

***REFGOV***

*Reflexive Governance in the Public Interest*

*Fundamental Rights*

**The Promotion of Fundamental Rights by the  
Union as a Contribution to the European  
Legal Space (II): the Balance between  
Economic and Social Objectives in the  
European Economic Constitution.**

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# **The Promotion of Fundamental Rights by the Union as a Contribution to the European Legal Space (II): the Balance between Economic and Social Objectives in the European Economic Constitution.**

**By O. De Schutter**

## **1. Introduction**

This contribution to the 'Reflexive Governance in the Public Interest' (REFGOV) project seeks to describe the complementarity between the progress of social rights (or more broadly, of the promotion of social objectives) in the European Community, and the establishment of the internal market and of the economic and monetary union. The examination of this complementarity should not lead to espouse a naïve neofunctionalist view according to which the promotion of the economic objectives of the Community by the abolishment of barriers to the movement of goods, services, capital and workers, followed by the establishment of the economic and monetary union, per necessity and automatically would lead to positive integration in other fields, in particular to the adoption of social policies as flanking measures. On the contrary, the role of exogenous factors, in particular changes in the political majorities in the Member States' governments at crucial moments (corresponding to shifts in the national public opinions), and fears created either by the economic restructurations in the mid-1970s or by the successive enlargements (especially in 1986 and in 2004), have played a decisive role in ensuring that the European Community would not limit itself to a customs union with a light coordination of monetary policies as under the original European Monetary System. The historical sequences presented here lead to the conclusion that a monitoring of the impact on fundamental rights of the developments of the internal market and the economic and monetary union should be kept under permanent review, in order to identify where it may be necessary to move towards further harmonization or other forms of coordination between the Member States' national policies, for instance in fields such as health care or education which could be deeply affected by the internal market.<sup>1</sup>

Viewed in its historical dimension, the construction of social Europe presents two main characteristics. First, over a long period social Europe was less an objective in its own right and rather an accompaniment to economic integration between Member States of the European Community and later Union. Second, it has developed gradually through recourse to a variety of legal methods and has involved a wide range of actors. At present it is primarily the result of certain provisions in the Treaty of Rome, of legislative measures, and of the case-law of the European Court of Justice (ECJ). But it has also resulted from the adoption of political declarations with no legally binding effect—such as the Community Charter of Fundamental Social Rights of Workers (1989) and the Charter of Fundamental Rights of the European Union (2000)—as well as from European social dialogue and “open” coordination between Member States over employment and combating social exclusion. In these conditions it is not easy to provide an overall diagnosis. However, it is possible to identify the successive historical stages in the construction of social Europe, and to relate these stages to a theoretical framework so as to reveal the logic that links them together. It is on this condition that we can attempt to make an assessment of the new situation created by

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<sup>1</sup> On health care and medical services, see Koutrakos (2005), Montgomery (2005) and Wyatt (2005). On education, see van der Mei (2005).

European Union enlargement with ten—and shortly twelve—new Member States, and the unprecedented challenge now facing the internal market in its social dimension.

## **2. The beginnings (1957-1974): the Common Market**

The Ohlin report of 1956 had identified the question exactly (International Labour Office, 1956). Would the creation by a small group of six states of an organization dedicated to economic integration have an impact on the protection of social rights within these states, and if so, would it call for compensatory measures? This question received a generally optimistic answer at the time. The ILO experts were confident that international competition within a common market would not be an obstacle to a gradual rise in living standards, related to the productivity increases that should result from the more efficient allocation of resources through free movement of the factors of production. For the future European Economic Community to be attributed competence in social matters was thus neither necessary nor recommended. Improved living and working conditions would result automatically from productivity gains in each state, notably through pressure from trade unions. Given the productivity differentials of workers in each state, it would be artificial and hence undesirable to establish a uniform level of social protection across the Community. The authors made two exceptions to this general conclusion. They noted the distortions of competition that could result from inadequate protection in some states for the principle of equal pay for men and women for equal work, which could give them an unfair comparative advantage in industries employing a large proportion of female labour. The same remark applied with regard to fixing weekly working hours and paid holidays—for the authors, the inadequate degree of organization of the work force in some states could lead to a lower level of protection for workers in these states, to the detriment of healthy competition. Nonetheless, the Ohlin report did not deem necessary the harmonization of protection levels within the European Economic Community. Its authors argued that the same result could be achieved by the Member States signing up to the same international conventions on these matters, negotiated within the ILO or the Council of Europe—the first project of the text that in 1961 would become the European Social Charter was already known at the time.

The Ohlin report is known to have considerably influenced the Spaak report presented to the Messina intergovernmental conference, and via that the Treaty of Rome of 25 March 1957 (Barnard, 1996; Davies, 1993; Deakin, 1996; Kenner, 2003: 2-6). The latter does not enumerate any social rights. It attributes the European Community no legislative competence in this area. Article 118 EEC provides merely that “the Commission shall have the task of promoting close co-operation between Member States in the social field”, particularly in matters relating to employment, labour law and working conditions, vocational training, social security, health and safety at work, the right of association and collective bargaining between employers and workers. The same provision provides that “To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organizations”. However, the Treaty of Rome contains a clause on the principle of equal pay for men and women for equal work—in Article 119 EEC (now Article 141 EC, after amendment)—and a provision relative to paid holiday schemes—in Article 120 EEC (now Article 142 EC). In addition, the European Social Fund was set up, with the task of improving employment opportunities within the common market by encouraging occupational and geographical mobility among workers and “thereby contributing to raising the standard of living” (Article 123 EEC). Lastly, Article 51 EEC (now Article 42 EC, after amendment) laid down that measures would be adopted to secure for migrant workers and their dependants aggregation, for the purpose of acquiring and retaining rights to social benefits and for calculating their amount, of all periods taken into account under the different national laws,

and payment of benefits to persons resident in the territories of Member States. The latter provision formed the basis for the adoption of the first regulation in 1958<sup>2</sup>, and the successive regulations issued thereafter were consolidated in Council Regulation (EEC) No. 1408/71 of 14 June 1971, on the application of social security schemes to employed persons and to members of their families moving within the Community<sup>3</sup>, which despite repeated modification is still today the applicable legislative framework. But Article 51 EEC and the regulations for its implementation, decisive for making the free movement of workers effective by avoiding them being penalized by the diversity of national laws on social security legislation, made no attempt to harmonize these laws. On the contrary, regulation n. 1408/71 organized their diversity<sup>4</sup>.

