 2006, there will be a broader evaluation of the process to determine whether the approach is meeting the targets set and whether it needs to be reviewed.

1.4.2 The European Commission's non-paper of 12 November 2002 on "Services of general economic interest and State aid" (11)

In the report on services of general interest dated 17 October 2001 (CEC, 2001c) – drawn up at the request of the Laeken European Council – the Commission announced that it would create a Community framework for State aid (12) awarded to the providers of

11 As part of a multilateral meeting held on 18 December 2002, the Commission's DG Competition organised an exchange of views with Member States' experts regarding the conditions for operating SGEIs in view of Community provisions governing State aid.

12 The Commission published two such reports on 5 June 2002 (CEC, 2002d) and 27 November 2002 (CEC, 2002e).

services of general economic interest. Going back to the definitions of terms in common use (SGI, SGEI, public services, etc.), the Commission indicated it preferred the notion of SGEI. It then outlined its understanding of several essential concepts which must be fully included in the current debate (CEC, 2002f).

Table 3: Articles 86(2) and 87(1) of the EC Treaty

Article 86(2) stipulates that "*undertakings entrusted with the operation services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular the rules on competition insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them*".

Article 87(1) of the Treaty provides that "*save as otherwise provided in this Treaty, any aid granted by a Member State of through State resources in any form whatsoever which distorts of threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market*".

- **The concept of State aid**

The Commission considers an undertaking covered by the rules of Treaty to be any entity carrying out an economic activity, irrespective of its legal status and how it is funded. Whether the entity operates for profit is irrelevant. Entities which do not seek to make a profit may compete with for-profit undertakings, and therefore constitute undertakings as per Article 87 of the Treaty. All activities where goods or services are offered in a given market are considered economic activities by the Commission.

Therefore, compulsory basic social security systems based on the principle of national solidarity do not count. However, fully funded optional supplementary schemes, where the benefits offered depend on the contributions paid and the organisation's financial performance, are considered economic activities. In the same way, medical services are

considered economic activities, regardless of the fact that the services provided may be paid for by the authorities or health insurers rather than directly by the patient. Transport for patients is an economic activity, subject to the rules governing State aid, where the activity is provided for remuneration.

The Commission points out that the concept of economic activity evolves over time, partly as a function of the political choices made by each Member State: "*Member States may decide to transfer to undertakings certain tasks traditionally regarded as falling within the sovereign powers of States*" (CEC, 2002f: 10). This means that it is not possible to compile a list of activities ([13]) which are in theory non-economic: "*[…] Such a list would not, therefore, provide genuine legal certainty as it would never be up to date and so would be of little use. Moreover […], competition law must be able to follow economic developments and, in particular, the fact that some Member States may decide to transfer to the market certain functions that traditionally fell within their public authority powers*" (CEC, 2002f: 11). This statement raises questions about fundamental principles to which we return later. In fact, the transfer of public authority functions to the market could mean that education, health, but also the justice system and public safety might one day be handed over to the private sector. Obviously this is unacceptable.

The Commission then explains the concept of aid, breaking it down into distinct types. Aid can come in three different guises:

a) The concept of State resources

State resources can be transferred in many ways: through direct subsidies, tax credits, benefits in kind, etc. Basically, it is a very broad concept. For example, by charging a subsidiary a lower price, the State

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13 In the report on services of general interest requested by the Laeken European Council, the Commission had already indicated that "*whilst a list of examples can of course be drawn up, it would not be feasible to provide a definitive list of all services of general interest that are to be considered 'non economic'* "(CEC, 2001c: 11). See also the Commission Communication of September 2000 (CEC, 2000b), particularly paragraphs 28-30 and the European Commission's annual report on competition policy.

is giving up State resources. Similarly, the fact that the State does not receive dividends from undertakings in which it has a stake constitutes a transfer of public resources. In the Stardust ruling of 16 May 2002 ([14]), the Court of Justice confirmed that resources made available to a public undertaking do constitute State resources in the meaning of Article 87 of the Treaty (CEC, 2002f: 12).

b) The effect on trade

To fall under Article 87, aid must affect trade between Member States or threaten to distort competition. In the case of State aid, these two conditions must be linked. Distortion of competition tends to presuppose the existence of a liberalised market. Trade is affected when financial aid strengthens the position of one undertaking in intra-Community trade in relation to other competing undertakings. Even in non-liberalised markets, the Commission considers that aid awarded to an undertaking may distort competition if the beneficiary undertaking is also active in liberalised markets ([15])

However, an annual subsidy given to the private operator of a public swimming pool ([16]) does not constitute aid affecting trade as laid down in Article 87. Basically, the Commission is concerned to see whether aid given is likely to significantly affect trade between Member States (CEC, 2002f: 13).

c) The concept of economic advantage

To qualify as aid under Article 87, compensation awarded to the operator using State resources must give a selective advantage. Selectivity exists when the advantage is limited to a few undertakings or to one field of activity. In other words, an undertaking may be given an

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14 Case C-482/99.

15 This can be a source of major problems for associations with a social purpose which could find themselves in breach of competition rules for those activities traded on the market.

16 Case N-258/2000, Dorsten swimming pool (CEC, 2002c).

advantage provided that this is exactly what is needed to carry out its public service mandate, and irrespective of whether the advantage qualifies as State aid (CEC, 2002f: 15).

- **"Awarding public service contracts"**

In defining the obligations of undertakings and States, the Commission refers to the requirement for public services to be "awarded". This should be done via an official public document – contract, mandate, etc. In particular, the deed should detail the nature of the public service obligations and of any exclusive or special rights accorded to undertakings; the undertakings and geographical area involved; the amount of any compensation to be paid to the undertakings, and the term of the obligations. The Commission considers that public services should be contracted out for a limited period so as to provide regular opening to competition. In the Commission's opinion, five years is sufficient, except where the type of investment dictates otherwise [17]. This time limit [18] does however raise some serious questions for traditional public operators, which now have to meet contractual conditions or risk losing the contract to a private operator (CEC, 2002f: 17).

- **Methods for selecting undertakings entrusted with SGEIs**

The Commission leaves Member States free to choose the manner in which services of general economic interest shall be provided. Member States may decide to provide SGEIs themselves or to entrust the task to public or private undertakings. However, the Commission adds: "the

17 An eight-year period was included in the proposed European Parliament and Council Regulation on Member States' activities concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway (cf. CEC, 2002d).

18 This period was increased to fifteen years in the 2001 Parliament and Council regulation on Member States' activities concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway.

principle of equality of treatment requires that all Community undertakings should be able to bid for SGEIs under the same conditions" (CEC, 2002f: 18).

- **Exclusive or special rights**

The Commission reiterates that exclusive or special rights may only limit competition insofar as these restrictions are necessary in order to carry out the specific public service task (CEC, 2002f: 19).

- **Transparent financial dealings between the State and undertakings in charge of SGEIs**

The Commission requires Member States to ensure that financial relations between the State and the financial undertakings responsible for SGEIs are transparent, detailing in particular:

- public resources provided (capital contributed, compensation for operating losses, contributions to lost funds, loans granted under preferential conditions, non-recovery of debt, etc.);
- public resources provided via other public undertakings;
- use of public resources.

When a Member State awards compensation for public services to an undertaking which also operates in an non-SGEI market, there must be separate accounts ([19]) to prevent over-compensation (CEC, 2002f: 20).

- **Financing the public service**

Member States are free to chose the way in which SGEIs are funded. The Commission has identified four main types of financing: fees paid by the users; public service compensation allowances paid by the State; offsetting for-profit and not-for-profit activities by protecting exclusive rights and funding provided by non-SGEI commercial activities. The

[19] Internal accounting should consistently apply analytical accounting principles which can be objectively justified, especially for the distribution of fixed costs between public service-related activities and the undertaking's other activities.

Commission considers these different funding models to be compatible, provided that they do not go beyond what is necessary to provide services of general economic interest (CEC, 2002f: 21).

- **Compensation paid**

The Commission recalls that, according to Court of Justice case law, compensation may cover all additional costs incurred in meeting public service obligations. "*The undertaking in question shall meet its public service obligations in economic equilibrium and will enjoy the margins typical for undertakings operating in the particular sector. The compensation paid must correspond to the 'market price' and must not include overcompensation, especially where*:

- *the procedure has created genuine competition;*
- *the service of general economic interest is entrusted to the undertaking which requested the lowest level of compensation and other conditions (service quality, employment criteria, investments, etc.) are set as minimums*" (CEC, 2002f: 22).

Obviously the latter criterion is very deceptive as it could lead to a reduction in security, service quality, numbers and quality of jobs, and sustainable long-term investments. Moreover, costs related to non-SGEI activities must be clearly identified and in no way ascribed to the public service costs. Consequently, where the same resources (staff, plant and equipment, etc.) are used for both types of activity, the costs must be broken down using reasonable and objective criteria. Finally, the total compensation must be assessed and audited annually to ensure that there is no overcompensation.

- **Overcompensation**

Any overcompensation constitutes State aid, which the Commission does not consider essential for providing SGEIs. In principle, the excess must therefore be returned to the Member State (CEC, 2002f: 25).

To sum up, financing for services of general interest is a central consideration. In its non-paper, the Commission has one major fixation: to avoid, come what may, any overcompensation or additional charges

related to public or universal service obligations. Public and universal service obligations are defined as obligations which the undertaking would not accept, or at least not to the same extent nor under the same conditions, if motivated by its own commercial interests.

The financing of public service obligations must be sound in accounting and financial terms and comply with market law. In view of the literature on the economics of subsidies, the Commission foresees two major problems with policies based on public subsidies:

- inefficiency: the Commission believes that consumer and investment decisions are distorted (i.e. impaired) by separating price and cost, and
- a lack of transparency: it is never clear exactly what monies are subsidies nor who is benefiting from them.

This attitude is also based on "some case studies" (no details given) which seem to demonstrate that the total public subsidies requested by providers operating in a monopoly position are greater than the amount genuinely required to meet public service obligations. The additional income generated, and therefore the additional profits for the operator, will strengthen the monopoly position of that operator and discourage others from entering the market. The Commission therefore feels that competition must be increased to put an end to profits made from monopolistic positions. This view, assuming a "cost-based" rather than a "needs-based" approach, obviously implies a considerable change for the operator. Certainly the Commission does in theory allow public monopolies or exclusive rights to be granted to public operators, but the draconian conditions imposed makes such arrangements nigh-on impossible. This restrictive approach bodes ill for the future of public services and their funding.

1.4.3 Will there be a Green Paper on services of general interest in 2003?

The Green Paper heralded in the Commission's Communication of 4 December 2002 (CEC, 2002g) will provide a unique opportunity to assess a number of key elements of services of general interest. The consultation document "*will identify questions that need to be explored and*

discuss issues rather than defining firm positions" (CEC, 2002g: 3). The Commission aims "*to establish the basis for developing a common approach on how to ensure the future of efficient high-quality services of general interest in the European Union*" (CEC, 2002g: 3). The document will mainly focus on the framework established in the current Treaty: "*The aim is to open a discussion that is linked to the work currently being pursued by the Convention but it is not intended to be a direct contribution to this debate*" (CEC, 2002g: 3).

The Green Paper should appear in spring 2003 under the Greek presidency. Following extensive public consultations, the Commission should finalise the document and present both the conclusions and some practical initiatives, including legislative ones, in summer 2003 under the Italian presidency. The Commission has set up eleven horizontal working groups ([20]) to be supervised by the relevant directorates general and including representatives from the other directorates general. Each of the eleven working groups will produce a chapter for the Green Paper. Every working group has already submitted a report dated 18 September 2002. All the contributions are currently being revised.

1.5 European Court of Justice

2002 could be described as a fruitful year in respect of Court of Justice case law. Three cases were of particular interest to observers concerned with SGIs.

1.5.1 Consequences of the Ferring judgment of 22 November 2001 on public service compensation

On 22 November 2001, the Court of Justice issued its judgment on the Ferring case ([21]) regarding the wholesale distribution of medication in France. The Court indicated in its judgment that where tax breaks

[20] The eleven working groups are: liberalisation; opening the market; internal market harmonisation; anti-trust rules; State aid rules; social services; local services; universal service; quality standards; access to the network; users/consumers; regulatory authorities; price controls; and evaluation.

[21] Case C-53/00.

granted to an undertaking entrusted with operating a service of general economic interest only offset the additional public service costs, the beneficiary undertaking is not being given an advantage in the meaning of Article 87(1) and therefore the measures do not constitute State aid. In fact, public service obligations may entail additional costs to which competitors are not exposed, and compensation allows the beneficiary undertaking to operate on an equal footing with its competitors. On the other hand, where the total exemption goes beyond what is needful to fulfil the public service obligation, the excess constitutes unlawful State aid and must be paid back.

However, on 19 March 2002, Mr. Léger, the Advocate General, gave his conclusions on the Altmark Trans GmbH case [22] This case concerned the conditions in which a Member State may grant subsidies to undertakings operating local public passenger transport services. In his conclusions, the Advocate General proposed overturning the Court's Ferring judgment and going back to Court of First Instance case law in the FFSA [23] case of 27 February 1997 and the SIC [24] case of 10 May 2000, which defined public service compensation as State aid. In his second set of conclusions dated 13 January 2003, Advocate General Léger declared that State funding of public services constituted State aid as defined in the Treaty. According to him, this type of financing is usually subject to the Community scrutiny system for aid. In theory, this means that Member States must notify the Commission of their funding plans and may not provide financing without first getting the green light from the Commission. As Court of Justice judgments tend to reflect the opinions of the Advocate General, it is likely that the precedent will be reversed. In addition, on 30 April 2002, Mr. Jacobs submitted his conclusions on the GEMO s.a. case [25] on public services for the

22 Case C-280/00.

23 Case T-106/95, Rec. 1997, p. II-0229.

24 Case T-46/97, Rec. 2000, p. II-2125.

25 Case C-126/01.

collection and disposal of animal carcasses and slaughterhouse waste. Mr. Jacobs proposed distinguishing between two categories of cases, based on the link between the financing provided and the general interest obligations, and on how clearly the latter are defined.

In cases where the relationship between the public funding provided and the clearly-defined general interest obligations is direct and obvious, a compensation model, as applied in the Ferring judgment, will obtain. In particular, this will apply where the obligations and the compensation are awarded following an open, transparent and non-discriminatory public procurement procedure. However, a State aid approach will be taken in cases where it is not clear that the public authority funding is intended directly to offset well-defined general interest obligations.

The European Commission will adopt a position based on the Court's stance. Either the Court of Justice will confirm the Ferring precedent, in which case the Commission will decide, when the time comes ([26]), how to calculate compensation and the selection criteria for undertakings entrusted with providing SGEIs. Alternatively the Court could reject the Ferring judgment, in which case the Commission will undertake to prepare a regulation ([27]) to exempt aid given for SGEIs from the advance notice requirement. In any event, the Commission considers that the total compensation, whether or not it constitutes State aid under Article 86, cannot cover more than the public service obligation *per se*.

The Court should reach a verdict as soon as possible in order to eliminate uncertainty and will do so when it rules on the outstanding Altmark, GEMO and ENIRISORSE cases.

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[26] See point 14 in the Commission Communication on the status of work on the guidelines for State aid and services of general economic interest, of 5 June 2002 (CEC, 2002d).

[27] This Commission regulation would be preceded by a Community framework, a form of guidelines, for a limited time period (2 years). The Commission would draft the regulation in the light of experience gained during the application of this framework.

1.5.2 Court judgment of 4 June 2002 known as the "golden shares" judgment (28)

In condemning the Commission's case against Belgium and finding in favour of the Belgian State, the Court of Justice has shed new light on the role of public authorities in the economically strategic energy sector. This revolutionary ruling has considerable significance for relations between the State and certain private operators – in this case Distrigaz s.a. (29) and the SNTC (national canal transport company). Basically, Ministers Wathelet and Maystadt (30) had issued a Royal Decree in 1994 creating a "golden share" in Distrigaz to benefit the State. This Decree provided the option of adopting a regulation establishing the right of the Belgian State to oppose (31) any transfer, use as security or change in the destination of certain strategic assets, and also the public authorities' right to annul certain management decisions considered contrary to the

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28 Case C-503/99 – Failure by a Member State to fulfil its obligations: rights attaching to the "golden shares" held by the Kingdom of Belgium in SNTC s.a. and Distrigaz s.a.

29 Since then, Distrigaz has split into two companies. Fluxys has taken over all transport infrastructure and storage (including Zeebrugge) activities while Distrigaz s.a. is responsible for all trade activities (purchasing, export, etc.).

30 Melchior Wathelet and Philippe Maystadt were Deputy Prime Minister, Minister of the Economy and Justice, and Finance Minister respectively.

31 The term "golden share" refers to an instrument created at the same time as public scrutiny, which has frequently been used as part of privatisations in other European countries. The concept is based on the "*action spécifique*" introduced by France in 1986, which in turn derived from the "golden share" approach applied several times in the United Kingdom during privatisation exercises. It must be noted that the Belgian version of the golden share gives the authorities powers of scrutiny which in certain important respects go further than in other countries. In particular, the Energy Minister has the power to overturn decisions taken by the management bodies if the Minister considers that these are contrary to the national energy policy guidelines (cf. report to the King on the above-mentioned Royal Decree, *Moniteur Belge* of 28 June 1994, p.17348).

guidelines for the national energy policy. The Commission contested the 1994 legislation, which empowered the Belgian State to intervene to ensure that SNTC and Distrigaz fulfilled their public service obligations – namely security of energy supply in times of crisis – whilst respecting the need for legal certainty. In the Royal Decree of 5 December 2002, the Deputy Prime Minister, Minister for Mobility and Transport and the Secretary of State for Energy declared, in the first article, that the special rights linked to a golden share could only be exercised in order to achieve four objectives:

- organising the opening of the gas market […];
- meeting public service obligations;
- achieving operational security and safety for installations and a stable transport network for natural gas;
- co-operation between European gas companies so as to ensure transport network interoperability.

Of course, Article 4 states that "*special rights […] shall only be exercised if the general interest in the energy sector is threatened, and on the basis of objective, non-discriminatory and transparent criteria […]*".

The Court judgment confirmed that the regulation in question is justified by the intention to guarantee security of energy supply in the event of a crisis. The judgment is generally seen as halting the shrinkage of the State's role and powers to act in key areas of the economy which are fundamental to citizens (safety, quality, respecting public service obligations, etc.).

1.5.3 Court judgment of 17 September 2002 in the Helsinki bus case

In a judgment issued in the case of Helsinki municipal council versus the transport operator Concordia, the Court of Justice decided that a municipality organising a call for tenders to operate urban bus services is entitled to take into account environmental considerations pertaining to the vehicles. The Court found that the decision-making body may consider environmental factors, provided that they are related to the

substance of the contract, do not give the decision-making body unlimited freedom of choice, and are based on the principle of non-discrimination.

This important judgment is particularly interesting in that it allows non-market factors to be taken into account when awarding a contract for the provision of public transport services. This judgment follows on from that of the CJEC on 26 September 2000 known as "Nord-Pas-de-Calais". Contrary to the Commission's opinion, the Court allowed the French government's argument that factors linked to employment or combating unemployment could constitute an additional condition when awarding public contracts (Noël, 2001).

2. Key elements in the debate on SGIs

2.1 Framework directive on SGIs

The Commission Communication of 4 December 2002 (CEC, 2002g) outlines the work done so far on examining a proposal for a framework directive on services of general interest. Firstly, we must bear in mind that after the European Council of Nice the Belgian presidency stressed the need to consolidate the principles governing services of general interest lying behind Article 16 of the Treaty ([32]). The Barcelona European Council of 15-16 March 2002 called on the Commission to continue examining the framework directive "*while respecting the specificities of the different sectors involved and taking into account the provisions of Article 86 of the Treaty*" (European Council 2002a: 18). The Commission Communication highlights the potential complexities of a framework directive, in particular the possible objectives, scope and contents of such a directive and its links to existing legislation in the sector.

[32] In the run-up to the Laeken European Council, the Internal Market Council adopted conclusions on 26 November 2001 in which the Council declared itself eager to see the results of this study.

2.1.1 Problems with the framework directive

There are many good reasons for adopting a framework directive on services of general interest. It is very important for the sake of democracy. However, the difficulties involved in this major undertaking should not be played down. There are two main types of difficulty:

- **Political situation**

There is no guarantee that the Commission will recommend horizontal legislation once the public consultation resulting from the Green Paper is complete. On various occasions, the Commission departments have stressed a number of potential technical problems ([33]), such as possible duplication of sectoral directives or problems with transposing a horizontal directive into national law. Furthermore, it would not be easy to obtain a qualified majority vote in the Competition Council on a proposal which went beyond the Article 16 compromise introduced in the Treaty of Amsterdam. The balance of power, we would suggest, does not necessarily argue in favour of an ambitious agenda. What is more, governments would be likely to oppose an ambitious proposal pleading subsidiarity, which already defines the areas governed by the Member States and their federal bodies. However, a vote in 2001 on the principle of establishing a framework directive indicates that the European Parliament would support the initiative.

Basically it seems probable that a substantial period of time will be devoted to establishing a compromise combining the different – and sometimes contradictory – objectives of increasing competitiveness while reducing prices, ensuring equal access to SGEIs while increasing consumer protection, factoring in sustainable development, and so on.

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[33] For example, distinguishing between networks and other services. Under the heading of network services, it is worth distinguishing between those which operate in a competition-based market and those which have natural monopolies (railways or energy), as there cannot be an infinite number of complex infrastructures.

- **Legal context**

The legal basis for a framework directive is a real problem. Experts do not believe that Article 16 of the Treaty constitutes an adequate legal working basis. It is defensive, dispensatory and conditional and is also hard for the uninitiated European citizen to understand. Perhaps it could be supplemented by Article 86(2), or Article 153 on consumer protection. Perhaps. In practice, the Treaty does not contain a sufficiently solid foundation for establishing a framework directive. In the absence of such a directive, the Commission could use its powers in the field of competition, which mainly benefit the consumer. However, this poses another problem: in legal terms, it is not actually possible for the Council to call on the Commission to exercise the powers established in the Treaty in a particular way. So neither the Council nor the Parliament would be able to comment on the proposal.

Other alternative solutions must be considered, such as introducing a specific title in the Treaty for SGEIs. Here the efforts of some Convention members to include specific provisions in the future Constitution should be supported. At the end of the day, the current Convention and ensuing Intergovernmental Conference should provide an opportunity to find a solution. The question of the legal basis for a horizontal directive, its potential added value over existing sectoral directives, and the need for general terms and principles in the directive are all matters which must be studied carefully.

2.1.2 From public service to universal service: swings and roundabouts?

The notion of universal service may have been around for a long time ([34]), but the European Community has only recently started to use it. The term dates back to the mid 1980s when the Commission launched its big push to liberalise telecommunications. Interestingly, the concept has gradually taken over from the notion of public service as liberalisation and the ensuing privatisation of public services have

[34] It first appeared in 1907 in the USA referring to telecommunications.

progressed (35). Gradually the notion of "universal service obligations" has replaced the "public service mandate". In addition to the slight nuances involved – the scope and sphere of activity of "mandate" is much broader than "obligation", which is more restrictive in nature – it seems that public service and universal service do not completely overlap and are noticeably different, even divergent. Although the concept of universal service has clearly evolved (36) as directives have been updated, a difference of substance is emerging. The European Union is gradually moving from the post-war neo-Keynesian system towards an Anglo-Saxon neo-classical approach (37). The framework directive would allow the differences in approach to be resolved while also creating a bedrock of common rights for the different sectors.

2.2 Are European regulatory agencies the forerunners of European public services?

It has been necessary to create national regulatory agencies in all the Member States, particularly for sectors where consistent and independent regulatory decisions are required. The creation of Community regulatory authorities is one option particularly worth considering (38). At EU level, fifteen such agencies have already been created under the Treaty (39). Two proposals for regulations to at

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35 It is true that Article 295 (former Article 222) of the Treaty declares that "*this Treaty does not in any way prejudice the rules in Member States governing the system of property ownership*".

36 It is particularly worth noting the Commission's efforts to clarify notions such as "affordable prices".

37 This approach is also evident in the Action Plan for financial services. Particularly worthy of note is the European Community's adoption of IAS (International Accounting Standards) which are very closely modelled on the US GAAPs.

38 Cf. the very informative Commission Communication entitled "the operating framework for the European regulatory agencies" (CEC, 2002h)

39 European Centre for the Development of Vocational Training; European Foundation for the Improvement of Living and Working Conditions;

establish other agencies are currently on the table [40]. These new European regulatory agencies, which independently manage clearly-defined sectors, could improve the way in which rules are implemented and applied within the European Union.

The "vertical" approach of establishing agencies on a case-by-case basis does help improve governance in the EU. Jacques Vandamme, honorary chairman of the GEPE [41], sees this as a precursor to "European public services" co-ordinating and complementing national public services. Vandamme believes that the agency approach will prove more beneficial than a framework directive on SGIs. The author considers caution to be the best policy for now. In fact, differences between the agencies far exceed their similarities. Having been established at different points in time, the agencies have to consider different obligations on a case-by-case basis. In other words, there is no one agency model in the EU, but rather several. There are two broad categories of agency [42]: executive ones and regulatory ones. Executive agencies are entrusted with purely management tasks – helping the

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European Environment Agency; European Training Foundation; European Monitoring Centre for Drugs and Drug Addiction; European Agency for the Evaluation of Medicinal Products; Office for Harmonisation in the Internal Market; European Agency for Safety and Health at Work; Community Plant Variety Office; Translation Centre for the Bodies of the European Union; European Monitoring Centre on Racism and Xenophobia; European Agency for Reconstruction; European Food Safety Authority; European Maritime Safety Agency; European Aviation Safety Agency.

40 Proposal for a Regulation laying down the statute for executive agencies entrusted with certain tasks in the management of Community programmes and proposal for a Regulation establishing a European Railway Agency.

41 The European Policy Studies Group (GEPE – *Groupe d'études politiques européennes*) is the Belgian member of the Trans-European Policy Studies Association (TEPSA), which was set up in 1974 to encourage transnational thinking about the future of Europe.

42 NB: A certain number of the existing agencies in the EU do not fall into either category.

Commission to implement Community programmes ([43]) – whilst regulatory agencies have an active decision-making role in establishing binding legal provisions to help regulate a given sector. These agencies are responsible for creating a network at Community level for activities which were originally dealt with at national level ([44]). At the moment, only three agencies have an overtly regulatory role: the Office for Harmonisation in the Internal Market (OHIM), the European Aviation Safety Agency, and the Community Plant Variety Office.

Obviously these agencies have a very important public service mandate. Nevertheless, the approach does have its limitations. As the Commission indicated in its Communication: "*use of the regulatory agencies must be in accordance with the basic principles on which the system of the Union is founded*" (CEC, 2002h: 5). The principle of balance between the institutions required for the Community method must be respected so as to guarantee continued unity and integrity in the executive functions at Community level. The decision-making agencies cannot be given responsibilities which have been specifically assigned to the Commission in the Treaty. At some point it will be necessary to assess whether this is a constructive approach which can complement the horizontal approach represented by the framework directive on services of general interest.

2.3 Should services of general interest be written into the Constitution?

Since the Cannes European Council (June 1995), Europe's politicians have repeatedly affirmed that services of general interest are a key component of the European social model. Article 16 of the Treaty of Rome stipulates that services of general economic interest play a fundamental role in the social and geographic cohesion of the Union. However, at the same time, this article does not provide an adequate

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[43] For example, the European Agency for the Evaluation of Medicinal Products and the European Food Safety Authority.

[44] See the White Paper on European governance (CEC, 2001d), particularly point 3.2, pp.28-29.

legal basis to lay the foundations for strong legal certainty and predictability. Article 36 of the Charter of Fundamental Rights recognises the right of access to services of general economic interest, but suffers from the same shortcomings. Although it establishes a link between fundamental rights and services of general interest, it does not provide a basis for the right of citizens to benefit from such services. As EU enlargement looms, it seems vital that SGIs be enshrined in the future Treaty of the European Union.

On the fringes of the Convention's activities there are three initiatives which have addressed the question of services of general interest either directly or indirectly. Firstly there is the Commission's draft institutional architecture. In a working document produced by the Commission services dated 4 December 2002 ([45]), the authors define services of general interest as part of the foundation of the European Union and its Member States. A new Article 4(3) states: "*the Union shall be mindful of the specific features of the Member States as regards their internal and external security and their public services*" (CEC, 2002i: 30). Article 36 of the Charter of Fundamental Rights would be integrated in a second section of the Constitution entitled "Fundamental Rights", reading: "*the Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Constitution, in order to promote the social and territorial cohesion of the Union* " (CEC, 2002i: 64). SGEIs are then dealt with in a third section on policies, but the Commission's proposals here are neither new nor innovative.

The second document is the contribution submitted in early January 2003 by the Belgian MEP (ECOLO party) Marie Nagy to the Convention working group on "Social Europe" (European Convention, 2003a). Nagy argues that the Union should promote SGIs as guarantees of fundamental rights, part of the European social model and the links

[45] Contribution to a preliminary draft Constitution of the European Union, feasibility study carried out at the behest of President Romano Prodi and in agreement with Commissioners Barnier and Vitorino under the supervision of François Lamoureux (CEC, 2002i).

between citizens and society (Article 3). The European Union and the Member States, within the confines of their respective competences and the scope of the current Constitution, should adopt legislative and implementation measures which allow them to carry out their mandates while respecting the principles of neutrality, equal access, universality, democratic evaluation, quality, transparency, participation and the precautionary principle. Undertakings entrusted with the management of SGEIs would be subject to competition rules, unless the authority responsible for organising the service decides to provide the service itself whilst respecting the principles of reversibility and reciprocity. Last but not least, financing for SGIs and SGEIs could take any form chosen by the competent authority provided that it is not contrary to Community general interest.

The third initiative came from Belgium and France. On 17 January 2003 the two States agreed to submit a joint contribution which reads "*at present, services of general interest are only recognised in the Treaty in terms of exemptions from competition law. The two countries believe that SGIs should have their own place in the future Treaty as part of fulfilling the objectives of the Union*" (European Convention, 2003b: 2). France and Belgium wish to do more than integrate the Charter of Fundamental Rights into the future Treaty: they include the role of these services in the objectives detailed in Article 3 of the new Treaty. They "*would like the provisions of Article 16 of the Treaty to be amended accordingly. Article 16 should provide a clear legal basis whereby the European Union, the Member States and regional or local bodies may, within the limits of their respective competences, adopt measures allowing services of general interest to fulfil all their obligations pursuant to Article 3 of the Treaty, while respecting the principles of neutrality, proportionality and freedom of definition. To this end, this article should contain a principle for action and also provide a list of objectives for services of general interest and mention the general principles applicable in respect of funding*" (European Convention, 2003b: 2-3). The two countries will propose an appropriate form of words.

3. Comparative analysis of four sectoral directives

An examination of Community texts adopted between the end of 2001 and the end of 2002 is a very useful gauge of how the Commission's approach has evolved in the different sectors.

3.1 Universal Service Directive of 7 March 2002 on electronic communications networks and services [46]

The Universal Service Directive is important because it clearly defines the current balance of power (European Parliament and Council of the European Union, 2002b). The regulatory framework established in 1998 for the total liberalisation of the telecommunications market in the Community defined the minimum universal service obligations and laid down rules for calculating the costs and financing involved.

3.1.1 Definitions

The parameters defining universal service are often criticised for being too vague about the scope. The directive has responded by providing more detailed definitions.

Affordable prices. Under the directive, an affordable price means a price defined by Member States at national level in the light of specific national conditions […], and may involve setting common tariffs irrespective of location or special tariff options to deal with the needs of low-income users. Affordability for individual consumers is related to their ability to monitor and control their expenditure. Although this criterion is by nature subjective and hard to enforce, it is significant that the Commission is now more interested in consumers' ability to contribute.

"Universal service obligations" (USO). Universal service obligations are defined as obligations a Member State imposes on an undertaking which is to provide a network and service in a given geographic area whereby, where appropriate, fees offset the provision of the service or

[46] The directive is due to be transposed into national law by 24 July 2003 and enter into force on 25 July 2003.

where special rates are offered to consumers with low incomes or particular social needs.

