

THE EU AND SOCIAL PROTECTION: WHAT SHOULD THE EUROPEAN CONVENTION PROPOSE?

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Introduction

In this paper I will discuss two interrelated questions: (1) What role, if any, should the European Union (EU) play in the development of social policy? (2) Does the proper role of the EU, as we would define it when answering the first question, require any changes to be made to the Treaty? If the answer to the second question is positive, the European Convention and the forthcoming Intergovernmental Conference (IGC) offer a unique opportunity to include the desired changes in a new European Treaty.

My discussion of the EU's role in social policy will not be exhaustive. I will concentrate mainly on the development of social protection, thus not going into employment policy and related issues. Nor will I relate the discussion on social protection to the discussion on how Member States can maintain the necessary funding for social programmes in a context of 'tax competition', nor to the debate on the future of the structural funds. This is not to say that these discussions are not important, quite on the contrary. However, my aim here is to examine the impact of the EU on the typical work of a national minister who is responsible for social protection (including health care), and what kind of EU such a minister would like to see develop now, and after the Convention.

In the first part of my paper, I will provide a succinct answer to my first question, concerning the role of the EU in social protection policy. In the second part I will present a brief survey of the European agenda of 'social protection' ministers as it stands today, and suggest short-term proposals for the further development of that agenda, which do not presuppose changes to the Treaty. My second part will show that the social protection agenda has gained some momentum since the Lisbon Summit of March 2000, but also that it remains politically and institutionally fragile. In the third part of my paper, I will elaborate on six proposals concerning the Treaty. These proposals answer to the questions raised in the first part and to the post-Lisbon experience discussed in the second part.

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1. WHAT ROLE SHOULD THE EU PLAY IN THE DEVELOPMENT OF SOCIAL PROTECTION POLICY?

What role, if any, should the EU play in the development of social protection policy? In order to give a coherent response to this question, we should first assess the facts: what role does the EU play in the development of social protection?

In an excellent textbook on policy-making in the European Union, Stephan Leibfried and Paul Pierson summarize the facts as follows: “The process of European integration has eroded both the sovereignty (by which we mean legal authority) and autonomy (by which we mean *de facto* regulatory capacity) of member states in the realm of social policy. National welfare states remain the primary institutions of European social policy, but they do so in the context of an increasingly constraining multi-tiered polity”². In addition to direct pressures on national welfare states resulting from social policy initiatives undertaken by the European institutions, the dynamics of market integration have created indirect pressures on national welfare states, *de jure*, through the direct imposition of market compatibility requirements by the European Court of Justice (ECJ), and *de facto* by the forces of economic competition in an integrated market.

1.1. Diminished legal authority through market compatibility requirements

Direct imposition of market compatibility requirements, or ‘negative policy reform’, as Leibfried and Pierson call it, mainly occurs through the application of two fundamental freedoms provided for in the Treaty: the free movement of workers and the freedom to provide services.

The application of the principle of free movement of *workers* implies that,

- firstly, a Member State may no longer limit most social benefits to its citizens;
- secondly, a Member State may no longer insist that its benefits only apply to its territory and thus may only be enjoyed there;
- thirdly, although a Member State is still largely free to prevent other social policy systems from directly competing on its own territory with the regime it has built, it is no longer entirely able to do so;
- fourthly, Member States do not have an exclusive right to administer migrants’ claims to welfare benefits.

The application of the principle of free movement of *services* is closely linked to the fact that the treaties, as well as secondary European law, focus on economic activity and entrepreneurial freedoms. The question is obviously: do welfare state services constitute an economic activity? If so, the freedom to provide financial or social services would apply, as would the general European competition regime, implying, for example, that Member governments can no longer exclusively decide who may provide social services or benefits.

Fortunately, European integration does acknowledge non-economic true welfare activity. However, there is no general exemption for welfare state activity from the treaty’s market freedoms, and the distinction between ‘economic’ and ‘welfare’ (or ‘solidarity’) activity is not always clear-cut. Hence, drawing – and continually

² Leibfried, S. and Pierson, P., *Social Policy. Left to Courts and Markets?*, In: Wallace, H. and Wallace, W., *Policy-Making in the European Union*, Fourth Edition, The New European Union Series, Oxford University Press, p. 268.

redrawing – this fine line between ‘economic’ and ‘solidarity’ activity is what much of the legal conflict and judgements of the ECJ are about.

In an outstanding report for last year’s Belgian Presidency of the EU, Professor Elias Mossialos³ and his team have shown that, in particular in the field of health care, there are significant prospects for a substantial remoulding of national policies through this ‘market filter’. As Leibfried and Pierson also stress, this is mainly due to the fact that health insurance has more ‘market characteristics’ in most national systems, is more fragmented into provider groups which already operate in markets (medical instruments, pharmaceuticals) or quasi-markets (doctors in private practice sickness funds) and has in most countries been traditionally exposed to substantial private provision. Moreover, national reforms have been increasingly geared to ‘market cures’ and de-regulation in recent decades. To the extent that these reforms move social insurance away from redistribution and solidarity, it is clear that beyond an as yet unidentified threshold, such programmes would become just another economic enterprise that must compete with private health insurance and other competitors on a level playing field.⁴

The example of health care shows that it would certainly be simplistic to blame ‘Europe’ for the problems national social policy makers are confronted with, as if ‘Europe’ *enforced* market solutions upon reluctant Member States. As a matter of fact, instead of asking the question “Do welfare state services constitute economic activity?” one could put forward a slightly different question: “To what extent do Member States believe they can organise their domestic welfare services as an economic activity?”