The considerable debt that the Treaty of Rome's authors owed to the philosophy of the Ohlin report is apparent in the subordination of the social objectives of European unification to the creation of the common market. While the elimination of barriers to the common market constitutes the instrument, social progress appears as its by-product. Thus Article 2 of the EEC Treaty (now Article 2 EC, after amendment) provides that "the Community shall have as its task, by establishing a common market and progressively approximating the economic policies of the Member States (...), an accelerated raising of the standard of living". In the same vein, Article 117 of the EEC Treaty (now Article 136 EC, after amendment) states that "Member States agree upon the need to promote improved living and working conditions for workers so as to make possible their harmonisation while the improvement is being maintained". The second indent states that such a development "will ensue not only from the functioning of the common market (...) but also from the procedures provided for in the Treaty and from the approximation of provisions laid down by law, regulation or administrative action".<sup>5</sup> The essentially programmatic character of these social provisions of the original Treaty of Rome—in the sense that these provisions imposed no legal requirement on Member States to cooperate for the purpose of achieving the social objectives fixed for them by the treaty—has been confirmed by the European Court of Justice in several decisions where it judged "with regard to the promotion of an accelerated raising of the standard of living, in particular, (...) that this was one of the aims which inspired the creation of the European Economic Community and which, owing to its general terms and its systematic dependence on the establishment of the Common Market and progressive approximation of economic policies, cannot impose legal obligations on Member States or confer rights on individuals"<sup>6</sup>. Thus in the *Sloman Neptun* judgment of 17 March 1993<sup>7</sup>, the Court of Justice had to rule on German legislation that was challenged for not banning the hiring of seamen of foreign nationality—five Filipino seamen in this instance—who were disadvantaged by their low rates of pay (around 20% the level for German seamen) and generally less favourable working conditions. A works council asked the Court of Justice to

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<sup>2</sup> Council Regulation No 3 on social security for migrant workers, OJ, No 3 of 16.12.1958, p. 561/58.

<sup>3</sup> OJ L 149 of 5.7.1971, p. 2. This regulation has been amended many times, and most recently by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 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 Council Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71, OJ L117 of 4.5.2005, p. 1.

<sup>4</sup> Hence what follows contains no discussion of social security for migrant workers.

<sup>5</sup> Article 136 EC includes an additional clause referring, among other things, to "the need to maintain the competitiveness of the Community economy". Some formulations of Article 117 of the EC Treaty have also been amended, but the principle according to which the Member States (now: the Community and the Member States) believe that improved living and working conditions making possible their balanced progress "will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action" stands.

<sup>6</sup> Case 126/86, *F. R. Giménez Zaera* [1987] ECR 3697, para 11. See earlier Case 149/77, *Defrenne (No 2)*, [1978] ECR 1365, paras. 19 and 31; Case 170/84, *Bilka-Kaufhaus GmbH*, [1986] ECR 1607; and, this time in the context of the ECSC Treaty that contains the definition of similar objectives, Joined Cases 3-18, 25 and 26/58, *Barbara Erzbergbau and others* [1960] ECR 173.

<sup>7</sup> Case C-72/91, *Sloman Neptun* [1993] ECR I-887.

declare such legislation incompatible with community law, either because it was tantamount to unlawful state aid or because it violated Article 117 of the EEC Treaty. The Court rejected the argument, however, that the latter provision required Member States to “monitor the influx of workers from non-member countries in order to prevent ‘wage dumping’ and other disturbances on the labour market and take measures to enable those workers to share in social progress if they are employed in the Community”. On the contrary, it affirmed the essentially programmatic nature of Article 117 of the EEC Treaty: “It relates only to social objectives the attainment of which must be the result of Community action, close cooperation between the Member States and the operation of the Common Market” (para. 25).

It is important to appreciate the full significance of this. If Member States are indeed required to respect the rules for establishment of an internal market—which in the hierarchy of objectives that the Treaty of Rome sets for the European Community constitutes the *instrument for realizing* more far-reaching objectives such as, notably, that of “an accelerated raising of the standard of living” (Article 2 of the EC Treaty today refers to the “raising of the standard and quality of life”)—they are nonetheless not required to take measures that contribute directly to this objective, and they are not even prohibited from taking measures that seem to run counter to their realization. For the Court, therefore, that the establishment of an internal market is not an end in its own right in the Treaty of Rome, but is rather a means for attaining certain social ends, does not imply that Member States must contribute to these ends when exercising the competences that remain their responsibility (Ball 1996; Majone 1993).

### **3. Stage two (1974-1985): emergence of a social Europe**

Sixteen years were to pass before the start of a new stage, with the adoption in January 1974 of a Social Action Programme, contained in a Council resolution<sup>8</sup>. At the same time as the European Community was enlarged by three new Member States, governments displayed a resolve to foster harmonization of social policy using the instruments—to be sure still modest in scope—available to them under the Treaty of Rome. The effects of the crisis associated with the sharp rise in the price of oil were starting to be felt; a sense of urgency predominated. Article 100 EEC (now Article 94 EC, after amendment) provided the possibility for the Council, acting unanimously, to issue directives for the approximation of national laws with a direct influence on the establishment or functioning of the common market. In addition, Article 235 (now Article 308 EC) also laid down that if action by the Community “should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers”, the Council, acting unanimously on a proposal from the Commission, was authorized to exercise the implicit powers. The Council encouraged the Commission to use these provisions in order to move towards realizing the social objectives of the Rome Treaty. The need to act at the Community level appeared all the greater because, in a parallel development, the Court of Justice had begun to consider all trading rules that might hinder directly or indirectly, actually or potentially, intra-Community trade, as measures having equivalent effect to quantitative restrictions on imports, prohibited under Article 30 EEC<sup>9</sup>. This jurisprudence heralded the acceleration of “negative” integration within the Community, through the gradual abolition of all direct or indirect barriers to trade. It also led the Court to evaluate the compatibility with the free movement of goods of a set of national laws that were intended, directly or indirectly, for the protection of certain social rights (Poiarses Maduro 1999: 453-455; Poiarses Maduro 1998). A greater effort towards “positive” integration at the community level was essential. Thus was launched the harmonization of social policy.

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<sup>8</sup> Resolution of 21 January 1974 concerning a social action programme, OJ 1974, C013, p. 1.

<sup>9</sup> Case 8/75, *Dassonville*, 8/74 [1974] ECR, p. 837, para. 5 (judgment of 11 July 1974).