Adaptability of the universal service obligations. "*Universal service obligations, which are defined at a Community level, should be periodically reviewed with a view to proposing that the scope be changed or redefined. Such a review should take account of evolving social, commercial and technological conditions and the fact that any change of scope should be subject to the twin test of services that become available to a substantial majority of the population, with a consequent risk of social exclusion for those who cannot afford them*" (Recital 25).

Article 15 of the directive charges the Commission with reviewing the scope of the universal service regularly (every three years) with a view to proposing amendments or new definitions. This re-examination is to take account of social, economic and technological developments […] ([47]). Here we find a reference to the principle of adaptability, which is often invoked. That said, it is perhaps unfortunate that the review period (every three years) is relatively long for a sector which is in constant flux. We would have preferred either a comitology procedure, empowering the Commission to step in when technical changes so required, or a shorter time frame (2 years, as in the postal directive).

Quality of service. Comparable and up-to-date information about the quality of undertakings' service will be made available to the end users. The data will be based on common indicators, definitions and measuring techniques ([48]). This is definitely a step forward; it now

47 Article 15(2) of the Directive. See also Annex V to the same directive which details the factors to be considered when reviewing the scope of universal service obligations. In particular, whether specific services are available to a majority of consumers and used by the majority of them, and whether the absence of such services or failure on the part of a minority of consumers to use them constitutes a source of exclusion.

48 Annex III to the Universal Service Directive therefore establishes a number of harmonised indicators including the time for the initial connection to be set up; number of faults per access line; repair times; response time for telephone information services; billing complaints, etc.

remains to extend the list of harmonised indicators to include more qualitative indicators.

3.1.2 Calculating the net cost of universal service obligations ([49])

It is useful to study this question, as it highlights the mechanism used and sheds more light on the debate surrounding compensation. Firstly, national authorities are required to consider all possible means of encouraging operators (both in general and in particular) to meet their universal service obligations profitably. The costs which the nominated undertaking could have avoided if it had not had to meet the universal service obligations must therefore be calculated accurately. The net costs incurred due to universal service obligations may be covered by the State by paying the relevant undertakings an indemnity against services provided under non-commercial conditions. This "making up the difference" clearly demonstrates the fundamental differences between a public undertaking providing a service of general interest and a private operator:

- the profit motive;
- the very nature of the "social" role of the activities, whether inherent in the case of a public undertaking (i.e. defined in law), or subject to compensation in the case of a private operator.

It is significant that the Commission's reasoning is based on the principle that social measures (universal service obligations) must be calculated separately from the "normal" business of the undertaking, so as to compensate undertakings for deviating from the more usual approach of "making people happy while making money". This explains the logic underpinning the notion of universal service.

[49] Cf. annex IV to the Directive.

3.2 Regulation on public service requirements and the award of public service contracts in passenger transport ([50])

In terms of public service, the general provisions obtaining for transport were based on Regulation 1893/91 of 29 June 1991 (Council of the European Communities, 1991). This regulation provides that charges incurred by transport undertakings in meeting public service obligations and the application of transport prices and conditions imposed by a Member State in the interest of one or more specific social groups will be eligible for compensation calculated using the common methods detailed in the regulation. The regulation defines public service obligations as "*obligations which the transport undertaking in question, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions*". It is as though public service obligations were disconnected from normal business practices. They are considered an exception, or even an anomaly. The financial burden partly falls on the public authorities, which are authorised to pay compensation for additional costs which the operator would not incur for reasons of "profitability". Here the State is seen as a stopgap. The State becomes the visible player working alongside the invisible market.

The new proposal for a regulation (CEC, 2002j) ([51]) on public service requirements and the award of public service contracts in passenger transport is a partial improvement on the former regulation. The Commission considers that market liberalisation based on national legislation has led to different procedures being used. This has created legal uncertainty regarding operators' rights and the obligations of the competent authorities. To rectify the situation, the Commission

[50] The full title is "Regulation of the European Parliament and of the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway".

[51] Submitted by the Commission in September 2000, the proposal was amended at first reading by the European Parliament on 14 November 2001. It is currently being discussed under the aegis of the EU Transport Council.

proposed introducing "regulated competition" between Community operators, which heralds the impending liberalisation of passenger transport.

In Recital 17, the Commission returns to this idea: "*as an alternative to deregulation, competent authorities should be able to choose controlled competition for services of general economic interest. This can take the form of competition for the award of exclusive rights; or the assignment of particular tasks to publicly-owned operators in a context where other operators are also free to provide services, but where all operators are constrained by quality and integration requirements*" (CEC, 2002j: 13). Under pressure from the European Parliament, the Commission acknowledged that "*the development of competition should therefore be accompanied by Community rules that promote the protection of the general interest in terms of adequate availability in all regions of high-quality, reasonably priced public transport, accessible to people with reduced mobility and providing full social coverage*" (CEC, 2002j: 13). Recital 50 even states that "*competent authorities should ensure that all operators comply fully with the social obligations established by relevant European and national law and with the provisions of any generally-applicable collective agreements*" (CEC, 2002j: 19).

The regulation finally defined public service contracts [52]. These contracts required operators to provide the competent authorities with the information necessary for monitoring and evaluating their performance and the performance of the transport network as a whole (e.g. number of complaints received, safety-related incidents). There are also provisions aimed at ensuring that public assets made available to operators are maintained. One interesting item introduced in the proposal was the safeguard clause allowing the authorities to protect existing staff in the event of a change of operator (Article 9(3)).

Several remarks can be made about this draft regulation. Firstly, there is the welcome appearance of the new concept of "regulated competition". In qualifying competition the Commission seems to imply that competition alone is insufficient and needs public authority

[52] Initial plans were for five-year public service contracts, then increased to eight years for bus services and fifteen for railway and inland waterway transport.

supervision. Secondly, the proposed directive frequently refers to the national regulatory authorities, in that they are able to intervene with greater ease and more speedily. We feel that the current proposal lacks a powerful principle of convergence guaranteeing that all national regulatory authorities will work in the same vein. Lastly there is no balancing of the competent authorities' duties (Article 4 in the directive) and the terms of public service contracts (Article 6a). At the very least, guarantees of quality and social integration should be better factored in– which is not the case in the selection criteria.

3.3 Directive on common rules for the internal market in electricity and natural gas

This proposal was tabled by the Commission on 13 March 2001 (CEC, 2001a) and is currently considered the most complete proposal on universal service. Article 3 (new) in the draft directive is divided into three parts:

1) Member States may subject natural gas undertakings to public service obligations which can affect security, including security of supply, regularity, quality and price of supplies, and environmental protection. However, these obligations must be clearly defined, transparent, non-discriminatory and verifiable.

2) Member States shall implement appropriate measures to ensure high levels of consumer protection, particularly with respect to transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms.

3) Member States shall implement appropriate measures to achieve the objectives of social and economic cohesion, environmental protection and security of supply.

Annex 1 adds "*Member States shall also implement appropriate measures to protect vulnerable consumers*" ([53]). The optional nature of the first section of Article 3 reduces its impact. It would have been better to establish a common obligation to be applied by each Member State.

3.4 Directive on the further opening to competition of Community postal services ([54])

Directive 97/67/EC of 15 December 1997 established a regulatory framework at Community level for the postal sector, including measures intended to guarantee the provision of a universal service. It also fixed weight and price ceilings for postal services which Member States may restrict to [a] universal service provider[s]. Article 3 of the Directive requires States to ensure that users enjoy the right to a universal service involving permanent provision of a postal service of specified quality provided throughout their territory at affordable prices for all users. To this end "*Member States shall take steps to ensure that the density of the points of contact and of the access points takes account of the needs of users*" (European Parliament and Council of the European Union, 1997: 19). Then Article 5 calls on Member States to "take measures" to ensure that the universal service provision meets the following requirements: comply with the "essential requirements"; offer an identical service to users under comparable conditions; not be interrupted or stopped except in cases of *force majeure*; evolve in response to the technical, economic and social environment and to the needs of users. In addition, "*Member States shall ensure that quality-of-service standards are set and published in relation to universal service in order to guarantee a postal service of good quality*" (Article 16) (European Parliament and Council of the European Union, 1997: 22).

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[53] Annex 1, e).

[54] Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services (European Parliament and Council of the European Union, 2002a).

Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002, amending Directive 97/67/EC, has a two-fold objective: further liberalisation of postal services and ensuring greater competition in the sector as compared with other communication methods while increasing service quality (European Parliament and Council of the European Union, 2002a). Recital 13 is effectively a bet: it claims that opening the market will contribute to the expansion of the postal markets whereby "*any reductions in staff levels among the universal service providers due to such measures (or their anticipation) are likely to be offset by the resulting growth in employment among private operators and new market entrants*" (European Parliament and Council of the European Union, 2002a: 22). That remains to be seen.

One of the major changes introduced by the new directive concerns the financing of universal services. A new indent in Article 12 stipulates that "*cross-subsidisation of universal services outside the reserved sector out of revenues from services in the reserved sector shall be prohibited except to the extent to which it is shown to be strictly necessary to fulfil specific universal service obligations imposed in the competitive area*" (European Parliament and Council of the European Union, 2002a: 24). In other words, a public service provider may no longer use other reserved services (for which he has exclusive rights or a monopoly) to finance services open to competition. In plain language, a public monopoly seeking to be more competitive than a private competitor in sectors open to competition may only do so by using its own added value in the sector rather than margins taken from reserved services.

Under pressure from the Belgian presidency, the opening of the postal sector was adjusted: the Commission is in fact due to carry out a investigation to assess the impact on the universal service in each Member State of the completion of the internal market in postal services in 2009. On the basis of the study's conclusions, the Commission will submit a report to the European Parliament and the Council by 31 December 2006, confirming, if appropriate, the proposed 2009 date for further liberalisation. In the meantime, the Commission is required to present a bi-annual report on the application of the directive in respect of developments in the sector, focusing in particular on

economic, social and technical factors, employment and service quality. New provisions are aimed at strengthening consumer protection (by dealing with claims using a transparent, simple and low-cost procedure) and the role of the national regulatory authorities, particularly in terms of reserved services. Surprisingly, although the Commission itself admits that universal services should evolve and adapt to consumer needs, the scope has not really evolved – there is no reference to email, for example.

3.5 Conclusion

From analysing these Community texts, it appears that the concepts of public service and universal service obligation vary from one sector to another. Some directives – such as the gas and electricity directive – refer to social cohesion and environmental protection while others do not. The timetable for reviewing the universal service also varies in the different directives, with two years in the postal services directive against three for the electronic communications directive. The degree of subsidiarity also varies both between sectors and from one set of provisions to another. We seem to be falling between two stools: recourse to the Member States is an admission of the Community's inability to harmonise a number of essential principles regarding public service.

General conclusion

2002 has seen a flurry of activity around services of general interest and services of general economic interest, but its value is limited or ambiguous. On the one hand, some welcome progress has been made, mainly through the vigilance of the European Council and the Council of Ministers, where a vocal minority (basically France and Belgium) has worked to ensure the survival of public service at all costs. However, these two institutions have also continued with opening up competition.

The Commission has also blown hot and cold in turn. No sooner does it announce a move to promote services of general interest (detailed methodology for evaluating the quality and performance of SGIs, exemption from declaring State aid, planned Green Paper on SGIs, etc.)

than it toughens its position (very restrictive notion of State aid, refusal to establish a watertight distinction between non-market services of general interest and market services of general economic interest, etc.).

The Court of Justice seems to be retreating: in going against the Ferring case law, the advocates general have effectively steered to the right. From now on, the Commission must be notified of all forms of State aid – subsidies, compensation, tax exemptions, benefits, etc. – which will effectively be unlawful unless they can be shown to contribute solely and directly to public service obligations or universal service obligations. Of course, the judges still have to rule on the Altmark and Gemo cases. There is still a glimmer of hope. The "golden shares" judgment is not enough to overcome the general impression of restrictive, even conservative, action on the part of the Court.

As for the European Parliament, we have seen that it has come to champion the opening of public services to competition and is trying to clearly define a way of protecting public service mandates.

Liberalisation moves inexorably on, weakening the foundations of public service day by day and replacing it with universal service, which is a derivative and inferior variant of public service. We have certainly observed some developments in universal service in the four Community texts outlined briefly above. Some public service assets have been maintained, such as continuity and quality. But we have also seen that the notion of universal service refers primarily to the individual consumer, whether low-income or vulnerable, rather than to a citizen who is a member of society as a whole. Furthermore, we have demonstrated the fundamental differences in the role of the State according to whether a service is public or universal. From being an active provider, the State has become the regulator, and is sometimes powerless to combat mergers or acquisitions that could be detrimental to the citizen. The role of the State is increasingly limited to enforcing market rules and compensating for any additional costs incurred because of universal service obligations. Is this neo-classical or neo-liberal trend inevitable? Not at all: the action of the Council of Ministers and the European Parliament is a deciding factor here. But a majority has yet to emerge in either body to reverse the underlying trend.

At the current time, the balance of power in the Council does not argue in favour of a change of direction. Nor does the European Parliament seem to offer the hoped-for lifeline at the moment, although there is a very active minority. In fact, the European Parliament has shown itself very determined to speed up liberalisation of the railways while failing to guarantee in full the best protection of general interest.

Could European citizens and civil society be the answer? In a democratic State based on the rule of law, representational democracy is the point of reference. Does this mean that participatory democracy cannot speak out to defend one of the pillars of the European social model? We would like to highlight a few possibilities which we feel should be defended every step of the way.

First of all, a sector-by-sector evaluation of liberalisation as a whole seems essential: looking at the claims, measuring the social, economic and environmental impact plus the overall effect on employment, including the quality of the jobs created. This evaluation should be pluralistic, independent, open-minded and democratic. It should be possible to apply the principle of reversibility if necessary, with the option of going back to exclusive rights or a public monopoly in the case of total or partial failure of the private system (the example of the effective re-nationalisation of the British rail system is particularly relevant here).

Secondly, citizens should be consulted regularly about the quality, accessibility, regularity, cost and adaptability of the services provided. This consultation should then lead to an improved service and, where necessary, new long-term investments. The consultation should be carried out by the public authorities closest to the citizen, but using a harmonised approach. We are in favour of a public service contract with citizens. The parliament and government would regularly review and agree the list of essential services considered "services of general interest" by means of a participatory procedure. At the end of the initial study and public consultation, a public service contract would be agreed with citizens. This contract would include the public service obligations to be met, the resources needed to achieve them, including financing,

and a harmonised methodology for evaluating the quality of service provided. In addition to an annual report, undertakings entrusted with the provision of services of general interest would submit a special report on the fulfilment of public service obligations, based on the contract of trust and the quality assessment. The public service obligations would be regularly assessed and reviewed in the light of this report and the public service contract of trust.

Thirdly, the State and public authorities should have very wide-ranging regulatory powers (see the "golden shares" judgment above), allowing them to intervene effectively if the market or private sector failed to meet its obligations. The evaluation and consultation measures would also indicate whether certain types of public monopoly or exclusive rights granted to the State (at national, regional or local level) were reasonable and should be reintroduced. The system offering the best guarantee of equality and solidarity should take precedence. Subsidiarity should not absolve the Commission from carefully monitoring how Member States take this concept into account. At times it should be possible for Community action to replace that of national or sub-national authorities so as to avoid the emergence of variable geometry in public service obligations.

Fourthly, services of general interest must be appropriately financed to allow public service obligations to be fully respected. Here we advocate a broad definition of the costs to be included to justify State aid, whatever form that may take.

Fifthly, legal certainty and predictability must be strengthened. All available channels should be used to ensure that the Convention integrates a strong reference to services of general interest in the draft Constitution. It is also important for the Commission to extract the maximum possible benefit from the publication of its Green Paper to move towards a framework directive on SGIs, a regulation exempting certain categories from the duty to notify State aid, an evaluation of the impact of "additional costs" related to public service obligations, and the list goes on.

Last but not least, obviously a clear and watertight demarcation line must be drawn between market services of general interest and non-market services of general economic interest. SGIs must be protected, notably from arbitrary application of the principle of competition and market forces. It is not acceptable for services of general interest which currently fall outside the scope of competition rules to be subject to them in the future. Although defining services of general interest, such as education and health, is still a sensitive area, rules must be established to exclude certain sectors' activities and exempt them from the law of the market. This debate is particularly relevant in the context of the GATS negotiations, where constant vigilance will be required.

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Rita Baeten

Health care on the European political agenda

Introduction

The systems for delivering and financing health care within the European Union (EU) differ widely, reflecting cultural differences and different historical developments. Furthermore, a great deal of public money is involved in this sector. These considerations have undoubtedly contributed to the fact that Member States have always watched jealously to keep the competence on health care within their national borders, and are unwilling to transfer responsibility to the European level.

This is spelt out explicitly for the first time in the Treaty of Amsterdam: "*Community action in the field of public health shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care*" (European Union, 1997: article 152 paragraph 5: 109).

Despite this, a number of mechanisms that have been built into the European construction process mean that various aspects of health care systems do end up on the European agenda.

Firstly, certain segments of health care systems form important economic sub-markets in themselves. We need only think of the market for medicinal products, or medical devices, or private health insurance. Health sector staff also form a major labour market. The aim of the European construction process is to create a single large internal market, and to remove possible obstacles to the free movement of persons, goods and services. The market segments we are dealing with here come under the European rules on freedom of movement. In the

process of creating the internal market, therefore, quite a lot of European rules have been established with the aim of guaranteeing free movement of medicines, health professionals, insurance policies etc.

But although it was clear from the outset that the rules of the European single market would apply to certain segments of the health sector, the European Treaties are also progressively being declared applicable to other aspects of public health care systems. This has happened as a result of judgements of the European Court of Justice, whereby for example the European rules relating to the freedom to provide services are deemed to apply to the delivery of health care, as do aspects of European competition law under certain circumstances. It was not the intention, when the European Treaty was drawn up, that these general rules should apply to the health sector, and the Treaty provisions therefore take no account of the specific nature of this sector. Several judgements of the European Court of Justice are therefore creating considerable uncertainty in Member States.

Furthermore, spending on health care represents a major share of government and social security expenditure. Most Member States are having problems keeping this expenditure under control. Technological and demographic developments, and the internal dynamics of health care systems, mean that expenditure on health care in many Member States is increasing rapidly. It is therefore understandable that this sector, in the light of budgetary restrictions imposed at the behest of European Monetary Union, is coming under close scrutiny from the competent European institutions. There is also a growing need for Member States to learn from one another what policy instruments are actually feasible, in order to use the available budgets in the most efficient way.

Finally, the EU has some explicit areas of competence in the field of public health, complementing national policies to improve public health, prevent human illness and disease, and obviate scourges which endanger human health. To this end the Community can encourage co-operation between Member States, adopt incentive measures and make recommendations. Initiatives taken by the EU in the field of public health often include actions related to health care, since health care

services are one of the links in the chain to improve public health and to prevent human illness and disease.

These factors mean that health care is increasingly becoming a subject on the European political agenda.

In this chapter, the most significant developments since the end of 2001 will be discussed and placed in a broader context. The description of developments in 2002 will start in December 2001, as important processes that were ongoing in 2002 were launched or accelerated at that time.

Three parallel but intertwined processes will be analysed: first of all the process on patient mobility and the impact of the internal market on health care; secondly the integration of health care and care for the elderly into the process of modernising social protection and finally the launch of the public health strategy and the related action programme in the field of public health. These processes gathered momentum in a remarkable way in the course of 2002.

EU policies to create the internal market which relate to health care, although extremely important for national health care systems, are not the focus of this chapter. For this reason, developments concerning e.g. pharmaceutical legislation, qualifications of health care professionals or health-related websites, etc. will not be discussed.

1. Patient mobility and the impact of the internal market on health care systems

1.1 Background

We referred in the introduction to the rulings of the European Court of Justice in which rules relating to the freedom to provide services were declared applicable to the delivery of medical care. The judgements that have received most attention in this context are the Kohll and Decker

judgements of 1998 ([1]). These were followed in 2001 by the Geraets-Smits and Peerbooms judgement ([2]). On the basis of these rulings, systems for funding the provision of medical care, regulated by national governments, may not discriminate against foreign care providers. Obstacles to the free provision of services may be imposed if it is necessary to guarantee the financial balance of the social security system, or to maintain a broad range of health care services accessible to all. These restrictions must however be based on objective criteria.

Before the judgements, access to health care beyond national borders was organised by EU Regulation 1408/71 (Council of the European Union, 1996) and was limited to specific circumstances. Patients were only allowed to go abroad for programmed care, after receiving authorisation from the financing institution to which they were affiliated. In most EU countries such an authorisation was only given in very specific situations, particularly when adequate or equivalent care was not available within a reasonable period in their own country. The tariffs and rates of reimbursement applied were those of the country where the care was delivered.

Following the judgements, patients may, provided there are no justified obstacles, travel abroad directly for purposes of medical care, without prior authorisation, pay the full cost of their care, and subsequently request reimbursement of the costs from the institution to which they are affiliated, at the rate of reimbursement which applies in the country where they are covered for the costs of medical care. It also means that health care financing systems have to formalise their relations with foreign health care services (and product suppliers) in the same way,

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1 Case C-158/96, Raymond Kohll *v.* Union des caisses de maladie, Judgement of 28 April 1998; Case C-120/95, Nicolas Decker *v.* Caisse de maladie des employés privés, Judgement of 28 April 1998.

2 Case C-157/99, B.S.M. Geraets-Smits v. Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v. Stichting CZ Groep Zorgverzekeringen, Judgement of 12 July 2001. These judgements have been discussed extensively in the 2001 issue of this series (Ghailani, 2002).

and on the same conditions, as they do with their national health care providers, without discrimination (Palm *et al.*, 2000).

The judgements thus opened up a second way of receiving reimbursement for care received abroad. Because of this, they caused a great deal of commotion in the Member States, and much uncertainty about the consequences of the rulings and how they should be transposed into national regulations. The Court rules on the basis of specific cases that are brought before it. The principles that underlie its judgements, however, have to be applied in all Member States. It is for Member States themselves to investigate how these principles apply to their own national situation.

Many questions remained unanswered, and a great lack of clarity persisted, about the way in which these judgements had to be applied to the various types of health care systems, about the kind of care, in each of the systems, for which restrictions might be justified, about the time within which a system must be able to deliver care, etc. Member States feared that they would lose control over the number of patients who would seek health care abroad, and consequently over the extra expense that this might cause. But more importantly, they feared the consequences the rulings could have on the internal organisation of their systems, on the way access to health care is structured, on the national mechanism for quality control or financial control, and also on the accessibility of care for the whole population (Palm *et al.*, 2000).

Awareness was also raised about the impact EU law may have on national health care systems. Member States had been careful to keep competence for health care within their national borders and, for understandable reasons, had never accepted European interference. But now they were confronted with the fact that the EU law that was established to create the internal market, indirectly had an impact on their national health care systems. Not only the rules on free movement of services, but also EU competition law and EU law on the free movement of products and persons could possibly be applied to their national systems.

The need for political reaction at EU level grew slowly, and the political developments concerning the impact of the EU internal market rules on health care systems have gained momentum since the end of 2001.

1.2 Developments since the end of 2001

1.2.1 Conference of the Belgian Presidency on the impact of EU integration on the social nature of health care systems and Presidency conclusions of the Laeken Summit

In December 2001 the Belgian presidency of the European Union organised a conference on the impact of the European integration and the single market on the social nature of national health care systems ([3]). The aim of this conference was to pave the way for a policy debate on these issues for the next presidencies. The conference was prepared by a scientific conference report, giving a comprehensive overview and thorough analysis of the impact of EU law on national health care systems, and on the mechanisms governing solidarity, equity and accessibility in the systems (Mossialos *et al.*, 2001). The conference discussed issues related to the free movement of products, including pharmaceutical products and medical devices; free movement of services, including patient mobility and cross-border care; free movement of health professionals; and competition law, state aid, complementary health insurance and public procurement. The conference discussed the issues at stake with the managers in the health care sector, public authorities responsible for health care delivery and financing, and national and international stakeholders. The scientific conference report concluded that, if the European social model is not to be undermined inadvertently by the inappropriate application of EU law designed to meet needs in other sectors, or a piecemeal series of CJEC judgements on health care, it will be necessary to agree on a statement of fundamental principles of general interest that enshrine the goals of European health systems, that balance the internal market with social goals, and that can be incorporated into a future Treaty. The

[3] "European Integration and National Health Care Systems, A Challenge for Social Policy", Ghent, 7-8 December 2001.

conference also pleaded for a system of open co-ordination, to learn form the experience of others, while taking account of national circumstances. According to the conference a form of European co-operation could make some of the challenges posed by the internal market for health care systems more explicit. The conference resulted in the publication of two books containing the scientific preparatory documents, refined after the conference (Mossialos and McKee, 2002 and McKee *et al.*, 2002).

Drawing on the dynamic created by this conference, the European Council of Laeken of 14-15 December 2001 stated in its conclusions: "Particular attention will have to be given to the impact of European integration on Member States' health care systems" (European Council, 2001: 9).

1.2.2 Report of the High Level Committee on Health on the internal market and health services

In a parallel action, the High Level Committee on Health drafted a report on the impact of the internal market on health services. This Committee is an advisory body of the Commission's Directorate General for Health and Consumer Protection, composed of civil servants from the Member States. The Committee received in 1999 a mandate to analyse the consequences of the CJEC rulings and the impact of Community provisions on health systems, following a request from some Member States in the health Council to discuss the consequences of the Kohll and Decker judgements in political terms. The report was presented by Commissioner Byrne on 17 December 2001 (CEC, 2001a).

The report pleads for the development of a proactive and broader health policy, taking full account of the interests of patients and health services. It states that until this happens, Community measures which impact on health will continue to be largely influenced and dominated by economic considerations and factors and not by health policy interests. The report pleads for key policy areas, hitherto regulated in an internal market context, including health care issues, to be brought into a health policy framework. It recommends integrating health into

general Community strategies such as the "Lisbon process" and applying the open method of co-ordination, by defining targets and objectives at European level, defining quantitative and qualitative indicators and benchmarks, and monitoring, analysing and evaluating the achievements in the Member States. It concludes that there may well be a need to consider a reformulation of the EU's competence in health, with the objective of moving all related health powers into one Treaty Article as a means of further clarifying roles and responsibilities.

Commissioner Byrne launched the report under an accelerated procedure ([4]), probably in an attempt to take the lead in the policy debate on the issue of patient mobility and the impact of the internal market on health care, rather than leaving it to the Directorate General for Employment and Social Affairs. In so doing, he probably also tried to influence the scope of the initiative the Spanish presidency intended to take on patient mobility (see below). Commissioner Byrne had already demonstrated on several occasions his sensitivity to the problems caused by the impact of the internal market on health care, and he probably wished to put the Spanish initiative into this broader context.

1.2.3 High level process on patient mobility

The Spanish presidency of the European Union, in the first half of 2002, put the issue of patient mobility on the political agenda. In February 2002 they organised an informal meeting of the ministers of health on this subject. Worth mentioning from the outcome of this meeting is the phrase: "*Doing nothing is not a viable option. Health care policy should be directed by politicians, and it does not seem that allowing the Courts to draw up health care policy is the proper thing to do for the health of patients in Europe*" ([5]).

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4 The report was launched without awaiting final formal approval, which was put on the agenda of the High Level Committee on Health in the spring of 2002. Instead, the members were asked for their agreement on the draft report in a written procedure.

5 Meeting of Health ministers, Summary, Málaga (Spain), 8 February 2002.

Four topics were selected for further discussion:

- highly specialised reference centres;
- sharing spare capacity with patients on waiting lists from other countries;
- facilitating care in the neighbouring country for those living near a border;
- providing care for persons who set up residence for long periods of time in another country.

It was mainly this last topic on care for persons with long term residence in another country that drove the Spanish to put the subject of patient mobility on the political agenda. Large groups of European pensioners reside in the Spanish coastal regions. The compensation that Spain receives from the Member States these patients come from, for the care they obtain in Spain, is paid to the central government in Madrid (Busse *et al.*, 2002: 97). The local health authorities in the coastal regions are not really paid for their extra workload and costs.

An expert meeting with representatives from the Member States in Mahon (Minorca) in May 2002 discussed the topic further, in order to prepare Council conclusions. The Council of ministers of Health of June 26th 2002 approved these Conclusions on patient mobility and health care in the Internal Market. The Council recognised that the health care systems in the European Union share common principles of solidarity, equity and universality, despite their diversity. It also recognised the emerging interaction between health systems within the European Union, particularly as a result of the free movement of citizens, and their desire to have access to high quality health services. It recognised that developments such as those relating to the single market have an impact on health systems, and are concerned that these should be consistent with the Member States' health policy objectives, and the common principles of the systems. It recognised the importance of co-operation and bilateral or regional arrangements, inter alia to examine the benefit of reference centres, and considered that there is a need to strengthen co-operation in order to promote the greatest opportunities for access to health care of high quality while

maintaining the financial sustainability of healthcare systems in the European Union. To this end the Council Conclusions invited the Commission to launch a "high level process of reflection", which should aim at developing timely conclusions for possible further action.

The launch of this process is an important step, taking into account the resistance of the Member States towards discussing health care issues in the European institutions. The awareness that Europe is entering the national health care systems by the back door of the internal market undoubtedly explains this development. However, some aversion remains, and this becomes clear when it comes to formalising the discussion. The proposal to investigate the possibility of applying the Open Method of Co-ordination in this high level process (6) was not accepted in the conclusions. Neither was the creation of a formal Committee to underpin the health Council. With the term "process" the intergovernmental aspect was stressed, rather than the supra-governmental approach.

Important in these conclusions is the fact that the issue is not limited to patient mobility, but that the issue of patient mobility is placed in the broader context of the impact of European economic rules on health care services.

There was an unexpectedly great amount of interest from Member States in participating in the informal process once it had been launched. All 15 ministers invited expressed their willingness to take part – Luxembourg only in an administrative sense. Additionally, some key stakeholders (representatives of health care professionals, health care services, patients and health insurers) are taking part in the discussions. The intention is to discuss the interim results of the reflection process in the Council of ministers of health and social affairs, the High Level Committee on Health mentioned above and the European Health Forum (7).

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6 For Open Method of Co-ordination: see next section.

7 An information and consultation mechanism, created by DG Health and Consumer Protection in 2001, in the context of the public health strategy, involving stakeholders in the health field.

Four main themes were selected for discussion in different working groups:

- European-wide co-operation to enable better use of resources;
- Information requirements for patients, professionals and policy-makers;
- Access to and quality of care;
- Reconciling national health policy with European obligations.

This fourth group would raise issues such as the impact of Treaty obligations on health systems; balancing free movement with planning of services; improving legal certainty for health services within the framework of EU law; and any need for new institutions or structures. These topics are clearly more sensitive for the Member States, as they raise fundamental questions about how Member States would, could, and should apply the internal market rules to their health care systems. The reflection process on the concrete impact of CJEC rulings on national systems is not at an equally advanced stage in all countries, nor among all the players within the countries. There has therefore been some resistance to the creation of this fourth working group, but it has finally been decided to maintain it.

The first meeting of the high-level reflection process has been postponed several times, delaying the process by several months. Final conclusions are expected for the end of 2003. The delay in starting the process is partly due to the unexpectedly great response to the initiative. However, it also reflects once more the reluctance of several Member States to discuss health care issues at European level, and the fear that the EU will interfere too much in their national systems. The great interest shown by ministers in participating in this informal discussion forum might also reflect this fear that issues would be discussed beyond their control, rather than reflecting their willingness to take EU initiatives on this subject.