The actual consequences of the application of the European competition regime and internal market rules have repeatedly been illustrated in rulings issued by the European Court of Justice. Let me give just one example. In the *Kohll*⁵ and *Decker*⁶ rulings, the Court considered that by demanding prior authorisation for the reimbursement of orthodontic treatment and the purchase of spectacles outside its territory, the Luxembourg health insurance rules had created an unjustified impediment to the free movement of goods and services within the European Union. Consequently, the Luxembourg social security system was forced to reimburse this unauthorised health care in another Member State. Even though I will explain later that these rulings were more nuanced than first thought (Section 3.2), they did make it clear again that social security systems, even if a matter of national competence, were not exempt from European law.

Moreover, the *Kohll* and *Decker* rulings create a dual system of social cover for health care:

- On the one hand there is the procedure governed by the EC regulation on the coordination of social security (Regulation 1408/71, to which I will refer in Section 2.4). This Regulation integrates the patient who has received authorisation from his or her social security institution into the social protection system where he receives the medical treatment, “*as though he were insured with it*”. This mainly implies that the patient is subject to the same cost sharing and the same regulations (e.g. referral for specialist care), and that costs are settled between both social protection systems according

³ E. Mossialos, M. McKee, W. Palm, B. Karl and F. Marhold (forthcoming, 2002), *EU Law and the Social Character of Health Care Systems*, P.I.E. – Peter Lang, Brussels.

⁴ The preceding paragraphs are to a large extent inspired by Leibfried and Pierson’s analysis.

⁵ ECJ, *Kohll*, C-158/96, (1998) ECR I-1931.

⁶ ECJ, *Decker*, C-120/95, (1998) ECR I-1831.

to the tariffs of the State where treatment was delivered. Mobile persons temporarily become 'members' of the host country's health care system.

- On the other hand, patients using the procedure created by *Kohll* and *Decker* are not integrated into the social protection system of another Member State but, when returning to their country of residence, claim the coverage of their home country's social protection system "as if they received the treatment there". This would mean that reimbursement in the State of residence is subject to the conditions and according to the tariffs applicable there.⁷

This duality not only creates some complexity and scope for confusion, it poses a more fundamental problem. The traditional procedure allows (conditioned) mobility, yet it preserves the internal cohesion of national health care systems. The *Kohll* and *Decker* procedure introduces a degree of freedom, which, if unlimited, may disrupt the internal cohesion of national health care systems. Thus, it might lead both to increasing inequalities in access to health care and to increasing problems when it comes to guaranteeing the quality of care to patients – two essential objectives European national health ministers generally want to achieve. This is not to say that increased patient mobility is intrinsically problematic. On the contrary, I believe increasing patient mobility can, for a number of reasons, be very positive if developed in the right kind of framework. For instance, it would allow the development of a system of European centres of excellence, especially for highly specialised medical treatments, as well as new and experimental therapies; it would allow to reap the full benefits from cross-border co-operation projects; or, to organise tangible solidarity between Member States with particular difficulties in the field of health care. However, the nature of the framework we apply to organise patient mobility will be crucial.

A practical example may illustrate what I mean. Suppose UK citizens were entitled to health care anywhere in Europe, in Belgium for instance, without prior authorisation, with the NHS having to reimburse the costs. Mobility of patients would create opportunities for the UK government and its citizens: it would provide an immediate solution for waiting lists, whilst the extra investment the UK government is currently undertaking takes time to produce practical results; and, in so far as the NHS would consider contracting-out its patients to the private sector within the UK, transparent and well-organised price competition between the British private sector and health care providers in the rest of Europe might be beneficial (since supply would be increased). However, free patient mobility also entails significant risks, both for the UK government and for its citizens: not just the risk of an uncontrollable bill (as the UK government cannot monitor cost-efficiency abroad), but also potential problems with regard to the quality of care, given the asymmetry of information that characterizes the health care sector. From the point of view of the Belgian health sector, mobility of British patients would create opportunities, such as extra revenue. But simultaneously, mobility of patients, if based on a '*Kohll* and *Decker*' type of procedure and not on the traditional procedure provided by Regulation 1408/71, might fuel the development of a 'two-speed' health care system in Belgium, if British patients were to be treated at 'free' tariffs (that is, tariffs not conforming to the Belgian national convention on tariffs). Indeed, a growing influx of patients from abroad, based upon *Kohll* and *Decker*, might nourish the development of an increasingly important 'non-convention' sector within Belgian health care, a development we would certainly not like to see.