The directives adopted in the period 1975-1986, that is, between the adoption of the Social Action Programme and the Single European Act, appear mainly as measures aimed at limiting the social impacts of the economic crisis and of the industrial transformations whose pace it sharply increased (Kenner 2003: 27). Characteristic examples are Council Directive 75/129/EEC of 17 February 1975 concerning the approximation of the laws of the Member States relating to collective redundancies<sup>10</sup>, Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses<sup>11</sup>, and Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer<sup>12</sup>. These directives were intended to achieve merely a partial harmonization of employee protection in the Member States of the Community. As stated in the preamble to Council Directive 80/987/EEC, the idea was not to eliminate differences between the Member States but "to tend to reduce those differences that may have a direct impact on the functioning of the common market". In addition, these directives imposed minimum standards, and explicitly left unchanged the capacity of Member States to apply or introduce provisions more favourable to employees. These characteristics were probably determined by the use of Article 100 EEC as a legal basis. At the outset, given the European Community's limited competences in social policy, European welfare law was necessarily a law to accompany the internal market, intended to attenuate its negative social impacts. But what is expressed here more fundamentally is the idea that European social law—since this was emerging—had to be conceived on a negative rather than positive mode: it limited the effects of the restructuring brought about by creation of the common market, but as yet had no ambition to steer the Community towards a particular European social model.

Even the spectacular advances made in this period over equal pay for men and women continued to be governed chiefly by a logic in which social rights appear as an instrument at the service of the internal market, although the Treaty itself presented the common market project as intended to promote an accelerated raising of the standard of living and to improve living and working conditions for employees. It was in this domain, however, that a new balance was gradually established between the economic objectives and social objectives of the Community. When the Court of Justice confirmed, in its second *Defrenne* ruling of 1976, the direct effect of Article 119 EEC—in part to make up for the slow transposition into law of the directive on the same question adopted the previous year<sup>13</sup>—it did so, first, on the grounds of the need to avoid distortions of competition, faithful in this respect to the reason for originally including this provision in the treaty: "in the light of the different stages of the development of social legislation in the various Member States, the aim of Article 119 is to avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay"<sup>14</sup>. At the same time, the Court observed that, "secondly, this provision forms part of the social objectives of the

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<sup>10</sup> OJ L 48 of 22.2.1975, p. 29. Directive amended by Directive 92/56/EEC (OJ L 245 of 26.8.1992, p. 3), and consolidated by Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ L 225 of 12.8.1998, p. 16).

<sup>11</sup> OJ L 61 of 5.3.1977, p. 26. This directive was subsequently amended (Council Directive 77/187/EEC (OJ L 61 of 5.3.1977, p. 26); Council Directive 98/50/EC (OJ L 201 of 17.7.1998, p. 88)), and more recently was consolidated: Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfer of undertakings, businesses or parts of undertakings or businesses (OJ L 82 of 22.3.2001, p. 16).

<sup>12</sup> OJ L 283 of 28.10.1980. This text has since been amended by Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 (OJ L 270/10 of 8.10.2002, p. 10).

<sup>13</sup> Council Directive 75/117/EEC of 10 February 1975, on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ L 45, p. 19).

<sup>14</sup> Case 43/75, *Defrenne v. Sabena* ("n°2"), [1976] ECR, p. 455 (para. 9) (judgment of 8 April 1976).

Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples” (para. 10), such that “this double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community” (para. 12). Council Directive 76/207/EEC of 9 February 1976 on implementing the principle of equal treatment for men and women as regards access to employment, to vocational training, and as regards working conditions<sup>15</sup>, had already opened the breach a few weeks earlier<sup>16</sup>. This Directive founded the recourse to the implicit powers clause (Article 235 EEC, now Article 308), which provided its legal basis, on the idea that “equal treatment for male and female workers constitutes one of the objectives of the Community, in so far as the harmonization of living and working conditions while maintaining their improvement are inter alia to be furthered”.

By a succession of small steps, therefore, the social objectives of the Treaty came to be given equal status as the objectives relating to economic integration. In the *Schröder* judgment of 10 February 2000, drawing the consequences of recognition of the right not to be discriminated against on sex grounds as one of the fundamental human rights, which the Court was required to uphold<sup>17</sup>, the Court reached the view that “the economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right”<sup>18</sup>. This judgment is a good illustration of how the gradual renegotiation of the balance between the economic and the social objectives of the treaty in the late 1970s, was encouraged and made possible by the introduction into the Court’s case-law of fundamental rights, recognized as general principles of Community law to counter the fears expressed by some national constitutional courts that affirmation of the primacy of community law, established by 1964, was in danger of infringing the human rights embodied in the national constitutions of Member States.

In parallel with this renegotiation, the Community was also extending its action in the field of health and safety at work. In 1975, again based on the implicit powers clause of the Treaty of Rome, the Council set up the European Foundation for the Improvement of Living and Working Conditions<sup>19</sup>. The Foundation—that was helped in its work by a committee of experts—had as task to “contribute to the planning and establishment of better living and working conditions through action designed to increase and disseminate knowledge likely to assist this development”<sup>20</sup>. Specifically, it was intended as an instrument to give the Community access to analyses, studies and research permitting a systematic scientific approach to the problems presented by the improvement of living and working conditions. The first action programmes on health and safety were adopted in 1978 and 1984. The first framework directive on health and safety at work was adopted in 1980; it related to the

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<sup>15</sup> OJ L 39, p. 40. This directive was amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ L 269 of 5.10.2002, p. 15).

<sup>16</sup> Directive 76/207/EEC was extended by the adoption of Directive 79/7/EEC of the Council, of 19 December 1978, on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ L 6 of 10.1.1979, p. 24), also using Article 235 EEC as its legal basis.

<sup>17</sup> Case 149/77, *Defrenne* (“n° 3”), [1978] ECR, p. 1365, paras. 26 and 27 (judgment of 15 June 1978); Joined Cases 75/82 and 117/82, *Razzouk and Beydoun v. Commission of the EC*, [1984] ECR, p. 1509, para. 16 (judgment of 20 March 1984), and Case C-13/94, *P. v. S.* [1996] ECR, p. I-2143, para 19 (judgment of 30 April 1996).

<sup>18</sup> Case C-50/96, *Schröder*, [2000] ECR, p. I-743, para. 57 (judgment of 10 February 2000).

<sup>19</sup> Council Regulation (EEC) No 1365/75 of 26 May 1975 on the creation of a European Foundation for the improvement of living and working conditions (OJ L139 of 30.5.1975, p. 1).

<sup>20</sup> Art. 2 § 1 of Council Regulation (EEC) No 1365/75, aforementioned.

protection of workers exposed to chemical, physical and biological agents at work<sup>21</sup>. It was completed by a number of “individual” directives, known as “sister directives”<sup>22</sup>.

Two concerns appear to account for these advances. First, that of setting minimum protection thresholds for working conditions at the Community level, so as to avoid Member States being deterred from guaranteeing this protection at a high level, for fear of damaging the competitiveness of undertakings situated on their territory. The second was that of identifying the most appropriate solutions for scientific problems that required both a high degree of expertise and a comparison of the solutions defined for each state. This provided the justification for resolving questions of health and safety at work at the level of the Community rather than of individual states. The more specialized the expertise required, the more the studies conducted—for example on the danger posed by certain chemical substances in the work environment—use up large amounts of resources, and the more the entrusting of such studies to a European agency like the Dublin Foundation represents economies of scale for all the states.