1.2.4 Simplifying Regulation 1408/71

In 1998, the Commission presented to the Council a proposal for a Regulation on coordination of social security systems (CEC, 1998) This proposal was aimed at modernising and simplifying Regulation (EEC)

No.1408/71 concerning the application of social security regimes to workers moving within the Community (Council of the European Union, 1996). For several years it has proved impossible to reach agreement within the Council on this issue, due to the requirement of unanimity. During the Belgian Presidency (second half of 2001), parameters for the modernisation of Regulation 1408/71, with basic options for modifying the regulation, were adopted by the Council (Council of the European Union, 2001). With regard to patient mobility, this agreement stated that it would be advisable to examine the implications of the CJEC case law on regulation 1408/71. In 2002, the Council started the discussion and reached a consensus on several chapters of the regulation, incorporating the agreement on the Parameters. This consensus includes the provisions on sickness, and relaxes slightly the provisions on the possibilities for cross-border care. This relaxation consists of:

- Authorisation for treatment outside the State of residence must be accorded when the treatment cannot be given in the Member State where the person resides within a time-limit which is medically justifiable, taking account of his/her current state of health and the probable course of the illness. This provision adds a medical criterion to the wording "undue delay" that is stipulated in the current Regulation. The addition of this medical criterion is a direct response to the Smits/Peerbooms judgement (see footnote 2).
- During a temporary stay in another Member State, insured persons are entitled to medical treatments which become medically necessary during their stay, taking into account the nature of the benefits and the expected length of stay. This provision replaces the current wording, which only allows immediately necessary care during a temporary stay in a Member State, other than the state of affiliation. This provision opens e.g. the possibility of treatment of chronic diseases during a stay abroad.
- Possibility of creating access to cross-border care for the members of the family of a frontier worker and some relaxation of access to cross-border care for retired frontier workers.

These proposals for changes were discussed at length in the Council working group and endorsed by the Council of December 3rd 2002. Final approval was, however, made dependent on agreement to the whole of the Regulation. The aim is to reach a global agreement within the Council by the end of 2003, after which the proposal will have to be sent to the Parliament.

Although these provisions offer some relaxation in the access to cross-border care, they do not really answer the questions posed by the CJEC judgements.

1.2.5 European Health Insurance Card

Finally we want to mention an initiative that might also encourage patient mobility. In the framework of a European action plan on competition, and in order to promote the mobility of workers by removing the obstacles that hinder this mobility (CEC, 2002a), the European Commission proposed to create a European health insurance card. This electronic card would replace the existing forms necessary for receiving health care abroad (in a first phase, form E 111 for travelling abroad). The intention is to cut down on paperwork and provide proof of entitlement to healthcare and appropriate national reimbursement throughout the EU. In this way it will simplify the procedures, rather than create new rights. It will not contain any health record. The Commission is to prepare a concrete proposal for the Spring 2003 European Council.

2. Integration of health care in the process for modernising social protection and in the co-ordination of macro-economic policies

2.1 Background

Relatively independently from the policy process which was launched concerning patient mobility and the impact of the internal market on health care systems, health care issues were also discussed during the same period at EU level as a result of the EU process aimed at modernising social protection. This is an initiative of the social players at EU level (the Council, in its Social Affairs formation, and DG

Employment and Social Affairs), unlike the initiative on patient mobility, which was initiated by the public health players.

The social protection process entered a new phase with the 1999 Commission Communication on "a concerted strategy for modernising social protection" (CEC, 1999). This Communication was based on four axes: making work pay; action against poverty and social inclusion; ensuring the future of pensions and ensuring high quality and sustainable health care throughout Europe.

The Lisbon European Council in March 2000 confirmed the four axes of the Communication. In order to achieve these aims, co-operation between Member States is to be strengthened by exchanging experiences and disseminating best policy practices. To implement this strategy the Lisbon Council introduced the open method of co-ordination (OMC) (European Council, 2000). This method involves fixing European-level common objectives in a given policy area and setting guidelines to achieve these objectives; establishing qualitative and quantitative benchmarks and indicators as a means to compare best practices; translating the guidelines into national and regional action plans by setting specific targets, and periodic evaluation as a mutual learning process. The development of organised and reciprocal learning processes to cope with a rapidly changing world, while respecting national diversity, is at the heart of the method (de la Porte *et al.*, 2001). A Social Protection Committee with high-level civil servants from the Member States was created to activate this social protection strategy.

The process on health care started with a mandate of the Göteborg European Council, in June 2001 that called on the Council to prepare a report on health care and care for the elderly, to be integrated into the Broad Economic Policy Guidelines. This report should be formulated in conformity with the open method of co-ordination and on the basis of a Joint Report of the Social Protection Committee and the Economic Policy Committee.

In October 2001, the Economic Policy Committee, at the request of the Ecofin Council, presented a report on the budgetary impact of the ageing of the population on public spending on pensions, health and

long-term care for the elderly (EPC, 2001). It includes financial projections up to the year 2050. The report illustrates the complexity of the link between ageing and expenditure on health and long-term care. Not only demographic changes, but also demand and supply factors influence the prognoses. Furthermore, the need for care depends not only on the age of the population, but also on the health status of elderly persons, which in turn depends on developments in medical science. Finally the need for formal care services depends on developments in labour market participation, particularly among females. The report concludes that, with the exception of a few Member States, increases in expenditure due to demographic factors in the more traditional health care sector will not be very large. On the other hand, increases in spending on long-term care over the projection period could, in several Member States, be dramatic.

The inclusion of health care in the social protection strategy is not surprising. The health care sector represents an important share of public spending. Member States are all confronted with the same kind of problems when it comes to controlling health care expenditure. This is due not only, or maybe not in the first place, to the ageing of the population, but also to technological developments in this sector, the rising expectation of the population and the internal dynamics of the systems. Controlling health care expenditure has therefore become an issue in the European co-ordination of macro-economic policies, in order to ensure the long-term sustainability of public finances. The Broad Economic Policy Guidelines (BEPGs) encourage Member States, year after year, to review health care systems in order to increase efficiency and take account of the ageing of the population.

On the other hand, national policy makers responsible for health care are extremely reluctant to discuss health care topics at European level. The awareness, however, that the European financial organs (the Ecofin Council advised by the Economic Policy Committee) would tackle the issue of health care anyway – from a purely budgetary angle – led those responsible for health care policy to agree, however reluctantly, to discuss health care issues at European level. Their concern is to add issues of quality and accessibility to this budgetary

approach. Other factors also influenced the acceptance of a European process on health care. Member States feel the need to learn from each other about the type of measures that can be effective in controlling spending while maintaining accessible care of high quality. The growing awareness of the impact of the EU single market rules on health care, as described in the previous section, also helped stimulate this process.

2.2 Developments since the end of 2001

2.2.1 Commission Communication on the future of health care and care for the elderly

To feed the debate of the Social protection Committee and the Economic Policy Committee, the Commission adopted on December 5th 2001 a Communication on the future of health care and care for the elderly (CEC, 2001b). This Communication gives an analysis of the challenges posed by the impact of demographic ageing, by the growth of new technologies and treatments, and by improved well being and standard of living on health care systems and expenditure. It identifies three common objectives for European health care systems:

- *Guarantee access for all to health care of good quality*. In this context reference is made to the process of co-ordination in the field of social exclusion and access to health care for disadvantaged groups;
- *Improve the transparency and quality of health care systems*. Here issues of cost-effectiveness of treatments and the cross-border dimension of quality are tackled. The Communication stipulates that the quality issue is made particularly complex by the diversity of patterns of provision of health care in the EU and the heterogeneity of medical treatment. It pleads for a comparative analysis of health care systems and medical treatment, making it possible to identify "best practice" in order to improve the quality of health care systems and optimise the use of resources in the context of social protection.
- *Ensure the financial viability of health care systems*. In this context the Communication urges continuation of the reforms already introduced so that spending evolves at a viable pace. Here again, the policy paper calls for more exchanges of experience, which would make it possible to keep track of the policies introduced over several years.

The Communication concludes that it is essential that all the players in the health systems –local authorities, health care professionals, social protection bodies, supplementary insurance companies, representatives of consumers – co-operate to attain the objectives. But it warns that this is often a difficult task, given the different and sometimes conflicting interests and viewpoints of those involved.

We note that the Communication does not seek to apply the Open Method of Co-ordination in the domain of health care, but pleads rather for co-operation. It also indicates that a larger degree of co-operation, involving the stakeholders, could be necessary in this area in order to achieve the objectives.

The European Parliament approved on January 15th 2003 a Resolution on the Commission Communication (European Parliament, 2003). This Resolution considers that the Commission's Communication is a good basis for discussion.

Worth mentioning is that the Resolution:

- warns against overemphasising the goal of financial viability and a mere cost-cutting strategy in the framework of the stability pact at the expense of accessibility, quality and solidarity.
- makes a plea for the creation of an internal market in health services and products. The initial wording of this paragraph has been amended considerably in the Social affairs Commission, in order to build in guarantees for the quality, accessibility, and financial viability of the systems and not jeopardise the health policy objectives of the Member States when establishing the internal market.
- calls for the application of the OMC to health care and care for the elderly. We do not therefore find in the Parliament the same reluctance we see in the Council to apply the OMC in the field of health care.
- calls on the European Convention to include a high level of health protection as a general goal in the draft Constitution and to define health policy as an area in which competence is shared between the European Union and the Member States.

2.2.2 Initial Report in the field of health care and care for the elderly

In accordance with the conclusions of the Göteborg European Council, the Council submitted to the Barcelona European Council in March 2002 the Initial Report in the field of health care and care for the elderly, prepared by the Social Protection Committee and the Economic Policy Committee (Council of the European Union, 2002).

This report stresses the complexity of the debate on health care. It mentions the historical differences of the systems, the organisational complexity, the division of responsibilities for health care on the one hand and care services for the elderly on the other, the difficulty of identifying the key cost factors, and therefore of making long-term forecasts for expenditure. According to the report it is also more difficult to arrive at standard definitions and to state objectives for health systems, although it considers the policy challenge to be probably more urgent, driven as it is by short-term pressures.

The Council considers in the report that the three long-term objectives set out in the Communication of December 2001 – accessibility, quality and financial sustainability of systems – provide a good framework for a collective exchange of information and experiences. This exchange should focus on the objective of identifying best practice and on identifying areas where the sharing of information and discussion of common challenges at EU level would add value in terms of securing the core social objectives of care and healthcare systems while ensuring their long-term sustainability. It pleads for the establishment of incentives for users and providers to ensure longer-term financial viability of the systems, and to ensure that the cost saving potential of technological progress is fully realised in the field of health care. It argues for a wide participation of those responsible for health policy in the discussion. Possible areas for an exchange of views are, according to the report, the provision of health care, health care quality, medical training and practice, licensing and accreditation and patient rights, and it refers to the opportunities in this field offered by the EC Public Health Action Programme. Perversely, the Council, one year earlier, had failed to endorse almost all the actions related to health care systems in

this Action Programme (see next section). The issues of the impact of European integration on health care systems are, in the final version of the report, and contrary to earlier versions, referred entirely to the Spanish initiative discussed in the previous section on patient mobility and the Health Council.

For 2002-2003 the Council proposes to concentrate on information gathering and exploring the possibilities for mutual learning and co-operation. This work should concentrate on the provision of health and long-term care for the elderly.

The report remains very cautious when it comes to proposing EU-level co-ordination in the field of health care. Even the term "co-operation" seems too sensitive, and becomes "co-operative exchange" on the basis of the responses.

The focus on the care for the elderly reflects the ambiguity of the process, trying to maintain the demographic changes (and their impact on public finances) as the starting point for the discussions. The limitation of the scope for the first year to care for the elderly is, however, quite theoretical and artificial, as most of the health care services (GPs, hospitals, …) are accessible to the whole population, irrespective of age, although the real use of the services might be age-related. Therefore, an analysis of the quality and accessibility of health care services for the elderly will automatically lead to an assessment of health care services in general. For long-term care, a focus on care for the elderly seems more relevant, as in most countries specific care services and institutions for older people exist (nursing homes, home care).

2.2.3 Questionnaire and Joint Report

In response to this report, the European Council of Barcelona, in March 2002, invited the Commission and the Council to examine more thoroughly the questions of accessibility, quality and financial viability in time for the spring 2003 European Council (European Council, 2002). A questionnaire to elicit information on health and long-term care for the elderly was sent by the Social Protection Committee to the Member States in April 2002. The Commission launched on January 3rd 2003 a

proposal for a Joint Report, based on the responses of the Member States to the questionnaire (CEC, 2002b). By publishing this draft Joint Report in the form of a formal Commission Communication, while it still has to be negotiated in the Social Protection Committee and the Economic Policy Committee, the Commission is trying to get a grip on this process which is, at least formally, rather dominated by the Member States and the Council.

The proposal for a Joint Report raises issues about co-operation in the field of quality of service delivery, particularly from the perspective of greater cross-border mobility of patients and of enlargement, and also about efficiency and cost effectiveness. The draft concludes that co-operative exchanges should continue. It seeks to focus particularly on improving the information base and on indicators, and to pay particular attention to employment issues. This last issue contains aspects such as maintaining the present workforce, recruiting and training new staff, opportunities to increase European employment levels, and gender issues in the care sector. Once again, however, the draft Joint Report does not advocate applying the open method of co-ordination in the field of health care, which would mean fixing European-level common objectives and guidelines to achieve these objectives, establishing qualitative and quantitative benchmarks and indicators as a means to compare best practice, and translating the guidelines into national and regional action plans by setting specific targets and periodic evaluation as a mutual learning process.

2.2.4 Similarities and dissimilarities with other processes in the field of social protection

We can identify some similarities with the other ongoing processes in the field of modernising social protection, but also important dissimilarities (for pensions and social inclusion, see article of Caroline de la Porte in this volume; see also Pochet, 2002; Peña-Casas, 2002 and Peña-Casas and Pochet, 2001).

We find the most striking similarities with what is happening in the field of pensions. In both processes, the players involved in social policy are reactive rather than proactive when it comes to putting the issue on the

European political agenda. In both processes, events can mainly be explained by moves taking place outside the social arena per se. The social affairs and health policy-makers are reacting to developments in the economic field at EU level. The initiatives taken in the context of the co-ordination of macro-economic policies, by the Ecofin Council, approach health care and pension issues in a narrowly demographic context and in terms of their impact on public finances. Furthermore, many elements of health care, as well as some aspects of pensions, fall outside the scope of the Social Affairs and/or Health ministers, but are subject to the EU economic rules of the internal market. Some elements must comply with the rules of free competition.

Member States and ministers responsible for social affairs/health care are extremely reluctant to put the issues of health care and pensions on the European political agenda, but are put on the defensive because they do not want to have these issues discussed solely in terms of their financial sustainability. They want to add issues relating to the quality of, and access to, the systems. For this reason the health and social affairs ministers have agreed only reluctantly to discuss these issues at EU level.

Applying the Open Method of Co-ordination in these areas seems, however, extremely sensitive, and even more sensitive in the field of health care than in the field of pensions. The provision, structure and use of health services are to a large extent culturally defined, and the use of the provision is personal. This explains the large differences between the systems, and the desire of national and regional policy makers to maintain the specific characteristics of their system, adapted to the expectations of their population.

The discussion on health care issues seems much more complex than the discussion in other fields of social protection. The financial viability of health care systems does not only depend on demographic changes. Increasing expenditure is also caused by technological evolution, rising expectations of the population and the internal dynamics of the systems. The health care systems, furthermore, involve interaction between a large variety of private and public players, (public authorities, sickness funds, hospitals, health care professionals, pharmaceutical

companies etc.) all of whom influence the cost, the quality and the accessibility of the systems. Exchange of information and good practice, establishment of guidelines and standards is therefore necessary, not only between civil servants in terms of policy practice, but also e.g. between health care professionals on clinical practice. To guarantee that systems can attain their goals, these players have to be involved in policy making.

3. Public health Strategy and Action Programme in the field of public health

Based upon the EU's competence in the field of public health [8], the Commission presented in May 2000 a Communication on the Health Strategy of the European Community including a proposal for a programme of Community Action in the field of public health (CEC, 2000). The Council and the European Parliament adopted this programme on 23 September 2002 for the period 2003-2008 (European Parliament and Council of the European Union, 2002). The decision was negotiated between the parliament and the Council in a conciliation procedure. The most contentious issue was that of the budget.

The programme, which will replace eight Community action programmes currently running, has a budget of EUR 312 million over the six years. Its main strands are to:

- improve information and knowledge relating to public health;
- enhance the ability of public authorities and health systems to respond rapidly and in a co-ordinated manner to health threats;
- promote health and the prevention of disease by addressing key health issues in all policies and activities

Overall, the final version of the action programme is less structured and straightforward than the initial Commission Communication. This is probably due to the complex decision-making process under the co-

8 Based on article 152 of the Treaty establishing the European Community, which requires a high level of human health protection to be ensured.

decision procedure, with legal texts being amended piecemeal by the different players in the different EU institutions, all with their own agenda and objectives.

The initial Commission proposal contained specific objectives and actions in the field of health care. These actions included developing and operating a Community network to monitor, undertake analysis and provide advice on clinical guidelines and quality and good practice in health care interventions, and to present reviews, advice and guidelines on health technologies, health interventions and quality and good practice. It is clear that the Commission's intention was to stimulate EU-level action on comparing and assessing health care systems. All these provisions were deleted by the Member States in the Council during the first reading in the co-decision procedure in 2001. There was a great reluctance on the part of Member States to accept European interference in this domain. The Council at the time took the position that these issues should be discussed in the context of the process of social protection. It is remarkable that this same Council, one year later, pleaded, in the Initial Report in the field of health care and care for the elderly (Council of the European Union 2002, see previous section) in favour of using the possibilities offered by the Public Health Action Programme for an exchange of views on health care issues. The attitudes of Member States towards agreeing to discuss health care issues at EU level have clearly made rapid progress in the space of a year.

The European Parliament clearly did not have the same reluctance to integrate health care issues into the programme. They sought, for instance, to include among the Community's obligations that of developing a contribution to the definition of minimum quality standards applicable to health and patients' rights, but the Council took the position that quality standards and guidelines and patients' rights are areas of Member State competence (Hervey, 2002). That is why, in the final text, this provision has been dropped.

The only explicit reference to health care systems is made in the action and support measure on: "*improving analysis and knowledge of the impact of health policy developments and of other Community policies and activities, such as the*

internal market as it affects health systems, in contributing to a high level of human health protection […]" (see annex, point 1.5). This is a new action, which was not mentioned in the initial Commission proposal and is probably inspired by the developments on patient mobility and the impact of the internal market on health care systems, as described earlier. Furthermore, an action has been maintained on reviewing, analysing, and supporting the exchange of experiences on health technologies.

The fact that there is no explicit reference to health care systems in the final approved texts does not mean that the Commission has no scope for action in this field. At the time of writing this article (January 2003) the work programme of the action programme has not yet been published. It seems nevertheless that the Commission intends to integrate several actions related to health care into this programme, based on the actions in the approved action programme related to public health, since public health policy covers health care issues.

Conclusion

In this chapter we have discussed several ongoing developments at European level that, while relatively independent from each other, result in health care issues being put on the European political agenda, despite the fact that the EU has no formal competence in this area. For the first time there is a wide consensus that these issues should be discussed at EU level, something which would have been unimaginable two years ago.

In each of these processes we see a complex interplay and fields of tension between several institutional players: vertically, between the Member States and the EU bodies; horizontally, between those responsible for social policies, for public health policies, for economic policies and for internal market policies. These fields of tension slow down the ongoing processes.

We have seen how the Member States, traditionally very reserved about accepting European intervention in their national health care policies, are compelled to react to situations created by the application of the principles of the single market to the national health care services, and

to react to developments in other fields, such as economic policies. The awareness that these developments do not necessary defend the interests of the national health care systems, and could become a threat to the basic social characteristics of these systems, forces them to a certain extent into an EU-level reaction. Most of the recent policy documents in the process on patient mobility and on health care within the process for modernising social protection, start by confirming that the health care systems in the European Union share common principles of solidarity, equity and universality, despite their diversity, and that these principles should be safeguarded. However, the acceptance of an EU-level discussion remains very reluctant and hesitant, and the fear of opening a box that can then never be closed remains strong. Therefore, the processes are continuously being curbed; the scope of actions, time and again, is restrained. Nonetheless, the time seems ripe for thorough discussion and a fundamental EU-level reaction to the unintended application of Treaty economic provisions to national health care systems. A political discussion on health care systems in the framework of modernising social protection and the application of the open method of co-ordination in this field seems, however, much more sensitive. The discussion in the field of health care is more complex than the discussion in other fields of social protection. The financial viability of the health care systems does not only depend on demographic changes, but increasing expenditure is also caused by technological evolution, rising expectations of the population and the internal dynamics of the systems. The health care systems, furthermore, involve interactions between a large variety of private and public players, all influencing the costs, the quality and the accessibility of the systems. Exchange of information and good practice, establishment of guidelines and standards is therefore necessary not only between civil servants in terms of policy practice, but also e.g. between health care professionals.

The Commission DGs responsible for public health and social affairs play a proactive role and are trying to stimulate and to broaden the discussions. This can be explained by their awareness of the issues at stake, but the launch of the processes also means an enlargement of

their sphere of action, and the processes can reinforce their relatively weak position towards the much more influential and powerful DGs responsible for economic policies, internal market and industry.

The role of the European Parliament is very limited in this field, and is not equal in each of the processes. The parliament is clearly open to tackling health care issues at EU level: they support EU-level initiatives on issues of quality and accessibility of health care and patient rights, and the application of the Open Method of Co-ordination.

The horizontal relationship between the actors in the economic field on the one hand, and in the social and health field on the other (DGs within the Commission, varying formations within the Council) is one of action and reaction, the position of the economic bodies being the most influential. This accounts for the process on the co-ordination of macro-economic policies and the Broad Economic Policy Guidelines. This accounts also for the EU policies on pharmaceutical products and medical devices, which we have not discussed in the context of this article. This accounts even for the positions taken by the Commission in the context of the cases before the European Court of Justice concerning the applicability of the provisions of the free movement of services to the health care services.

The relationship between the EU bodies responsible for public health on the one hand and social policy on the other hand has not always been a smooth one either. There has been some competition to claim responsibility for the different processes. This now seems to have been settled. The process on patient mobility and the impact of the internal market on health care services has become the domain of the public health players. From the outset they have been more dynamic in this field, and this now seems to be accepted. The integration of health care into the process to modernise social protection remains the domain of the social bodies. There is some co-operation and exchange between the processes, and the documents resulting from the different processes now systematically refer to each other when they address issues that are the domain of the other bodies.

We find, however, that the more concrete the issues selected to be worked on in the different processes become, the more the topics under discussion become intertwined. In each of the processes we note issues of European-wide co-operation on access and quality of care, on information requirements and patient mobility, on the impact of the internal market on health care and on health care technology assessment. Furthermore, the representatives of the Commission and the Member States who are designated to participate in the discussions on these various processes are often the same, since the same competences and experiences are needed. It is too early to anticipate where this convergence of the content and the persons participating on the processes will lead. A closer co-operation or co-ordination of the different processes seems increasingly necessary.

We have described how several documents in the ongoing processes refer to the need to integrate into the Treaty the necessary guarantees to safeguard the social nature of national health systems. The issue at stake here has been well formulated by Mossialos and McKee in a book which was issued as a result of the Belgian presidency's conference, mentioned earlier: "*The attempt by governments of EU Member States to 'ring fence' national competence in health matters through Article 152 EC (ex 129) may prove to be unwise. It may be better to recognise that health is an issue where a model of 'multi-level governance' applies in the EU context. Thus, it may be more appropriate to articulate expressly a 'non-market' basis for health care along the lines of social solidarity and universality at both national and EU levels*" (Mossialos and McKee, 2002: 72).

Or by minister Vandenbroucke in the paper he presented at the Max Planck Institute in Cologne: *"Member States have lost more control over national welfare policies in the face of pressures from integrated markets than the EU has de facto gained in transferred authority, substantial though the latter may be. Thus there is a growing gap in our steering capacity with regard to welfare policy"* (Vandenbroucke, 2002: 7).

The debate on the incorporation of the necessary safeguards into the Treaty has gained momentum thanks to the Convention on the future of Europe.

The main stakeholders, the European Trade Union Confederation (ETUC, 2002) and the representatives of the health care sector in the European Union Health Policy Forum ([9]) urged the Convention to include in the future Treaty the fundamental human right to health as stated in the Charter of Fundamental Rights of the EU, and safeguards for accessible health care of high quality organised on the basis of solidarity.

In a response, the working group "Social Europe" of the European Convention recommends adding solidarity as a basic value in the Future Constitutional Treaty, and a horizontal clause to safeguard the social objectives of the Union, including a high degree of social protection, a high level of public health, efficient and high quality social services and services of general interest as equivalent, and not subordinate, to economic objectives (European Convention, 2003) ([10]).

Given these developments, we can expect that health care will be at the centre of the social debate at EU level in 2003.

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9 A Healthy Constitution for Europe, declaration signed by the members of the European Union Health Policy Forum, including all the main European umbrella organizations of social health care insurers, consumer organisations, patient organisations, hospitals, health care provider organisations, health care professional organisations, public health organisations, public service unions.

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Christophe Degryse

Cross-industry social dialogue in 2002: a testing year

Introduction

After three years in which the European cross-industry social dialogue had to some extent run out of steam (1), 2002 appeared to be a test period. Would the European social partners (2) manage to regain the upper hand, and prove to the European institutions their ability to deploy fresh reserves of energy? This apparently is what they set out to do, with three significant results, symbolically at least: the signing of a voluntary agreement on telework, the presentation of a joint multi-annual work programme, and the launch of a new form of "open method of co-ordination" applied to the social dialogue in the field of skills and qualifications. Later in this article we shall analyse the content of these three results achieved in 2002 – and of the developments taking place in other areas such as restructuring, portability of

1 See the 2000 and 2001 editions of *Social Developments in the European Union*: the employers' refusal to negotiate a framework agreement on information and consultation of workers in national undertakings, and the failure of negotiations on temporary work, had tended to "weigh down" the thrust of collective bargaining in the last two years.

2 The European Trade Union Confederation (ETUC), the Union of Industrial and Employer's Confederations of Europe (UNICE), the European Union of Crafts, Trades and Small and Medium-sized Enterprises (UEAPME), and the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP).

supplementary pension rights, lifelong development of competencies and qualifications, etc. – but first it may be helpful to sketch out briefly some of the more political and/or economic factors which provide the context for today's social dialogue.

Increased recognition and the desire for autonomy

Some important developments can indeed be noted. Following the European Commission's Communication on the future of the social dialogue, we have to emphasise that this dialogue is now at a crossroads. Its role is better recognised by the Community institutions as a player in the Lisbon strategy (in those aspects relating to "economic and social modernisation" ([3]), and at the same time as an element in democratic governance, as defined by the European Commission. The Heads of State and government, at their spring summit in Barcelona, emphasised in particular "*the need to strengthen the role of the social partners in modernising the organisation of work, improving its quality, vocational training and access to and durability of employment.*" (European Council, 2002: 46). And they went on to say: "*The social partners share responsibility for finding a balance between flexibility and security in employment and making it possible for enterprises to be adaptable. They must above all play the principal role in anticipating and managing change and achieving the balance which will safeguard the way enterprises operate as well as the interests of workers*" (European Council, 2002: 46).

This recognition does not, however, extend to inviting the social partners to become involved in drafting the policy guidelines related to the Lisbon objectives. In particular, it will be recalled that the social

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[3] The following are mentioned: preparation for entry to the knowledge-based society by recognising the key role of lifelong learning and skill acquisition; integration of professional mobility and career paths into the debate on working conditions; active ageing; promotion of equal opportunities; taking account of employment and more open access to the labour market; promotion of sustainable development; integration of the issue of quality as an overall performance factor both in terms of work organisation and in terms of health and safety, or indeed worker involvement, or negotiations on anticipated changes.

partners were not consulted in advance of Barcelona on the Ecofin report dealing with the macro-economic component in the policy mix, nor on the Commission's document on environmental issues (sustainable development). Although the ETUC's Executive Committee, on 12 March 2002, reiterated its commitment to the European social dialogue, it nonetheless gave a firm reminder that "*this cannot exempt the Commission from its responsibilities for promoting social and employment policies, all the more so where social dialogue fails to deliver results*" (ETUC, 2002a: 2).

Although, ten years after Maastricht, the social partners are now being recognised as quasi-legislative players by the Community institutions, they for their part now want to assert their autonomy in relation to those institutions, especially the Commission. We may presume that this shared desire is not the result of a similar process of reasoning in the minds of the employers and of the employees. The ETUC is in fact gambling on greater autonomy increasing the opportunities for negotiation, while retaining, as we have seen, the "weapon" of legislation if negotiations should fail. (The Commission should remain, as it were, just outside the door, ready to intervene). For the employers, autonomy seems to mean greater freedom of choice to refuse to negotiate. As we shall see more specifically in the chapter dealing with negotiations ongoing in 2002, the employers' attitude remains extremely reticent towards any European initiative, involving legislation or agreement, on the issues outstanding – be it restructuring, protection of personal data, or portability of supplementary pension rights.

The Commission, for its part, in its stated desire to promote the open method of co-ordination within the social dialogue, seems to be withdrawing more and more from its role as the initiator of legislation (in the field of social policy). The question of European works councils is a significant case in point. The Directive setting up these bodies was due for revision in 2002, but nothing has appeared. For the ETUC, this is no doubt a signal: Brussels is no longer necessarily to be seen as an ally in seeking greater socio-economic regulation in Europe. The legislative "weapon", in this situation, is unlikely to frighten the employers unduly.

Enlargement

Another factor to be borne in mind is the prospect of enlargement. Here, the gaps in the autonomous social dialogue, especially in the sectoral dialogue in Central and Eastern European countries, threaten to undermine relations between the social partners in the future enlarged Union. It was partly with this in mind that the Commission adopted its Communication on the future of the European social dialogue, which is being urged to "*broaden its practices, diversify its operational methods and use to best advantage the entire bargaining area*" (CEC, 2002a: 7).

As a contribution towards enhancing the social dialogue in Europe as it is now and in the enlarged Union, the Commission, amongst other things, announced that it would shortly be launching a study on the representative nature of cross-industry and sectoral organisations involving the social partners in countries which are applying for membership. It also called on the social partners to strengthen their co-operation, especially within industries, and to improve their internal decision-making procedures with a view to enlargement, particularly with regard to the definition of negotiating mandates and the conclusion of agreements.

Development of practices and instruments

Turning more specifically to the way in which practices are evolving within the social dialogue, here too we find ourselves at a critical juncture. As was mentioned in the previous Social Developments, the implementation of the Maastricht social policy agreement (1991), which took shape during the second half of the 1990s in the form of framework agreements intended to serve as a basis for legislation, seems today to be heading in a different direction. Even if there is as yet no actual backtracking, "legislative" framework agreements seem for the time being to have been set aside in favour of voluntary agreements whose status and follow-up mechanisms are far from being totally clear. This development goes hand in hand with the progressive implementation of the "open method of co-ordination", introduced at Lisbon, within the social dialogue. The High Level Group on the future of industrial relations ticked off a series of recommendations in 2002,

including some calling on the social partners to make use of the open method of co-ordination and to define indicators for measuring progress made in the field of quality of labour relations.

The Commission Communication referred to above points in the same direction, when it stresses that "*the use of machinery based on the open method of coordination is an extremely promising way forward*" (CEC, 2002a: 18). In the Commission's view, the social partners could implement some of the their non-regulatory agreements by identifying objectives or guidelines at European level, basing themselves on periodic national implementation reports, and carrying out a regular evaluation of progress made. With this in mind, it calls upon the social partners "*to adapt the open method of coordination to their relations in all appropriate areas; prepare monitoring reports on implementation in the Member States of these frameworks for action; introduce peer review machinery appropriate to the social dialogue*" (CEC, 2002a: 18). We shall see in the following paragraphs how the social players intend to respond to this suggestion.

In its avowed role as the "promoter" of European social dialogue, a role which moreover is attributed to it under the Treaties, we see in the mind of the Commission a certain desire – which may be legitimate – to harness this dialogue in the interests of achieving European economic objectives, in particular the objectives of Lisbon. But one question is likely to arise at some point: does this not run counter to the desire of the social partners (especially the ETUC) to conduct a more autonomous dialogue, meaning, to put it bluntly, more independent of Brussels' agenda?

In the following paragraphs we shall deal with the main agreements which were reached during the year 2002. These relate to telework, the preparation of a joint multi-annual work programme for the social partners, and lifelong development of skills and qualifications. In a second stage we shall look at negotiations which took place, or which were started, during the year on restructuring of undertakings, portability of supplementary pension rights, protection of employees' personal data, and the effects of stress on safety and health at work.

