SOCIAL DEVELOPMENTS IN THE EUROPEAN UNION
Social developments in the European Union 2004
edited by
Christophe Degryse and Philippe Pochet

Sixth annual report
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Preface

Two major events of 2004 will go down in the European history books: enlargement to take in the central and eastern European countries as well as Cyprus and Malta, and the adoption of the draft constitutional Treaty for Europe. Both of these events were subjects of debate throughout the year, since their implications affect all the policies – and indeed the very future – of the European Union.

Nevertheless, these two events alone will not shape the future of the Union. They will be what the political leaders, intellectual elites, economic players, social organisations and trade unions make of them. Enlargement could in fact contribute, internationally, to making Europe a new model for other regions and continents: a model of economic development which takes into account the need for social progress and sustainable development. Alternatively, it could dilute Europe and its political goals into a free-trade area devoid of any ambitions apart from competition and trade.

The same holds true for the draft European Constitution, whose ratification by all twenty-five Member States could not be taken for granted at the time of writing these lines. Imperfect though it may be, the draft text does contain improvements to the workings of the European Union.

Enlargement and the European Constitution will give those who come to terms with them the opportunity to construct a new political, economic and social project for Europe. They will become what the players decide to make of them.

In this day and age of precipitate globalisation, extending and reinforcing the social model is not the least of the challenges facing Europe. The Union needs, in the immediate future, to square up to the differing degrees of economic and social development in its midst, but also to meet the expectations and needs of all the European citizens, and of all those people elsewhere in this world of ours who place their hopes in it – and they are legion.
In order to extend and reinforce the European social model it is more necessary than ever to create transnational forums for dialogue within the enlarged Europe. Indeed, the dissemination of information and the analysis of developments in European social policy can not only feed into the debate but can also influence political decision-making.

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 2004. This volume, published in English and French, is aimed at a wide readership and seeks to promote reflection and debate about the state of social Europe and its future prospects. We hope you will enjoy reading it.

Henning Jørgensen (ETUI-REHS), Lars Magnusson (SALTSA), Philippe Pochet (OSE), Christophe Degryse
The two main events of Europe’s political life in 2004 were, without a doubt, the enlargement of the European Union (EU) and the adoption of the draft constitutional Treaty. Fifteen years after the Berlin Wall came down, the entry of ten new Member States into the Union on 1 May represented, for those countries, the culmination of a lengthy and sometimes laborious transition process. As for the Union, this enlargement does not mark an end-point in the reunification of the continent: the EU must still prepare for the accession of Romania, Bulgaria, Croatia and, no doubt in the more distant future, Turkey and yet more countries. The decisions taken by the European Council in December 2004 concerning these further enlargements have triggered a debate about Europe’s borders, its identity and its political vision.

In parallel with these discussions, the completion of the Intergovernmental Conference’s deliberations and the adoption of the draft constitutional Treaty signalled – for the time being – the end of a lengthy process dating back to the Maastricht Treaty (1992), geared to adapting Europe’s political vision and institutions to the geopolitical consequences of the fall of the Berlin Wall. The reality of a Union of 25, and soon more, is radically different from that of the period before the collapse of the Soviet Union. And, owing to enlargement and the adoption of the draft constitutional Treaty, the face of Europe may be thought to have changed more in 2004 than in any other year since the European Union began to take shape.

However, even though these two events are crucial, we should like to draw attention to one other aspect in this introduction to the current edition of Social Developments. Europe is not an island; it is being fashioned in a rapidly changing world. Since the Single Act of 1986
whose objective, let us not forget, was to relaunch the building of Europe in an environment characterised on the one hand by competition from Japan and the United States and, on the other, by the emergence of threshold countries such as Korea, Taiwan and Brazil, the European debate has grown progressively more inward-looking. It has focused on internal ventures – the single market and the single currency – aimed at forging a regional economic (and political) entity. But little attention or energy has been devoted to the rest of the world, a world undergoing radical development in some respects. The end of the east-west confrontation has brought not everlasting stability, nor the end of history, but renewed forms of conflict. US military domination has revived an issue which was already beginning to surface in the Single Act but had not yet led to anything very spectacular: European cooperation in the diplomatic and military fields.

We are moreover witnessing the emergence of some major new economic and commercial powers. China appears to be turning into the workshop of the world and India into a global service centre. A new international distribution of labour is becoming apparent, assisted by the dazzlingly fast advances in information technology and the reduced cost of transporting freight. National labour markets are feeling the effects of offshoring, and the production of goods and services is undergoing a worldwide redistribution. These phenomena are affecting all regions of the world (for example, Mexican plants assembling products for the US market are relocating to Central America or China). The many concerns which already existed in connection with this rapidly changing world are further heightened when one senses that the consequences of these upheavals have not yet been fully grasped, especially in view of the growing inequalities between regions, between countries and within countries.

There are winners, but there are many losers too. As is described in the first report by the International Labour Office on the social dimension of globalisation, “The global market economy has demonstrated great productive capacity. Wisely managed, it can deliver unprecedented material progress, generate more productive and better jobs for all, and contribute significantly to reducing world poverty. But we also see how far short we still are from realizing this potential. The current process of globalization is generating unbalanced outcomes, both between and within countries. Wealth is being created, but too many countries and people are not
Globalisation, with its succession of (threats of) restructuring, outsourcing, job losses and rolling-back of social achievements, arouses a mounting sense of social insecurity among trade union circles in the rich countries. In this context there is a proliferation of critical assessments, not only from workers’ organisations and the “anti-globalisation” camp, but equally from international organisations, which particularly highlight deficiencies in the governance of this globalisation. 2004 was a key year for trade unions in terms of the gradual formation of a worldwide trade union movement, owing to the merger of two large confederations: the International Confederation of Free Trade Unions (ICFTU) and the World Confederation of Labour (WCL). If this new international organisation proves to be more than a bureaucratic manoeuvre, it may offer an opportunity to determine fresh global trade union strategies for confronting the social challenges of globalisation.

How, in the new circumstances briefly outlined above, are we to assess the likely impact of those two European events, enlargement and the adoption of the draft constitutional Treaty? Two readings are possible, it seems to us. The first will stress that these two events, both crucial to the future of the Union, have overlooked the future of the European social model. The reunification of Europe, indispensable and desirable though it was, has been carried out according to an essentially liberal approach. A number of “old” Member States are reluctant to countenance budgetary solidarity, as was clear from the debates prior to the adoption of the next financial perspectives. Moreover, the principle of freedom of movement for workers from the new Member States gave rise to several requests for temporary derogations. We cannot be sure, from this point of view, that the citizens of central and eastern Europe have a sense of joining a Europe based on solidarity. At present, the only immediate “benefit” of enlargement amounts to trade liberalisation and the opening up of markets which, apparently, is expected to provide all the answers. This approach to enlargement may

well be liberal but it is liberal by default, due to the absence of a political vision striving to achieve social progress for all in the Europe of 25.

The draft constitutional Treaty, for its part, is more complex to analyse. Formally, this Treaty does not constitute a step backwards from the earlier treaties in social terms. On the contrary, it even makes some headway which, if seized on by the political and social stakeholders, might prove valuable. But, in a Europe increasing from 15 to 25 members, the maintenance of the unanimity rule for votes on fiscal matters opens the door to fiscal (and hence social) dumping. More broadly, there are other outstanding problems for which no political solutions were found at the Intergovernmental Conference, among them deficiencies in the economic governance of the euro zone. Finally, the main reason why the draft Treaty has fomented so much debate in progressive circles – including traditionally pro-European ones – is the lack of any real progress in preserving the European social model. In a way, it is feared that the *acquis communautaire* of social Europe – recognised and preserved, but apparently no longer a priority for further development – is not up to the challenges of enlargement and globalisation.

The second reading takes a more all-round view of Europe in an international context. From this perspective, the only way of preserving the European social model and national social models is to extend geographically the fundamental values on which they are founded. Therefore, although enlargement in itself obviously cannot bring about social progress at European level, it does nevertheless constitute an opportunity to extend – albeit to a limited degree – the foundations of the European social model to the central and eastern European countries. This extension, which no doubt appears rather unambitious, is by no means negligible in the light of what is happening internationally, in particular the domination of the US model (need we recall that China, having initially considered modelling its system of collective bargaining and labour law on that of Germany, is now envisaging following the American example?). From this global perspective, despite all of its inadequacies, the constitutional Treaty represents a major step forward. Rather than unilateralism, it opts for institutionalised multilateralism: far removed from the federal ideal, true enough, but the antithesis of unrestrained domination by great powers.
It creates a stable social order – social dialogue, trade union rights, public services and social protection – in a basically hostile international context: this in itself may be regarded as something of a success.

Having said that, this second reading cannot ignore the fact that these are potential, not certain, developments. In actual fact, those who would like to see Europe purely and simply aligning itself with the dominant liberal trends are still a force to be reckoned with. Europe therefore continues to be torn in two directions: that of gradual integration into the liberal world of globalisation, by means of increased liberalisation, competition and deregulation; and that of constructing a political vision aimed at extending to the entire continent a dynamic model based on legislation, collective bargaining and economic and social policy coordination. These two directions correspond to two quite distinct political visions, neither of which enjoys unanimous support in Europe's capital cities. This lack of unanimity plays into the hands of the least highly regulated vision (the construction of a political vision requires a consensus; its disintegration can occur in the absence of a consensus). Thus the risk is that, for want of a shared political, economic and social goal, the Europe of 25 – and soon more – may turn out to be a market Europe rather than a political Europe.

But there is nothing inevitable about that. Future political debates around the review of the Lisbon strategy and the financial perspectives but also, more particularly, the directive on services in the internal market and the revision of the Working Time Directive, are symbolic of the new-style Europe in the making: a Europe of solidarity, governance and broader-based social progress or one of self-interest, deregulation and social competition – in the name of competitiveness that is supposedly full of beneficial effects. The political, economic and social stakeholders have a key part to play in these debates. The unprecedented decision taken in February 2005, to take “back to the drawing board” the Bolkestein directive on the liberalisation of services in the internal market, demonstrates the importance of deliberation and public debate, but also of involving all stakeholders in shaping European society.

In this year's edition of Social Developments in the European Union we shall explore eight themes which, it seems to us, went to the very
heart of European social debate in 2004: the Services Directive, the social dialogue, the European Employment Strategy, the issues of asylum and immigration, the coordination of healthcare systems, pensions reform, the draft constitutional Treaty and, finally, certain aspects of European Court of Justice case law in the field of social affairs.

- The debates surrounding the draft directive on services in the internal market proved particularly vibrant in 2004, both in political circles and within trade union and social organisations. These debates were so stormy that, in early 2005, the European Commission announced its intention to revise the initial proposal. Éric Van den Abeele shows us in the following pages in what way the much-vaunted country of origin principle, initially included in the draft directive, could be fundamentally altering the type of Europe we are building.

- The European social dialogue continued in 2004 with the employers’ side very much on the offensive. The year was peppered with a number of industrial disputes in various Member States on matters such as working time, more flexible working hours and employee participation. The European social partners reached a consensus on an autonomous agreement concerning work-related stress but, according to Christophe Degryse, the cross-industry social dialogue currently lacks sufficient momentum to tackle more controversial topics such as, for example, working time.

- The European Employment Strategy (EES) was synchronised with the Broad Economic Policy Guidelines (BEPGs) in 2004. But what is most striking of all is the rethink about the operation of the open method of coordination and the Lisbon strategy, which is supposed to coordinate the economic, employment-related and social aspects of European integration. This review concerns its effectiveness but also what priorities to pursue: the champions of liberal orthodoxy – led by the Commission – would like to return to an agenda centring on competitiveness. On the other hand, the Stability and Growth Pact is being overhauled, meaning that there is some possibility of the rules on economic coordination evolving towards a more flexible approach which is more responsive to the economic state of affairs in individual Member States. In his contribution, Philippe Pochet analyses not only
the evolution of the EES with 25 Member States but also the major debates which will determine its future.

- Asylum and immigration policy has undergone fresh developments, especially in view of enlargement to incorporate the central and eastern European countries. Even though, in respect of asylum, the fifteen "old" Member States appear to acknowledge through gritted teeth the need to permit a little more legal immigration, they seem less concerned about protecting asylum seekers than about devising policies to prevent them from entering the territory of the Union, says Cécile Barbier. What is more, although the Union's powers in this field are of recent date, the complexity of the decision-making process would seem to be at least partially to blame for the lack of ambition evident in the texts adopted.

- Policy developments in the field of healthcare came along thick and fast this year. They have not always, however, been very consistent, argues Rita Baeten. She notes with regard to the Services Directive and its impact on healthcare, as well as initiatives launched in connection with patient mobility and the coordination of healthcare systems, that numerous stakeholders are involved and their aims are sometimes quite divergent.

- Although the open method of coordination in the field of pensions was initiated some time ago, this process follows on from some quite tumultuous national debates around keeping public expenditure under control, but also around reform of state pension systems in the light of forthcoming demographic change. According to David Natali, the Union's role relates mainly to the employability of older people and the growing role of supplementary pension schemes, which are expected to contribute to more sustainable social protection systems in the years ahead.

- The agreement reached in June 2004 on the draft constitutional Treaty and its signature in October did not mark the end of discussions about the future of the EU. On the contrary, the preparations being made for ratification, especially in those countries which have chosen to go down the referendum road, have in some cases sparked heated arguments both about the content of the text itself and also more generally about the social and economic direction being taken by the Union. Cécile
Barbier informs us that the draft Treaty, which falls short of expectations in many quarters, does provide a partial response to the need for the EU to express itself with a single voice on the international scene. In addition, it contains some innovations liable to enrich democratic debate within the Union, including in the social sphere.

- As for the European Court of Justice, it continues to play a crucial part in the various aspects of European integration. In this edition of Social Developments, Dalila Ghailani has examined some significant judgements related to European social policy and, in particular, on issues pertaining to equal treatment for men and women, social security in Community law, and the rights and obligations of workers and employers.

We hope that these various contributions will make for interesting reading.

European social dialogue: modest achievements in a climate of conflict

Longer working hours, more flexible work schedules, restructuring, outsourcing: much of the debate around industrial relations in 2004 was controversial. None of the major European Union (EU) countries – Germany, France, Italy, the United Kingdom – was immune to trade union discontent or even anger. Several trials of strength took place, mostly on issues raised by the employers’ organisations (working time, but other bones of contention included co-determination and the welfare state). Thus the European social dialogue was played out in a general climate of national tensions, against a backdrop consisting of EU enlargement, the renewal of the European Parliament and the installation of the new Barroso Commission.

In the following paragraphs we shall begin by describing and assessing the autonomous agreement on work-related stress, concluded in 2004. We shall then review the follow-up to two earlier agreements: one on telework (ETUC, UNICE/UEAPME and CEEP, 2002) and the other on the framework of actions for the lifelong development of competencies and qualifications (ETUC, UNICE and CEEP, 2002). We shall look at the consultations of the social partners launched by the European Commission in 2004 (on the Working Time and Works Council Directives, on musculoskeletal disorders and on reducing exposure to substances that cause cancer). We shall also take stock briefly of developments in the sectoral social dialogue in 2004, especially the establishment of three new sectoral social dialogue committees. Last of all, we shall examine the communication from the Commission on the future of the European social dialogue, as well as the reactions it has provoked from the social partners.
1. Autonomous agreement on work-related stress

Stress at work featured on the social partners’ work programme for 2003-2005, but that did not prevent the European Commission from seizing the initiative and opening a preliminary round of consultations on this matter back in December 2002. The social partners responded by informing the Commission of their intention to hold a seminar on this topic, supposed in principle to lead to the start of autonomous negotiations aimed at an agreement on work-related stress. These negotiations began on 18 September 2003 (for more details on this preliminary round, see Degryse 2004). It took just over eight months for an agreement to be reached, on 27 May 2004. This agreement was adopted unanimously by Europe’s employers, grouped together in the Union of Industrial and Employers’ Confederations of Europe (UNICE), despite strong objections from the Italian employers, and by a qualified majority by the European Trade Union Confederation (ETUC), with votes against from the DGB (Germany), AKAVA (Finland) and AC (Denmark). It was officially signed on 8 October 2004.

1.1 Issues at stake in the negotiations

According to figures supplied by the Commission, more than 40 million people were affected by work-related stress in the Europe of Fifteen. One person in four complained of stress. This generated costs of some €20 billion per year. These figures alone lead one to believe that it is in the interest of employers’ organisations and trade unions alike to hold negotiations on this matter since, on the one hand, it is related to the quality of work and, on the other, it impacts on economic performance because absenteeism caused by stress at work lowers productivity. This common interest constituted the basis on which the negotiations were founded: it was a win-win scenario. Nevertheless, it was not long before a number of difficulties surfaced. The negotiators needed not only to arrive at a shared definition of work-related stress, but also to agree on the individual and/or collective nature of this phenomenon and to identify its main causes. Finally, they had to determine the scope of a voluntary agreement on this topic and define the mechanisms to be used in preventing or eliminating stress at work.
1.2 Content of the agreement

The agreement on work-related stress consists of seven points (ETUC, UNICE/UEAPME and CEEP, 2004a), the main elements of which we shall now attempt to summarise. In the introduction, the social partners agree that stress “can potentially affect” any workplace – i.e. including SMEs – and any worker, but that “in practice” not all workplaces and not all workers are necessarily affected. The aim of the agreement is to increase the awareness and understanding of employers, workers and their representatives of work-related stress (hence it must be perceived as a collective problem). The objective is to provide them with a framework to identify, prevent and manage problems of work-related stress, without attaching blame to individuals. The agreement then describes stress – we should note that this is a “description” and not a “definition”, since the latter notion was rejected by the employers’ negotiators. Stress is described as a state accompanied by physical, psychological or social complaints or dysfunctions and which results from individuals feeling unable to bridge a gap with the requirements or expectations placed on them. The individual has great difficulty in coping with prolonged exposure to intensive pressure (here we note the emphasis on the individual). In this description, the social partners affirm that “stress is not a disease but prolonged exposure to it may reduce effectiveness at work and may cause ill health”. Lastly, stress originating outside the working environment is distinguished from stress at work, which may be caused by different factors such as work content, work organisation, the working environment, poor communication, etc.

Next comes a section identifying stress problems. This entails an analysis of factors such as work organisation and processes (working time arrangements, degree of autonomy, workload, etc.), working conditions and environment (exposure to abusive behaviour, noise, heat, etc.), communication (uncertainty about what is expected at work, forthcoming change, etc.) and subjective factors (emotional and social

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1 Harassment and violence at work, which are potential factors of stress, were excluded from the negotiations by virtue of the fact that the European social partners’ work programme envisages the possibility of specific negotiations on these issues (theoretically in 2005).
pressures, feeling unable to cope, perceived lack of support, etc.). Whilst the trade union negotiators emphasised objective factors related to the company, the employers’ delegation for its part homed in on subjective factors pertaining to the individual. Be that as it may, the agreement stipulates that “if a problem of work-related stress is identified, action must be taken to prevent, eliminate or reduce it. The responsibility for determining the appropriate measures rests with the employer. These measures will be carried out with the participation and collaboration of workers and/or their representatives”. The agreement cites Framework Directive 89/391, under which all employers have a legal obligation to protect the occupational safety and health of workers, considering that this obligation also applies to stress problems (Council of the European Communities, 1989). These problems may be addressed by various means, including those set out in the framework directive, such as an overall process of risk assessment. The last part of the agreement deals with the various measures – collective and/or individual – which may be put in place to prevent, eliminate or reduce problems of work-related stress.

1.3 An appraisal

Work-related stress is totally absent from the agenda of the social partners and/or the legislator in certain European Union countries. A study carried out by the European Industrial Relations Observatory (EIRO) points out that “stress is rarely dealt with specifically in health and safety legislation and is an issue in collective bargaining in only a few countries. Stress is a matter of increasing importance for trade unions and for some employers’ organisations, but overall it is still an ‘invisible’ issue in industrial relations, at least with regard to effective preventive action” (Llorens and Ortiz de Villacian, 2002). This statement alone demonstrates that the first plus-point of the European agreement is its very existence. Indeed, simply raising the issue may help to place it on the political and social agenda in some countries. In others, however, the minimum common denominator achieved here will not improve on a state of affairs which is already more favourable, be it in terms of statutory provisions or collective bargaining. And the actual content of the agreement must surely be regarded as a minimum common denominator. As stated above, the main sticking points between the employers and workers during its negotiation revolved around the definition/description of stress – is it a “disease”? –, the collective or individual nature of the problem, and the
dividing line between work-related stress and stress related to the worker’s private life.

Even though a number of studies concur that stress is a disease, the social partners’ agreement refrains from defining it as such and merely acknowledges that prolonged exposure to stress “may cause ill health”. As to its origin, the agreement considers that stress can be caused both by personal factors (e.g. family problems whose mental health consequences are taken into the workplace), and by specifically work-related factors. The problems in the latter category relate to work content and organisation, the working environment, etc. Clearly, the employers’ side sought to highlight the individual and subjective aspect of stress, meaning that it could be ascribed to personal causes for which the company is not responsible, whereas the trade union side tried to emphasise its collective and objective aspect, thus linking stress to general problems of work organisation.

The main reason why the ETUC endorsed this overall compromise is because the agreement makes explicit reference to work organisation, working conditions and the general work environment as potential factors of stress: this was one of its strategic priorities. It is nonetheless true that all the splits between employers and workers can be read between the lines of the agreement: the personal/work-related origins of stress, the individual/collective aspect, subjective/objective factors, etc. Since the negotiators failed to construct a joint, shared notion of work-related stress, they juxtaposed their views of the problem in the hope that they would balance each other out.

1.4 Implementation and follow-up

Another key priority of the trade unions was to tighten the provisions for implementing and following up the agreement, in the light of what is seen as a very mixed track record on implementation in the case of the autonomous agreement on telework (2002) owing to strong reservations from the employers (see next section). Reading the agreement on stress, it is noticeable that the implementation and follow-up procedures have been rewritten. The new version seems in part to be very formalistic. For instance, concerning implementation, the agreement “commits the members … to implement it”, rather than stating that the agreement “shall be implemented by the members”. From a semantic point of
view, the notion of “commitment” may be deemed a little more binding. The differences are more clear-cut in respect of follow-up:

- the report on implementation of the agreement will be given to the Social Dialogue Committee rather than to an ad hoc group;
- to this end the Social Dialogue Committee will, during the first three years, prepare a yearly table to precede the full report;
- the signatory parties will evaluate the agreement at any time after five years, if requested by one of them.

Finally, as concerns the non-regression clause, the wording is identical in both documents. The main progress therefore concerns follow-up of the agreement and, more symbolically, implementation (which is, however, the principal stumbling block, judging by the telework agreement). It is interesting that, when the agreement on stress was presented to the press, all the social partners emphasised their undertaking to implement it in full. Yet this policy commitment to act in good faith does not resolve the recurrent question as to the nature and status of autonomous agreements, together with the rights and obligations flowing from them. This grey area is moreover the reason why some component groups within the ETUC oppose the agreement.

Overall, then, we can conclude that the agreement on work-related stress is rather weak in content but does plug a gap in certain EU countries. In addition, its implementation and follow-up provisions show signs of some tentative progress.

2. Following up earlier agreements

In this section we shall assess the track record of the autonomous agreement on telework and the framework of actions on competencies and qualifications, both signed in 2002.

2.1 Telework agreement

The rules for national-level implementation of the autonomous agreement on telework, signed by the European social partners in July 2002, were still at issue in 2004 (on the provisions of the agreement, see Degryse, 2003). On the whole, reasonable headway had been made with implementation in a quantitative sense, but the quality of this imple-
mentation continued to generate a string of question marks. Let us remember that this autonomous agreement was the first one having to be put into effect by the members of UNICE/UEAPME, CEEP and the ETUC (and the EUROCADRES/CEC Liaison Committee), in accordance with the procedures and practices specific to management and labour in the Member States. This had to be done by July 2005 at the latest. In 2006, an ad hoc group set up by the signatory parties will prepare a joint report on the implementation action taken at national level. Only then, in principle, will it be possible to assess the precise impact of the agreement’s provisions on (tele)workers. Lastly, the member organisations involved may consult the signatory parties about any questions on the content of the agreement and, if requested by one of the parties, the agreement may be reviewed any time after July 2007.

There was insufficient information available at the end of 2004 to carry out a detailed country by country analysis of transposition. National negotiations were still under way in several countries. It already seems, however, that there is no uniform method of transposing the agreement. While awaiting the joint report in 2006, the European Trade Union Institute (ETUI-REHS) has produced its own interim report on the implementation of the document (Clauwaert et al., 2004), from which the following broad conclusions can be drawn:

- in some countries, cross-industry and/or sectoral negotiations have been opened on the basis of the European agreement;
- in others, the Labour Code has been amended so as to incorporate the issue of telework;
- in others, recommendations have been adopted by tripartite bodies.

In another country, lastly, implementation has been confined to the publication of a guide on telework. The situation is therefore multi-faceted and depends both on individual countries’ models of industrial relations and the balance of power between trade unions and employers’ organisations, but likewise on the more or less prominent role that governments choose to play in these negotiations. Thus, to take two very contrasting examples, in Belgium the federal government has put distinct pressure on the employers to make them come to the negotiating table – which they initially refused to do. In the United
Kingdom, the only cross-industry initiative mentioned by the ETUI-REHS study is the publication by the two sides of industry of a non-binding guide on telework.

Obstacles to the agreement’s implementation have included not just the question of translations of the text (in certain countries this matter has even led to negotiations in its own right), but also the very nature of an autonomous agreement. The interpretations by employers’ organisations and trade unions are at variance. As in 2003, some employers’ federations still believe that the status of this text does not necessarily mean enforcement is mandatory, but that it is enough to draw up a set of good practices. The trade unions interpret it quite differently: the agreement is “autonomous” or “voluntary” in that the decision to embark on negotiations on this topic is autonomous or voluntary, but the same does not apply to implementation of the final outcome. These interpretations diverge so widely that the various signatory parties to the agreement need to sit down and clarify how this type of agreement is to be interpreted and what its scope should be. Such clarification is all the more necessary in that national social dialogue structures and procedures are highly diverse and in some cases at unequal stages in their development; the representativeness of organisations also varies, and tends to be weaker in the new EU Member States. In the absence of a clear response to the twofold question on the quality of enforcement of this type of agreement and its coverage, there is a real risk that the European social dialogue will produce texts without equivalent effects for all workers throughout the European Union – ranging from collective agreements to information leaflets. In other words, the European social dialogue will lose its effectiveness (its relevance?) in combating the social competition to which companies in the different EU countries are liable to resort.

2.2 Framework of actions on competencies and qualifications

In a previous article, we described the Framework of actions for the lifelong development of competencies and qualifications, adopted in March 2002, as the European social partners’ contribution to the Lisbon strategy in the experimental shape of an open method of coordination (see Degryse, 2002). This method of coordination, applied for the first time to the social dialogue, relates more specifically to
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guideline 4 of the European employment strategy (cf. article by Philippe Pochet in this volume). The idea was that the European social partners would devise some European “guidelines” on the development of competencies and qualifications and then call on the national economic and social players to incorporate them into their discussions and practices. The joint assessment made by the social partners in March 2004 is upbeat: “It clearly emerges from the document that social partners have intensively debated the issue of competence development in all Member States. Debates took various forms in the Member States, thereby respecting national practices and traditions of dialogue between the social partners and/or concertation between public authorities and players on the labour market. The framework of actions created or strengthened an impetus for dialogue and joint work on the lifelong development of competences and qualifications in most Member States, building on existing practices” (ETUC, UNICE/UEAPME and CEEP, 2004b: 4).

Various instruments were used to this end, including collective agreements in some Member States, the creation of discussion forums in others, the carrying out of joint projects, the production of practical tools to help companies step up their worker education and training activities, etc. One of the aims of this framework of actions is to improve the linkage between the European and national social dialogues, as well as between the cross-industry and sectoral levels (several actions have been undertaken at European sectoral level in the fields of electricity, metalworking, postal services, etc.).

The choice of “competencies and qualifications” as a topic has made it possible to focus this linkage on a relatively uncontroversial subject area. The second follow-up report outlines several initiatives and examples of good practice. But the jury is still out on whether the European framework of actions really has generated fresh momentum on this issue, or whether the framework has been little more than a heading that brings together a list of activities which would have been carried out in any event at national and/or sectoral level. It would furthermore be interesting to find out whether, and to what extent, national debates on competencies and qualifications have the capacity in turn to influence the European debate.
3. Consultations in 2004

The European Commission undertook four consultations of the social partners in 2004: on the revision of the Working Time and Works Council Directives, as well as on musculoskeletal disorders and reducing exposure to substances that cause cancer and reduce fertility. We shall take a brief look at all these consultations, dwelling for a little longer on the issue of working time, which aroused a good deal of heated debate in 2004 both at European level and in the Member States.

3.1 Working time

The planned revision of the Working Time Directive was without a doubt one of the most controversial subjects of 2004. This revision was initiated under particularly difficult circumstances for the trade union movement: a whole host of company directors in Germany, Belgium and France had been demanding longer and/or more flexible working hours as a means of boosting their competitiveness. Most symptomatically, at the end of 2004 the French Prime Minister, Mr Raffarin, put forward a government plan to row back on the 35-hour week introduced by the previous Socialist government. Discussion of the European Working Time Directive, then, took place during an entire year of highly offensive attitudes in the world of business and, in some countries, among political circles. This debate was launched on 30 December 2003 with the publication of a communication from the European Commission aimed at revising the 1993 Working Time Directive (CEC, 2003). This document, also used for the first phase of social partner consultation, pursued three aims:

- to evaluate the application of derogations from the reference periods and the opt-out;
- to analyse the impact of European Court of Justice case law concerning the definition of working time and the qualification of time on call;
- to consult the European institutions and the social partners on a possible revision of the text.

Discussion initially focused above all on the opt-out clause. This was a temporary provision obtained by the United Kingdom in 1993,
authorising Member States – in actual fact the UK – not to apply the cap on the number of working hours (48 hours/week) under certain conditions, in particular by prior agreement of the worker. This opt-out was intended to be individual, and it was supposed to be used in certain specific situations. Yet it has manifestly been misused in the UK, where employers have obliged workers to sign the employment contract at the same time as the consent form whereby the worker waives the limit on his/her working hours. Clearly, if both documents are presented at the same time, it is in the interest of a job applicant to sign them both rather than risk not signing either – the upshot being that some 3.7 million British employees work more than 48 hours per week, or three and a half times as many as the European average (2). These excessive working hours enable the country to be competitive with France and Germany by engaging in social competition. Therefore, one of the principal reasons for revising the Directive in the first place was to halt misuse of the opt-out clause (following enlargement, some new Member States have likewise been making widespread use of the opt-out).

For this reason, the European Parliament lent its support in February 2004 to the idea of revising the Directive, with a view to improving worker protection (European Parliament, 2004a and 2004b). The ETUC was delighted. An initial exchange of views on this matter was held in the Employment and Social Affairs Council in March, and a consensus emerged on the reference period to be taken into consideration for calculating the average of 48 hours per week. This period was four months; the ministers agreed to extend it to one year (which builds greater flexibility into the calculation, for example for workers whose work intensity fluctuates significantly over the course of a year). Until that point, the debate seemed to have got off to quite a good start, but matters soon took a turn for the worse. On 19 May, as part of the second phase of consultation, the Commission invited the European social partners to negotiate directly among themselves on an amendment to the Directive, or else to give general indications as to the thrust of further legislation (CEC, 2004a). In this

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second document, the Commission put to the social partners four approaches concerning the opt-out:

- to revise the individual opt-out, with a view to its phasing-out, as soon as possible, and to identify, in the meantime, practical ways of tackling abuses (the strategy advocated by the European Parliament);
- to tighten the conditions for application of the individual opt-out, ensure that it really is voluntary and that it is not being misused in practice;
- to permit exemptions from the maximum weekly working time only through collective agreements or agreements between the social partners;
- to authorise such derogations only by means of collective agreements or agreements between social partners, while retaining the possibility of an individual opt-out in undertakings without such an agreement and no representation of the employees.

As concerns the definition of working time, the European Commission’s proposal to the European social partners was to create a third time category in addition to “working time” and “rest time”: on-call time, intended to cover periods when the worker is in the workplace, available for duty but not actually engaged in it (3). Lastly, the Commission proposed that the social partners should agree to extend the reference period over which the average duration of a working week is calculated.

The trade unions were quick to react: the ETUC immediately said that it was “alarmed” by the approaches suggested by the Commission, since they would allow the opt-out to be preserved as a legitimate solution – instead of abolishing it. They would likewise prevent on-call hours from being recognised as working time and would expand the reference period for calculating the average weekly working time. The employers were of a completely different opinion. UNICE considered that only periods of actual work should count as working time, that the general

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3 Rest time is regarded as working time in some cases (on-call time during which hospital doctors, fire-fighters and police officers must be available for duty).
rule on calculating weekly working time should be an average taken over at least twelve months, and that the opt-out should be maintained. UNICE declared in mid June that there was no point in holding negotiations: an agreement with the ETUC was impossible, given the diametrically opposed positions of the two organisations.

The ball was therefore back in the Commission’s court: on 22 September it placed before the Council and the European Parliament a proposal for a revision of the Working Time Directive (CEC, 2004b). As far as the opt-out is concerned, the Commission proposed allowing Member States not to apply the maximum weekly working time limit where expressly authorised by a collective agreement or social partner agreement and where the worker consents. The Commission specified that – when a collective agreement is not in force and there is no collective representation of the workers within the undertaking or the business that is empowered, in accordance with national law and/or practice, to conclude a collective agreement – the employer must obtain the consent of every worker (Such circumstances may exist in SMEs, but are also commonplace in companies in central and eastern Europe). This consent must moreover be subject to strict conditions: it has to be given in writing, it cannot be given when the employment contract is being signed, its validity is limited to a maximum period of one year (renewable), no-one may work more than 65 hours per week, and employers must keep a register showing the number of hours actually worked. This register must be supplied to the competent authorities on demand.

With regard to on-call time, the Commission incorporated into its proposal for a directive what it had already proposed to the social partners, namely the creation of a new category in addition to working time and rest time: on-call time. This was defined in the text as the “period during which the worker has the obligation to be available at the workplace in order to intervene, at the employer’s request, to carry out his activity or duties” (CEC, 2004b: 9). The inactive part of on-call time would not constitute working time in the meaning of the directive. However, the Commission left it up to Member States, through national legislation or a collective agreement or social partner agreement, to count this inactive part of on-call time as working time.
As concerns the periods within which compensatory rest must be granted, the Commission laid down a maximum period of 72 hours in cases where the provisions on compulsory rest periods are waived (in the opinion of the Court of Justice, compensatory rest should be taken immediately). Finally, with respect to the reference period for calculating the duration of weekly working hours, the Commission proposed keeping it at four months but offering Member States the option of extending it to one year, provided that the social partners are consulted and social dialogue is encouraged. Under such circumstances, workers must not work more than 65 hours per week.

In trade union circles, the verdict on the Commission’s proposals was extremely negative. The ETUC Executive Committee adopted a resolution on 13 October which found virtually all the draft provisions unacceptable:

- the reference period extendable from four months to a year subject to a mere “consultation” of the social partners could lead to extremely long hours during certain periods, as well as to increasingly irregular and unpredictable working hours;

- the new “inactive part of on-call time” concept is deemed to conflict with the aims of the directive and with other existing European legislation. This concept could have disastrous effects, especially in the field of healthcare;

- the maintenance of the individual opt-out when there is no collective agreement in force will reinforce rather than restrict the use of the opt-out, while perhaps putting increased pressure on trade union organisations to accept individual opt-outs (since employers might go so far as to reject collective agreements or even to derecognise the trade union). As for the conditions attaching to the individual opt-out (worker’s consent, valid for one-year, renewable, absolute limit of 65 hours per week), these are still too ambiguous since they will not put an end to documented cases of misuse and will ultimately make the 65-hour week acceptable in law.

The ETUC concludes that this proposed revision of the directive could bring about longer working weeks and more unpredictable hours, and could make it more difficult to reconcile work and family life.
This highly sensitive dossier came back before the Employment and Social Affairs Council on 4 October, and then again on 6 December 2004. The latter meeting reached a consensus on the extension to the reference period and on the question of compensatory rest, and made some headway on the concept of on-call time. However, the main sticking point among the ministers – the question of the opt-out – was not resolved. The Council was split between countries arguing for a collective opt-out clause based only on collective agreements, thereby restricting the scope for derogating from the rule by means of an individual opt-out, and countries in favour of maintaining an individual clause. The latter camp, comprising the United Kingdom and Ireland, was bolstered by EU enlargement: several of the new Member States came out in favour of preserving derogations on an individual basis, meaning that this group now has a substantial majority. Be that as it may, it was evident at the end of 2004 that overall agreement on the proposed directive was a long way off; some observers even felt that it would be very difficult, if not impossible, to reach a compromise on the issue of the opt-out since blocking minorities exist on both sides.

3.2 Works Councils

The revision of the 1994 Directive on European Works Councils was long-awaited (Council of the European Union, 1994). On 20 April 2004 the European Commission launched a first round of social partner consultations on this Directive which, for the record, provided for the establishment of European Works Councils (EWCs) or European information and consultation procedures in companies employing 1,000 or more workers located in at least two Member States. This enables trade union delegates from the various countries where the company is established to come together, meet the management, receive information and give their opinions on the strategies and decisions affecting the company and its workforce. Some 650 companies or groups have signed EWC agreements in the Europe of Fifteen, covering 11 million workers and, more directly, 10,000 of their representatives. But in fact these 650 companies only constitute just over a third of the

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4 France, Belgium, Spain, Sweden and Greece, according to the Bulletin of the European Union (No.8844 of 9 December 2004).
undertakings theoretically affected by the Directive, i.e. approximately 1,800.

The Commission’s consultation document gives a broadly positive assessment of European Works Councils, stating that “EWCs have been highly successful in providing access to information and consultation for employees in decision making processes and obtaining their feedback on company development, especially in relation to managing change. However, […] certain weaknesses identified in how EWCs operate mean that a new look is needed at how EWCs can fully develop” (CEC, 2004c). The principal reasons why a review of the text is needed are EU enlargement, which increases the number of companies covered by the Directive (and means that the EWCs of companies with branches in the acceding Member States will have to be enlarged), the implementation of the Lisbon objectives in 2000, the increased amount of restructuring among large European companies and internal developments within EWCs. In its consultation document the Commission calls on the social partners “to give their opinion on:

1) How best to ensure that the potential of European works councils to promote constructive and fruitful transnational social dialogue at the level of the undertaking, which will benefit both companies and their employees, is fully realised in the years ahead.

2) The possible direction of Community action in this regard, including, as the case may be, the revision of the European works councils Directive.

3) The role they believe the social partners themselves can play in addressing the issues that arise having regard, as appropriate, to their recent reflections on related issues in the context of managing change and its social consequences” (CEC, 2004d: 10).

The ETUC bemoaned the length of time taken by the Commission to initiate this revision process, something the ETUC had for years deemed necessary and urgent but which is four years behind schedule. It reacted promptly to this consultation, asking that the pace be stepped up and declaring its readiness for talks with UNICE. In particular, the ETUC “hopes that UNICE, which opposed first the directive and then its review, will now support a speedy revision, which would improve and add to the effectiveness of relations between the social partners at European level” (ETUC, 2004). In a resolution adopted by its Executive Committee on 4 and 5 December
2003 (ETUC, 2003), the trade union confederation had already set out an extremely detailed list of points which it wishes to address in connection with the review of the Directive. This list is too long to be reproduced here in full (26 proposed amendments), but let us single out what we regard as its salient points. The ETUC calls in particular for:

- a clearer definition of information and consultation;
- a new definition of the notion of confidentiality, for example so as to ensure that the members of EWCs are not prevented from communicating with each other or with their unions;
- a reduction in the period granted for the negotiation of agreements from three years to one;
- the imposition of sanctions on companies which infringe the law, and the legal entitlement of worker representatives to challenge violations of agreements;
- the right of EWC members to receive training, including in languages and economic, financial and social affairs;
- better access to experts’ opinions;
- the right to hold preparatory and follow-up meetings;
- the right of access to company sites for EWC members.

As for UNICE, its response could not have been more different (UNICE, 2004a). The employers’ organisation announced straight away that it “is strongly opposed to a revision of the EWC Directive. European employers are convinced that the best way to develop worker information and consultation in Community-scale undertakings is through dialogue at the level of the companies concerned” (UNICE, 2004a: point 3). Nevertheless, “ convinced of the value of exchanging and learning from experience at the EU level”, UNICE declared its readiness to discuss this matter in the context of the European social dialogue, “using a similar method as when preparing the orientations of reference for managing change and its social consequences” (Concerning the scope of this method, we would refer readers to the previous edition of Social Developments in the European Union 2003, pp.62-63, and in particular its very lukewarm reception from the trade unions).
Even though Europe’s employers were opposed to the 1994 Directive, they now recognise that Works Councils “are beginning to demonstrate their value in informing and consulting workers at transnational level on relevant matters, and have generally helped companies in communicating change” (UNICE, 2004a: point 4). UNICE nonetheless draws attention to the complexity of organising discussions in such transnational bodies and of ensuring that European Works Councils dovetail smoothly with national or establishment-level arrangements for information and consultation. In the employers’ opinion, the Commission’s consultation document does not adequately reflect this complex reality, especially because it focuses too narrowly on the operation of Works Councils in instances of restructuring. Similarly, UNICE expresses a number of reservations as to the reasons for reviewing the Directive: “Trying to extrapolate lessons from experience of the application of the EWC directive before 1 May 2004 for enlarged Europe would be misleading. Time must be given to companies and workers concerned to learn how to use the procedures put in place […] before trying to draw conclusions on whether or not to revise the Directive” (UNICE, 2004a: point 7).

Arguing that EU-level legislative intervention would be counter-productive, it asserts that the social partners – and not the legislator – are best placed to take forward the operation of EWCs. They can do so by monitoring the transposition and implementation of the Directive in the new Member States, holding exchanges of views and drawing lessons from the experiences of European Works Councils, especially in view of EU enlargement. It was moreover in this spirit that two joint seminars were held in October 2004, aimed at carrying out case studies of EWCs.

With the exception of these seminars, the revision of the Directive appeared at the end of 2004 to be proceeding at an astonishingly slow pace. What was equally astonishing was the minimal importance seemingly attached by the Commission in this process to one obvious deficiency: the small number of Works Councils established when compared with the number of companies theoretically covered by the Directive (650 out of 1,800 undertakings). According to an ETUC memorandum, most of the companies affected by the Directive employ fewer than 5,000 workers but only 23% of them have an EWC. As for multinationals with over 10,000 employees, just 61% of them have an EWC. How can these major shortcomings be explained, and how are
we to interpret and learn from the patchy implementation of the 1994 Directive? These questions should have been thoroughly discussed as soon as it was decided to review this text.