#### **4. Stage three (1985–1997): from the Single European Act to the Treaty of Amsterdam**

A new stage in the evolution of social Europe opened in 1985-1986. The accession of Spain and Portugal to the Community in 1986, coming after that of Greece in 1981, raised the question of the coexistence within a single economic area of countries with, at that time, sharply contrasting standards of living. Fears of “social dumping” now began to appear<sup>23</sup>. There was clearly a need to facilitate approximation of national legislation in certain fields, notably social welfare, the more so since jurisprudence favoured “negative” economic integration, through progressively challenging national regulations that constitute barriers to trade, putting the regulatory regimes of the various Member States in direct competition with each other. In the “*Cassis de Dijon*” judgment of 12 February 1979<sup>24</sup>, the Court of Justice affirmed the principle of mutual recognition for the free movement of goods. The judgment stated that Germany could not ban imports to its territory of alcoholic beverages, “provided that they have been lawfully produced and marketed in one of the Member States” (para. 14), by reference to the requirements of a national regulation on the sale of spirit drinks that

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<sup>21</sup> Council Directive 80/1107/EEC of 27 November 1980, on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work (OJ L 327 of 3.12.1980, p. 8).

<sup>22</sup> For example, concerning exposure to asbestos: Council Directive 83/477/EEC of 19 September 1983 on the protection of workers from the risks related to exposure to asbestos at work (second individual Directive within the meaning of Article 8 of Directive 80/1107/EEC (OJ L 263 of 24.9.1983, p. 25), later amended by Council Directive 91/1382/EEC of 25 June 1991 (OJ L 206 of 29.7.1991, p. 16).

<sup>23</sup> This notion is in reality more complex to define than its spontaneous usage would suggest. The 1993 Green Paper *European Social Policy – Options for the Union* defined “social dumping” as the “unfair competitive advantage within the Community derived from unacceptable social norms” (Commission of the European Communities 1993: p. 7). See also the White Paper *European Social Policy – A way forward for the Union*, COM (94)333 final, 27 July 1994, para. 19 (which called for a framework of minimum common standards in social matters as a rampart against the temptation of competitive deregulation in social matters) and the Council Resolution of 6 December 1994 on some aspects of social policy in the European Union: a contribution to economic and social convergence in the Union, OJ No C 368, 1994, p. 4, para 10. Clear from this definition is that such and such a regulatory policy adopted by a state cannot be considered as a form of “social dumping” in its own right but only by reference to some assumed common norm, the violation of which confers the unfair character on the competition by the state in question. A more strictly economic definition, directly based on the commercial practice of dumping whereby a product is sold on a given market at below its cost of production so as to eliminate competitors, may also be used. Social dumping is then understood as a wage practice whereby workers are paid less than their real productivity, or when the level of wages does not follow productivity gains, so as to maintain a competitive advantage over competitors.

<sup>24</sup> Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR, p. 649 (judgment of 20 February 1979).



set a minimum alcohol content for different categories of alcohol-based products. For the Court, the obstacles to intra-Community trade resulting from national laws on the sale of the products in question were not to be considered compatible with the prohibition of measures having equivalent effect to quantitative restrictions on imports, except “in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating, in particular, to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer” (para. 8). The German government argued that under the mutual recognition requirement the regulation that protected consumers least would gradually predominate throughout the Community, precipitating a negative spiral—a form of competitive deregulation, with no state wanting to set standards higher than those prevailing in neighbouring states<sup>25</sup>. By rejecting this argument, but while not excluding that the imposition of certain national regulations, though creating barriers to the free movement of goods, might be necessary to meet overriding public interest objectives, the Court did not deny this difficulty but seemed of the view that this was the inevitable, albeit in some ways regrettable, consequence of the free movement sought by the treaty.

In the *Webb* case<sup>26</sup>, the Court of Justice had to address the question of whether the freedom to provide services guaranteed by the treaty was compatible with a national regulation that required a permit for the service activity of supplying agency work. By deciding in its judgment of 17 December 1981 that such regulation, when it occurs in a domain that is “particularly sensitive from professional and social viewpoints” (para. 18), must in principle be admitted<sup>27</sup>, though noting that this “measure would be excessive in relation to the aim pursued, however, if the requirements to which the issue of a licence is subject coincided with the proofs and guarantees required in the state of establishment” (para. 20), the Court in fact extended to services the lessons of its “*Cassis de Dijon*” judgment. Barriers to the free provision of services resulting from application of the law of the host country are acceptable only in so far as the regulation of the country of origin does not ensure an equivalent protection. Likewise, a few months later the Court ruled that a national regulation extending to employers established in another Member State a requirement to pay the employer’s share of social security contributions for workers in that state when those employers were already liable for similar contributions in respect of the same workers and for the same periods of employment, constituted an unjustifiable barrier to the free provision of services, because it discriminated against providers of services established in another Member State when performing work in the first state<sup>28</sup>. By its ruling that such a requirement would be no more justified even if it were intended to “offset the economic advantages which the employer might have gained by not complying with the legislation on minimum wages in the state where the work is performed”, the Court implicitly admitted the risk of social dumping

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<sup>25</sup> See para. 12 of the judgment, which reflects these arguments: according to the German government, “the lowering of the alcohol content secures a competitive advantage in relation to beverages with a higher alcohol content, since alcohol constitutes by far the most expensive constituent of beverages by reason of the high rate of tax to which it is subject”; furthermore, “to allow alcoholic products into free circulation wherever, as regards their alcohol content, they comply with the rules laid down in the country of production would have the effect of imposing as a common standard within the Community the lowest alcohol content permitted in any of the Member States, and even of rendering any requirements in this field inoperative since a lower limit of this nature is foreign to the rules of several Member States”.

<sup>26</sup> Case 279/80, *Webb* [1981] ECR, p. 3305 (judgment of 17 December 1981).

<sup>27</sup> “It is permissible for Member States, and amounts for them to a legitimate choice of policy pursued in the public interest, to subject the provision of manpower within their borders to a system of licensing in order to be able to refuse licences where there is reason to fear that such activities may harm good relations on the labour market or that the interests of the workforce affected are not adequately safeguarded. In view of the differences there may be in conditions on the labour market between one Member State and another, on the one hand, and the diversity of the criteria which may be applied with regard to the pursuit of activities of that nature on the other hand, the Member State in which the services are to be supplied has unquestionably the right to acquire possession of a licence issued on the same conditions as in the case of its own nationals” (para. 19).