1. Agreements achieved in 2002

1.1 Framework agreement on telework

The subject of telework in Europe – its development, and ways of regulating it – has been on the agenda of the social partners for several years. As early as 1996, research was carried out by the European Foundation for the Improvement of Living and Working Conditions in order to analyse its development, its definitions and the national regulatory frameworks which had (or had not) been put in place. The trade unions for their part had appealed to the Commission to present a draft directive designed to regulate this form of flexible working. The Commission chose the collective bargaining route, and in June 2000 it launched a first phase of consultation with the social partners on the basis of Article 138(2). The second phase of consultation was initiated on 16 March 2001, a few days after the European employers had proposed negotiating a voluntary agreement on this issue [4]. On 20 September 2001 the social partners announced that they intended to open negotiations on telework. These began on 12 October 2001, and concluded on 23 May 2002, the date on which the agreement was concluded. The official signature took place on 16 July 2002.

1.1.1 A brief account of the telework situation within the EU

With the development of information technologies and networks, telework has acquired considerable momentum. According to European figures, some ten million people are affected by this form of working, whether they be paid employees working at home, self-employed workers, travelling workers who work at least ten hours a week outside their home or their principal place of work, or casual workers. Within Member States, laws, codes of conduct and/or collective agreements have been adopted in recent years in order to encourage the development of telework. The aim of European negotiations was to draft a common set of rules to operate within the broader project being pursued by the Commission, of modernising and improving labour

4 For a more complete account of the background to this, see Degryse (2002: 30ff).

relations. This was being done, in the words of the social partners themselves, "*with the aim of making undertakings productive and competitive and achieving the necessary balance between flexibility and security*" (ETUC *et al.*, 2002a: 1).

1.1.2 Content of the agreement

The agreement on telework is a "voluntary agreement". This means that unlike the previous three "framework agreements" concluded between the European social partners (parental leave, fixed-term contract work and part-time work), this agreement was not intended to serve as a basis for legislation. It will not be transposed into a directive by the Council of the EU, but will be implemented by the member organisations of the signatory parties themselves – including, in accordance with their own wishes, the member organisations in the applicant countries – following the national procedures and practices specific to management and labour ([5]). Since it is a voluntary agreement, a certain degree of leeway is granted to the national social partners to conclude agreements which adapt or complement the European agreement in order to take account of specific needs, but without reducing the general level of protection afforded to workers within the scope of the European agreement.

In essence, the text of the agreement is expressed in five pages. It is concerned first of all to define telework as "*a form of organising and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employers premises, is carried out away from those premises on a regular basis*" (ETUC *et al.*, 2002a: 2). Anyone in Europe who practises telework as defined above is

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5 Article 139 of the EC Treaty:

«*1. Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.*

2. Agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States ["voluntary agreement" – ed.] *or, in matters covered by Article 137, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission* ["framework agreement with a legislative purpose" – ed.]».

therefore covered by the agreement. According to figures supplied by the Commission, it ought to cover around 4.5 million employed teleworkers.

The agreement stipulates that telework is voluntary for the worker and the employer concerned. It may form part of the employee's initial job description, or the two parties may enter into it *voluntarily* at a later date. In either case the employer is obliged to supply the teleworker with the relevant written information (applicable collective agreements, description of the work to be performed, and also the department of the undertaking to which the teleworker is attached, etc.). Moving to telework must not affect the teleworker's employment status. It must also be reversible in those cases where it does not form part of the initial job description. Finally, in terms of their conditions of employment, teleworkers must be allowed to enjoy the same rights as comparable workers at the firm's place of business. However, specific additional agreements, either collective or individual, may be necessary in order to take account of the particular features of this form of working.

The agreement goes on to stipulate a number of rights and obligations of the parties, concerning:

- *data protection*, notably with regard to software, used and processed by the teleworker for professional purposes;
- *respect for privacy* of the teleworker if any kind of monitoring system is put in place;
- *equipment* (supply, installation, maintenance) which, as a general rule, is the responsibility of the employer – unless the teleworker uses his/her own equipment – together with communications costs, and a technical support facility;
- *health and safety*, which are the responsibility of the employer (implying access to the place of work under certain conditions);
- *organisation of work*: working time is managed by the teleworker; the workload is equivalent to that of comparable workers at the

employer's premises; measures to be taken to prevent the teleworker from being isolated from other workers in the company;

- *training*: access to training, career development opportunities and appraisal policies on an identical basis to other workers;
- *collective rights*: same trade union rights, same conditions for participating in and standing for elections to bodies representing workers as for workers at the employer's premises.

If we compare the content of this agreement with the demands generally expressed in the trade union world, we may consider that these negotiations resulted in a good agreement. The teleworker preserves his/her employment status; telework cannot be made compulsory; issues of health, safety, trade union rights, training, etc. are taken into account. We would point out that the text does not explicitly mention the question of reimbursement to cover costs such as the teleworker's heating and electricity. These may however, under certain conditions, be considered as forming part of the costs directly linked to this form of work, and be subject to compensation (so they are not automatically excluded).

Apart from that, the crucial question now is how the agreement is to be implemented, and to what extent its provisions will be strictly observed. As we have seen, this is a voluntary agreement. Its implementation is a matter for the members of the signatory parties, i.e. the organisations affiliated to UNICE/UEAPME, CEEP and the ETUC. It will be carried out "*in accordance with the procedures and practices specific to management and labour in the Member States*" (ETUC *et al.*, 2002a: 3) within a period of three years (16 July 2005). As for monitoring and follow-up, the text specifies that: "*Member organisations will report on the implementation of this agreement to an ad hoc group set up by the signatory parties, under the responsibility of the social dialogue committee. This ad hoc group will prepare a joint report on the actions of implementation taken. This report will be prepared within four years after the date of signature of this agreement. […] The signatory parties shall review the agreement five years after the date of signature if requested by one of the signatory parties*" (ETUC *et al.*, 2002a: 4).

Monitoring the follow-up to this agreement is an essential aspect of negotiations, because it involves "testing" the truly operational nature of this new model of voluntary agreement. In the case of framework agreements this was less of an issue, since once they had been transposed into a directive, scrutiny by the courts became mandatory. In this instance, the social partners at national level have a fundamental responsibility to ensure proper application of the provisions. This, incidentally, has led an informed observer to remark that, for once, national management and labour organisations will be fully involved in the dynamics of this process – something which, in her view, can only be positive. "*This fact*", declared Anna Diamantopolou, the Commissioner responsible for Employment and Social Affairs, somewhat pompously, "*marks the advent of the era of European social dialogue*". Granted. But it remains the case that this mode of implementation is still to a large extent a "gamble" on the ability and good will of national confederations to transpose the agreement into their own practices. There is a risk that monitoring compliance with the provisions of the agreement may be very piecemeal, especially in the applicant countries in Central and Eastern Europe. There is also the fear that the agreement may not be implemented at national level, or may not cover all workers. If either of these situations occurs, will it be possible to rely on the agreement in court? Opinion is divided. Some people believe that, because the possibility of concluding such agreements is there for all to see in Article 139 of the Treaty – which lays down the obligation to implement them – they will form part and parcel of the *acquis communautaire*. Other emphasise the lack of any real judicial scrutiny, because the agreements are not a legislative act. The real test will no doubt come through the case law of the Court of Justice of the European Communities, if an action for non-compliance with the provisions of the agreement were to be brought before a national court, and referred to EU level. The ETUC's position is that the European Court will confirm that this type of agreement is included in the *acquis communautaire*, thus making it legally binding.

1.2 Work programme of the social partners

The work programme of the European social partners, which was foreshadowed in their joint declaration to the Laeken European Council in December 2001, was beyond doubt one of the key points in the social dialogue in 2002 (ETUC *et al.*, 2002b). It is in fact a real innovation, since for the first time the social partners have decided, autonomously, to take matters into their own hands. Until now, the agenda for the European social dialogue had always been drawn up under the oversight of the Commission. Under the terms of the Social Policy Agreement signed in 1991 and incorporated into the Maastricht Treaty, it is the Commission which proposes consultation to the social partners on themes which it chooses, based on its own legislative programme. The Commission therefore remains in control. Hence the importance attached to the definition of an autonomous joint programme by the ETUC, CEEP and UNICE/UEAPME. Having such a programme should mean that European social negotiations no longer move forward case by case, on the basis of political or "one-off" strategic agendas, or indeed of short-term economic events.

The 2002-2005 programme, which was presented on 28 November 2002 on the occasion of the social dialogue summit, fits in both with the strategic axes linked to the Lisbon strategy, and with the preparations for enlargement. Representatives of employers and employees held discussions throughout the year to identify themes of common interest. Three subjects emerged: employment, enlargement and mobility. These will be dealt with using various instruments, from European agreements to exchanges of experience, taking in opinions, recommendations, etc. (cf. table below).

Work Programme of the European Social Partners 2003-2005

1. EMPLOYMENT		
Themes	***Actions***	***Calendar***
Employment guidelines	Reports on Social Partner actions in Member States to implement employment guidelines (taking into account the cycle of 3 years)	2003-2005
Lifelong learning	Follow-up of "framework of actions" + evaluation report	2003-04-05
Stress at work	Seminar with a view to negotiating a voluntary agreement	2003
Gender equality	Seminar on equal opportunities and gender discrimination aiming at a framework of actions	2003
Restructuring	Identify orientations that could serve as a reference to assist in managing change and its social consequences on the basis of concrete cases	2003
Disability	Update of joint declaration of 1999 as a contribution for the European year on disability	2003
Young people	Promoting young people's interest in science and technology to help address the skills gap through joint declaration and/or awareness-raising campaign	2003-2005
Racism	Updating joint declaration of 1995 (with participation of candidate countries)	2004
Ageing workforce	Seminar to discuss case studies and explore possible joint actions	2004
Harassment	Seminar to explore possibility of negotiating a voluntary agreement	2004-2005
Telework	Monitoring of follow-up to framework agreement	2003-2005
Undeclared work	Seminar aiming at a joint opinion	2005

2. ENLARGEMENT		
Themes	***Actions***	***Calendar***
Industrial relations	Joint seminars on industrial relations (case studies on different ways of articulating different levels of negotiations)	2003-2005
Social dialogue	2 enlarged Social Dialogue Committees per year	2003-2005
Restructuring	Study on restructuring in candidate countries	2003-2004
Lifelong learning	Include candidate countries in follow-up to framework of actions	Seminar in 2004, inclusion in reporting 2005
Implementation of legal acquis	Joint seminar on European Works Councils	2004
EU social and employment policies after enlargement	Prospective reflection to identify issues that will arise in the EU after enlargement such as increase in diversity, migrations, transborder work, etc.	Starting in 2004
3. MOBILITY		
Themes	***Actions***	***Calendar***
Action plan on skills and mobility	Seminar to identify areas where joint actions by the social partners at EU level could help addressing obstacles to mobility (notably for managerial staff), including supplementary pensions	2003-2005

Source: ETUC *et al.*, 2002b.

When this agenda was presented, the point was made that this was not a closed-loop exercise, limiting future negotiations solely to the subjects mentioned. Obviously the Commission remains free to consult the

social partners on subjects other than those listed here. It was emphasised that nearly twenty subjects are on the agenda for the next three years.

It is also worth emphasising the kind of instruments chosen to tackle these themes. A large number of seminars, studies and joint reflections are planned; few negotiations as such. Only harassment and stress will probably form the subject of a voluntary agreement. Seminars might, ultimately, open the way to negotiations in other areas: restructuring and gender equality. There is no trace of "legislative" framework agreements in prospect.

This programme doubtless confirms the fact that social dialogue is increasingly moving in directions different from those followed in the years 1995-2000. In the words of M. de Buck (UNICE), when presenting the programme to the press, "*the legislative route has not been abandoned*". Nevertheless, one may wonder about what looks like weakness of ambition, at a time when the social partners are seeking to deploy a greater degree of institutional autonomy.

How is this turn of events to be explained? Are we to see in it the prospect of enlargement – something which is already a reality for both employers' and trade union organisations – and a concern that the initial agenda for the Europe of the 25 should not become overloaded? (6) Are we to see it as the desire to try out the autonomy already achieved, in terms of procedures and implementation, before moving on to tackle subjects which might give rise to too much divergence of opinion? It is probably a bit of both.

Let us recall that the ETUC, in its original proposals, placed greater emphasis on more binding instruments (framework agreements on restructuring, corporate social responsibility, stress, older workers, data protection, etc.). But it appears that the balance of forces was against them.

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6 We note in passing that even within the Commission, there are those who warn against expecting too much activity on the social front before 2010 …

1.3 Lifelong development of competencies and qualifications

On 14 March 2002 the social partners adopted a Framework of actions for the lifelong development of competencies and qualifications. This strategy is an attempt at a joint response to the changes brought about by the development of new information and communication technologies and the associated speeding-up of trade flows. The Framework of actions is a response to the appeal by the EU Council and the Commission for the social partners to become more involved in lifelong learning, once again as an extension of the Lisbon objectives. In formal terms the interesting thing about this text is that it is the first time the open method of co-ordination has been applied to the social dialogue.

The jointly approved text opens with the following statements: "*Markets globalise and simultaneously segment in order to retain increasingly mobile customers. Businesses will have to adapt their structures more and more quickly in order to remain competitive. The intensive use of team-work, flattening of hierarchies, devolved responsibilities, as well as greater multi-tasking are leading to the growth of learning organisations*" (ETUC *et al.*, 2002c: 1). This evolutionary process is facing businesses with a number of new challenges, including the identification and development of strategic competencies, ways of mobilising them quickly, greatly increased mobility both inside and outside firms, etc.

With this in mind, the social partners have decided to present a joint initiative to the spring European Council in Barcelona, the essential objective of which is to provide an impetus for the development of competencies and the acquisition of qualifications to be perceived as a shared interest by both enterprises and employees in each Member State. The lifelong development of competencies depends, in the view of the social partners, on the existence of a solid foundation [7], with

[7] The following elements have been identified as forming part of the solid foundation: reading, writing, numeracy and at least a second language, problem-solving ability, creativity and teamwork, computing skills, ability to communicate, including in a multi-cultural context, and the ability to learn how to learn, etc.

which individuals are equipped during their initial education. This solid foundation should be jointly defined and updated by the national education systems and the social partners.

Four priorities

The Framework of actions defines four priorities which, according to the signatories, should make possible the lifelong development of competencies. These priorities can be summarised as follows:

First, identifying and anticipating the need for competencies and qualifications. This must take place at the enterprise level (human resources, social dialogue, management, individual development plans, etc.) and at national and/or sectoral level (collective analysis of competency needs, development of vocational qualifications, with particular emphasis on young people, employees, job-seekers and companies). The Framework of actions appeals in particular for work in partnership with education and training providers.

Next, recognising and validating competencies and qualifications. To this end, employees should be encouraged to develop their competencies throughout their working life, and acquire the tools to better identify and manage existing competencies within the firm. The social partners also consider it necessary to deepen dialogue with the aim of improving transparency and transferability, both for the employee and for the enterprise, in order to facilitate geographical and occupational mobility and to increase the efficiency of labour markets.

Third priority: informing, supporting and providing guidance to both employees and enterprises on learning choices, opportunities for career evaluation, training opportunities, etc.

Finally, the Framework of actions appeals for resources to be mobilised at the level of public authorities, enterprises and employees. This can be done through taxation of enterprises and individuals, as well as via the European structural funds, including the European Social Fund.

As they did with the voluntary agreement on telework, employers and trade unions have provided for a follow-up procedure in the Framework of actions. First they have undertaken to distribute the

document to all interested players at European and national levels. Next they will apply themselves to drafting an annual report on national action undertaken in connection with the four priorities. In March 2006 they will evaluate the impact of the Framework of actions on enterprises and workers, and where appropriate, will update the priorities.

The working method utilised by the social partners is clearly related to the open method of co-operation. It consists in defining "guidelines" (the four priorities) at European level, involving the various players, especially national players (businesses, public authorities, workers, training providers, etc.) in the implementation of these guidelines, and providing for annual evaluation reports which may lead to a re-adjustment of the objectives set. Because we are here operating outside the framework of the Community institutions, there is no question of "recommendations" being formulated in case of non-compliance with the guidelines laid down, as is the case for the European employment strategy. The question is, what will be the actual scope of this Framework of actions, and to what extent the social partners' action in defining and implementing a "solid foundation" for training and qualifications is likely to raise issues of legitimacy involving other national players, particularly in the world of education. It will be noted that this action plan fits into a wider institutional process inspired by Lisbon ([8]), which gives it a certain measure of support and legitimacy in political terms.

2. Negotiations ongoing in 2002

2.1 Corporate restructuring and its social consequences

There is no doubt that corporate restructuring is a sensitive subject for European public opinion, and for workers in particular. The recent history of the internal market is littered with numerous "crises", which

[8] Cf. in particular the Council resolution of 27 June 2002 on lifelong learning (Council of the European Union, 2002), in which the role of the social partners is repeatedly stressed.

have heightened awareness of this issue amongst political and socio-economic players.

On 15 January 2002 the Commission called upon employers' and workers' organisations to become involved in a dialogue on ways of anticipating and managing the social consequences of corporate restructuring. The aim was to see whether the social partners could agree amongst themselves on a set of "principles" which would allow "*socially intelligent*" restructuring operations (in the Commission's words) to go ahead; the idea being to define a body of good practice in this area. This initiative fits into the framework of "managing change" under the Lisbon strategy (CEC, 2002b), and was approved by the Barcelona European Council [9].

The rather coy expression "managing change" refers to a harsher reality in social terms. According to EU figures, the number of restructuring operations has increased considerably in the last ten years. Between 1991 and 1999, the number of mergers and takeovers involving EU undertakings went up from around 8,200 to 12,800. Job losses associated with these "changes" amount to some hundreds of thousands (over 350,000 in 2001 alone, according to press figures which were repeated by the Commission).

Without fundamentally questioning these restructuring operations, which it sees as the price to be paid if the European economy is to remain competitive in the globalisation process (one of the Lisbon objectives), and without proposing any harmonisation of rules governing the social aspects of restructuring operations, the Commission was keen to identify four main axes which would help soften their social impact. These are as follows:

- employability and adaptability of workers;
- effectiveness and simplification of legislation and procedures;

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9 "*The European Council invites the social partners to find ways of managing corporate restructuring better through dialogue and a preventive approach; it calls on them to engage actively in an exchange of good practice in dealing with industrial restructuring*" (European Council, 2002: 8).

- external liability of employers (re-instatement of industrial sites after use, forecasting the effects of restructuring on sub-contractors and their employees);
- socially responsible implementation of restructuring decisions (adequate information for workers, fair compensation and periods of notice, machinery for resolving conflicts).

2.1.1 Position of the social partners

UNICE announced its position on the first phase of consultation on 8 March. The employers' organisation immediately stakes out the ground in terms of economic competitiveness: "*European businesses must be able to change work organisation to take advantage of new technologies and boost productivity or pursue economies of scale in order not to fall behind global competitors*" (UNICE, 2002a: 1). In UNICE's view, restructuring decisions are based on economic arguments, not on the level of social legislation, but "*social legislation should not make change difficult, as this could deter the initial decision to invest and therefore have negative effects on employment in the long term*" (UNICE, 2002a: 1). The employers highlight the fact that a "*substantial*" legislative framework already exists to deal with the social aspects of industrial restructuring, both at European level (directives on collective dismissals, transfer of undertakings, European works councils, the European limited company, and national information and consultation procedures) and at national level (national legislation and agreements between social partners). They therefore argue that "*it is essential to avoid additional regulatory constraints on businesses*" (UNICE, 2002a: 2). Putting it bluntly, the social consequences of restructuring cannot be tackled at a European level. The employers justify this position by pointing out that measures designed to minimise the negative effects of restructuring "*can only be decided at local level if they are to be targeted on the real needs of the people affected and involve them in the definition of the most suitable measures*" (UNICE, 2002a: 2). At best they say they are prepared to organise exchanges of experience on the practices adopted by firms in anticipating and managing change, in order to encourage a positive attitude to change across Europe as a whole.

The ETUC, for its part, adopted a completely different attitude. In a resolution adopted by its Executive Committee on 11 March 2002, it considers that "*a range of Community instruments – both legislative and/or contractual – are needed in order to ensure that decisions regarding corporate restructuring are based on long-term perspectives and managed in a socially acceptable manner. Such measures must include the ongoing development and improvement of minimum standards. Dialogue between social partners aimed at developing best practices on anticipating and managing restructuring, though important and welcome, is not enough. The European Commission and the Council should not abandon responsibility in this area to the social partners alone*" (ETUC, 2002b: 1). This more proactive stance is reflected, for example, in the demand that firms should be obliged to publish an annual report on changes which have an impact on employment, working conditions and the environment. The trade unions believe that regulation in this field should come about either through contractual arrangements or by means of legislation.

2.1.2 "Exploratory discussions" get under way

At the Social Affairs summit in Barcelona on 14 March 2002, Mr. Prodi encouraged the social partners to take up this issue within the social dialogue. Thus at the beginning of April discussions got under way in the hope of reaching workable conclusions within three months. On 5 July, the ETUC, UNICE and CEEP sent a letter to Mrs. Diamantopolou, the Commissioner responsible for Social Affairs, asking the Commission to suspend the second phase of consultation pending the results of a seminar arranged for the autumn to look at concrete cases "*in order to identify orientations that could serve as reference to assist in managing change and its social consequences in situations of restructuring*" ([10]).

[10] Letter sent by fax on 5 July 2002, addressed to Anna Diamantopolou, Commissioner for Employment and Social Affairs, European Commission, re: Commission consultation document on restructuring, signed by Emilio Gabaglio, Secretary General of the ETUC, Philippe de Buck, Secretary General of UNICE and Rainer Plassmann, Secretary General of CEEP.

The seminar was held on 17 and 18 October at Knokke (Belgium). It immediately became apparent that UNICE-UEAPME was being "held back" by some elements among the employers' ranks who were very much opposed to the discussions, and had virtually no room for manoeuvre. All the meeting was able to do was to look at six case studies of restructuring situations and try to draw lessons from them. It was not possible to conclude the seminar with any proposals for action or identify any orientations, as had been agreed in the joint letter to the Commission.

Apart from the objections of principle voiced by the employers, there were a number of more technical questions raised. We shall mention three: what place might there be for the European sectoral organisations in this debate (putting it the other way, can one envisage holding negotiations on restructuring without inviting representatives of the steel industry, the textile industry, etc. to take part in the discussions – which in turn raises the problem of the employers' sectoral representatives, and of co-ordinating the cross-industry and sectoral levels)? What place might there be for SMEs in such discussions (multi-national companies which are carrying out restructuring plans usually work with a large number of sub-contractors and equipment suppliers, who are the most directly affected by any changes)? How can one take account of the situation of Central and Eastern European countries in such negotiations (as we have seen, the employers' level of organisation in these countries is very piecemeal)? All of these are major difficulties which are bound to appear on the negotiating table in 2003. (The theme of restructuring does in fact feature in the joint work programme of the social partners for 2003-2005).

2.2 Portability of supplementary pension rights

Another very complicated dossier tackled by the social partners in 2002 was the portability of supplementary pension rights. On 12 June the Commission launched a first formal round of consultation of employers and employees on this subject, with the aim of encouraging occupational mobility within pension schemes, and hence facilitating mobility of workers themselves (CEC, 2002c). What is at issue here is the question of supplementary pensions, when a worker is employed in

a Member State other than his/her country of residence, or when he/she changes employers. The Commission's consultation centred around three questions: rules relating to *acquisition* and preservation of pension rights; rules concerning *transferability* of pension rights; and those relating to *cross-border membership* of pension schemes (i.e. the possibility of retaining the same pension scheme while working in another Member State).

Brussels considers this consultation justified because of the complex situation facing workers who are obliged to move from one occupational scheme to another, including within their own country (in particular, long vesting and waiting periods, and the conditions attached – minimum age, career breaks, transfer of retirement capital, taxation, etc.). It also makes the point that many Member States tend to give preference to supplementary pension schemes, in order to meet the challenge of an ageing population. For these reasons the Commission asked the social partners to express a view on the usefulness of Community action in this area, and on the form such action should take: a collective agreement, directive, recommendation, code of practice, guidelines, etc. Consultation also covered the scope of such a measure, its main features, and whether initiatives should be taken at cross-industry or at sectoral level.

2.2.1 The view of the social partners

The European Trade Union Confederation produced its opinion in September. It highlighted its request for a European regulatory framework covering financial, social and fiscal aspects linked to the implementation of occupational pension schemes. Workers moving with the EU are penalised, in the ETUC's view, because of the extremely heterogeneous nature of schemes currently in place in Member States. But it expresses immediate regret that there is no mention of participation by the social partners in the setting-up of schemes and the choice of strategic investments. Although the ETUC comes out strongly in favour of a European regulatory framework, it nevertheless insists that such a framework cannot entail any questioning of the way supplementary occupational pension schemes are organised,

but "*should be restricted to outlining some principles for implementation by the cross-sectoral or sectoral partners concerned in each Member State*" (ETUC, 2002c: 1).

In its reply, the ETUC details six aspects where difficulties have been encountered. These can be summarised as follows: access to occupational pension schemes (all workers, regardless of age, seniority and type of employment contract, should have access to an occupational pension scheme, insofar as such schemes exist in the host country), vesting periods (which should be as short as possible) and age conditions (which should be abolished), the preservation and maintenance of rights (which should be guaranteed by a directive laying down a number of principles at European level), the accrual of rights due to multiple memberships (to be settled in the sectoral social dialogue), cross-border membership and seconded workers, and finally optional transfer rights.

In conclusion, the ETUC expresses itself in favour of a European legislative text incorporating a number of standards and principles on the points mentioned above, and urges that this should be implemented either by each Member State in the case of regulatory measures, or through sectoral or cross-industry social dialogue, as appropriate. Besides those aspects which relate to consultation as such, the trade unions also insist that the Commission tackle issues relating to tax harmonisation as it applies to occupational pension schemes, the situation of migrant workers within a single country, the establishment of occupational pensions through collective bargaining and joint fund management, or management with the participation of the social partners, and the principle that guidelines on the investment of assets and technical measures managed by occupational pension institutions should take into account considerations of social responsibility.

UNICE, on the other hand, while "fully supporting" action aimed at facilitating the mobility of the workforce within the European Union, points out nevertheless that the Commission is suggesting EU measures "*that would go beyond cross-border issues and tackle the conditions for acquisition, preservation and transferability of supplementary pension rights at national level*" (UNICE, 2002b: 1). The employers' view is that any EU initiative should merely seek to eliminate barriers to freedom of movement,

without interfering in the details of how supplementary pension schemes are organised in the Member States.

Given the diversity of organisational modes and content of supplementary pension schemes in the different countries, the employers conclude that Community legislation covering the conditions for acquiring rights to a supplementary pension would be neither desirable nor achievable. "*How to tackle obstacles to portability of supplementary pension rights can only be addressed within each Member State, with the participation of all relevant actors involved (social partners, institutions for pension provision, etc.) at different levels (inter-professional, sectoral/industry or company level), depending on the type of scheme concerned*". And they warn that "*a single solution at EU level could bring about more restrictions in certain national situations and therefore employers could be discouraged from offering a supplementary pension scheme to their employees*" (UNICE, 2002b: 2). While opposed to a single type of European instrument, UNICE nevertheless declares itself in favour of exchanges of experience and information on solutions reached in Member States.

2.2.2 Second phase

The strategy adopted by the social partners on the issue of supplementary pensions is, as we see, fairly similar to that adopted on industrial restructuring. On the one hand, the trade union side is calling for a European regulatory framework, including legislative instruments designed to achieve harmonisation; on the other hand, the employers are refusing to countenance compulsory European measures, and prefer exchanges of experience and information. It will be noted that the subject of pensions as such does not figure among the items included in the work programme of the social partners for 2003-2005, but it does appear indirectly in the action plan on competencies and mobility. The Commission intends to hold a second round of consultation during the first half of 2003 before deciding whether or not any EU action should be undertaken in this field.

2.3 Data protection

In August 2001 the Commission initiated a first round of consultation with the social partners on the subject of protecting workers' personal data throughout the European Union. There are currently two

directives regulating this issue (European Parliament and Council of the European Union, 1995 and 1997), but in the Commission's assessment, their scope and the way they are applied in the workplace are not spelt out in sufficient detail. The purpose of the Commission's initiative was therefore to clarify the way in which the principles set out in these directives are to be applied at the workplace.

The second phase of consultation was launched on 31 October 2002. The Commission is proposing "*a set of principles and rules governing treatment of personal data at work in order to provide clear and comprehensive guidance to employers and workers about their rights and obligations in this field*" (CEC, 2002d: 1). The following areas are covered: worker's consent, medical data, drug testing, genetic testing, monitoring and surveillance of workers. The existence of such data may be a "*necessary and reasonable*" consequence of the employer/employee relationship, but in certain instances may also entail some risks for workers.

Reaction of the social partners

Taken as a whole, the first consultation showed that employers and employees both recognise the importance of a specifically "professional" approach to the issue of processing personal data. However, the way in which this approach is conceived differs markedly as seen by the employers or the trade unions. Points of contention are the need for additional action, the direction and content of such action, and the level at which these questions should be discussed. UNICE points out that there are already directives regulating certain aspects of data processing (the Health and Safety Directive on medical data, or Directive 95/46 which has already been mentioned); the employers also justify the use of "drug" tests, or monitoring and surveillance, on grounds of safety and/or "legitimate" reasons. The ETUC, on the other hand, considers that broadly speaking, workers are not sufficiently well protected against certain practices on the part of their employers, and urges a total ban on genetic screening, limits to be placed on medical data and testing for drug use, and a prohibition on permanent, automatic monitoring of workers.

The Commission, for its part, believes that legislation (a specific directive) could be envisaged, with a view to establishing a European framework on this issue. This might encourage the social partners to negotiate a framework agreement themselves in the course of 2003, although as we have seen, their positions differ considerably. It is worth noting that this item does not appear in the work programme of the social partners as published in late November 2002. This may, however, simply be due to the timetable being too tight, since a technical seminar on data protection was being organised for the end of 2002.

2.4 Stress at work

Finally, the Commission has also decided to launch a first phase of consultation with the social partners on the question of stress at work. This consultation got underway on 2 December, and the partners have six weeks in which to reply. For this reason we shall not deal in any more detail with this question until the 2003 edition of Social Developments. Let us however note that it is estimated that over 40 million people in the EU are affected by stress at the workplace, and that this is thought to cost Member States some 20 million euros every year. The Commission raises three questions in the consultation process: is there need for an initiative in this area? If so, does it need to be taken at Community level? If so, should this issue be tackled in the first instance by means of a non-binding instrument (as the Commission would prefer) or via a binding instrument with a joint initiative by the social partners?

Conclusion

In terms of European social relations, 2002 has been a busy year. A number of subjects have appeared on the negotiating table, some of which might be said to have had a test function. In the case of telework, the test involved the *implementation and follow-up* of this first "voluntary agreement" in European history. As we have seen, opinions still differ on how to interpret the precise scope of this agreement in legal terms. In the case of corporate restructuring, it is the *interface between the cross-industry and sectoral levels* which is the point at issue. This is a very complex subject, and the ability of the social partners to organise a form

of multiple-entry negotiation will also be put to the test in 2003. In the "Framework of actions for the development of competencies and qualifications", the *influence of the European social partners at national level* is at stake, via a new open method of co-ordination. In the joint work programme, it is their ability to *have a more autonomous negotiating agenda* in respect of the European Commission while maintaining their own momentum. There are thus plenty of challenges to improve the quality of agreements, the way they are implemented, and their degree of "independence" in institutional terms.

But there are other lessons to be learned. First, there is a persistent attitude on the part of the employers, who are proving more reluctant than ever when it comes to European measures designed to regulate the economy of the Union, whether on a legislative or a contractual basis. At the different stages of consultation conducted by the Commission, we keep meeting the same reservations in the minds of UNICE – the European level is not relevant, there is no point in considering additional measures to those that already exist – if not actual warnings, as in the case of restructuring or supplementary pension schemes. Is this the reason why UNICE is proposing exchanges of experience and information, so as not to expose itself to criticism? One might well think so. So there is a danger that this strategy may in fact serve to cover up the deficiencies of the social dialogue.