⁷ The preceding paragraphs are inspired by W. Palm and J. Nickless, (2001), "Access to healthcare in the European Union: The consequences of the *Kohll* and *Decker* judgements", *Eurohealth*, vol. 7(1), p. 13-22.

One can also imagine other interactions between Member States. If a Member State X decided to semi-privatise part of its domestic health care system, the application of a 'Kohll and Decker' type approach to patient mobility may, to some extent, favour privatisation of health care activity in neighbouring countries. In other words, when it comes to patient mobility, the fundamental question is: will we create opportunities, by offering new solutions to European patients with respect to the built-in solidarity of our systems, or will we simply export our problems to each other?

1.2. Diminished autonomy due to *de facto* pressures on welfare states

De facto indirect pressures on welfare states are the result of enhanced competition within the single market as well as of the economic and budgetary policies promoted by the EU.

I believe one should avoid cheap talk about 'social dumping going on in the EU'. Intensifying competition in an integrated market is only one of the many challenges our national welfare states are facing. Today, our welfare systems are under strain primarily because (a) the traditional fields of social protection, such as pensions and health care, require greater resources, and (b) because new social risks and needs have emerged. Furthermore, we know from experience that European integration does not necessarily lead to retrenchment. Indeed, in many countries the single market led to renewed agreements between the social partners and consequently to the rethinking – rather than the retrenchment – of their welfare states.

Nevertheless, it would be naïve just to extrapolate.⁸ Economic and monetary integration and the growing importance of capital and labour mobility within the Union will leave a bigger mark on the architecture of our welfare states in the long run. Furthermore, in the short term, we are on the eve of the enlargement of the Union. In other words, the history of integration still has to be written. When it comes to the actual impact of European integration on welfare state development, the jury is still out, although economic theory is quite clear on this issue. For instance, economists have long recognised the potential dangers of increased mobility leading to a loss of the tax base (perhaps even to 'tax competition') with consequential effects on the capacity of EU Member States to finance their social programmes.

Pressure on welfare states is not just the result of market integration, but is also created by the follow-up of Member States' economic policies through the EU's Broad Economic Policy Guidelines and multilateral surveillance, and the assessment of the budgetary situation of the Member States through the annual stability plans. To be sure, recognizing that these political processes create pressure by no means implies that the considerable attention in the EU to sound public finances is to be swept under the carpet. On the contrary, sound and sustainable public finances are a *conditio sine qua non* for a sound and sustainable social policy, which is evidently a major issue in our ageing societies. However, a focus on financial prudence always carries with it the danger that one myopically economises on what would be sound and necessary investment. Social investments are no exception to this observation. Intelligent social investment is much needed for two reasons: to answer the increasing expectations of our citizens concerning the quality of today's public services in general (a matter of public concern in many Member States, and one of

⁸ Just as it would be naïve to limit the analysis to a superficial assessment of developments over time: even if we do not witness actual 'retrenchment', it may well be the case that there is already a degree of 'underprovision of social insurance' in contemporary welfare states; see Drèze for a recent synthesis of this discussion in J. H. Drèze (2002), "Economic and Social Security: The Role of the EU", *De Economist*, vol. 150(1), p. 1-18.

the sensitive issues in recent elections); and, secondly, to prepare our welfare states for the future, given the reality of ageing. It may be the case that a 'straightforward' shift of costs to the private sector lightens budgetary burdens, but on the other hand this may offer few substantive solutions to tricky issues such as quality, equity and justice – it may even lead to less quality, equity and justice.⁹ Hence, sound public finances should be accompanied by sound social investment. Whilst there is tangible EU pressure (and rightly so) for sound public finances, there is, so far, comparatively little EU pressure for intelligent social investment.

1.3. Common objectives and legitimate diversity

A sober assessment of the facts, together with uncontroversial economic theory, points to two conclusions.

Firstly, it seems fair to say that Member States have lost more control over national welfare policies in the face of pressures from integrated markets than the EU has *de facto* gained in transferred authority, substantial though the latter may be. Thus, there is a growing gap in our steering capacity with regard to welfare policy. This is problematic, since the combination of diminished Member State autonomy and authority and continued weakness in developing responses at EU level may restrict both the scope and the pressure for innovative social investment, which is needed everywhere given the common challenges – for health care and elderly care, and for pension systems – created by the dynamics of demographic ageing. The problem will be exacerbated by EU enlargement because the requirement of unanimity in the Council for important areas of social policy entails the risk of paralysis of decision-making in the social field, and, probably even more importantly, because enlargement will bring about dramatic increases in the economic, social, politico-cultural and politico-institutional heterogeneity among EU Member States.¹⁰

Secondly, in a context of increased mobility, not just of workers and capital, but also of service organisations, care providers and patients, the Treaty constellation might prioritise two polarised trajectories, as Leibfried and Pierson fear: core welfare state components (redistribution, pay-as-you-go,...) would remain 'intervention-free', to the extent that they are 'pure' welfare; but the more these functions are provided by market-based services, the more the welfare state (in whole or in parts) would tilt towards the sphere of 'economic action' from the point of view of the EU institutions, thus becoming subject to single market principles and market regimes. Thereby the welfare state could gradually be submerged into a single European 'security' market, that is, a single market for personal protection and insurance instruments.¹¹ There are fundamental and well-known economic reasons (information asymmetry, adverse selection...) as to why market principles and social security are no easy twins, neither at national level, nor at European level. As I will argue below, the Court has, so far, followed a cautious path, with sufficient nuances and due respect for the prerequisites of national welfare policies. Yet, although it would be unfair to blame 'Europe' for some of the difficulties facing national social policy makers if they choose to rely more on market or quasi-market mechanisms in their welfare provision (as I