3.3 Health and safety

Two other social partner consultations were initiated in 2004, in respect of workers’ health and safety in their place of work. The first began on 26 March and concerns reducing exposure to substances that cause cancer and reduce fertility. Estimates have revealed that 32 million people are exposed to these substances at doses which can be considered hazardous, and 35,000 to 45,000 people die every year of work-related cancers. The cost of a single death from work-related cancer amounts on average to € 2.14 million, taking the total cost for such deaths in the EU to over € 70 billion per year. The consultation document poses four main questions:

- Should the current directive on exposure to cancer-causing substances be extended to include substances which are detrimental to reproduction?
- Should the number of substances covered by the Directive be increased?
- Are the levels of such substances set out in the existing Directive appropriate?
- Should measures be taken to make the procedures within the Directive simpler and more adaptable to scientific progress?

The second consultation was launched on 12 November and concerns the protection of workers against musculoskeletal disorders (5). These complaints, which take the form of back pain and repetitive strain injuries, constitute the principal health and safety problem facing European workers today. Studies have shown that in the EU they affect over 40 million workers in all sectors and account for between 40 and 50% of all occupational health problems. The cost to Europe’s employers amounts to billions of euros, and 0.5 to 2% of GDP is lost

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every year. The Commission explains in its consultation document that whereas in principle these complaints are covered by general Community health and safety legislation, much of this legislation dates back more than ten years and does not apply specifically to work-related musculoskeletal disorders. Some Member States have passed laws to deal with the problem but others have not. For this reason, the Commission asks workers and employers to answer the following questions:

- Do you consider that the existing health and safety legislative framework is appropriate and sufficient to prevent musculoskeletal disorders, or do you consider that further initiatives are needed in this area? Should this initiative focus on upper-limb musculoskeletal disorders, or should it address other musculoskeletal disorders as well?

- If so, should this initiative be taken at Community level?

- If so, which should be the priority preventative focus of this initiative: ergonomics, work organisation, psychosocial aspects, or other issues?

- If so, taking into consideration the existing EU Directives applicable to this field, do you consider that a binding instrument is called for from the outset, either by amending the existing Council Directive 90/270/EEC on the minimum safety and health requirements for work with display screen equipment (Council of the European Communities, 1990) or by adopting a new and specifically binding instrument? Would you instead favour the use of non-binding initiatives, such as the use of voluntary European standards or guidelines? Or would you prefer a method combining the regulatory with the non-regulatory, such as a binding legal act, setting out the goals to be achieved, with the technical means of achieving those goals described through European standards and other guidelines? Do you consider that a joint initiative of the European social partners pursuant to Article 139 of the EC Treaty would be appropriate?
4. Sectoral social dialogue: main developments

The European social dialogue underwent fresh developments in various sectors of activity during 2004. We shall review below the most significant ones in thirteen sectors, beginning with the establishment of three new sectoral social dialogue committees (SSDCs) – local and regional government, the audiovisual sector and the chemical industry – and following on with another sector, insurance, which seems to be in rather poor shape.

4.1 Local and regional government

The 29th sectoral social dialogue committee, for local and regional government, was officially instituted on 13 January 2004. The establishment of this SSDC puts on a formal footing a social dialogue which has existed since the late 1990s. The protagonists in this sector had already adopted some joint declarations (on equal opportunities in 1999; on European employment policy in 2000). The new committee, comprising representatives of the Council of European Municipalities and Regions - Employers’ Platform (CEMR-EP) and the European Federation of Public Service Unions (EPSU), has adopted a work programme for 2004-2005 and a joint declaration on telework (see below). The main planks of its programme are to promote high-quality public services, strengthen social dialogue in the new Member States, become involved in determining Commission policies (especially in the field of employment) and to complement the work of the cross-industry social partners. At the inauguration of this new SSDC, the two sides of industry also adopted a joint declaration on telework. In it they refer explicitly to the autonomous agreement signed by the cross-industry social partners in 2002, encouraging their members to be guided by it when introducing or managing telework in their sector. They undertake in addition to monitor future trends in telework in their sector and to conduct a preliminary appraisal in 2005.

4.2 Audiovisual sector

The sectoral social dialogue committee in the audiovisual sector held its inaugural meeting and adopted its rules of procedure on 29 April 2004. The negotiations geared to launching a European social dialogue in the public audiovisual sector had been initiated in 1998, between EURO-
MEI and the European Broadcasting Union (EBU). This process finally resulted in the formation of a committee encompassing the entire audiovisual sector, involving the International Federation of Actors (FIA), the International Federation of Musicians (FIM), the European Federation of Journalists (EFJ), with EURO-MEI for the workers and the Association of Commercial Television (ACT), the Association of European Radio (AER), the European Coordinator of Independent Producers (CEPI), the International Federation of Film Producers Associations (FIAPF) and the EBU for the employers. At their constitutive meeting, the social partners mainly discussed their work programme: it will initially revolve around certain key European Union initiatives with an effect on the sector (the Directive on Services in the Internal Market, the Working Time Directive), the aim being to arrive at a common position on these texts. The committee plans at a later stage to address other issues such as health and safety, equal opportunities and training, the role of women in the media, access to employment for ethnic minorities, and also enlargement and its impact on the European social model.

4.3 Chemical industry

The constitutive session of the sectoral social dialogue committee for the chemical industry took place on 14 December 2004. The establishment of this committee, the 31st, follows on quite logically from a period of cooperation between the social partners in this sector (the European Mine, Chemical and Energy Workers’ Federation – EMCEF – for the workers and the European Chemical Employers’ Group – ECEG – for the employers), which had already resulted in the drawing up of joint position papers, most notably in November 2003 on the REACH legislation (6). The chemical industry is Europe’s second largest industrial sector, employing more than two million people, and has the highest turnover in the world in this sector. At a conference held in Helsinki on 10 September 2004, the social partners in the chemical industry signed a joint position paper on education, skills and lifelong learning in the European chemical industry. They undertake in

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6 This is a proposal for a directive setting out a new regulatory framework for chemicals in Europe (Registration, Evaluation and Authorisation of Chemicals).
this document to set up a joint working group which will, in the first instance, carry out an in-depth analysis of the status quo regarding skills, qualifications, vocational (further) training and lifelong learning within the industry. The second stage will be an exchange of information and good practice comparing the different national systems of education in order to support further developments in these areas. The joint text also looks at issues related to bolstering the image of the chemical industry, support for the teaching of science in schools, and improving vocational education and lifelong training for workers.

4.4 Insurance

Negotiations on lifelong learning in the insurance sector were broken off on 28 May 2004 after a year of talks (UNI-Europa Finance for the workers, and three employers’ organisations: the European Federation of National Insurance Associations – CEA, the European Association of Cooperative and Mutual Insurers – ACME, and the International Association of Insurance and Reinsurance Providers - BIPAR). The social partners in the banking sector had adopted a joint declaration on lifelong learning in March 2003, and the aim of UNI-Europa was to achieve a similar declaration in the insurance sector. The negotiations foundered in particular over ways of determining skill requirements, the provision of training during working time and trade union involvement in the training process. The collapse of these talks fits into a wider context of rather weak social dialogue in the insurance sector, as demonstrated in particular by a study produced by the Observatoire social européen (Pochet et al., 2004). Social dialogue in the sector has been marking time since the mid 1990s, so much so that for a while the Commission considered classifying this sectoral social dialogue committee as “dormant”.

4.5 Transport

The Community of European Railway and Infrastructure Companies (CER) and the European Transport Workers’ Federation (ETF) signed two important agreements, negotiated as part of the European social dialogue, on 27 January 2004: one on the European licence for drivers carrying out a cross-border interoperability service, and the other on the working conditions of railway workers assigned to cross-border services. The European driving licence had been under discussion since
2000. Both of these texts are to be kept under review by a working group which will meet every six months at the same time as the SSDC.

### 4.6 Telecommunications

On 5 May 2004, the European social partners in the telecoms sector (the European Telecommunications Network Operators’ Association – ETNO – for the employers, and UNI-Europa Telecom for the workers) reached an agreement on a charter for call centres. This joint document, officially unveiled on 15 June 2004, lays down a set of basic principles in various areas including health and safety at work, working time, worker training, etc. These principles deal in the main with the quality of customer service, working conditions, qualitative and quantitative performance targets, personnel management, work organisation, information and consultation of worker representatives, and compliance with basic labour standards as set out in the ILO Declaration on fundamental principles and rights at work. Following on from the elaboration of a set of “guidelines” on telework in Europe in 2001, the call centre charter constitutes the second joint undertaking of the European social partners in the telecoms sector, one which is experiencing rapid growth but whose geography considerably transcends Europe’s borders (many companies have now outsourced their call centres to countries such as India).

### 4.7 Electricity

On 4 June 2004, the social partners in the electricity sector – Eurelectric for the employers and the European Federation of Public Service Unions (EPSU) as well as the European Mine, Chemical and Energy Workers’ Federation (EMCEF) for the workers – signed a joint declaration on future training requirements in the sector. This text forms part of the EPSU-EMCEF work programme, which strongly emphasises the issues of lifelong learning and skills. Indeed, according to research commissioned by the social partners, Europe’s electricity industry is currently facing a major skills shortage. It is in an attempt to remedy this state of affairs that they have agreed on a number of principles aimed at raising these issues at all levels (companies, national social partners, European institutions). EMCEF and EPSU likewise undertake to assess what practical follow-up there has been to this joint declaration in 2007.
4.8 Construction
The social partners in the construction industry (FIEC and the EFBWW) published a brochure on the employment of young and older workers on 24 March 2004. With 1.9 million companies and almost 11 million employees, the construction sector is Europe's largest industrial employer. Yet the employment and integration of young people in this sector appears to pose a growing problem. The social partners have seen fit to air some solutions by producing this brochure, highlighting above all the importance of tutorship, i.e. the establishment of a formal relationship between an older, more experienced worker and a young recruit to the company. So as to help construction firms develop this tutorship mechanism, the brochure provides a description of the stages to be gone through, examples of good practice, and practical data sheets for the employer, the tutor and the youngster. In April, furthermore, FIEC and the EFBWW adopted a joint declaration on the proposal for a directive on services in the internal market. This text calls in particular for the amendment or deletion of some articles in the directive which could, in their opinion, encourage abusive practices, unfair competition, social dumping and undeclared labour.

4.9 Postal services
On 16 January 2004, the European social dialogue committee of the postal sector launched a website devoted to social dialogue in the postal sector (7). This initiative is the first of its kind as far as the sectoral social dialogue is concerned. The sector generates a turnover of € 80 billion (1.4% of GDP) and employs 1.7 million people. The website has two main aims according to its initiators: to build on and highlight the work of the SSDC, and to encourage and facilitate exchanges between the postal sector social partners at European level, especially by making available the agendas and minutes of SSDC meetings and providing a database of contacts in the European post offices.

4.10 Cleaning industry
The European social partners in the cleaning industry (EFCI and UNI-Europa) adopted a joint declaration on 17 September 2004, entitled

“Selecting best value in public procurement of cleaning services”. Now that the European Directive on procedures for the award of public works contracts, public supply contracts and public service contracts (adopted in March 2004) has to be transposed into the Member States’ national legal systems, the European social partners in this sector are appealing to the local, regional, national and European contracting authorities to select the economically most advantageous offer of cleaning services (best value for money), rather than limiting their criteria to the lowest price only.

4.11 Commerce

The social partners in the commerce sector (UNI-Europa Commerce and EuroCommerce) adopted on 28 May 2004 a declaration on promoting the employment and integration of disabled persons in commerce and distribution in Europe. This declaration calls in particular for the elaboration of a disability management strategy as part of equal opportunity policy. It is mainly directed at affiliated employers’ and trade union organisations.

4.12 Horeca

On 11 June 2004 the social partners in the hotel, restaurant and catering (Horeca) sector (EFFAT and HOTREC) adopted a set of joint recommendations laying down guidelines on training and development in the Horeca sector, especially in SMEs. They likewise adopted new rules of procedure for the sectoral social dialogue committee.

4.13 Culture

Following the conference held in Tallinn on the enlargement of the social dialogue in the performing arts sector, the social partners in this sector adopted on 18 April 2004 a joint declaration on the future of the social dialogue in an enlarged Europe.

5. Future of the social dialogue: communication from the European Commission

The main aim of the communication adopted by the European Commission on 12 August 2004, “Partnership for change in an enlarged Europe - Enhancing the contribution of European social dialogue” (CEC, 2004e), is to improve the structure of the European social
European social dialogue: modest achievements in a climate of conflict

In this document, the Commission surveys recent developments in the social dialogue, both cross-industry and sectoral, as well as the challenges confronting it, above all enlargement (technical capacity of social partner organisations in the new Member States, national industrial relations systems, a wider variety of existing traditions, etc.) and the management of economic and social change. Management of change, in the Commission’s view, constitutes the prime purpose of the European social dialogue, which means that the social partners’ contributions must be “as concrete and effective as possible”. The Commission’s starting point, however, is that the implementing provisions contained in many of the texts produced through social dialogue are vague and imprecise. Furthermore, the significance and status of the European social partners’ texts is not always easy to understand. There is a clear allusion here to certain documents resulting from the sectoral social dialogue, as well as to the controversy surrounding the nature and status of “voluntary” or “autonomous” agreements adopted in the cross-industry social dialogue (telework and stress, see above). Consequently, the Commission puts forward some new terminology on which the social partners are invited to base themselves when drafting their documents. Four major categories are defined:

- “agreements” implemented in accordance with Article 139(2). Texts in this category establish minimum standards and entail the implementation of certain commitments by a given deadline. Two main types of agreement fall within this category: agreements implemented by Council decision (or “framework agreements”) and autonomous agreements (also known, but too ambiguously, as “voluntary” agreements) implemented by the procedures and practices specific to management and labour and the Member States. The Commission helpfully recalls that Article 139(2) states that Community-level agreements “shall be implemented”, which implies that there is an obligation to implement these agreements and for the signatory parties to exercise influence on their national members
in order to implement the European agreement (including in the case of autonomous agreements) (8).

- “process-oriented texts”. This rather odd term covers a variety of joint texts which are implemented in a more incremental and process-oriented way than agreements. There are three main types of instrument falling within this category: frameworks of action, which identify certain policy priorities towards which the national social partners undertake to work (with appropriate follow-up); guidelines and codes of conduct, which make recommendations and/or provide guidelines to national affiliates concerning the establishment of standards or principles; and policy orientations, in which the social partners pursue a proactive approach to promoting certain policies among their members and undertake to assess the follow-up given and its impact.

- “joint opinions” and “tools”. This category consists of social partner texts and tools which contribute to exchanging information, either upwards from the social partners to the European institutions and/or national public authorities, or downwards, by explaining the implications of EU policies to national members. Such documents in fact constitute the bulk of the texts adopted by the social partners over the years, usually intended as input into the work of the European institutions and/or national public authorities.

- “procedural texts”. This final category consists of texts which seek to lay down the rules for bipartite dialogue between the parties. This category also includes the social partner texts which determine the rules of procedure for the sectoral social dialogue committees.

Lastly, Annex 3 contains a proposed “drafting checklist for new generation social partner texts”, in which the Commission asks the social partners to provide, for each text adopted, a certain amount of information such as the addressee(s), the status and purpose of the text, the deadline by which the provisions should be implemented, the rules for national-level implementation, etc.

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8 See the controversy on this subject in the section on telework, above.
The ETUC made known its initial (somewhat mixed) reactions to this communication at the end of September. On the one hand, the trade union confederation welcomes the fact that the Commission recognises the important role of the autonomous social dialogue as well as its qualitative and quantitative development, and calls on the Member States to bolster the administrative capacity of national social partner organisations. Similarly, it welcomes the undertaking to encourage the social partners to strengthen the link between European Works Councils and the various levels of social dialogue, plus the commitment to clarify the tools of the social dialogue (particularly as concerns “autonomous” agreements). On the other hand, it draws attention to what it regards as three problematical issues: the Commission document does not make the Lisbon agenda any better balanced; it does not prevent either a conflation of the different levels of European social dialogue or the ability of employers to engage in unilateral initiatives in the field of corporate social responsibility; and, finally, it rules out any recourse to autonomous negotiations and agreements in a number of instances such as, for example, the revision of existing directives.

UNICE, for its part, adopted a very detailed position paper on the Commission communication on 25 November (UNICE, 2004b). It can be summarised as follows: promotion of the European social dialogue must be predicated on genuine respect for the social partners’ autonomy, since it is they who organise both the cross-industry and the sectoral social dialogue, as well as on the principle of subsidiarity, “which means recognising that industrial relations remain essentially national and that interaction between the EU and national levels is not a hierarchical relationship but one of complementarity and can be of a different nature depending on the issue or challenge” (UNICE, 2004b: point 3). Yet, according to UNICE, the Commission communication is governed by an “excessively administrative and interventionist” conception of the social dialogue. It cites by way of example the suggestion (not to be taken up, in its view) regarding establishment of a Community framework for transnational collective bargaining, but also the statement that the Commission’s right of initiative can be exercised at any time, and the Commission’s conception of the synergies between the European sectoral level and the company level, “notably the artificial links made between EWCs and the EU sectoral social dialogue” (UNICE, 2004b: point 5).
Whereas the employers agree that the main aim of the social dialogue should be to facilitate economic and social change, and especially to facilitate implementation of the Lisbon strategy, they see no need to devise a fuller framework for the European social dialogue. Any such framework would even be deemed “unacceptable and misleading”, as European-level negotiations and the resulting framework agreements are fundamentally different from collective agreements deriving from bargaining on wages and working conditions in the Member States.

In short, UNICE’s position boils down to a threefold refusal: the refusal to go along with a centralised approach to the social dialogue, the refusal to envisage a single model of social dialogue, especially in the context of enlargement, and the refusal of a “political” role for the Commission, which should confine itself to providing studies, information and perhaps monitoring. We would also draw attention to this comment by UNICE concerning “autonomous” or “voluntary” agreements: “It is important to underline that it is not because an agreement is not legally binding that its efficiency or legitimacy can be questioned. On the contrary, for issues for which a legislative approach is not appropriate, the framework of reference offered by a voluntary agreement is a factor of efficiency and of good governance. Moreover, this type of agreement, by avoiding to impose excessive constraints, can result in a better balance between flexibility and security than a legally binding text” (UNICE, 2004b: point 7). As to following up this type of agreement, UNICE considers that “over-prescriptive follow-up provisions would be counter-productive for the implementation of new generation texts given the diversity of (and developments in) national industrial relations practices” (UNICE, 2004b: point 18). Finally, while the European employers’ organisation states that it agrees overall with the typology of agreements proposed by the Commission, it insists that such a typology cannot be more than an ex-post analytical tool; nor can it be exhaustive. “Any attempts to turn it into an ex-ante framework would be totally unacceptable as it would hamper the autonomy of the social dialogue. It would also be counter-productive as it would block innovation in the EU social dialogue” (UNICE, 2004b: point 19).

**Conclusions**

As far as matters of substance are concerned (organisation of working time, European Works Councils, the role and purpose of social dialogue), the European social dialogue – at least at cross-industry
European social dialogue: modest achievements in a climate of conflict

Social developments in the European Union 2004

level – revealed deep-seated differences of opinion between the trade unions and employers’ organisation in 2004. Only one cross-industry agreement was signed in the course of the year, on work-related stress. This type of topic lends itself to win-win compromises between the trade unions (quality of work) and employers (productivity); but the amount of compromise at European level has been minimal. What is more, it is fashioned in a way – an autonomous agreement – which leaves its status ambiguous. Not that this agreement is superfluous: it places the issue of work-related stress firmly on the political and social agenda of all the EU Member States, as well as (slightly) tightening the follow-up procedures.

For the time being, however, the social dialogue seems sadly lacking in the kind of momentum which would enable it to tackle more sensitive issues. The inability to embark on cross-industry negotiations about the revision of the Working Time Directive demonstrates the current limitations of a European social dialogue which, for the past twelve years, has been confined to relatively consensual topics (parental leave, competencies and qualifications) or ones that have created winners on both sides (fixed-term employment contracts, part-time work, telework); but it has come to grief over more controversial matters where one of the parties – the employers, in fact – thinks it has nothing to gain (information and consultation for workers, data protection, organisation of working time).

We should point out here that the employers are increasingly tending to regard Community initiatives in the field of social affairs as interference which flouts the principle of subsidiarity and disregards the autonomy of the social partners. At the same time, however, they vigorously contest the idea of gradually creating a European framework for transnational collective bargaining. The sole purpose of the European social dialogue, in their opinion, should be to promote economic and social change via a flexible, non-binding approach.

The trade union approach is radically different: European-level collective bargaining is seen as a means of forestalling competition between national systems (and workers). The issue of working time could have been exemplary in this regard in 2004, if only UNICE had not ruled out any prospect of negotiating with the ETUC. The turn
taken by events on this front has since demonstrated that in actual fact the employers' organisation has the benefit of a number of objective allies, not only in London and in other capitals but also within the European institutions. In its proposal for a new Working Time Directive, the Commission appears to adopt a new policy strategy which amounts to endorsing the organised balance of power in companies where appropriate structures already exist (presence of trade unions, worker representation, collective agreements, etc.) but makes no attempt to extend the outcome of this balance of power to companies where it is lacking. This new approach – which could be criticised on the same grounds as autonomous social dialogue agreements, namely the absence of equivalent effects – implies that the Commission’s attitude to the European social model is undergoing a significant change. For the first time ever, the revision of a directive is resulting in the extension of a temporary derogation initially granted only to the United Kingdom, an extension which opens the door to social competition. In the context of the enlarged Union, it could be inferred from such an approach that the Commission is moving away from a certain type of European social model which cannot survive unless it is expanded and consolidated rather than threatened with competition.

One final word about the sectoral social dialogue. It is impossible to assess the sectoral dialogue in its entirety, given the contrasting dynamics from one sector to another. The various sectors have gradually been putting arrangements in place since the official establishment of sectoral social dialogue committees (SSDCs) in 1998. This was again apparent in 2004, with the formation of three new SSDCs. The existence of such bodies, however, is no guarantee of dynamic activity, as evidenced this year by the insurance sector, unable to overcome its stumbling blocks. The European Commission’s communication on the future of the social dialogue arises out of a desire to lend better structure to this social dialogue and above all to the fruits of its negotiations. We therefore find ourselves engaged in a long-term process which has not yet produced any particularly remarkable results but is at least still ongoing.
References


The European Employment Strategy and the Broad Economic Policy Guidelines

Introduction

The European Employment Strategy (EES) and the Broad Economic Policy Guidelines (BEPGs) were synchronised in 2004 for the second year running. This was an intermediate year in the new three-year cycle (2003-2005). For the record, the strategic guidelines are drawn up in year one, their implementation is described in year two and, finally, year three focuses on assessing the policies pursued. This three-year cycle was chosen in recognition of the fact that it takes time to implement reforms; thus their effects cannot be judged on an annual basis. In principle, therefore, 2004 should merely have been a year of transition. It was however notable for three major dynamics which impacted on the EES (and the BEPGs).

The first of these was enlargement. Procedures intended for fifteen Member States had to be adapted for twenty-five. Of course, this problem affects all European policies. One solution is to work in turn in small groups and then in plenary formation: that is what happened, for example, in the Cambridge process whereby the National Action Plans (NAPs) undergo peer-group analysis. Furthermore, the new Member States had to be acclimatised to the subtleties of the EES (even though they had been partially prepared for it by going through the JAP – Joint Assessment Paper – exercise, a sort of pre-EES). Some pedagogical work was therefore required. In addition, there is a dearth of mutual awareness. Who knows anything about the Slovenian or Estonian labour market? And, conversely, who in Estonia knows anything about the Belgian or Irish labour market? The effects of
enlargement will nonetheless not be fully felt until the EES comes up for review, enabling the new Member States to feed in their priorities.

The second dynamic was the mid-term review of the Lisbon strategy, whose content and procedures alike have come in for a good deal of criticism. Wim Kok (the former social-democrat Prime Minister of the Netherlands), who had previously chaired the group on EES reform in 2003, was asked to preside over a working group on the reform of Lisbon. This debate, the overarching link between all the open methods of coordination, has direct and significant repercussions on the European Employment Strategy and on economic policy coordination.

Thirdly, there was the rethink about the rigidity of the Stability and Growth Pact and the attempt to find a new formula taking more account of specific national circumstances and laying greater emphasis on total debt rather than annual deficits. Even though this rereading of the Pact does not completely depart from the underlying monetarist economic ideology, it does nevertheless partially call into question the credo that public finances must be balanced whatever the cost.

These three dynamics demonstrate once again that both the EES and the BEPGs are dynamic procedures which have evolved considerably since they were put in place. Thus, the combined processes of Lisbon and economic and employment policy coordination have by no means bedded down yet, in terms of either procedures or content. However, the most important step forward is that there are now some thorough, academic multi-country empirical studies available, gauging the effects of these flexible methods and the problems linked to their implementation (Zeitlin and Pochet, 2005; Govecor, 2004; Galgóczi, 2004). Added to these, there are a number of national monographs (see for example the articles on the website of the European Union Center at the University of Wisconsin-Madison) (1).

The first section of our contribution will be devoted to these initial empirical findings. We shall then examine the 2004 recommendations concerning both the EES and the BEPGs. Lastly we shall describe the mid-term review of the Lisbon strategy. What is interesting is that these

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1 http://eucenter.wisc.edu/OMC/index.htm
three aspects have had very little influence on one another. The analyses of EES implementation have not been fed into the deliberations on how to follow up the Lisbon process. The agenda of reports, meetings and other activities has continued as before, despite the criticisms and the in-depth studies. The analyses, processes and political implications still remain three very separate factors.

1. The EES: first lessons learnt

The available empirical data can be grouped according to five sub-themes (2):

1) substantial policy changes;
2) procedural changes;
3) mutual learning;
4) influence mechanisms at national level;
5) participation.

1.1 Substantial policy changes

The first point on which all the studies concur is that the National Action Plans are not regarded by national administrations or in political circles as strategic documents, but in essence as documents of an administrative kind. This point is crucial in that it helps to explain the lack of active interest taken by the stakeholders, be they formal (e.g. national parliaments) or non-governmental (trade unions, NGOs, etc.) (see below). This assertion does not mean that the EES is entirely without effect or that these documents cannot, by their very nature, be strategic (the decision not to give these documents a strategic role in coordinating national measures was, after all, a political one). It is just that the NAPs are not a central element of national employment provisions, and for that reason the stakeholders attach only marginal significance to them. The argument can also be turned round to point out that, since the stakeholders do not set any great store by these

2 They are taken from Jonathan Zeitlin's concluding analysis in the volume “The Open Method of Co-ordination in Action. The European Employment and Social Inclusion Strategies” (Zeitlin and Pochet with Magnusson, 2005).
European strategies, those in charge have no reason to make them into more strategic documents. The NAPs now form part of the national administrative landscape, and “the EES has provided a common framework for national employment policy, and an element of structure, with annual planning and review. A more long-term, or at least medium-term, policy perspective has been introduced in some countries where it did not exist” (Govecor, 2004: 10). What influence the NAPs do have derives from the fact that the annual repetition of the process has generated a language common to all Member States (Goetschy, 1999). As pointed out by Zeitlin (2005: 451), terms such as “raising employment rates, activation, prevention, active ageing, lifelong learning, gender mainstreaming, flexicurity, reconciling work and family life, social exclusion as a multi-dimensional concept, inclusive labour market, integrated partnership approach, etc.” are now part of the standard vocabulary used by the “Europeanised” players on the labour market. These players are more numerous now than in the past (diffusion effect), but there are many key national players (such as company-level or even sectoral trade union negotiators) and local players (e.g. operators of projects under the European Social Fund) who are still totally unfamiliar with this European language. This does not necessarily mean that the policies pursued are any different, but they are not presented in the standard European jargon. It is also worth noting that in many countries the employers are (wholly) absent from these debates.

The adoption of a common language does not mean that the policies pursued in all 25 Member States are identical. Barbier (2005) has shown convincingly how activation policies, central to the EES, still vary considerably from one Member State to another and that different activation models coexist: those of the Scandinavian countries versus those of the English-speaking countries, for example. As Amparo Serrano Pascual (2004) concludes in her study of convergence (or otherwise) in activation policies for young people, “in the social intervention model based on activation some factors of divergence have been observed but also factors of convergence. While the policies inspired by this model differ widely, depending on the dominant institutional setting of each country, there is also, none the less, a certain convergent trend, at least in Europe, in terms of the social norms which inspire these activation policies” (Serrano Pascual, 2004: 515).

European influence must also be seen in parallel with other possible sources of influence (e.g. the OECD – on this point see Armingeon and
Beyeler 2004 – or, in horizontal fashion, other Member States). For instance, Kvist (2004) shows how the Scandinavian countries have exerted influence on one another in respect of activation policies especially recently, based on the Danish model, without a single reference being made to the EES and the European context.

These initial findings need to be analysed in a dynamic fashion. The EES may well have greater influence in the long term, since the adoption of a common language could eventually shape the way in which problems are perceived and hence the solutions that might be viable. But this remains a hypothesis which will need to be validated or invalidated at a later stage.

1.2 Procedural changes

The second point of consensus among the studies devoted to the EES is that in most cases it has favoured better across-the-board coordination within each national administration and between different administrations (e.g. Employment and Finance). As is made clear in the Govecor study, “despite the NAPs being documents of low importance in the national policy-making system, the NAP process and the EES in general has improved coordination and facilitated links between different policy areas. Coordination between ministries has improved in almost all countries, and links between various actors in the production of the NAPs have been developed. Horizontal integration of policy areas (such as labour market policies, social assistance, pensions, taxation, etc.) has been improved nationally, but also at European level” (Govecor, 2004: 9). This is an outcome which will need to be assessed following the introduction of the new procedures aligning the BEPGs and the EES, since they ought to strengthen the strategic cooperation between Ministries of Employment and Ministries of Economics and Finance.

Vertical coordination between different hierarchical levels has likewise been improved in certain cases, as is particularly evident in some federal countries. In Belgium, for example, where the system for the allocation of powers is exclusive – with the federal authorities having no constitutional scope for coordinating the responsibilities devolved to the regions – the EES has facilitated the conclusion of voluntary cooperation agreements between regional/community and federal entities. In Italy and in Spain, where regional devolution has been
introduced, the EES has enabled Rome and Madrid to keep (partial) control over this regionalisation process. In Sweden, the regional and local authorities have become more involved with the passage of time (Viffel, 2004). Nevertheless, such vertical coordination is still uneven, and several Member States certainly would not want their regions to have too much direct contact with Brussels.

1.3 Learning

According to the studies available, the effects in terms of learning and exchanging good practice have been modest, at least at first sight. It has to be said that the expectations were undoubtedly excessive and failed to take account of the difficulty of transferring good practices from one country to another, even by adapting them (see Ross, 1995). But national sluggishness in the face of change should also be borne in mind. Above all, it is legitimate to ask how effectively changes can be made in the absence of a major crisis forcing those concerned to review their traditional practices and thought patterns (on this point see the example of the Netherlands, Visser, 2004). Moreover, “Network-building between national and European level is often limited to small sections of national ministries and governmental agencies, which means that learning and deliberation is at best taking place in the administrative sphere, not in the public, and so far only to a limited extent among stake-holders more broadly” (Govecor, 2004: 9). This clearly raises the question of how to spread new ideas beyond the narrow circle involved with the EES. The study by Meyer (2004) demonstrates that the “heavyweight” press in France, Germany and the United Kingdom hardly ever refers (any more) to the EES. A diffusion effect could however take place through the specialist press which reaches the strategic players and not the “general public” (no study has investigated this aspect, to our knowledge).

A more realistic look at mutual learning does nevertheless reveal several positive elements. First of all, an improvement in national statistics. This has happened in countries whose statistics were of notoriously poor quality, such as Belgium, but also in countries which, like the Netherlands, thought they had high-quality statistics. More importantly, no doubt, efforts have been made to develop standardised European statistics and to launch a new European Euro-Silk survey. Determined efforts by the “Indicators” sub-groups of the Employment Committee
and the Social Protection Committee have led to improvements in the comparability of national data.

The second effect is the introspective exercise of having to present a national plan every year detailing the main reforms undertaken, but also of receiving critical comments from other Member States and the Commission on what is considered good practice (the so-called Cambridge process). The learning effects relate not so much to foreign examples as to the fact that all parties are obliged to reflect on the coherence – or lack thereof – in their own systems.

The third effect is the learning process undergone by the Commission itself in areas where its expertise was weak. Learning here relates to content but also to procedures. For example, the exchange of good practice was not operating properly (see in particular Casey, 2005), which led the Commission to overhaul the programme from top to bottom. The exchange process will from now on revolve around major topics: the theme for the Mutual Learning Programme of spring 2005 is “Attracting more people to the labour market: making work a real option for all”. Furthermore, the Member States must submit good-practice files related to the topic if they are to host the peer review meetings. Having said that, the change of procedure does not appear to have had the desired results, and the Commission indicates in an internal memorandum that “the number of responses to this request was disappointing”.

Zeitlin (2005: 473) rightly points out that, surprisingly, there has been “little success of the EES in identifying which types of active labour market policies or tax-benefit reforms were most effective under which circumstances, and revising the guidelines accordingly”. One hypothesis we would put forward is that this failure to identify the most effective reforms might derive from the very nature of the EES: it focuses on the results achieved by the different countries (benchmarking and indicators on the results) and not on the means used to achieve them (e.g. the relative cost of measures versus their effectiveness). This has led to progress in comparing results by adopting a one-dimensional approach in most cases (employment rates, for example; for a critical appraisal of the indicators see Salais, 2004). But that takes no account of institutional interactions (coherence), nor of the resources made available. For instance, there is no indicator as to
the percentage of GDP devoted to active expenditure on unemployment divided by the number of unemployed, which would illustrate the relative efforts made and their potential effectiveness. The absence of an institutional reading leads to partial imitations. For example, the Belgian activation policy claims to take its lead from the Danish policy, since the latter performs well in terms of unemployment and activation, but overlooks the fact that replacement rates (unemployment benefit as a proportion of final wages) are much higher in Denmark. The two systems are therefore quite different: one – that of Belgium – is based on long-term, low-level allowances and limited monitoring, while the other – that of Denmark – relies on generous short-term allowances but with rigorous checks (and substantial assistance). The EES in its present form gives no insight into the complementary roles of institutions, because it deliberately centres on limited outcomes measured by indicators in a one-dimensional fashion.

1.4 Influence mechanisms at national level

Over and above the already-mentioned influence of a common vocabulary which could perhaps lead to cognitive harmonisation (i.e. a shared vision of the causal factors explaining unemployment), the empirical studies show that a political selection is made as concerns which guidelines to implement at national level. Jelle Visser (2005) speaks of “selective downloading” and Erhel et al. (2005) of a leverage effect. These findings are borne out by the Govecor study (2004: 20): “at the national level, compliance and adaptation was sporadic and pointing to a systematic and in some areas widening the ‘commitment-implementation gap’ of policy coordination. Governments often departed from their commitments made at EU-level and ignored substantive individual recommendations for policy change directed to them. They often pursued a pick-and-choose strategy, implementing only those recommendations in line with their political aspirations, but not the more costly or long term ones”. Here too, we need to beware of determinism. Governments are not the only players in the game: opposition parties can likewise take their lead from one or other of the recommendations. The attitudes of political parties are not set in stone, and opinions often vary as to what reforms to undertake. Coalition governments are in power in several countries with, once again, potentially divergent views. The important point is that the EES is not implemented in an across-the-board fashion, and current political interests will guide priorities
when it comes to implementation. One could say that the EES is a European-level compromise depending on the political balance of power at a given moment (not necessarily or solely left/right, since certain social-democrat governments can also be interested in a Europe-wide reform agenda, as is the case in Germany); this compromise will be reinterpreted nationally according to the current political agenda and balance of power.

1.5 Participation

Trade union participation in drawing up and implementing the NAPs has been very uneven. As for participation by employers, it has been minimal. The table below summarises the findings of various cross-cutting studies (see de la Porte and Pochet, 2005).
Table 1: Participation of social partners in the NAPs of the Employment Strategy (2002 and 2003)

<table>
<thead>
<tr>
<th>Country</th>
<th>Government document/ Joint document</th>
<th>Direct, written social partner contributions to NAPs 2002/2003</th>
<th>Improved social partner participation 2003</th>
<th>Participation in NAP implementation</th>
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<tr>
<td>AT</td>
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<td>UK</td>
<td>GD</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Sources: Where the data were drawn from and comments on the nature of the data:

1) (3rd and 4th rounds) National Reports of the Govecor project (www.govecor.org) – for Austria, Belgium, France, Germany, Ireland, Italy, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. In these reports, there were interviews with social partners in some cases. In other cases, the analyses were based on interviews and reports from the governmental perspective. The national reports of the Govecor project were the most uneven source of data, as the research focus was broader than social partner participation.
2) A Survey by the European Foundation for the Improvement of Living and Working Conditions on the Participation of Social Partners in the NAPs (2002) of the Employment Strategy (www.eiro.eurofound.ie) – for all 15 Member States. The survey looked at the subjective evaluation of participation by the social partners; the survey by EIRO was the most uniform, in that it was based on a questionnaire sent out to all of the social partners.

3) Joint Report on Social Partner Actions in Member States to Implement Employment Guidelines (ETUC, UNICE/UEAPME and CEEP, 2004). This report commented on social partner activity in the 2003 NAPs in all EU countries but France and Ireland. No reasons were given for their exclusion from the report. It is a self-evaluation by the national social partners, but the purpose of the report was political, hence some bias in the way the data were presented.

Since the NAPs are not strategic for governments, the trade unions take them seriously but do not make a major investment in them. In other words, the trade unions are keen to keep pace with the national and European agenda but are reluctant to become involved in a complex game over which they have no control nationally, let alone at European level. It is easier for them to put pressure on employers directly, or on governments, rather than engaging in a complex European game offering them little likelihood of furthering their own agenda. “In our analysis, the first years of the EES took the character of a two-level game, with the Commission and the Council as the key actors, and where governments tried to stay in control of the processes domestically. European social partners have also resisted attempts to give them the role of implementers of Council policy” (Govecor, 2004: 9). According to our own analysis (de la Porte and Pochet, 2005), the space allocated to the social partners is an important issue. The EES has been changed on several occasions without any open deliberation process having taken place. The Kok report (Kok et al., 2003) is a telling example. Even though this group included a few trade unionists, the report was produced in a discreet, not to say secretive, manner. The European trade unions are thus being asked to play a proactive part in a process over which they hold no sway. Ultimately, as pointed out by Casey (2005), “by subscribing to the strategy, social partners were also subscribing to a wider approach to economic policy – an approach that was scarcely compatible with the approach advocated by trade unions”. Be that as it may, participation has been put on an institutional footing through the coordination of the BEPGs and EES cycles and through the recognition – including in the constitutional Treaty – granted to the tripartite summit with the social partners, the Commission and the presidency of the European Council.
prior to the Spring Council (see article by Cécile Barbier in this volume). Redressing the balance between the economic and employment fields thereby becomes a strategic matter but, according to the European social partners’ document on the EES, by 2003 nothing had changed as far as consultation practices were concerned (except in Luxembourg).

Enlargement will likewise impact on participation by trade unions and employers. As Galgóczi points out, “the original framework of the EES was prepared in the context of the EU15, so it has not always fitted into the conditions of the acceding and candidate countries. This especially refers to the role of the social partners which, contrary to the general assumption of the EES, are not in a strong position in these countries, with institutional weaknesses in the infrastructure of social dialogue. Continuing support in this respect from the EU institutions and EU15 Member States towards the new Member States and candidate countries seems also to be essential in the future” (Galgóczi, 2004: 45). Perhaps the upgrading of the social dialogue to a “European value”, also enshrined in the constitutional Treaty, may eventually serve as a lever for the social stakeholders in the new Member States. So far, however, we have insufficient empirical data and insufficient hindsight to validate such a hypothesis.

In conclusion, there is now ample material demonstrating that the EES has had certain effects – not always those anticipated – but it is as yet too soon to make any final pronouncements, especially about whether or not the use of a common language gradually leads to the formulation of similar policies due to the creation of a common cognitive framework (it will not be possible to validate this hypothesis for some time to come).

This increase in detailed knowledge of the mechanisms has had no impact whatsoever on the EES as it operates in practice (in the sense that the EES has become an integral part of national bureaucratic practices and a significant outside event is required to alter it, such as the review of Lisbon – see section 3). We now turn to the 2004 recommendations, which follow in the wake of the 2003 Kok report.

2. The 2004 recommendations

Readers will remember that the twenty or so guidelines were replaced by just ten guidelines in 2003. The Commission’s 2003 recommendations
followed these guidelines (see last year’s Social Developments), thereby providing a relatively accessible comparative overview for the first time. The Kok report on employment (Kok et al., 2003), for its part, chose to structure its recommendations to Member States around four major themes:

- increasing adaptability;
- making work a real option for all;
- investing in human capital;
- mobilising for reforms (this last point did not give rise to any specific national recommendations).

The number of recommendations ranged from five for the United Kingdom, Austria and Ireland to ten for Portugal: i.e. roughly twice as many recommendations as were made by the Commission in previous years. It is hard to give an exact figure, however, since the recommendations – both those from the Commission and those in the Kok report – can often contain several sub-recommendations.

This year, the Commission has seen fit to adopt the classification method set out in the Kok report. For the most part, the recommendations are identical or almost identical to those in the Kok report. But the Commission seems to have taken pleasure in amending them slightly, dividing them up or grouping them together, or even altering the categories or order, all of which makes meticulous comparisons extremely awkward. The streamlining operation carried out last year has fallen by the wayside, and it is once again impossible to compare the recommendations to Member States in the long term (for an overview of 2003, see annex). Moreover, gender equality has totally disappeared from sight. Let us not forget that this was one of the four pillars underpinning the 1997 strategy and became one of the ten guidelines at the time of the 2003 reform (and indeed the one accounting for the largest number of recommendations – ten countries out of fifteen – on a par with active ageing). Gender equality has now got lost, or rather has become invisible, drowned by a flood of one hundred or so recommendations.
Table 2: Number of recommendations per country in 2004

<table>
<thead>
<tr>
<th>Country</th>
<th>Increasing adaptability</th>
<th>Making work a real option for all</th>
<th>Investing in human capital</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>3</td>
<td>3</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>Denmark</td>
<td>1</td>
<td>3</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>Germany</td>
<td>3</td>
<td>4</td>
<td>2</td>
<td>9</td>
</tr>
<tr>
<td>Greece</td>
<td>3</td>
<td>4</td>
<td>2</td>
<td>9</td>
</tr>
<tr>
<td>Spain</td>
<td>3</td>
<td>3</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>France</td>
<td>3</td>
<td>3</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>Ireland</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Italy</td>
<td>3</td>
<td>3</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>1</td>
<td>3</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>1</td>
<td>4</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>Austria</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Portugal</td>
<td>3</td>
<td>3</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>Finland</td>
<td>1</td>
<td>3</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>Sweden</td>
<td>1</td>
<td>3</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Total</td>
<td>28</td>
<td>45</td>
<td>23</td>
<td>96</td>
</tr>
</tbody>
</table>

As far as content is concerned, five countries received recommendations concerning wage policy for the first time under the EES (previously this area fell within the remit of the BEPGs). These recommendations in fact reiterate those made in the Kok report. Interestingly, the United Kingdom is advised to “ensure that wage developments do not exceed productivity developments” (see BEPG guideline 3). One wonders whom the Commission is addressing here, since all forms of wage coordination have long been
abolished in the UK. The Commission also sets out priorities for the new Member States: these priorities are much less numerous than the recommendations made to the old countries but, most significantly, they merely reproduce – virtually word for word – the priorities of the 2003 Kok report.