Another factor, closely linked to the previous one, is that the negotiations on restructuring are showing how the employers' side can, in some cases, be paralysed by their own internal decision-making system, a system which requires unanimity on agreements which have been negotiated ([11]). We can only emphasise the importance, in this context, of the Commission's appeal for an improvement in internal decision-making mechanisms, particularly when it comes to defining negotiating mandates and concluding agreements. If things carry on like this in the Europe of 25, it will not only be the EU Council which will be in danger of being paralysed, but the social dialogue as well.

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11 Whereas UNICE says it is in favour of qualified majority voting in the Council.

Given all this, we may perhaps wonder about the willingness of the social partners to conduct a more autonomous social dialogue. Paradoxically, this comes at a time when their work is becoming increasingly recognised by the European authorities, who make no secret of their wish to see social negotiations put to good use in implementing the Lisbon objectives. The European Council in Barcelona proved this. For the ETUC especially, this greater degree of autonomy raises the question of power relationships. So long as European trade unionism cannot provide itself with the means of exerting effective pressure to maintain the momentum of the social dialogue (rights of collective action), it will find itself at a disadvantage when faced with employers whose strength is due not so much to the consistency of their European convictions as to the shortcomings of the internal market (which allow, and indeed encourage, competition in terms of tax, social standards and wages) and the persistent liberal ideology of the European project. It is no doubt in order to avoid a dangerous stand-off that the ETUC is urging the setting-up of a "permanent secretariat" for the European social dialogue, to be maintained by the Commission and jointly managed by the social partners. The establishment of such a secretariat is one of the main trade union demands, as part of the process of establishing a truly European system of industrial relations. But, and this is the other paradox of UNICE's position when it comes to autonomy, the employers are against the idea, even though a structure of this kind seems to be essential, if only to be able to organise and plan work efficiently on a multi-annual basis.

It is therefore pretty obvious that the term "autonomy" means different things, depending on whether it is used by UNICE or the ETUC. For the former, it means essentially bringing employers and employees together face to face, with the Commission, and hence Community legislation, keeping a low profile. For the ETUC on the other hand, autonomy cannot mean that the triangular relationship of ETUC, UNICE and the Commission will disappear. The game has to be played

as a threesome, with the Commission prepared to step in should the employers prove intransigent ([12]).

One last point before concluding this article. Under the European treaties, the Commission's job is to encourage consultation with the social partners at Community level, and to take all useful measures to facilitate dialogue between them. Although the Commission has conducted several consultations in recent years, it appears that its concern to promote the open method of co-ordination and other flexible processes (cf. the racket that was made about corporate social responsibility) is not so much complementing as replacing legislative initiatives in the social field. For example, 2002 was supposed to be the year when the directive on European works councils came up for revision, but nothing has appeared. In more general terms, the Commission's social agenda for 2000-2005 mentions a number of processes to be pursued (European employment strategy, social inclusion, etc.), numerous reports and communications to be published, but very little in the way of new draft directives in the social field. Is not this lack of initiative, coupled with inertia on the part of the employers, likely to damage the dynamic development of a truly social Europe?

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The sectoral social dialogue in 2002: taking stock

Continuity, in terms of the quantitative output of the sectoral social dialogue, has been the hallmark of 2002. The productive momentum which built up in certain sectors over previous years was sustained, but there were few innovations or qualitative leaps in hitherto less active areas.

The legal framework for the sectoral dialogue derives, of course, from the same articles of the EC Treaty as the cross-industry social dialogue. Accordingly, two types of procedure govern relations between employers' and employees' organisations:

- *consultation* by the Commission, pursuant to Article 138 ([1]), on the shape of any future social policy proposal. If action is eventually decided upon, there is provision for a second round of consultation (which may entail autonomous negotiations among the social partners) on the actual substance of the proposal. This type of consultation has so far been limited to the social partners meeting under the cross-industry dialogue;
- autonomous *negotiation* of framework agreements pursuant to Article 139(2) of the Treaty, leading either to a voluntary agreement (to be implemented by member organisations at national level), or to the adoption of a Council decision, on the basis of a proposal, duly

1 Article 137 offers a list of the precise areas where the social partners may be consulted.

considered, from the Commission. Only two of the five agreements negotiated to date at sectoral level have come into effect via this legislative route (2).

The sectoral dialogue in 2002 delivered just one agreement of the kind described above – a voluntary agreement in agriculture. Other activities involving the social partners happened lower down the scale.

Let us now take a more systematic look at what has happened within the sectoral dialogue. Depending on their *intensity* and the *degree to which they are binding* on the parties, events can be divided into three broad categories, corresponding roughly to those adopted by the European Commission in its *Report on Industrial Relations* (CEC, 2002a).

- *Agreements* under Article 139 (see above) whereby employers and trade union organisations agree to *carry out a specific action programme* (with or without accompanying planning and implementation resources). Such agreements constitute the most sophisticated level of activity taking place under the sectoral social dialogue, although their voluntary nature means that practical arrangements may differ from one Member States to another. (Relevant factors here are national levels of affiliation to signatory employers' and trade union organisations and, more generally, the balance of power between organisations.) Coverage can therefore vary according to country, sector, region or category of worker (3). Agreements in the field of commerce tend to be the only ones matching the highest criteria.
- *Joint activity* involving organisations of employers and employees, but not necessarily within the framework of an agreement which is

2 These are Council Directives Nos. 99/63/EC of 21 June 1999 (European Agreement on the organisation of working time of seafarers of 30 September 1998) (Council of the European Union, 1999) and 2000/79/EC of 27 November 2000 (European Agreement on the organisation of working time of mobile workers in civil aviation of 22 March 2000) (Council of the European Union, 2000).

3 With the exception of countries where national legislation extending the scope of these agreements could be enacted.

binding on the parties. Under this heading would come codes of conduct, recommendations etc. which are passed to the public authorities at European or national level. Sectors so far involved have been: *commerce*, *banking*, *private security* and *industrial cleaning*. This type of activity may signal that the social partners wish to position themselves politically on the European stage, paving the way for future joint action. Equally, however, it may be a way of equipping national affiliates of the signatory bodies, and/or other groups affected by the activities of the sector, with a set of relatively specific and immediately useable instruments. The Commission implicitly acknowledged this in its recent Communication on the social dialogue (CEC, 2000b) in which it *called upon the social partners to restrict their use of the term "agreement" to activities falling under Article 139 of the Treaty*.

While not strictly forming part of the *social dialogue* proper (i.e. joint activity by the social partners), o*ther events* may be significant in terms of *industrial relations*, highlighting the kind of issues facing employers' and employees' organisations in the relevant sectors and providing useful indicators as to the challenges, constraints and perhaps limitations of the current sectoral social dialogue process. A number of positions were adopted in 2002; action was also taken by individual players (e.g. the European Federation of Transport Workers (ETF) in the maritime, aeronautic and railway sectors). Let us now consider these different types of activity in the light of the *strategies deployed by the players* in the social dialogue, in particular the employers. Assuming that this dialogue – and more especially its sectoral configuration – is but one instrument among many (Branch and Greenwood, 2001) available to them, the question arises as to the optimum environment for facilitating or promoting greater and more substantive employer investment in the process (in line with what has been observed in sectors such as private security provision and industrial cleaning).

1. Voluntary agreements between the social partners

A framework agreement on vocational training in the agricultural sector was signed on 5 December 2002 by the Committee of Agricultural Organisations in the European Union/General Committee for

Agricultural Co-operation in the European Union (COPA/COGECA) and the European Federation of Trade Unions in the Food, Agriculture and Tourism Sectors and allied branches (EFFAT).

One of the triggers for this was the White Paper on the same topic published in 1997. Meetings and seminars were then held in 1999 and 2000 under the auspices of the Social Dialogue Committee (SDC) for the sector, with the aim of assessing the interplay between level of qualifications, productivity and job enhancement.

Training and qualifications often arouse sensitivities in the agricultural sector. The Commission estimates that 60% of those working in agriculture score low on the education scale; and the agreement itself acknowledges that many of the competencies acquired by the bulk of employees in the sector are not backed by any specific qualification or diploma.

The main features of this agreement are:

- more systematic involvement of the social partners during the *various stages of training:* evaluation of qualifications, devising of training programmes, creation of assessment panels, trainee placements;
- facilitating free movement of workers by the use of *records of competencies*, which encourage employee self-assessment and empower individuals to make choices regarding further training. The agreement states that each employee will be entitled to a "competencies passport" containing employment references/testimonials and listing his or her particular competencies and aptitudes;
- similarly, qualifications earned within the sector will be confirmed in *reference or testimonial form* in a document describing the tasks the holder can be expected to perform;
- various measures concerning implementation and follow-up by the signatory parties (in particular, the setting up of a monitoring committee);
- an appendix to the agreement containing a model version of the agricultural worker's competencies passport, together with a glossary of terms used in the context of training and assessment.

This agreement needs to be read in the light of the trend in human resources management over the past decade towards a *competencies-oriented* evaluation of employee knowledge. It also takes account of the objectives laid down at the Lisbon summit, which advocated *investment in human resources* and heralded the advent of a *knowledge-based society* (European Council, 2000a). Another goal of the Lisbon and Feira summits was to involve the social partners in a process of *lifelong learning* (European Council, 2000b).

The cross-industry social partners in Europe have clearly taken up the challenge, reflecting upon what needs to be done and, on 28 February 2002, agreeing to a "framework of actions for the lifelong development of competencies and qualifications" (see article by Christophe Degryse in this volume) (ETUC *et al., 2002).*

According to internal Commission sources, moreover [4], negotiations among the same parties are about to begin on health and safety at work.

2. Further joint activities by the social partners

Even if it is not always easy to pinpoint particular results, the social partners can achieve visibility through appropriate action: joint texts, manuals and guidance, undertakings to act in particular fields, position papers, etc.

2.1 Banks and financial services

On 28 February 2002, the social partners in the *banking sector* meeting in the SDC (i.e. the European Banking Federation –Banking Committee for European Social Affairs, the European Savings Banks Group, the European Association of Co-operative Banks and UNI-Europa) drafted a joint statement on lifelong learning. This refers explicitly to the action programme drawn up by the cross-industry social partners (see above) and comprises three main principles:

- a definition of vocational competencies;
- recognition and validation of these competencies;

4 Interview with Rudi Delarue, 16 December 2002.

- the establishment of a basic framework of ″rights and duties″ to govern relations in the workplace.

Although this agreement is worded in fairly precise terms, nothing specific is said about how the principles might be put into practice by the sectoral social partners at Member State level.

2.2 Commerce

The social partners operating in the field of *commerce and distribution* (for the employers, *Eurocommerce* and, for the employees, *Union Network International - UNI-Europa)* reached agreement on a joint set of voluntary guidelines designed to promote *age diversity* (i.e. to fight age discrimination) in the sector.

The resulting code of conduct in essence enshrines the principle of combating age discrimination in the workplace. It also provides for measures to postpone the age of retirement – in *mutually acceptable fashion* – for older employers and employees, mainly via flexible retirement schemes. Special attention is paid to the possible impact of such flexible employment arrangements on entitlement to pensions and levels of benefit. Equal access to training is another priority, with emphasis placed on the new information and communication technologies. In the case of older workers, particular consideration needs to be given to adapting the pace of work. Once again, all of these objectives fall under the remit handed down by the Lisbon summit.

2002 saw a resumption in activity by the social partners in two sectors: private security and industrial cleaning, both of which come under the "Property Services" section of UNI-Europa.

2.3 Private security

The private security sector, although small in terms of number of employees, has experienced a considerable increase in activity over recent years, largely because of the recent trend by public authorities to outsource segments of their security work. Accordingly, the social dialogue within the sector has been relatively strong since it began in 1992.

The social partners – CoESS (the representative organisation of private security employers) and UNI-Europa for the workers – agreed on

13 December 2001 to a joint declaration calling on the Member States to harmonise legislation affecting the sector. The proclaimed goal of the text being to *promote harmonious development*, emphasis is placed on the need to professionalise the sector, in particular by targeting quality of service and regulation of public procurement. In the shape of an appeal to the European public authorities – in particular the Council of Ministers and national governments – CoESS and UNI-Europa drafted recommendations to cover the following:

- authorisation for employees to exercise the profession in question (exclusion in the case of criminal convictions);
- making companies subject to a system of authorisation (via the granting of licences in respect of compliance with ethical, financial and social criteria);
- evaluation and monitoring of the activities of private security firms by the public authorities;
- vocational training (in particular, general provision of basic training for all workers in the sector);
- health and safety (especially stress management);
- working conditions (in order to counter the sometimes very high *turn-over* among staff).

In early 2002 the social partners also published a European manual on core vocational training for security personnel, designed for distribution throughout the entire sector in the EU. A broad array of subjects is covered and the booklet serves as a basic introduction to the issue of security at work sites.

2.4 Industrial cleaning

In 2002 the European Federation of Cleaning Industries (EFCI) and UNI-Europa devised a *European Health and Safety Manual* for workers in the sector, the aim being to offer basic information on relevant practical issues: risks and risk factors, personal protective equipment, signage, first aid.

In March the social partners also produced a guide for organisations (companies and public authorities) involved in outsourcing by means of calls for tender. Entitled *Selecting Best Value*, this booklet lays down a set of basic principles which can be of assistance in sorting and selecting bids. A challenge is made to the traditional approach of favouring short-term financial interest and accepting the lowest possible bid. Instead a broader-based vision is advocated, comprising criteria such as technical quality. It is significant that the social partners have become active in this field following a resurgence of sub-contracting. Calls for tender in an outsourcing environment can lead to social dumping within the sector (with price competition generating a downward spiral in terms of working conditions and wages).

2.5 Sectoral Dialogue Committees

There were 27 ([5]) SDCs in existence at the end of 2002 and, although none was actually set up during 2002, preliminary discussions began in various sectors:

- in the municipal services sector, a social dialogue committee is about to be created, with the trade union side represented by EPSU and the employers by the Council of European Municipalities and Regions – Employers' Platform (CEMR-EP). The committee took time to establish because of the diversity of trade union representation and the complex network of employer interests;
- discussion appears to be well underway in the sports sector, which encompasses a broad range of diverse activities, including professional sports, companies and voluntary associations offering training, amateur competitive sport, sport for leisure and sport as a vector of social action and integration. Obstacles nevertheless remain. While it is clear that UNI-Europa is the main trade union player, the employers as yet have no European organisation. Links are currently being forged among national federations – particularly in football – in the hope of resolving the problem;

5 For a complete list, please see the Annex to the most recent Commission Communication on the social dialogue (CEC, 2002b).

- lastly, although no date has yet been set for the establishment of a SDC in the hospitals sector, talks are continuing. The situation is similar to that in the sports sector, with a clearly identified and operational trade union interlocutor, but a more complex picture on the employers' side (centralised/decentralised structures, majority public/majority private sector involvement).

2.6 Enlargement

Since the Warsaw conference (March 1999) on enlargement and the social partners, several conferences and seminars have been held under the auspices of the social dialogue in various sectors on how to integrate the candidate countries into the social dialogue. In most sectors a process of reflection is underway by now and contacts are being forged, jointly or at individual organisation level, with a view to adapting the social dialogue in preparation for enlargement. The chief difficulty likely to be faced by the social partners is the low level of sectoral organisation – and sometimes even the total absence of trade union or employer interlocutors in the candidate countries, particularly those of the former Soviet bloc (CEC, 2002b). The Commission has therefore re-asserted its desire to see such structures put in place, holding out the possibility of funding for consolidation activities.

3. Other features of sectoral industrial relations in 2002

Industrial relations in several sectors were characterised by a degree of tension and/or the exercising of political pressure by the social partners.

3.1 Transport

On 23 March 2002 the working time directive was extended to take in certain categories of workers in the road transport sector, in particular those who are self-employed. Consultation among the social partners did occur, but they were unable to reach agreement. The directive therefore reflects those areas where there was consensus among the social partners (Broughton, 2002a).

As to the *rail transport* sector, the 3rd International Railway Workers' Action Day was held on 26 March 2002, upholding a now established

tradition. The motto this year was "Safety, not profit, first". With competition in the sector on the increase, key issues for the organisers from the ETF were health and safety and the need to foster harmonisation of working conditions within the EU (Broughton, 2002b).

Discussions are also underway on the transferability and mutual recognition of qualifications. This is set to become a real issue with increasing rail deregulation and the likely rise in trans-frontier traffic in the wake of network interoperability.

On 19 June 2002 the ATCEUC, which represents air traffic controllers in eight EU countries, spearheaded strike action in protest against the "Single European Sky" project and the disappearance of the concept of national air space. Among the concerns raised were the possibility of employees being deprived of public sector status, job losses and general insecurity as regards employment in the sector.

3.2 Port services

The main sectoral players are the ETF (Seafarers, Dockers and Fisheries sections) representing the employees and, for the employers, CLECAT (European Organisation for Forwarding and Logistics), ESPO (European Sea Ports Organisation), FEPORT (Federation of European Private Port Operators), ECSA (European Community Shipowners' Association) and ESC (European Shippers' Council).

At a conference held on 3 December 2002, the ETF Dockers section challenged the usefulness of the proposed European Parliament and Council directive on market access to port services. It drafted some amendments in the hope of removing the perceived threat to welfare and working conditions, the big fear being social dumping and falling safety standards in the sector (ETF, 2002a). Independent strike action in several Member States highlighted these preoccupations.

The idea of a directive met with a much more positive reception from the employers. CLECAT welcomed the proposal in 2001, highlighting the need to sharpen the competitive edge of the sector and pointing to the emphasis in the text on safety at work and environmental

guarantees. A desire was none the less expressed for account to be taken of allied issues such as market access to rail infrastructures in port areas and the inclusion of river ports. CLECAT was also anxious to see equal treatment of private and public ports operators (CLECAT, 2001). Changes subsequently made to the proposal met with approval from the employers.

FEPORT and ESPO, representing the ports, issued a joint declaration in which they expressed their overall satisfaction with the changes to the proposed directive. They did however put forward some further suggestions, mainly with regard to the management of port infrastructures. The focus here was on restricting the notion of *self-handling* to ships' crews only and, in the case of very small port structures, waiving the requirement that there should be at least two operators (ESPO and FREPORT, 2002).

The shipowners, represented by ECSA, were supportive of the general thrust of the Communication, although concern was voiced over the perceived vagueness of some of the Commission's definitions. Attention was also drawn to possible obstacles to free competition when freight handling contracts are awarded and a general wish was expressed that European rules should not be more restrictive than existing international provisions (ECSA, 2002).

3.3 Fisheries

The ETF has in addition been critical of the cod fishery moratorium imposed in several EU fishing zones by the Commissioner responsible, Franz Fischler. Before any final decision is taken, the ETF would like the fishermen and other workers in the sector to be involved in the debate. There is concern as to the future repercussions for the sector and the impact on employment in coastal regions (ETF, 2000b).

3.4 Agency work

The sector set up a social dialogue committee in July 2000, bringing together UNI-Europa and the International Confederation of Temporary Work Businesses (Euro-CIETT). The SDC's activities were subsequently suspended during negotiations on agency work between

the cross-industry social partners. Euro-CIETT and UNI-Europa expressed their disappointment over the failure of this process and, on 8 October 2001, prepared a series of guidelines to be put forward once the Commission regulatory proposals appeared on the table. The SDC has in the meantime resumed work.

Conclusion

It is never easy to draw general conclusions from a limited range of experience, but observation of the sectoral social dialogue over several years has highlighted significant features.

1) The general trend has been for a limited number of framework agreements to be signed each year as part of the sectoral social dialogue. 2002 was no exception in this regard. There is, however, no Council directive forcing people to implement such agreements; instead the social partners at national level are invited to work together if they so desire. The favoured approach has been to adopt common positions and issue recommendations; hardly the "top level" of activity in terms of national industrial relations. The Commission implicitly alludes to this in its recent Communication on the social dialogue, in which the sectoral social partners are called upon to define the nature of the texts they adopt, clarifying their terms and reserving the word "agreement" for texts drawn up according to the procedures laid down in Article 139(2) of the Treaty (CEC, 2002b: 19).

2) Another feature of the sectoral social dialogue is that many issues addressed by the social partners fall within certain parameters. Most of the activity observed in 2002 was in pursuit of the Lisbon objectives. Vocational training and lifelong learning were among the favourite subjects, with several sectors working across boundaries, as they had done in previous years. This mirrors the mainstreaming approach to the Lisbon process throughout the social dialogue. Possibly there is also a certain amount of competition going on between some sectoral players – UNI-Europa among them – and the cross-industry dimension – the ETUC.

3) Unsurprisingly, the social partners' preferred topics under the sectoral dialogue tend to be in areas of relatively low conflict (6). Matters traditionally at the centre of industrial relations at national level continue to stand out by their absence from agreements and general debate. Observers and researchers often point to two factors by way of explanation: the lack of strong interlocutors on the employers' side, and diverging views among trade union organisations as to the weight to be accorded to the supranational social dialogue.

Another interesting feature is that the sector with the highest degree of tension – i.e. transport, with its various facets – is notably cool on the social dialogue front. Any activity by the employers and unions tends to be less co-ordinated. European moves towards privatisation and deregulation presumably have their part to play here. We can only conclude that tension among the players does not at this stage seem to be propelling the social dialogue forward.

5) By the same token, sectors where "it is happening" as far as the social dialogue is concerned are not the ones which have traditionally driven forward industrial relations (e.g. manufacturing industry). Statistically speaking, it is in the less significant – and even marginal – areas where activity is at its maximum. The greatest dynamism at European level is to be found in the field of private security and industrial cleaning. This would seem to confirm the assumption that only when both sides – and more especially the employers – are truly motivated will anything of substance be achieved. The two sectors cited are representative of less-developed players who may be feeling a need to enhance their image in order to give greater legitimacy to their activities. This would certainly seem to be the case with private security. Another possible motive is that

6 We should nevertheless avoid over-simplification. Superficially win-win arrangements (e.g. on vocational training) may conceal markedly diverging interests between the players. The annual number of paid training days would be an illustration.

they are seeking recognition with an eye to expansion. Some of the momentum behind the social dialogue in these sectors can be presumed to derive from such factors (7), and this supports the argument that the sectoral social dialogue is not a natural prolongation of national industrial relations, but instead opens up fresh avenues. The nature, content and significance of this new dimension are, however, yet to be fully established.

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Dalila Ghailani

Social policy case law of the Court of Justice in 2002

Introduction

The Court of Justice of the European Communities (CJEC) occupies a pre-eminent position in the European institutional system, which cannot remotely be compared with that of similar international courts enjoying a usually marginal role. Its importance is a corollary of the role of law in European integration. Within a system in which integration is dependent on the decisions of the European institutions, it was not possible to award these bodies fully sovereign powers. Guarantees had to be incorporated into the treaties to protect the interests of States and individuals affected by these decisions. An appeals process had to be provided for. The existence of the notion of the rule of law within European legal culture was reflected in the establishment of legal control mechanisms.

The extraordinary development of the Court's role is largely linked to a particular provision, Article 177 of the Treaty of Rome, the new Article 234 EC. When cases involving problems of Community law are referred to national courts, this provision allows them to put questions to the Court as to the interpretation which should be given to Community provisions or as the validity of enactments of the institutions. This preliminary ruling mechanism sets up a genuine dialogue between the national court and the European Court. It is for the national court and not the parties to the case to determine whether a matter should be referred to the European Court. It is also for the

national court to apply the Court's conclusions regarding the case referred to it (Dehousse, 1997).

Dozens of referrals for preliminary rulings are made to the CJEC each year. A sizeable proportion of them relate to the social sphere: equal treatment for men and women, social security of migrant workers, cross-border health care, the insolvency of employers, and the transfer of undertakings are all areas where clarification has been required from the Community's highest instance. Such clarifications play a fundamental role in the development and content of Community law. Thus, two new directives were adopted during the course of 2002. The first covers the insolvency of employers, and the second the implementation of the principle of equal treatment for men and women in employment and vocational training. These two new directives incorporated the Court's case law on these issues and will be referred to later.

The year 2002 witnessed the fiftieth anniversary of the Court of Justice and proved no exception to the rule. The Court's deliberations have been highly instructive. Since it would be impossible to cover every case relating to social policy, we have selected a number which were particularly noteworthy. They have been divided into three sections: social security of migrant workers, equal treatment for men and women, and the rights and obligations of employees and employers.

1. Social security of migrant workers: Regulation 1408/71 and its implementation

Since its creation in 1957, the promotion of free movement for workers has been one of the pillars of the European Economic Community. This freedom encouraged the economic development of the Member States. Active measures were needed to guarantee the free movement of workers beyond national borders. A significant portion of these measures had to be taken in the realm of social security. Workers would not have availed themselves of this right to free movement if, in doing so, they had lost their social security entitlements. As most national legislation in this area is based on nationality or residence, it could not be applied to migrants unless social security schemes were co-ordinated

(Pennings, 2001). Regulation 1408/71 on the co-ordination of social security schemes (Council of the European Communities, 1971) was adopted to avoid these undesirable effects. This Regulation, now undergoing amendment, is without any doubt the most obscure and difficult to understand of all Community texts. Questions as to its scope are regularly referred for preliminary rulings.

Advances on maintenance payments for the benefit of the children of divorced parents: Anna Humer, 5 February 2002 ([1])

In the *Offermanns* case ([2]), which we referred to in the previous edition of Social Developments in the European Union, the Court of Justice made it clear that advances on maintenance payments were indeed family benefits within the meaning of Regulation 1408/71, and should thus be granted irrespective of nationality. In the *Humer* ruling, the Court continued along the same lines, stipulating that residence cannot be a factor in determining whether or not such advances should be granted.

Anna Humer, born on the 10 September 1987, is the child of a marriage of Austrian nationals. The couple divorced on 9 March 1989, and, since then, the mother has had custody of her daughter. In 1992, the mother moved to France with her daughter, where they have been ordinarily resident ever since and where she is a salaried worker. The father continues to reside in Austria.

On 2 November 1993, the father assumed an obligation under a court settlement to pay monthly maintenance payments for his daughter. He was at that time employed in a commercial capacity and continued in that occupation until at least 31 January 1998, after which date he was unemployed.

On 24 July 1998, Anna Humer applied to the Austrian State for advances on maintenance payments for a period of three years. She

1 CJEC, 5 February 2002, *Humer*, C-255/99, Rec.2002 I-1205.

2 CJEC, 15 March 2001, *Offermanns*, C-85/99, Rec.2001 I-2261.

claimed that, despite "repeated enforcement measures", her father's maintenance payments were several months in arrears.

The court of first instance dismissed that application for an advance on the ground that the child and her mother, who had custody of her, were not ordinarily resident in Austria, as required by Austrian legislation. Anna Humer's case was successful on appeal. An appeal was brought by the Austrian State before the *Oberster Gerichtshof*, the court of final instance, which referred the question to the Court of Justice of the EC to determine whether the Austrian rule is compatible with European Law. The Court considered whether the advance on maintenance payments provided for under Austrian legislation constitutes family benefits for the purposes of the Community Regulation on the social security of migrant workers and members of their families.

The Court reiterated that the expression in the Regulation "to meet family expenses" is to be interpreted as referring, in particular, to a public contribution to a family's budget to alleviate the financial burdens involved in the maintenance of children. The Court noted in addition that the reasons given by the Austrian legislature were to ensure the maintenance of minor children in cases where their mothers are left to cope alone with their children, and, in addition to the heavy burden of raising their children, find themselves faced with the additional difficulty of obtaining maintenance for them from the father. Previously, the Court had also emphasised that it is to resolve such difficult situations that the State has to take the place of the person in default of payment of maintenance and pay advances on maintenance. The Court, therefore, maintained that advances on maintenance payments constitute family benefits. Moreover, where either of a child's parents is employed or self-employed, that child, as a member of the worker's family, falls within the scope ratione personae of the Community Regulation even where, as a result of divorce, he does not live with the latter.

In joint cases *Hoever and Zachow* ([3]), the Court ruled that the spouse of a worker may benefit from advances on maintenance payments in particular in order to compensate for the default of a parent from whom maintenance is due. This argument applies to all members of the family, including minor children, who enjoy the same direct right. Moreover, the right to free movement, which permits residence in another Member State, would be hampered if the granting of family benefit payments were contingent on the place of residence. It follows that residence in another Member State should not hinder the granting of family benefits where the requisite conditions are fulfilled.

Application of a bilateral convention which is more favourable than Regulation 1408/71: Kaske v. Landesgeschäftsstelle des Arbeitsmarktservice Wien, 5 February 2002 ([4])

In the *Rönfeldt* ([5]) ruling, the Court decided that a bilateral or multilateral convention could not give rise to the loss of social security advantages for workers who had exercised their right to freedom of movement. In that ruling, it was pension rights which were at issue. The Court applied the same case law in the *Kaske* case, but with respect to unemployment benefit.

Ms. Kaske, a German national by birth, has also been an Austrian national since 1968. She was for ten years an employee in Austria and made contributions to unemployment insurance. In 1983, she moved to Germany, where she worked and contributed to an identical insurance scheme for 12 years. After a period of unemployment, she was once more employed in a new post subject to compulsory unemployment insurance. She then returned to Austria and on 12 June 1996 applied to the regional bureau of the *Arbeitsmarktservice* for unemployment benefit. The latter rejected her application on the ground that Ms. Kaske did not

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3 CJEC, 10 October 1996, *Hoever and Zachow*, C-245/94 and C-312/94, Rec.1996 I-4895.

4 CJEC, 5 February 2002, *Kaske*, C-277/99, Rec. 2002 I-1261.

5 CJEC, 7 February 1991, *Rönfeldt*, C-227/89, Rec. 1991 I-323.

fulfil the conditions for the granting of this benefit provided for under the Austrian law transposing the Community Regulation on social security of migrant workers, which entered into force in Austria on 1 January 1994. On the one hand, Ms. Kaske had not completed a period of insurance or employment in Austria immediately before making her application for unemployment benefit, and, on the other, the special provisions provided for by Austrian legislation for the benefit of residents completing a stay of at least fifteen years in Austria before the acquisition of periods of insurance abroad did not apply to her. This derogation makes it possible for the application for unemployment benefit to be favourably met in Austria without there being any need for the interested party to complete a new period of employment before applying for unemployment benefit.

However, Ms. Kaske submitted that an Austro-German Convention, which entered into force in 1979, might permit the periods of insurance she had completed in Germany to be credited to her. Under these circumstances, Ms. Kaske entered an appeal against the Office's decision, which was rejected. She challenged this decision before the *Verwaltungsgerichtshof*. This court referred the matter to the Court of Justice of the European Communities and asked whether the provisions of the Austro-German Convention, which were more favourable than national law, could apply despite the subsequent entry into force of the Community legislation. The question at issue was whether the CJEC's *Rönfeldt* case law could apply with respect to unemployment benefit.

The Court noted that, contrary to what the Austrian government submitted, there was no reason why the arguments in the *Rönfeldt* ruling, concerning pension rights, should not equally apply to unemployment benefit, which can be categorised as a social security advantage; the case law refers to these kinds of advantages as an overall group.

This implies that a national of a Member State which is a party to a bilateral convention, who has exercised his right as a worker to free movement, enjoys a right to unemployment benefit prior to the entry into force of the Community Regulation on social security of migrant workers. Such a person has an established right to the continued application of the said Convention which continues once the Regulation

enters into force. The interested party rightly entertained a legitimate expectation that he would benefit from the provisions of the bilateral convention.

Accordingly, the Court considered that there is no reason to differentiate between the periods of insurance or employment according to whether these periods fell before or after the entry into force of the Treaty and Regulation. Entitlement to the application of the Convention could be acquired prior to the intervention of the Community text. It is only if the worker has exhausted all the rights accrued on the basis of a period of insurance or employment after the entry into force of the Community rule that his situation must be assessed in the light of the provisions of that regulation.

Moreover, the Court stipulated that national rules which impose restrictive residence conditions for the granting of unemployment benefit (fifteen years prior to the last employment abroad), first discriminate on the grounds of nationality, since they confer privileges on "settled" Austrians, and, second, constitute an obstacle to free movement, as they disadvantage nationals of other Member States. In any event, such conditions are incompatible with the Community law principle of the free movement of workers.