⁹ Myles offers an excellent analysis of this problem with regard to pensions in a report prepared for the Belgian Presidency of the EU by Esping-Andersen *et al.*, to be published as Chapter 3 in G. Esping-Andersen, D. Gallie, A. Hemerijck and J. Myles (2002), *Why we need a new welfare state?*, Oxford University Press.

¹⁰ According to simulations by the Commission, the income gaps between countries will double in a Union with 27 members. For the 8 poorest countries, accounting for about 16% of the EU 27 population, average income per capita will be around 40% of the EU 27 average.

¹¹ Leibfried and Pierson, *o.c.*, p. 283

emphasized in Section 1.1), the Treaty provides no robust guarantee against a polarised development as feared by Leibfried and Pierson.

It is not a matter of political opinion but a matter of fact that the economic and institutional dynamics of creating a single market have made it increasingly difficult to exclude social issues from the EU's agenda: "the tidy separation between market issues, belonging to the supranational sphere, and social issues, belonging to the national spheres, is unsustainable."¹² However, the answer to this problem is not an additional transfer of national competencies to the EU, nor the imposition of uniformity, let alone harmonisation for the sake of harmonisation. Although I will stress that the concept of 'a European social model' not only makes sense but should be specified by means of 'common objectives', I also think national governments could not possibly agree on a detailed European blueprint for the core functions of the welfare state. As Fritz Scharpf rightly argues, any attempt to override legitimate diversity by imposing uniform European solutions could blow the Union apart. National diversity cannot be treated as illegitimate; on the contrary, it is itself part of the legitimating structure of beliefs and practices supporting the multilevel European polity.¹³

Although there is a proper role for EU legislation in the social domain (and decision making has to become more efficient in this domain, as I argue in section 3.4), social protection policy is and should primarily remain the responsibility of municipalities, regions and nation states. Nevertheless, Europe should enable the Member States to develop 'active welfare states' and encourage intelligent social investment, by indicating the broad objectives, both where employment and social protection are concerned. And cross-border mobility should create additional opportunities for intelligent welfare solutions, rather than make welfare policies more difficult to sustain.

2. THE POST-LISBON CHALLENGE: TURNING PRINCIPLES OF CO-OPERATION INTO OPERATIONAL PRACTICE

This approach to EU social policy – that the EU needs an operational social policy concept, yet that it is not synonymous with imposing uniformity, nor with a transfer of competences – inspired the Belgian Presidency of the EU in the second half of 2001. Our *leitmotiv* was to put the principles agreed at the Lisbon Summit of March 2000 into practice, building on the work done by the French and the Swedish Presidencies which followed the Portuguese Presidency. These 'Lisbon principles' – as I would call them – hinged both on a substantive idea (economic performance and social cohesion are not mutually exclusive, but mutually reinforcing objectives, between which a new equilibrium has to be found) and on a methodological proposal, coined 'open method of co-ordination'. The Portuguese Presidency moreover had a precise ambition concerning the 'leadership' of European co-ordination: it intended to enhance the steering and co-ordinating role of the European Council, and attempted to reduce the virtually exclusive competence of the Economic and Financial Affairs

¹² Leibfried and Pierson, *o.c.*, p. 268

¹³ Scharpf, F., (2002), *Legitimate Diversity: The New Challenge of European Integration*, Cahiers européens de sciences po, 1. Scharpf provides a highly interesting analysis of the obstacles to social policy making at the EU level, centred on the idea of 'legitimate diversity', which I share. However, he proposes different solutions to those I suggest in this paper. Scharpf's first solution is provided by (a revised version of) the provisions on 'closer co-operation' in Title VII of the Treaty. His second solution consists of a combination of the 'Open method of co-ordination' with the idea of 'framework directives'. I cannot do justice to his sophisticated argument here. To put it very briefly, firstly, I fear that 'closer co-operation' in the social field might be more divisive than Scharpf thinks, and, secondly, that combining framework directives with the Open method of co-ordination might be politically counterproductive.

Council (ECOFIN) over the Broad Economic Policy Guidelines and to take employment and social concerns into account in their drafting.¹⁴

With regard to social protection, our ambition ‘to implement Lisbon’ implied three goals: firstly, to make European co-operation in the fight against poverty and social exclusion operational; secondly, to launch the open method of co-ordination in the field of pensions; thirdly, to prepare the ground for reforming the current rules governing the co-ordination of social security schemes for mobile citizens (Regulation 1408/71).¹⁵ The third priority – social security co-ordination – belongs to the realm of EU legislation, or ‘hard law’; the first two issues belong to the realm of the ‘open method of co-ordination’, or ‘soft law’.