Table 3: Priorities for the new Member States

<table>
<thead>
<tr>
<th>Country</th>
<th>Increasing adaptability</th>
<th>Making work a real option for all</th>
<th>Investing in human capital</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td>1</td>
<td>3</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>Czech Rep.</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>Estonia</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Hungary</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Lithuania</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Latvia</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Malta</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Poland</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>Slovenia</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Slovakia</td>
<td>1</td>
<td>3</td>
<td>2</td>
<td>6</td>
</tr>
</tbody>
</table>

The Member States submitted their NAPs in October 2004. These were the first “real” NAPs for the new Member States, which had until then submitted JAPs (1). It is worth noting that the BEPGs followed an altogether different approach, scrutinising the position of the new Member States in particular in 2004. What is striking about the recommendations is that public deficits have become something of a fetish. Overall debt is relatively low in most of these countries, while

their need for investment is glaringly obvious. It would therefore make economic sense for those countries to run deficits in excess of 3% so as to invest in infrastructure for the future. The Commission’s role would then be to make sure that the funds really are being spent on investment for the future and not used for current expenditure. In reality, however, the Commission is doing nothing but enforce the Stability and Growth Pact as adopted in 1997. Even though the Pact is undergoing a review and certain types of investment are likely to become permissible, the Commission has opted to remain the guardian of the treaties in the narrowest sense of the term. Unless DG Ecfin has been won over to the strict definition of the 3% and is determined to make its mark on the debate around the review of the Pact. Be that as it may, what is striking yet again is the capacity of the economic players to take the lead once more and already to have prepared recommendations for the new Member States, while their social counterparts are lagging behind.

3. Review of the Lisbon strategy

We analysed the Kok report on employment and the reform of the EES in the last edition of Social Developments. Wim Kok was commissioned to present another report, this time devoted to a review of the Lisbon strategy (Kok et al., 2004). This followed on from the European Council’s acknowledgement of the fact that Lisbon had failed to produce the desired results and that its objectives would not be achieved by 2010 as announced. One key aspect of the debate about Lisbon’s failure in the social arena is the limited progress made in three areas: overall employment rates, women and older workers. These results worsened still further with the entry of the ten new Member States, whose employment rates are lower on average and have, in several cases, declined in recent years. For instance, the Czech Republic, Estonia, Lithuania, Malta, Poland, Slovakia and Slovenia all have low employment rates and show a low pace of progress – or no progress at all – towards the 70% goal. The three tables below summarise these results in respect of employment rates: overall, for women and for older workers.
### Table 4: Overall employment rates

<table>
<thead>
<tr>
<th>Rates in 2003 (%)</th>
<th>Pace of progress since 1997</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Low</td>
</tr>
<tr>
<td>&gt; 70</td>
<td>DK</td>
</tr>
<tr>
<td>65-70</td>
<td>AT, CY, DE, PT</td>
</tr>
<tr>
<td>&lt; 65</td>
<td>CZ, EE, LT, MT, PL, SI, SK</td>
</tr>
</tbody>
</table>

*Source:* CEC (2005a: 5).

### Table 5: Female employment rates

<table>
<thead>
<tr>
<th>Rates in 2003 (%)</th>
<th>Pace of progress since 1997</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Low</td>
</tr>
<tr>
<td>&gt; 60</td>
<td>DK</td>
</tr>
<tr>
<td>55-60</td>
<td>CZ, EE, LT, SI</td>
</tr>
<tr>
<td>&lt; 55</td>
<td>MT, PL, SK</td>
</tr>
</tbody>
</table>

*Source:* CEC (2005a: 5).

### Table 6: Employment rates of older workers (55-64)

<table>
<thead>
<tr>
<th>Rates in 2003 (%)</th>
<th>Pace of progress since 1997</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Low</td>
</tr>
<tr>
<td>&gt; 50</td>
<td>CY, EE</td>
</tr>
<tr>
<td>40-50</td>
<td>EL</td>
</tr>
<tr>
<td>&lt; 40</td>
<td>AT, DE, PL, SI, SK</td>
</tr>
</tbody>
</table>

*Source:* CEC (2005a: 5).
Concerning policy priorities, the new Kok report highlights improvements in respect of economic growth, employment and productivity. Social cohesion and environmental sustainability are classified as second-order priorities. Five key policy areas are identified, one of which is the labour market. For this area, the advice is to follow the recommendations made in the European Employment Taskforce report (see Social Developments 2003). Other priorities highlighted include the development of strategies for lifelong learning and active ageing, as well as developing reform partnerships for growth and employment. In line with the initial spirit of the Lisbon Summit, the report emphasises “increasing employment rate and removing disincentives for female labour force participation” (Kok et al., 2004: 31). Other initiatives in the social protection area are also included under the heading of labour market policy, be they legal or soft law initiatives. These include the temporary agency work Directive, adopted in 2003, ensuring sustainability of pension schemes (an allusion to the OMC pensions process), and the OMC social inclusion process. However, there is no in-depth discussion of progress on these social issues.

In order to enhance delivery, the report calls for greater political commitment by governments, and also wider involvement by the European Parliament, called on to play a “proactive role in monitoring performance”. Furthermore, the discourse on wider involvement of other actors is emphasised, notably the European social partners, but also – important for genuine national-level commitment – national parliaments. The Kok report considers that national parliaments and social partners should be more closely involved. The report also recommends that efforts be made to “engage (...) citizens in its implementation”. However, precisely how citizens should be involved is not spelled out. This approach, giving the leading role to the Commission and based on naming and shaming, was not well received by the EU Council which would like to continue to control the agenda and avoid uncontrolled pressure. The Kok report paved the way for that of the Commission by casting considerable doubt on the effectiveness of the OMC, especially with regard to its social aspects and its governability.

In January 2005 the Commission put forward its own vision of the future of Lisbon. It proposes (re-)focusing on the issue of competitiveness. Its own role would be to bring forth national reforms in a bilateral
relationship with each Member State. Each State would appoint a “Mr/Ms Lisbon” responsible for coordinating initiatives nationally. The Lisbon report would become the central report, divided into three parts: one on macroeconomics (the BEPGs), one on microeconomics (the structural reforms – Cardiff) and one on employment. As far as other social policy areas are concerned, the Commission states in its technical report that “the Commission will review the Open Method of Coordination processes related to the Lisbon strategy with a view to establishing their value added in the context of this renewed delivery and reporting structure. This implies that satellite OMCs and other sectoral processes can feed into the national Lisbon programmes to the extent that they directly relate to growth and jobs. Those processes that would no longer feed into the renewed Lisbon structure could be maintained for other policy purposes outside the Lisbon strategy” (CEC, 2005b: 5).

Conclusions
Both the EES and, to a lesser extent, the BEPGs are in a state of crisis as concerns their effectiveness and legitimacy: effectiveness, first and foremost, since – as we demonstrated in section one – painstaking analysis reveals that their effects have until now been limited. Certain effects have of course been felt, but it is hardly surprising that dozens or even hundreds of meetings and documents should make some kind of a mark. What emerges clearly from these studies is that the changes have not been cumulative: Portugal, for example, produced a number of internal institutional innovations in conjunction with the Lisbon strategy and the OMC when the socialists were in power, but these innovations were stopped dead by the right-wing Barroso government. The same phenomenon is apparent in Italy and in the Netherlands. Thus it is not incorrect to say that, rather than being strategically incorporated into different national approaches, the EES and the BEPGs have been grafted onto existing procedures in a more or less marginal way without them being altered to any significant extent (routine bureaucratic incorporation).

The crisis of legitimacy, secondly, derives from the inadequate integration of the EES into national democratic procedures. The proposed solution is to strengthen national coordination and participation by the relevant stakeholders. But such proposals carefully sidestep the debate about how the European objectives are adopted in the first
place. Who is involved in drawing them up? The dominant perspective is still top-down. We know the solutions; they now need to be implemented. But do we know how to solve the employment crisis?

A lack of consistency exists both between and within individual policies. The EES has been amended almost every year (Pochet, 2005) as a result of internal assessments but more especially external events (the rightward shift of several governments). The alterations have been made not as a result of thorough analysis of their advantages and limitations, but as a result of political compromises. This has led a number of players to question the appropriateness of the proposed solutions on the one hand and, on the other, Europe’s interference in complex social compromises. The sensitivity of this matter is all the greater in that the messages being sent out are becoming increasingly “liberal”, even – in this year’s version – borrowing from the BEPGs’ obsession with wage restraint (for a comparison of the OECD and European recommendations on employment and social protection, see Casey 2004).

Finally, there is inadequate visibility. Whereas a growing number of players had become accustomed to a four-pillar strategy, in 2003 the EES was amended and built around ten “commandments”. Then the Commission adopted the three thematic priorities of the Kok report, and the recommendations, having acquired a degree of stability last year, have been revisited in the light of the Kok report. True enough, the message has scarcely changed, but all these developments make the dynamic and the timing incomprehensible even to specialists. Are the BEPGs being indirectly affected by fall-out from the debate around the Stability and Growth Pact? The Pact has opened up scope for discussion about the cross-over between monetary and budgetary policy. Of course, in its 2004 version, the Commission again goes to almost ridiculous lengths to abide by the standard discourse, for example in the case of the Baltic States which have little debt but are desperately short of public investment.

What is particularly striking, however, is the readiness of the public authorities (Commission and Member States) to discredit the OMC, even though they themselves were responsible for its implementation – clear evidence of the fragility of the apparent consensus around these “new forms of governance”.

References


Health care: after the Court, the policy-makers get down to work

Introduction

With the start of 2004 it seemed as if a general signal was given to deal with national health care systems. The starting shot came from DG Internal Market of the European Commission with the proposal for a Directive on services in the internal market (CEC, 2004a). This general horizontal Directive, in its 2004 version (1) aims at removing trade barriers for services between Member States and is explicitly applicable to health care services. DG Competition followed by launching its ideas on the abolition of restrictions on competition in professional services, tackling regulations on price fixing, recommended prices, advertising, entry requirements and reserved rights (CEC, 2004b). At the same time rules on state aid were proposed, including rules on subsidies in the health care sector. The Ecofin Ministers discussed for the first time at a breakfast meeting issues of health care spending and its impact on the sustainability of public finances.

These developments ring in a new phase. For many years Member States watched jealously to ensure that EU policies did not interfere

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1 In this contribution we refer to the Directive on services in the internal market as it has been presented by Commissioner Bolkestein on 13 January 2004. Let us remember that the spring Summit of March 2005 has declared that “In the light of this ongoing debate which shows that the directive as it is currently drafted does not fully meet these requirements, the European Council requests all efforts to be undertaken within the legislative process in order to secure a broad consensus that meets all these objectives” (European Council, 2005: point 22).
with their national health care systems. Slowly, the awareness dawned that even though the EU has no formal responsibility in the field of health care, EU law in other areas, mainly the internal market, does affect national health care systems. Once the European Court of Justice defined health care provision as an economic activity in 1998, the health ministers at EU level tried to reach agreement on a political answer to the problems this might cause. In the meantime however the EU internal market players and those responsible for competition law took over the initiative and launched politically and legally binding proposals to apply market principles in the health care sector. Social and health players are thus put on the defensive. The public authorities responsible for health care are more aware than ever of the risks inherent in these developments. They fear losing the capacity to steer their own health systems, without the EU taking over their responsibilities to guarantee equal access to high-quality care for all their citizens. In response, the Health Ministers agreed for the first time to establish at EU level a permanent mechanism to discuss health care issues and to enforce cooperation and coordination in this field, applying the open method of coordination. Also, the debate about the definition of a specific role for social and health services of general interest was brought to the fore.

In this article we will discuss these developments, beginning with the initiatives taken by the economic players, followed by the initiatives of the social players, and finally drawing some conclusions.

1. Economic players raise the temperature in early spring

The tone for the discussions on health care was set early in 2004. In January, February and March the Commissioners responsible for the Internal Market, Competition, and Economic and Monetary Affairs competed with each other to launch proposals and debates targeting health care services and the national health care systems. The basic assumptions on which the different policy initiatives were based, did not always seem very coherent, as we will indicate. Some policy lines seemed to be rather contradictory, even among the economic players. In any case these initiatives raised many concerns among the public authorities responsible for national health care systems and increased the need for a policy response from their side.
1.1 Health included in the proposal for a services directive

The first move was undoubtedly made by the Commission’s DG Internal Market, when it launched its proposal on services in the internal market on 13 January 2004 (see article by Éric Van den Abeele in this volume). This horizontal Directive, in its 2004 version, is supposed to apply in its entirety to health care services just as to any other type of commercial service. Moreover, it contains an article specifically devoted to the question of reimbursement for the cost of health care received in another Member State. The inclusion of health and social services within the scope of the Directive, together with the potential consequences thereof, provoked unprecedented reactions from the public authorities responsible for health policy and from the organisations concerned. In this section we shall first of all describe the political context in which health care was included in this proposal. We shall then explain the specific aspects of the health care sector which justify a separate approach. We shall look at those provisions of the draft Directive which are potentially the most problematical for the health care sector in terms of legal uncertainty and deregulation before, last of all, drawing some conclusions.

1.1.1 The policy context

The Directive, as proposed by the Commission, is applicable to any economic activity. Indeed, the Court had decided in a series of judgements that health care provision is an economic activity and that the free movement provisions of the Treaty thus apply (1).

Since the aforementioned Court rulings, Member States have been considering how to cope with the situation brought about by these rulings and how to accept free movement principles whilst preserving


Social developments in the European Union 2004 81
the characteristics of their national systems and their steering capacity. Member States are clearly wrestling with the obligation to integrate the free movement principles into their national health care regulations. They hoped to formulate policy responses at EU level through the debates in the high level process on patient mobility (see below). The Health Ministers had laid down their recommendations in the report on this high level process in December 2003 and were awaiting the Commission’s reply that was promised for the spring of 2004 in the form of a Communication. This Communication would include proposals to improve legal certainty following the Court of Justice jurisprudence concerning the right of patients to benefit from medical treatment in another Member State. In spite of the fact that DG Internal Market participated in the high level process on patient mobility, it did not at any point reveal its intention to launch the Directive on services in the internal market, including health care services. Nevertheless, the Services Directive tackles crucial issues that were discussed during the high level process, such as the reimbursement of costs for care received in another Member State.

Furthermore, the debate aimed at defining the specificity of services of general (economic) interest, including health care services was also in full swing (see below).

The proposal for a Services Directive bypassed all these processes. No attempt was made to apply a specific approach to health care services. The general rules apply in an even stricter way to the health sector than to some public utilities such as electricity and gas distribution, postal services and water distribution services, which are partially exempted from the proposal.

It seems that DG Internal Market was displeased by the fact that most of the Member States had not adapted their legislation in an appropriate way to the Court’s rulings on the reimbursement of care received in another Member State (CEC, 2003a). Lobbying by commercial interests, such as commercial hospital groups and laboratories that hope to expand their activities across borders within the EU, has undoubtedly also played a role.
1.1.2 Why is the inclusion of health care problematic?

The underlying concept of the proposal is a simple relationship between a consumer and a provider. However, health care services form part of complex systems involving interactions and structural links between many involved players. Furthermore, in the health care sector not only do consumers and suppliers operate, but also a third, mainly public party, which pays the major part of the bill. Consequently price mechanisms, based on the relationship between supply and demand, do not function properly. Therefore, health care financiers make agreements with care providers on the price, content and volume of the care provided to their clients. These contracts are designed to prevent care providers from steering the demand for care in their own interest and to prevent more, or more expensive, medical services than necessary from being used, due to the fact that not the patient but the financier bears (a part of) the costs.

Another specific feature of the health care sector is the information asymmetry between patients and health care providers. Health care is increasingly complex, and patients in general lack the necessary background knowledge to make an informed decision about the care they need and the quality and effectiveness of the service they receive. Since health care providers may have other interests than their patients, the information asymmetry makes the relationship very precarious. As it is difficult for patients to assess their own needs properly and in time, public authorities have to provide these guarantees.

Furthermore, access to high-quality health care is considered in Europe as a fundamental right. European health care systems are therefore based on principles of social solidarity and universal coverage and are embedded in social protection systems. The provision of high-quality care equally accessible to all citizens is considered a core task of the public authorities. In order to be able to provide these guarantees, large amounts of public money are invested in this sector. These systems enjoy broad public support.

For all these reasons public authorities need legal instruments to guarantee the most effective use of the limited budgets available, to
keep prices down, to guide choices between comparable treatments and to guarantee access for all to high-quality care.

We will now illustrate in what ways the proposal for a Services Directive would put these necessary regulatory powers of the public authorities under pressure.

1.1.3 Potential impact on health care systems

As drafted by the Commission, the provisions of the Directive devoted to freedom of establishment oblige Member States to simplify and remove a large number of authorisations and licensing procedures and to limit the number of documents required for access to a health care service activity and to the exercise of health care provision.

Member States are expected to set up a major screening exercise to identify and assess procedures and conditions that care providers have to comply with. They should verify that these requirements are non-discriminatory, necessary and proportional. If not, the conditions should be changed or abolished. The conditions that need to be screened include the basic instruments of the health care authorities. We would mention the rules on planning, necessary to guarantee a balanced geographical spread of health care supply, the price fixing mechanism, guaranteeing affordable prices, the legal form of the health care provider such as being a non-profit making organisation, staff norms in health care institutions and referral systems. After the entry into force of the Directive, Member States would no longer be able to introduce any new requirements of this sort, unless the need for it were to arise from new circumstances. The Commission would examine the compatibility of any new requirements with Community law, and could request that Member States refrain from adopting or abolish the requirement.

It is not specified how the criteria for non-discrimination and proportionality, but most importantly necessity, would apply to the health care sector. Consequently, the provisions could create considerable legal uncertainty for health care authorities.

The European Commission would have the power to oblige national health care authorities to abolish or change regulations. However, the Commission can only verify whether the health care regulations are in
conformity with the internal market rules, but not whether they are necessary and effective to achieve their basic objectives, that is to guarantee their citizens high-quality services accessible to all. The Commission thus could not take over the responsibilities and obligations of the Member States, but the national level for its part would lose its capacity to steer the system.

For service providers who wish to provide services in another Member State on a temporary basis, the proposed Directive introduces the principle of the country of origin. According to this principle, health care providers wishing to provide care on a temporary basis in a Member State other than the one where they are established would be allowed to do so without being subject to the national provisions of the Member State where they provide this care, but only to those of the Member State of establishment. This would for instance apply to provisions related to access to and exercise of care provision, in particular those requirements governing the behaviour of the care provider, the quality or content of the care, advertising, contracts and the provider’s liability. Member States would not be able to impose on health care providers established in another Member State an obligation, for example, to make a declaration or notification to the competent authorities; to apply specific contractual arrangements between the care provider and the recipient or to possess an identity document issued by its competent authorities specific to the exercise of the service activity. They could not forbid the provider to set up a certain infrastructure such as an office with consulting rooms.

The extent to which the exercise of regulated health care professions (e.g. doctors, nurses, pharmacists, midwives) would be exempted from this principle is not clear in the Commission proposal and depends also on the outcome of the negotiations concerning the review of the legislation on the recognition of professional qualifications (3).

3 The Commission’s proposal for a framework Directive on the recognition of professional qualifications, launched in 2002 (CEC, 2002) also included the “country of origin principle”, allowing the temporary provision of services by regulated (health) professionals based on the legislation in the country of establishment. This concept was debated intensively in the European
Many crucial questions remain unanswered. If a health care provider supplies care on a temporary basis in another Member State, does the social protection system of the host Member State have to fund this care? If so, at what tariff and under what conditions? If a health care provider temporarily provides for instance pharmaceutical products or laboratory tests (e.g. on wheels), what prices do they have to apply, and what regulations on advertising, prescriptions, quality and information to patients apply?

If the 2004 version of this proposal were to become law, health care providers established in a Member State that imposes lower conditions on the provision of health care could, based on the legislation of this Member State, provide care in other Member States, competing with the health care providers of host Member States who do have to comply with more legal requirements. This would bring about reverse discrimination and would consequently put pressure on regulations in host Member States and could provoke a spiral of deregulation. Health care systems that opt for more private and for-profit care provision in their country could easily export these private elements to other countries.

According to the initial proposal for a Directive, the Member State of origin is also responsible for supervising the provider and the care provided abroad. Apart from the question as to the feasibility of supervision by the Member State of origin, we can question the legitimisation and motivation of a public authority to control health care services provided abroad to citizens of another Member State. The authorities of the Member State of origin do not have to account for their conduct to the citizens of the host Member State who are receiving the care.

Member States must also ensure that patients can obtain in their Member State of residence information on the legislation applicable in other Member States related to the access to and exercise of the (health care) service activity. However, health care systems are extremely

Parliament and the Council and they introduced restrictions to this principle, in particular for professions having a public health or safety impact (Council of the European Union, 2004a and European Parliament, 2004).
complex and it is not easy to make citizens understand the health care
system of their own country. Enabling a citizen to understand the
systems of 25 countries, all potentially operational on the territory of his
country, and expecting him to make an informed choice between
providers could be highly problematic. Moreover, patients need this
information at a time when they are in a vulnerable and dependent
position, because they need care.

In Article 23 the Commission’s proposal for a Directive defines the
conditions under which national social security systems must reimburse
the costs of medical care received in other Member States. These draft
provisions are based on the European Court of Justice’s case law.
However, where Member States complained about the lack of legal
certainty, due to the Court rulings, the Commission proposal for a
Directive does not add clarity.

It is not clear what conditions and formalities health care funders may
require for the reimbursement of ambulatory care received abroad. The
distinction between ambulatory care and hospital care is not at all clearly
defined. The relationship between the proposal for a Directive and
Directive 1408/71 on the coordination of social security systems, also
including rules on the assumption of the costs for health care received
abroad, is not clear. It also remains unclear whether financing
institutions can apply different reimbursement rates for contracted and
non-contracted care (AIM, 2004).

The proposed Directive moreover lifts bans on advertising for regulated
(health care) professions. However, advertising aims to increase
consumption, not necessarily of the best quality care for the best price.

In conclusion, the initial Commission proposal does not take into
account the specificity of the health care sector, where extensive
regulation is needed to redress market imperfections and to guarantee
the accessibility of high-quality care to all citizens. The proposal does
not take into account the involvement of a third party in the health care
sector, the (public) financier of the care service. This financier needs to
be able to impose cost-effective behaviour on providers, in order to
guarantee the financial viability of the system.
The Commission’s proposal would lead to legal uncertainty for public authorities, providers and patients and could result in deregulation in this sector where regulation is a crucial element for quality- and cost control. Deregulation could lead to more exploitative behaviour by care providers and thus to higher prices, provision of more unnecessary care and of needless highly specialised care. In short, (public) health care financiers would lose control over their expenditure and this would harm the financial viability of national health care systems, as well as the EU macro-economic policy objectives.

1.2 Rules on state aid for (health) services of general interest

At around the same time as the Services Directive was proposed, the Commission’s DG Competition launched proposals governing state aid (4) (the so called “Monti package”). This package included a proposal for a Commission Decision and a draft for a Community framework for state aid in the form of public service compensation (CEC, 2004c and 2004d). State aid that distorts competition in the common market is prohibited by the EC Treaty. The Treaty, however, allows exemptions to the ban on state aid where the proposed aid schemes may have a beneficial impact in overall Union terms. The proposals aim to increase legal certainty for Member States and for undertakings entrusted with the operation of services of general interest, spelling out the conditions under which public service compensation constitutes state aid that is compatible with the common market in accordance with the EC Treaty if it is necessary to the operation of Services of General Interest (SGEIs).

The draft Decision would apply to services that constitute services of general economic interest in all the sectors governed by the EC Treaty. The rules set out in the proposal would apply to small amounts of compensation granted to smaller undertakings providing SGEIs on the one hand and to hospitals and social housing undertakings entrusted with tasks involving SGEIs on the other hand. The draft Decision sets out conditions for the entrustment, compensation and transparency of the state aid awarded. If the aid is awarded according to these criteria, it

4 http://europa.eu.int/comm/competition/state_aid/others/.
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is considered compatible with the Treaty and this aid is exempted from the requirement of prior notification to the Commission of the intention to grant state aid.

The proposal for a Community framework on the other hand sets out the conditions under which state aid to other undertakings entrusted with SGEIs is in conformity with the Treaty. This is thus applicable to “bigger” SGEIs, not being hospitals or social housing undertakings. These state aids remain subject to prior notification to the Commission.

These proposals have been submitted for informal consultation to the Member States, the European Parliament and other stakeholders involved. The Commission intends to adopt these proposals by July 2005. The aim of the proposals is thus to set out rules for exemptions to the state aid rules, applicable in principle to the SGEIs affected. Nevertheless, in practice the notification requirements were up until then not applied to SGEIs and certainly not to health care services. Health care and hospital services were for the first time explicitly mentioned in relation to the EC state aid rules. For the first time EU legislation concerning the health care sector was based on the Treaty articles on competition (Article 86), i.e. on the Treaty provisions serving as a basis for market liberalisation. This again raised awareness and concern among Member States about the fact that health care services were defined as an economic activity in the meaning of the Treaty and consequently were not exempted from common market and competition rules.

1.3 More competition in professional services

During the same period, early 2004, Commissioner Monti also launched in a report the discussion about abolishing unjustified restrictions on competition in professional services (CEC, 2004b). The potentially restrictive regulations referred to here concern price fixing, recommended prices, advertising, entry requirements and reserved rights and regulations governing business structures and multidisciplinary practices in these professional services. In its report the European Commission calls on Member States, the professions concerned and their regulatory bodies to reform or eliminate restrictions that prevent competition in these professional services, unless clearly justified by public interest conside-
The Commission also suggests exploring together with all relevant actors the need to put in place pro-competitive and transparency enhancing accompanying mechanisms. From May 2004 onwards, administrative enforcement of the EC competition rules in the liberal professions became mainly the task of national competition authorities. The Commission would report in 2005 on progress in eliminating restrictive and unjustified rules.

The same discourse as for the proposal for a Services Directive is used, stressing the importance of the service sector as the engine of growth in the European Union and highlighting professional services as an important part of it. Yet the scope of the report is not very clear. It concentrates on the professions which have so far been analysed in some detail by the Commission, namely lawyers, notaries, accountants, architects, engineers and pharmacists. It mentions that similar conclusions could be reached concerning allied professions, where they exist. It states explicitly that medical professions are not covered by the provisions. This exclusion of medical professions is a crucial difference from the proposal for a Services Directive. It is noteworthy that the attention paid to the exclusion of the medical professions from the scope of the report is limited to 8 words (CEC, 2004b: 7, point 6) and a footnote saying that the OECD is carrying out complementary work. No justification at all is given for the exclusion of medical services. The arguments for excluding medical services from this report could in all probability be used in the same way to exclude them from the Services Directive. By not giving any justification, any contradictions in the Commission’s position and maybe differences in policy approach by the different Commission DGs are thus covered up.

On the other hand, pharmacists are included in the scope of the report. This suggests that the definition of medical services is interpreted rather narrowly. Nor is any justification given for making a distinction between pharmacists and other medical professions.

1.4 Macro-economic policies and health care

Health care systems were not only subject to policy initiatives in the context of internal market and competition law in the spring of 2004. The guardians of the EU’s macro-economic policies likewise targeted health care systems. At a breakfast meeting, in the margins of the
Economic and Financial Affairs Council of 11 May 2004, the Ministers of Finance discussed for the first time the impact of health care spending on public finances. This discussion was prepared for by the Economic Policy Committee from January 2004 onwards and followed up by a Commission document to the Economic Policy Committee in March (CEC, 2004e). This note provides an overview of developments in the health care sector of EU Member States; examines the main drivers of health care spending and considers experiences with reform measures. It states that there is a strong economic rationale for some public sector involvement in the financing and provision of health care on the grounds of both efficiency and equity. It states that aggregate cost-containment measures to control volume, prices and wages have helped to constrain expenditure and are key elements in comprehensive health care strategies for Member States. This analysis contrasts with the assumptions of the Services Directive whereby less public intervention and more free movement would lead to higher quality and lower prices, including for health services.

The Ministers agreed that there is likely to be considerable pressure for increased public spending on health, driven largely by ageing and public expectations, and that this would pose a challenge for budgetary management. However, no clear declaration of intent for future work in this field was made.

2. Social and health players aim for closer cooperation in the field of health care

The above-mentioned initiatives of the economic players interacted with ongoing processes launched by the social players at EU level.

We will look into three policy debates: on patient mobility; on the integration of health care in the process for modernising social protection and on the definition of social and health services as services of general interest (see also Baeten, 2003). The economic players’ initiatives influenced developments in these fields to a considerable extent.
2.1 Patient mobility and health care developments in the European Union

The issue of patient mobility was brought to the political agenda of the Health Council, mainly because Member States were concerned about the consequences of a series of judgements of the European Court of Justice, applying the rules on the freedom to provide services to health care provision and reimbursement (5). The Health Council of 26 June 2002 recognised that developments such as those relating to the single market have an impact on health systems. This Council expressed the concern that these developments should be consistent with the Member States’ health policy objectives, and with the principles of solidarity, equity and universality on which all the systems are based. The Council conclusions invited the Commission to launch a High Level Process of reflection on these issues. This was the first time that the Member States, traditionally extremely reluctant to allow EU debate on health care, accepted that an EU body would discuss health care issues. The awareness that Europe is entering the national health care systems by the back door of the internal market undoubtedly explained this development.

The High Level Process involved Health Ministers from 14 Member States, as well as EU level civil society groups. The acceding countries also took part in the second half of the reflection process. On 9 December 2003 the final report of the reflection process was presented (CEC, 2003b). It contained 19 recommendations for action at EU level. They are based around five themes:

- European cooperation 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;
- health-related issues and the EU’s Cohesion and Structural Funds.

The recommendations included developing information systems to enable Member States to share spare capacity in each other’s health care systems and to make it easier to purchase medical or other health services across borders; developing proposals for a framework for cross-border health care purchasing; cooperation on health technology assessment; the identification of European centres of excellence in high technology treatments or treatment of rare diseases; developing a common understanding of patients’ rights, entitlements and duties; addressing the issues of data protection and confidentiality in the exchange of patient information between Member States, as well as the issues surrounding the provision of “e-health services” over the Internet; studying the flows of patients and health professionals within the EU and internationally and an analysis of how the EU can contribute to promoting both quality of and access to health care.

The Commission was invited in the report to explore how legal certainty could be improved following the Court of Justice jurisprudence concerning the right of patients to benefit from medical treatment in another Member State. The report pointed out that options for secondary legislation could include further provisions updating the coordination of social security systems, general provisions on the free movement of patients or specific clarifications on the application of Community law to health services.

The expectations of the high level process were considerable. It was hoped that it would outline policy initiatives ensuring that Member States would maintain their steering capacity over the organisation and the financing of their systems. The report of the High Level Group did not really meet these expectations. It succeeded in singling out the issues at stake and calling for further information gathering and analysis, but did not come up with concrete proposals for action. Instead, it invited the Commission to put forward proposals on some of the topics.

Several explanations can be given for this lack of clear policy conclusions. In the first place, there seemed to be a broad consensus among Member States on the analysis of the problems caused by the
impact of the internal market on health care systems. However, there was much less consensus on how to deal with these problems. Some Member States were paralysed by the idea that their national health care systems would have to comply with European standards. They preferred rather general statements on the need to maintain their national responsibilities. In the second place the outcome of the negotiations on the European Constitution only gradually became clear during the high level process. Some partners hoped that the draft Constitution would give more guarantees to balance social and internal market objectives. Last but not least, in the phase of drafting the final Conclusions of the process, the European Commission was in the driving seat. Although the process was coordinated within DG Sanco, it was clear that DG Internal Market watched jealously to ensure that the final report would not contain any proposal running counter to their intentions to include health care provision in the Directive on services in the internal market. The Member States participating in the process agreed for instance on a statement listing the most important policy instruments they need to be able to steer their health care systems. The Commission’s text added to this list the words “while respecting Community law”. The Member States participating in the process were not able to oppose this wording, as this would mean that they would have to come up with alternative proposals for changing Community law, and they were not able to reach an agreement on this. It is clear that the proposal for a Services Directive was in the drawers of DG Internal Market awaiting the final outcome of the High Level Process. It was launched straight after the approval of the final report of the Process.

On 20 April 2004 the European Commission presented its answer to the recommendations of the High Level Process, in the form of a Communication on patient mobility (CEC, 2004f). This Communication was adopted together with a Communication on the application of the “open method of coordination” (OMC) to health care and long-term care (CEC, 2004g) (discussed below). These two Communications aim to encourage cooperation among Member States in the field of health care.
The Commission proposes European cooperation in the following fields:
- rights and duties of patients;
- sharing spare capacity between health care systems and cross-border care;
- the mobility of health professionals;
- European centres of reference;
- health technology assessment.

The Commission Communication mainly proposes actions concerning information gathering, developing better understanding and mapping the situation. In a next step it proposes to define common objectives for applying the open method of coordination to some of the issues listed. In response to the request for more legal certainty, voiced by the Member States in the recommendations of the high level process, the Commission refers to the proposal for a Services Directive. The Commission also invites Member States to take initiatives to improve legal certainty. Furthermore, the Communication pleads for improving information and knowledge about health systems and identifying and exchanging best practices.

To drive forward this process of cooperation, the Commission created a High Level Group on Health Services and Medical Care (CEC, 2004h). The Group consists of senior representatives of Member States and the Commission, calling on external experts as necessary. DG Sanco has been very enterprising in setting up this High Level Group quickly. The speed with which this initiative was taken mirrors the competition between the “health” and “social” players at EU level to take the lead in the process of European cooperation on health care.

The Health Council of 1 and 2 June 2004 welcomed the setting up of this High Level Group and invited the European Commission to ensure that this Group would work, as appropriate, in cooperation with other relevant bodies, in particular the Social Protection Committee and the Economic Policy Committee. The Health Council also underlined the need to explore how legal certainty could be improved following the European Court of Justice jurisprudence concerning the right of patients...
to receive reimbursement for medical treatment in another Member State. The Council makes clear that the Commission’s answer, i.e. to refer on the issue of legal certainty to the proposed Directive on services in the internal market, does not meet these needs. Many Member States voiced concerns at the Council with respect to the inclusion of health care in this Services Directive.

A first note on the activities of the High Level Group was sent by the Commission to the Council in December 2004, setting priorities for work in 2005 (Council of the European Union, 2004b).

The High Level Group may become an important instrument for cooperation in the field of health care and cross-border care. It could become a forum for reaching consensus on policy initiatives to provide more legal certainty to the Member States and patients. However, progress has been very slow. 2.5 years after the setting up of the High Level Process, no concrete policy output has been achieved.

The High Level Group also has its structural limitations. It was set up by the Commission’s DG Sanco, based on the Article 152 EU powers on public health. Contrary to the Social Protection Committee (SPC) (see below), it is accountable to the Commission and not to the Council, and is created by a Decision and not embedded in the Treaty. This has two consequences. In the first place the High Level Group cannot serve as a place for political debate on the impact of EU policies in other fields on national health care systems. This was strongly felt by the Member States in relation to the debate on the Services Directive. Secondly, the central role played by the Commission in this High Level Group makes the Member States somewhat suspicious of it, for example as concerns the draft Services Directive. A Commission-led body is not the right place to discuss proposals put forward by the Commission. There was therefore no appropriate forum where they could discuss the concerns of the national health care authorities with regard to this proposal.

This explains why the Council again decided in June 2004 to set up another permanent mechanism, which reports to the Council, on patient mobility and health care developments in the European Union and to assesses the impact of the European Union on health systems. In order to avoid a proliferation of working parties, this new body became
the existing Council Working Party on Public Health (composed of attachés from the Member States’ permanent representations to the European Union and preparing the Health Council negotiations), but in a different composition. High level senior officials would attend these meetings of the Council Working Party. This Working Party on Public Health, meeting at senior official level, is expected to offer advice and political guidance on horizontal issues related to health care, in particular on:

- assessing the impact of the European Union on health systems, patient mobility and health care developments;
- promoting exchanges of information, experience and good practice;
- considering long-term perspectives for health care.

By the end of 2004, this group had met only once and discussed some potential input into the debate on social and health services of general interest, prepared by the Social Protection Committee, and the proposal for an EU health strategy put forward by Commissioner Byrne. Contrary to the strong pressures to create this working party, it thus seems not really to be able to provide any specific input into the ongoing debates and provide countermeasures to the moves of the economic players. On the contrary, it seems to be turning into one more body that gives advice on initiatives of the social players.

2.2 Open method of coordination in the field of health care

As mentioned earlier, the European Commission also launched a second Communication in April 2004, proposing the application of the open method of coordination to health care (CEC, 2004g) (6). This Communication builds further on earlier decisions to involve health care in the process of modernising social protection. The Lisbon European Council in 2000 highlighted the need to reform and adapt social protection systems, including health care, in order to meet the

6 This method involves fixing European-level common objectives in a given policy area 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.
challenge of demographic ageing and ensure social cohesion. Since then, several reports and Communications on health care and care for the elderly have been drafted and presented to the European Council. During this process three common objectives for European health care systems have been identified: to guarantee access for all to health care of good quality; to improve the transparency and quality of health care systems; and to ensure the financial viability of the systems. The reports proposed closer cooperation and exchanges of views between Member States, but did not propose applying the open method of coordination (OMC). Indeed, Member States have always been extremely reluctant to give the EU scope to act on health care issues. Health authorities have always, for cultural and historical reasons, jealously sought to keep the responsibility for health care provision within their national borders.

The current Commission Communication is thus the first clear proposal to use the open method of coordination for health care. It aims to define a common framework to support Member States in the reform and development of health care and long-term care, which would allow them to define their own national strategies and to learn from the experiences and good practices of others. The Communication proposes a series of joint objectives for developing care systems, built on the previously formulated common principles of European health care systems:

- ensuring access to high-quality care based on the principles of universal access, fairness and solidarity and providing a safety net against poverty or social exclusion associated with ill health, accident, disability or old age;
- promoting high-quality care in order to improve people’s state of health and quality of life;
- ensuring the long-term financial sustainability of high-quality care accessible to all.

Two cross-cutting issues can be distilled from the proposed objectives: human resources management, including training, and cost-effective management of the available resources. The Communication announces that the open method of coordination will contribute to involving the many actors in this sector, particularly the social partners, the health
care professions and patient representatives. How the stakeholders of the health care sector will be involved in the process is however not yet very clear. The Communication includes a timetable. The Council of 4 October 2004 supported the main thrust of the Commission’s Communication, without taking a position about the proposed objectives. The Council considered that the Communication went into too much detail and endorsed the opinion of the SPC, stating that the OMC should be introduced in a progressive and flexible manner; should not impose an excessive administrative burden; should involve health ministries directly; and should avoid overlap with the High Level Group on Health Services and continue working jointly with the Economic Policy Committee (EPC). The proposed timetable will be adapted in order to start the process cautiously and to formulate the objectives on a “bottom up” basis, starting from national reports.

The Member States did thus call for an OMC “light”, an intergovernmental process with qualitative rather than quantitative objectives. They stressed the subtle balance between all the stakeholders in national health care systems and expressed their fear that over-specific EU guidelines could upset these balances. They mainly stressed the need for an exchange of national experiences.

2.3 Why closer cooperation?

As described above, the process of patient mobility on the one hand and the process applying the open method of coordination to health care on the other hand started out as two separate processes, each based on a different series of issues and each involving another set of players (Baeten, 2003).

The patient mobility process reflects the concern of the health ministers in the Health Council about the growing impact of the internal market on national health care systems and the fear that this could put pressure on the social nature of these systems. This process is further pushed forward by the Commission DG responsible for health (DG Sanco), seizing on the issue of patient mobility to legitimise more EU action in the field of health care.

The application of the open method of coordination to the health care sector is embedded in the process for modernising social protection.
This process was the reaction of the “social” players (Council formation, Commission DG) to the “economic” players (Ecofin Council and DG Ecfin). The latter, which oversees public finances, exerted pressure on the national social protection systems to control expenditure, in order to be able to cope with the ageing of the population. The “social” players wanted to add to this discussion issues relating to quality of and access to social protection systems, in order to avoid straightforward cutbacks in spending. The reluctance among Member States to apply this open method of coordination in the field of health care has always been substantial. If the preparedness to accept European cooperation in this field and the OMC is growing, this can equally be attributed to the concern among Member States as to the potential impact of the internal market and of the “internal market” players on their national systems.

The willingness of Member States to accept structured and institutionalised EU level cooperation in the field of health care is very new. The proposal for a Services Directive has been mentioned by many Member States as an argument for accepting closer cooperation. Member States hope that with closer cooperation in this domain they can face up to these interventions, have their say in the debates and achieve more coherence in EU policies towards health care systems.

Whether the established bodies and processes are adequate to achieve this objective remains to be seen. The profusion of bodies involved in closer cooperation does not really strengthen the position of the social players. Although all the players involved stress that close coordination between the different committees and processes is necessary, a good deal of energy will be invested in providing opinions on advice given by other bodies. There is a risk of losing sight of the main objectives of the processes as too much time and effort is spent on endlessly coordinating the cooperation processes and on cooperation between the coordination processes. The national civil servants responsible and stakeholder representatives are already now complaining that they are hardly able to study in depth all the documents circulated on which they have to give advice.

Whether the acceptance in principle of the application of the open method of coordination in this sector will continue once concrete macro and micro level common objectives have to be formulated in the
health care sector also remains to be seen. The diversity of systems is so great that it will be a major policy challenge to reach consensus on such objectives.

2.4 Health care within the debate on services of general interest (SGIs)

The debate on services of general interest has been discussed extensively in the editions of 2002 and 2003 (see Social Developments 2002 and 2003).