<sup>28</sup> Joined Cases 62 and 63/81, *Seco and Desquenne & Giral v. Etablissement d’assurance contre la vieillesse et l’invalidité*, [1982] ECR, p. 223 (para. 9) (judgment of 3 February 1982).

that could result from the mutual recognition requirement. But this was probably the best way of encouraging states to move forward along the path of social harmonization, as was well illustrated by the adoption a few years later of Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services<sup>29</sup>, which was in direct response to the *Rush Portuguesa Limitada* judgment of 27 March 1990<sup>30</sup> and to the fears this judgment had revived about unfair competition from Member States with lower protection for workers' rights in the framework of the provision of services.

When Jacques Delors became president of the European Commission in 1985, the conditions were thus in place for a new qualitative leap forward in European unification. The adoption of the Single European Act, negotiated in 1985-1986 and put into effect on 1 July 1987, was the combined result of the United Kingdom's wish to move faster to completion of the internal market, for which the symbolic date of 31 December 1992 was set, and the concern of other states, notably France, that this project should be accompanied by further progress in social policy. The Commission's Work Programme for 1985 had been quite explicit about the need for this linkage: "the positive effects gained from the large market would disappear if some states attempted to obtain a competitive advantage over the others at the expense of a social regression. The existence of a European Social Area should therefore prevent recourse to these social dumping practices, harmful to total employment".<sup>31</sup> In Article 8a introduced into the EEC Treaty, the Single European Act—whose Preamble took the novel step of referring to the European Convention of Human Rights and to the European Social Charter—defined the internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty"; the Commission shall decide "measures to progressively establish the internal market over a period expiring on 31 December 1992". New Article 100a of the EEC Treaty (now Article 95 EC) facilitated realization of this objective by providing the possibility for the Council to adopt such measures by qualified majority, except those applying to fiscal provisions, those relating to the free movement of persons and those relating to the rights and interests of employed persons<sup>32</sup>. Most importantly, the Single Act was the first time provisions were introduced into the Treaty of Rome that explicitly accorded the Community a role in the social field. New Article 118a provided that the Council shall adopt, by qualified majority, directives imposing minimum requirements on the Member States in order to encourage "improvement, especially in the working environment, to guarantee a better level of protection of the health and safety of workers"; Article 118b contained the first reference to the development of a social dialogue at the Community level<sup>33</sup>. Lastly, the Single European Act sought to strengthen social and economic cohesion within the Community, which was the subject of a new Title in the Treaty of Rome: the action of the structural Funds (European Social Fund, European Agricultural Guidance and Guarantee Fund, European Regional Development Fund) was given the objective of reducing the disparities between the regions and the backwardness of the least-favoured regions<sup>34</sup>.

Article 100a EEC allowed the Council to adopt, by qualified majority, several directives that appeared sufficiently closely linked to the establishment of the internal market to justify use

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<sup>29</sup> OJ L 18 of 21.01.1997, p.1.

<sup>30</sup> Case C-113/89, *Rush Portuguesa Limitada v. Office national d'immigration*, [1990] ECR, p. I-1417 (judgment of 27 March 1990).

<sup>31</sup> Work Programme of the Commission, 1985, Bull. CE, Suppl. 4/85, para. 56.

<sup>32</sup> Article 100 A § 2 EEC, inserted by Article 18 of the Single European Act.

<sup>33</sup> This provision states that "The Commission shall endeavour to develop the dialogue between management and labour at the European level which could, if the two sides consider it desirable, lead to relations based on agreement".

<sup>34</sup> Article 23 of the Single European Act, adding Title V to Part Three of the EEC Treaty (Article 130 A to 130 E).

of this legal basis<sup>35</sup>. As the Court of Justice subsequently had occasion to confirm, the simple fact that a directive has for objective not only the establishment of the internal market but also an objective of a social nature does not preclude taking this provision as a legal basis<sup>36</sup>. Thus Council Directive 89/686/EEC of 21 December 1989, on the approximation of the laws of the Member States relating to personal protective equipment<sup>37</sup>, justified its contribution to the creation of the internal market by the observation that national provisions as regards personal protective equipment, often highly detailed, differ significantly from one Member State to another, and “may thus constitute a barrier to trade with direct consequences for the creation and operation of the common market”.

Possibly the clearest manifestation of this resolve to bring a social dimension to the creation of the internal market was the Community Charter of Fundamental Social Rights of Workers, adopted by the European Council at Strasbourg on 8-9 December 1989 (Vogel-Polsky and Vogel, 1992: 173-180; Bercusson, 1991: 195-295; Bercusson, 1996: 575-598; Betten, 1989; Hepple, 1990). However, the Charter takes the form of a solemn political declaration, adopted by eleven of the twelve Member States, the UK having decided not to sign up to it; and has no legally binding effect. It attributes no additional competence in social matters to the Community; indeed, Article 27 declares instead that responsibility for implementing the Charter lies primarily with the Member States. Lastly, its ambitions are modest, since it concerns only the fundamental social rights of workers—and not, as the European Commission initially proposed in its projects of May and September 1989<sup>38</sup>, all fundamental social rights. In any case, it has no other objective than that of encouraging the Member States and the European Community, within the limits of their respective competences, to work for the recognition of certain fundamental social rights. Its chief merit lies in having encouraged the Commission to make proposals to the Council over social policy, in the areas of Community competence.

The Treaty of Maastricht on the European Union, signed on 7 February 1992 and that came into force on 1 November 1993, did not constitute the qualitative leap forward in social policy that could have been hoped for. The Social Policy Agreement—this too signed by eleven of the twelve Member States—contained in the Social Policy Protocol annexed to the Maastricht Treaty set out the modalities whereby states signatories of the Agreement can establish closer cooperation in social policy areas, since the Protocol authorized them to “have recourse to the institutions, procedures and mechanisms of the Treaty for the purposes of taking among themselves and applying as far as they are concerned the acts and decisions required for giving effect to the above-mentioned Agreement” (para. 1 of the Protocol) (Watson, 1993; Whiteford, 1993). But Economic and Monetary Union—certainly one of the main issues in the new treaty and *the* main issue of its community dimension—had the effect of re-launching, by default, the question of social policy within the Union. As set out in Article 121 § 1 EC, the convergence criteria established at Maastricht for Member States wishing to participate in the third stage of economic and monetary union and join the single currency required these states to control their inflation (which in principle should not exceed by more than 1.5 percentage points that of the three best performing Member States

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<sup>35</sup> Article 100 EEC (amended Article 94 EC) was less easy to use as a legal basis, since it required unanimity. Nonetheless it permitted the adoption during this period of, for example, Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ L 225 of 12.8.1998, p. 16).