The reader is also invited to consider the *INSS and TGSS* cases relating to the award of pension rights, *Martinez Dominguez* on pensions under a social security convention between Member States concluded prior to accession to the European Communities, and *Rydegard* on the retention of entitlement to benefits for an unemployed person travelling to another Member State to seek work (6).

6 CJEC, 3 October 2002, *INSS and TGSS*, C-347/00, unpublished; CJEC, 24 September 2002, *Alfredo Martinez Dominguez*, C-471/99, unpublished; CJEC, 21 February 2002, *Rydegard*, C-215/00, Rec.2002 I-1817.

2. Equal treatment for men and women

The starting point in the European Union with regard to equal treatment was the principle of equal pay for work of equal value, set out in former Article 119 (now Article 141) of the EC Treaty. From these modest beginnings, the Court of Justice has developed an extensive body of case law which, in many Member States, has brought about substantial changes to women's employment rights, and even, in certain cases, to men's. Beyond the issue of equal pay, a general principle of equal treatment for men and women has been developed, which is now increasingly recognised in Community legislation and the Court's case law. Moreover, the Treaty of Amsterdam provides a new legal basis (Article 13) for legislation on discrimination and recognises the legitimacy of positive action. This makes it possible to grant the under-represented sex certain advantages with a view to permitting the exercise of a profession, and avoiding or compensating for any disadvantages encountered during the course of a career (Vonfelt, 2000). We have selected two rulings from this sphere in 2002.

Differentiated access to nursery places: Lommers v. Minister van Landbouw, Natuurbeheer en Visserij, ruling dated 19 March 2002 (7)

Mr. Lommers was an official at the Netherlands Ministry of Agriculture. His wife was gainfully employed elsewhere. In December 1995, Mr. Lommers asked the Minister to reserve a nursery place for his child yet unborn. This request was rejected on the ground that, in conformity with Circular No. P 93-7841, which was applicable within the Ministry and attempts to tackle the under-representation of women therein, children of male officials could be given places in the nursery facilities in question only in cases of emergency. At Mr. Lommers' request, the Commission for Equal Treatment considered whether this circular was compatible with the *Wet Gelijke Behandeling van mannen en vrouwen* (Law on Equal Treatment of Men and Women) and concluded that it was. The Ministry therefore rejected the applicant's complaint. Mr.

7 CJEC, 19 March 2002, *Lommers*, Rec.2002, p.I-2891.

Lommers' appeal against that decision was declared unfounded by the *Arrondissementsrechtbank te's-Gravenhage*.

Mr. Lommers appealed against that judgment to the *Centrale Raad van Beroep*. He claimed that the Minister for Agriculture had not demonstrated that the number of women staying in their jobs after taking maternity leave had increased as a result of the subsidised nursery places scheme. He also maintained that, in most Netherlands Government Ministries, no distinction is made between men and women as regards access to subsidised nursery schemes arranged within them. Insufficiency of resources cannot be invoked as a ground for excluding male officials of the said Ministry from the nursery scheme in question. What is more, such an exclusion would be contrary to Article 2(1) of Directive 76/207/EEC (Council of the European Communities, 1976) ([8]). The Minister for Agriculture maintained on the contrary that the scheme in question is justifiable under Article 2(4) ([9]) of the Directive. The priority given to women was the result of a determination to tackle inequalities existing between male and female officials. The creation of nursery places is the kind of measure needed to help eliminate this *de facto* inequality.

The *Centrale Raad van Beroep* decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling: does Article 2(1) and (4) preclude rules of an employer under which subsidised nursery places are made available only to female employees save where, in the case of a male employee, an emergency situation, to be determined by the employer, arises?

The Court pointed out, first, that the making available to employees, by their employer, of nursery places at their place of work, or outside it, was indeed to be regarded as a 'working condition' within the meaning

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8 The article states: "*For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status*".

9 "*This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities […]*".

of the Directive. It emphasised, second, that a scheme under which nursery places made available by an employer to his staff are reserved only for female employees does in fact create a difference of treatment on grounds of sex, within the meaning of Articles 2 and 5 of the Directive. The situations of a male employee and a female employee, respectively father and mother of young children, are comparable as regards the possible need for them to use nursery facilities because they are in employment.

The question to be examined was whether a measure such as that at issue is permissible under Article 2(4), and, if so, whether it adheres to the principle of proportionality. The Court emphasised that the case papers reveal that when the Circular was adopted, the employment situation within the Ministry of Agriculture was characterised by an extensive under-representation of women and that a proven insufficiency of proper, affordable care facilities for children was such as to encourage female officials in particular to quit their jobs. The Court therefore held that such a measure belongs to that group of measures that are designed to eliminate the causes of women's reduced opportunities of access to employment and careers and intended to improve the ability of women to compete on the labour market and pursue a career on an equal footing with men.

Such a derogation from equal treatment of men and women must remain within the limits of what is appropriate and necessary in order to achieve the aim in view. Next, the measure at issue does not totally exclude male officials from its scope but allows the employer to grant requests from the latter in cases of emergency. Nevertheless, a measure which would exclude male officials who take care of their children by themselves from access to a nursery scheme subsidised by their employer would go beyond the permissible derogation provided for in Article 2(4) of the Directive, by interfering excessively with the individual right to equal treatment which that provision guarantees.

Determination of a different age condition based on gender with regard to access to occupational pensions: Pirkko Niemi v. Valtiokonttori (management body for the State pensions scheme), ruling dated 12 September 2002 ([10])

An enlisted public servant who served in the defence forces from 1 April 1969, Mrs. Niemi reached the age of 55 in 1993 and 60 in 1998. On 31 March 1999, she had completed 30 years of service in the defence forces. As an enlisted member of the defence forces, Mrs. Niemi is covered by the pension scheme laid down in Law 280/1966 on pensions for State officials, for which the age-limit is set by Decree 667/1992. That scheme is administered by the *Valtiokonttori*, which decides pension applications at first instance. In order to determine her pensionable age based on years of service, Mrs. Niemi sought a binding advance ruling from the *Valtiokonttori*. By decision of 26 April 1995, Mrs. Niemi was informed that she would not be entitled to an old-age pension until she reached the age of 60 years.

Mrs. Niemi appealed against that decision to the *Valtion eläkelautakunta*, claiming entitlement to a pension from the age of 55. Her appeal was dismissed. Appealing before the *Vakuutusoikeus* (social security tribunal), she stated that a man who had exactly the same employment record as hers and exactly the same duties would have been entitled to a pension from the age of 50 or 55, whereas the age for women enlisted in the defence forces was 60, without exception. The pension scheme applicable was therefore discriminatory on grounds of sex, contrary to the Finnish law on the equal treatment of men and women and to Community law.

The appeal court was uncertain as to whether a pension payable under Law 280/1966 falls within the scope of Article 119 ([11]) of the Treaty, and

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10 CJEC, 12 September 2002, *Pierkko*, C-351/00, unpublished.

11 Article 119, now Article 141, states "*Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. […] 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer*".

whether that pension scheme is contrary to the prohibition of discrimination laid down in that article. It therefore decided to stay proceedings and to refer the following question to the Court for a preliminary ruling: "Does the pension scheme under the *Valtion eläkelaki* fall within the scope of Article 119 of the Treaty or of Council Directive 79/7/EEC (Council of the European Communities, 1979) (12)?"

Mrs. Niemi submitted that persons reaching retirement age must retire from the service and are then entitled to receive a retirement pension based on their years of service up to that age limit. Such a pension constitutes a benefit comparable to pay and falls within the scope of Article 119 of the Treaty. In addition, the existence of different age-limits for women and men carrying out the same work is contrary to Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

The Court recalled that benefits granted under a pension scheme which essentially relates to the employment of the person concerned form part of the pay received by that person and come within the scope of Article 119 of the Treaty. Even if the scheme at issue is determined directly by statute, that is not in itself sufficient to exclude such a scheme from the scope of Article 119 of the Treaty. In addition, the applicability of that provision to pension benefits is not conditional, as the Finnish government submitted, upon a pension being supplementary to a benefit provided by a statutory security scheme. The existence of a link between the employment relationship and the retirement benefit is the only decisive criterion for determining whether a retirement pension falls within the scope of Article 119. If the pension concerns only a particular category of workers, if it is directly related to the period of service completed and if its amount is calculated by reference to the public servant's last salary, the pension paid by the public employer is in that

12 In the words of Article 7 (1) a) "*This Directive shall be without prejudice to the right of Member States to exclude from its scope: (a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits*".

case comparable to that paid by a private employer to his former employees. In this case, public servants who benefit under the pension scheme constitute a particular category, that of persons enlisted in the defence forces. A person is entitled to this pension only if he is in a relationship with the State as a public servant or ordinary employee. The age-limit which gives rise to compulsory retirement, which in turn gives entitlement to pension benefits, is directly related to the period of service completed. Finally, the level of the pension paid under Law 280/1966 is determined by the person's length of service. Moreover, pension benefits paid under Law 280/1966 are calculated on the basis of the average pay received over a period limited to a few years directly preceding retirement.

A pension such as that granted under the *valtion eläkelaki* 280/1966 satisfies these criteria and therefore fall within the scope of Article 119 of the Treaty, which prohibits any discrimination with regard to pay as between men and women, whatever system may give rise to such inequality. Accordingly, it is contrary to that article of the Treaty to determine an age condition, differing according to sex, for eligibility for employment-related pensions for workers who are in identical or similar situations.

To conclude on equal treatment, Directive 2002/73/EC of 23 September 2002 (European Parliament and Council of the European Union, 2002a) amended Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. The main aim of these changes is to incorporate the Court's case law into the Directive. Thus the new Directive introduces and defines the notions of "direct discrimination, indirect discrimination and sexual harassment". Moreover, "this Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity". The provisions relating to appeals and the protection of employees have also been revised. Finally, the Directive contains a new section on the creation by Member States of a body or bodies for the promotion, analysis, monitoring and support of equal treatment. Member States must come into conformity with this new Directive by 5 October 2005 at the latest.

3. Rights and obligations of workers and employers within the Community legal system

The three decisions we have selected concern the difficulties linked to the transfer of undertakings, insolvency of employers and the posting of workers.

Safeguarding of employees' rights in the event of the transfer of undertakings: Beckman v. Dynamco WhicheloeMacfarlane Ltd [13] and Temco Service Industries [14]

Economic development has led on both a national and a Community level to changes in the structure of undertakings, *inter alia* through the transfer of undertakings, businesses or parts of businesses to other employers as a result of legal transfers or mergers. Provisions were needed to safeguard employees' rights in the event of a change in employer. Moreover, significant differences existed with regard to the scope of employee protection in this sphere. The Council therefore adopted Directive 77/187/EEC to encourage the harmonisation of national legislation guaranteeing the retention of workers' rights and requiring transferors and transferees to inform and consult workers' representatives in good time (Council of the European Communities, 1977). This Directive was subsequently amended in the light of the impact of the internal market, legislative tendencies in the Member States with regard to helping undertakings in economic difficulty, and the Court's case law and legislation already in force in most of the Member States. Legal certainty and transparency required a clarification of the notion of transfer in the light of CJEC case law. This clarification has not, however, changed the scope of Directive 77/187/EEC as interpreted by the Court (Council of the European Union, 2001). Since the facts in the following cases arose prior to the adoption of this new Directive, it was in the light of the 1977 Directive that the Court answered the questions referred by national courts for preliminary rulings.

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13 CJEC, ruling of 4 June 2002, *Beckmann*, C-164/00 Rec.2002 I-4893.

14 CJEC, ruling of 24 January 2002, *Temco Service Industries*, C-51/00, Rec.2002 I-969.

The first case is the following: Mrs. Beckman worked within the *National Health Service* under the GWC conditions of service (the *General Whitley Council* is a system for determining employment conditions in the public sector through joint negotiations between employers and employees). She contributed to the NHS Superannuation Scheme. On 1 June 1995, the body for which Mrs. Beckmann worked was transferred within the meaning of Article 1(1) of Directive 77/187/EEC to DWM. Mrs. Beckmann continued to work for DWM until she was dismissed for redundancy as from 6 May 1997. On this occasion, DWM paid Mrs. Beckmann the lump sum redundancy payments without any reduction to reflect payments under Section 46 of the GWC conditions. This article provides that employees aged between 50 and the retirement age having more than five years' service in the NHS Superannuation Scheme have the right to early retirement with immediate payment of pension and lump sum compensation, in the event, *inter alia*, of dismissal for redundancy. Mrs. Beckmann met these two conditions, but received none of the benefits provided for. Her case therefore came before the *High Court of Justice, Queen's Bench Division*, which referred the following two questions to the Court for a preliminary ruling:

Is the employee's entitlement to early payment of a pension and retirement lump sum and/or to the annual allowance and lump sum compensation a right to an old-age, invalidity or survivors' benefit within the meaning of Article 3(3) ([15]) of Council Directive 77/187/EEC?

If the answer to Question 1 is no, is there, derived from or implemented by statutory instruments, an obligation of the transferor arising from the contract of employment, the employment relationship or the collective agreement within the meaning of Article 3(1) and/or 3(2) ([16]) which

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15 "*Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States […]*".

16 Article 3 states: "*1) The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer […] shall, by reason of such transfer, be transferred to the transferee […]. 2) Following the transfer […], the*

transfers by reason of the transfer of the undertaking and renders the transferee liable to pay the benefits to the employee upon dismissal?

The Court maintained that although the NHS belongs to the public sector, NHS employees are covered by national employment law and are, therefore, eligible to benefit from the provisions of the Directive. An arrangement such as that under Article 46 of the GWC conditions of service provides, *inter alia* in the event of a certain form of dismissal, for an early retirement pension together with payments to enhance that benefit. Given the general objective of safeguarding the rights of employees in the event of transfers of undertakings pursued in Article 3(1) and (2), the exception to the rule relating to the transfer to the transferee of the transferor's rights and obligations must be interpreted strictly. It may apply only to the benefits listed exhaustively. It is only benefits paid from the time when an employee reaches the end of his normal working life and not benefits paid in the event of dismissal for redundancy that can be classified as old-age benefits.

The Court's answer to the second question is that the transferee is bound by the rights and obligations arising from a contract of employment or an employment relationship existing between the employee and the transferor on the date of the transfer of the undertaking, and by the terms and conditions agreed in a collective agreement. Apart from the exceptions under Article 3(3) relating to old-age, invalidity or survivors' benefits, no exception to those rules is provided for. On a proper construction of Article 3, the obligations applicable in the event of the dismissal of an employee, arising from a contract of employment, an employment relationship or a collective agreement binding the transferor as regards that employee, are transferred to the transferee regardless of the fact that those obligations derive from statutory instruments or are implemented by such instruments.

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transferee shall continue to observe the terms and condition agreed in any other collective agreement on the same terms applicable to the transferor under that agreement […]".

In the *Temco Service Industries* case, the Court made its fourth ruling on the transfer of cleaning businesses (17). This time, it examined the scope of the Directive on the transfer of undertakings from three points of view: its scope, the contractual nature of the transfer and whether workers have the option of objecting to the transfer.

Volkswagen Brussels (VW) entrusted the cleaning of a number of its production plants to BMV from 2 May 1993 until December 1994, when it terminated the contract. BMV subcontracted the cleaning work to its subsidiary GMC. By contract signed on 14 December 1994, Volkswagen instructed Temco to provide the same services. GMC, whose only business was at Volkwagen's plants, dismissed all its staff apart from four protected employees. Pursuant to the collective agreement applicable to cleaning and disinfecting undertakings concerning the engagement of staff in the event of a transfer of contracts for daily maintenance, Temco asked BMV to forward to it the list of staff assigned to the VW contract. When GMC had forwarded that list to it, Temco re-engaged part of the staff of GMC. As GMC had ceased to pay them, the four protected employees brought proceedings against GMC, BMV and Temco before the *Tribunal de travail* in Brussels, which held that the activity of cleaning the Volkswagen plants had been transferred from GMC to Temco by a series of contracts and that there was thus a transfer of an undertaking within the meaning of the Directive.

Temco appealed against that judgment before the *Cour du travail* in Brussels. That Court raised the question of the applicability of the Directive in the light of two specific features of the dispute. First, GMC was only a subcontractor of BMV which held the cleaning contract at issue before Temco. GMC had therefore never had a contractual relationship with Volkswagen. Second, GMC continued to exist for several years after the contract for cleaning held by BMV had been terminated by Volkswagen.

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17 CJEC, 11 April 1994, *Schmidt*, C-392/92 Rec. 1994 I-1311; CJEC, 11 March 1997, *Süzen*, C_13/95, Rec.1997 I-1259; CJEC, 10 December 1998, *Hernandez Vidal e.a.*, C-127/96, Rec.1998 I-8179.

The Court noted that the applicability of Article 1(1) of the Directive is subject to three conditions: the transfer must result in a change of employer, it must concern an undertaking, a business or part of a business, and it must be the result of a contract. In this instance, the question called for an analysis of the subject of the transfer and its contractual nature.

In the meaning of the Directive, the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract. The term "entity" thus refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective. With respect to a cleaning company, an organised grouping of wage earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity. The Court underlined that Article 1(1) may also apply to a transfer of part of a business. It is not significant that the transferor undertaking continues to exist after one of its activities is taken over by another undertaking and that it retains part of the staff engaged in that activity, since the transferred activity is an economic entity in its own right. Although GMC continued to exist as a legal entity after the termination of the cleaning contract between Volkswagen and BMV, it had ceased its only activity, which was taken over by Temco.

On the contractual nature of the contract, the Court recalled that the transfer can be effected in two successive contracts concluded by the transferor and transferee with the same legal or natural person. The fact that the transferor undertaking is not the one which concluded the first contract with the original contractor, but only the subcontractor of the original co-contractor, has no effect on the concept of legal transfer since it is sufficient for that transfer to be part of the web of contractual relations even if they are indirect.

The *Cour du travail* raised the question of whether Article 3(1) should be interpreted as meaning that it does not preclude the contract or employment relationship of a worker employed by the transferor on the date of the transfer of the undertaking from continuing with the transferor. The Directive lays down the automatic transfer to the

transferee of the rights and obligations incumbent on the transferor under the contracts of employment existing on the date of the transfer. It is not possible to derogate from this mandatory rule. However, on previous occasions, the Court has conceded that the employee has the option of refusing to have his contract of employment transferred to the transferee. It now answers that Article 3(1) does not preclude the contract or employment relationship of a worker employed by the transferor on the date of the transfer of the undertaking from continuing with the transferor where that worker objects to the transfer of his employment contract or employment relationship to the transferee (see Peltzer's commentary, 2002).

Protection of employees in the event of the insolvency of their employer: Rodriguez Caballero v. Fogasa, 12 December 2002 ([18])

Realising that measures were necessary to protect employees in the event of the insolvency of their employer, and in particular to guarantee the payment of outstanding claims, in 1980 the Council adopted a Directive to that end (Council of the European Communities, 1980). The Directive also attempted to address the need for balanced economic and social development within the Community. Moreover, there were still differences between the Member States regarding the scope of protection of employees in this sphere, which could have a direct effect on the functioning of the common market. The Directive applies to employees' claims arising from contracts of employment or employment relationships existing against employers who are in a state of insolvency within the meaning of the Directive. National law defines the notions of "employee", "pay", "right conferring immediate entitlement" and "right conferring prospective entitlement". It provides that the guarantee institutions should guarantee the payment of employees' outstanding claims for the period preceding the date of the onset of the employer's insolvency, of the notice of dismissal or date on which the contract of employment was discontinued. Nevertheless, Member States may limit these institutions' obligation to pay.

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18 CJEC, 12 December 2002, *Caballero v. Fogasa*, C-442/00, unpublished.

As the *Caballero* case reveals, the implementation of this Directive gives rise to various difficulties. Mr. Rodriguez Caballero was dismissed by his employer on 30 March 1997. The judicial procedure prescribed in applicable Spanish law led to an agreement under which that undertaking acknowledged that the dismissal was unfair and accepted that the *"salarios de tramitación"* (remuneration due in the event of unfair dismissal and paid during the procedure provided for in Article 56 of the Workers' Statute) which it owed would be paid with effect from the date of dismissal up to the date of the conciliation. This remuneration was not paid by the undertaking. An enforcement procedure was commenced, during which the undertaking at issue was declared insolvent. Mr. Rodriguez Caballero thus requested Fogasa, the Wages Guarantee Fund, to pay it to him, which Fogasa refused by decision of 30 April 1998.

Mr. Rodriguez Caballero challenged that decision before the *Juzgado de lo Social n* °2 *de Albacete*. That court dismissed the application on the ground that, under Article 33 ([19]) of the Workers' Statute, Fogasa does not incur secondary liability in respect of the "*salarios de tramitación*" where they result from conciliation between the parties. Mr. Rodriguez Caballero appealed against that judgment to the *Tribunal Superior de Justicia de Castilla-La Mancha*. That court referred three questions to the Court of Justice for a preliminary ruling on the interpretation of Article 1 of Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer. This article provides that "this Directive shall apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1)".

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19 "*The Wages Guarantee Fund, […] shall pay to workers the remuneration owing to them in the event of insolvency, suspension of payments, […]. Remuneration shall include the amount which the conciliation agreement or the judicial decision recognises […] as well as the supplementary compensation in respect of "salarios de tramitación" awarded where appropriate by the competent court […]*".

The referring court essentially raised the following question: should the *"salarios de tramitación"* payable to the employee as a result of the dismissal being unfair be regarded as falling within those claims arising from Article 1(1) of the Directive? In the affirmative, is there an obligation to determine claims by way either of a judicial decision or an administrative decision, or can they be recognised in the course of conciliation, a compulsory procedure conducted before a court? If the answer is yes, may the national court responsible for giving judgment in the proceedings refrain from applying a provision of national law which excludes the claim from the scope of matters for which the guarantee institution is responsible and apply Article 1(1) of the Directive directly?

In answer to the first two questions, the Court sought to ascertain the conditions under which claims in respect of *"salarios de tramitación"* are covered by the concept of employees' claims arising from contracts of employment or employment relationships referred to in Article 1(1) of the Directive. Only those claims relating to pay are covered within the meaning of Article 3(1). It is for national law to specify the term "pay" and define it (Article 2(2)). National legislation must nevertheless respect the general principles of law whose observance the Court ensures. Moreover, the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules. Fundamental rights include the general principle of equality and non-discrimination. That principle precludes comparable situations from being treated in a different manner unless the difference in treatment is objectively justified. The Court found that no convincing arguments had been submitted such as to justify the difference in treatment between claims for ordinary remuneration and claims for "*salarios de tramitación*" granted by judicial decision, on the one hand, and claims for "*salarios de tramitación*" acknowledged as the result of a conciliation procedure, on the other, for the purpose of excluding the latter claims from the scope of the Directive. The argument that this difference in treatment is justified by the desire to avoid misuse was rejected. Accordingly, claims in respect of "*salarios de tramitación*" must be regarded as employees' claims arising from contracts of employment or employment relationships and relating to pay, within the meaning of

Articles 1(1) and 3(1) of the Directive, irrespective of the procedure under which they are determined, if, according to the national legislation concerned, such claims, when recognised by judicial decision, give rise to liability on the part of the guarantee institution and if a difference in treatment of identical claims acknowledged in a conciliation procedure is not objectively justified.

As to the third question, the Court emphasised that the national court must set aside national legislation which, in breach of the principle of equality, excludes from the concept of "pay" within the meaning of Article 2(2) of the Directive claims such as those at issue; it must apply to members of the group disadvantaged by that discrimination the arrangements in force in respect of employees whose claims of the same type come, according to the national definition of "pay", within the scope of the Directive.

In conclusion, it should be noted that Directive 2002/74/EC of 23 September 2002 (European Parliament and Council of the European Union, 2002b) amended the Directive on the protection of employees in the event of the insolvency of their employer. The amendments attempt to adapt the provisions of the Directive to developments in the internal market, to new tendencies in Member States' legislation on insolvency and to the case law of the CJEC. The scope of the Directive has been modified as a result. The terms "insolvency" and "employee" have been redefined, the obligations of the guarantee institution have been revised and a section on transnational situations has been added. The Directive entered into force on the day of publication. Member States must come into conformity with it by 8 October 2005.

Minimum salaries for posted workers: Portugaia construçoes Lda, 24 January 2002 ([20])

The building sector is geographically one of the most dispersed, with very marked regional differences. It is an extremely labour-intensive area in which mobility levels are very high. Within the EU, problems

[20] CJEC, ruling of 24 January 2002, *Portugaia,* C-164/99, Rec. 2002, I-787.

concerning the posting of workers have put enormous pressure on working conditions to the extent that undertakings previously had the option of posting workers abroad and employing them there under the wage and working conditions of the country of origin. A lengthy legislative process led to the adoption of a Directive on this subject.

From 1992 onwards, the European Federation of Building and Wood Workers lobbied the Commission and the Parliament on a continuous basis with regard to posting. Several countries tried to resolve the problem by enacting their own national legislation: France passed 13 orders (1993) while Belgium, the Netherlands (1994) and Germany (1996) adopted the route of legislation and collective agreements. Germany suffered from a specific problem in that collective agreements could not be applied *erga omnes*. In 1996, Germany imposed a minimum salary for posted workers.

These systems of rules suffered from shortcomings, however. The legal framework contained in the Directive had to be created to make the *"lex loci"* rule binding in all Member States (Dufresne, 2001). After having been deadlocked for a number of years, the Directive was finally adopted in 1996 (European Parliament and Council of the European Union, 1996). Today, it applies where undertakings post workers to the territory of another Member State for the provision of a transnational service. It aims to abolish those uncertainties and obstacles which may hinder the freedom to provide services, by increasing legal certainty and allowing working conditions applying to posted workers to be defined whilst avoiding the abuse and exploitation of posted labour. The deadline fixed for its implementation in the Member States was 16 December 1999. The remuneration of posted workers is that set out in the collective agreements of the host country.

In the *Portugaia* case, the Court tackled the thorny problem of minimum salaries for posted workers. It thus had the opportunity to confirm its previous case law on posted workers in the *Finalarte* ruling ([21]).

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21 CJEC, ruling of 25 October 2001, *Finalarte*, joint cases C-49/98, C-70/98, C-50/98, C-52/98 to 54/98, C-68/98 and C-69/98, Rec. 2001 I-7831.

Before considering the facts of the case, an overview of the relevant legislation is necessary. According to the German legislation on the posting of workers, the legal provisions laid down in a collective agreement in the construction industry declared to be of binding general application also apply to domestic employers established abroad and their employees working within the territorial scope of application of the collective agreement and must guarantee a single minimum wage for all workers within its scope of application. A breach is punishable as an offence.

The social partners in the German construction industry concluded a collective agreement laying down a minimum wage in the construction sector in the Federal Republic of Germany. The collective agreement was declared generally applicable with effect from 1 January 1997. Given that the facts in this case arose in 1997, prior to the deadline for the transposition of the above-mentioned Directive (16 January 1999), the provisions of that Directive are not applicable.

The facts are as follows. Portugaia is a company established in Portugal. Between March and July 1997, it carried out major structural building work in Tauberbischofsheim in Germany. In order to carry out that work, it posted a number of its workers to that building site. In March and May 1997, the employment office in Tauberbischofsheim carried out an investigation into the employment conditions on that building site. It concluded that Portugaia was paying the workers who had been the object of the inspection a wage lower than the minimum wage payable under the collective agreement applicable in this sector. It accordingly ordered payment of the sum outstanding, that is to say the difference between the hourly rate owing and that actually paid, multiplied by the total number of hours worked.

Portugaia lodged an objection against the recovery notice for payment of that sum before the *Amtsgericht Tauberbischofheim*, which referred to the Court of Justice of the EC the matter of the compatibility of the German rules with Community law and more specifically with the freedom to provide services.

The Court began by referring to its case law which establishes that in principle Community law does not preclude a Member State from requiring an undertaking established in another Member State which provides services in the territory of the first State to pay its workers the minimum remuneration laid down by the national rules of that State. It is therefore for the national authorities or, as the case may be, the courts of the host Member State, before applying the minimum-wage legislation to service providers established in another Member State, to determine whether that legislation does indeed, and by appropriate means, pursue an objective of public interest, namely the protection of employees. Measures restricting the freedom to provide services cannot be justified by economic aims, such as the protection of domestic businesses. It is, thus, for the national court to determine whether the rules in question ensure the protection of posted workers. It is necessary to determine whether those rules confer a genuine benefit on the workers concerned, which significantly augments their social protection.

On the question concerning the possible derogation provided for under German legislation, the Court points out that the fact that a domestic employer may, in concluding a collective agreement specific to one undertaking, pay wages lower than the minimum wage laid down by a collective agreement declared to be generally binding, whilst an employer established in another Member State cannot do so, constitutes an unjustified restriction on the freedom to provide services.

Conclusion

The number of cases on which rulings have been made, of which we have only given a brief impression, is a testimony to the intensity of activity at the Community's highest court. It also reveals the difficulties experienced by national courts in applying Community law. The year 2003 is unlikely to be an exception.

In the *Wiebke Busch* case (22), the Court will rule on the question of whether a nurse who has taken educational leave is under an obligation to inform her employer if she knows she is pregnant when she wishes to return to work before the end of that leave, given that, due to her pregnancy, she will be unable to carry out all of her duties.

In the *Dory* case (23), the CJEC will tackle the question of the compatibility with Directive 76/207/EEC of the German law rendering military service compulsory only for men. Does such service constitute illegal discrimination against men, insofar as women may undertake military service but are not obliged to do so?

Under Directive 80/987/EEC on the protection of workers in the event of the insolvency of their employer, the Court will rule on whether the competent authority of a Member State may refuse to pay salary arrears to an employee of a bankrupt company when he holds 25% of the undertaking's capital and has failed to claim this pay for more than 60 days after having become aware of the collapse in the undertaking's creditworthiness (24).

In conclusion, a good deal of ink will continue to be spilt over Regulation 1408/71. The Court will rule, amongst other matters, on whether the home child-care allowance which parents may claim if they decide not to take up a guaranteed place in a public nursery should be considered as a family benefit within the meaning of the Regulation (25). The Court will also decide whether a pensioner, or a member of his family, who is entitled to draw a pension under the legislation of one Member State but who resides in another Member State where, pursuant to the Regulation, he receives sickness insurance benefits in kind as though he were a pensioner from that Member State, such benefits being chargeable to the social security institution of the State

22 *Wiebke Busch v. Klinikum Neustadt GmbH & Co Betriebs KG*, C-320/01.

23 *Alexander Dory v. Federal Republic of Germany,* C-186/01.

24 *Maria Walcher v. Bundesamt für Soziales und Behindertenwesen Steiermark,* C-201/01.

25 *Päivikki Maaheimo*, C-333/0.

responsible for paying the pension, is entitled to travel to the territory of the latter in order to receive medical treatment ([26]).

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26 *RP Van der Duin v. Onderlinge Waarborgmaatschappij ANOZ,* C-156/01.

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Caroline de la Porte

How relevant is the pensions OMC to the reform of pension systems in EU Member States?

Introduction

The pursuit of the internal market project on Member States' pension systems first brought the discussion on pensions to the European level, and the indirect effects of rulings of the European Court of Justice (CJEC), in particular on the third pillar of pension systems, have been debated for a long time (Anderson, 2002; Bosco, 2000). These interesting discussions, however, are not the object of this article. Instead, its focus is on the Open Method of Co-ordination (OMC) – the co-ordination of Member States' policies through objective-setting, benchmarking and multilateral surveillance (de la Porte *et al.*, 2001) – in pensions policy in the year 2002. The OMC on pensions has been characterised as weak, when the OMC on employment (European Employment Strategy) is taken as the benchmark. It nevertheless represents a significant step, since it is the first time that the reform of *public* pension systems, representing the *major part* of Member States' social security systems, both in substance and in budgetary terms, has explicitly been brought into the debate at the European level. Moreover, in line with the principle of subsidiarity, public pensions are traditionally an area of national competency.

The OMC in the area of pensions seeks to propose a line of reform for pension systems as a whole: State pensions schemes, occupational pension schemes and private personal pensions (CEC, 2002a). The European debate on the reform of pension systems, through the OMC, began in March 2001, when the Stockholm Council suggested that the

Economic Policy Committee (EPC) and the Social Protection Committee (SPC) should define a European policy line on the reform of pension systems. In practice, the process of agreeing upon the contours of a European policy line on the reform of pension systems has proved to be a struggle between economically and socially oriented players (de la Porte and Pochet, 2002).