In 2003 the European Commission launched a consultation on the policy options to be taken in the form of a Green Paper (CEC, 2003c). Concerning health care services, it is noteworthy that nowhere does the Green Paper classify them as being potential economic services. On the contrary, the Green Paper states explicitly “Furthermore, the future of non-economic services of general interest, whether they are related to prerogatives of the State or linked to such sensitive sectors as culture, education, health or social services, raises issues on a European scale, such as the content of the European model of society” (CCE, 2003c: 15, point 47). The distinction between the economic and non-economic nature of a service is crucial, as non-economic services are not covered by the internal market, competition and state aid rules of the Treaty. The only sectors discussed in the Green Paper as economic services of general interest are the services provided by large network industries and services such as waste management; water supply or public broadcasting. This is remarkable at a time when the Court of Justice has over several years, in a series of judgements, held consistently that health care provision is an economic activity. It is hard to imagine that the Commission services were not aware of these judgements. Maybe they hoped not to provoke a policy debate on a specific approach to the application of internal market and competition rules for health and social services. The approach of the Green Paper contrasts sharply with the approach in the Services Directive, where health and certain social services are not only labelled as economic, but where no specific approach is foreseen at all. The Green Paper stresses nevertheless that the distinction between economic and non-economic activities is dynamic and evolving and that for an increasing number of services this distinction has become blurred. The Green Paper also stresses the need for more legal certainty.
The reactions to the Green Paper were massive. It raised awareness of the issues at stake among categories of players up until then barely mobilised around the potential impact of the internal market and competition rules on their sector. This certainly applies to the not-for-profit health and social services. They mainly called for a reinforcement of subsidiarity in the sector of health and social services. No calls for a Community framework for social services were voiced. Various commentators – largely from the social sector, trade unions and the regions – considered that a distinction between economic and non-economic services based solely on the market would be too narrow. They argued in favour of broader criteria, such as social and environmental objectives, an absence of profit or the involvement of volunteers, in order to determine whether a service is economic or non-economic in nature (Van den Abeel, 2003). Concerns were expressed about the lack of legal certainty for social and health services of general interest.

In May 2004 the European Commission launched its White Paper on services of general interest, drawing on the conclusions of the debate on the Green Paper. It presents the main elements of a strategy for services of general interest (CEC, 2004i). The Communication pays much attention to social and health services of general interest. The Commission supports the views stressed in the consultation that the personal nature of many social and health services leads to requirements that are significantly different from those in network industries and stresses that any Community policy in the area of services of general interest must take due account of the diversity that characterises different SGIs and the situations in which they are provided. Again, this position contrasts with the Commission’s approach on the Services Directive, where no differentiation is made between services of general interest and commercial services, and certainly not among services of general interest.

A specific section is dedicated to social and health services of general interest. The Commission argues for a systematic approach in order to identify and recognise the specific characteristics of social and health services of general interest and to clarify the framework in which they operate and can be modernised. The Commission announces its
intention to set out this approach in a Communication, to be adopted in the course of 2005. This Communication would take stock of the Community policies that are related to the provision of social and health services of general interest and describe the ways in which these services are organised in the Member States. The Communication would also set out a mechanism for a regular assessment of the national frameworks for the provision of social services of general interest.

The Commission also declares that it will subject any legislative proposals, such as a potential framework Directive on services of general interest, to prior extended impact assessment of its economic, social and environmental implications. Again, no social or environmental impact assessment has been made of the Services Directive. Remarkably, contrary to the Green Paper, the White Paper does not pay any attention to the difference between economic and non-economic services of general interest. This might be because it is difficult to draw a clear line between the two and because the distinction is dynamic and evolving. To draft the Communication on health and social services of general interest, close cooperation has been instituted with the Member States via the Social Protection Committee and the High Level Group on health services and medical care. A questionnaire has been sent to the Member States with the aim of collecting input for the Communication.

Conclusions

Developments in 2004 regarding EU policies to tackle health care issues have been extremely rapid. The tone has undoubtedly been set by the economic players, launching proposals for enforceable hard law. The proposal for a Services Directive is the caricature of this approach. No consultation, no debate, no coordination, but action. No impact assessment of this proposal on health care services and health care systems has been carried out, not a single word has been written on the potential impact of the proposal on the health care sector. Other Community proposals regarding the internal market take a more balanced approach towards the health care sector. But even then, the impact assessment remains poor, as are the justifications for a specific approach for the health care sector. The different initiatives of the
economic players do not always express a coherent view either. This is most striking between the Services Directive on the one hand and the analysis of the Commission’s DG Ecfin on the impact of health care spending on public finances on the other hand. DG Ecfin states that there is a strong economic rationale for some public sector involvement in the financing and provision of health care on both efficiency and equity grounds. This analysis contrasts with the assumptions of the Services Directive stating that less public intervention and more free movement would lead to higher quality and lower prices, including in the health care sector.

This divergence of views is somehow predictable as the different actors have different objectives. The EPC has to monitor public spending; the internal market actors have to boost economic activity. As long as health care is mainly funded from public resources, these actors will have divergent views…

The social and health players are disconcerted by these initiatives. They feel the need to react. This drive for action at EU level is becoming stronger than the fear of too much EU interference in their national health policies. The discourse is changing and the argument for subsidiarity to avoid EU level debate on health care systems is less often voiced. However, the slowness of the processes for closer cooperation in the field of health care contrast with the time pressure that is put on the concrete legal initiatives to liberalise the market in health services, such as the proposal for a Directive on services in the internal market. Those responsible for health care policy are thus put on the defensive and are not able to give an adequate and clear political response to developments. The cooperation processes risk drowning in a proliferation of bodies, contradictory advice, streamlining initiatives etc. They stick mainly to data collection and assessment of existing experiences but have not so far been able to draw up any clear policy lines or concrete proposals, let alone make legal proposals. There seems to be a consensus among Member States on the analysis of the problems. However, there is much less consensus on ways of dealing with these problems.
References


The draft Services Directive: a visionary instrument enhancing competitiveness or a Trojan horse threatening the European social model?

Introduction

At the time when talks with the World Trade Organisation (WTO) were underway with a view to a new round of negotiations on services, and immediately after the mid-term review of the Lisbon Strategy, of which the draft ‘Services’ Directive is a cornerstone, many questions concerning the scope of such a framework instrument remained unanswered. Should the country of origin principle (COP), which lies at the heart of the Commission proposal, be seen as a “visionary” principle contributing to the abolition of regulatory barriers and pointless administrative charges and, hence, leading to higher growth and more jobs? Or does it, on the contrary, apply the brakes to European integration based on minimum harmonisation? We shall show that, although the COP does not constitute a ‘first’, it is not a general principle of Community law recognised by the treaties and the case law of the Court of Justice of the European Communities (CJEC). This is probably what led the President of the Commission, José Manuel Barroso, to take a step backwards – a rather unusual decision for a Commission President – under pressure from the European Parliament and certain Member States. The Internal Market Commissioner, the Irishman Charlie McCreevy, was essentially saying the same thing to the European Parliament when he asserted: “Since my very first meeting with the Parliament before my appointment, it has been crystal clear to me that there are real problems with the Services Directive brought forward by the previous Commission. As drafted, it simply was not going to fly. […] We
need […] to address concerns about the operation of the country of origin principle: giving greater confidence and certainty to businesses and consumers on what law will apply to cross-border transactions; building the trust and confidence between Member States necessary for it to operate effectively; and ensuring that it cannot lead to a lowering in standards in any way” (1).

In the first part of this contribution, we shall examine the role of the services sector in the economy. We shall see that a new international division of labour is in the making and that the competitiveness of the European Union (EU), which justifies the proposed Directive in the eyes of its backers, will be determined by the services sector. We shall attempt to give a general overview of the way the proposal is organised.

In the second part, we shall attempt to shed light on the numerous issues raised by the Directive with respect to its impact, in particular on services of general interest (2) and on the posting of workers.

Finally, we shall attempt to draw lessons from this draft Directive with regard to the building of Europe.

1. A visionary proposal?

1.1 Background

1.1.1 Importance of the services sector

Services play a significant role in industrialised economies. In 2003, the services sector (3) accounted for nearly 62.4% of the GDP of the 25 Member States, or about 120 million jobs – direct and indirect – within the EU, but only 20% of intracommunity trade. The growth rate of the services sector between 2000 and 2003 was 1.7% (4). Out of a total of $ 560 billion, services accounted for 60% of all cross-border

2 This article does not cover the proposal’s effect on health care, which is discussed separately by Rita Baeten in this volume.
3 By comparison, manufacturing industry accounted for 17.7% of EU employment, or 34.1 million jobs.
4 L’Écho, 21 September 2004.
investments in 2003. The fact that it is increasingly possible for services such as accountancy, invoicing, computer development, industrial design and so on to be produced in one place and consumed in another disrupts businesses’ investment policy and long-term strategy. For the United Nations Conference on Trade and Development (UNCTAD) (United Nations, 2004), this phenomenon is giving rise to a ‘new international division of labour’. For example, an assessment carried out in 2003 and quoted by UNCTAD (Bardhan and Kroll) estimates that 3.4 million jobs could leave the United States for developing countries between now and 2015. 14 million Americans could “potentially” be affected by relocations. Even though for the time being this is essentially a North-North phenomenon (5), it is clear that developing countries will attempt to position themselves so as to attract these high added-value services. *Mutatis mutandis*, this phenomenon will have a lasting influence on the European Union due to relocation/outsourcing moves not only within the EU area but also outside it.

**1.1.2 A priority of the Lisbon Agenda**

In March 2000, the European Council meeting in Lisbon invited the Commission and the Member States to implement a strategy aimed at removing obstacles to the free movement of services, in order to contribute to making the EU the most competitive and dynamic knowledge-based economy in the world by 2010. This strategy was aimed at bringing about economic and social renewal in the EU. A year after its launch, it was furnished with a third pillar: the Göteborg European Council of 15-16 June 2001 added an environmental dimension to the Lisbon strategy. The stated aim was to use economic reforms as a springboard for the creation of employment and social cohesion, and to promote sustainable development in Europe by beginning to take account of environmental considerations.

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5 54% of relocation projects during the period 2002-2003 were to developed countries such as Canada, Israel or Ireland.
The Kok Report (Kok *et al.*, 2004) threw light on the fact that the EU is lagging behind the United States in a number of areas (productivity, growth, business start-ups, the export of advanced technology, etc.). Moreover, it emphasised the rise of India in the services sector, and that of China in the manufacturing sector. The Kok Report points out: “(...)

*Europe has no option but radically to improve its knowledge economy and underlying economic performance if it is to respond to the challenges of Asia and the US*” (Kok *et al.*, 2004: 12). Amongst the key recommendations made by the former Netherlands Prime Minister were the elimination of obstacles to the free movement of services and the creation of a single market for services. Nonetheless, the report clarifies two important points: “(1) it would be inconsistent with the Lisbon model to achieve competitiveness gains at the price of social dumping. (2) It must be ensured that removing obstacles for the free movement of services serves the interest of consumers” (Kok *et al.*, 2004: 25).

1.2 The draft Services Directive: a guide for the uninitiated

In December 2000, the Commission submitted its ‘strategy for the internal market in services’ (*6*). The Commission officially adopted its draft Directive on 13 January 2004 (CEC, 2004a). The Council began its work on the Directive in February 2004, first under the Irish and Netherlands presidencies, and then from 1 January 2005 onwards under the Luxembourg presidency. A Council working group, created for the purpose and comprising representatives of the 25 Member States, has been given the task of scrutinising and amending the Directive. The intention of the future UK Presidency was to complete the first reading in November 2005, with the European Parliament giving its opinion during the month of June 2005. The transposition deadline for the Directive was established at two years after its adoption, that is, in 2008 at the earliest.

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*6* In 1990, the Commission had already tried to submit a draft Directive on the responsibility of service providers (COM (1990) 482, OJ C 12 of 18 January 1991, page 8), which was rejected by the Council.
1.2.1 Content of the Directive

Objectives and justification

The Directive has been designed as a general and horizontal legal framework. The proposal is intended to complete the *acquis communautaire* and not to act as a substitute for existing Directives. The new provisions are to be added to those provided for in other Community instruments, which, in the Commission’s view, justifies a system of derogations to avoid any incompatibilities and ensure overall consistency.

The Commission points to the numerous complaints received from economic operators and the settled case law of the Court of Justice in order to justify this initiative. According to the Commission, the direct application of Articles 43 and 49 of the Treaty in infringement procedures against Member States would require a case-by-case approach, which would be both lengthy and tiresome to implement.

Legal Basis

The draft Directive is based on Article 47(2), sentences 1 and 3, on Article 55 and on Articles 71 and 80(2) of the EC Treaty. Article 47(2) of the Treaty permits the Council to issue directives under the co-decision procedure with a view to coordinating provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons. Article 55 makes some of the rules relating to establishment applicable to services and refers back to Articles 45 to 48 of the Treaty. Articles 71 and 80(2) are provisions relating to the principles governing the transport regime, which is, moreover, completely excluded from the scope of the Directive.

Scope

Under its own Article 2(1), the proposal applies to all services provided by service providers established in a Member State. Nevertheless, under Article 2(2), the Directive does not apply to three particular types of business:

- financial services;
- electronic communication services and networks;
- transport services.
The scope of the Directive is extremely broad: it covers the full range of services of general economic interest (SGEI) apart from transport and electronic networks and communications. All other SGEIs are covered by the Directive. The derogation referred to in Article 17 only concerns postal services and water and energy distribution networks. Moreover, this derogation only affects the COP and not the other provisions of the Directive (inter alia the authorisation scheme and prohibited requirements).

**Definition**

The notion of a service is defined in Article 50 of the Treaty as covering in particular activities of an industrial character, activities of a commercial character, activities of craftsmen and activities of the liberal professions. These include services to businesses such as management consultancy, office maintenance and security services, publicity and recruitment services, but also audiovisual services and home help services such as help for the elderly.

It is important to point out that such services may at the same time involve services:

- requiring proximity between service provider and recipient;
- necessitating movement on the part of either recipient or service provider;
- which may be provided at a distance, including over the internet.

In accordance with the Court's case law, the notion of a service covers any economic activity normally provided against remuneration without this meaning that the service must be paid for by those benefiting from it, and irrespective of how the consideration constituting the remuneration is funded.

Nevertheless, the remuneration aspect is missing from activities carried out by the State in the absence of consideration in the fulfilment of its social, cultural, educational and legal roles. Such activities are not covered by the definition set out in Article 50 of the Treaty and are not included in the scope of the Directive.
1.2.2 Mechanism of the Directive

With a view to removing barriers to freedom of establishment (7), the proposal provides for:

- administrative simplifications, such as the creation of ‘single points of contact’ (Article 6), from which businesses will be able to obtain all the necessary information and where they can complete all the formalities required for establishment. Provision is also made for completing these formalities by electronic means. All of these procedures will have to be based on objective criteria, of which businesses will be informed in advance;

- reducing to a strict minimum any authorisation schemes (Articles 9 to 13) applicable to service activities, in particular the conditions for granting such authorisation. The imposition of residence or nationality conditions will be prohibited, for example;

- the prohibition of certain particularly restrictive legal requirements (Articles 14 and 15), such as quotas or the number of undertakings required.

With a view to promoting freedom of movement for services, the proposal provides for:

- the right of recipients to use services from other Member States without being prevented from so doing by restrictive measures or by discriminatory behaviour on the part of the public authorities or private operators;

- the introduction of a mechanism to provide assistance to recipients who use a service provided by a service provider in another Member State. The recipient must be able to obtain in his country of residence information on requirements applicable in other Member States and on possible methods of appeal;

7 The concepts of freedom of establishment and freedom to provide services are closely linked and sometimes lead to confusion. The definition of establishment included in Article 4(5) “means the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, through a fixed establishment of the provider for an indefinite period” (CEC, 2004a: 45).
- the removal of a series of requirements made by the country of destination with regard to the posting of workers to provide a service.

In order to create mutual trust between Member States, the proposal provides for:

- possible further harmonisation of legislation on essential matters such as consumer protection, dispute settlement and professional insurance;

- reinforced cooperation between national authorities, involving a clear allocation of tasks between Member States. A system for peer review and information exchange between the national authorities will be progressively set in place;

- measures for promoting the quality of services, such as voluntary certification of activities and the drawing up of quality charters;

- promotion of voluntary codes of conduct at Community level.

1.2.3 The country of origin principle (COP)

Chapter III is devoted to the free movement of services. In Section 1, Article 16, it sets out the ‘country of origin principle’ in accordance with which: “The Member States shall ensure that providers are subject only to the national provisions of their Member States of origin which fall within their coordinated field” (8).

As well as this cardinal principle, there is the further principle according to which Member States may not restrict services from another Member State. However, three types of derogation are possible:

- general derogations from the COP (Article 17): there are 23 possible derogations;

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8 This reference to the coordinated field in Recital 21 should be understood as “all requirements applicable to access to service activities and to the exercise thereof, in particular those laid down by the laws, regulations and administrative provisions of each Member State, whether or not they fall within an area harmonised at Community level or are general or specific in character and regardless of the legal field to which they belong under national law” (CEC, 2004a: 32).
- transitional derogations form the COP (Article 18): cash-in-transit services and hearses, gambling activities with pecuniary value and the judicial recovery of debts;

- case-by-case derogations from the COP (Article 19): safety of services including public health; the exercise of a health profession and the protection of public policy.

The law applying to the provision of a service is thus no longer that of the Member State in which this service is delivered but rather that of the country of origin.

1.2.4 Does the proposal respect the notion of public service?

As well as services offered on a commercial basis, the proposal also covers services of general economic interest (SGEI), that is, services which correspond to an economic activity within the meaning of the Court’s case law and Article 49 of the Treaty. It does not cover services which form part of State prerogative (9) (such as, for example, internal and external security, the administration of justice, the conduct of foreign relations and other areas in which the public authority exercises its authority) (10) and services of general non-economic interest (SGNEI), such as education.

Two types of provision specific to SGEIs are, however, provided for:

- an overall exemption from the Directive for certain SGEIs regulated by Community law (electronic communications networks and services, transport services);

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9 For example, the Court has ruled that public education services were non-economic in nature (they do not fall under the Services Directive). On the other hand, certain types of higher education (such as MBAs, etc.) could be considered to be economic in nature.

10 The Court thus considered that bodies responsible for social security schemes such as compulsory sickness insurance were not an economic activity. Similarly, a body monitoring airspace or a private law body conducting antipollution monitoring in a sea port are characteristic of the public authorities and are not economic in nature.
- a derogation from the country of origin principle in the case of the freedom to provide postal services, as well as the distribution – and not the generation – of electricity, gas and water (Article 17(1-4)).

In respect of the distinction between SGEI and SGNEI, the Commission offers the following comments:

- the service must be provided against consideration in the form of remuneration;

- this remuneration does not necessarily have to be paid by the recipient of the service. The Commission gives the example of health care, which is characterised as economic, but which is not paid for in its entirety by recipients;

- the economic or non-economic status of the service is independent of the legal status of the service provider: public or private undertaking, non-profit making association, etc.;

- the notion of a service cannot be determined definitively, inter alia because the circumstances in which the service is provided must always be taken into account. Where certain ‘grey areas’ arise, matters will have to be referred to the Court.

The proposal does not attempt to deal either with the question of SGEIs as such, or with the opening of these services to competition (11). The Services Directive will not thus impose the privatisation or liberalisation of SGEIs on Member States (12). Moreover, the Commission takes account of national characteristics and leaves Member States considerable liberty as to the manner in which they define and organise SGEIs. However, the Member States will have to abandon certain prior authorisations and, as part of a mutual evaluation exercise, assess the compatibility of their national requirements with the Court’s case law. The Directive does not attempt to open SGEIs organised as national monopolies to competition, nor to

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11 Cf. Main Features of the [Services] Directive; see also the Commission’s explanatory memorandum.

12 Recital 35 of the proposal.
liberalise or privatise public undertakings (cf. Recital 35). It attempts to facilitate the movement of services and the conditions required for the establishment of operators for SGEIs already open to competition (13).

2. A controversial draft Directive

2.1 Is the impact assessment biased?

It can be stated in general that few impact studies of the proposed Directive have been carried out (14). Those which do exist are either partial or insufficient, and frequently both. Until the publication of a report produced in November 2004 by the Copenhagen Economics institute, no serious study had assessed the real impact of the proposal.

2.1.1 The Commission's first impact assessment

A Commission working document dated 13 January 2004 entitled “Extended impact assessment of proposal for a Directive on services in internal market” (CEC, 2002a: 24) initially concluded that a horizontal Directive was appropriate. However, this analysis of the proposal’s impact, though undoubtedly necessary, was to a great extent inadequate in that it did not consider any questions other than those raised as part of the Lisbon Strategy, i.e. eliminating barriers to the completion of the single market.

Firstly, the impact assessment did not take account of the possible conflicts between the objectives of the single market and the other objectives of the Union or its Member States. Thus, there is no examination as such of the compatibility between the removal of administrative barriers as a whole and the carrying out of public service obligations (Ghékière, 2002). Secondly, the choice of a horizontal Directive has not been evaluated in the light of the possible special circumstances of certain services more sensitive to the opening of

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13 It is useful to clarify that, where in future an SGEI activity is opened up to competition internally (in the absence of a Community directive), the relevant provisions of the Services Directive will apply.

14 Most of the studies published in 2004 related first and foremost to the legal and administrative impact rather than a genuine economic, statistical or sociological evaluation. See in particular Gelière (2004).
markets. Finally, the most important element: the assessment concludes that the impact of the Directive is positive without considering its possible negative consequences on certain sectors or in certain cases. In fact, it really seems as though the purpose of this impact assessment was to give legitimacy to the framework Directive rather than to lay the foundations for a genuine and precise evaluation of any particularly negative effects, especially in certain sectors, on employment, social cohesion (15) or the environment. During their presidency, the Netherlands often referred to the Centraal Planbureau study (Centraal Planbureau, 2004) asserting in a rather peremptory fashion that the Services Directive could lead to an increase of 15% to 30% in intracommunity trade in services and of 20% to 35% in direct foreign investment. The arguments used (a strange cross between OECD indicators and their own ‘administrative heterogeneity indicators’) – which were incidentally extremely abstruse – resembled not so much a scientific assessment and as a partial submission in defence of the Directive.

2.1.2 The economic assessment by Copenhagen Economics (16)

Acceding to the justified criticism which arose in response to its first assessment of the proposal’s impact (see above), the Commission called on a respected economic institute for a more accurate account of its effects on the sectors concerned and on the Member States (17). Based on a database of 275,000 European businesses, the new impact assessment concluded that there would be:

- an improvement in productivity and growth, with an increase in gross added value of 0.8% (calculated in terms of consumption);

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15 This point was emphasised by Catelene Passchier, Confederal Secretary of the European Trade Union Confederation (ETUC) during the hearing on the Services Directive organised in the European Parliament on 11 January 2004.


17 The Commission thus recognised that its impact assessment rested on both data and a methodological basis insufficient to assess the macroeconomic effect of the proposal’s implementation.
- a reduction in the cost of services;
- increased added value on production in all sectors, with additional added value of € 33 billion for the services sector alone;
- a net increase in employment as high as 600,000 individual jobs or growth of 0.3%;
- wage rises;
- an intensification of trade in services.

Emphasising that these results only covered two thirds of the services concerned (18), Copenhagen Economics considered that:
- some sectors would gain more than others, above all those which are heavily regulated;
- some Member States would gain more than others, above all those countries with the most regulations.

According to Copenhagen Economics, the net gain in employment would be observed in all the Member States, with a shift in jobs from the secondary to the tertiary sector. The study gives no indication of any possible relocations occurring between Member States. The predicted results would be observed over a period of between five and eight years but might be faster or slower depending on the responsiveness of Member States. According to the study, there would be a positive long-term impact on entrepreneurship.

This new study prompts a number of criticisms. Firstly, it looks only at economic factors – in a nutshell, growth and employment – without attempting a more detailed assessment of the Directive’s likely social and environmental impacts. Secondly, a significant methodological bias distorts the results. Indeed, the authors acknowledge that they focused only on those sectors for which they had sufficient information. The conclusions drawn by Copenhagen Economics from its assessment are

18 As a result of the inadequate quality of the data, the study does not consider construction, social services or health. Similarly, the study does not provide an impact assessment regarding the competitiveness of services within the EU compared with the rest of the world.
supposed to be universal and representative, but in fact involve a very partial and mechanistic vision of things, which is somewhat worrying. Finally, the study deliberately failed to take into account the impact on services of general economic interest, adjudged ‘hard to define’, when it is precisely this issue which is giving rise to debate.

An overall and in-depth impact assessment, reflecting the impact of the three Lisbon dimensions (economic, social and environmental), is critical, especially in the opinion of the European Parliament and the Council, if the positive and negative effects of the proposal are to be evaluated.

2.2 Shaky foundations

2.2.1 Legal basis

The choice of a very restrictive legal basis (essentially Articles 47(2) and 55) is dubious. Indeed, these legal bases emphasise very clearly the primacy of one objective – freedom of establishment, free movement of economic operators and the liberalisation of services – to the detriment of other objectives of the Treaty relating inter alia to the citizen, who is also a consumer, employee and patient. Yet the horizontal nature of the Directive implies that its provisions will have direct repercussions on other Community policies: services of general economic interest (Articles 16 and 86(2)), health (Article 152) and consumer protection (Article 153) among others. Both the importance of the services sector for the economic and social life of the twenty-five Member States and the impact which it has on other Community policies really required that the legal basis should also include principles other than those exclusively selected, i.e. freedom of establishment and the freedom to provide services.

2.2.2 Definition

The definition of what constitutes a service (Article 4(1)) is extremely broad. It covers “any self-employed economic activity, as referred to in Article 50 of the Treaty, consisting in the provision of a service for consideration”. The Commission refuses to define what the economic nature of an activity actually is, emphasising that this would be a difficult exercise and that services tend to evolve over time. Given that Article 50, which defines those activities which are State prerogatives, is very restrictive, the
Commission (or the Court) might well consider at a given moment that any service may be destined to become an economic activity: education, personal services, cultural services, etc. Characterising an activity as economic has very profound consequences, far outstripping the scope of the draft Directive, particularly with respect to competition and State aid. This argues in favour of establishing as watertight as possible a distinction \((19)\) between the two notions: economic and non-economic. Different criteria could be used which would make it possible to adapt the application of the Directive, especially the COP, on the basis of the service under consideration:

- is it a commercial service? Is it profit-making?
- is it a service essential to the population or to certain groups of persons? Is it a local service? Is the service social or cultural, etc., in nature?
- is an element of subsidiarity a principal factor in the service?

At the very least, it would be desirable to give special status to those activities situated in the grey area, on the border between economic and non-economic. It would be very imaginative of the Commission if it agreed to draft a communication on this specific and very sensitive point.

2.2.3 The COP, a rule concerning the conflict of laws

The draft Directive introduces two fundamental changes. First, it applies the country of origin principle to service providers in general. In this instance, the Commission applies the principle according to which the special law derogates from the general law. Second, the Commission abandons the idea of harmonising the laws and rules of the Member States. In doing so, the Commission is adopting a profound change in the traditional Community approach in force for more than forty years.

\(^{19}\) In the light of this debate, some consider that a positive – or negative – list of non-economic activities should be drawn up in order to be able to exclude them from the scope of the EU Treaty. Others, on the contrary, underline the difficulties involved in artificially freezing a field which by its very nature evolves over time.
The simultaneous application of several national laws competing with one another in the same country raises a number of questions of principle. Certain fundamental constitutional principles such as, for example, national sovereignty, equality before the law and the lawfulness of offences and penalties are called into question.

A principle with a past …


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<tr>
<th>COP - Derogations</th>
<th>Country of origin principle or internal market principle</th>
<th>Authorised Derogations</th>
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| Services Directive | Article 16 providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field. | Article 17 23 general derogations  
Article 18 3 transitional derogations  
Article 19 3 case-by-case derogations |
| E-Commerce Directive | Article 3(2) Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State. | Article 3(4) Derogations concerning the protection of public policy, public health or public security, the protection of consumers, including investors  
Annex to Article 3(3) 8 derogations including the freedom for parties to choose their contract and the contractual obligations under contracts signed by consumers. |
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<tr>
<th>Directive on the Protection of Personal Data</th>
<th>Article 1</th>
<th>Article 10</th>
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<tr>
<td>This Directive harmonises the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community.</td>
<td>2 derogations foreseen including the abolition of calling line identification</td>
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<th>TVWF Directive</th>
<th>Article 2(a)(1)</th>
<th>Article 2(a)(2)</th>
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<tr>
<td>Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive.</td>
<td>Member States may derogate if programmes contain pornography or gratuitous violence and if programming contains incitement to racial, sexual, religious or national hatred</td>
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<tr>
<th>Electronic Signature Directive</th>
<th>Article 4(2)</th>
<th>No derogations foreseen</th>
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<td>Member States shall ensure that electronic-signature products which comply with this Directive are permitted to circulate freely in the internal market.</td>
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… but one which has far-reaching effects

It should first be noted that the scope of the COP in the Services Directive is broader and more potent than in the four other Directives. Thus, the Directive on the Protection of Personal Data authorises the use of the COP, but on a harmonised basis. The E-Commerce
Directive contains a derogation concerning the freedom of the parties to choose their contract. As to the other Directives, they are based on the principle of mutual recognition in much more restricted areas.

**A debatable principle**

The extension of the COP to services which are by nature very diverse, despite the fact that they fall into the same general category of economic activities within the meaning of Community law, raises numerous points of principle beyond the fact that it takes place on an immediate basis. The difficulties posed by the COP concern (a) its legality; (b) the legal certainty of operators; (c) the impact of the absence of a minimum level of legislative harmonisation on the principle of equality before the law, as well as (d) the effective protection of recipients of services.

With regard to the lawfulness of the principle, it must be noted that the COP poses fundamental questions concerning adherence to Community law. It should be clearly stated that the COP has a taint of unlawfulness about it; it is not a general principle of Community law. Neither the Treaty nor case law recognises the COP as an autonomous legal principle. In this respect, a combined reading of Articles 49 and 50 of the Treaty is unambiguous: “[…] restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended”. Article 49 implies that the principle of mutual recognition, i.e. the prohibition of restrictions on the freedom to provide services and not the COP, is established if and only if there is equivalence. As for Article 50(3), it states that: “the person […] may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions (our emphasis – ed.) as are imposed by that State on its own nationals”. Equally, what the Treaty says here relates to the equivalence of provisions between the country of origin and the country of destination. With the COP, a “national” service provider would be treated differently from one coming from another Member State and bringing with him his own national law.

As to foreseeability and legal certainty, the apparent simplicity of setting out the principle of the country of origin of the service provider neglects the fact that there are still a number of uncertainties for service providers and recipients. The same applies with respect to the nature
The draft Services Directive and extent of the responsibilities of the national authorities in their own country. There is a significant danger of proliferating litigation pending a clear interpretation of the Directive by the Court in case law. Finally, the application of the COP to service providers does indeed make economic sense, as the Commission has repeatedly emphasised. But it constitutes a source of confusion with other rules, for example consumer law or social law, for which the legislation of the country of the recipient of the service takes precedence.

Moreover, it should be pointed out that the congruity of the draft Directive with the acquis communautaire, as covered in Article 3(2), constitutes an element of legal uncertainty. The addition of further systems of rules appears to create a source of difficulties in interpretation, particularly in the light of other Directives implementing the principle of mutual recognition, but also in terms of transposition and implementation by the Member States.

Is the COP a flag of convenience?

The internal market was built on the progressive approximation and harmonisation of the legislation of Member States (20). In adopting the country of origin principle, the proposal freezes the differences between the Member States’ legislations. The traditional balance between the effectiveness of the freedoms guaranteed by the Treaty and the proper functioning of the internal market seems to have been called into question.

Furthermore, making the State of origin responsible for approving and monitoring the service provider for activities carried out beyond the territory of that State will have the effect of rendering it more difficult to implement those checks which are still the task of the host country. It appears that a premium is thus offered to the most free and easy Member State or the one with the least exacting legislation.

Thus, Article 95(1) second sentence of the Treaty provides that: “The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market”.

Social developments in the European Union 2004
In the absence of a serious impact assessment, the potential consequences of the proposal are incalculable but difficult to foresee. In the worst-case scenario, certain Member States could be faced, in the near future, by a danger of ‘social dumping’ and of relocation to the benefit of the least demanding countries in the Union or even of third countries: after all, along with the principles contained in the proposal, there are, in some cases, very favourable conditions concerning investment and taxation for undertakings (some countries allow zero rating as long as the profits are reinvested). In this regard, we need only look at the case of the Latvian construction sites in Sweden (21) to grasp the dangers to which such a situation could lead. The risk that the proposal will lead to legal dumping (a bid for the lowest common denominator through the use of the COP) cannot be ruled out. Some even believe that that is the desired aim.

Consistency with the stipulations of international private law

The application of the COP is not without effect on the existing stipulations of international private law. Indeed, the draft Directive affects two areas of judicial cooperation in the civil sphere. First, it affects some of the rules which govern the applicable law on contractual obligations, covered by the Convention on the law applicable to contractual obligations, signed in Rome on 19 June 1980 (22) (hereafter “Rome I”) which it is planned to transform into a Regulation (CEC, 2002b). Next, it affects the rules governing the law applicable to non-contractual obligations, which are subject to a draft

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21 This concerns the dispute between Sweden and Latvia over the renovation of a local school: the Latvian workers are paid € 1533 gross per month whilst the gross monthly wage of a Swedish construction worker is € 2680. The Swedish unions maintain that the collective agreements negotiated between the employers and the union establish a principle governing the entire local labour market whilst the Latvians maintain, on the contrary, that the freedom to provide services and free competition must be allowed to prevail in the Community. (See on this point Libération, 7 December 2004 and Le Monde, 15 December 2004, page 3).

There are likely to be compatibility problems with ‘Community’ international private law both in force and in preparation. Indeed, in that the COP clearly favours service providers to the detriment of other participants in the service relationship, in particular the recipient, it undermines the traditional rules binding the two parties, and overturns the currently-existing legal balance. In other words, the implementation of the COP would lead to the probable application to the same legal situation of two or more different legal systems. This would constitute a source of legal uncertainty concerning the respective scopes of the applicable rules.

The opinion of the Committee on Civil Law…

In its opinion of 24 September 2004 (2004/001 (COD) 12655/04), the Committee on Civil Law Matters proposed doing away with any mention of contractual and non-contractual obligations in Article 16 (defining the COP) and adding to Article 17 a general derogation relating to the rules concerning the legislation applicable to contractual and non-contractual obligations in the area of judicial cooperation in civil matters. In comprehensible language, this means including solely in Rome I and Rome II the rules concerning the legislation applicable in contractual and extra-contractual matters; in other words, ensuring that the rules of international private law (IPL) prevail over the application of the COP, for reasons as much of legal clarity as for the consistency of Community law. Of course, the underlying issue is that of the law applicable (country of origin or country of destination). Article 3 of the Rome Convention is very clear in this regard. It stipulates that “the contract is governed by the law chosen by the parties”.

… and the reaction of the Council Legal Service

However, in its comments on the opinion of the Committee on Civil Law, on 22 October 2004, the Council Legal Service (2004/001 (COD) 13858/04) took the opposite view, that is to say it preferred the COP, pointing out that IPL did not provide better protection for the consumer and that it was better to think more in terms of the two working together rather than in terms of a conflict between them.

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23 Doc 12746/04 justciv 130, codec 1046 in its 27 September 2004 version.
2.3 Effect of the proposal on certain sectors of activity

2.3.1 Consistency with SGEIs

Differential treatment

Somewhat paradoxically, local social services and SGEIs are included in the scope of the Directive with two exceptions: social services are covered under freedom of establishment and not under the freedom to provide services. On the other hand, the provisions concerning the freedom to provide services, and in particular the application of the principle of the law of the country of origin, do not apply to services provided for consumers where the subject of the service is not harmonised under Community law (social services of general interest, for example).

It is true that the new Recital 7(a) (former Recital 35) of the consolidated version of the draft Directive does not oblige the Member States either to liberalise SGEIs, or to privatise the public bodies providing these services, or to abolish existing monopolies. However, the proposal neglects to mention the fact that, in the name of the freedom to provide services and freedom of establishment, operators from other Member States will be able to compete directly with SGEIs organised as national monopolies.

Interaction between the proposal and the Public Service Obligation (PSO)

A) Freedom of establishment (Articles 9 to 15)

SGEIs and social or local services of general economic interest must fulfil the public service obligations (PSO) defined in European law and by national, regional or local ruling, decree or order.

The provisions of the Directive apply to SGEIs. The Commission has clearly confirmed this. The modes of sectoral regulation of certain SGEIs based on the prior monitoring of operators according to an approval system will be affected by the draft Directive. Will this be taken so far as to assess the forms of organisation of SGEIs in the light of the prohibited requirements (Article 14) or those to be evaluated (Article 15)?

Whilst the existence of compulsory minimum or maximum tariffs does not appear to be called into question, is it not the case that other
The draft Services Directive obligations will constitute interference in Member States’ freedom to organise SGEIs, for example, the obligation to notify any new provision? Should authorisation schemes not be considered as forming a fully-fledged part of the organisation and regulation of SGEIs by the Member States? Answering this question in the negative could in the long-term lead to the dismantling of the very notion of SGEIs and to a weakening of the European social model.

In order to clear up any uncertainty, it is felt by some that a particular status should be reserved for SGEIs, which would not be excluded from the scope of the Directive in respect of Articles 9 to 15, perhaps in the form of an exception or a derogation.

B) Freedom to provide services (Articles 16 to 25)

The impact of the country of origin principle on SGEIs appears less dangerous for several reasons:

a. first, due to the derogations applicable to certain SGEIs (postal services; distribution of electricity, gas and water);

b. second, due to the derogations applicable to SGEIs provided exclusively for consumers, the subject of which has not been harmonised; a significant number of those SGEIs not covered by sectoral Directives (for example, social services of general interest and especially health care) are excluded;

c. third, because the freedom to provide services is based on the temporary nature of the activity, (duration, frequency, regularity and continuity) and is, a priori, not compatible with the carrying out of service obligations.

C) The use of voluntary codes of conduct (Article 39)

By favouring the use of voluntary codes of conduct, the proposal contributes to the replacement of a public method of regulation by a private and professional method of regulating services. This will not be without effect on SGEIs.
### Table 2: SGIs and the Services Directive: scope

<table>
<thead>
<tr>
<th></th>
<th>Freedom of establishment</th>
<th>Free movement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-economic SGIs</td>
<td>Not covered</td>
<td></td>
</tr>
<tr>
<td>Education Services</td>
<td>If a general education system and in the absence of remuneration</td>
<td></td>
</tr>
<tr>
<td>Social security services</td>
<td>If a general compulsory scheme</td>
<td></td>
</tr>
<tr>
<td>SGEIs</td>
<td>Covered by exemption and sectoral derogations, + role of the recipient (B to B or B to C)</td>
<td></td>
</tr>
<tr>
<td>SGEIs regulated under Community law</td>
<td>Exemptions and derogation</td>
<td></td>
</tr>
<tr>
<td>Transport</td>
<td>Overall exemption</td>
<td></td>
</tr>
<tr>
<td>Postal services</td>
<td>Covered</td>
<td>Derogation</td>
</tr>
<tr>
<td>Electricity (distribution)</td>
<td>Covered</td>
<td>Derogation</td>
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<tr>
<td>Gas (distribution)</td>
<td>Covered</td>
<td>Derogation</td>
</tr>
<tr>
<td>Public television</td>
<td>Non-interference with Treaty protocol</td>
<td></td>
</tr>
<tr>
<td>Electronic communications</td>
<td>Exemption</td>
<td></td>
</tr>
<tr>
<td>Social SGEIs</td>
<td>Covered</td>
<td>Not covered (B to C)</td>
</tr>
<tr>
<td>Health (exercise of a profession)</td>
<td>Covered</td>
<td>Derogation</td>
</tr>
<tr>
<td>Local SGEIs</td>
<td></td>
<td></td>
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<tr>
<td>Treatment of waste water</td>
<td>Not covered if not open to competition</td>
<td></td>
</tr>
<tr>
<td>Water distribution</td>
<td>Covered</td>
<td>Derogation</td>
</tr>
<tr>
<td>Treatment of waste</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Others</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lottery</td>
<td></td>
<td>Temporary exemption</td>
</tr>
</tbody>
</table>

How SGEIs and the overriding reason relating to the general interest (ORRGI) fit together

The notion of an ORRGI found in Articles 5, 9, 10 and 15 is both developmental and restrictive. The Court requires that, in order for a national provision validly to obstruct or limit the exercise of the right of establishment and the freedom to provide services, it must pursue a general interest objective. The Court adds that this general interest objective should not be safeguarded by rules to which the service provider is already subject in the Member State in which he is established. Other cumulative requirements must be satisfied:

- being non-discriminatory;
- being objectively necessary;
- being proportionate to the desired objective.

Most of the requirements linked to SGEIs are justifiable in terms of an overriding reason relating to the general interest (for example: the requirement in Belgium that retirement homes may only be set up in the form of non-profit-making associations – ASBL). Nevertheless, the relationship between public service obligations and the notion of ORRGI is in danger of giving rise to assessment and even implementation problems in the Member States.

Bringing European law in line with SGI (24)

The Services Directive does not in any way pre-empt the deliberations carried out in the framework of the White Paper on SGI (CEC, 2004b). Nothing could be further from the truth, as SGEIs will from

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24 Article III-122 of the European Constitution provides that: “Without prejudice to Articles 1-5, III-166, III-167 and III-238, and given the place occupied by services of general economic interest as services to which all in the Union attribute value as well as their role in promoting its social and territorial cohesion, the Union and the Member States, each within their respective competences and within the scope of application of the Constitution, shall take care that such services operate on the basis of principles and conditions, in particular economic and financial conditions, which enable them to fulfil their missions. European laws shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Constitution, to provide, to commission and to fund such services”.

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now on be ‘broken down’ into three separate blocks: they are partially dealt with in sectoral Directives (this is the case for transport and electronic communications); in some cases there will be derogations from the COP (postal services; distribution of gas, electricity and water); all the other SGEIs are subject to the Directive as a whole with absurd consequences: the rules will be stricter for social services of general interest than for the Telecoms package. It would have been better to include all of the relevant provisions for SGEIs under a single legal heading (a European law on SGEIs) and to make of it a new legal instrument, rather than differentiating between the situations and mixing the categories as does the draft Directive.

Towards the exclusion of SGEIs from the scope of the Directive?

The arguments in favour of excluding electronic communications and transport from the scope of the Directive should apply for the postal sector, the energy sector (gas and electricity) and water. The first two sectors have recently been subject to modernisation (including in the framework of public service obligations) and liberalisation is under way. As for the postal sector, currently being liberalised (cf. Third Railway Package which is still being negotiated), the Commission will submit its evaluation report on the possible liberalisation of all postal services by 31 December 2006. Finally, for water, the special characteristics of the sector argue in favour of a specific approach.

It would be logical to exclude all regulated SGEIs on the grounds that the detailed sectoral legislation already in existence or currently being drafted will regulate the functioning of these sectors.

Social and local services of general interest should also be excluded from the scope of the Directive due to their intrinsic nature (a force for social cohesion and inclusion; a force for citizenship and personal emancipation; a generator of fundamental rights, etc.). To this should be added the subsidiarity aspect in an area very close to citizens/consumers. By their very nature, social and local services of general interest do not constitute economic activities in the same manner as a commercial service. It is to be expected that the deliberations leading to the ‘communication on social services of general interest’ will be accompanied by arguments to this effect.
3.3.2 Impact on the posting of workers

The draft Directive recognises the full application of Directive 96/71 (25) on the posting of workers. This area has the benefit of a derogation to the COP in Article 17(5). This means that any enterprise which posts workers to another Member State must abide by all the working and employment conditions in force, all the legal, regulatory and administrative provisions, collective agreements, working/rest times and periods for the protection of pregnant workers, paid leave, minimum wage, health and safety rules, etc. The proposal does not call these principles into question. However, it gives rise to three types of problem:

a) effective implementation of monitoring;

b) danger of dumping in respect of temporary employment;

c) determining the law applicable to cross-border employment relationships (compatibility with Rome I and Rome II).