<sup>36</sup> Case C-491/01, *Regina v. Secretary of State for Health, ex parte British American Tobacco Company*, judgment of 10 December 2002 (request for a preliminary ruling on the validity of Directive 2001/37/EC of the European Parliament and the Council of 5 June 2001, on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ L 194, p. 26)). Cf. on the limits to the use of Article 95 EC (corresponding to Article 100 A EEC, after amendment), Case C-376/98, *Germany v. European Parliament and Council of the European Union*, [2000] ECR, p. I-8419 (judgment of 5 October 2000).

<sup>37</sup> OJ L 399 of 30.12.1989, p. 18.

<sup>38</sup> COM(89)248, of 31 May 1989; and COM(89)471.

in terms of price stability in the year before the examination of the situation of the Member State involved). They also imposed a ratio of the annual government deficit to gross domestic product (GDP) that should not exceed 3% at the end of the previous budgetary period and a ratio of gross government borrowing to GDP that should not exceed 60% at the end of the previous budgetary period. These criteria encouraged the adoption of deflationary policies, even when this was at the expense of growth and employment in the short-term, which later produced reactions. The first signs of this new awareness appeared with the White Paper from the Commission in 1993 on growth, competitiveness and employment, the conclusions of which were approved by the European Council on 11 December 1993 (Commission of the European Communities, 1993). But there was little enthusiasm among Member States to follow all the proposals in the White Paper, and it was not until the Extraordinary European Council on Employment in Luxembourg, on 20-21 November 1997—the first ever devoted entirely to employment—that the need for better coordination of the employment policies of the Member States was clearly recognized. The major achievement of this European Council—other than the higher profile now taken by employment on the European political scene—was to anticipate the coming into force of the Treaty of Amsterdam, signed in 1997 and that came into force on 1 May 1999, which inserted a new title on employment into the Treaty of Rome and provided for adoption by the Council, on a proposal from the Commission, of guidelines on employment that the Member States “take into account in their employment policies” (Article 128 § 2 EC). Significantly, recourse to such “common lines of approach for both objectives and means” according to the conclusions of the European Council in Luxembourg (para. 2), are conceived on the model of the “broad economic policy guidelines” of the Member States and the Community which, since the Maastricht Treaty, aim to ensure a degree of convergence in the economic policies of Member States in the economic and monetary union. In the same way that the economic interdependence of the states justified defining their economic policies as a question of common interest, so it justified making their employment policies part of a coordinated approach<sup>39</sup>. At the same time, alignment did not mean equivalence, and Article 128 § 2 EC specifies that the employment guidelines “shall be consistent with” the broad economic policy guidelines—that is, remain subordinated to them.

## **5. Stage four (since 1997): after the Treaty of Amsterdam**

The Treaty of Amsterdam of 2 October 1997 essentially reintroduced the Social Policy Agreement of 1992 into the EC Treaty, something made possible by the intervening change of political majority in the United Kingdom. The result was on the whole unsatisfactory (Betten, 1997; Robin-Olivier, 1999). The Chapter of the EC Treaty that now contains the “social provisions” does not formally recognize the fundamental social rights. Although the Community and the Member States shall act on social matters “having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of Fundamental Social Rights of Workers” (Article 136 EC), Article 137 EC provides modestly that the Community “supports and completes the action of the Member States” in a certain number of fields (workers’ health and safety, working conditions, information and consultation of workers, integration of persons excluded from the labour market, equality between men and women) through the adoption of directives, which must contain “minimum requirements for gradual implementation”; the Council can also adopt unanimously measures for the social security and social protection of employees, the protection of workers in the case of redundancy, on the representation and

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<sup>39</sup> As was stated by the conclusions of the European Council in Luxembourg of 20-21 November 1997: “The idea is, while respecting the differences between the two areas and between the situations of individual Market States, to create for employment, as for economic policy, the same resolve to converge towards jointly set, verifiable updated targets”.

collective defence of workers and employers, for determining the employment conditions of third-country nationals legally resident in the Community. Still excluded from any form of harmonization are pay, the right of association and collective action (strike or lock out). The Treaty of Nice, on which political agreement was reached in December 2000 but that did not enter into force until 1 February 2003, subsequently reworded Article 137 EC but made only one important modification<sup>40</sup>. The open method of coordination (or “OMC”), which under the Treaty of Amsterdam was envisaged solely for combating social exclusion, was extended to all the areas covered by Article 137 EC. Article 137 § 2a) now provides that the Council may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonization of the laws and regulations of Member States.

The European Council of Lisbon of 23-24 March 2000 was where the OMC really emerged, as an authentic alternative both to pure intergovernmentalism and regulatory competition between the States, and to transferral of additional competences to the Community and greater harmonization. But the immediate impetus for innovation in methods of governance came from the concern to combine, in a balanced framework, improving the economic competitiveness of Member States in the context of economic globalization, with social cohesion. The objective of the Lisbon strategy, as expressed in the Council conclusions, was to prepare the transition to the knowledge-based society and economy, to “modernise the European Social Model, investing in people and combating social exclusion” and encouraging economic growth. For the purpose of conducting an overall strategy to achieve these objectives, a new open method of coordination is introduced, “as the means of spreading best practice and achieving greater convergence towards the main EU goals” (para. 37 of the conclusions of the Lisbon European Council).

The open method of coordination is primarily a new mode of governance. It is based on fixing Union guidelines for translating into national and regional policies, establishing indicators to facilitate comparison, and peer review. The goal is to combine a decentralized approach involving the social partners and civil society actors, with coordination ensured by evaluation of national action plans for employment and social inclusion<sup>41</sup>. It is this dimension in particular that has focused the attention of the scientific community (Scott and Trubek, 2002; Pochet and Magnusson, 2005). From the perspective of defining the balance within the Union between economic objectives and social objectives, its contribution has been ambivalent. In some cases, national governments have been able to use the guidelines and recommendations adopted under the European employment strategy, or the common objectives endorsed for combating social exclusion, to gain acceptance from their public opinions or parliaments for unpopular reforms that, without this legitimation, would probably not have been accepted (Visser, 2005). This depoliticization of national policy-making over welfare and employment, combined with the instrumentalization by Member States of the best practices recommended for the Union, has on the whole encouraged the introduction of reforms tending to an activation of welfare benefits, and aiming to get the economically inactive into the labour market, in particular to meet the challenge that demographic trends in Europe pose to the future of our social security systems. More fundamentally, the objective of strengthening social cohesion, which was manifested by the adoption of national action

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<sup>40</sup> Moreover, the Treaty of Nice removed the reference contained in the Treaty of Amsterdam version of Article 137 EC to the possibility for the Council acting unanimously to take measures concerning “financial contributions for promotion of employment and job-creation (...)” (see Article 137 § 3, para. 5 EC, in its previous version). In addition, the version amended by the Treaty of Nice states that the provisions adopted pursuant to Article 137 EC “shall not affect the rights of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof”, a point absent from the version adopted at Amsterdam.