I will discuss the notion of open co-ordination in section 2.1. Next I will summarize what has been achieved so far with regard to social inclusion, pensions and social security co-ordination in sections 2.2, 2.3 and 2.4, and indicate a number of short-term challenges. In section 2.5 I touch upon the prospects for developing the open method of co-ordination in the field of health care and care for the elderly. In sections 2.6 and 2.7 I will briefly address two other instruments of policy making, which also have their role to play: EU legislation and social dialogue. Together with the questions raised in Part 1, this description of our current experience sets the scene for my discussion of necessary Treaty changes in Part 3.

2.1. The open method of co-ordination as a creative instrument¹⁶

The methodological foundations for the open method of co-ordination as a new Europe-wide approach to social policy were formally laid down at the Lisbon European Council in March 2000. Before that, policy co-ordination at EU-level had been applied to economic policy (multilateral surveillance of national economic policies, provided for in the 1992 Maastricht Treaty) as well as in the field of employment (the Luxemburg process, formalised by the 1997 Amsterdam Treaty as “co-ordinated strategy for employment” and fine-tuned by the Luxembourg European Council the same year). In what follows, I distinguish the ‘policy co-ordination’ that had been established before the Lisbon Summit, for which a formal basis exists in the Treaty, and the ‘open method of co-ordination’ as it was defined in Lisbon. Together they constitute however one ‘cookbook’ of soft-law methodologies, and in the political debate these methodologies are often conflated under the general heading of ‘open co-ordination’.¹⁷

¹⁴ As rightly remarked by M. Ferrera, M. Matsaganis and S. Sacchi in “Open coordination against poverty: the new EU ‘Social Inclusion process’”, forthcoming in the *Journal of European Social Policy*. For an interesting discussion of this problem of ‘leadership’ in the EU, with reference to the Lisbon process, see M. Telò (2002), “Governance and government in the European Union: the open method of coordination”, in M. J. Rodrigues (ed.), *The New Knowledge Economy in Europe*, Edward Elgar, Cheltenham.

¹⁵ This third goal of the Belgian Presidency is less explicit in the Lisbon Conclusions, but in my opinion logically follows from the combination of a number of general concerns expressed by the Lisbon Summit, such as mobility of the workforce, social cohesion, etc.

¹⁶ For more elaborate recent treatments of the open method of co-ordination, see e.g. de La Porte, C. and Ph. Pochet (eds.) (2002), *Building Social Europe through the Open Method of Co-ordination*, P.I.E.-Peter Lang, Brussels, and M. J. Rodrigues (ed.) (2002), *The New Knowledge Economy in Europe*, Edward Elgar, Cheltenham.

¹⁷ From a legal perspective on the actual Treaty, the very common political conflation of ‘policy co-ordination’ and ‘open method of co-ordination’ is not just confusing, but wrong, since the actual Treaty clearly forces one to make that distinction sharply. As I briefly indicated in section 3.3., whether or not one should opt for one ‘generic’ definition of open co-ordination, encompassing both the policy co-ordination which has already its legal basis in the actual Treaty and the open method of co-ordination defined at the Lisbon Summit, is a difficult question.

In a nutshell, the open method of co-ordination is a process in which clear and mutually agreed objectives are defined, after which peer review, on the basis of national action plans, enables EU Member States to compare practices and learn from each other. This method respects – and is in fact built on – local diversity; it is flexible, but it aims to promote progress in the social sphere. An efficient learning process requires the use of comparable and commonly agreed indicators in order to monitor progress towards the common goals, as well as evaluation and, possibly, soft recommendations made by the European Commission and the Council. The exchange of reliable information aims – at least to some extent – at institutionalising intelligent “policy mimicking”.¹⁸

Because it is pragmatic, this ‘open’ approach can *effectively* lead to social progress. Thus, we have found a way that implies a credible commitment to a social Europe. Consequently, we are sending important messages to European citizens. For instance, the explicit formulation of a European social agenda can be seen as a ‘defensive shield’ against a possible retrenchment of our welfare states in the light of economic unification. However, I believe the added value of the open method of co-ordination goes beyond being a technical learning process and beyond preventing welfare retrenchment in Europe.

Defining commonly agreed objectives is much more than merely a *useful technique* in view of the intended progress in the Member States. Common objectives are *essential* because they allow us to translate the much discussed but rather abstract “European social model” into a tangible set of agreed objectives to be rooted in European co-operation. For the first time, thanks to the open method of co-ordination, this abstract concept is being interpreted by means of more precise definitions of the outcomes we want to achieve.

Echoing Anton Hemerijck,¹⁹ I would say that the open method of co-ordination is both a cognitive and a normative tool. It is a ‘cognitive’ tool, because it allows us to learn from each other. In my opinion, this learning process is not restricted to the practice of other Member States, but also extends to their underlying views and opinions, an area that is no less important. Open co-ordination is a “normative” tool because, necessarily, common objectives embody substantive views on social justice. Thus open co-ordination gradually creates a European social policy paradigm.