A) Monitoring System

The proposal does not alter the fact that, as is the case at present, it is the responsibility of the Member State of posting (and not the Member State of the employees) to:

- make a prior declaration stipulating the names of the workers to be posted, their nationality, date and place of birth, marital status, occupation, qualifications, domicile, residence permit, social security affiliation, copy of the contracts, work permit, place and duration of the work, etc.;
- designate a representative who is resident in Belgium and is tasked with keeping social documents.

These provisions of the Belgian law have been called into question by the Commission (as an unjustified barrier to the freedom to provide services which discriminates against undertakings not established in Belgium) under a different procedure. They are also called into question by the draft Directive.

25 Transposition into Belgian law goes beyond the minimum required by Directive 96/71. It provides for additional monitoring methods. This includes inter alia the obligation for undertakings posting workers to Belgium to:
State of origin) to carry out “in its territory the checks, inspections and investigations necessary to ensure compliance with the employment and working conditions applicable under Directive 96/71/EC” and to take “measures in respect of a service provider who fails to comply with those conditions” (Article 24(1) of the proposal).

Although it does not directly affect the substance of Directive 96/71, the draft Services Directive would nonetheless make it necessary to change the system in place. Indeed, Article 24(1) of the proposal on Services provides inter alia for a prohibition on the requirement for a prior declaration, on the obligation for foreign undertakings to have a representative in the Member State’s territory and on the requirement to have social documents in the Member State (obligations considered by the Commission to be disproportionate) (26).

In exchange for the disappearance of these obligations, the Services Directive makes the Member State of origin responsible and grants it a role with respect to the conservation (two years after the end of the posting) and transmission of documents, and reinforces administrative cooperation between the Member State of origin and the Member State of posting (Article 24(2)). The proposal thus grants a new role to the Member State of origin (cf. Article 24(2) in fine), which must “assist the Member State of posting to ensure compliance with the employment and working conditions applicable under Directive 96/71/EC and shall, on its own initiative, communicate to the Member State of posting the information specified in the first subparagraph”, particularly if it becomes aware of any irregularities.

According to the Commission, the reduction of the bureaucratic burden weighing on businesses in maintaining the monitoring options of the country of posting and in strengthening administrative cooperation, coupled with an extension of the responsibility of the Member State of origin, constitutes significant added value in terms of both monitoring and the functioning of the internal market.

26 The Commission does however single out the construction sector because it provides that systems allowing for a prior declaration will be permitted to continue for this sector until 31 December 2008 (cf. Article 24(1)(b) of the proposal), the date by which the new administrative cooperation system should be working effectively.
B) The temporary employment and construction sectors

B.1 The temporary employment sector is particularly affected by the problem of worker safety. Monitoring is made possible through an approval procedure (27). Certain EU countries have abolished this prior approval of job placement services. The future Directive will force people to accept that businesses need not adhere to the regulatory framework when employing or posting temporary workers, not least in Belgium.

The principle of non-discrimination (Article 9a) will have the effect of prohibiting all discrimination within the authorisation schemes, and therefore also for businesses established in the host country, which will lead in practice to the abrogation of any prior approval scheme (28).

There is a significant risk of social dumping. The draft Directive will render monitoring and inspection very difficult or practically impossible (the requirement for a posting declaration cannot be imposed, other than in the construction sector; the requirement for a representative on the territory of the Member State cannot be imposed; the requirement to hold and conserve social documents in the Member State cannot be imposed). The major risk is that companies providing workers or temporary workers will set themselves up in the State with the least stringent regulations. This would have a serious impact on the number of jobs available to national workers and place strains on the labour market in respect of working conditions and pay.

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27 Cf. ILO Convention No.181 adopted on 19 June 1997 revising the Fee-Charging Employment Agencies Convention of 1949. It allows the member to define the legal status of the private employment agency as well as the conditions for operating such an agency through an approval scheme.

28 The aim of the prior authorisation scheme is to ensure that the applicant has adhered to a series of rules (social regulations, absence of debt or convictions on the part of the administrators or managers, transparency of financial arrangements and shareholdings, information to workers: model employment contract and employment regulations, etc.) which it will no longer be possible to verify.
Monitoring will become ineffective. Major difficulties are foreseeable in the transmission and obtaining of data needed by the inspection services. As a result, the Directive could have serious repercussions on the viability of social security systems.

B. 2 With regard to the construction sector, particular attention will have to be given to the special characteristics of this sector. As the Belgian Conseil national du travail (CNT) emphasised in an opinion, “regulations concerning inter alia working conditions, health and safety which have been established with the social partners should not be destabilised (…). If we wish for instance to take account of safety at work issues, it must be possible for solidarity initiatives to continue to exist. If foreign undertakings do not participate (cannot participate) in sectoral initiatives on safety, this will have a negative effect on the competitiveness of Belgian undertakings, on safety and also on the quality of services”.

C) Determination of the law applicable to cross-border employment relationships (compatibility with Rome I and Rome II)

The principle of applying the law of the country of origin foreseen by the draft Directive seems to call into question the current system for determining the law applicable to cross-border employment relationships. In the case of posting, a hard core of essential rules of the host country is applied in conformity with Directive 96/71/EC on the posting of workers. For cross-border employment situations other than posting, the principles in the 1980 Rome Convention on the law applicable to contractual obligations apply. In many cases, the law of the place where the service is provided, i.e. of the host country, will apply.

Directive 96/71/EC concerns posting, i.e., a temporary situation in which a worker habitually working in one Member State is sent to another Member State to work. On the other hand, the scope of the 1980 Rome Convention is much broader: it applies to any employment relationship with a foreign dimension. On the basis of the definition of a posted worker, it can be deduced that the following are not cases of posting and fall under the scope of the Rome Convention:

- a worker who is directly posted from the country of origin to the host country (without being previously employed in the country of origin);
- a worker who is posted to the host country whose posting is extended in time and is therefore no longer considered as being a temporary worker.

**Example 1: an undertaking which posts a worker – law applicable**

If an undertaking in country A posts a worker to an undertaking in country B, the law of the host country will apply during the posting.

If the posting becomes extended in time, it will no longer be a posting within the meaning of Directive 96/71/EC (since the situation has lost its temporary character). The law of the host country will nonetheless continue to apply in accordance with the Rome Convention.

With the COP, the draft Directive foresees the principle of applying the law of the country of origin, except in cases of posting within the meaning of Directive 96/71/EC.

As a result, the law of the country of origin should be applied to cross-border employment situations which are not postings (since they are not intended to be an exception to this principle).

Then there is the question of the compatibility of the principle of the law of the country of origin in the draft Directive with the principles of the aforementioned Rome Convention, which has not been ratified by many Member States. Indeed, if the principles of the draft Directive were applied:

- the law of the host country would be applied throughout the period of the posting. On the other hand, the law of the country of origin would apply where the posting is extended (and not the law of the host country as provided by the Rome Convention);
- where the posting situation is extended, it would still appear more logical to maintain the application of the law of the host country rather than that of the country of origin.

**Source:** FPS Employment, Labour and Social Dialogue, Brussels.
Example 2: a foreign service provider employs local workers

A company located in the United Kingdom employs French workers to work in France (irrespective of the period for which they are employed).

Situation on the basis of the Rome Convention (Rome I):

This is not a case of a posting within the meaning of Directive 96/71 (as there was no prior employment of the workers in the country of origin and they are not being sent to a different country from the one in which they normally work).

- According to the Rome Convention, the freedom to choose the reference law applies (United Kingdom or France)
- But it will be the compulsory French provisions which will apply.

Situation on the basis of the Services Directive:

- The COP applies;
- Unless the parties have made a different choice with regard to the law applicable
- This might mean that a British undertaking employing a French worker in France would not be obliged to adhere to the essential French provisions (in respect of working time or pay, for example, by using the United Kingdom’s opt out in this sphere).


What conclusions can be drawn?

1. By disrupting the balance existing in Rome I, the draft Directive substantially changes the current system for determining the law applicable to cross-border employment relationships, by favouring the interests of service providers without taking account of the general principle of justice which consists in seeking solutions that are equitable for all the parties concerned. The application to the employment relationship of the law of the country in which the employer is established manifestly disrupts the balance between the interests of employers and those of workers, to the detriment of the latter.

2. It will be very much in the employer’s interest to become established in countries where social protection and employment law are least stringent. This approach will have the effect of encouraging social dumping by undermining the circumstances of national undertakings.
in their own countries. The application of the general principle of the law of the country of origin risks encouraging the creation of certain deflection mechanisms in order to avoid applying the law of the Member State where the worker is working if it offers more protection than the COP. The European Trade Union Confederation goes further. It considers that the draft Directive “is an open invitation to abuse and manipulation, and a threat for the European social model. Instead of harmonizing upwards, it stimulates regime-competition between Members States, and a race to the bottom, to the detriment of workers, consumers, and the environment” (Passchier, 2004: 7).

3. Such an approach will not guarantee legal certainty. It is to be feared that in certain cases or from certain points of view, the law of two or more countries will apply to the same legal situation, which will constitute a source of legal uncertainty and instability and, therefore, of inconsistencies.

2.3.3 Interaction of the proposal with the General Agreement on Trade in Services (GATS)

An organic link

The Commission maintains that “the Directive is without effect on international negotiations (GATS...)”. In point 5 of the explanatory memorandum of the draft Directive, under the heading ‘Coherence with other Community policies’ one sub-section (page 16) is entirely devoted to the negotiations in the framework of the GATS. It is specifically indicated that “This proposal does not affect these negotiations (...) which reinforce the need for the EU swiftly to establish a genuine internal market in services to ensure the competitiveness of European businesses and strengthen Europe’s negotiating position”. It is thus clear that an organic link exists between the Services Directive and the WTO negotiations on services.

In substance, there are several similarities between the GATS and the draft Directive. Like the GATS, the draft Directive gives an extensive definition of services because it covers all services. The proposed Directive applies to the same modes of providing services as does the GATS: services provided from the country of origin (mode 1 of the GATS), services involving client mobility (mode 2), services involving a commercial presence in another country (mode 3), services involving
staff mobility (mode 4). A comparative examination of the provisions of the GATS and of the draft Directive reveals therefore that this proposal ties in very neatly with the GATS agenda. If it is adopted, the proposal will have two direct effects on the functioning of the European Union and on the negotiations for implementing the GATS:

a) the Commission will be freer to negotiate bids for the liberalisation of services since the Services Directive will be part of the acquis communautaire, and therefore part of the Commission’s negotiating mandate, without there being any possibility of a veto by the Member States;

b) the rebound effect of these negotiations in the area of services could lead to larger concessions and to an enhanced opening of the market in services to the outside, with all the effects of relocation of investment and employment that these are likely to induce.

It can therefore be concluded, contrary to the Commission’s assertions, that the draft Directive will strengthen the application of the GATS and vice-versa.

Same areas covered

During the negotiations in 1994, the Member States protected certain essential services from the application of certain provisions of the GATS by means of exemptions. These exemptions include education, health, social services and culture; precisely the sectors covered, in whole or in part, by the scope of the Services Directive. There is nothing to indicate formally that the notion of public service is protected against privatisation. Nevertheless, Paragraph 7 of the Doha Declaration stipulates “We reaffirm the right of members under the General Agreement on Trade in Services to regulate, and to introduce new regulations on, the supply of services”. This provision would permit States to protect their public services, in particular in the areas of education and health. After the 31 July 2004 agreement in the WTO, no sector and no mode of provision seems definitively protected. We can therefore expect a high level of liberalisation in a great number of new sectors. The requests which the EU is preparing to put to other members of the WTO relate to those services which fall under the scope of the draft Services
The draft Services Directive

Directive: computer services, professional services, construction and distribution services, energy and environmental services, tourism, etc.

A partially positive impact assessment (see for example Kox and Lejour, 2004).

In another point of convergence with the draft Directive, the impact scenarios on the liberalisation of services in the framework of the WTO also conclude that the liberalisation of services in OECD countries would have very favourable effects (29):

a) the studies conclude that there would be a win-win situation: developed countries and developing countries alike would gain if they undertook enhanced liberalisation under the GATS;

b) the potential results in terms of well-being would depend on the extent of the opening up of services (the broader the liberalisation, the greater the benefits).

It can thus be concluded, despite the Commission’s denials, that the two agendas are advancing shoulder to shoulder and reinforce each other. At the time of writing, three questions were in need of rapid answers:

1) will the signs of openness on the part of the President of the Commission, Mr. Barroso, in February 2005 play a positive role on the GATS negotiating mandate?

2) will public services be clearly and definitively excluded from trade negotiations?

3) will a watertight separation be made between the negotiations internal to the Union in the context of the internal market and the trade negotiations in the WTO context?

29 These estimates vary from $ 58 billion at the lowest to several hundreds of billion dollars, on the basis of figures available for the year 2002.
Conclusions

In drawing our conclusions, how can we fail to note that a change in the fundamental nature of European construction is under way? Indeed, until President Barroso recognised ‘that there was a problem’, the draft Directive promised to disrupt the traditional Community balance based on European integration through harmonisation. In the draft Directive, harmonisation measures are reduced to a minimum or even totally neglected in favour of radical liberalisation based on a system of regulatory competition. With the COP, we would be heading towards a spiral of deregulation in which Member States would seek to maximise their ‘comparative advantage’ in order to benefit from the free movement of services at the lowest cost. Ever since we learned from Lavoisier that ‘nothing is lost, nothing is created, everything is transformed,’ it was to be feared that this supposed lower cost for the economy would have a hidden social and environmental cost. In this regard, it is essential that an independent impact assessment involving open debate, and incorporating the three pillars of the European Councils of Lisbon and Göteborg, should finally be carried out.

Will the European Union – its businesses, its citizen-consumers, its workers and its employees – succeed in breaching the so-called gulf separating it from the United States? Such a thing is possible, but not certain. Is it worth chasing after this goal, and what price will have to be paid? For there is already another challenge facing the EU, and that is the emergence of a number of States, such as India, Israel and Russia, which are already positioning themselves in the new international division of labour. These countries have incalculable comparative advantages in terms of labour and start-up costs, without even mentioning their fiscal, legal and social advantages. In charging headlong into a race for competitiveness without assessing any of the other factors and their impact on the European social model, the EU runs the risk of undermining its own social model based on solidarity and social cohesion. At the time when the WTO negotiations are being resumed, such a signal does not augur well. For our part, we expect that the heads of State and government and the European Parliament will grasp what is at stake in this draft Directive and will return to the path of upwards harmonisation. And let us hope that the allusions made by
President Barroso to remedying the shortcomings of the draft Directive will lead to something specific.

References


European Constitution: a ratification process with an uncertain outcome

The post-enlargement European Union is a very different entity from the Europe of Fifteen and, even more so, the European Communities of the founding fathers. That Europe is well and truly a thing of the past. The fall of the Berlin Wall led to the unification of the continent. The gap left behind by the disappearance of the east-west split was plugged by the United States, whose supremacy has been far from absolute since the attacks of 11 September 2001 but whose unilateralism is nonetheless dominant. In a context overshadowed by the globalisation of the economy, emerging economic powers such as China and India likewise confront Europe with fresh challenges. The main challenges facing the Union at the start of the 21st century are to come to terms with its latest enlargement and to find its rightful place in the world. The Constitution gives this Union new foundations, endowing it with new attributes but without replacing all of the existing ones. It makes the Union more democratic and contains a degree of progress, including in respect of social affairs.

The ratification process was officially launched in Rome on 29 October 2004, when the Heads of State and Government signed the draft Treaty establishing a Constitution for Europe. Its outcome was looking uncertain at the beginning of 2005, due to the holding of decision-making referendums in several countries, including France, where a no-vote could not be ruled out. It is significant that certain countries have decided to hold consultative referendums prior to parliamentary ratification. The first debates to take place, in late December 2004, confirmed the difficulty of looking beyond the national dimension of European issues. The opposition to the Constitution in France,
spearheaded by traditionally pro-European former leading members of
the Socialist Party, reveals a degree of disquiet – not to say distrust –
with regard to the Union. The process of putting the Union on a
constitutional footing has only just begun, and this is probably the
aspect least well understood by European public opinion. In the
following paragraphs we shall examine the main features of the
Constitution and the progress it makes in relation with social policy.
Thereafter we shall outline the initial debates taking place in the
ratification process at the end of 2004.

1. Major steps forward in the draft text

The Constitution contains four parts as well as the various protocols
and declarations negotiated previously but also by the European
Convention and the IGC (1). Part I contains the constitutional
principles as such and some elements of simplification and clarification,
such as the establishment of categories of competence, the
simplification of legal acts and decision-making procedures, and greater
involvement of national parliaments in overseeing the principle of
subsidiarity. In that it groups together the constitutional elements thinly
scattered across the European treaties or laid down by the Court of
Justice, the content of Part I resembles that of a Constitution. A
catalogue of fundamental rights has been added, following the
incorporation of the Charter as Part II.

The values and objectives of the Union acquire a new status. They will
be promoted by all of its institutions. The Union will act in respect with
three fundamental principles in all of its actions: the principle of
conferral, governing the limits of the competences conferred on the
Union, and the principles of subsidiarity and proportionality, governing
the exercise of these competences. The Constitution contains a
flexibility clause enabling the Union to step in to attain one of the
objectives set out in the Constitution where the necessary powers to do
so have not been provided by the Constitution (Article I-18).

1 The Treaty establishing a Constitution for Europe was published in the Official
The simplification brought about by the Constitution consists in a reorganisation of the EC and EU treaties, which are merged into a single legal entity – the European Union – possessing legal personality (this will enable it to accede to the European Convention on Human Rights and to sign other international agreements and treaties or to be represented alongside the Member States in international organisations). Another aspect of clarification is the abolition of the dual nature of the Union, hitherto founded on the European Community on the one hand and, on the other, on the policies and forms of cooperation introduced by the Treaty on European Union. The three-pillar structure can therefore be abolished. Member States wishing to move ahead at a faster pace will be able to engage in enhanced cooperation among themselves. These principles emerged from the proceedings of the European Convention, the majority of whose members were MEPs and members of national parliaments; they were not contested by the Intergovernmental Conference (IGC). Nor did it question the inclusion of the principle of the primacy of EU law. This principle, established long ago by the Court of Justice (2), is confirmed and given a much higher profile than the indirect reference made to it in the Protocol on the Application of the Principles of Subsidiarity and Proportionality, annexed to the Amsterdam Treaty.

The institutional set-up is supplemented by the creation of the post of Minister for Foreign Affairs, who is at the same time Vice-President of the European Commission. With regard to European diplomacy in-the-making, the future Minister for Foreign Affairs, assisted by a European External Action Service, is a major innovation. He/she will chair the External Affairs Council, thereby lending greater coherence and continuity to EU policy-making. As Minister, he/she will be in charge of the common foreign and security policy and the common security and defence policy. As Vice-President of the Commission, he/she will coordinate the external dimension of Community policies. He/she will have to demonstrate uncommon political skill to represent both dimensions of EU diplomacy on the international scene. That means

2 CJEC, Flaminio Costa v E.N.E.L., Case C-6/64, Judgement of the Court of 15 July 1964.
not only managing his/her “two hats” but also relations with the future President of the European Council, who will likewise represent the Union in the outside world “at his or her level and in that capacity” in the framework of the common foreign and security policy. The European Council becomes a fully-fledged institution: its President will be elected by the members of the European Council for a term of two and a half years, renewable once. Both Presidents will take up their duties on the day when the Constitution enters into force.

“National representation” within the European Commission is to be preserved until 2014. After that, the Commission will comprise a number of Commissioners corresponding to two thirds of the Member States, according to the principle of equal rotation. The principle of its President being elected on the basis of appointment by the European Council acting by a qualified majority is written into the text. The other members of the Commission will be appointed nationally, the President’s role being confined to allocating portfolios within the College of Commissioners. The text, in both its pre- and post-IGC versions, is far from perfect. Criticism is levelled essentially, but not exclusively (3), at Part III where the main amendments derive from the abolition of the three-pillar structure and the adaptation of the provisions to bring them into line with the new definition of legal acts and decision-making procedures defined in Part I (see Beaud et al., 2004; Collignon, 2002). Apart from the reorganisation of the provisions relating to external action and to the area of freedom, security and justice (see chapter in this edition of Social Developments concerning asylum and immigration policies), most of the other provisions in Part III – setting out the acquis of the Union – were not revisited by the Convention.

Part IV, comprising the General and Final Provisions, has undergone certain changes as compared with the original treaties. The conventional method becomes a permanent part of an “ordinary” revision procedure.

3 From an institutional point of view, there is the political rivalry between the President of the Commission and the President of the Council, as well as the respective roles of the latter and the Minister for Foreign Affairs on the international scene.
It introduces simplified revision procedures in the form of a passerelle clause, renamed “simplified revision procedure”, as well as a procedure whereby Part III can be amended without having recourse to an IGC, but also without having to convene a Convention. Neither the Convention nor the IGC managed to eliminate the requirement for unanimous voting in the IGC or in the European Council (see section 5).

2. Values and objectives of the Union

The Preamble to the Constitution refers to “the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law”. Europe is no longer a purely economic undertaking; it “intends to continue along the path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived (…), and to strive for peace, justice and solidarity throughout the world”. Article I-2 establishes the values of “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

According to the objectives defined in Article I-3, the Union’s aim is to promote peace, its values and the well-being of its peoples. Internally, it “shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.(…) It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child”. The Union promotes “economic, social and territorial cohesion, and solidarity among Member States”. Finally, it “shall respect its rich cultural and linguistic diversity”. Externally, “the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter”. In general terms, a social clause included in Part III stipulates that all policies drawn up by the Union
must respect a number of social demands “linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health”.

2.1 A hybrid social dimension

The Constitution lends greater clarity to the distribution of competence between the Union and the Member States, dividing it into areas of exclusive competence, shared competence and competence to carry out actions to support, coordinate or supplement the actions of the Member States. Economic and employment policies are to be coordinated “within arrangements as determined by Part III, which the Union shall have competence to provide”. The situation nevertheless remains complex. Social policy belongs to the area of competence shared between the Union and the Member States “for the aspects defined in Part III”. In these areas, “the Union and the Member States may legislate and adopt legally binding acts (...). The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence”. A special article is devoted to the coordination of economic and employment policies: pursuant to Article I-15(1), amended by the IGC, “The Member States (and no longer the Union - author’s note) shall coordinate their economic policies within the Union. To this end, the Council of Ministers shall adopt measures, in particular broad guidelines for these policies”. Particular provisions apply to the States whose currency is the euro. According to Article I-15(2), “The Union shall take measures to ensure coordination of the employment policies of the Member States”. The IGC did not follow up in Part III the content of Article I-15(3), whereby “The Union may take initiatives to ensure coordination of Member States’ social policies”.

The inclusion of the open method of coordination (OMC) procedures in Part III confers a coordinating role on the Commission but not on the Union. The OMC is not enshrined in Part I of the Constitution. In the social fields, its procedures are introduced in Article III-213 (the Commission may take initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation). This article reproduces Article 140 of the EC Treaty, determining the way in which the Commission “shall encourage cooperation
between the Member States and facilitate the coordination of their action’. The European Parliament will in future be kept fully informed, a new element when compared with the original definition of the OMC adopted by the Lisbon European Council. No mention is made of the other stakeholders in the OMC, such as the social partners, regional authorities or voluntary bodies. Consultation in the Economic and Social Committee will involve “representatives of organisations of employers, of the employed, and of other parties representative of civil society, notably in socioeconomic, civic, professional and cultural areas”, which ought to enable voluntary bodies and NGOs to make their voices heard. A Declaration added by the IGC could give the impression that all the fields referred to in Article III-213 constitute supporting action only. Among these is employment. The reference to employment in the article on the coordination of economic and employment policies was achieved only after heated debate at the European Convention.

2.2 Democratic life of the Union

Part I of the Constitution contains a Title on the democratic life of the Union. The principle of representative democracy is upheld and placed on a constitutional footing; in other words, the current practices for consulting civil society are preserved. The role of the social partners and social dialogue is confirmed, as is – following the IGC – their contribution to tripartite social dialogue. Recognition is thereby granted to a practice which developed in parallel with the proceedings of the European Convention and which grants the social partners a role in the preparations for the Spring European Summits (Council of the European Union, 2003).

2.3 Popular right of initiative

One unique innovation of the European Constitution is to sanction a popular right of initiative, complementing but not substituting the national constitutions by adding a right which does not exist in some national constitutions. The Constitution enables citizens, provided that they collect one million signatures in a significant number of Member States, to ask the Commission to submit a proposal for a legal act in order to implement the Constitution (Article I-47(4)). This is a relatively small number: the European Trade Union Confederation alone has the capacity to mobilise more than 60 million people. This new right does
not place the Commission under any obligation or threaten its right of initiative, but one can hardly imagine that it will ignore requests expressed in such a way. Citizens are not being given a right which is denied to the EU institutions: as the EC Treaty, the Constitution recognises the right of the Council and the European Parliament to ask the Commission to submit a proposal. Before the Constitution enters into force, a European law will be needed to spell out the implementing rules and the minimum number of Member States from which the citizens presenting the petition must come in order to be able to exercise this new right. The content of this text will be a key element in assessing the true scope of this new right, which has the potential to open up a new European public space for putting forward social, economic or environmental demands but also ones related to citizenship.

2.4 Decision-making procedures
The Constitution reduces the number of legal instruments (from 15 to 6). They are: European law, European framework law, European regulation, European decision, recommendations and opinions. It draws a distinction between legislative acts and non-legislative acts (executive acts, i.e. European decisions of the European Council, European regulations and decisions of the Council, and recommendations of the Commission and the European Central Bank in specific cases). The legislative procedure (the current codecision procedure) virtually becomes the norm for the adoption of legislation. This takes the form of a European law and a framework law (replacing the current regulation and the directive). Generally speaking, unless the Constitution stipulates otherwise, the Council acts by a qualified majority. Some special procedures remain however.

2.4.1 Definition of qualified majority
The new definition of qualified majority voting (QMV), circumscribed by procedures intended to prevent three large countries from forming a blocking minority on their own, has been preserved, but the price paid is an increase in complexity. This system will apply as from 1 November 2009 pursuant to Article 2(1) of the Protocol on
transitional provisions (4). A qualified majority is defined as at least 55% (and no longer 50%) of the members of the Council, including at least fifteen of them and representing Member States comprising at least 65% (and no longer 60%) of the population of the Union (Article I-25(1)). A draft decision reintroducing a formula based on the Ioannina compromise makes it possible to take account of opposition to the adoption of an act by a qualified majority, even if this opposition does not meet the conditions necessary for the formation of a blocking minority (5). This Decision will take effect on 1st November 2009 and will remain in force at least until 2014. Thereafter the Council may decide to repeal it. When the Council does not act on a proposal from the Commission or from the Union Minister for Foreign Affairs, “the qualified majority shall be defined as at least 72% of the members of the Council, […] comprising at least 65% of the population of the Union” (Article I-25(2)). This applies in the field of Justice and Home Affairs (JHA) when the Council acts at the initiative of the Member States; in the field of the common foreign and security policy (CFSP) when it acts at its own initiative; in respect of economic and monetary policy when it acts on a recommendation from the Commission or the ECB; when it rules on the suspension of a Member State’s rights or the withdrawal of a Member State from the Union; and when making various appointments.

2.4.2 Ordinary legislative procedure

The consequence of turning the ordinary legislative procedure into the general rule is that the Council acts by a qualified majority in codecision with the European Parliament, on the basis of a proposal from the Commission. This procedure is extended to many new cases (27), but some special procedures remain especially with regard to non-discrimination (Article III-124) and social affairs (Article III-210). The law or framework law establishing the measures needed to combat discrimination will require a unanimous decision of the Council and the

4 Protocol No.34 on the transitional provisions relating to the institutions and bodies of the Union.

5 Declaration No.5 on Article I-25.
consent (rather than consultation) of the European Parliament. Only the basic principles of these measures will be determined in accordance with the ordinary legislative procedure. The article on social policy (Article III-210) is a carbon copy of the existing Article 137 TEC. It preserves unanimity in the Council and consultation of the European Parliament, as well as the possibility of having recourse to a passerelle clause in order to switch to ordinary legislative procedure voting in three of the four social policy areas excluded from it (protection of workers where their employment contract is terminated; representation and collective defence of the interests of workers and employers, including codetermination; and conditions of employment for third-country nationals legally residing in Union territory. Social security – quite rightly – is not affected). This article does not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

### 2.4.3 Social security for migrant workers

The progress made by the Convention in terms of extending QMV to cover certain aspects of taxation and budgetary provisions was overturned at the IGC. Other advances were maintained, but with the possibility of “emergency brakes” being applied (social security and judicial cooperation in criminal matters). As concerns social security for migrant workers, if a Member State considers that a draft text contravenes the fundamental principles of its own legal system, it can ask for the matter to be referred to the European Council. The European Council then has four months, either to send the dossier back to the Council, thereby terminating the suspension of the procedure, or to request the Commission to submit a new proposal. Unlike in the case of judicial cooperation in criminal matters, no provision is made for launching enhanced cooperation in respect of social security for migrant workers.

### 2.4.4 Services of general economic interest

The Constitution allows for the adoption of a European law with a view to establishing the principles and laying down the conditions for the operation of services of general economic interest, enabling them to fulfill their missions “without prejudice to the competence of Member States, in compliance with the Constitution, to provide, to commission and to fund such services”. As in the current EC Treaty, the derogation from competition
rules is maintained: “Undertakings entrusted with the operation of services of general economic interest (...) shall be subject (...) to the rules on competition, insofar as the application of such provisions does not obstruct the performance, in law or in fact, of the particular tasks assigned to them”. The European Commission announced in 2004 that it would refrain from publishing a proposal for a framework directive on services of general economic interest, on the grounds that the future Constitution would contain a better legal basis (CEC, 2004). At the start of that same year, the Commission had adopted the draft Services Directive (the Bolkestein Directive) which, if adopted as it stands, would have a number of knock-on effects on social services (see article by Éric Van den Abeele in this volume). The controversy aroused by this draft text has been so intense that it could compromise the positive outcome of the ratification process in France.

2.4.5 “Cultural” and “social” exemptions in external commercial relations

Lastly, less widely debated and yet directly linked to the foregoing, the Constitution classifies external commercial relations among the Union’s areas of exclusive competence. The Commission will conduct negotiations on the basis of guidelines adopted by the Council by a qualified majority and overseen by a committee of representatives from the Member States; the Council will conclude these agreements by a qualified majority on behalf of the Union. The European Parliament will be kept informed of the progress made in negotiations and, most importantly, the agreements concluded will be subject to its consent. The European Convention had added to the commercial spheres in which the Council acts by a qualified majority (6) trade in services, commercial aspects of intellectual property and foreign direct investment. At the end of the proceedings of the Convention, France managed to push through unanimity in the field of trade in cultural and audiovisual services “where these agreements risk prejudicing the Union’s cultural

6 Changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.
and linguistic diversity” (the “cultural exemption”). Pursuant to Article III-315, unanimity likewise applies to the fields of trade in services (the IGC abolished the obligation that such agreements must entail the movement of persons) and foreign direct investment where such agreements include provisions for which unanimity is required for the adoption of internal rules.

At the request of Finland, in addition to the cultural exemption the constitutional text contains a “social exemption”. The Council acts unanimously when negotiating and concluding agreements “in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them”. Member States will have the opportunity to object to the “selling-off” of these services in the context of international trade negotiations under the GATS (General Agreement on Trade in Services), something particularly dreaded by the anti-globalisation movement. It remains to be seen what interpretation will be placed on the legally vague conditions serving to justify recourse to unanimous voting.

2.5 Fundamental rights

One of the main innovations of the Constitution is the incorporation of the Charter of Fundamental Rights as Part II. Another is the accession of the Union to the European Convention on Human Rights (ECHR), the consequence of which will be “to place the Union in a similar situation to that of the Member States, whose constitutions protect fundamental rights but which, in this area, are also subject to external monitoring by the European Court of Human Rights” (Bribosia, 2004: 213). The IGC amended the Constitution by tightening up the wording: “the Union shall accede to the European Convention on Human Rights” rather than “shall endeavour to accede”. Accession is facilitated by the abolition of unanimity. There is a Protocol laying down the principles to be respected by the accession agreement and a Declaration calling for a closer dialogue between the Court of Justice of the European Union and the European Court of Human Rights once the Union accedes. The Constitution says nothing, however, about the date of accession.

The incorporation of the Charter is one of the most symbolic aspects of the “constitutionalisation” of the Union, a process begun but by no
means completed by the Constitution. Its provisions will continue to impose constraints on the EU institutions and the Member States when they implement the law of the Union. It remains to be seen how the fundamental rights recognised in the Charter might help nudge the development of legislation in the direction of an EU human rights policy (De Schutter, 2004).

3. Economic governance

The Convention had slightly improved the governance of the euro zone by acknowledging the informal role of the Eurogroup and providing for the adoption of measures solely among the Member States whose currency is the euro. The aim was for those countries to reinforce coordination and surveillance of their budgetary discipline, to adopt among themselves broad economic policy guidelines compatible with those adopted by the Union as a whole, and to ensure the external representation of the euro. The IGC did not clarify the meaning of “unified representation” any more than the Convention had done. It did however confirm the separate status of the euro zone countries by authorising the Ecofin Council, confined to the countries whose currency is the euro, to adopt decisions relating to multilateral surveillance and excessive deficits. No new members will be admitted to the euro zone without the prior agreement of these countries. None of the ten new Member States participates in the single currency at present, but Lithuania, Estonia and Slovenia joined the European exchange mechanism on 27 June 2004 in preparation for their future participation. These countries aspire to join the euro zone in January 2007.

The Commission’s role in respect of multilateral surveillance has been somewhat increased. It will be able to send a direct warning to a Member State which departs from the principles jointly agreed in the broad economic policy guidelines. As far as excessive deficits are concerned, the Commission has a lesser role than it had in the Convention’s proposals. Contrary to the situation pertaining under the EC Treaty, the Commission will be able to address an opinion to a Member State where an excessive deficit exists or may occur, informing the Council accordingly. The Council will decide whether an excessive deficit exists on the basis of a proposal from the Commission (and no
longer a recommendation). The specific provisions applying to the countries whose currency is the euro authorise these countries to take decisions among themselves at this stage, without the country concerned being allowed to vote. At the next stage, the adoption of recommendations to be forwarded to the Member State concerned, as now the Commission will only have the right to make a recommendation (and not a proposal, as had been decided by the European Convention, the consequence of which would have been to require a unanimous vote in the Council to amend the content of the Commission proposal).

Finally, the IGC also drew up a Declaration reasserting its faith in the Stability and Growth Pact, suspended on 25 November 2004. In the meantime the Court of Justice has nullified the Council conclusions (7). The Commission has put forward new proposals with a view to carrying out a limited revision of the Pact. However, as implied by statements made at the end of 2004, the search for a compromise between the champions of budgetary discipline and those who advocate a relaxation of certain criteria – varying, it is true to say, from one national situation to another – constituted a genuine challenge for the Luxembourg presidency (first half of 2005). What was ultimately needed was to elaborate a set of rules respected across the board by the Member States and the Community bodies.

4. Enhanced cooperation

The Constitution could take the establishment of enhanced cooperation among Member States wishing to move ahead at a faster pace from the theoretical stage to the practical. Those States not desiring the progress proposed in terms of creating a genuine European criminal area will be able to remain outside of it, as will those not wishing to join in with the border, asylum and immigration policies. The Constitution paves the way for the establishment of enhanced cooperation in the former case; in the latter it leaves intact the derogations negotiated at the time of the

7 CJEC, Commission of the European Communities v Council of the European Union, Case C-27/04, Judgement of the Court of 13 July 2004.
Amsterdam Treaty by the United Kingdom and Ireland on the one hand and by Denmark on the other.

Generally speaking, recourse to enhanced cooperation will only ever be used as a last resort. Such cooperation cannot relate to the Union’s areas of exclusive competence. The number of countries participating is set at one third of Member States and no longer at eight, which in effect raises this number to nine in an EU of up to 27 Member States. As in the Treaty of Nice, a request to establish enhanced cooperation must be submitted to the Commission by the group of States concerned. Since it cannot relate to the Union’s areas of exclusive competence, the request – which must specify the scope and the objectives pursued through enhanced cooperation – is addressed to the Commission. The Commission can then submit appropriate proposals. If it chooses not to do so, it must justify its decision. The Council, acting by a qualified majority on the basis of a Commission proposal, then adopts a European decision to proceed with enhanced cooperation (Article III-419(1)). The consent of the European Parliament must be obtained (it is no longer merely consulted). Enhanced cooperation is aimed at furthering the objectives of the Union, protecting its interests and reinforcing its integration process. Any Member State wishing to participate in enhanced cooperation already in progress must notify its intention to the Council and the Commission.

With regard to economic governance, the Constitution allows for a relative differentiation of the decision-making process in the euro zone countries. The euro zone constitutes the highest level of integration among some of the EU Member States. Whilst it is the case that the launch of enhanced cooperation is probably the only way of reinforcing the integration process, a greater differentiation of the euro zone could be accompanied by the setting of more ambitious fiscal and social objectives between all or some of these States (e.g. a minimum wage). Since the IGC maintained the passerelle article, these countries could likewise decide (unanimously) to act by a qualified majority in areas where unanimity is required or to resort where appropriate to the normal legislative procedure in the context of enhanced cooperation. The Treaty of Nice made no such provision. Future participants are invited in a Declaration to state their intention to make use of this option when making their request to establish enhanced cooperation.
The significance of this provision is that Member States wanting to “reinforce [the] integration process” of the Union may do so, while those wishing to join in with ongoing enhanced cooperation must prove their desire to participate by forfeiting their capacity to block decisions.

The IGC reintroduced unanimous voting in the Council for the launch of such cooperation in respect of the common foreign and security policy. The exclusion from this mechanism of decisions having military or defence implications confirms – if confirmation were needed – the intergovernmental nature of the future defence policy. In this sphere the Constitution makes provision for a special type of enhanced cooperation described as “permanent structured cooperation”.

5. Revision procedures

The European Convention dismissed the option of setting out the policies of the Union in a distinct legal text, opting instead for a single text in four parts, Parts I and III of which could not be revised separately (8). As stated in Part IV, the Treaty will be subject to three different types of revision, but the unanimity requirement is not abolished for any of these revision procedures. Under the “ordinary” revision procedure (Article I-443), which perpetuates the conventional method as a democratic means of preparing large-scale revisions, the IGC must adopt the Convention’s recommendation “by common accord”. The amendments will not enter into force until they have been ratified by all the Member States in accordance with their respective constitutional requirements. From a political point of view, however, the inclusion of the European Parliament in the “constituent body” and the recognition of new powers in the procedures for revision of the

8 In 2003, the Praesidium of the European Convention justified this decision on the grounds that “laying down different amendment procedures for Parts One and Three would mean re-opening discussion on the structure of the Constitutional Treaty, as it would give rise to requests for certain areas of Part Three to be moved to Part One” (European Convention, 2003: 10). In 1999, the report by a “group of wise men” created by the Prodi Commission prior to the 2000 IGC had advocated separating the existing texts into two parts requiring different revision procedures, with unanimity no longer needed for the second part comprising the policies of the Union (see von Weizsäcker et al., 1999).
Constitution have been regarded by some as symptomatic of the transition from a Treaty to a Constitution (Franck, 2000: 37).

**Simplified revision procedures**

In addition to the “ordinary” (or full) procedure, two “simplified” revision procedures have been inserted into Part IV. The first of these, contained in Article IV-444, relates to decision-making procedures; the other one specifically concerns the internal Union policies and action defined in Part III (Article III-445). In the case of a simplified revision of decision-making procedures, the European Council may, with the consent of the European Parliament, decide to move from unanimity to a qualified majority (except for decisions having military implications or in the field of defence) or to waive the general rule for the adoption of EU legislative acts by deciding to abandon the special legislative procedure in favour of the ordinary legislative procedure. The scope of this mechanism is however limited by the fact that a single national parliament is at liberty to oppose this new constitutional right of the European Council. The Constitution likewise contains a simplified revision procedure for the internal Union policies and action defined in Part III. But its use, which will avoid having to hold an IGC and also to convene a Convention, will still require a unanimous decision of the European Council, followed by ratification in each of the Member States. Changes introduced in this manner cannot alter the distribution of powers between the Union and the Member States. A degree of scepticism prevailed as to how possible it really will be for the European Council or the Council to use the existing passerelle mechanisms until such time as the Council in December 2004 successfully decides to activate the similar mechanism forged in respect of the area of freedom, security and justice (see article on Asylum and Immigration).

Under the “ordinary” revision procedure, the European Council will decide by a simple majority to convene a European Convention, within which the Parliament will be represented, along with representatives of the national parliaments, representatives of the Heads of State and Government and also of the Commission. The Council may decide by a simple majority not to convene the Convention, but this decision would have to obtain the consent of the Parliament, which thus has the final say concerning large-scale revisions of the Constitution. In future either the Parliament, the Commission or the government of any Member State may submit proposals for a revision of the Treaty: this applies both to an “ordinary” revision (the full procedure) and to a simplified
revision of Part III. These innovations should imbue European election campaigns with fresh dynamism. The principal outcome is that this text, even though it bears the name “Constitution”, will not have a fifty-year lifespan, as was originally predicted by the Chairman of the European Convention, Valéry Giscard d'Estaing.

6. The ratification process

The Constitution, a product of the revision procedure for the existing treaties, is itself still a treaty and will be adopted “by common accord” by “a conference of representatives of the governments of the Member States”. It must then be ratified by “the High Contracting Parties in accordance with their respective constitutional requirements”. Once the constitutional text comes into force there will be no change to this twofold requirement for unanimity among the Member States and national ratifications on the occasion of future “full” revisions of the Constitution. The IGC set the date of 1st November 2006 for the entry into force of the Treaty establishing a Constitution for Europe. Where the parliamentary method applies, the new Treaty will be adopted following the customary vote by the country’s parliamentary chamber(s) on a text ratifying an international treaty. This parliamentary process had already been completed by the end of 2004 in two countries, Estonia and Hungary (on 11 November and 20 December respectively). Where a referendum is held, the citizens will have a direct say on the text. This will be the case in France, Denmark and Ireland. In other countries the referendum will be for consultative purposes (Spain, United Kingdom, Netherlands and Luxembourg) and will be followed by parliamentary assent.