<sup>41</sup> For the genesis of the method, it is worthwhile consulting the essays by the members of the group of experts brought together under the Portuguese presidency of the Union in the first semester 2000, edited by Maria Joao Rodrigues (Rodrigues, 2004).

plans for social inclusion, never really appeared independent of the objective of raising the employment rate and thus ensuring macro-economic stability. This was made explicit by the decision of the European Council of spring 2005, following a mid-term evaluation of the Lisbon strategy, to re-launch the strategy by focusing it more explicitly on growth and employment, which will lead to the adoption by the Council of integrated guidelines consisting of broad economic policy guidelines and employment guidelines<sup>42</sup>.

The open method of coordination as implemented in employment policy (the Luxembourg process) and in combating social exclusion (in the broader framework of the Lisbon strategy) does not involve the adoption of new binding obligations for Member States but the definition of common objectives combined with an organized sharing of national experiences to foster mutual learning between Member States. In this way it has led all the actors involved in these developments to employ a common vocabulary, reflecting a shared perception of the challenges to be faced and of the means by which to move towards the objective defined at the Lisbon European Council in March 2000<sup>43</sup>. The central idea that runs through these changes is expressed clearly by the Committee of Social Protection in the report submitted to the Council Employment, Social Policy, Health and Consumer Affairs of December 2002, which revised the common objectives of the OMC for the fight against social exclusion, initially endorsed by the Nice European Council in December 2000: “Employment is the best safeguard against social exclusion. In order to promote quality employment it is necessary to develop employability, in particular through policies to promote the acquisition of skills and life-long learning. The implementation of the objectives to which the European Union has committed itself within the European Employment Strategy will, therefore, make a vital contribution to the fight against exclusion. Economic growth and social cohesion are mutually reinforcing. It is a precondition for better economic performance that we create a society with greater social cohesion and less exclusion. Social protection systems also play a key role. In this context, the national and social assistance and minimum income schemes are important instruments in social protection policy. It is vital, in the context of an active welfare state, to create modern systems of social protection which promote access to employment. Retirement pensions and access to health care also play an important role in the fight against social exclusion”<sup>44</sup>.

This general approach was reinforced following the mid-term review of the Lisbon strategy 2000-2010. The report from the high-level group of experts chaired by W. Kok, the Dutch ex-Prime Minister, of November 2004<sup>45</sup>, immediately approved by the European Commission<sup>46</sup> and by the Council of the Union, noted that the Lisbon strategy had not delivered the expected results, in particular because of an overloaded agenda and conflicting priorities, and inadequate commitment among the Member States. The refocusing on growth and job creation aimed to act as a priority on one of the three strands—economic, social and environmental—previously defined in the Lisbon strategy, as reviewed by the Göteborg European Council of July 2001<sup>47</sup>. Social cohesion is defined in terms that present it as

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<sup>42</sup> The conclusions of the Brussels European Council of 22-23 March 2005 (doc. Council 7619/1/05, REV. 1) indicated furthermore “As a general instrument for coordinating economic policies, the BEGPs should continue to embrace the whole range of macroeconomic and microeconomic policies, as well as employment policy insofar as this interacts with those policies; the BEGPs will ensure general economic consistency between the three strands [economic, social and environmental] of the strategy” (para. 38). On 12 April 2005, the Commission presented its integrated guidelines for growth and employment for the period 2005-2008.

<sup>43</sup> See notably the Social Policy Agenda (2000-2005) (Commission of the European Communities, 2000), approved by the Nice European Council of 7-9 December 2000; and Commission of the European Communities, 2004.

<sup>44</sup> Fight against poverty and social exclusion: common objectives for the second round of National Action Plans, 25 November 2002 (doc. Council 14164/1/02 REV 1).

<sup>45</sup> *Facing the Challenge—the Lisbon Strategy for growth and jobs* (November 2004)

<sup>46</sup> Commission of the European Communities (2005).

<sup>47</sup> In the Communication to the Spring European Council that ratified the modalities of the new start for the Lisbon Strategy, the Commission proposes “to refocus the Lisbon agenda on actions that promote growth and jobs in a manner that is fully consistent with the objectives of sustainable development. The actions falling under this

resulting necessarily from improvements in the performance of Member States over employment. It is still among the objectives to be pursued. But the reform efforts will be concentrated less on fighting social exclusion as such than on incentives for employment and on developing provisions that, ensuring a combination of labour market flexibility and employment security, encourage career mobility while founding employment security on adaptability and upgrading skills, and on facilitating business start ups, rather than on the statutory right to keep one's job.

## 6. Conclusion

The mid-term review of the Lisbon Strategy is provisionally the final act of the dialectic between economic and social objectives in the short history of European integration. It is too early to evaluate its impact. However, three conclusions seem to stand out clearly at this stage. The overall dynamic that we have surveyed runs from a neglect of the social dimension of building the common market, to a major advance in social harmonization in the 1970s and 1980s, and to a slowdown at the end of the 1990s. The ambition set by the Single European Act of 1986—completion of an internal market by 31 December 1992—and that defined in the Treaty of Maastricht in 1992—economic and monetary union and creation of a single currency between the Eurozone states in 1999—both produced a desire to see progress in economic and monetary integration accompanied by advances in the social welfare sphere. But the techniques employed have been very different—to begin with, adoption of regulatory initiatives; in the more recent phase, open coordination between Member States over policies for employment and for combating social exclusion. Each of these movements was accompanied by a rhetoric of fundamental rights: the Community Charter of the Fundamental Social Rights of Workers of 1989 was followed by the Charter of Fundamental Rights of the European Union proclaimed at the Nice Summit in December 2000 (Sciara, 2004). But these texts have had a limited concrete impact in the field of social policy, not so much because they lack legally binding status but because the charters do not modify the division of competences between Member States and the European Community. The Charter of Fundamental Rights, in particular, may go some way to expanding the place of fundamental social rights in the elaboration of Community laws and policies, and it may influence how the European Court of Justice defines the balance between, on the one hand, the economic freedoms of movement and competition law, and on the other, social rights (De Schutter, 2002; Hervey and Kenner, 2003). But naturally it is not enough to modify the more fundamental imbalance that results because the rules for the internal market are defined in the Treaty of Rome and in the derived law, whereas employment law and social protection are still determined principally at the level of Member States (De Schutter, 2000). The emergence of Social Europe seems bound to become harder still in the future, since enlargement of the Union to 25 Member States makes decision-making in this area particularly onerous, given the different approaches of the Member States.