Open co-ordination is not some kind of fixed recipe that can be applied to any issue. Our methodology in the field of social inclusion (see section 2.2) differs from the policy co-ordination that has been developed with the 1997 Luxembourg Employment Process on the basis of Art. 128 of the Treaty. (In the Employment Process, a report is submitted every year. On the basis of this report, *individual recommendations* are made to individual Member States). Our methodology with regard to pensions will differ in turn from that applied to social inclusion: it consists of a fairly light process, where Member States report to each other every three or four years on how they include commonly agreed objectives in their national policy, with a yearly update which will enable us to integrate common conclusions on pension policy into the Broad Economic Policy Guidelines drawn up by the Union every year. In other words, policy co-ordination and open co-ordination together constitute a cookbook that contains various recipes, lighter and heavier ones.

¹⁸ Intelligent policy mimicking needs to be actively managed and – to put it in the words of Anton Hemerijck and Jelle Visser – “contextualized”. See A. Hemerijck and J. Visser (2001), *Learning and Mimicking: How European Welfare States Reform*, manuscript.

¹⁹ Hemerijck defines the European social model on the basis of ‘cognitive’ and ‘normative’ dimensions in ‘The Self-transformation of the European social model’ in G. Esping-Andersen et al., *o.c.*.

Elsewhere, I have emphasised that when using this cookbook we have to bear certain key principles in mind.²⁰ *Firstly*, this is only one method amongst others. We cannot fly to a social Europe on the wing of open co-ordination alone. We also need another wing, namely legislative work. Therefore, the open method of co-ordination must not replace legislative work where it is necessary. *Secondly*, we must not confuse the objectives with the instruments of social policy. Confusing these elements goes against the spirit of subsidiarity that is fundamental to the open method of co-ordination. Moreover, lack of clarity with regard to fundamental objectives leads to biased policy analysis.²¹ The *third* principle is 'comprehensiveness': we have to include all possible tools in the analysis.²² The *fourth* principle concerns the choice of benchmarks we use when we want to put objectives into practice: when we define our standards, we have to be realistic and ambitious at the same time. We definitely need *best practices* in the learning process: feasible "standards of excellence" instead of standards of mediocrity. The *fifth* – and final – principle for the useful application of the open method of co-ordination is located at a practical level. We cannot possibly measure progress without comparable and quantifiable indicators. For this reason, finding an agreement on a set of indicators with regard to social inclusion was a top priority for the Belgian Presidency of the EU. For the same reason, we now want to develop a set of pension indicators. It seems to me that this fifth principle is the actual litmus test for the political readiness to engage in open co-ordination. Anyone who paid lip service to this method should put their words into action when it comes to the development of indicators. Related to the fifth principle is the need for statistical capacity building at the EU level.

The 'soft' character of open co-ordination is often met with scepticism. Yet, I believe that by means of 'soft' co-operation and consensus building we can go far beyond solemn but vague declarations at European Summits. Admittedly, as far as social inclusion and protection are concerned, the jury on the results of open co-ordination is still out. Nevertheless, I think we are entitled to extrapolate (*mutatis mutandis*) from our experience in the field of employment. The first comprehensive test as to whether the policy co-ordination applied to employment is actually able to meet the high expectations will be the mid-term evaluation of the Luxemburg process. In July 2002 the European Commission will present a Communication in which it will evaluate the employment strategy, based on an analysis of the national impact assessments. As far as the Belgian impact assessment is concerned, the report rightly states that "there is no doubt whatsoever that the employment and labour market policies have been modified by the European employment guidelines. [...] The European employment strategy brought about changes and innovations in all branches of employment policy [...]. Co-ordination between the different levels of government has evolved in the positive sense since the introduction of the National Action Plans in 1998". One may conclude that the 'convergence stress' has been very real, and

²⁰ See F. Vandenbroucke, "Sustainable Social Justice and 'Open Co-ordination' in Europe", in G. Esping-Andersen e.a., o.c., and F. Vandenbroucke (2002), "Social Justice and Open Coordination in Europe. Reflections on Drèze's Tinbergen Lecture", *De Economist*, vol. 150(1), p. 83-93.

²¹ For instance, the debate on the future of pensions has for a long time been dominated by elaborate comparative analysis of pay-as-you-go *versus* funded systems. Such analyses on instruments tackle for example the question of their relative efficiency given macroeconomic and demographic hypotheses. While this is an important question, we must make sure that the pension debate does not get bogged down in such debates on instruments.

²² At the end of section 1.2, I already mentioned that a shift of costs from social insurance to the private sector would probably lighten the government's budgetary burden, but may offer few solutions to tricky fundamental questions. This clearly holds, for instance, in the field of pensions, where problems of intergenerational equity and intragenerational justice obviously are not 'solved' by such a shift. It may indeed even lead to less equity and justice. A comprehensive approach to the pension challenge hence requires us to revisit not only our public pension pillars, but also the regulation of our private pillars.

tangible results can be indicated. The assessments will without doubt highlight that the impact has varied among the Member States, and the assessments will be critical of a number of issues. If the assessment report written by the Belgian institutions is representative, there will be criticism, amongst others, of the lack of evaluation mechanisms and of the fact that a report must be produced every year. This gives rise to an increase in what are sometimes irrelevant short-term measures, because new measures need to be thought up every year, at the cost of efficiency in the longer term.