Antecedents to the battle between these two visions started behind the scenes prior to the actual decision to apply the OMC to pensions. One significant milestone was the opinion of the EPC on the reform of pension systems in 1997, putting three strong arguments for pension reform on the table, namely demographic change, the fiscal burden and the efficiency of labour markets. The arguments were dominated by the economic actors from 1997-2000, as the socially oriented players were absent from the debate. In this respect, the pensions OMC has been important, as it has brought the socially oriented players into the debate, prior to which they only addressed the issue of reform of pension systems from a labour market perspective, with slogans such as "active ageing". This has become an important element of the current European pensions policy through OMC, which seeks to encourage older people to stay on the labour market for a longer time. In addition to agreeing with the policy objectives of the economically oriented actors on the "active ageing" policies and the need to ensure the financial sustainability of pension systems, the socially oriented players have brought another element into the debate: the need for pension systems to be adequate, principally to allow people to maintain their living standards.

This article will first present an overview of, and recent developments in, the pensions OMC. Special attention will be devoted to the participatory dimension of the pensions OMC, in other words, the extent to which social partners and stakeholders are involved in the process. It is important to analyse this dimension in view of the theoretical presentation of the OMC as a tool of multi-level governance to enhance the participation of social partners and stakeholders at all stages of policy-making and implementation (Council of the European Union, 2000). The hypothesis we shall defend is that the pensions OMC

has not contributed to enhancing participation, but that instead, the path-dependent national traditions of participation are confirmed.

It will then, in the second part, attempt to answer the question of the added value of the pensions OMC for Member States, through an analysis of the report by the Commission on three key objectives: adequacy, financial sustainability and labour force participation. The hypothesis here is that the core of the OMC on pensions fits in with the dominant discourses propagated on pension reform nationally, making the real impact difficult to assess.

1. Key characteristics

1.1 Overview and recent developments

The progressive development of the policy line to which both the EPC and the SPC contributed became visible at successive meetings of the European Council through the presentation and endorsement of various reports, analyses and communications. In this process, the role taken on by the European Commission is that of an orchestrator, proposing ideas and possible policy options, which are then debated and decided upon by the economically and socially orientated actors (de la Porte and Pochet, 2002). In short, the EU is increasingly becoming an agenda setter for Member States, by bringing to the fore issues that are not necessarily on national agendas at a given moment (Pochet, 2003).

What must also be highlighted is that the policy content of this OMC, even more than the others, overlaps with that of other processes. The impact on public finances of increasing expenditure on pensions is assessed in the Stability and Growth Pact, in the framework of which Member States yearly submit Stability and Convergence Programmes that include targets for the achievement of long-term sustainability of public finances. The Broad Economic Policy Guidelines (BEPGs), as a complementary instrument to the Stability and Growth Pact (Hodson and Maher, 2001), also address this issue. The economically oriented players therefore see no need to introduce the OMC in pensions policy (Interview with Commission official, May 2002).

The BEPGs and the European Employment Guidelines (EEG) address the need to increase the employment rate among ageing workers. This is reinforced through an over-arching European benchmark, with the European Council having decided upon the need to increase the employment rate of older women and men (55-64) to 50% by 2010. This article will later discuss how the Commission, in its draft report, reappropriates this benchmark within the pensions OMC and uses it to make implicit recommendations to Member States to take measures to increase the participation rate of older people in the labour market.

Finally, the adequacy pillar, where one key objective is to tackle poverty among pensioners, partially overlaps with the aims of the OMC that has been launched on social inclusion. However, the social inclusion OMC is the exclusive competency of the Social Affairs Ministers. There is no discussion between the socially and economically oriented actors on the problem of poverty in old age in the framework of the OMC on social inclusion. Therefore, the novelty of the pensions OMC is to have brought these two groups of actors into dialogue on the reform of pension systems, and in particular on the need for pension systems to provide an "adequate" income during old age.

This strong interlinkage with other processes was also emphasised during the Laeken European Council (December 2002), where it was stated that the pensions OMC "*takes its place alongside a range of existing, well functioning EU processes which, as part of their wider remit, deal with aspects of pension policies*" (CEC, 2002b: 10). There is also a more explicit reference to the need for the result of this OMC to feed into the other processes, notably the BEPGs, which have, since the Stockholm European Council (March 2001), acted as an over-arching policy document for the policies of the Union. However, despite this discursive consensus on the need to integrate the pensions OMC with the other co-ordination processes, it is *de facto* rather isolated. Efforts to streamline the core co-ordination processes (including the Stability and Growth Pact, Broad Economic Policy Guidelines and European Employment Guidelines) in order to enhance effectiveness and transparency, and to decrease the possibilities of contradictory aims, are well under way (CEC, 2002c). However, this is not the case for

processes that are "lighter", including the OMC on pensions. There is thus a risk that, if not fully streamlined with that other processes, the social dimension of the pensions OMC will be left aside.

One "round" of the pensions OMC has now been completed, if the Lisbon definition – definition of guidelines, selection of benchmarks, transposition of the agreed guidelines to national level (reflected in the national reporting process), multilateral surveillance (CEC, 2002b) and peer review – acts as the reference point. Of the various OMC processes in the social arena (the others are in employment through the European Employment Strategy and in social inclusion), it is the "softest" to date. In health care, the existing process cannot (yet?) be identified as an OMC (de la Porte, 2002).

To review the situation rapidly: at the Goteborg Council (June 2001), the core of the pensions policy was endorsed. It is organised around three pillars: adequacy, financial sustainability, responding to changing needs. After that, the Commission presented a communication where ten objectives were agreed under these three headings (CEC, 2001). The communication is the result of negotiation between different actors within the Commission. It was then discussed in the EPC and the SPC, which finally agreed on eleven objectives (SPC and EPC, 2001) that were endorsed at the Laeken Summit in December 2001. Under the adequacy pillar, there are three objectives: to prevent social exclusion in old age, to allow people to maintain their living standards and to promote solidarity between and within generations. Under the financial sustainability pillar, there are five objectives: two relate to working life and two to pension systems themselves. The first two are to raise employment levels and to extend working lives. The following three are to ensure sustainable pensions in a context of sound public finances, to adjust benefits and contributions so as to share the financial consequences of ageing in a balanced way between the generations, and finally to ensure that private pension provision is adequate and financially sound. Under the pillar on responding to changing needs (also referred to as the modernisation pillar), there are three objectives: to adapt to more flexible employment and career patterns, to meet the aspirations for greater equality of women and men, and to make

pension systems more transparent and demonstrate their ability to meet challenges.

Then, the Member States submitted their "National Strategy Reports" (NSR) on pensions in September 2002, in which they presented the strategies that they have undertaken and are undertaking in view of the European-level objectives. In October, the so-called peer review session took place. During this session, Member States reviewed each other's NSRs on the basis of pre-established questions. In December 2002, the Commission adopted the draft joint report of the Commission and the Council that evaluates the national strategies for adequate and sustainable pensions. A superficial reading of the report reveals that most Member States have launched reforms in line with the European objectives in this area. The Commission, however, urges Member States to make further reforms to be fully in line with the European aims, some needing to focus more on financial sustainability, others more on adequacy. In the report there was more focus on these pillars than on the modernisation pillar. Interestingly, the Member States are advised to increase Labour Force Participation (LFP) as a means of increasing financial sustainability through increased economic productivity and improving adequacy through longer periods of contribution, thus ensuring a higher level of pension. Anna Diamantopoulou optimistically stated that this report was a "milestone" in EU policy co-ordination. It remains to be seen how the Council will respond to the draft version of the report – will it accept the implicit policy recommendations made by the Commission to Member States (as is the case in employment policy) or will it seek to render the report more neutral, in the name of subsidiarity (as was the case for the first joint report of the Commission and the Council, where the initial classification of the Member States' performance by the Commission was discarded by the Council)? The Council is to approve the report prior to the forthcoming Spring European Council in March 2003, where it is to be endorsed.

The report is divided into three major sections.

The first part of the first section reiterates the discourse on the challenge of population ageing. It is principally based on information from the EPC report of November 2000, that presented a

comprehensive projective analysis through 2050 on the impact of the ageing of the population on public pension systems. The EPC's analysis essentially consists of long-term projective simulations of public pension expenditure (up to 2050) based on demographic and macro-economic assumptions. There is disagreement among economists on the solidity of the baseline assumptions that act as starting points and are also linked to the conclusions drawn (Math, 2001; see Fitoussi and Le Cacheux, 2002 for quite different economic projections). It is undeniable that pension expenditure is on the rise, but the degree of rising expenditure is difficult to establish with certitude. Nonetheless, what is essential to note here is that the discourse on population ageing is presented as and increasingly accepted among the public as conventional wisdom (European Commission, Eurobarometer, autumn 2001). This acceptance of the "challenge of ageing" discourse reflects the fact that "*[…] through the forums for discussion created by the EU, ideas are spread, awareness raised, and policy networks created*" (Pochet, 2003).

The discourse on the need to reform pension systems due to population ageing is also propagated by a number of other international actors, notably the World Bank, that first viewed pension systems in three pillars (World Bank, 1994). It was an influential player in propagating the discourse on the need to reform pension systems due to the ageing of the population. In December 2002, the OECD published a report on the contribution of delaying retirement to economic growth and employment, making policy recommendations along the same lines as the EU. In addition to increasing production and consequently available resources for consumption, the report also points out that such a strategy would decrease the burden of ageing on public finances. It finds early retirement plans particularly "unadapted and obsolete", and qualifies incentives to leave the labour market early as "distortions" that penalise the economy as well as workers (*Le Monde* Interactif, 2002).

The second part of the first section then goes on to discuss perceptions among the public and knowledge of different aspects of their pension systems. It includes the extent to which the interviewees believe they will be secure in old age, and how they perceive a possible change in policies towards an increase in the retirement age. Due to the

reinforcement of the discourse on population ageing, public opinion is rather pessimistic about future security in old age through the public pillar of the pension system. Approximately 50% of respondents claim that they would get by with great difficulty or with difficulty. As to the policy shifting towards more "active ageing", public opinion is more often than not against such changes. The report therefore points out that "*public attitudes in several Member States lag behind a reform process that is already engaged […] Creating greater awareness of what reform measures are needed […] should be a priority […] particularly as far as the link between employment and pension systems is concerned*" (CEC, 2002b: 21).

The second section is an analysis of the extent to which Member States meet and seek to meet the eleven European objectives, pillar by pillar.

The third section of the report draws conclusions and suggests steps to be taken in the future. Politically, the emphasis is on the need for Member States to pursue reforms of their pension systems in line with the objectives of the pensions OMC. As to future steps, the report highlights that one key priority is to work on common indicators reflecting the objectives. The Indicators Sub-Group of the SPC and the Ageing Working Group of the EPC are currently undertaking work in this direction. The suggestion is not just to focus on the present or recent past, but also to include future projections. In addition to creating indicators reflecting the eleven objectives of the pensions OMC, the report suggests assessing overall confidence in pension systems at regular intervals, as is done in Finland. Another look at future population growth and the long-term sustainability of public pensions will be taken by the Ecofin Council in 2005, when new census data is available. It essentially consists of repeating the exercise that resulted in the widely referenced report of the EPC produced in November 2000. The methodology, that has not been without criticism (Math and Pochet, 2001), will be refined. The Ecofin Council also envisages the inclusion of health and long-term care in the analysis.

Unofficially, there is agreement on the fact that the pensions OMC need not be an annual process. The common objectives and working methods will be reviewed in 2004 and a decision taken on whether or

not it will be necessary to launch a second round of OMC on pensions (CEC, 2002a).

Country summaries are annexed to the report. They are interesting insofar as they include implicit recommendations to Member States on reform of their pension systems. They will be analysed in the following section.

1.2 Participatory dimension of the pensions OMC

In the political and academic discourse (de la Porte and Nanz, 2003), the OMC has been presented as an important tool to improve *transparency* and *democratic participation*" (Council of the European Union, 2000: 7). This dimension is of particular importance when taking account of the debates around the need for Europe to become closer to citizens and to tackle the problem of the democratic deficit. The assumption is that the OMC's emphasis is on elements of participatory democracy, notably the inclusion of a wider array of 'stakeholders', civil society organisations, local and regional actors at all different stages (Council of the European Union, 2000: 6). One of the architects of the OMC, Mario Telò (2002) indicates that: "*If the actors of civil society are not concerned, consulted, involved at the level of partnership and negotiation, one of the aspects of the 'openness' of the new method will be belied*" (Telò, 2002: 265). Moreover, concerning analyses of the OMC as a "new", often presented as exemplary, mode of governance in the EU (Héritier, 2003), this participatory dimension is emphasised and, indeed, used to differentiate it from the classic Community method. To what extent does this dimension of the OMC, in the area of pensions, live up to its promise?

In line with the discourses on the need for "Europe" to respond to the democratic deficit, it is recognised, in the framework of the pensions OMC, that the "modernisation" of pension systems "*require(s) changes in attitude, lengthy consensus-building processes and the respect of citizens' legitimate expectations about their own pension entitlements*" (CEC, 2001: 2-3).

Among the eleven objectives of the OMC, the last combines the elements of transparency and participation. It is of interest to note that the 11th objective proposed in the 2001 communication (CEC, 2001) only focused on the transparency dimension. The participation element

(in italics below) was subsequently added in the joint report of the EPC and the SPC of November 2001, defining the implementation modalities of the OMC in the area of pensions, which was then endorsed by the Laeken European Council (December 2001). It now reads that the aim is to "*make pension systems more transparent and adaptable to changing circumstances, so that citizens can continue to have confidence in them. Develop reliable and easy to understand information on the long-term perspectives of pension systems, notably with regard to the likely evolution of benefit levels and contribution rates. Promote the broadest possible consensus regarding pension policies and reforms. Improve the methodological basis for efficient monitoring of pension reforms and policies*" (CEC, 2002b: 91). The reference to participation is not as direct as in, for example, the social inclusion OMC, that has a separate objective devoted to participation, naming the types of actors to be involved. The pensions OMC does not seek, according to its objectives, to be as participatory as the social inclusion OMC or even the European Employment Strategy, in which the participation of social partners has been institutionalised.

The national reports have generally been written jointly by the ministries of labour and social security and economics and financial affairs, sometimes including ministries of business and/or industry. However, the configuration differs across Member States, some including up to four ministries, while others are limited to one ministry. None of the National Strategy Reports (NSRs) make reference to the involvement of social partners or other actors in writing the reports. However, other sources of information indicate that there was some consultation with NGOs at national level [1], although the extent to which they influenced the process in substantive terms is not clear.

The NSRs have been analysed according to the transparency and participation criteria. Some, often in view of their own national policy priorities and/or traditions, emphasise one of these elements. Table 1 below summarises whether the reports focus, in the framework of objective 11, on transparency, participation or both these elements.

1 I would like to thank Jonathan Zeitlin (University of Wisconsin-Madison) for this point.

Table 1: Transparency and Participation in the NSRs of the Member States on Pension Reform

Country	Transparency	Participation
Austria	X	
Belgium	X	X
Denmark	X	
Finland	X	X
France	X	X
Germany	X	X
Greece	X	
Ireland	X	X
Italy	X	X
Luxembourg	X	X
Portugal		X
Spain		X
Sweden	X	
The Netherlands	X	X
United Kingdom	X	X

Without entering into detail on the way that the national reports present these different elements, it is interesting to note that the participatory dimension has particularly been highlighted in countries where social partner contributions to pension policy design and implementation are an integral part of national practice. These countries include, *inter alia*, France and Italy, where the social partners successfully opposed fundamental pension reform proposed respectively by Juppé and Berlusconi during the mid-1990s (Natali, 2003).

It does not appear that the pensions OMC as such has contributed, at the national level, to enhancing the participation of different actors in the reform of pension systems. However, the OMC on pensions is new, and one could thus argue that it has not yet been given the possibility to fully filter into national policy arenas in this and otherrespects.

On the issue of transparency, most Member States present information on mechanisms to ensure this aspect of the pension system, such as websites and information centres. Some have still to introduce or refine the mechanisms for transparency. In the case of Greece, in particular, this is of crucial importance, since there is a deep crisis of confidence in the pension system. To rebuild confidence in the system, transparency has been identified as a key pillar of the reform strategy. The OMC on pensions could in this case be used as one additional instrument to support a reform agenda along these lines.

2. Substantive analysis [2]

Having reviewed the current state of affairs in the pensions OMC, with a special focus on transparency and participation, the second part of this article will analyse how the Commission assesses the performance and reform policies of the Member States in relation to three key aspects of the pensions OMC:

- adequacy, represented by the extent to which pension systems manage to combat poverty and maintain the living standard of pensioners;
- financial sustainability;
- labour force participation, especially in the light of the Stockholm Council's benchmark of 50% participation among the population in the age group 55-64.

2 This analysis was based on the draft joint report written by the Commission. In the subsequent version of the report that was amended by the Council, the economic prerogatives appear to stand out more clearly.

This review will reveal the policy emphasis of the Commission. As discussed in the first part of the article, it is also interesting in so far as it will reveal the implicit influence of other OMCs on the pensions OMC.

Three categories will help to structure the analysis:

1) negative assessment, consisting of negative performance, accompanied by insufficient measures to meet the challenges concerned;

2) medium assessment, consisting of medium performance, with measures designed to meet challenges that are not deemed entirely convincing;

3) positive assessment, consiting of positive performance, with measures regarded as robust.

2.1 Adequacy

2.1.1 Negative assessment

Concerning the fight against poverty, the pension systems of only two countries were assessed negatively: Italy and the United Kingdom. In the former, a radical reform of the first pillar has decreased replacement rates, but is being addressed through new schemes in the second and third pillars. Coverage is not yet widespread, but the draft law on a new pension reform includes measures to promote the second and third pillars. The report also pointed to the need of atypical workers to be addressed. Adequacy in general is singled out as a challenge to be addressed in Italy.

As to the UK, the basic pension was assessed to be very low. Throughout the 1990s, there was increased participation in schemes under the second and third pillars, which benefited all but the poorest pensioners. The report pointed to the widening gap between the majority of pensioners and the poorest fifth of pensioners. Approximately 20% of pensioners live in households with incomes below 60% of the median income. Adequacy thus developed into an increasing challenge throughout the 1980s and 1990s. The government has taken several measures to address this challenge, including a

"Pension Credit" to replace the very low and severely means-tested minimum income guarantee. In the draft report, the Commission expresses uncertainty as to the effectiveness of this and other measures for tackling poverty.

For Italy and especially the United Kingdom, the implicit recommendation is to take additional measures to address the poverty challenge.

2.1.2 Medium assessment

Nine countries fall into the medium category: two countries with southern welfare state regimes – Greece and Portugal; four countries with corporatist welfare regimes – Germany, France, the Netherlands, Austria; two countries with social-democratic welfare regimes: Finland and Sweden; and Ireland, representing the Anglo-Saxon welfare state regime. Despite differentiated challenges, of which some details will be given below, one common challenge pointed out in almost all of these country assessments was the higher poverty risk among women.

Women represent the majority of older people – almost 60% of people over 65 years and approximately 65% of those over 75. Due to lower labour force participation and earnings, women have lower individual pension entitlements than men. The report highlights that for future generations, the situation is likely to improve as more women enter the labour force, have longer career histories and higher life-time earnings. However, in the short run, these challenges need to be tackled for current pensioners (CEC, 2002b).

In Greece, old age has been identified as the most important factor in determining the risk of poverty, which is exacerbated by the radically curtailed minimum income protection and the expected decrease in traditional family solidarity. The Greek NSR has therefore taken many measures to address this challenge. In the draft joint report, the Commission recognises the relevance of the Greek strategy's focus on addressing poverty in old age, but states that the poverty risk is over-estimated, implying that there is no longer an urgent need to focus on this issue.

In Portugal, recent measures have sought to raise minimum pensions, which should help alleviate poverty risks, although adequacy has explicitly been highlighted as a challenge.

The draft joint report points out that in Germany, progress has made in the second and third pillars, which is deemed sufficient to make up for the small reduction in the first pillar. Measures have also been taken to include persons in atypical situations.

In France, the pension system is generally judged to be effective in poverty alleviation, but the inequity of the system was highlighted. The need to ensure equitable treatment of members of different schemes was suggested.

In the Netherlands, there is almost no risk of poverty as the basic pension is high, and the second pillar of occupational pension schemes is more developed than elsewhere in the EU, due to collective agreements to ensure mandatory coverage for most workers, which is also likely to be extended to more atypical workers.

In Sweden, there has been a major reform of the pension system, which will lead to a widening gap between wage earners and pensioners with earnings-related pensions and those on guaranteed minima, which could lead to poverty risks. Interestingly, the Commission does not consider this a major challenge.

In Finland, measures are being taken to improve the situation of people in atypical situations.

In Ireland, the poverty rate of older persons decreased during the period 1994-2000. The government is taking further measures to reduce this poverty rate.

2.1.3 Positive assessment

The assessment of the extent to which pension systems respond to the challenge of adequacy has been positive for four countries: Denmark and Luxembourg, where the first pillar is well developed, come as no surprise. For Belgium, the expansion of the second pillar of pensions to reduce the gap between final earnings and pension benefits through

collective agreements is deemed positive, as it could increase replacement rates and living standards in the long run. In the case of Spain, the report points out that the pension system "*[…] appears to perform well in terms of adequacy*" (CEC, 2002b: 122). It then states that the "*government nevertheless wishes to strengthen occupational pension provision*" (CEC, 2002b: 121).

2.2 Financial sustainability

2.2.1 Negative assessment

The verdict on financial sustainability was negative for five countries: three countries with southern welfare state regimes (Greece, Spain, Italy) and two with continental welfare state regimes (Belgium and France).

The Commission pointed out that the reform of pension systems in Greece does not address the issue of financial sustainability. The reform is criticised for focusing on "*existing problems rather than helping prepare for the ageing problem*" (CEC, 2002b: 118).

As concerns Spain, the report points out that the pension system "*[…] faces a major challenge with regard to financial sustainability*" (CEC, 2002b: 122) and that while recent measures, including the establishment of a reserve fund, are steps in the right direction, the reform efforts were deemed to be insufficient. The report points out that the Spanish system does not currently face a challenge, butthat the major challenge is likely to be from 2020 onwards.

Italy is noteworthy in that it has the highest old-age dependency ratio among the EU Member states. The government has taken measures to curb pension expenditure growth, something recognised in the report. But the report pointed with concern to the current deficit of the pension system. It also criticised the high financing requirement of the present reform of the first pillar, "*which is too long to address the demographic imbalances*" (CEC, 2002b: 133).

For Belgium, concern was expressed about public finances moving into deficit in 2002 and the unusually high level of public debt: the Commission bluntly doubted the success of the major pension reform

introduced, as it depended on budget surpluses being achieved for several decades to come.

As for pension reform in France, which still remains to be defined, the report highlighted that the "*financing of the pension system for the decades ahead is currently not secured, and significant further reform efforts are needed*" (CEC, 2002b: 126).

2.2.2 Medium assessment

The situation is medium for six countries.

For Denmark, Finland and the Netherlands, the Commission report points out that while the strategies are otherwise on the road to sustainability, they rely on high and continuous surpluses in general government finances for many years, about which the Commission has some doubt.

In the case of the Netherlands, the report also indicates that public pensions expenditure appears moderate compared to the extent of demographic ageing (rising faster than the EU average). The government has planned a pension reform to increase the importance of the second pillar and to decrease the risks to financial sustainability, which is welcomed by the Commission.

For Germany, the Commission merely notes that "some" progress has been made to respond to the challenges of financial sustainability, but that further efforts are required.

In the case of Luxembourg, the report puts much emphasis on the possible breakdown of the system in Luxembourg, as its financial sustainability depends on high economic growth, but also on major contributions by non-resident workers. The report suggests that the associated risk factor should be taken into account in the amount of reserves being held by the general pension scheme.

In Portugal, the latest pension reform has made progress in meeting the financial challenge of the pension system. The Commission is however critical of the fact that the government has only presented its programme of how to address this challenge up to 2030.

2.2.3 Positive assessment

Only three countries received positive ratings for ensuring the financial sustainability of their pension systems: one Scandinavian country, Sweden, that has undertaken a major reform, and the two Anglo-Saxon countries: Ireland and the United Kingdom.

The increase in the old-age dependency ratio, smaller in Sweden than the EU average, combined with the new reformed pension system that seeks to limit growth of pensions expenditure, explains why Sweden fares so well. The expected rise in spending is estimated to be relatively small and should not represent a major challenge. The challenge is addressed through an automatic balancing mechanism built into the earnings-related pension scheme and a buffer fund.

The ageing challenge in Ireland, although expected later than for most of the EU countries"*[…] presents the same challenge for Ireland as other Member States*" (CEC, 2002b: 129). The Commission report praises Ireland for having made "*good progress in ensuring the financial sustainability of the pension system*" (CEC, 2002b: 130). The government has reportedly been committed to accumulating a reserve fund for future liabilities and to setting up a system for monitoring the adequacy of contribution rates through regular actuarial reviews.

For the UK, the Commission points out that financial sustainability appears to be secured well into the future. The conclusions of the Commission also state that it depends to a larger extent than other countries on the performance of private pension providers. However, the Commission cites the EPC's forecast of November 2000, according to which the UK is the only country where public pension expenditure is expected to fall to 4.4% of the GDP by 2050. The risk is therefore not assessed to be consequential.

2.3 Labour force participation

There were two countries for which the issue of labour force participation was not brought up: Ireland and Portugal.

2.3.1 Negative assessment

Seven countries fall into this category: all three southern European countries and four continental countries.

The report considers that in Italy it is necessary to introduce more incentives to stay in employment longer, and to increase the employment rate in general, and those of women (41%) and older workers (currently 28%) in particular. While recognising that measures are being taken to encourage labour force participation among women and older workers in Spain, the report considers that further measures are necessary in this respect. In the case of Greece, the Commission is critical of the effectiveness of the measures to increase employment rates among older workers, as the employment rate of older workers has decreased by 3%.

While Austria, Belgium and France have taken some measures to improve the participation of older people in the labour market, the Commission insists that further measures are required.

For Luxembourg, the report highlights that employment rates among residents, especially women and older people (now 25%), should be raised.

2.3.2 Medium assessment

Denmark, the United Kingdom, the Netherlands and Germany received a medium assessment.

Denmark and the United Kingdom have taken measures to increase labour force participation among the older population, and to defer retirement, although the Stockholm target has already been reached. However, the Commission believes that in order for the objectives to be achieved, efforts need to be boosted further.

The Commission points out that some scope for raising employment existed in the Netherlands, especially among the high proportion of women working part-time and older workers (now 40%), which is being addressed.

While the Commission report viewed the efforts of Germany to increase labour force participation among older workers positively, it stated that further efforts needed to be made.

2.3.3 Positive assessment

The systems of two Nordic countries were assessed positively.

Currently, Finland's labour force participation is 67%; among older workers it is 46%. The government plans to increase this rate to 55% by 2010, above the Stockholm target, which would increase the effective retirement age, currently 59. In its report, the Commission approves of such a strategy.

In Sweden, the employment rate among older workers is the highest in the EU and early retirement is not a major problem, although there are increasing rates of sick leave among this group of workers.

2.4 Policy emphasis of the European Commission in the joint report

To conclude this brief analysis, two points will be made. First, in the joint report, the Commission's implicit recommendations are clearly much stronger when supported by quantitative benchmarks or reference to quantitative data on the ageing of the population. Second, besides this bias on the basis of quantitative data, there is a quite balanced treatment of the eleven objectives. In addition to the elements above, considerable attention is devoted to the issue of equal treatment and the vulnerable position of older women. The bringing together of social and economic priorities in the pensions debate through the OMC has thus been followed through from the agreement of objectives to the joint report.

Conclusion

On a positive note, this brief analysis has illustrated that dialogue and even agreement on objectives between economically and socially oriented players has been possible in the framework of the OMC. As put by Pochet "*[…] the discussions taking place at European level propose incremental change, touching on a range of issues, where efforts are made to reconcile*

apparently contradictory objectives (collective solidarity and market forces)" (Pochet, 2003). Another effect has been to render the pension reform discussions at European level somewhat less secretive and more coherent. Moreover, although the Commission leans slightly more towards the policy measures supported by quantitative benchmarks, notably the employment rate among older workers, there has overall, in the joint report of the Council and the Commission, been a rather even-handed treatment of the different policy objectives of the pensions OMC. However, all these positive aspects may be ephemeral if the pensions OMC is not streamlined with the other European co-ordination processes. Reference is made in the Joint Council and Commission report to the progress being made in the directive on activities and supervision of institutions for occupational retirement provision, however, the extent to which, at national level, these processes are linked, remains an open question (Council of the European Union, 2002).

Another element not treated in detail but nevertheless essential is that the impact of the pensions OMC as such is not clear, as the eleven objectives concur with policy recommendations made through other means. An optimistic vision would be that "*[…] the more complex the discussions at European level, the more weight they carry, and the more options they offer for dealing with the challenges of ageing*" (Pochet, 2003). If the objectives of the pension reform OMC and the implicit recommendations made by the Commission are taken seriously or are combined with other means to promote change, then the OMC on pensions could be consequential for Member States. However, as argued by Dehousse (2003) "[…] *in the eyes of public opinion, cooperation between experts within more or less obscure networks is not necessarily the best form of legitimation […] Space for debate and mechanisms of control are thus necessary*". Hence the need to render the process more open in terms of participation – i.e. having the social partners and other actors involved in the process.

At best, the pensions OMC could be conceived as a means through which to help Member States frame the different initiatives and measures taken to address pension reform in a holistic manner through three pillars: adequacy, financial sustainability and modernisation. One

could imagine that for countries just beginning their pension reform process, the "late-comers", such as Greece and Portugal, it could have an influence.

At worst, it could be characterised as yet another bureaucratic process. In this scenario, Member State bureaucrats gather all relevant information and frame it in a report that seeks to illustrate that the Member States really are in step with the European policy line. One could imagine that this could be the case for countries having completed the reform of their pension systems, such as Sweden and Denmark.

One could also, more realistically, imagine a middle way, according to which Member States use the pensions OMC to enhance some aspects of their pension reform or to introduce new elements. This could be blame-shifting from national to European level, in the case of unfavourable public opinion, reflected in the joint report of the Council and the Commission, for a planned pension reform. This could for example be (and is for some continental countries) the case for the progressive introduction of policy measures to increase the average retirement age and to extend the number of working years for an adequate replacement rate of the salary earned during working life, in line with the "active ageing" paradigm. However, it would be naïve to point to the pensions OMC as the exclusive trigger for such a policy shift. The OMC on pensions could instead be characterised as one element among others to reinforce the position put forward by policy makers in the national arena.

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Future prospects

In this 2002 edition of "Social Developments in the European Union" we have observed that the key elements of national social models are currently at the very heart of policy discussion in the Community. Nothing can escape a European dimension nowadays – to say the least – whether it be social protection, employment policy, the social dialogue or services of general interest. As we have seen, the objectives assigned to these different topics have not always been thoroughly clarified at EU level. Many questions remain unanswered and there are a number of contrasting visions in some cases, which means that conflict surrounds certain issues (retirement pensions, for instance). However, it is not just the policy guidelines given – or to be given – at European level which lack total clarity; the same applies to the question of what instruments are to be used – as amply demonstrated by debate within the European Convention. What objectives? What instruments? What scenarios? These are the three open-ended questions, which thankfully are at least now being posed. There can be little doubt that political circles will play a crucial role in formulating the answers; hence the importance of the present phase.

In an uncertain international environment, the Convention on the future of Europe is endeavouring to redefine the European venture. One of the lessons which can be learnt from the proceedings of the Convention in 2002 is that there can be no avoiding a debate about the social model. Yet paradoxically this model is extremely difficult to define. For this reason the question as to what values underpin this collective venture – one which in the long term is not confined to economic integration – is absolutely central.