The open methods of coordination applied to employment and combating social exclusion, though also in relation to pension and health care reform, aim to take into account the interdependence of Member States within an integrated economic and monetary area, with a view to imposing a common discipline on them and avoiding a situation in which a lack of economic reforms in one state—or poorly designed reforms—has a negative impact on the other states in this area. These OMCs are not intended primarily to limit the risk of competitive deregulation between Member States, which would probably be detrimental to

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strategy should reinforce the Union potential to meet and further develop our environmental and social objectives. However, the challenge is to define now a strategy that addresses the areas in which Europe is not performing well (for example, our stagnant growth and insufficient job creation)" (Commission of the European Communities 2005: 13).

the protection of fundamental social rights. In one way, OMCs have exactly the opposite effect. Under the pressure of regular peer review, they encourage the states to initiate reforms that may be difficult to accept for the population, to the detriment, at least in the short term, of social cohesion; OMCs place these economic reforms, that are necessary to improve the economic performance of the Member States, out of reach of electoral contingencies, and introduce continuity between different national governments. The much-publicized risk of “competitive deregulation”, or of social dumping emanating from the Central and Eastern European countries in order to attract investors to them (for contrasting views on this risk, cf. Vaughan-Whitehead, 2003 and Commission of the European Community, 2004) is perceived as less real than the danger that some states will fail to play the game over the economic reforms needed for the Union “to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion”, according to the new strategic goal defined at the Lisbon European Council of 23-24 March 2000 (para. 5).

It is therefore fundamental that the process of economic reform, including the reform of labour markets and the modernization of social welfare systems to make work pay, should be framed by a reference to fundamental rights (Smismans, 2005; Lo Faro and Andronico, 2005). The high-level group on the future of social policy in the enlarged European Union believed that fears of social dumping must be kept in proportion, first because the differences in labour costs between the new Member States (in particular the eight countries of Central and Eastern Europe) and the old Member States correspond to real productivity differences, and will diminish over time, and second because all EU Member States are party to common international commitments, in the International Labour Organization and in the Council of Europe (Commission of the European Communities, 2004: 13). The latter argument had been used by the Ohlin Report in 1956. But it does not take account of the fact that, over and above the apparent identity of the international commitments, the scope of these commitments and the modalities of their implementation vary greatly between Member States. There is therefore a justification for establishing, actually within the European Union, a mechanism to monitor observance of fundamental social rights by Member States, in order to limit the risk of excessive differences between states and to strengthen the European Social Model (De Schutter, 2005).

Even if the risk of competitive deregulation remains limited including in the enlarged European Union, enlargement, due to the persistence of differences between the various Member States—will nevertheless have the effect of accelerating the process of restructuring of enterprises, forcing them to adapt to the demands of increased competition within the European economic area. These restructurings are not anomalous per se—on the contrary, they are actually part of the Lisbon Strategy, which conceives them as reinforcing the competitiveness of the European Union in a globalised context. But in the most exposed industrial sectors, the social impacts are potentially considerable. Hence the emphasis on the urgent need for solidarity not only between the “old” and the “new” Member States, so as to favour a catching up by the latter—the role of the structural funds in guaranteeing economic and social cohesion is obviously decisive in this respect—but also, within each state, between the sectors threatened by restructuring and other, more sheltered sectors.

Yet the question that arises today is that of whether the Member States have not deprived themselves of the capacity to ensure adequate protection for the weakest sectors (Guild, 1999; Ferenczi, 2005). On the one hand, they are subject to the budgetary discipline imposed on them as part of economic and monetary union and formalized in the stability and growth pact<sup>48</sup>. On the other, they have great difficulty raising the level of taxation in order to

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<sup>48</sup> Initially, the procedure for excessive government deficits provided by Article 104 EC was fixed by Council Regulation (EC) No. 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ L 209 of 2.8.1997, p. 1). The revision of the procedure



pay for social programmes that can no longer be paid for by government deficits. More specifically, the fiscal reforms that can be envisaged today tend systematically to favour enterprises over households and, within the taxation of personal income, the richest sections of the population over the poorest. The mechanics of this are simple: the most mobile factors (enterprises and the private individuals with the highest incomes benefit most from mobility within the European Union) are those that states tend to treat lightest, since overly heavy taxation on these factors may well cause them to establish themselves or reside elsewhere. It matters little that the level of fiscal burden, among the factors guiding companies when deciding where to invest, plays only a relatively secondary role—less important in any case than infrastructure quality, proximity of markets, or the level of qualification of the available labour. The fear that companies will relocate, or that the wealthiest individuals will leave the country—is often enough on its own to influence the direction of reforms. This phenomenon of fiscal competition in the field of company taxation<sup>49</sup> has increased markedly with enlargement, since several Member States are currently engaged in the strategy that Ireland (where the rate of tax on companies is 12.5%) successfully pioneered many years ago. The tax rate on reinvested profits is 0% in Estonia, as against 19% in Poland and Slovakia and 33% in France. In Germany it was reduced from 40 to 25% under Chancellor Schröder's Red-green coalition. Thus, "the average nominal rate of corporation tax in the Union of fifteen went from 48% in 1982 to 32% in 2002. And the most marked accelerations in this fall occurred at the times when economic integration was progressing: in the early 1990s (completion of the internal market) and in the early 2000s (introduction of the euro)" (Moatti, 2005).

That is where we stand at present. From the start of the European Community, attempts to balance the economic dimension by the social dimension have always run up against a limit, that of the refusal by Member States to give up too large a share of their competences over social welfare and taxation. This first obstacle is now joined by a second: the forms of the transaction between the economic and the social—which must define the specificity of the European social model—appear increasingly dictated by the evolution of economic globalisation, and by the Union's concern to remain competitive relative to its large competitors, chief among them the United States. The Lisbon Strategy was intended as much—if not more—to prepare the European Union for facing the shock from globalising economies, as it was to provide for managing the relations between Member States, so as to limit attempts by Member States to resort to free riding strategies within an integrated economic area. But without any strengthening of the mechanisms of solidarity both between and within states, there is a real risk that the social dimension—the perpetual junior partner—will remain subordinated to macro-economic orthodoxy and the imperatives of advancing globalisation. More than ever before, if the Member States are to win back the sovereignty they are losing to the markets, they must accept to entrust certain forms of its exercise—through transferral of further competences—to the Union.

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in June 2005 (Council Regulation (EC) No. 1056/2005 of 27 June 2005 amending Regulation (EC) No. 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L 174 of 7.7.2005, p. 5) represented a significant improvement, since it takes into account qualitative factors—i.e. the source of excessive deficits—and the economic heterogeneity in the Member States.

<sup>49</sup> The same phenomenon does not affect value-added taxes (VAT), over which coordination exists between the Member States, nor taxation of savings, about which an agreement was reached between the Member States in June 2003. On the other hand, a degree of competition exists over the income tax of private individuals, especially as regards the higher tax bands (Moatti, 2005).

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