6.1 France

Prior to the holding of the national referendum, the French constitution will have been revised in conformity with the decision of the French Constitutional Council. The Council ruled that neither the name change (“Treaty establishing a Constitution for Europe”) nor the affirmation of the primacy principle necessitated a review of the French constitution. The reasons given to justify a prior constitutional review are not related

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to the legal status of the text, which remains a treaty in international law. Rather, they relate to the transfer of new powers to the Union in areas affecting the exercise of national sovereignty: border controls, judicial cooperation in civil and criminal matters, the future establishment of a European Public Prosecutor's Office and the strengthening of certain powers (asylum and immigration). The various passerelle mechanisms allowing for procedures to be altered without national ratification (the transition from unanimity to a qualified majority or to the normal legislative procedure where QMV is not provided for) necessitate a review of France's constitution. The same holds true for the simplified revision procedure, not entailing national ratification but leaving individual parliaments the option of objecting. This right to oppose a simplified revision as such likewise requires an amendment to the French constitution, as do the new rights granted to national parliaments. At issue here is the “early warning system” enabling national parliaments to monitor the enforcement of the principle of subsidiarity and the procedure enabling them, through their Member State, to appeal to the Court of Justice on the grounds that the subsidiarity principle has been infringed by a legislative act.

6.1.1 The French Socialist Party says yes

In France, the opposition to the Constitution from the far left, the far right and pro-sovereignty groups is part of a well-known anti-European stance. When hostility to the Constitution, spearheaded by some former leading French socialists, became a divisive factor within the Socialist Party, its first secretary François Hollande decided to hold an internal referendum. The yes-vote (59%) won the day on 1st December, on a turnout of 80%. But that did not entirely halt the spread of negative arguments in French society: criticism is levelled at policies currently being pursued within the Union but also at enlargement. There is moreover opposition to some of the economic provisions of the Constitution, even though these are identical to the ones in the existing treaties. The idea of “setting them in stone” in the Constitution (a term described as inappropriate) is deemed unacceptable. The “no” camp likewise plans to campaign against the Constitution by denouncing the proposed Services Directive (Bolkestein Directive), a document which has nothing to do with the Constitution. Some of the “no” campaigners also hail from groups opposed to Turkish accession, an issue which is
unrelated to the Constitution but splits French political circles down the middle, on left and right alike. This debate is reflected in the Constitutional law amending the French constitution, tabled in early January 2005 and according to which Turkey’s accession to the European Union will be subject to a referendum.

6.2 Denmark: the small Socialist People’s Party says yes

In Denmark there has been a change of attitude towards the European Union among members of the Socialist People’s Party (Socialistisk Folkeparti), a small party situated to the left of the Social-Democrats and formerly hostile to the country’s accession to the Communities (1973). The internal referendum held by this party on the Constitution resulted in a victory for the “yes” camp (10). Somewhat unexpectedly, 65% of its members took part in the ballot and a large majority of them, 64%, voted in favour. Thus the likelihood of a yes-vote winning the day at the national referendum is considerably increased, now that the “yes” camp has been joined by a small party which contributed to the rejection of the Maastricht Treaty – but also to the acceptance of the compromise enabling the country to vote “yes” in the second referendum on Maastricht. The Socialist People’s Party added its voice to the “political agreement on Denmark in an enlarged Union”, signed on 2 November by the parties belonging to the government coalition (the Liberal Party, Venstre, and the Conservative Party, Konservative Folkeparti) and those on the centre-left (the Social-Democrat Party, Socialdemokratiet, and the Radical Party, Radikale Venstre). As reported in Le Monde, the Constitution is described in this agreement as guaranteeing “more effective” operation of the EU, setting out “clearly” the aims of the organisation and in particular promoting “social progress and a high level of environmental and consumer protection” (11).

11 Le Monde, 4 February 2005.
6.3 Consultative referendums in Luxembourg, the Netherlands, the United Kingdom, Spain and Portugal

Luxembourg's constitution does not rule out the possibility of holding a referendum on the European Constitution (12). Following a decision of the Council of State on 12 October 2004, a specific law was adopted for the purposes of holding this referendum. Voting will be compulsory for everyone registered on the electoral roll, but the result will not be legally binding. The Netherlands have likewise decided to hold a consultative referendum, even though the constitution makes no provision for it. There has recently been an upsurge in Euroscepticism among the Dutch population, which could result in a very high rate of abstention, with a turnout similar to that at the European elections (39.3%).

In the United Kingdom, the decision to hold a consultative referendum was announced as long ago as 19 April 2004, but in political terms Parliament's hands will clearly be tied by the outcome. The debate hinges mainly on the consequences of a no-vote, which would be motivated by rejection of a European superstate, an image conjured up by the Eurosceptics. UKIP, the party which advocates UK withdrawal from the EU and obtained 16% of the vote at the European elections in June 2004, is busily campaigning.

In Spain, the Council of State asked the Spanish Constitutional Tribunal to verify whether the Treaty establishing a Constitution for Europe was in any way inconsistent with the Spanish constitution. As in France, the opinion of the Constitutional Tribunal related to the compatibility with the Spanish constitution of incorporating the principle of the primacy of EU law over national constitutions, and that of integrating the Charter of Fundamental Rights. The verdict of the Constitutional Tribunal was that the European Constitution and that of Spain were compatible and that there was no need to review the Spanish constitution. The opposite decision would have jeopardised the plan to hold a referendum, since a constitutional review would have been required, a cumbersome procedure entailing the dissolution of both Houses (Senate and Congress of Deputies) of Parliament (Cortes)

12 Article 51(7) of the Luxembourg constitution.
generales) and hence the calling of a general election. The opinion of the Constitutional Tribunal thus paved the way for a referendum, held on 20 February 2005. Spain’s constitution allows for the King to call consultative referendums on political decisions of major significance. The last referendum held related to Spanish membership of NATO in 1986.

Portugal’s constitution does not provide as such for a referendum to be held in order to approve international treaties. However, matters of national interest which are to be the subject of an international agreement may be put to the population for approval. In such a case, proposed referendums are forwarded by the Assembly of the Republic or the government to the President of the Republic, who then carries out preliminary, mandatory, checks as to their constitutionality and legality. On 17 November the Parliament (Assembly of the Republic) adopted a resolution containing the question to be answered by the Portuguese people: “Concorda com a Carta de Direitos Fundamentais, a regra das votações por maioria qualificada e o novo quadro institucional da União Europeia, nos termos constantes da Constituição para a Europa?” (“Do you agree with the Charter of Fundamental Rights, the qualified majority voting rule and the new institutional framework of the European Union, as established by the Constitution for Europe?”). Both of the parties in the ruling coalition, the PSD (Partido Social Democrata) and the Partido Popular (CDS-PP), voted in favour of the text, as did the main opposition party, the PS (Partido Socialista). Nonetheless, on 17 December the Portuguese Constitutional Court ruled the question unconstitutional, primarily due to its lack of clarity, clarity being one of the conditions laid down by Portugal’s constitution (objectivity, clarity and precision).

6.4 Euroscepticism in Poland and the Czech Republic?

Poland was one of the new Member States with the lowest turnouts in the pre-accession referendum and at the European elections (59% and 20.87% respectively). It is also a country where the pro-sovereignty and populist lists obtained the highest number of votes in June 2004. President Aleksander Kwasniewski (SLD) is in favour of a referendum and would like it to be held in 2005 at the same time as the general and presidential elections. A debate about holding a referendum took place in the Sejm (Lower House of Parliament) on 2 December. The
Democratic Left Alliance (SLD) and the Social-Democrat Party (SPLD) believe that the Constitution is beneficial to Poland and necessary for the Union. The Civic Platform (PO) and the Law and Justice Party (PiS) are critical of the constitutional text, which is rejected by the League of Polish Families (LPR). Ratification would have more chance of success in Poland by means of a referendum than through the parliamentary method.

The situation in the Czech Republic is equally complex. Prime Minister Stanislav Gross was in an awkward position at the start of 2005, at the head of a government coalition incorporating the Social-Democrat Party (CSSD) and the Centrist Coalition (consisting of the Christian Democrat Union-Czech People’s Party, KDU-CSL, and the Union of Liberty-Democratic Union, US-DEU). Mr Gross is in favour of holding a referendum and would like it to take place in June 2006 to coincide with the general election. Under the Czech constitution, international treaties are ratified by Parliament unless a constitutional law requires that a referendum be held (13). The President of the Republic, Vaclav Klaus, who himself founded one of the parties currently in opposition, the ODS (Civic Democrat Party, an ultra-liberal and Eurosceptic party formed in 1991), declared in Berlin in November 2004 that he was “100% opposed to the European Constitution”. The ODS did call on the Czech people to vote for EU accession, but the party leadership decided to come out against the Constitution in December 2004. A text geared to the holding of a referendum in late 2005 was tabled in the Senate by the ODS on 13 January 2005. The adoption of such a law requires a three-fifths majority vote in both Houses of Parliament (14). Parliamentary ratification would be more problematical than the referendum method, since the government only has a wafer-thin majority (one seat) in the Chamber of Deputies.

6.5 What happens if ratification is rejected?

Should a problem occur, a Declaration annexed to the Treaty stipulates that “if, two years after the signature of the Treaty establishing a Constitution for

13 Article 10a of the constitution of the Czech Republic.
14 Article 39(4) of the constitution of the Czech Republic.
Europe, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council” (15). This Declaration reflects the pragmatic nature of the solutions found when Denmark and Ireland voted “no” in 1992 and 2000 respectively. If only a small number of countries were affected, the solution might be to hold a second consultation at the end of an as yet undetermined period. Were the Danish, British or Irish people to reject the Treaty, however, it would seem unlikely that their reasons for saying “no” could lead to the establishment of new derogations. These countries already have the benefit of derogations, and progress in respect of criminal justice cannot be imposed on Member States not wishing to be involved. The other question arising therefore relates to the desire to remain within the Union. Depending on the reasons for this no-vote, the European Council would look into the matter. When announcing the referendum to the House of Commons on 19 April 2004, the UK Prime Minister Tony Blair made it plain that the intention was for the British people to have their say about their country’s place in Europe. UK withdrawal seems not to have been altogether ruled out at this stage. At present the rules on admission are laid down by the EU Treaty, but there is no article permitting a Member State to withdraw unilaterally from the Union. The constitutional Treaty contains an innovation in this regard, introducing a procedure for voluntary withdrawal. There is however nothing to prevent the negotiated withdrawal of a Member State (or of more than one) at an Intergovernmental Conference which would consequently review the provisions of the European treaties. Such a revision, just like any other, would have to be subjected to national ratification procedures, with all the political difficulties which that could generate.

If the no-vote were to win the day in France, signifying a rejection of Europe headed up by the pro-sovereignty camp and the far right as well as by the champions of a more social Europe, the implications would be

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15 Declaration No.30 on the ratification of the Treaty establishing a Constitution for Europe.
difficult to interpret. The latter group regards rejection of the text as a means of obtaining its renegotiation. One no-vote could lead to others.

The compromise reached by the IGC is already regarded in some quarters as going beyond what is reasonable. Such is the case in the UK’s view with respect to the incorporation of the Charter. Apart from the fact that renegotiation would seem extremely hypothetical, the agreement of the United Kingdom would be indispensable, and that country gives no sign of shifting the “red lines” it refuses to cross on social and fiscal matters and in respect of the passerelle procedures, as defined ahead of the IGC (16). If rejected by one or more countries of which France, the Union would not suffer an institutional crisis since the Treaty of Nice would remain in force. The consequence of that would be to keep in place the provisions decried by the backers of a more social Europe, depriving the Union of the scope for further progress which is inherent in the Constitution. The most likely consequence would be to put the Constitution on hold indefinitely, or even for it to be abandoned, plunging the Union into a period of existential uncertainty. Whatever happens, the question will be how to embark on early implementation of those provisions of the Constitution which rally the greatest consensus (e.g. with regard to the European External Action Service and the Minister for Foreign Affairs, or to the popular right of initiative).

Conclusions

The text of the constitutional Treaty goes too far for some and not far enough for others, but it does contain certain novel elements. In the social sphere, it introduces among the values and objectives of the Union some component parts of the “European social model”; respect for human rights, the social market economy, full employment, social progress, a high level of protection and improvement of the quality of the environment, measures to combat exclusion and discrimination, the promotion of social justice and protection, equality between women and men, solidarity between generations and protection of the rights of

the child, economic, social and territorial cohesion, and solidarity among Member States. The incorporation of the Charter of Fundamental Rights and the inclusion of a social clause circumscribe and mark out these social aspects. The Constitution likewise contains some democratic elements enabling citizens to make their voices heard, by creating a popular right of initiative. New horizons are also opened up by the newly acquired right of the European Parliament to table drafts with a view to revising the content of the text.

The Constitution therefore introduces innovations on two points crucial to the development of democracy in Europe. In neither case is a blank cheque on offer: European democracy in all of its forms is merely adumbrated here, and the way in which it is put into practice will depend on the will of the European peoples to breathe life into a Constitution which provides only the first elements of a response. But it will not be the last European document. For numerous European citizens, belonging to the European Union is something self-evident, but since enlargement the Union has increasingly been seen as no longer providing guarantees – that much is obvious from the protests against the draft Services Directive. At a time when the globalisation debate is turning into a debate about democracy and social justice in the context of a globalised economy, the Union could make a significant contribution, provided that it escapes from the trap of copying the United States by importing its economic model characterised by labour flexibility, deregulation and privatisation – which in turn generates more exclusion (Rifkin, 2004).

The Constitution is better structured in social terms but in no way prefigures the content of EU policies, which entail increased amounts of complexity and heterogeneity in the wake of enlargement on 1st May 2004. One might in fact fear that this “constitutional moment” has arrived either too late or too soon. Too late, in that it perhaps fulfils the desires of a Europe of a different era, within which the goal of “an ever closer union” was shared by a majority of Member States. Too soon, since the enlarged EU is too young to coalesce around a project as abstract as that of endowing the Union with a Constitution, which symbolises the transition to another political dimension seen by some as undesirable.
References


Despite the so-called “zero immigration” policy advocated by EU governments in the 1980s, migration into the European Union never really came to a halt. The increase in the flow of migrants since the start of the 1990s is both a reflection of the changes which have occurred since the Berlin Wall came down and a consequence of war in the Balkans, the attraction of the Union in Asian countries and globalisation. Having acknowledged through gritted teeth the need to permit a little more legal immigration, the fifteen “old” Member States nevertheless decided to have recourse to measures negotiated in the accession treaties with the new Member States enabling them to derogate from the acquis communautaire in respect of free movement for workers. Yet immigration and asylum policies require, above all else, cooperation with neighbouring countries. As far as asylum is concerned, the Member States seem less concerned about protecting asylum seekers than about devising policies to prevent them from entering the territory of the Union. As is clear in the case of measures to combat illegal immigration, what really counts is the existence of political will. Although the Union’s powers in this field are of recent date, the complexity of the decision-making process is at least partially to blame for the lack of ambition evident in the texts adopted at European level. There is a good deal of vocal opposition and resistance. Certain aspects of the Constitution undeniably make the procedures more democratic, without however enabling the Union to define a genuine common policy on labour market access.
1. Europe, a reluctant land of immigration

Having long been a land of emigration, especially to the United States, Europe has become a continent of immigration. Since the 1990s, the migrants flowing into Europe have been more numerous than those bound for the United States. A report published by the United Nations in March 2000 about demographic trends over the next fifty years argued for “replacement immigration” with a view to offsetting the inevitable decline in Europe’s population (United Nations, 2000). The report envisaged net annual migration of 857,000 individuals. This document was highly controversial in that it raised the question of a more open European migration policy as a solution to the demographic deficit, while at the same time asking how pension systems are to be funded and how older workers can be retained in the labour force. Owing to the closure of legal immigration channels, would-be immigrants are using the political asylum route for purposes of economic migration. Consequently, the EU Member States have gradually toughened the conditions for granting refugee status; what has followed is a curtailment of a fundamental right of persons fulfilling the criteria laid down by the Geneva Convention and other international texts.

Certain traditional countries of emigration are now becoming the chosen destination of migrants, including those coming from east European countries. This is particularly true of Spain, Ireland, Portugal and Italy. The new Member States are also experiencing migration flows and have, since enlargement, become an access route into the territory of the Union. The migrants concerned do not necessarily intend to settle permanently: cross-border commuting (Wihtol de Wenden, 2004), namely temporary migration involving some to-ing and fro-ing, is another new dimension in the migration flows from east European countries (seasonal and farm workers, domestic servants, builders, etc.). Some EU countries are drawing on highly skilled foreign labour, authorised to enter their territory subject to quota limits (most notably Germany). Other temporary stays for service providers are negotiated.
under the auspices of the GATS Agreement (General Agreement on Trade in Services) (1).

2. Free movement for persons and enlargement

As the Commission notes in its first report on immigration, “It is, however, not only high skilled labour that is in demand as some, in particular Southern European countries or recent immigration countries, have a need for low-skilled workers” (CEC, 2004a: 4). In this report, the Commission gives a picture of migration trends in Europe, looking at changed immigration patterns and describing action taken at national and European level in respect of admission and integration. It sets out the changes experienced within the new Member States which, having previously been countries of emigration, are now attracting immigrants from the countries of the former Soviet Union and the Balkans. This immigration is helping to make up for a labour and skills shortage. Several publications have dealt with the population movements coming from the new Member States, fuelling fears that a massive influx would occur after enlargement. A study carried out by the Dublin Foundation on migration trends in the enlarged Europe, and published belatedly, took a more considered view of these arguments (2). This study did not contest the aptness of the transitional measures negotiated in the run-up to accession, but nor did it predict that nearly all the Member States would resort to them. The result has been a two-speed approach to European citizenship as concerns labour market access, which constitutes real discrimination between citizens of the Union.

In principle, European citizens enjoy freedom of movement and the right to settle anywhere on the territory of the Union. These rights have been fashioned on the basis of economic rights and enshrined in a directive (European Parliament and Council of the European Union,

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1 “Mode 4” of the GATS concerns the movement of natural persons, mainly highly skilled people, with a view to carrying out service contracts as self-employed workers or as employees of foreign service companies coming to Europe for a fixed period of time to work as sub-contractors.

2004a). But the directive’s provisions apply only in part to nationals of the new Member States following their accession on 1st May 2004, on account of the transitional measures written into the accession treaties (apart from those of Cyprus and Malta) in respect of free movement for workers. These measures derogate from the principles laid down by various European texts (Council of the European Communities, 1968a and 1968b; European Parliament and Council of the European Union, 1996) and authorise the fifteen former Member States to regulate access to their labour markets for a maximum period of seven years (two plus three plus two years). These measures, denounced by citizens of the new Member States who feel that they are being treated as second-class citizens, will be reassessed by the Commission at the end of a two-year period. The general transition period is scheduled to end after a five-year period, i.e. on 30 April 2009. Should the labour market suffer serious disruption, the Fifteen may be authorised to keep their national measures in place for a maximum period of two more years.

Ireland and Sweden have refrained from restricting access to their labour markets (3). Access is also free in the United Kingdom, but a registration system has been introduced with a view to monitoring the impact of EU enlargement on the UK labour market. Social security legislation has been amended so that access to certain benefits is now means-tested. The measures taken vary from one Member State to another. For instance, Germany and Austria – on which, for historical and geographical reasons, enlargement is likely to have the biggest impact – may well restrict labour market access to a greater extent than the rest of “old” Europe (especially with regard to self-employed persons providing certain services, above all in the construction industry).

Fears of a massive influx of workers from a new Member State are even more real in view of the prospect of Turkish accession. In its recommendation on Turkey’s application, the European Commission envisaged for the first time the possibility of introducing permanent safeguard measures relating to free movement for citizens/workers (CCE, 3

3 In Sweden, the Parliament (Riksdag) rejected on 28 April 2004 a government bill to limit free movement for workers from central and eastern European countries for a period of two years.
2004b). This was one of the elements considered by the European Council in December 2004 which scheduled the start of these negotiations for 3 October 2005, linking the negotiating process with unprecedented restrictions that could quite simply lead to a breakdown in the process if the terms of the agreed negotiating framework are breached.

3. The external dimension

With regard to external relations, the EU endeavours to integrate immigration policy into its relations with third countries, and more particularly the management of migration, to include combating illegal immigration and trafficking in human beings (CEC, 2002). To this end the Union has developed a network of “immigration liaison officers” in third countries in order to establish and maintain contact with the host countries’ authorities. Their role is to help prevent and combat illegal immigration, as well as assisting with the return of illegal immigrants and the management of legal immigration (Council of the European Union, 2004a: Article 1). The EU also runs a technical assistance programme for the benefit of third countries, aimed at backing their efforts to better manage all aspects of migration flows (European Parliament and Council of the European Union, 2004b). This multiannual programme (2004-2008) has a budget of € 250 million and “is particularly, but not exclusively, intended for those third countries actively engaged in preparing or implementing a readmission agreement initialled, signed or concluded with the European Community” (European Parliament and Council of the European Union, 2004b: 2).

Five main areas are identified for action: drafting legislation on legal immigration; disseminating information on the opportunities for legal immigration and the consequences of illegal immigration; developing international protection; establishing a policy to combat illegal immigration, including measures to combat the trafficking of human beings and the smuggling of migrants; and the readmission and reintegration of persons who are sent back. The programme can provide support for various initiatives such as information campaigns, aid for the creation of asylum and migration management systems, the establishment of systems for the collection of data on migration phenomena and exchanges of information on migration trends, especially towards the Union, and support for the reintegrations of persons who return to their country of origin.
Since enlargement, the Union has also been faced with managing its new external borders. This has entailed drawing up a new Neighbourhood Policy, one aspect of which relates to migration (CEC, 2004c) (4). The Union’s stated aim is to export “stability, security and well-being for all concerned” and “to avoid new dividing lines at the borders of the enlarged Union”. One of the means to this end is the establishment of a new “Neighbourhood and Partnership Instrument”, one of six instruments intended to replace the Union’s existing external relations tools and focused on fostering cross-border relations (CEC, 2004d). This also requires the adoption of national action plans, the first of which were adopted by the Commission in December 2004 (CEC, 2004c) (5). These action plans, based on existing association or partnership or cooperation agreements, share common principles but are tailored to each country’s specific circumstances. One of the first plans sets out the framework for relations between the EU and Ukraine. The crisis unleashed in Ukraine at the time of the presidential elections in late 2004 highlights the importance of fine-tuning these agreements on a case-by-case basis. It may well be that the terms of the plan proposed in December fail to meet the European aspirations of the Ukrainian President, Mr Yushchenko. The way in which these relations evolve will speak volumes about the Union’s future borders but also about the EU’s relations with Russia, a country which has by no means fully accepted Ukraine’s independence and from which the last vestiges of dictatorial and imperial pretensions have yet to disappear.

4 The countries in Europe covered by the Neighbourhood Policy are Russia, Ukraine, Belarus and Moldova. But Russia has opted to establish a special partnership. In the Mediterranean region, with the exception of Turkey which is engaged in a pre-accession strategy, the Policy applies to all of the non-EU countries participating in the “Barcelona process”: Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Syria, Tunisia and the Palestinian Authority. The Brussels European Council of June 2004 welcomed the Commission’s proposal on the European Neighbourhood Policy as well as the one on including Armenia, Azerbaijan and Georgia.

5 The countries concerned are Israel, Jordan, Morocco, the Palestinian Authority, Tunisia and Ukraine.
4. From the Amsterdam Treaty to the draft Constitution: a Europe of variable geometry

Having progressed from a total lack of powers to the development of negative powers during the course of the 1980s, the Community/Union had very little say until recently in the highly sensitive area of immigration policy. The Maastricht Treaty had introduced a new “third pillar” on cooperation in the field of justice and home affairs, which included asylum and immigration measures in the same context as measures to combat terrorism and crime (6). The Amsterdam Treaty, signed in June 1997, introduced a new objective for the Union: to establish an area of freedom, justice and security, based on the one hand on a new Title IV of the EC Treaty concerning “Visas, asylum, immigration and other policies related to free movement of persons” and, on the other, on the revised provisions of the third pillar on police and judicial cooperation in Title VI of the EU Treaty. This had the merit of dissociating asylum and immigration matters from those related to the fight against crime.

At the same time, another consequence of the Amsterdam Treaty was to incorporate into the EC and EU Treaties the cooperation already underway between certain Member States in the framework of the Schengen Agreement. Moreover, the right of Ireland and the United Kingdom to take part in – or to remain outside of – the process of adopting decisions covered by Title IV, together with Denmark’s opt-out from the same Title, illustrates the high degree of complexity created by the Amsterdam Treaty. The Treaty of Nice failed to simplify the complex state of affairs created by the Amsterdam Treaty: it paved the way for more use of the Community method but in a gradual and limited fashion (see Box). The Treaty of Nice also leaves intact the restrictions which the Amsterdam Treaty placed on the powers of the Court of Justice in Title IV areas. It likewise preserves the derogations to the Amsterdam Treaty negotiated by the United Kingdom and Ireland on the one hand and by Denmark on the other.

6 For the record, the Maastricht Treaty bases the European Union on three "pillars": Community policies (agriculture, transport, etc.); the common foreign and security policy; and justice and home affairs.
Complexity of the decision-making process

Until 1st May 2004, the Council acted unanimously after consultation of the European Parliament for the adoption of texts concerning asylum and immigration, with the exception of visa policy. The Commission did not possess its usual exclusive right of initiative, since individual Member States were also able to submit proposals. Since then, the Commission has regained its right of initiative but must examine any initiative taken by a Member State calling on it to submit a proposal to the Council. Qualified majority voting (QMV) is applied in three different ways (a qualified majority with or without co-decision; dependent on the adoption of earlier measures; applicable at the end of a five-year period following the entry into force of the Amsterdam Treaty, i.e. on 1st May 2004). QMV and consultation of the European Parliament have applied to visa policy since the entry into force of the Amsterdam Treaty (list of third country nationals subject to a visa requirement and establishment of a uniform format for visas, Article 62(2b i & iii). QMV and co-decision of the European Parliament are used since 1st May 2004 for the procedures and conditions for issuing visas by the Member States and rules on a uniform visa, Article 62(2b ii & iv). Administrative cooperation measures have since 1 May 2004 been adopted by the Council acting by a qualified majority on the basis of a proposal from the Commission and after consultation of the European Parliament. As far as asylum is concerned, the move to QMV with co-decision by the European Parliament takes place only once the basic legislation has been adopted. The same applies to measures concerning refugees and displaced persons: these measures consist in laying down minimum standards for granting temporary protection to displaced persons from third countries who cannot return to their country of origin and to persons who otherwise need international protection. QMV and consultation of the European Parliament have applied to new fields of visa policy since the Amsterdam Treaty entered into force (list of third country nationals subject to a visa requirement and establishment of a uniform format for visas, Article 62(2b i & iii).

The five-year period which expired on 1st May 2004 did not apply to the adoption of measures in the following areas: receiving refugees and displaced persons, legal immigration – mainly the conditions for entry and residence; the procedures for issuing visas and long-term residence permits, including for the purposes of family reunification; setting out the rights and conditions under which third country nationals who are legally resident in a Member State may reside in other Member States. The adoption of these measures requires a unanimous decision of the Council based on a proposal from the Commission or from a Member State, with mere consultation of the European Parliament, unless the Council were to decide otherwise and resorted to the passerelle article. Declaration No.5 invited the Member States to draw on this article as from 1st May 2004 with a view to applying the co-decision procedure in respect of free movement for third-country nationals for a maximum period of three months and in respect of illegal immigration. This likewise applied to checks on persons at the external borders, starting from the date of an agreement reached on the scope of the measures concerning the crossing of the external borders. The Council took up this invitation at the end of 2004 and slightly extended its scope (see below).
The EC Treaty likewise contains a so-called passerelle mechanism enabling the Council, from 1st May 2004 onwards, to decide unanimously after consultation of the European Parliament to move to co-decision and to extend scrutiny by the Court of Justice to some or all of the areas under Title IV. Declaration No.5 authorises the Council to apply this mechanism as from 1st May 2004 in respect of free movement of third country nationals (Article 62(3)) and illegal immigration (Article 63(3b)). After much discussion, the Council has successfully resorted to the use of this mechanism, which is by no means applicable to all the “freedom” aspects of Title IV, as was originally proposed by the Netherlands presidency of the Council; it does nonetheless go slightly beyond the terms previously agreed at Nice (see below).

5. The draft European Constitution

The Intergovernmental Conference (IGC) did not call into question the results of the European Convention as concerns asylum and immigration, which went a considerable way towards making the procedures more democratic. As part of the area of freedom, security and justice, asylum and immigration policies are among the shared competences between the Union and the Member States. By contrast with the existing situation, the Commission entirely regains its right of initiative, and the normal legislative procedure (a qualified majority in the Council and co-decision with the European Parliament) becomes the rule for the adoption of European laws and framework laws on asylum and immigration. Such legislation covers all the areas set out in the Tampere programme, including aspects related to integration policy and the definition of the rights of third-country nationals who are legally resident, but without envisaging any new rights for long-term residents. The measures adopted will be subject to scrutiny by the Court of Justice. This is a significant change, once and for all putting an end to an approach characterised ever since the incorporation of the Schengen Agreement by the rejection of any supranational judicial scrutiny (Bigo and Guild, 2004).

In a break with the principle whereby the European Council has no legislative competence, the Constitution sanctions the existing practice by writing into the text the current role of the European Council in
determining strategic orientations for legislative and operational planning in the area of freedom, security and justice. The Commission and European Parliament are not involved. A new mechanism is created for the purpose of assessing policy implementation with a view to realising the area of freedom, security and justice (Title IV of Part Three); the European Parliament and national parliaments will be kept informed of this assessment. Scrutiny by national parliaments is stepped up in the context of police and judicial cooperation in criminal matters: a quarter of all the votes allocated to national parliaments (instead of a third) will be sufficient in order for a reasoned opinion to be forwarded to the Commission regarding non-compliance by a draft legislative act put forward in the context of the area of freedom, security and justice. The procedures vary depending on what action is envisaged at EU level. This applies to the adoption of measures where there is a sudden influx of third-country nationals: such measures will take the form of Council “regulations” or “decisions”, with the Council acting by a qualified majority on a Commission proposal and after consulting the European Parliament. Finally, as concerns policies on external border checks, asylum and immigration, the politically highly sensitive principle of solidarity and a fair sharing of responsibilities among Member States is sanctioned, including from a financial point of view.

Nevertheless, many factors still stand in the way of defining a genuine immigration policy. Firstly, following intense pressure from Germany, the Union will not have the right to determine the number of third-country nationals entitled to enter the Union; the Member States will retain responsibility in this field. Secondly, on the subject of social security for migrant workers, whereas Article 42 of the TEC provided for unanimity in the Council and co-decision with the European Parliament, the Convention laid down the ordinary legislative procedure, namely a qualified majority in the Council and co-decision with Parliament. The price paid for the IGC’s retention of the ordinary legislative procedure was the inclusion of an “emergency brake”, i.e. the possibility for a Member State to refer the decision to the European Council. That body must then refer the matter back to the Council within a period of four months and lift the suspension of the procedure or else ask the Commission to submit a new proposal. This mechanism, which makes no provision for enhanced cooperation among Member
States wishing to forge ahead (as is the case in respect of judicial cooperation in criminal matters), could ultimately lead to paralysis within the Union. Thirdly, concerning employment conditions for third-country nationals, the current situation under Article 137 of the TEC is maintained, namely a decision taken by the Council acting unanimously, consultation of the European Parliament and a passerelle mechanism enabling the Council to decide unanimously to make the ordinary legislative procedure applicable to this matter. Finally, these proposals did not enjoy the support of all Member States, and the most stubborn ones have managed to preserve their derogations. Variable geometry has been maintained: the United Kingdom and Ireland on the one hand, and Denmark on the other, have managed to keep their opt-outs (7).

6. From Tampere to the Hague

After the entry into force of the Amsterdam Treaty and following the Vienna Action Plan (Council of the European Union and CEC, 1999), the Tampere European Council adopted guidelines and priorities aimed at establishing a common asylum and immigration policy with a view to realising the area of freedom, security and justice. Under this approach, the separate but closely linked issues of asylum and migration required the development of a common EU policy comprising the following four aspects:

- partnership with the country of origin;
- a common asylum system;

7 In Denmark’s case the Protocol reflects the current situation: the country will not participate in the adoption of measures related to the realisation of the area of freedom, security and justice (Part III, Title III, chapter 4 of the Constitution). A new sentence was introduced in the Protocol whereby “it would be in the best interest of the Union to ensure the integrity of the acquis in the area of freedom, security and justice” (Protocol No.20). The opt-out of the United Kingdom and Ireland concerns provisions on policies related to border checks, asylum and immigration (section 2) but also judicial cooperation in civil matters (section 3) (Protocol No.19). It likewise concerns the mechanism for assessing the implementation of EU policies in the area of freedom, security and justice. The state of affairs created by the Protocol on the Schengen acquis incorporated into the context of the European Union also remains unchanged (Protocol No.17).
- fair treatment for third-country nationals;
- management of migration flows.

At the request of the Tampere European Council, the Commission drew up a six-monthly scoreboard for gauging progress. The difficulty of attaining the goals laid down in the five-year programme adopted by the Tampere European Council in 1999 for the development of asylum and immigration policies can be explained by the specific nature of the institutional and decision-making context resulting from the creation of an area of freedom, security and justice (CEC, 2004f). The different EU Member States’ conceptions of migration policy reflect the diversity of policies dictated by political circumstances and by labour market requirements. Population ageing is a growing trend, including after enlargement to take in ten new countries since they are confronted by the same phenomenon. Yet the need for foreign labour to compensate for shortages on the EU’s labour markets has been acknowledged by the Commission ever since the year 2000 (CEC, 2000).

The Commission’s proposed introduction of an open method of coordination (OMC) in this field has been without consequence in the Member States (CEC, 2001a). At the same time, the Commission put forward a proposal for a directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities (CEC, 2001b). This draft was never discussed. However, even though there is no formally approved OMC, mechanisms have nevertheless been put in place for exchanging views. A group of experts, the Immigration and Asylum Committee, was instituted by the Commission in 2002. In addition, it also established the European Migration Network as a pilot project to analyse the political, legal, demographic, economic and social aspects of migration and asylum. Information in specific fields is exchanged by the national contact points on integration, set up by the Commission in 2003, and, within the Council, by the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (CIREFI) (Council of the European Union, 1994). The Commission also published in June 2004 a study on the links between legal and illegal immigration, in which it argues for an intensification of information exchanges as well as consultation and cooperation among
Member States. It announced a public consultation and the publication of a Green Paper on whether or not the admission of persons for economic reasons should be governed at EU level (CEC, 2004g).

From one report to the next, the Commission’s attempts to put the definition of a genuine immigration policy on the European agenda have encountered resistance from national governments. Few texts on the rights of third-country nationals have actually seen the light of day, and even those contain a number of derogations. The goals set out at Tampere with a view to a common immigration policy are certainly still a long way off. The directive on family reunification (Council of the European Union, 2003a) and the one on long-term residents (Council of the European Union, 2003b) were adopted only after the addition of several national derogations. In connection with the Lisbon strategy, the Commission put forward a number of proposals intended to facilitate the admission of third-country nationals to carry out scientific research in the European Community (CEC, 2004h). It is estimated that 700,000 such researchers will be required by 2010. The Justice and Home Affairs Council of 19 November 2004 reached a political agreement on the draft directive and scheduled its implementation for the end of 2008. Finally, having been the subject of a political agreement on 30 March 2004, the directive on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service was formally adopted by the Council in December 2004 (Council of the European Union, 2004b) (8). The United Kingdom, Ireland and Denmark stood aside from the adoption of these texts.

7. The Hague Programme

The Hague Programme was drawn up at an informal meeting of the Justice and Home Affairs Council held in Scheveningen, near The Hague (Netherlands), on 30 September – 1 October 2004. It provoked a good deal of debate on account of the questions raised about asylum, unremunerated training or voluntary service.

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8 The Commission’s original proposal concerned the conditions of entry and residence of third-country nationals for the purposes of studies, vocational training or voluntary service.
in view of the events of the summer and the human tragedies which had occurred in the Mediterranean. By way of a response, the German and Italian Ministers of the Interior, Otto Schily en Giuseppe Pisanu, had on 12 August floated the idea of creating reception centres outside of the EU to process asylum applications, or the “outsourcing of asylum procedures”. Meanwhile, the “G5” – which brings together the Ministers of the Interior from Italy, Germany, the UK, France and Spain – failed to agree on the German/Italian plans at its meeting in Florence on 17-18 October 2004 because of opposition from France and Spain. The Netherlands presidency did not however abandon the idea (see below).

7.1 Drawing up an action plan
The Hague Programme was adopted by the European Council of 4-5 November. It builds on the headway made in the Constitution, which identifies certain objectives and priorities for inclusion in an action plan to be submitted by the Commission in 2005. The Commission is to submit an annual report (rather than six-monthly ones, as with the “scoreboards” of the past) on the implementation of the Programme. The Council will produce some specific assessment measures in 2005, given the need for better monitoring of the Programme’s implementation, as emphasised by both the Commission and Parliament. Regular reports will be drawn up by the Commission and by the Council.

7.2 Citizenship
In terms of protecting fundamental rights and citizenship, the Hague Programme welcomes the Commission’s proposal to extend the mandate of the European Monitoring Centre on Racism and Xenophobia, turning it into a Human Rights Agency. The enforcement of the directive on free movement and the right of residence is scheduled for review in 2008.

7.3 Recourse to the passerelle mechanism
In the field of asylum, immigration and borders, the European Council called on the Council to decide by 1 April 2005 at the latest whether or not to apply the passerelle article to all Title IV measures, this decision being confined to the adoption of measures intended to enhance
“freedom” except as far as legal immigration is concerned. The decision was in fact taken on 22 December 2004 and scheduled to take effect on 1st January 2005 (see below).

7.4 Towards a common asylum system in 2010

The European Council considered that the second phase of the asylum procedure began on 1st May 2004, and scheduled the adoption of the second-phase instruments and measures to take place “before the end of 2010”. This should mean in practice that the Council will act by a qualified majority in co-decision with the European Parliament. The implementation of the first phase has however been completed yet, on account of difficulties encountered over the adoption of the directive on asylum procedures, one of the key documents of the first phase (Council of the European Union, 2004c). The need to achieve a unanimous vote on this text, under discussion for three and a half years, resulted in a scaling-down of its ambitions. Immediately prior to its adoption, the draft directive was criticised by several NGOs for constituting a clear infringement of Member States’ commitments under the European Convention on Human Rights and the 1951 Geneva Convention relating to the Status of Refugees. The United Nations High Commissioner for Refugees (UNHCR) had likewise deplored the fact that this text rowed back on existing international standards. The sticking-point was the list of safe countries of origin.

This document is nonetheless a centrepiece of the first phase in the establishment of a European asylum system, as is the proposal for a Council directive on the minimum standards to be met by third-country nationals or stateless persons to claim refugee status or by persons who otherwise need international protection and the content of the protection granted (the “qualification” directive, also formally adopted on 29 April) (Council of the European Union, 2004d). The Council therefore called for full implementation of this phase, which will include the final adoption of the directive on asylum procedures but carried out in accordance with the procedures in force at the time of the first phase, namely unanimity in the Council and consultation of the European Parliament. The Justice and Home Affairs Council decided on 19 November that the list of third countries would be finalised after the adoption of the directive “on the basis that, at present, it is not possible to reach
agreement on such a list’. A study on the advisability, prospects, difficulties and practical implications of joint processing of asylum applications is to be undertaken by the Commission. Cooperation mechanisms will be put in place prior to the setting up of a European asylum bureau once a common asylum procedure is established. Furthermore, a separate study, to be conducted in close consultation with the UNHCR, is to look into the merits, appropriateness and feasibility of “joint processing of asylum applications outside EU territory”. It is worth noting that this idea has been rejected by the European Parliament (European Parliament, 2004a: point 9). The idea of outsourcing asylum requests, naturally “in complementarity with the Common European Asylum System and in compliance with the relevant international standards”, is still on the European agenda.

7.5 Legal immigration and integration

As concerns legal immigration and measures to combat illegal employment, the European Council called on the Commission to present before the end of 2005 an action plan on legal immigration, comprising admission procedures enabling the labour market to respond to a constantly changing foreign labour force. Concerning illegal immigration, the Member States are expected to meet the targets for scaling down the informal economy contained in the European employment strategy. The programme contains a new section on the integration of third-country nationals. The European Council identified the minimum aspects on which common principles should be determined. These basic principles should create a European framework within which the Member States, the Council and the Commission are called upon to promote a properly structured exchange of experiences and information on integration, with the creation of a publicly accessible website. The Handbook on Integration for policy-makers and practitioners, alluded to in the Commission’s report on immigration, appeared in November 2004 (CEC, 2004i). The first common principles adopted by the Council on 19 November constitute only a very patchy and incomplete reflection of the Handbook’s chapter on civic participation, which stresses the importance of political rights.

7.6 The external dimension of asylum and immigration

In terms of external relations, the Commission is invited, by the spring of 2005, to fully incorporate the issue of immigration into country-by-
country and region-by-region strategy documents for all the third countries concerned. The European Council reasserted the importance of the Neighbourhood Policy. With respect to the protection of refugees, the European Council called on all third countries to accede to and comply with the Geneva Convention. In this same line of thought, the European Council asked the Commission to draw up regional protection programmes, inspired by the pilot protection programmes to be launched by the end of 2005.

In June 2004 the Commission published a communication on the “protection capacity of regions of origin” (CEC, 2004) which provoked conflicting reactions. Some saw it as the first step towards realising the ideas put forward by the United Kingdom in 2003 about outsourcing asylum procedures to the periphery of the Union or to far-off countries, whilst the aim according to the Commission is to improve the managed entry of persons in need of international protection in the Union and to assist the countries of the regions of origin, often merely countries of transit, to become genuine first countries of asylum. To this end, it recommends the setting up of multiannual “EU resettlement schemes” as well as “EU regional protection programmes”, formed in partnership with the third countries in the region concerned (an action plan and a regional protection programme are scheduled for December 2005 at the latest).

At the informal Justice and Home Affairs Council in The Hague, the Ministers of the Interior announced on 1st October that a sum of €1 million, funded to the tune of 80% by the Commission and 20% by the Netherlands, would be released in order to help the north African countries (Mauritania, Morocco, Algeria, Tunisia and Libya) to develop national asylum systems with trained staff. Commissioner Vitorino stated that the Commission, backed by the Netherlands, would finance five pilot agency projects for refugees in North Africa in order to upgrade the existing installations in Libya, Tunisia, Algeria, Morocco and Mauritania. The Commissioner subsequently made it very clear that these camps would not be involved in “processing” asylum requests (9).