This fundamental debate is flanked on a daily basis by other, apparently more modest, talks, but ones which are likewise gradually reshaping the nation-states. This is happening through classic legal instruments, of which the European Court of Justice is often only the tip of the iceberg, but also via new forms of co-ordination. Ever since the Single European Act, Europe has been pursuing this twin-track approach: continually redefining its purpose and goals, on the one hand, and, on the other, carrying out everyday tasks in a sequence of trial and error. The social sphere would appear to be the most symptomatic of this dual strategy. Working methods in this sphere have been evolving bit by bit over the past few years. The outcomes are uncertain as yet, and even unsatisfactory, but at least discussion is ongoing. Similarly, the "constitutional" talks reveal just how hard it is for politicians to reach agreement on Europe's fundamental social values.

In our opinion, one of the principal social challenges – both for the future Constitution and for the flexible co-ordination processes – pertains to the democratic debate in different areas (European, national and, above all, in the interstices between these two levels). Whereas there are no ready-made solutions, some interesting headway has been made in the Convention's drafting procedures. The same applies to the repeated calls for greater involvement of the social partners and civil society in the new Employment Strategy.

But let us return to the short-term outlook for social developments in Europe. At the start of 2003, the Commission signalled the way ahead for social policy in a Communication ([1]): we shall outline below what we believe are its most salient points.

In respect of employment, the main task this year will be to review the European Employment Strategy. The Commission is planning to publish another Communication laying down the actual approach to be followed. In the meantime, the normal course of events will continue

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1 Communication from the Commission "Scoreboard on implementing the social policy agenda", COM (2003) 57 final, 6 February 2003 (http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0057en01.pdf).

with the adoption of annual guidelines and recommendations. Another Communication will be issued concerning the interaction between immigration, employment and social policies in the EU. Thus it will be necessary to clarify the links between employment policy and the other Open Methods of Co-ordination. The link between employment policy and social protection will also need to be clarified: the Commission is preparing measures to enhance EU co-operation to promote work incentives within social protection systems ("make work pay"). The Social Protection Committee has already drawn up a report on this topic to launch the debate.

Likewise in 2003, the Member States will finalise their second National Action Plans on poverty and social inclusion. The question of how this area should tie in with the guideline to be devoted to it in the new Employment Strategy is bound to arise. 2003 will also be the year of the first European report on equality and discrimination, as well as the draft Joint Report on Social Inclusion.

Two reports are pending in the field of pensions: one from the Commission on the exit age from the labour market (an issue also known to be the focus of recent study at the OECD); and the joint report for the spring summit, which caused a good deal of tension between various Directorates General of the Commission as well as between the Social Protection Committee and the Economic Policy Committee.

In addition, the Commission is planning a Communication on the next steps in political co-operation in the field of healthcare and care for the elderly, and another concerning the introduction of a European health insurance card.

This is not an exhaustive list. We could equally mention the mid-term review of the social policy agenda and of the European Social Fund; the recasting of the directives on equal opportunities; the formulation of a gender equality work programme; and the amendment of the regulation on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. And the list goes on.

Finally, as concerns the social dialogue, the Commission is planning ("at last", it is tempting to say) a consultation of the social partners concerning the advisability of amending the directive on European works councils. This matter will inevitably be linked to another sensitive subject: "socially intelligent" restructuring, currently under discussion among employers and employees. Also on the social partners' agenda will be the follow-up of consultation on the processing of workers' personal data and the protection of privacy in the employment context, as well as exploratory talks about a possible new agreement on stress in the workplace.

As can be seen, there is no shortage of subject matter. Social Europe has certainly not gone off the boil, and the day to day agenda is a busy one. Social affairs in Europe could be said to range more widely now than ever before. Yet this agenda alone is no guarantee of satisfactory progress.

We believe in addition that two vital conditions need to be met. The first is that all components of this agenda must be fully and completely included in the determination of the EU economic guidelines. These guidelines are being superimposed on national economic policy guidelines to an increasing extent as time goes by: in particular, there could be no question of leaving the important Community debate about social protection disconnected from the Member States' economic, budgetary and fiscal policy decisions. Thus, if pensions are regarded as a "matter of common interest" for the future, then the long-term funding of social protection, and hence budgetary policy and taxation, are equally so. The same goes for healthcare. As stated in the Foreword, if social policy does not encompass all these interrelated issues, it might well be confined to a by-product of a narrowly circumscribed economic model. And that would also mean refusing to allow the economic and the social strands to join forces in fulfilling *jointly determined* objectives.

This brings us to our second condition, which is no less important: the fundamental objectives of the European socio-economic model pursued must indeed be determined jointly. Such joint determination implies a more explicit interrelation between this embryonic model and national political debates – including, of course, parliamentary debate

and social negotiations in the Member States. This interaction is not straightforward: Europe is, in a sense, a permanent coalition "government", neither solely left-wing nor solely right-wing. It is continually having to come to terms with different political tendencies which themselves evolve as a result of national elections. In the social sphere, Europe still lacks a "founding compromise" on which to base the development of European and national policy debates as well as industrial relations. At the time of writing, the Convention did not seem capable of providing the foundation for such a compromise.

These two conditions – integrating the social agenda into the economic policy guidelines, and interweaving the European and national levels – derive in part from the new working methods which we have examined in this volume. Flexible co-ordination (more "horizontal" instruments), without doubt to a greater extent than the classic legislative tools (more "vertical" instruments"), needs to sit within an overall context and involve stakeholders at all the different levels concerned. What a huge challenge for the future of the enlarged European Union.

Christophe Degryse

Chronology 2002
Key events in European social policy

JANUARY

15 January: The European Commission launches a **consultation with the social partners** on "socially intelligent" restructuring.

15 January: The European Commission publishes an update of its autumn forecasts on **the employment situation** in Europe. *Employment in Europe 2001*, Autumn Update, Office for Official Publications of the European Communities, Luxembourg, 2001.

15 January: The European Commission adopts its **Spring Report** on "The Lisbon Strategy. Making Change Happen", COM (2002) 14 of 15 January 2002.

24 January: The European Commission adopts **its report for the Barcelona summit**. Report requested by the Stockholm European Council: "Increasing labour force participation and promoting active ageing", COM (2002) 9 final of 24 January 2002.

30 January: The European Commission publishes its interim report on **economic and social cohesion** in the light of enlargement. First progress report on economic and social cohesion, COM (2002) 46 final of 30 January 2002.

FEBRUARY

5 February: The European Parliament adopts its report on the Worker **Information and Consultation** Directive. Ghilardotti report on the joint text establishing a general framework for improving information and consultation rights of employees in the European Community (A5-0026/2002 of 24 January 2002).

5 February: The European Parliament approves the Directive on **working time for road transport workers**. European Parliament legislative resolution on the joint text approved by the Conciliation Committee for a European Parliament and Council Directive on the organisation of the working time of persons whose occupation is the performance of mobile road transport activities (A5-0013/2002 of 23 January 2002).

6 February: The European Commission adopts a proposal for a regulation to give **foreign residents** the same social rights as European citizens. Proposal for a Council Regulation extending the provisions of Regulation (EEC) No.1408/71 to nationals of third countries not already covered by these provisions solely on the ground of their nationality, COM (2002) 59 final of 6 February 2002.

11 February: The European Commission proposes a Directive on a residence permit for victims of **illegal immigration networks and trafficking in human beings**. Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who co-operate with the competent authorities, COM (2002) 71 final of 11 February 2002.

13 February: The European Commission adopts an Action Plan for **skills and mobility**. Commission Action Plan for skills and mobility, COM (2002) 72 final of 13 February 2002.

18 February: The Council adopts a common position on the review of the Directive on the protection of employees in the event of the **insolvency of their employer**. Proposal for a European Parliament and Council Directive amending Council Directive 80/987/EEC on the

approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (EU Bulletin – 2002: 1.3.45, p. 39).

18 February: The Council of the European Union finally adopts the Directive on **working time for road transport workers**. Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities (OJ L 80 of 23 March 2002, pp.0035-0039).

19 February: Creation of a Contact Group between the **European Trade Union Confederation (ETUC)** and four European umbrella organisations representing environmental, social, development and human rights **NGOs** to establish structured dialogue with the European Convention.

19 February: The Commission publishes its second scoreboard monitoring the **social agenda** and European social policies. Scoreboard on implementing the social policy agenda, COM (2002) 89 final of 19 February 2002.

21 February: UNICE calls on the European Commission to revise the proposal for a directive on **temporary agency work**.

26 February: The Council and the European Parliament reach an agreement during conciliation on **employment incentive measures**. Decision on Community incentive measures in the field of employment (2000/0195 (COD) and 6676/02 - Presse 55-G).

28 February: The Justice and Home Affairs Council reaches an agreement on the **Eurodac** system for monitoring the fingerprints of applicants for asylum. Council Regulation (EC) No.2725/2000 of 11 December 2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention.

MARCH

1 March: The European Commission approves the conclusions of the report by the High Level Group on **the future of industrial relations in Europe**. Report of the High Level Group on Industrial Relations and Change in the European Union, Office for Official Publications of the European Communities, Luxembourg, 2002.

5 March: Contribution by the social partners in the social dialogue committee on **lifelong development of competencies**.

7 March: Employment and Social Affairs Council.

11 March: EuroCommerce and Uni-Europa Commerce sign voluntary guidelines supporting **age diversity**.

12 March: UNICE questions the need for a European Commission Communication on the management of **"socially intelligent" restructuring**.

14 March: The European Trade Union Confederation (ETUC) proposes to UNICE that they enter into discussions for three months on their contribution to the anticipation and good management of **corporate restructuring**.

15 March: The **social summit** becomes an integral part of the spring European Council.

20 March: The European Commission proposes a Directive on **temporary agency work**. Proposal for a Directive of the European Parliament and of the Council on working conditions for temporary workers, COM (2002) 149 final of 20 March 2002.

23 March: The Directive on worker information and consultation in national companies is published in the Official Journal. Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for **informing and consulting** employees in the European Community (OJ L 80 of 23 March 2002, pp.0029-0034).

27 March: UNICE calls on the Council and the European Parliament to find a simpler solution to the proposal for a directive on **temporary agency work**.

27 March: Creation of a "**Work Relations**" group of Directors-General within the European Commission.

APRIL

4 April: John Monks, an English trade unionist, begins a European career and sets his sights on the post of **Secretary General of the European Trade Union Confederation (ETUC)** with a view to replacing Mr. Gabaglio.

10 April: The Commission presents a draft of a Community return policy on **illegal residents** in the EU. Green Paper on a Community return policy on illegal residents, COM (2002) 175 final of 10 April 2002.

15 April: The Platform of European **Social NGOs** makes its contribution to the work of the Convention.

18 April: During conciliation, the European Parliament and the Council reach agreement on **equal treatment for men and women in the workplace**, incorporating a common mechanism to **combat sexual harassment** (8103/02 - Presse 108).

26 April: Political agreement by the Justice and Home Affairs Council on the general minimum conditions for the **reception of applicants for asylum** in Europe. Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States (EU Bulletin 4/2002: 1.4.7.) and COM (2000) 578 final of 20 September 2000 and COM (2002) 326 final of 18 June 2002.

25 April: The European Parliament approves the proposal for a directive laying down minimum standards on the **reception of applicants for asylum**. Hernández Mollar report on the proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in the Member States (A5-0112/2002 of 15 April 2002).

MAY

7 May: The European Commission advocates the establishment of a **European Corps of Border Guards**. Towards integrated management of the external borders of the Member States of the European Union, COM (2002) 233 final of 7 May 2002.

14 May: The Members of the European Parliament adopt the report on the protection of employees in the event of the **insolvency of their employer**. European Parliament position adopted at second reading on 14 May 2002 with a view to the adoption of Directive 2002/…/EC of the European Parliament and of the Council amending Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer.

15 May: The Foundation for the Improvement of Living and Working Conditions publishes a study on **temporary agency work** in Europe.

22 May: The European Trade Union Confederation (ETUC) provides an assessment of the **European Employment Strategy** and puts forward proposals for the revision of the process.

23 May: The negotiations between European social partners (ETUC/UNICE/CEEP) on **telework**, which began on 12 October 2001, conclude after eight months of talks. The ETUC's negotiators recommend the adoption of the negotiated framework agreement to the ETUC's Executive Committee. European Framework Agreement on Telework of 16 July 2002 (S/2002/206.01.02/Accord fr).

28 May: The proposal for a directive **on the residence permit for victims of networks of smugglers** who co-operate with the authorities is published in the OJ. Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who co-operate with the competent authorities, COM (2002) 71 final of 11 February 2002 (OJ C 126 E of 28 May 2002, pp.0393-0397).

30 May: The European Commission and Eurostat publish the report on "The **social situation** in the European Union 2002". It stresses, in

particular, that immigration is not a solution to the ageing of the population. "The social situation in the European Union 2002", Eurostat, Luxembourg, 2002.

30 May: The European Parliament adopts a report on **corporate social responsibility**. Howitt report on the Commission Green Paper entitled "Promoting a European framework for corporate social responsibility" (COM (2001) 366 - C5-0161/2002-2002/2069 (COS)) (A5-0159/2002 of 30 May 2002).

30 May: A report by the European Commission looks at **social responsibility in SMEs**. *European SMEs and Social and Environmental Responsibility*, Office for Official Publications of the European Communities, Luxembourg , 2002.

30 May: The Youth Council approves a resolution which provides for the application of the **open method of co-ordination in the youth field**. European co-operation in the field of youth – Council Resolution, 2430th meeting of the Education/Youth Council, Brussels, 30 May 2002.

JUNE

3 June: At the informal meeting of the Transport Ministers, Spain announces that it has applied to the CJEC for annulment of the Directive on **working time for road transport workers** (Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities).

4 June: UNICE and the ERT send an open letter to President Prodi on the issue of **corporate social responsibility**.

5 June: The European Commission adopts a report for the Seville summit on the guidelines for State aid and **services of general economic interest**. Report from the Commission on the status of work on the guidelines for State aid and services of general economic interest, COM (2002) 280 final of 5 June 2002.

12 June: The European Commission approves two memoranda of understanding concerning the participation of applicant countries in Community action programmes to **combat social exclusion**.

12 June: The European Commission launches the first phase of consultation of the social partners on the issue of the **transferability of supplementary pension rights**.

12 June: The European Commission calls on the social partners to evaluate their participation in the implementation, at national level, of the **European Employment Strategy**.

13 June: The Justice and Home Affairs Council formally approves the Framework Decision on the **European arrest warrant** (Doc. 7253/02) and the Framework Decision on combating terrorism (Doc. 6128/02) (OJ L 164 of 22 June 2002, pp.0003-0007).

14 June: The European Parliament approves the amendments to the 1976 Directive (76/207/EEC) on **equal treatment** for men and women as regards access to employment, vocational training and promotion, and working conditions (PE-CONS 3624/2002 - C5-0185/2002 - 2000/0142(COD) and report A5-0207/2002 of 29 May 2002).

14 June: The work programme on the follow-up of the objectives of **education and training** systems is published in the OJ (OJ C 142 of 14 June 2002, pp.0001-0022).

14 June: European employers, meeting in the Council of Presidents, call for European decisions **on asylum and immigration, a Community patent and eEurope.** UNICE elects Jürgen Strube as its next President.

18 June: The European Commission adopts a method for evaluating **services of general interest in Europe**. Communication from the Commission – A Methodological Note for the Horizontal Evaluation of Services of General Economic Interest, COM (2002) 331 final of 18 June 2002.

18 June: The European Commission presents an amended proposal for a directive on the **minimum standards for asylum procedures**. Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM (2002) 326 final of 18 June 2002 and COM (2002) 326 final/2 of 3 July 2002.

19 June: European air traffic controllers launch a **strike in protest** against the "single sky" plan proposed by the European Commission which, in their view, would pave the way for the privatisation of air traffic control services.

26 June: The European Commission adopts a Communication on **European social dialogue** in which it proposes, in particular, setting up a "tripartite social summit for growth and employment". "The European social dialogue, a force for innovation and change", COM (2002) 341 final of 26 June 2002.

27 June: The proposal for a directive of the European Parliament and of the Council concerning certain **aspects of the organisation of working time** (codified version) is published in the OJ. Proposal for a Directive of the European Parliament and of the Council concerning certain aspects of the organisation of working time (codified version), COM (2002) 336 final of 24 June 2002.

27 June: The Education/Training Council adopts a resolution on lifelong learning. Resolution of 27 June 2002 on lifelong learning, OJ C 163 of 9 July 2002, pp.0001-0003.

29 June: The Decision of the European Parliament and of the Council of 10 June 2002 on **Community incentive measures in the field of employment** is published in the OJ. Decision No.1145/2002/EC of the European Parliament and of the Council of 10 June 2002 on Community incentive measures in the field of employment (OJ L 170 of 29 June 2002, pp.0001-0006).

JULY

2 July: The European Commission adopts a Communication on **corporate social responsibility**, which follows on from its Green Paper of July 2001. Communication from the Commission concerning corporate social responsibility: A business contribution to sustainable development, COM (2002) 347 final of 2 July 2002.

2 July: The European Commission lays down fifteen quality indicators in the field of **lifelong learning**. European report on quality indicators of lifelong learning. Fifteen quality indicators. Report based on the work of the working group on quality indicators. European Commission, June 2002, Brussels (only available in English).

3 July: The European Trade Union Confederation (ETUC) welcomes the Communication from the European Commission on the future of **European social dialogue**.

4 July: The European Parliament calls on the European Commission to strengthen the local dimension of the **European Employment Strategy**. Schmid report on the Commission Communication "Strengthening the local dimension of the European Employment Strategy", (COM (2001) 629 - C5-0076/2002 - 2002/2034(COS)) (A5-0214/2002 of 31 May 2002).

4 July: The European Parliament calls on the Commission to present a 2003 **gender equality work programme**. Figueiredo report on the application of the gender equality work programme (2001-2005) (A5-0197/2002 of 29 May 2002).

5 July: The European Commission adopts a Communication on the **financial participation of employees** in the enterprise. Communication from the Commission – On a framework for the promotion of employee financial participation, (COM 2002) 364 final of 5 July 2002.

10 July: In a letter to Commissioner Anna Diamantopoulou, the social partners state that they are going to organise a seminar on **managing change** and its social consequences in situations of restructuring and

call on the European Commission not to launch the second stage of consultation on restructuring pending the results of this seminar.

16 July: The social partners sign a Framework Agreement on Telework. Framework Agreement on Telework of 16 July 2002 (S/2002/206.01.02/Accord fr).

17 July: European Employment Strategy: the European Commission takes stock of the situation after five years. Taking stock of five years of the European Employment Strategy, COM (2002) 416 final of 17 July 2002.

19 July: The European Commission sets up a High Level Group on European **economic governance** in an enlarged Union.

29 July: The European Commission presents a report on the impact of Objective 1 of the **Structural Funds** for the period 2000-2006. The economic impact of Objective 1 interventions for the period 2000-2006. Final report to the Directorate-General for Regional Policy, Jörg Beutel, May 2002 (only available in English).

AUGUST

1 August: The Council's conclusions on **patient mobility** are published in the OJ. Conclusions of the Council and of the representatives of the Member States meeting in the Council of 19 July 2002 on patient mobility and health care developments in the European Union (OJ C 183 of 1st August 2002, pp.0001-0002).

27 August: The proposal for a directive regulating **temporary agency work** is published in the OJ. Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers, COM (2002) 149 final of 20 March 2002 (OJ C 203 E of 27 August 2002, pp.0001-0005).

27 August: The Council's amended proposal on **family reunification** is published in the OJ. Amended proposal for a Council Directive on the right to family reunification, COM (2002) 225 final of 2 May 2002 (OJ C 203 E of 27 August 2002, pp.0136-0141).

SEPTEMBER

3 September: The European Commission publishes a Communication on streamlining the annual **BEPGs and EES cycles**. Communication from the Commission on streamlining the annual economic and employment policy co-ordination cycles, COM (2002) 487 final of 3 September 2002.

3 September: The European Parliament rejects the Randzio-Plath report on development and new prospects for the European economic union (**economic governance**). Randzio-Plath draft report on development and new prospects for the European economic union (2002/2062(INI) provisional of 27 June 2002).

4 September: The European Parliament adopts the Miet Smet report on the scoreboard on implementing the **social policy agenda**, which calls, in particular, for the OMC to be integrated in the Treaty and for the European Parliament to be involved. Smet report on the scoreboard on implementing the social policy agenda (A5-0256/2002 of 10 July 2002).

5 September: In a report on **European citizenship**, the European Parliament calls for long-term immigrants to be granted rights which are as near as possible to those enjoyed by EU citizens. Coelho report on the third Commission report on citizenship of the Union, (COM(2001)506 - C5-0656/2001 - 2001/2279(COS)) (A5-0241/2002 of 20 June 2002).

6 September: The European Commission presents the **2002 annual report on employment**. *Employment in Europe 2002. Recent development and prospects*, Office for Official Publications of the European Communities, Luxembourg, 2002.

6 September: The informal Ecofin Council supports the strategy proposed by the **European Commission on streamlining the economic policies (BEPGs) and employment policies (EES)**.

11 September: The European Commission adopts a draft interinstitutional agreement on a **Solidarity Fund** to help regions affected by major disasters (IP/02/1287).

13 September: The informal Justice and Home Affairs Council reaches a political agreement on the definition of **refugee status**.

16 September: The European Trade Union Confederation (ETUC) responds to the Commission Communication "First stage of consultation with the social partners on the **transferability of supplementary pension rights**".

19 September: The Economic and Social Committee gives its opinion on the European Commission's draft directive on temporary workers. Opinion of the Economic and Social Committee on the proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers (COM (2002) 149 final-2002/0072(COD)), SOC/110 of 19 September 2002.

20 September: UNICE responds to the consultation launched by the Commission on the **transferability of supplementary pension rights**.

24 September: The European Commission's proposal for a "**tripartite social summit** for growth and employment" is published in the OJ. COM (2002) 341 final - 2002/0136(CNS) (OJ C 227 E of 24 September 2002, pp.0565-0566).

25 September: The European Commission proposes applying for a further year a reduced rate of VAT to **labour-intensive services**.

25 September: The European Parliament adopts the Smet report on **representation of women among the social partners of the EU**. Smet report on representation of women among the social partners of the European Union (A5-279/2002 of 10 September 2002).

25 September: The European Parliament adopts its report on the assessment of the **European Employment Strategy** after five years and calls, in particular, for the strategy to be adapted with a view to the extension of the European labour market. Schmid report on the Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on taking stock of five years of the European Employment Strategy, (COM (2002) 416) (A5-0301/2002 of 12 September 2002).

OCTOBER

5 October: The Directive on **equal treatment for men and women** as regards access to employment and training is published in the OJ. Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 269 of 5 October 2002, pp.0015-0020).

8 October: The Directive on the protection of employees in the event of the insolvency of their employer is published in the OJ. Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ L 270 of 8 October 2002, pp.0010-0013).

8 October: The Employment and Social Affairs Council emphasises the need to mainstream gender issues in the **fight against poverty and social exclusion**, and to draw up with the European Commission a good practice guide for the next national action plans in this area. 2454th meeting of the Employment, Social Policy, Health and Consumer Affairs Council of 8 October 2002 (12746/02 - Presse 306).

9 October: The new programme of Community action in the field of **public health** 2003-2008 is published in the OJ. Decision No.1786/2002/EC of the European Parliament and of the Council of 23 September 2002 adopting a programme of Community action in the field of public health (2003-2008) (OJ L 271 of 9 October 2002, pp.0001-0012).

10 October: The Executive Committee of the European Trade Union Confederation (ETUC) adopts **its contribution to the work of the Convention** "A Constitutional Treaty for a Social and Citizens' Europe".

10 October: The Executive Committee of the European Trade Union Confederation (ETUC) decides to propose to the 10th Statutory

Congress (26-29 May 2003 in Prague) the candidature of **John Monks**, Secretary General of the British TUC, as the ETUC's Secretary General and successor to Emilio Gabaglio.

10 October: The Executive Committee of the **European Trade Union Confederation (ETUC)** affiliates the YS (Norwegian Vocational Trade Union Confederation) and the EAKL (Association of Estonian Trade Unions). The YS has 197 000 members and the EAKL has 50 000. The ETUC now has 76 national trade union confederations from 34 European countries and 11 industry federations, with a total of over 60 million members.

10 October: The European Parliament adopts its report on the **Action Plan for skills and mobility** and calls, in particular, for consideration to be given to the possibility of laying down a "European workers' status". Bastos report on the Commission Communication on the Commission's Action Plan for skills and mobility (COM (2002) 72) (A5-0313/2002 of 19 September 2002).

14 October: The European Commission publishes a Communication on a European return policy on **illegal immigrants**. Communication from the Commission to the Council and the European Parliament on a Community return policy on illegal residents, COM (2002) 564 final of 14 October 2002.

15 October: The Justice and Home Affairs Council adopts conclusions on the **integration of third country nationals** (12894/02 - Presse 308). 2455th meeting of the Justice and Home Affairs Council, Brussels, 14 and 15 October 2002 (EU Bulletin 10/2002: 1.4.6, p.50).

16 October: The Commission launches a European Forum on **Corporate Social Responsibility**.

23 October: The European Parliament calls on the European Commission to make progress on occupational **health and safety laws**, and regrets that it has not yet launched a multiannual programme for SMEs in this field. Hughes report on the Commission Communication "Adapting to change in work and society: a new

Community strategy on health and safety at work 2002-2006", (COM (2002) 118) (A5-0310/2002 of 16 September 2002).

23 October: The European Parliament calls for the legislation governing **health and safety** at work to be applied to self-employed workers working within an undertaking. Pérez Álvarez report on the proposal for a Council recommendation concerning the application of legislation governing health and safety at work to self-employed workers (COM (2002) 166) (A5-0326/2002 of 4 October 2002).

25 October: Eurocadres calls for the bodies responsible for **employment and qualifications**, in particular Eures and the Bologna process, to be opened to the social partners.

31 October: The European Commission proposes to the social partners a European framework of principles and rules governing the **protection of personal data at work** (second consultation).

NOVEMBER

4 November: UEAPME calls for independent representation of crafts, trades and SMEs in the cross-industry social dialogue.

6 November: The European Commission adopts a Regulation to facilitate **State aid for employment**. Commission Regulation (EC) No.2204/2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment, OJ L 337 of 13 December 2002, pp.0003-0014.

8 November: In the continuing debates on economic governance, the Praesidium of the European Convention announces that it is going to propose the creation of a **Working Group on Social Europe**.

13 November: The European Commission publishes its draft joint **employment** report for 2002. Draft Joint Employment Report 2002, COM (2002) 621 final of 13 November 2002.

14 November: The Regulation establishing the EU **Solidarity Fund** for natural disasters is published in the OJ. Council Regulation (EC)

No.2012/2002 of 11 November 2002 establishing the European Union Solidarity Fund (OJ L 311 of 14 November 2002, pp.0003-0008).

14 November: The European Parliament and the Council reach a political agreement in conciliation on the Directive limiting **exposure to noise** at work. Joint text approved by the Conciliation Committee. Directive of the European Parliament and of the Council on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise) (C5-0501/2002 of 14 November 2002).

20 November: The European Commission proposes establishing five benchmarks in **education and training**. Communication from the Commission "European benchmarks in education and training: follow-up to Lisbon European Council", COM (2002) 629 final of 20 November 2002.

21 November: The European Parliament adopts its position on the draft Directive on **temporary agency work**. van den Burg report on the proposal for a Directive of the European Parliament and Council on working conditions for temporary workers, COM (2002) 149 final (A5-0356/2002 of 23 October 2002).

21 November: The EP adopts the report on the extension of the Regulation on **social security benefits to third country nationals**. European Parliament legislative resolution on the proposal for a Council Regulation on extending the provisions of Regulation (EEC) No.1408/71 to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality (COM (2002) 59 – C5-0084/2002 - 2002/0039(CNS)) (A5-0369/2002 of 5 November 2002).

22 November: The Praesidium of the Convention publishes a draft mandate for the new **Working Group on Social Europe** of the Convention, which will be launched on 6 December (CONV 421/02 of 22 November 2002).

26 November: UEAPME sets out its position on the assessment of the implementation of the **European Employment Strategy** and highlights its shortcomings.

27 November: The ETUC Secretary General, E. Gabaglio, presents the ETUC's contribution to the work of the **Convention**.

28 November: European Social Dialogue Summit. The social partners present their **work programme** for the 2003-2005 period.

28 November: UNICE sets out its position on the European Commission's document on "**Corporate Social Responsibility**" (2002/109.07/UNICEcomments_final FR).

DECEMBER

2 December: The European Commission launches the first stage consultation of the social partners on the effects of stress **on health and safety at work**.

3 December: The European Commission adopts a Communication on integrating migration issues in the co-operation agreements with third countries. Communication from the Commission to the Council and the European Parliament – Integrating migration issues in the European Union's relations with third countries, COM (2002) 703 final of 3 December 2002.

3 December: The Social Affairs Council adopts a general approach on the simplification and modernisation of Regulation (EEC) No.1408/71 on the co-**ordination of social security systems**. 2470th meeting of the Council (14892/02 - Presse 376).

5 December: An agreement on **training in the field of agriculture** is signed between the social partners.

5 December: The European Parliament adopts the joint text on the exposure of workers to risks arising from noise. Report A5-0401/2002 of 26 November 2002 and European Parliament legislative resolution on the joint text, approved by the Conciliation Committee, for a European Parliament and Council Directive on the minimum health

and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise), PE-CONS 3666/2002 - C5-0501/2002 - 1992/0449A(COD).

5 December: The European Parliament calls for greater protection for **victims of trafficking in human beings** who co-operate with the competent authorities. Report A5-0397/2002 of 19 November 2002 and European Parliament legislative resolution on the proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who co-operate with the competent authorities (COM (2002) 71 - C5-0085/2002 - 2002/0043(CNS)).

11 December: The European Commission publishes a Communication on the **free movement of workers**, which looks, in particular, at the issue of migrant workers and their families. Communication from the Commission – Free movement of workers: achieving the full benefits and potential, COM (2002) 694 final of 11 December 2002.

17 December: The Commission publishes the "Draft joint report by the Commission and the Council on **adequate and sustainable pensions**".

17 December: The European Parliament approves the report on the Directive concerning certain aspects of the **organisation of working time**. Report A5-0426/2002 of 4 December 2002 and European Parliament legislative resolution on the proposal for a Directive of the European Parliament and of the Council concerning certain aspects of the organisation of working time (COM (2002) 336 - C5-0297/2002-2002/0131(COD)).

18 December: A political agreement is concluded between the Fifteen on "Dublin II" – Criteria and mechanisms for determining the Member State responsible for examining an **asylum application** lodged in one of the Member States by a third country national.

Chronology drawn up by Christophe Degryse
with the assistance of Dominique Jadot.

List of abbreviations

BEPGs	Broad Economic Policy Guidelines
CEC	Commission of the European Communities
CEEP	European Centre of Enterprises with Public Participation
CFI	Court of First Instance
CJEC	The Court of Justice of the European Communities
COR	Committee of the Regions
DG	Directorate General (of the Commission / the European Parliament)
ECB	European Central Bank
ECC	European Community Commission
ECOFIN	The Council for Economic and Financial Affairs
EEA	European Entertainment Alliance
EEC	European Economic Community
EES	European Employment Strategy
EFBWW	European Federation of Building and Woodworkers
EFFAT	European Federation of Food, Agriculture and Tourism Trade Unions
EFJ	European Federation of Journalists
EMCEF	European Mine, Chemical and Energy Workers' Federation

EMF	European Metalworkers' Federation
EMU	Economic and Monetary Union
EP	European Parliament
EPSU	European Federation of Public Service Unions
ESC	European Economic and Social Committee
ETF	European Transport Workers' Federation
ETUC	European Trade Union Confederation
ETUCE	European Trade Union Committee for Education
ETUF-TCL	European Trade Union Federation – Textiles Clothing and Leather
EU	European Union
EUROGROUP	Informal structure bringing together those Ministers out of the Ecofin-Council of Ministers that do represent Member States from the Euro area
GATS	General Agreement on Trade in Services
IGC	Intergovernmental Conference
NAPs	National Action Plans
OMC	Open method of co-ordination
SGEI	Services of General Economic Interest
SGI	Services of General Interest
UEAPME	European Association of Craft, Small and Medium-sized Enterprises
UNICE	Union of Industrial and Employers' Confederations of Europe
UNI-Europa	Union Network International
US	Universal Service

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