Legitimate questions are raised, notably by the European Parliament, about the relation between open co-ordination and democratic decision making in Europe. One of the potential gains of open policy co-ordination is that it requires all national governments to prepare and discuss their policy reforms in public, and this, moreover, simultaneously. Open co-ordination definitely implies 'openness' in that sense too. On the other hand, the absence of formal involvement of the European Parliament points to a democratic deficit. This constitutes an important issue for the debate on the future of Europe's institutions that will be prepared by the Convention.

In more general terms, a potential risk with the further development of the open method of co-ordination is that it might gradually change the actual balance between the European institutions – the Parliament, the Council, the Commission – in an undesirable way, which is detrimental both for the Parliament and the Commission. Not only, open co-ordination must not replace other policy tools that have proven their usefulness; it should not be an instrument against either the Commission or the Parliament. Moreover, without involvement of the Commission, effective open co-ordination itself is difficult to envisage.

Let me therefore conclude this section by emphasising again that open co-ordination is not a panacea, let alone a magic formula for social policy. Yet, an effective open method of co-ordination is more than an intelligently managed learning process and a defensive instrument. If we employ it judiciously, open co-ordination is a proactive and creative method that allows us to define 'social Europe' in more specific terms and to anchor it firmly as a common collective good at the heart of European co-operation.

2.2. Combating poverty and promoting social inclusion

Eradicating poverty and promoting social inclusion constituted one of the key ambitions set out by the Lisbon European Council of March 2000. In December 2000, a political agreement was reached on common objectives with regard to social inclusion and, at the beginning of 2001, the Member States were called upon to submit national action plans on social inclusion. By the end of 2001, we were able:

- to adopt a first joint EU report on social inclusion, containing both an analysis of the national action plans on social inclusion laid down by each Member State last year in June, as well as "soft recommendations" for Member States' policies;
- to adopt a set of 18 quantitative indicators on social exclusion within the EU Member States.²³ They will now enable each country to accurately

²³ *Report from the Social Protection Committee on indicators in the field of poverty and social exclusion* (13509/01). See also, for a thorough discussion of the use of quantitative indicators at EU level, Atkinson, T., Cantillon, B., Marlier, and B. Nolan (2002), *Social Indicators. The EU and Social Inclusion*, Oxford University Press, Oxford.

measure the current situation and the evolution of social exclusion, as a multidimensional concept, in a comparable way. This first set covers four dimensions of social exclusion: financial poverty, employment, health and education. The best known example of these indicators is the 'low income rate', defined as the percentage of individuals living in households where the total household income is below 60% of the median national income; it indicates the percentage of individuals who are at 'risk of poverty'. Other indicators are: the rate of 'persistent low income'; the rate of persons with low educational attainment; regional cohesion; the rate of people living in jobless households; the proportion of early school leavers not in further education or training; self-perceived health status according to income level; and the proportion of the long-term and very long-term unemployed;

- to approve a four-year action programme, which was launched on 1 January 2002 and aims at stimulating co-operation between policy makers, social partners, NGO's, scientists and the socially excluded.

Thus, one 'round' of open co-ordination has been implemented, and with the commonly agreed indicators the method can become fully operational. Moreover, further progress is on the agenda. During the second half of this year, the Danish Presidency will have to engage in an assessment and a review of the common objectives on social inclusion that were agreed at the Nice European Summit. In my opinion, this review should be restricted to a limited number of important issues, such as the mainstreaming of the gender issue in the inclusion process and the commitment of the Member States to setting national poverty *targets*, which can be linked to the commonly agreed indicators. As the indicators are multidimensional, a pragmatic way to make progress would be to require the Member States to present *targets*, but to give them the possibility to choose their own priority target(s).

With a view to enlargement, I very much appreciate the fact the European Commission has engaged in bilateral discussions with the accession countries. From this summer onwards, accession countries will start preparing their own national reports called "Joint Inclusion Memoranda" (JIM's), based on National Action Plans on social inclusion so that they will be ready to immediately become members of the Social Protection Committee and fully engage in the open method of co-ordination in this field as soon as enlargement takes place. As I indicate in section 3.3, we should now prepare the implementation of the open method of co-ordination after enlargement – and where necessary, adapt it – both in terms of its practical feasibility, and in terms of its legal entrenchment.

2.3. Pensions: a social challenge with financial constraints

Regarding pensions, the Employment and Social Affairs Council and the Economic and Financial Affairs Council (ECOFIN) and later the European Councils in Laeken and Barcelona, agreed on 11 common objectives and a working method for European co-operation in this field²⁴. These common objectives refer to the adequacy of pensions, the financial sustainability of pension systems and their modernisation in response to changing societal needs. The Belgian Presidency very explicitly wanted an integrated approach, encompassing both a concern for financial

²⁴ *Quality and viability of pensions: Joint report on objectives and working methods in the area of pensions, report by the Social Protection Committee and the Economic Policy Committee (14098/01), as endorsed at the Employment and Social Policy Council on Dec. 3, 2001.*

sustainability and a concern for the adequacy of pensions.²⁵ This broad perspective has been institutionalised by including both the Employment and Social Affairs Council and ECOFIN in this process, but also by the explicit request that the results be integrated into the Broad Economic Policy Guidelines. This should allow Europe to speak with one – balanced – voice on pensions for the first time.