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9 At a conference jointly organised by the European Policy Centre and the Fondation Roi Baudouin on 4 October 2004.
8. Implementation of the Hague Programme: a slight relaxation of decision-making procedures

In its recommendation, the European Parliament called for co-decision and extended scrutiny by the Court of Justice to apply to all aspects of the area of freedom, security and justice, and “initially for immigration measures” (European Parliament, 2004b). It should be remembered that, during the European Parliament debate on the area of freedom, security and justice in October, the Dutch Minister of Justice, Mr Donner, justified the fact that the Netherlands presidency was not proposing an extension of scrutiny by the Court on the grounds that it would constitute an excessive workload for the Court in the newly enlarged Union. The Parliament likewise called for recourse to Article 42 TEU so as to apply the Community method to measures for combating terrorism and international crime. Following the adoption of the Hague Programme, the Council forwarded to the European Parliament a proposal restricting the move to co-decision to Title IV measures intended to strengthen the “freedom” dimension, excluding the field of legal immigration (Council of the European Union, 2004e).

The European Parliament approved the draft Council decision in December, asking that the co-decision procedure should also apply to measures on legal immigration; these measures should not affect the right of Member States to set entry numbers for third-country nationals coming from third countries, as indicated in the Constitution. The Parliament also called for the curbs imposed on the powers of the Court of Justice to be abolished (European Parliament, 2004c). It likewise stressed the fact that on 5 November 2004 the European Council had invited the Commission, after consulting the Court, to present a proposal for a Council decision instituting a specialised panel for actions relating to matters covered by that same Title IV, in conformity with Article 225A of the EC Treaty. According to the decision adopted by the Council at the end of December (Council of the European Union, 2004i), the co-decision procedure applies as from 1 January 2005 to measures aimed at removing checks on persons when crossing internal borders, measures on the crossing of external borders and measures laying down the conditions under which non-Europeans may move around the territory of the Union for a maximum period of
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The decision also relates to illegal immigration and measures aimed at ensuring a balance between Member States as regards the reception of refugees and displaced persons. Measures concerning legal immigration by non-Europeans into Member States and from one Member State to another will continue to be adopted by the Council acting unanimously after consulting the European Parliament. This affects entry and residence conditions as well as rules on the procedures whereby Member States issue visas and long-term residence permits, including for the purposes of family reunification. It also affects measures determining the right of third-country nationals who are legally resident in one Member State to take up residence in another Member State.

It is worth noting that recital 10 of the decision encourages the adoption of incentive measures geared to supporting action by Member States to integrate non-Europeans who are legally resident on their territory. These measures "might be adopted by the Council acting in accordance with the appropriate legal basis provided for in the Treaty". Finally, Denmark took no part in the adoption of this decision, but the United Kingdom and Ireland expressed their desire to participate in the adoption and enforcement of the decision.

Conclusions

The issues of asylum, immigration and free movement, but also mobility within the EU, will remain high on the European agenda. The aim is to create a unified, borderless area while complying with the international rights and obligations deriving from the Geneva Convention and its additional protocols, but also with fundamental rights. With regard to free movement of persons on EU territory for employment purposes, the measures adopted by most Member States in the run-up to enlargement will have to be reviewed. The formulation of a common asylum policy is a contentious issue in a Europe which is at risk of abandoning its tradition of tolerance if it continues to adopt measures restricting access to refugee status by persons who meet the conditions.

This presupposes the gradual introduction of a genuine immigration policy so as to prevent people wishing to come and work in the Union from abusing the asylum method, thereby depriving people who are
fleeing their countries for reasons recognised by international agreements from enjoying the protection to which they are entitled. The Lisbon goal calls for an easing of entry and residence conditions for highly skilled persons. But unless an admission policy is devised for migrant workers, labour shortages will only be filled in the meantime by tolerating undeclared employment. Under these circumstances, discrimination between EU workers in respect of their right to free movement should be removed as quickly as possible. Whether confronted by a need for skilled, less skilled or low-skilled labour, the Union ought to invent a new method whereby it can elaborate a common approach together with the Member States. Four challenges have to be met: developing an area of free movement, non-discrimination and integration for all persons resident on EU territory; establishing relations with the EU’s immediate neighbours such that it is unnecessary to deploy excessive resources in protecting its external borders; being bold enough to open up legal immigration channels; and refraining from infringing the fundamental principles on the protection of persons which are guaranteed by international agreements.

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The European Union and pensions: recent steps in “hard” legislation and “soft” co-ordination

Introduction

Pensions are more and more at the centre of the European debate. Notwithstanding the persistent pre-eminence of national governments, the European institutions have been taking a growing interest and role in the related policy-making process. In the last few years, hence, the interplay of national and supranational actors has become a key aspect of this debate. According to the Lisbon Strategy, the “pension issue” is dealt with by the EU according to three different (but complementary) dimensions (European Council, 2000). The first axis concerns the development of integrated, transparent and efficient financial markets by eliminating obstacles to investments in supplementary pension funds. In that respect, the Community method is used to implement such a strategy. The second one aims to face population ageing through the co-ordination of macro-economic policy (and especially of budget policies). In that sense, the Stability and Growth Pact and the Broad Economic Policy Guidelines represent the main instruments to be adopted. Finally, the third axis consists of the modernisation of social protection programmes through the improvement of their financial sustainability and the promotion of social integration and equality in an “active” welfare state. The Open Method of Co-ordination (OMC) on pensions (and to a lesser extent the other OMCs on social inclusion and employment) is the specific process introduced to favour a co-ordinated response to common challenges. All these procedures, introduced at
different times, now coexist in the European policy-making process (Pochet, 2003).

While the recent scientific literature is mainly focused on the implementation of soft modes of governance (see Palier, 2003; de la Porte and Nanz, 2004), this chapter aims to briefly summarise recent events in two different European arenas. The first part will be devoted to analysing the content and process related to the “hard” legislation introduced for occupational pension schemes (consistent with the reduction of public pension generosity). The second part will briefly refer to the main events of 2004 in the “soft” co-ordination of national pensions (through the OMC), with particular emphasis on the active role of the Commission and the Council (especially of the Social Protection Committee - SPC). Our concluding remarks will review the main features of the EU policy-making procedures, stressing the links between soft and hard interventions. From a normative point of view, both are increasingly focused on the greater role of supplementary pensions. From a procedural perspective, their comparison paradoxically shows that hard governance is more open and participative than soft governance.


As Pochet (2003) noted, EU action in the area of complementary pensions is based on two key aspects of the Treaty: free movement for people, services and capital; and the competition policy. According to the first goal, the EU adopted Directive 2003/41 on the Activity and Supervision of Institutions for Occupational Retirement Provision (1). In 1991, a phase of discussion started by means of a number of Commission communications and preparatory reports. In 1995, the first attempt to regulate the issue failed. A new phase, thus, started with the setting up of the High-level Group on the free movement of people and, in 1997,

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1 A first step towards the harmonisation of professional pension provision was implemented through Directive 98/49 of June 1998 to safeguard the portability of pension rights across the EU (Castegnaro and Jung 2003).
The European Union and pensions: recent steps in “hard” legislation and “soft” co-ordination

with the publication of the Green Paper on complementary pensions (CEC, 1997).

These different elements allowed the Commission to set out in October 2000 a proposal for a directive on institutions for occupational retirement provision (pension funds, superannuation schemes, etc.). The aim was to create a prudential framework at the EU level strong enough to protect the rights of future pensioners and to increase the affordability of occupational pensions. The draft directive did also seek to enable an institution in one Member State to manage company pension schemes in other Member States.

1.1 The Directive’s content and its potential outcomes

Directive 2003/41 on the Activities and Supervision of Institutions for Occupational Pensions (IORPs) was adopted in May and published in September 2003. It will be implemented in the EU countries (with a deadline fixed for September 2005). According to the Union’s aspiration to increase opportunities for a free market in services, it aimed to facilitate a pan-European market for occupational retirement provision and create a framework for the efficient operation of pension institutions and the defence of their members’ interests. IORPs are defined as “institutions, irrespective of their legal form, operating on a funded basis, established separately from any sponsoring undertaking or trade for the purpose of providing retirement benefits in the context of an occupational activity” (Article 6).

The new legislation is to apply to cross-border schemes but also to occupational schemes in one Member State only (but each country may exclude funds with fewer than 100 members).

More specifically, the Directive follows certain objectives. First, it aims to protect members and beneficiaries of pension funds. Institutions providing supplementary pensions, in fact, will be subject to detailed rules of operation and safeguards for their members. For instance, IORPs have to be registered in a national register, run by persons of good repute, and must have properly constituted rules, while their liabilities must be calculated and certified by specialists. Members and beneficiaries have then to be properly informed about their rights, the situation of the institution and the terms of the scheme. Competent authorities must conduct supervision of IORPs through inspections and

Second, it requires IORPs to be sufficiently funded. Sufficient and appropriate assets are required to cover the technical provisions (e.g. the liabilities of the schemes), with each Member State expected to impose detailed requirements. Occupational schemes must be fully funded while, in the case of a financial deficit, the scheme has to adopt a recovery plan. That exception is not admitted for schemes which undertake cross-border activity: they must be funded at all times.

Third, the Directive enables institutions to accept sponsorship by, and run a pension scheme for, a company located in another Member State. The new legislation allows for mutual recognition of Member States’ supervisory regimes. An IORP can manage the schemes of firms located in other Member States by adopting the prudential rules of the country where it is established (that is the so-called ‘home-country control’). At the same time, the social legislation of the host Member State (applicable to the relationship between the sponsoring undertaking and the members) will continue to apply (Castegnaro and Jung, 2003).

Fourth, it allows IORPs to follow an investment strategy tailored to the characteristics of their pension schemes. Pension institutions, in other words, have to follow the ‘prudent person principle’. Assets must be invested in the best interest of members and be widely spread at all times to guarantee the security, quality, liquidity, and profitability of the portfolio. Moreover, investment in shares and in risk capital should not be unduly restricted. Each Member State has the opportunity to subject occupational scheme institutions established within its jurisdiction to more detailed investment rules, but would not be able to prevent them from investing up to 70% of their portfolio in shares and corporate bonds and up to 30% in currencies other than those of the future pension liabilities. The Directive makes it possible for host Member States (where the company sponsoring the pension fund is located) to ask home Member States (where the pension institution is established) to apply quantitative rules to assets held by cross-border pension schemes. UNICE, the organisation of industrial and employers’ confederations of Europe, strongly favoured the ‘prudent person principle’, while the European Trade Union Confederation asked for more stringent
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regulation (according to the proposed “Code of good practice” defined in 1998). That code stressed the need for the participation of workers’ representatives in the management of pension funds (Esposito and Mum, 2004).

As far as its (potential) outcomes are concerned, the new legislation affects occupational pension institutions (second pillar provision) covering about 25% of the EU labour force and manages assets of around €2,500 billion (29% of EU GDP). As a consequence, the new legislation is likely to be very significant, especially where institutions for occupational retirement provision are common. Its potential impact leaves, however, a certain degree of freedom to the Member States. First of all, the Directive provides a general framework for the activities of occupational schemes. It does not try to require Member States to introduce specific arrangements, for example about the tax treatment of contributions, funds and benefits. However, it enables pan-European institutions to operate according to the Financial Services Action Plan for the years 1999-2005 (Arnot, 2004). This is expected to be one of the major foreseeable effects. Its goal is to optimise the conditions in which these institutions operate, and to create a framework for prudential supervision. To sum up, it will provide a “passport” to IORPs wanting to accede to the single market. Such a first step towards the harmonisation of (supplementary) pension institutions is thus limited and leaves Member States ample room for manoeuvre in its implementation.

All countries will implement the EU legislation in this field through their own legislative processes. It is worth stressing the different perspectives on the potential outcomes at national level. In countries like the UK, the Directive is expected to have a limited effect on actual barriers to a common system of occupational schemes, if not to be a further threat to the development of a single (and efficient) pension market (Thompson, 2004). As noted by a representative of the British National Association of Pension Funds, “new EU rules could have a huge consequence for British company schemes […] continuing to provide a defined benefit pension is a hugely costly undertaking for any supervising employer. We know a number of firms have closed their schemes to new members but our concern is that greater numbers will also close future accruals because of these extra-costs” (Steed,
2003). In other countries (e.g. Sweden), by contrast, the new rules are regarded as a key instrument to replace detailed national investment rules by a general principle of prudence with fewer restrictions on investing pension capital in private equity funds (Kullgren and Hogstrom, 2004).

1.2 The role of European institutions and actors in the legislative process

The legislative process is based on the key role of different players: the Council, the Commission and the Parliament. Moreover, the European Court of Justice plays a decisive role to ensure respect of the Treaty regarding (gender) equality and freedom of competition (Esposito and Mum, 2004).

As far as the occupational pension Directive is concerned, it was adopted at the end of a long process beginning with discussions dating back to the early 1990s (Pochet, 2003). Then, as from 2000, the EU took the final steps towards the adoption of new legislation. In October, the Commission adopted the proposal prepared by the Internal Market DG. According to the co-decision procedure, the Commission transmitted it to the Economic and Social Committee, to the Council and to the European Parliament (EP). The Council drew its conclusions in May 2001, while the EP held its first reading in July. An initial agreement on a common position was reached in June 2002 (the Council formally approved it in November). In March 2003, the EP adopted the text at second reading with some amendments. Finally the Council approved the Directive in May. In June 2003, the EP and the Council signed the definitive text.

An in-depth analysis of the legislative process reveals a more complicated and open interaction of actors, not limited to the EU institutions. As Math (2001) noted, in fact, various economic actors pushed for complementary social protection systems (usually embedded at national level) to be subject to European competition policy. This initiative was combined with that of the EU to create (and use) a broad network of interests providing knowledge about the issue.

In line with the recommendations of the High-level Group on the free movement of people (the Veil Group), for example, the Commission
set up a Pensions Forum which met for the first time in 2000. Its role is to help the Commission resolve problems linked with cross-border movement. It has indicated that the Commission is willing to increase the number of participants. It is composed of representatives of national governments and the social partners, as well as pension funds, insurance companies and investment companies, and finally fund members (Pochet, 2003).

That forum contributed to improving the dialogue between the Commission and the social actors. In June 2002, there was a first phase of consultation of social partners (European Trade Union Confederation, ETUC; Union of Industrial and Employer’s Confederations of Europe, UNICE; and European Association of Public Sector Employers, CEEP) on the portability of private pension rights. In the first part of 2003, during the legislative process, the ETUC criticised at different times the compromise reached by the Council and the Commission. It pressed the EP to include in the directive more obligations to inform not only members but also beneficiaries of pension funds, and to take into account the ETUC’s demand concerning the participation of social partners in determining strategic investment decisions (ETUC, 2003a). The final draft of the Directive took on board the ETUC request on information for fund beneficiaries, but not the one on their participation in the management of funds. In a broader sense, the European trade union movement reacted in a much more sceptical way to the increasing role of supplementary schemes. The ETUC Executive Committee argued that the adequacy of supplementary funds cannot be deemed satisfactory, in particular with respect to non-standard workers, and that “there is less or no solidarity in defined contribution systems” (ETUC, 2003b). Similarly, on the question of demographics, the Executive Committee criticised the EPC point of view that fully funded schemes can contribute to economic growth, while it says nothing about the current reduction in the value of financial assets (ETUC, 2003b).

Moreover, other interest groups and lobbies have been included in the forum. For example, the European Older People’s Platform (AGE) has been a member of the forum since 2001. AGE is a network of non-profit organisations of older people, involved in a range of policy and
information activities to put older people’s issues on the EU agenda. It is co-financed by its members and by the European Commission (AGE, 2003).

On 15 September 2003, the Commission launched a second phase of social partner consultations on the portability of supplementary pension rights. The ETUC adopted a resolution in October. In line with the first consultation, the ETUC came out in favour of a European initiative to eliminate obstacles to the mobility of workers. This should consist first of a legislative initiative related to fiscality and other obstacles to the transfer of pension rights, and then of a European framework agreement more focused on the legitimate role of social partners in managing occupational funds, the defence of national specificities concerning pension systems, equal treatment of mobile workers, etc. The Confederation thus gave priority to the social dialogue at the European and national levels (ETUC, 2003c).

At the parliamentary level, therefore, the Pension Forum of the European Parliament was activated in 2003, at the initiative of Dutch MEPs (2). It is a platform for dialogue aimed at promoting the analysis and knowledge of first-pillar and funded occupational schemes, through the exchange of information between the Commission (DG Internal Market, DG Employment and Social Affairs, and DG Economic Affairs) and representatives of insurance institutions. It is mainly sponsored by pension funds for civil servants in the Netherlands. The European Insurance and Reinsurance Federation (CEA), the European Association of Paritarian Institutions of Social Protection (AEIP), and the EFRP are part of the steering committee of the forum (Esposito and Mum 2004). The CEA (European Insurance and Re-insurance Federation) brings together insurance companies from all 25 Member States and 5 non-EU countries. The European Association of Paritarian Institutions (AEIP) consists of paritarian institutions (where both employers’ and employees’ representatives have a managerial role) providing pension benefits and includes members from 5 EU states and Switzerland (Natali, 2004).

Private organisations are thus active in the field to obtain amendments and advance their interests – which are not always identical, as can be seen by the tension between the CEA and the EFRP (see Pochet 2003; Esposito and Mum 2004) over the Commission’s proposal on the activities of occupational retirement funds. In a certain sense, the organised interests have anticipated EU enlargement through the direct involvement of representatives of new members (and non-members as well). In 2003, the EFRP launched a second report proposing a strategy to deal with the emergence of pan-European occupational funds based on national sections (EFRP, 2003). The European Federation of Fund Managers (FEFSI) is another actor that tried to influence the EU decision-making process. It is the pan-European umbrella organisation of the investment funds industry in 19 EU Member States (including Poland, Hungary, Slovakia and Czech Republic), Norway, Liechtenstein, Switzerland and Turkey. Its annual report described Directive 2003/41 as a “[…] significant step forward towards a single market for financial services, (but) it did not reach what should have been its main goal, the creation of a true level playing field for all financial institutions. (Thus) FEFSI and its members will have to monitor carefully the transposition of the Directive into national legislation and encourage the national legislator ‘to go the right way’[…]” (FEFSI, 2003).

Another more subtle strategy adopted by private interests is to legitimise their demands by producing, or referring to, academic studies in the field. In this context, the role of the European Round Table of Industrialists (ERT), a group of about forty senior industrialists, is significant. The ERT set up a working party which produced a document entitled “European pensions, an appeal for reform—Pension schemes that Europe can really afford” published by the De Benedetti Foundation (ERT, 2000) and widely publicised in the media. The Foundation has links with leading researchers and university staff, and its work is presented as independent research. This argument adopted by one sector of European employers is in strong contrast to UNICE, which brings together national employers’ federations and has kept a very low profile on this issue. It was only in November 2001 that UNICE adopted a ‘Strategy Paper on Sustainability of Pensions’. UNICE points out clearly that ‘there is no single European model of pension system. A “one size fits all” solution is neither desirable, nor appropriate or feasible across the EU’. The EU should, therefore, play a fairly modest role.
A further complication derives from the new procedures to improve the effectiveness of EU legislation, and from the persistent role of the Court of Justice. On the first point, the Union adopted a new package of measures establishing a new committee structure to respond more efficiently to developments in the financial market and to ensure the consistent implementation of rules across the EU (CEC, 2003). In November 2003, new committees with regulatory and supervisory tasks were thus established. The role of the regulatory committees is to advise the Commission on technical implementing measures for directives laying down the framework principles to be followed on a given issue (that is the case of Directive 2003/41). In the case of supplementary pensions, the European Insurance and Occupational Pensions Committee (EIOPC) is part of the revised decision-making structure. This first level of committees is then supplemented by a second level of advisors. The Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS), at that further level, has the task of giving technical advice to the EIOPC in order to ensure the implementation of EU law in daily supervisory practice in the Member States.

As indicated above, the Court of Justice (ECJ) played an important role. Basic public pensions, like other social security mechanisms, are not subject to competition policy. Third pillar provision, however, is bound by competition rules. For other supplementary retirement income schemes (the second pillar), the situation is less clear. However, the Court of Justice is increasingly inclined to pronounce on this subject, and it tends to reinforce the liberal economic logic of the Rome Treaty (Pochet, 2003). The two most recent ECJ decisions concerned restrictions on cross-border contributions and payments. They are deemed contrary to the fundamental principles of the Treaty. The Danner case (October 2002) concerned the tax treatment of contributions paid by non-Finnish persons (resident in Finland) to funds located outside Finland. The Court ruled that the Finnish tax authority decision – that contributions paid to a German pension scheme by a German person resident in Finland would not be subject to the same tax relief as would have been possible in the case of a Finnish resident – was contrary to Article 59 of the Treaty of Rome. The Court rejected the argument put forward by the Finnish authorities that contributions to foreign arrangements...
should be taxed because of the lack of a guarantee of being able to tax pensions when they come into payment (Thompson, 2004).

The second case (the *Skandia case* of June 2003) was related to contributions paid to an occupational scheme issued by a non-Swedish company. Under Swedish legislation, in fact, contributions to an insurance company located in Sweden are tax-deductible, while contributions to a company located outside are not. The Court rejected the argument of the Swedish authorities that the different tax-treatment was to maintain effective fiscal controls and to preserve the integrity of the tax base. The ECJ then stated that there were no compensatory measures to offset the disadvantage suffered by an employer who chooses a foreign insurer (Thompson, 2004).

2. **Soft co-ordination on pensions: between EU enlargement and the streamlining process**

The Stockholm Council in 2001 officially launched the “soft” governance on pensions on a three-year basis (2001-2003). The process involved the definition of some major policy guidelines (June 2001), then the adoption of a more precise set of policy objectives (December 2001), the adoption of National Strategy Reports by the Member States (September 2002), and the Joint Report on safe and sustainable pensions by the Commission and the Council (March 2003) (see de la Porte, 2003). After this first cycle of policy-making, a new phase started, a new round of national reports being expected for July 2005 (see Table 1 for the next steps in the Pensions OMC).³

Various European actors intervened to improve the definition of goals and strategies and to assess policies implemented by Member States.

³ Different OMCs deal in fact with the pensions issue. The European Employment Strategy on the one hand addresses active ageing (in other words the need to improve employment rates among the elderly active population), while the OMC on Social Inclusion addresses the problem of poverty in old age (Natali, 2004).
In the following pages we will briefly summarise the main events of 2004. Then, we will show how the key actors in the process (the Commission and the Council) interacted. We will try to assess the outcomes of their activity, and its link with hard regulations.

2.1 Strategic and “day-to-day” evolution of pensions OMC in 2004

In 2004, the OMC process was developed around three different, complementary and partly overlapping dimensions. The first dimension was to finalise the work in the OMC process on pensions in advance of the Spring European Council. To contribute to the “day-to-day” functioning of the OMC on pensions, the European institutions first dealt with the problem of indicators. As demonstrated by recent contributions to the literature (Salais, 2004; Natali and de la Porte, 2004; Peña Casas, 2004), the definition of “social” indicators for the assessment
of the adequacy of pension provisions is decisive for the improvement of the OMC in this policy sector. Solidarity objectives, mainly of a qualitative nature, are difficult to quantify, assess and compare (much more so than economic indicators). These difficulties are mainly due to structural differences in pensions systems and to the multitude of factors that would need to be taken into account, many of them outside of the pension system, such as (the adequacy of) health care provision.

According to the agenda proposed at the beginning of the year, the Indicator Sub-Group (ISG) of the Social Protection Committee (SPC) has published a series of interim reports dealing with this challenge. Much of the effort of the ISG focused on the definition of theoretical replacement rates (the ratio of an individual's average pension to his/her average income before retirement), as a correct indicator to measure the income situation of the elderly population (SPC, 2003a and 2004a). A further aspect has been related to assessing the role of supplementary pillars in improving the adequacy of pension systems (SPC, 2004b). The definition of such information proved particularly difficult. As argued by Peña Casas (2004), the long-running debate on the definition of viable data on pensions has taken on some particular aspects. On the one hand, the action of the SPC has been highly related to national procedures. On the other, hypotheses for the definition of projections as to the adequacy of pension programmes have been heavily based on statistics from EU bodies other than the SPC. The Commission proposed partly overcoming these difficulties through the compilation of the latest available data and indicators from EU sources used for the National Strategy Reports. This is expected to allow Member States to assess their own position relative to others and to explain the differences (CEC, 2004d). This activity on indicators was finalised for the Spring Council and then for the Conference on “Second Pillar Pension Schemes between Solidarity and Free Market” held under the Dutch Presidency in November.

The second dimension was related to EU enlargement and, as stressed by the Social Protection Committee (SPC), the “need to give new Member States direct experience of the processes of policy cooperation on social inclusion and social protection” (SPC, 2004a). The new countries have been observers within the relevant committees (e.g. the SPC) since May 2003. In
addition, they have been engaged in bilateral work with the Commission in order to introduce more co-operation on social policies. Bilateral seminars have been organised to help identify present and future challenges around pensions and to share information concerning reforms implemented in recent years. This was to allow new Member States to participate fully in the second round of the pensions OMC from 2005 (CEC, 2004a).

Broadly speaking, the EU dealt with the enlargement process with the aim of revising its social agenda for the coming years. Consequently, the Commission established the High Level Group on the future of social policy in the enlarged EU. Its mandate was to identify the main challenges, opportunities and pathways for action over the period 2006-2010. In May 2004, the group completed a report for the Commission. It identifies the EU of 25 as a major challenge for the next social agenda. The main related issues were defined as the old Member States’ fears of widespread social dumping, and the apprehensiveness of new Members about coping with the challenges resulting from the transformation of their societies and economies. The OMC, in this changing context, is defined as a promising tool able to foster convergence around some common priorities while respecting national and regional diversities. The group recommended the OMC as a means of providing a comprehensive approach to steer reform to cater for old and emerging new risks (CEC, 2004c).

The “Guidance Note for the Preparation of the 2005 National Strategy Reports on Adequate and Sustainable Pensions” was thus consistent with the broad aim of promoting the integration of new Member States in the co-ordination procedures. In October, DG Employment and Social Affairs presented the preliminary version of the Guidance Note to the SPC and the EPC for adoption. The note aims to provide information to old, and particularly new, countries on the preparation of the new National Strategy Reports (NSRs) to be submitted by July 2005. Moreover, the DG defined the criteria which the Commission has to adopt to analyse

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4 In December 2002, for instance, an international conference on the “Modernisation of social protection systems in Candidate Countries” took place in Brussels (Natali, 2004).
and assess them. This report defined a common format to facilitate the co-operation, the exchange of information, and the public debate within and among the Member States via the study of one's own country situation with reference to that in other countries and at the EU level (CEC, 2004d).

The third dimension, lastly, was consistent with the progressive implementation of the streamlined policy co-ordination (of social inclusion and social protection) along the lines agreed in the Council’s Conclusions of October 2003. The first step was the proposal of an “Updated and Revised Timetable of Work for 2004 to 2006” based on the programme annexed to the Commission’s Communication of May 2003. In preparation for streamlining, particular emphasis was put on the evaluation of the first years of implementation of OMC procedures. In January 2005, the Commission will propose a draft questionnaire to be sent to Member States as well as to other key stakeholders in the social protection field (e.g. EU-level social partners, EU-level NGOs and EU-level associations representing regional and local authorities) (CEC, 2004f). As proposed by the Commission, “the evaluation of the OMC in the fields of pensions and social inclusion is intended to inform the decision to be taken by the European Council of Spring 2006 on the establishment of a full streamlined process” (CEC, 2004e). The Commission will then take stock of the responses and on this basis present an evaluation report at the end of 2005.

The preliminary version of the new Joint Report on Social Protection and Social Inclusion (to be discussed by the SPC at its December meeting) can be defined as the result of the first broader co-ordination of social policies. The draft proposed by the Commission already focused on the key targets for the future evolution of the European co-ordination process, and for the further reform of old-age programmes (CEC, 2004e). As to pensions, the report again proposed the three broad guidelines originally defined in the OMC process: financial sustainability, social adequacy, and modernisation (5). The Commission

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(5) The report is in fact based on the Joint Report on adequate and sustainable pensions of 2003 and not on the new national reports.
stressed that future pension systems can provide adequate benefits only if they are financially viable. A major challenge is thus to obtain the long-term sustainability of pension programmes without jeopardising their effectiveness. To achieve such mixed and ambitious goals, the EU puts forward two main policy responses. Firstly, it appears crucial to raise the effective retirement age. Secondly, the increasing role of supplementary private programmes was adopted as a common goal. In both of these areas, the report notes that EU countries have been aware of the consequences of demographic ageing and consequently have achieved significant (but not decisive) progress. As far as the third axis of the pensions OMC is concerned, the modernisation of social protection programmes, the report identifies three different lines of action, on changing employment patterns, the improvement of gender equality and the provision of sound information to individuals to help them make difficult choices about their retirement (CEC, 2004e). From a procedural viewpoint, the report stressed the importance of maintaining key priorities to help address the most pressing issues. The Member States and the Commission are expected to assess how national strategies can be made more effective by the use of targets, benchmarking, etc. and to consult all the stakeholders on what further action could be needed to deal with social challenges. In this context, the streamlining process and the extension of co-ordination to include health-care should be used to create a stronger focus on implementation and synergies across the entire area.

If we compare the hard legislation mentioned above with the soft governance, they prove consistent with each other. Even if Directive 2003/41 was adopted as part of the Financial Services Action Plan aimed at strengthening the EU financial industry, its potential outcomes are in line with the EU Social Agenda (Gora and Kernan, 2004). The attempt to create a common framework for institutions providing occupational pensions is in line with objective 8 of the Open Method of Co-ordination (as indicated by the 2003 Joint Report on adequate and sustainable pensions). The EU in fact intends to ensure, through appropriate regulatory frameworks and through sound management, that private and public funded pension schemes can provide benefits with the required efficiency, affordability, portability, and security (Council of the European Union, 2003). This is with a view to a more
complicated architecture of pension arrangements that mix an (eroded) public pillar with supplementary private programmes. Directive 2003/41 is consistent with objectives 9 (adapt pensions to more flexible employment careers granting at the same time the access and the portability of pension rights) and also 11 (make pension systems more transparent and provide beneficiaries with information). The recent documents proposed in the OMC reinforced this general coherence. As argued by Palier (2003), the European agenda on pensions is thus consistent with the argument about the progressive erosion of public coverage and the parallel improvement of private programmes (implying more financial risks for their beneficiaries and higher contributions to pay).

2.2 The role of the European institutions and actors in the pensions OMC

The OMC process consists of a constellation of institutions each with a particular role and task. Here, we refer to two institutions that represent the key actors in the pension sector at European level: the Commission and the Council. Both have individual contributions to make to defining goals and guidelines, and to improving the effectiveness of the process. Moreover, they also share some responsibilities for the implementation of the co-ordination procedures (de la Porte and Pochet, 2002).

The Commission has a key role of co-ordination of the other actors interacting in the policy-making process. It proposes ideas and political options that will be discussed later by the other European institutions. Even if it is not explicitly related to the Open Method of Co-ordination on pensions, the report for the annual Spring European Council represents one of the cornerstones of the Commission's activity in the wake of the Lisbon Strategy. The 2004 Report, ‘Delivering Lisbon. Reforms for the Enlarged Union’, was adopted in February and outlined the main priorities for Member States (see Table 2 for a brief summary of the main events of the year). It emphasised, moreover, the progress made in the first four years of the Agenda for a competitive job-creating and knowledge-based economy characterised by social cohesion.
Among the key priorities (together with improving investments and strengthening productivity), the promotion of active ageing was included to ensure higher employment rates and more viable public finances. In line with the first aim, the report showed the reduced impact of strategies adopted in some Member States; and consequently the need to take more action to promote active ageing as the key measure to implement in the coming years. According to the second goal, the Commission stated that “more has to be done to make national
public finances viable in the medium and long term [...] so as to cope with the demographic trend’. To foster active ageing of elderly workers, the Commission proposed acting on four fronts (combined with pension reforms): removing disincentives for workers to work longer, discouraging early retirement, stimulating life-long learning, and improving working conditions (CEC, 2004a).

A further step stressing the importance of pension programmes (and their reform) for the development and modernisation of Europe is represented by the Scoreboard on Implementing the Social Policy Agenda adopted by the Commission at the beginning of March (CEC, 2004b). This communication to the Council, the Parliament, the Economic and Social Committee and the Committee of the Regions consisted of the monitoring of commitments and progress on some key issues. The modernisation of social protection was among them. Here, as well as in the report for the Spring Council, the need to bring pension spending under control was emphasised. In particular, the main priority to be implemented was to use the window of opportunity for reforms, before demographic ageing alters the age composition and thus the electorate.

As mentioned in the previous section, two other documents by the Commission were specifically geared to enhancing the effectiveness of the OMC on pensions especially in an enlarged EU: the already-mentioned Guidance Note for the Preparation of the 2005 National Strategy Reports on Adequate and Sustainable Pensions, and the Outline Draft of the Joint Report on Social Protection and Social Inclusion. The latter, in particular, proposed two policy responses to the ‘pension problem’: the raising of the effective retirement age, and the major role of privately managed schemes. This is consistent with the broad strategy of the EU in the past year.

The Council is usually defined as the other pillar of the OMC architecture (de la Porte and Pochet, 2002). It is a key actor providing technical knowledge and information on individual policy fields, especially through the work of its committees. The Social Protection Committee, in particular, has proved a decisive actor for the improvement of both the strategic and the “day-to-day” working of the OMC process. The work programme endorsed by the SPC at the beginning of 2004 clearly defined the main lines of action for that year.
The SPC acted to improve the technical basis for the other EU institutions’ activity. Firstly, it has worked on a study based on questionnaires completed by the Member States on how pension policies support the move to longer working lives. Secondly, as mentioned above, the Committee (especially the ISG) tried to improve knowledge about the adequacy of public and private pension programmes. In both these respects, the SPC co-operated with other actors (the Commission and the EPC).

From a normative viewpoint, the Council under the Dutch Presidency clearly pushed for a stepping-up of the role of supplementary pensions. In November, the Dutch Ministry of Social Affairs in co-operation with the Commission and national organisations of social partners and insurance companies organised a Conference on solidarity and the free market in second pillar schemes. The potentially growing role of occupational schemes was stressed as a solution to current challenges affecting old-age programmes. The conference was the occasion for academic actors close to the “liberal” viewpoint on pension funds to put forward their arguments in favour of a further growth of private schemes in pension systems (6). As to the social partners and their role in the OMC, it is particularly limited (especially if compared to the Social Inclusion OMC and the European Employment Strategy; de la Porte and Pochet, 2002). Their influence operates mainly through consultation by the Social Protection Committee. As for the ETUC, it created a working group on social protection in 1996. In February 2003, it published a communication on the Joint Report on pensions. It was a precise critique of some of its parts: e.g. the risk of subordination of the social goals to a pure economic logic, and the need to pay more attention to the financial viability of private supplementary schemes (and not only of the public pillar) (ETUC, 2003b).

What is more, the ETUC has set up another ad hoc working group on Pension Funds. The European trade unions have also tried to strengthen their co-operation with social NGOs. In 2001, the Platform

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of European Social NGOs and the ETUC adopted a joint communication on promoting the social dimension of the EU and in particular social protection (Natali, 2004). A further aspect which may improve the participation of interest groups in the pensions OMC is the reduced tensions between and within social actors. After a period of conflict before the turn of the century, the European social partners (ETUC, UNICE/UEAPME and CEEP) sent a lettre commune to the Commission on social protection and the streamlining of OMCs in this field in September 2003. On that occasion, the social actors declared themselves to be in favour of rationalisation, but stressed the need to take the specificity of each policy into account. Moreover, they called for enhanced inclusion of the social partners in the co-ordination process, and in the peer review phase in particular (ETUC, UNICE, UEAPME and CEEP, 2003). If compared to the role of liberal think-tanks favourable to the erosion of the public pillar, the social actors proved less effective in promoting closer co-operation with intellectuals and academics. The trade unions have not set up round tables like the ERT to define and promote an alternative agenda on these issues.

Conclusions

The analysis of both soft co-ordination of national pensions and hard legislation on occupational schemes has proved to be an interesting means of assessing the current role of EU institutions in that field. As regards the normative content of EU policy-making, two different but interrelated goals are increasingly important. The employability of the elderly, and the growing role for supplementary pension funds, are both expected to contribute to more sustainable social protection systems in the future. The latter point, in particular, has attracted attention from the European institutions. The Commission expressed its favourable attitude towards the development of occupational and individual schemes in the draft outline of the Joint Report on Social Protection and Social Inclusion, and in the Report for the Spring Council. The Council, especially under the Dutch Presidency, emphasised that strategy. In this context, the Social Protection Committee devoted part of its activity last year to improving knowledge about the adequacy of private (second and third) pillars. This seems consistent with the previous action of the Committee and its socially-oriented arguments.
The SPC (together with the Commission) stressed the need to improve the EU institutions’ technical knowledge as a decisive step towards assessing the viability and the adequacy of national pensions. According to the main preoccupation expressed in the scientific literature, the need for “better” indicators is at the top of the Committees’ agenda.

The interest in the growing importance of private institutions proved to be closely related to the other policy-making process under scrutiny in this chapter. Legislative rules approved in 2003 to regulate supplementary pension fund institutions are expected to influence (and favour) the development of a pan-European market in occupational schemes. The role of the different EU institutions was to reduce the barriers to that growth. The overall strategy is thus consistent with a reduced role for the public pillar and the consequent rise in resources to be used on financial markets through private pension funds. Despite the ETUC’s efforts, Directive 2003/41 is mainly concerned economic and financial issues while “social concerns” are not clearly expressed.

From a procedural point of view, then, “hard” governance proved much more open than the Open Method of Co-ordination in several respects. Experts are incorporated into the legislative process and also into the implementation phase. The new committee structure, based on different-level advisors (the EIOPC and the CEIOPS), aims to give more precise technical advice to the Commission on the adoption of implementing measures for directives (e.g. the one on occupational pensions). As regards the participation of social partners and civil society, therefore, the legislative process offers various opportunities. The Pensions Forum of the Commission, for example, has been the locus for social actors’ representatives and for social NGOs to express their opinions about the harmonisation of rules on the second pillar, and especially on the mobility issue. The Pension Forum of the European Parliament has constituted a further platform for dialogue and the exchange of information between the EU and representatives of insurance institutions. A number of private organisations are thus already part of the policy-making process and are able to intervene at different stages to defend the interests of their membership. Lobbies of fund managers and other economic and financial interests proved particularly effective in participating in the process and in involving academic experts.
The “soft” mode of governance, by contrast, has demonstrated less broad-based participation through the Social Protection Committee. The social partners have on several occasions regretted this lack of participation both at the European and at the national level. A more integrated approach by trade unions and civil society (as demonstrated by the joint communication of the ETUC and the European Platform of social NGOs in September 2003), together with a less adversarial relationship between social actors, seems to favour a less restricted network for the co-ordination of national pension systems.

Finally, as regards the enlargement process, the open nature of the legislative process allowed representatives of the organised interests in new Member States (and in non-members) to become involved, well before 1 May 2004. In the OMC process, the new countries are increasingly well integrated, as proved by their involvement in drawing up the new national reports for 2005.

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The European Union and pensions: recent steps in “hard” legislation and “soft” co-ordination


Social developments in the European Union 2004
Overview of social policy case law of the European Court of Justice

Introduction

Throughout 2004, discussions were monopolised by constitutional matters and the long-awaited enlargement of the European Union. Whilst attention was focussed on the appointment of the ten new Commissioners, the Court of Justice of the European Communities (CJEC) devoted part of the year to adapting to the requirements of enlargement. This approach, both discreet and thoughtful, is entirely suited to the nature of the Court, which rarely produces sensationalist rulings. The European citizen generally follows high-profile cases such as Bosman in 1995 on restrictions on professional footballers or Kreil in 2000 on access to the German Federal Army for women. The Court nevertheless plays a decisive role beyond these cases in the different areas of European integration, which has often earned it the title “driving-force of integration”. The self-assertive phase embarked on by the Court and mentioned in the previous version of Social Developments in the European Union continued in 2004. The Court has continued to reaffirm and elucidate the principles stemming from its previous rulings which, in the light of the number of cases pending before the Court, is a very useful process. The following pages will deal only with rulings concerning social policy, and in particular three themes which we regard as very important: equal treatment for men and women, social security in Community law, and the rights and obligations of employees and employers. For each theme, only those rulings which are of particular interest will be discussed and an exhaustive review will not be attempted. Care will be taken, however, to inform the reader of other disputes settled by the Court which may be of interest.
1. Equal treatment for men and women

1.1 The entitlement of transsexuals to a survivor’s pension: K.B. v. National Health Service Pensions Agency (1)

National legislation which, by failing to recognize the new sexual identity of transsexuals, makes it impossible for them to marry, is in breach of Community law if the consequence is to deprive them of entitlement to a survivor’s pension.

K.B., a nurse, worked for the National Health Service (NHS) for twenty years, during which time she contributed to the NHS pension scheme which provides for the payment of a survivor’s pension to the surviving spouse (that is to say the person married to the affiliated person). K.B. has shared an emotional and domestic relationship for a number of years with R., who has undergone a surgical gender reassignment, changing his sex from female to male. K.B. wishes R. to be able to benefit from the widower’s pension. United Kingdom legislation prevents a transsexual from marrying under his new sex because it is impossible to amend the birth certificate which states the original sex. Moreover, the law regards any marriage in which the spouses are not a man and a woman as null and void. Against their wishes, therefore, K.B. and R. have not been able to marry, which prevents R. from receiving the survivor’s pension. K.B. brought an action before the British courts because she believes herself to be the victim of discrimination based on sex in respect of pay. She believes that the notion of “widower” should be interpreted in such a way as to encompass the surviving member of a couple who would have achieved the status of widower had his sex not resulted from surgical gender reassignment. The Court of Appeal referred this question to the Court of Justice.

According to the Court, a survivor’s pension paid under an occupational pension scheme falls within the scope of Article 141 EC and Article 1 (1) sub-paragraph 1 (2) of Directive 75/117 concerning the

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1 CJEC, Case C-117/01, K.B., ruling of 7 January 2004, not yet published at the time of writing these lines.

2 Article 141 EC stipulates “1. 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. 2. […] "pay" means the ordinary basic or minimum wage or salary and any other consideration […]

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approximation of the legislation of Member States concerning the application of the principle of equal pay for men and women (Council of the European Communities, 1975) which prohibits all discrimination based on sex over pay.

The Court points out that the decision to restrict certain benefits to married couples, while excluding all persons who live together without being married, cannot in itself be considered as being prohibited by Community law because it constitutes discrimination on the grounds of sex. Whether the claimant is a man or a woman is irrelevant for the purposes of awarding the survivor’s pension. However, there is inequality of treatment which, although it does not directly undermine enjoyment of a right protected by Community law, affects one of the conditions for the grant of that right. This inequality of treatment relates to the capacity to marry, which is a necessary precondition for the grant of a widower’s pension. Indeed, by comparison with a heterosexual couple where neither party’s identity is the result of gender reassignment surgery and the couple are therefore able to marry, a couple such as K.B. and R. are quite unable to satisfy the marriage requirement. The fact that it is impossible for them to marry is due to the United Kingdom rules concerning marriage and birth certificates.

Recalling that the European Court of Human Rights has held that the fact that it is impossible for a transsexual to marry according to his new sexual identity was a breach of his right to marry under Article 12 of the ECHR, the Court notes that the legislation at issue must be considered as being in principle incompatible with Community law. However, given that it is for the Member States to determine the conditions under which legal recognition is given to a change of gender, the Court leaves it to the national court to determine whether a person in K.B.’s situation can rely on Community law in order to gain recognition of her right to nominate her partner as the beneficiary of a survivor’s pension.

which the worker receives directly or indirectly in respect of his employment, from his employer”. The first sub-paragraph of Article 1 (1) of the Directive states: “The principle of equal pay for men and women […] means, for the same work or for work to which an equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration”.

The United Kingdom had already been criticised on two occasions by the European Court of Human Rights on 11 July 2002 (3) for having denied a transsexual a change to his birth certificate thus prohibiting his marriage to a person of his former sex. After these two rulings, the United Kingdom government had promised to change the legislation and indeed did so. The Gender Recognition Act 2004 grants legal recognition of their gender reassignment to transsexuals. It provides for a sex recognition certificate to be issued by a special panel in two cases: where either the claimant suffers from a medically diagnosed sexual dysphoria, has lived according to his/her new sex for two years and intends to continue to do so until death, or where he/she has legally changed sex under the law of a foreign country featuring in the list drawn up by the relevant minister. The issuing of such a certificate involves a change in the person’s legal status and permits him/her to marry a person of the opposite sex. The law is due to enter into force on 4 April 2005.

1.2 The right to maternity leave: Gómez v. Continental Industrias del Cauchó SA (4)

A female worker must be able to take her annual leave during a period other than her maternity leave even if the latter coincides with the period generally established by a collective agreement for annual leave for staff as a whole.

Ms Gómez, an employee at Continental Industrias, was on maternity leave from 5 May until 24 August 2001. This period coincided with one of the periods for annual leave in her workshop, laid down by collective agreement. When she nevertheless applied to take that leave after her maternity leave, Continental Industrias did not allow her request. Ms Gómez bought proceedings before the Juzgados de lo Social de Madrid. The referring court referred a question to the Court of Justice in respect of Directives 93/104 concerning the organisation of working time (Council of the European Union, 1993), 92/85 on the protection of

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3 ECHR, rulings of 11 July 2002, Christine Goodwin v. United Kingdom and I. v. United Kingdom, not yet published in European Court Reports.

4 CJEC, Case C-342/01, Gómez, ruling of 18 March 2004, not yet published at the time of writing these lines.
pregnant workers (Council of the European Communities, 1992) and 76/207 concerning equal treatment for men and women (Council of the European Communities, 1976).

The Court began by pointing out that paid annual leave of at least four weeks, enshrined in Article 7(1) of Directive 93/104, is a particularly important principle of Community social law. Its aim is to allow the worker actual rest. The purpose of maternity leave is different: the latter is intended to protect the woman's biological condition during this period as well as to protect the special relationship between the woman and her child following childbirth. Furthermore, Article 11 (2) (a) of Directive 92/85 provides that, in principle, the rights connected with the employment contract must also be assured in a case of maternity leave: including the right to annual paid leave. Finally, the determination of when annual leave is to be taken falls under Article 5 (2) (b) of Directive 76/207. The Directive at the same time permits the adoption of provisions intended to protect women in relation to pregnancy and maternity. However, these provisions must not give rise to unfavourable treatment regarding working conditions. It follows that Community law requires a female worker to be able to take her annual leave during a period other than the period of her maternity leave, even if the period of maternity leave coincided with the general period of annual leave fixed, by a collective agreement, for the entire workforce.

We shall briefly mention the principles brought out by the Court in other disputes. In Alabaster, the Court decided that the former Article 119 (new Article 141) of the Treaty must be interpreted as requiring that any pay rise awarded between the beginning of the period covered by the reference pay and the end of the maternity leave must be included among the pay components taken into account in calculating the amount of such pay. This requirement is not limited to cases where the pay rise is back-dated to the period covered by the reference pay. In the absence of any Community legislation in this sphere, it is for the
competent national authorities to determine how, in compliance with all the provisions of Community law, any pay rise awarded during or before maternity leave must be included among the pay components used to calculate the pay due to a worker during maternity leave (6).

In *Elsner-Lakeberg*, the Court ruled that Community law was contravened by a national provision according to which part-time teachers did not receive any remuneration for additional hours worked when the additional work did not exceed three hours per calendar month, if that different treatment affects considerably more women than men and if there is no objective unrelated to sex which justifies that different treatment or it is not necessary in order to achieve the objective pursued (7).

The Court also decided that Community law must be interpreted as precluding a national provision which reserves the exemption from the age limit for obtaining access to public-sector employment to widows who have not remarried and are obliged to work, excluding widowers who have not remarried and are in the same situation (8). Readers interested in this issue should also consult the *Schneider*, *Haackert*, *Bais* (9) and *Hlozek* (10) rulings.

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6 CJEC, Case C-147/02, *Alabaster*, ruling of 30 March 2004, not yet published at the time of writing these lines.

7 CJEC, Case C-285/02, *Elsner-Lakeberg*, ruling of 27 May 2004, not yet published at the time of writing these lines.

8 CJEC, Case C-319/03, *Briheche*, ruling of 30 September 2004, not yet published at the time of writing these lines.

9 CJEC, Case C-380/01, *Schneider*, ruling of 5 February 2004; CJEC, Case C-303/02, *Haackert*, ruling of 4 March 2004; CJEC, Case C-284/02, *Bais*, ruling of 8 November 2004, not yet published at the time of writing these lines.

10 CJEC, Case C-19/02, *Hlozek*, ruling of 9 December 2004, not yet published at the time of writing these lines.
2. Rights and obligations of employees and employers

2.1 Obligation to inform employees in Community-scale groups of undertakings for the purposes of establishing a Works Council: Kühne & Nagel (11)

The obligation to provide information to employees of Community-scale groups for the purposes of establishing a European Works Council cannot be evaded by locating the central management of the group outside the European Union.

Kühne & Nagel AG & Co. KG is part of a group of Community-scale enterprises Kühne et Nagel whose parent company is established in Switzerland and in which attempted negotiations with a view to establishing a Works Council did not succeed. Council Directive 94/95 (Council of the European Union, 1994) provides for the establishment of European Works Councils for Community-scale enterprises or groups of enterprises. When the central management of a group is located in a third country and has no designated representative in one of the Member States of the European Union, the management of the enterprise within the group employing the greatest number of employees in one of the Member States, in other words, the deemed central management, is obliged to make arrangements allowing for the establishment of a European Works Council. In this case, it was for the German member of the group Kühne et Nagel to take on this role.

The German management, without disputing that it was under an obligation to provide information to the German works council, stated that it could not perform its obligation because it did not have this information and the central management located in Switzerland refused to supply it. The dispute was brought before the German courts, and the Bundesarbeitsgericht, to which the case was referred on final appeal, referred the case to the Court of Justice for an elucidation of the obligation to provide information set out in Article 1(2) of the 1994 Directive.

11 CJEC, Case C-440/00, Kühne & Nagel, ruling of 13 January 2004, not yet published at the time of writing these lines.
The Court pointed out that the aim of the Directive is to ensure that the employees of Community-scale undertakings are properly informed and consulted by a system of negotiations between central management and employee representatives when decisions which affect them are taken in a Member State other than that in which they are employed. The Court affirmed that, in order for this aim to be achieved, it is essential that the employees concerned be guaranteed access to information enabling them to determine whether they have the right to demand the opening of negotiations between central management and employee representatives for the setting up of a European Works Council. Such a right is a necessary prerequisite for determining whether a Community-scale undertaking or group of undertakings exists, which is itself a precondition for the setting up of a European Works Council or of a transnational procedure for informing and consulting employees. When the central management is located outside the European Union, the responsibility for supplying employee representatives with the information essential to the opening of such negotiations for the setting up of a European Works Council falls to the deemed central management located within the Union. Given the need for the system of transnational information and consultation which the Directive seeks to establish to function properly, if the deemed central management does not have the information essential for the opening of negotiations on the setting up of such a Council, it must demand the essential information from the other undertakings belonging to the group located in the Member States. Moreover, the managements of the other undertakings belonging to the group which are located in the Member States are obliged to provide the deemed central management with the said information in their possession. Finally, the Member States must, whilst being mindful of the undertakings’ interests, ensure that adequate administrative or judicial procedures are in place to enable the obligations deriving from the Directive to be enforced. The information to be supplied under the Directive encompasses information on the average number of employees and their distribution across the Member States, the establishments of the undertaking and the group undertakings, and the structure of the undertaking and the undertakings of the group, as well as the names and addresses of the employee representatives who might participate in the setting up of a special negotiating body or the establishment of a European Works Council. It
is for the national court to determine whether, in the present case, this information is essential for the opening of negotiations on the setting up of a European Works Council. The Court confirmed these principles in *ADS Anker*, a similar case on which it ruled on 15 July 2004 (12).

### 2.2 Organisation of working time: Pfeiffer et al. v. Deutsches Rotes Kreuz (13)

For emergency workers working for an emergency medical service the maximum weekly working time, including periods spent on call, should not exceed 48 hours. Derogations to this principle are only valid if the worker has given consent individually, expressly and freely.

Mr Pfeiffer and the other applicants before the national court are, or have been employed as, emergency workers by the *Deutsches Rotes Kreuz* (German Red Cross), a private law institution which *inter alia* manages the land-based emergency service carried out by means of ambulances and emergency medical vehicles. In the various contracts of employment, the employer and employees apply a collective agreement according to which the average weekly working time of the employees, taking account of their obligation to provide an on-call service of at least 3 hours per day on average, was extended from 38.5 hours to 49 hours. During these on-call periods, the emergency workers concerned must make themselves available to their employer at the place of employment and must remain continuously alert in order to be able to act immediately should the need arise. Before the *Arbeitsgericht Lörrach*, Mr Pfeiffer and his colleagues sought to confirm that their average weekly working time should not exceed the limit of 48 hours provided for in Directive 93/104/EC concerning certain aspects of the organisation of working time. This court stayed proceedings in order to refer several questions for a preliminary ruling on this subject to the Court of Justice.

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12 CJCE, Case C-349/01, *ADS Anker*, ruling of 15 July 2004, not yet published at the time of writing these lines.

13 CJEC, Cases C-397/01 to C-403/01, *Pfeiffer c. a.*, ruling of 5 October 2004, not yet published at the time of writing these lines.
The Court noted first that this Directive also applies to the activities of emergency workers in attendance in ambulances in the framework of an emergency service. None of the exclusions provided is relevant in this case: the services concerned are not essential for the protection of public health, safety and order in cases, such as a disaster, the gravity and scale of which are exceptional and a characteristic of which is the fact that, by their nature, they do not lend themselves to the planning of working time, nor are they road transport services given that the main purpose of the activity in question is to provide initial medical treatment to a person who is ill or injured. The Court went on to state that consent must be freely and expressly given by each worker if the 48-hour maximum period of weekly working time, as laid down by the Directive, is to be validly exceeded and that it is not sufficient for the employment contract to refer to a collective agreement which permits such an extension.

Along the lines of Jaeger (14), the Court ruled that such periods of duty time must be taken into account in their totality in the calculation of a maximum daily and weekly working time. The Court confirms that the 48-hour upper limit on average weekly working time, including overtime, constitutes a rule of Community social law of particular importance from which every worker must benefit, since it is a minimum requirement necessary to ensure protection of his/her safety and health. In the case of the emergency workers, the Directive precludes legislation in a Member State the effect of which is to permit the maximum duration to be exceeded, whether by means of a collective agreement or a works agreement based on such an agreement. The Court lastly notes that the Directive fulfils all the conditions necessary for it to produce a direct effect as regards the maximum weekly working time of 48 hours, that is, so far as its subject matter is concerned, it appears unconditional and sufficiently precise, enabling it to be relied upon before the national courts by individuals against the State where the latter has failed to implement the Directive by the end of the period prescribed or where it has failed to implement the

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14 CJEC, Case C-151/02, Jaeger, ruling of 9 September 2003, ECR. 2003, I-8389. This ruling was referred to in the last version of Social Developments.
Directive correctly. In the case of a dispute between individuals, a Directive cannot be invoked, since it cannot of itself impose obligations on an individual. Nevertheless, a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a Directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Directive in order to achieve an outcome consistent with the objective pursued by the Directive. In this case, the national court must thus do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by the Directive in question, is not exceeded.

The Court has also ruled on working hours in *Wippel*. The Court ruled that Community law does not preclude legislation establishing the maximum working time at 40 hours per week and eight hours per day, and which regulates maximum working time and the organisation of working time without distinction to full-time and part-time workers. It does not preclude a contract of part-time employment of workers of the same undertaking, under which the length of weekly working time and the organisation of working time are not fixed but are dependent on quantitative needs in terms of work to be performed, determined on a case-by-case basis, such workers being entitled to accept or refuse that work (15).

We note in conclusion that a revision of the ‘working time’ Directive (1993) calling into question the case law in *Jaeger* and *Pfeiffer* (CEC, 2004) was discussed in 2004. For this purpose, the Commission wished to distinguish inactive periods within on call time, which would not be considered as working time (16). For further details, the reader is invited to read Christophe Degryse’s article in this volume.

15 CJEC, Case C-313/02, *Wippel*, 12 October 2004, not yet published at the time of writing these lines.

16 See also the position of the European Trade Union Confederation of 22 September 2004.
2.3 Protection of employees in the event of their employer's insolvency: Barsotti, Castellani and Venturi v. Istituto nazionale della previdenza sociale (INPS) (17)

The Directive on the protection of employees in the event of the insolvency of their employer authorises Member States to limit the liability of the guarantee institutions to a sum which covers the basic needs of the employees. This intervention ceiling must be paid in full even where the employer has paid a portion of the pay for the period covered by the guarantee.

Mr Barsotti, Ms Castellani and Ms Venturi, employees of insolvent companies, are owed part of their remuneration relating to the final period of their employment contract or employment relationship. They claimed payment of the balance thereof from the Fund. The INPS rejected those claims, either in part or in whole. The Tribunale di Pisa, the Tribunale di Siena and the Corte suprema di cassazione, before which the cases had been brought, decided to stay proceedings and make a reference to the Court in respect of the interpretation of Council Directive 80/987 concerning the protection of employees in the event of their employer's insolvency (Council of the European Communities, 1980). The Italian courts essentially asked whether Articles 3 (1), and the first sub-paragraph of Article 4 (3) of the Directive are to be interpreted as meaning that they allow a Member State to limit the liability of the guarantee institutions to a sum which covers the basic needs of the employees concerned and from which are to be deducted payments made by the employer during the period covered by the guarantee.

The Court points out that under Article 3 (1) of the Directive, Member States shall take the measures necessary to ensure that guarantee institutions, subject to Article 4 of that same Directive, ensure payment of employees’ outstanding claims relating to pay for the period prior to a given date. The first sub-paragraph of Article 4 (3) of the Directive provides the Member States with an option of setting a ceiling to the liability for employees’ outstanding claims in order to avoid the

17 CJEC, Cases C-19/01, C-50/01, C-84/01, Barsotti e.a., ruling of 4 March 2004, not yet published at the time of writing these lines.
payment of sums going beyond the Directive’s social objective. That social objective is to guarantee employees a minimum level of Community protection in the event of the employer’s insolvency through payment of outstanding claims resulting from contracts of employment or employment relationships and relating to pay for a specific period. While the Member States are entitled to set a ceiling to the liability for outstanding claims, they are bound to ensure, within the limit of that ceiling, the payment of all the outstanding claims in question. Any part payments received on account by the employees concerned on their claims in respect of the guarantee must be deducted therefrom in order to determine the extent to which they are outstanding. On the other hand, a rule against aggregation, according to which remuneration paid to the said employees during the period covered by the guarantee must be deducted from the ceiling set by the Member State to the liability for outstanding claims, directly undermines the minimum protection guaranteed by the Directive. Article 3 (1), and the first sub-paragraph of Article 4 (3) of the Directive do not allow a Member State to limit the liability of the guarantee institutions to a sum which covers the basic needs of the employees concerned and from which are to be deducted payments made by the employer during the period covered by the guarantee.

3. Social security in Community law

3.1 Compensatory supplements to retirement pensions: Skalka v. Sozialversicherungsanstalt der gewerblichen Wirtschaft

Mr Skalka, an Austrian citizen, has, since May 1990, received a disability pension paid by the Sozialversicherungsanstalt. Since he reached the age of 60, the same amount of benefit has been paid as an early retirement pension based on a long period of insurance. Mr Skalka has been
habitually resident in Tenerife since the end of 1990. On 16 December 1999 he applied, on the basis of the GSVG (the federal law concerning social insurance for non-employees working in commerce), to the Sozialversicherungsanstalt for a compensatory supplement. That institution refused his application on the ground that he had his habitual residence abroad and that the benefit in question could not be exported. The Fund courts to which the case was referred held that the compensatory supplement was a special non-contributory benefit within the meaning of Article 10a (21) of Regulation No.1408/71 on the coordination of social security systems (Council of the European Communities, 1971) and could not be granted to a person habitually resident in a Member State other than the Republic of Austria. At both instances it was considered that there was no reason to request a preliminary ruling from the Court on the legal classification of the benefit, on the ground that the Jauch ruling of 8 March 2001 (22) gave a sufficient answer on that point. Mr Skalka appealed on a point of law against the appeal ruling to the Oberster Gerichtshof, which decided to stay proceedings and refer a question to the Court for a preliminary ruling.

The referring court asked whether the compensatory supplement provided for by the GSVG, a benefit included in Annex IIa to Regulation No.1408/71, constitutes a special non-contributory benefit within the meaning of Article 4(2a) (23) so that the situation of a person who, like Mr Skalka, fulfils after 1 June 1992 the conditions for the granting of that benefit, is governed with effect from 1 January 1995, the date of Austria’s accession to the European Union, by the

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21 “Notwithstanding the provisions of Article 10 and Title III, the persons to whom the current regulation applies enjoy the special non-contributory benefits in cash under Article 4(2)(a) exclusively in the Member State in which they are resident under the legislation of that State insofar as the benefits are mentioned in Annex II (a). The benefits are paid by the institution in their place of residence”.


23 The Regulation “applies to special non-contributory benefits which are provided under legislation or schemes other than those referred to in Article 4(1) or excluded under Article 4(4), where such benefits are intended inter alia to provide supplementary, substitute or ancillary cover against the risks covered by the branches referred to in Article 4(1)(a) to (h)”.
coordinating provisions in Article 10a of that Regulation and the benefit can therefore be paid only to a person habitually resident in Austria. The provisions in Article 10a of Regulation No. 1408/71 derogating from the principle of the exportability of social security benefits must be interpreted strictly. That provision can apply only to benefits which are both special and non-contributory and which are listed in Annex IIa to that Regulation. The compensatory supplement is included in the list of special non-compensatory benefits within the meaning of Article 4 (2a) of Regulation No. 1408/71, to which Annex IIa of that Regulation applies.

It remained therefore to be examined whether the benefit in question is special and non-contributory in nature. The Austrian compensatory supplement tops up a retirement or disability pension and is by nature social assistance in so far as it is intended to ensure a minimum means of subsistence for its recipient where the pension is insufficient. Its grant is dependent on objective criteria defined by law. Consequently, it must be classified as a 'special benefit' within the meaning of Regulation No. 1408/71. As to whether or not it is contributory in nature, the determining criterion is how the benefit is actually financed. The Court must consider whether that financing comes directly or indirectly from social contributions or from public resources. In the case of the Austrian compensatory supplement, the costs are borne by a social institution which then receives reimbursement in full from the relevant Land, which in turn receives from the federal budget the sums necessary to finance the benefit. The Austrian compensatory supplement must therefore be regarded as being non-contributory in nature as under Article 4 (2a) of Regulation No. 1408/71.

According to the Court, under the provisions of Article 10a and Annex IIa of Regulation No. 1408/71, the compensatory supplement, within the meaning of the G3V/G, falls within the scope of that Regulation and therefore constitutes a special non-contributory benefit within the meaning of Article 4 (2a) of that Regulation, so that the situation of a person who, after 1 June 1992, fulfils the conditions for the grant of that benefit is governed with effect from 1st January 1995, the date of Austria’s accession to the European Union, solely by the coordinating provisions laid down by the said Article 10a. It can therefore only be granted to a person whose habitual residence is in Austria.

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3.2 Care allowance: Gaumain-Cerri & Barth v. Kaufmännische Krankenkasse-Pflegekasse (24)

Ms Gaumain-Cerri, of German nationality, and her husband, who is French, reside in France and practise their profession on a part-time basis in an undertaking in Germany. By virtue of that employment, both are covered by German care insurance. Their son, who lives with them, is disabled. As a dependant of his parents he is in receipt of care insurance benefits, namely the care allowance. The parents themselves, at home and on a voluntary basis, assume the role of carers providing assistance to a reliant person. However, the KKH care fund, the body providing insurance against the risk of reliance on care, refuses to pay the old-age insurance contributions of Ms Gaumain-Cerri and her husband in respect of their activity as carers for a reliant person on the ground that they are not resident within Germany. Under the SGB (the German social security code), in view of the non-professional nature of that activity and in the absence of residence within the country, they are neither obliged to contribute to nor entitled to receive statutory old-age insurance. The non-professional nature of the activity in question means that they do not have the status of worker enabling them to rely on the provisions of the Regulation No.1408/71 (Council of the European Communities, 1971).

Ms Barth, who is of German nationality, is resident in Belgium and looks after a retired civil servant from whom she receives monthly payment in Germany. According to the SGB, the assistance provided by Ms Barth is non-professional. She carries out no other professional activity. The retired person whom she assists is in receipt of care insurance allowance from two bodies, the Landesamt für Besoldung und Versorgung Nordrhein-Westfalen, as the basic social insurance provider for retired civil servants, and the PAX Familienfürsorge Krankenversicherung, as an additional insurer under a compulsory private care insurance policy, the conditions of which are required by law to be identical to those applicable to the basic social insurance. Given the fact that she is resident outside Germany, the Landesversicherungsanstalt Rheinprovinz.

24 CJEC, Cases C-502/01 and C-31/02, Gaumain-Cerri & Barth, ruling of 8 July 2004, not yet published at the time of writing these lines.
discontinued payment of the contributions enabling Ms Barth to acquire pension rights. Ms Gaumain-Cerri and Ms Barth brought proceedings before the Sozialgericht Hannover and the Sozialgericht Aachen respectively, claiming that the care insurance should pay the old-age insurance contributions on their behalf in respect of their activity assisting a reliant person.

The German courts asked the CJEC whether the payment of old-age benefit social contributions by the body providing care insurance for the third party providing home care for a reliant person constituted a sickness benefit or old-age benefit within the meaning of Article 1 of Regulation No.1408/71 and whether the fact that the said benefit is supplied by an institution under private law affects the answer. They also asked whether Article 39 EC of the Treaty, Regulation No.1408/71 or other provisions of derived law precluded denying the said benefit on the basis that the reliant person or the third party was resident outside the State of the institution with which the reliant person had care insurance.

The Court gave its answer in two stages. According to the Molenaar ruling (25), the benefits intended to cover the risk of old age of a third party assisting a reliant person, such as those provided for by care insurance, constitute ‘sickness benefits’ payable to the reliant person within the meaning of Article 4 (1)(a) of Regulation No.1408/71. The fact that the third party is personally in receipt of such a benefit is of no consequence on account of the fact that the person whose reliance on care justifies the grant of the whole of the benefit is thereby benefiting from a scheme designed to help him/her to receive the care which his/her condition requires. That benefit is thus fully covered by that branch of sickness insurance.

The fact that care insurance is at times provided in whole or in part by a private insurer on the basis of a private insurance contract cannot, in

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25 Ruling made in response to a question for a preliminary ruling raised during a dispute concerning the refusal to pay care allowance to persons subject to care insurance because they are not resident in Germany. CJEC, Case C-160/96, Molenaar, ruling of 5 March 1998, ECR I843.
such a case, put it outside the scope of Regulation No.1408/71, since the conclusion of such a contract follows directly from the application of the social security legislation at issue.

The Court next considered whether, in a case such as that of Ms Gaumain-Cerri, the direct payment of the old-age insurance contributions of the third party assisting the reliant person is to be made in accordance with the legislation of the State of residence of the reliant person or in accordance with that of the competent State. Under Articles 19 and 20 of Regulation No.1408/71 (26), the fact that benefits are benefits ‘in kind’ or benefits ‘in cash’ may have an effect as to which legislation is applicable. As the care allowance takes the form of financial aid which enables the standard of living of persons requiring care to be improved as a whole, it should be considered as a sickness insurance cash benefit as referred to in Regulation No.1408/71. Payment of the old-age insurance of a third person to whom a reliant person resorts for assistance at home must itself also be categorised as a sickness insurance cash benefit by reason of its ancillary nature to the care insurance proper, inasmuch as it directly supplements the latter.

Accordingly, under Article 19 (1) (b) and (2), the payment of old-age insurance on behalf of the third party assisting a reliant person who is resident in France and who belongs to the family of a worker covered by German care insurance must be insured by the competent German institution in accordance with the legislation on care insurance as if the reliant person were resident in Germany, unless that person is entitled to an equivalent benefit under French law.

It remained to be examined whether the competent institution may refuse to grant a particular care insurance benefit on the ground that the third party is not resident within the competent Member State. The reply must be in the negative. The status of Union citizenship conferred by Article 17 EC, and which these third parties enjoy, enables nationals of the Member States who find themselves in the same situation to

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26 These articles concern situations in which the interested parties are resident in a Member State other than the competent State, inter alia as cross-border workers, with regard to sickness and maternity insurance for employees and members of their families.
enjoy within the scope of the Treaty the same treatment in law, subject to such exceptions as are expressly provided for. Refusal to pay the old-age insurance contributions of a third party assisting a reliant person on the ground that he/she is not resident in the competent State, the legislation of which is applicable, leads to different treatment of persons finding themselves in the same situation.

Thus, as concerns benefits such as those under German care insurance accorded to an insured person resident on the territory of the competent State or to a person resident on the territory of another Member State and covered by that insurance as a member of the family of a worker, the Treaty, in particular Article 17 EC, and Regulation No.1408/71 preclude payment of the old-age insurance contributions of a national of a Member State in the position of the third party caring for the recipient of those benefits being refused by the competent institution on the ground that that third party or the aforementioned recipient resides in a Member State other than the competent State.

It should be noted in concluding this section that, on one hand, Regulation (EC) No.883/2004 of the Parliament and the Council on the coordination of social security systems which repeals Regulation No.1408/71 (except for the purposes of certain Community agreements and acts) came into force on 20 May 2004 (European Parliament and Council of the European Union 2004). The Regulation aims to simplify and codify the existing legislation, whilst adhering to the principles of equality and assimilation as developed by the Court of Justice. On the other hand, Regulation (EC) No.631/2004 of the Parliament and the Council amending Council Regulation (EEC) No.1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation EEC No.574/72 laying down the procedure for implementation entered into force on 1st June 2004 (European Parliament and Council of the European Union, 2004). The amendments concern the alignment of rights and the simplification of procedures.
Conclusions

2005 will see a growth in the number of cases referred to the Court. Rulings will be made on a certain number of cases on which the Advocates General have produced opinions. It should be noted that most of them still concern equal treatment for men and women. In McKenna (27), the Court will rule on the question of whether an incapacity for work caused by a pregnancy-related illness occurring during pregnancy may, in accordance with Community law, be treated in the same way as incapacity for work caused by any other illness and be set against the number of days during which, under the sick-leave scheme applicable in the case, employees are entitled to have their pay maintained in full, and then in part. In Mayer (28), the Court will again be consulted on the effect of the principle of equal pay for men and women on these areas of social security.

Junk (29) will give the Court the opportunity to clarify, on the one hand, the meaning to be given to the concept of ‘redundancy’ in Council Directive 98/59/EC and, on the other, the scope of the information and consultation obligations imposed on the employer by that Directive. Finally, in Nikoloudi (30), the Court will rule on the compatibility of national legislation with the Community law concerning equal treatment for men and women. This legislation provides inter alia for the exclusion of part-time workers from appointment as established members of staff, where a certain category of part-time posts is available only to women.

27 CJEC, Case C-191/03, Western Health Board v. Margaret McKenna.
28 CJEC, Case C-356/03, Elisabeth Mayer v. Versorgungsanstalt des Bundes und der Länder.
29 CJEC, Case C-188/03, Irmtraud Junk v. Wolfgang Kühnel als Insolvenzverwalter über das Vermögen der Firma AWO.
30 CJEC, Case C-196/02, Vasiliki Nikoloudi v. Organismos Tilepikoinonion Ellados.
References


Future prospects

The period which began with EU enlargement in May 2004 coincided with numerous processes of revision, review and reform. There was of course the draft reform of the treaties in the shape of the European “Constitution”. There was also, in early 2005, the review of the Lisbon strategy, the reassessment of the Stability and Growth Pact, the re-examination of the European employment strategy and preparations for a revision of the Structural Funds. At a more mundane level, and on a more limited scale, there were also revisions of the Working Time Directive and the European Works Council Directive, a reappraisal of the draft Services Directive, and so the list goes on. Last but not least, the menu for 2005 included a redefinition of the budgetary perspectives for 2007-2013. To put it mildly, Europe is facing an agenda of reforms, reviews and revisions, both political, economic and social.

EU enlargement to take in the central and eastern European countries as well as Cyprus and Malta undoubtedly goes some way to explaining this myriad of processes. It is impossible for twenty-five countries to operate in the same way as fifteen. Yet enlargement does not explain everything. There has at the same time been a search for new political dynamics and directions, with one same point – or rather question – cropping up in all the discussions: is the European Union embarking on a process of deregulation or regulation? The overarching issue arising in all these political debates, be they about the Constitution, the Working Time Directive or the balance between the economic, social and environmental objectives of Lisbon, is (de)regulation.

In actual fact, it is not so much a matter of a question as of a split, or a power struggle. All these overlapping processes moreover offer a good opportunity to gauge this power struggle between the champions of a
Europe which deregulates and bolsters the “creative strengths” of competition, and the supporters of a Europe which circumscribes the market for the sake of equity and social progress. It has to be admitted, however, that these dynamics are by no means unequivocal. For instance, the reappraisal of the Lisbon objectives as proposed by the Commission has been denounced for taking an ultraliberal turn; on the other hand, the reform of the Stability Pact has been welcomed enthusiastically in trade union and progressive circles, where it is seen as advancing economic governance. Similarly, the proposed thrust of the new Working Time Directive has been roundly criticised on account of its inherent potential for deregulation; on the other hand, the Heads of State and Government recognised in an unprecedented fashion that there was a problem with the Services Directive. No doubt the utterly divergent interpretations of the constitutional Treaty are the most blatant illustration of this equivocal state of affairs: in one camp, its backers claim that it sets out social progress in black and white while, in the other, its detractors read it, equally in black and white, as a neoliberal text in which deregulation is “set in stone”.

Social progress or a neoliberal venture: could these two analyses of European events in 2004-2005 be described as two sides of the same euro? They are a reflection of the players and the power struggles in which they are engaged: the EU project is not a homogeneously left or right wing project; it is a compromise which is reflected especially in texts such as the Lisbon agenda or the constitutional Treaty. But it is not a compromise based on synthesis, resulting in some kind of relatively explicit and agreed European alliance. Rather, it is a compromise based on superimposition, i.e. on an accumulation of economic, social and environmental objectives which are sometimes difficult to reconcile with one another.

This superimposition of compromises is as useful to national political majorities of whatever colour – which can pick out objectives matching their own priorities – as it is to opposition parties, which can always find grounds for contention. How else could we explain the relative consensus around Lisbon or around the Constitution among the conservative, liberal and social-democrat parties currently in power in Europe’s capital cities? But we must bear in mind that even within this apparent “European consensus”, left/right divisions are often played
out – sometimes in a quite brutal fashion. The consequence, in the economic arena, is a twofold advantage for the pro-deregulation approach since, firstly, the treaties favour this type of approach and, secondly, progressive groups have to reach constructive compromises (what common regulations should we adopt?), whilst liberals can get by with negative compromises (what rules should we abolish?). These compromises can therefore be described as asymmetrical.

One of the principal spheres in which these divisions have come to the fore is the social policy sphere. And, quite clearly, the prevailing political and institutional climate during the period under scrutiny in this volume has hardly been propitious for social aspirations: the political climate, owing to the overriding liberal view of enlargement and the absence of any prior social debate. As we wrote in our conclusion to the last edition of Social Developments in the European Union, “the sole immediate benefit of enlargement therefore boils down to trade liberalisation, which is apparently expected to work miracles”. This liberal approach on the part of the former Europe of Fifteen has been strengthened by the governments of some of the new arrivals, which seem to be seeking in the Union not a driver of domestic social progress (as was the case at the time of Spanish and Portuguese accession, when catching up with the European social model became a political leitmotif), but support for the implementation of highly liberal economic policies. Nor does the current climate favour social aspirations from an institutional point of view, in that the advocates of a “social Europe” have had difficulty in finding allies both in the European Parliament and in the Commission and Council.

Considerable concern was expressed in the face of this unfavourable momentum, in 2004-2005, especially by trade union organisations. Indeed, the way in which the Directive on services in the internal market and the revision of the Working Time Directive have been addressed arouses fears of a radical shift, not in strategy but in Europe’s policy objectives. The Services Directive, in its 2004 version, aims to create an internal market for services without first making any attempt to harmonise standards, the result being to open the door to unfettered competition. This strategy poses major problems in certain social sectors, first and foremost healthcare. At the time of writing these lines,
the revision of the Working Time Directive, initially intended to put an end to the temporary UK derogations concerning maximum weekly working time, was on the brink of facilitating derogations across the board: in other words, competitive social deregulation in this area too.

Rather than promoting a strategy for catching-up and convergence in the social sphere – by means of even minimal harmonisation – the Commission and certain Member States apparently prefer to make different systems compete with one another. In the context of a newly enlarged Union where standards vary so widely, such competition could rapidly end up as a blueprint for deregulation. In both the Directive on services and the one on working time, the formulation of common rules by public authorities has been replaced, in the first case by administrative cooperation and, in the second, by negotiation between the social partners – provided that they exist. The authors pretend to forget that administrations, which already have enough difficulty cooperating with each other nationally, will not find it any easier to do so at European level (we need only think about the language problems involved); they likewise overlook the “black holes” in trade union representation at sectoral and company level in many countries. The supposed safeguards against deregulation will therefore be blown away like straws in the wind: Europe will become less and less homogeneous with, on the one hand, some parts temporarily protected by efficient administrative bodies and by the relatively significant presence of trade union representatives and, on the other, parts which are subject to the law of the jungle.

In historical terms, the European project has charted a course from upward harmonisation (1960s and 1970s) to minimum standards (1980s and 1990s), since when it seems to be embarking on a new phase, namely making different models compete with one another. The rationale given for this enforced competition is an attempt to render Europe more competitive, which ought to rally a consensus among the various political groups since competitiveness is supposed to create more growth and hence more jobs. But what has been thrown into sharp focus by the trials and tribulations of the Services Directive is the lack of vigilance on the part of Europe’s social-democrat parties with regard to the risk of destroying the balance between economic and social objectives. It took unprecedented campaigning by social
stakeholders and trade unions throughout Europe for political leaders to realise that this breaking point had been reached. Is their realisation merely transitory, or will it facilitate a shift in the balance of power in a basically unfavourable political environment?

Symbolically, that is probably the main function of the “European consensus” as described above. If it succeeds in achieving a satisfactory balance between economic constraints and social aspirations (which may change over time), it can no doubt contain and organise the political debate within it. If, on the contrary, it is perceived as a tool for imposing invasive policies, some players will wish to depart from this consensus and construct a power struggle outside of it. Such is undoubtedly the underlying significance of the no-vote cast by the French left wing at the referendum on the draft European Constitution. Even though the constitutional Treaty makes no fundamental changes to European policies – it even contains some social progress – some people nevertheless view it is as a consolidation of the successive asymmetrical compromises they deem incompatible with the preservation of the social values of the post-war period. Moreover, the fundamentalist interpretation currently being given by certain political players to the market doctrine contained in the European treaties (ever since Rome!) is liable to shatter the consensus (1), whereas that consensus was able to prevail for forty years based on the same founding treaties.

We are not dreaming of an enlarged market, said the former President of the European Commission, Jacques Delors. A large market whose sole purpose was to boost competition – in a Europe where

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1 As Fitoussi and Le Cacheux lucidly put it, “(...) European history has done a U-turn: the stranglehold of market doctrine over the political sphere has led to such a suffocation of democracy that it now in turn threatens the public domain in many countries of the continent” (in L'état de l'Union européenne 2005, edited by Jean-Paul Fitoussi and Jacques Le Cacheux, Fayard/Presses de Sciences Po, Paris, 2005).
unemployment, poverty and social insecurity have persisted for too long – would not be a dream but a nightmare.

The principal task to which today’s political leaders and elites should devote themselves is therefore, without any doubt at all, to reinvent a political project for the European Union of 25 Member States.
Chronology 2004
Key events in European social policy

JANUARY


27 January: Social dialogue: the Community of European Railways (CER) and the European Transport Workers’ Federation (ETF) sign two agreements negotiated as part of the European social dialogue on the European driving licence and the working conditions of railway workers assigned to cross-border services. “Agreement on the European licence for drivers carrying out a cross-border interoperability service” and “Agreement on certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services”, Brussels, 27 January 2004.
FEBRUARY


18 February: Services of general interest: the Commission proposes new rules to increase legal certainty for services of general economic interest following the Altmark judgment of the Court of Justice, Press Release, IP/04/235, Brussels, 18 February 2004.


MARCH


Competencies and qualifications: publication of the second follow-up report of the social partners on the framework of actions for the development of competencies and qualifications. ETUC, UNICE/UEAPME and CEEP, “Framework of actions for the lifelong


30 March: Working time: the ETUC calls for the European Commission’s proposal for a directive on working time to put an end to long working hours in Europe. “The ETUC calls for a directive that will put an end to long working hours in Europe”, ETUC Press Release, Brussels, 30 March 2004.


APRIL


2 April: Trade union action: the ETUC organises a trade union demonstration in Brussels in favour of a more social Europe.


23 April: Works Councils: the ETUC calls for the pace of the revision of the European Works Councils Directive to be stepped up and states that it is ready to engage in consultation with UNICE, ETUC Press Release, Brussels, 23 April 2004.

29 April: Asylum and immigration: after three and a half years of debates, the Home Affairs Ministers of the Fifteen agree on common minimum standards on procedures for considering asylum applications. 2579th Council meeting – Justice and Home Affairs, Luxembourg, 29 April 2004 (8694/04, presse 123).

Asylum and immigration: the UN High Commissioner for Refugees (UNHCR) severely criticises the agreement reached in the Council on the procedures for considering asylum applications.

Social dialogue: launch of the 30th sectoral social dialogue committee for the audiovisual industry.
MAY

1st May: Enlargement: the European Union is enlarged to include ten new Member States (Poland, Czech Republic, Hungary, Slovakia, Slovenia, Estonia, Lithuania, Latvia, Cyprus, Malta) and becomes the Europe of Twenty-Five.


**JUNE**

1st June: **Healthcare:** entry into force of the European Health Insurance Card.


3 June: **Non-discrimination:** the Commission launches consultation on the future orientation of the anti-discrimination policy.

8-10 June: **Services – Internal market:** the Congress of the European Mine, Chemical and Energy Workers’ Federation (EMCEF) adopts a motion to reject the Services Directive, Press Release, Brussels, 14 June 2004.

10 June: **Constitutional Treaty:** a few days before the European Council and the adoption of the draft Constitutional Treaty, “ETUC warns of rising anger among European workers at moves to weaken the EU Constitution’s social dimension”, ETUC Press Release, Brussels, 10 June 2004.

11 June: **Working time:** the Transport Council reaches a political agreement on a common position on the draft regulation concerning driving and resting times in road transport. 2589th Council meeting - Transport, Telecommunications and Energy, Luxembourg, 10 and 11 June 2004 (9865/04, presse 176).
11-12-13 June: European elections.


**JULY**


AUGUST


SEPTEMBER


10 September: Social dialogue: at the conference of the European social partners of the chemicals industry in Helsinki (ECEG and EMCEF), the European chemicals industry expresses its desire to see the establishment of a sectoral social dialogue committee for the chemicals industry, *Bulletin of the European Union*, No.8784 of 14 September 2004, page 20.


OCTOBER


November


Lisbon Strategy: the ETUC supports the Kok Report but regrets the fact that social cohesion and sustainable development have been neglected. “Social Europe as a driving force for economic growth: ETUC supports the Kok Report, but regrets that social cohesion and sustainable development are neglected”, ETUC Press Release, Brussels, 3 November 2004.

4 November: Tripartite summit: the Tripartite summit highlights the fact that the social Europe must be accompanied by a Europe that is economically strong and united.


26 November: Employee participation: the Competitiveness Council reaches a compromise on employee participation in companies resulting from cross-border mergers. 2624th Council meeting - Competitiveness (Internal Market, Industry and Research), Brussels, 25-26 November 2004 (14687/04, presse 323).

DECEMBER

7 December: Health and safety: the Employment Council reaches a political agreement on minimum health requirements for workers exposed to optical radiation.


14 December: Social dialogue: launch of the 31st sectoral social dialogue committee for the chemicals industry.

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
CFSP  Common foreign and security policy
CJEC  Court of Justice of the European Communities
COR  Committee of the Regions
DG  Directorate General (of the Commission / the European Parliament)
EC  European Community
ECB  European Central Bank
ECOFIN  Council for Economic and Financial Affairs
ECSC  European Coal and Steel Community
EEC  European Economic Community
EES  European Employment Strategy
EMU  Economic and Monetary Union
EP  European Parliament
EPC  Economic Policy Committee
EESC  European Economic and Social Committee
ETUC  European Trade Union Confederation
EU  European Union
EUROGROUP  Group of 12 Member States having adopted the euro
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<th>Abbreviation</th>
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<tr>
<td>GATS</td>
<td>General Agreement on Trade in Services</td>
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<td>IGC</td>
<td>Intergovernmental Conference</td>
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<td>JHA</td>
<td>Justice and home affairs</td>
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<td>NAPs</td>
<td>National Action Plans (in context of OMC)</td>
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<td>NGO</td>
<td>Non-governmental organisation</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<tr>
<td>OMC</td>
<td>Open method of co-ordination</td>
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<td>SGEI</td>
<td>Services of General Economic Interest</td>
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<td>SGI</td>
<td>Services of General Interest</td>
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<tr>
<td>SGNEI</td>
<td>Services of General Non-Economic Interest</td>
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<td>SGP</td>
<td>Stability and Growth Pact</td>
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<td>SPC</td>
<td>Social Protection Committee</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>UEAPME</td>
<td>European Association of Craft, Small and Medium-sized Enterprises</td>
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<td>UNICE</td>
<td>Union of Industrial and Employers’ Confederations of Europe</td>
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<td>US</td>
<td>Universal Service</td>
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