An integrated approach is indeed reflected in the 11 objectives. For instance, the first common objective states that Member States should “*ensure that older people are not placed at risk of poverty and can enjoy a decent standard of living; that they share in the economic well-being of their country and can accordingly participate actively in public, social and cultural life*”. According to the sixth objective Member States should also “*reform pensions systems in appropriate ways taking into account the overall objective of maintaining the sustainability of public finances. At the same time sustainability of pension systems needs to be accompanied by sound fiscal policies, including, where necessary, a reduction of debt. Strategies adopted to meet this objective may also include setting up dedicated pension reserve funds.*” According to yet another objective, Member States are required to “*ensure, through appropriate regulatory frameworks and through sound management, that private and public funded pension schemes can provide pensions with the required efficiency, affordability, portability and security*”.

Member States also agreed to draft a first National Strategic Report on pensions by September 2002. In this report they will elaborate on their efforts made at national level to meet the common objectives. Finally, Member States have agreed to start developing indicators for assessing and monitoring action in the field of pensions. I believe the forthcoming Danish Presidency should give priority to the development of common indicators in the field of pensions, so that we can assess the progress in this area by the end of this year. A final agreement should be possible by the end of 2003, under the Italian Presidency.

Still in the field of pensions, next year’s Presidencies, namely those of Greece and Italy, will have to ensure that the work on pensions is truly integrated into the Broad Economic Policy Guidelines. This is important in view of the fact that our European open method of co-ordination approach to pensions is the result of long and sometimes difficult negotiations which aimed, successfully, at striking a balance between two formations of the Council, ECOFIN and the Employment and Social Affairs Council. It would be unacceptable for the Broad Economic Policy Guidelines, which are an important instrument (provided for in the Treaty) in the hands of the ECOFIN Council for the coordination and monitoring of economic policies of the Member States, to deviate, as far as pensions are concerned, from what was agreed on in the joint open method of co-ordination approach. This would certainly be unacceptable in view of the two explicit requests from the Heads of State and Government regarding the Guidelines. In Lisbon, the European Council indeed requested that the Guidelines should also focus on reforms aimed at promoting social cohesion. In Göteborg the European Council asked to incorporate the results of the joint work on pensions into the Guidelines.

²⁵ Financial sustainability and social justice are often seen as uneasy friends at best, sworn enemies at worst. This is a mistake. Financial sustainability is not an “external” constraint affecting our pension systems independently of their internal logic. On the contrary: intergenerational (and intragenerational) fairness is a precondition for their sustainability. This is very transparent in the budgetary debate: the sustainability of the public pension system will be jeopardised if essential future government spending is crowded out by the costs of ageing, or is only sustainable on the basis of unacceptably high taxes.

Notwithstanding our clear political intentions, this year's Broad Economic Policy Guidelines do not sufficiently reflect the importance of employment and social policy objectives. I fully agree with the opinion of the Social Protection Committee on this year's Guidelines when it states that: "The Guidelines should be a central instrument in promoting a well co-ordinated policy mix which reflects the articulation between economic, employment and social policies – the so-called policy triangle – established by the Lisbon European Council. This should also involve giving greater recognition to the work being done, under the open method of co-ordination, in relation to the fight against poverty and social exclusion and on the provision of safe and sustainable pensions, to give effect to the objective of creating 'greater social cohesion' established by Lisbon"²⁶. With regard to one of the fundamental 'Lisbon principles', we are certainly not yet where we should be. What happens with the result of the open co-ordination on pensions in 2003 will be the real 'moment of truth'.

2.4. Social protection for mobile citizens: simplifying and improving the European co-ordination of social security systems

Free movement of persons is one of the cornerstones of European integration and one of the four freedoms enshrined in the EC Treaty. One of the determining factors as to whether people may enjoy this freedom is the guarantee that administrative barriers will not affect their social security rights. In 1971, the Council of Ministers therefore adopted Regulation No 1408/71, which guarantees that people moving within the European Union retain their social security rights.

While this Regulation affords ample protection, one could say that the complexity of the Regulation and its numerous amendments are an impediment to free movement. That is why the Belgian Presidency decided to address the fundamental question of how to proceed with the necessary simplification and improvement of Regulation 1408/71. In December of last year, the Employment and Social Affairs Council reached an agreement on a number of principles and basic options (so-called "parameters") which provided the political framework within which the Council and the European Parliament are now working on specific reforms for modernising Regulation 1408/71. At the last Social Affairs Council under the Spanish Presidency (3 June 2002), the Council reached a political agreement on the general provisions of the new Regulation, which determine important matters such as the *personal and material scope of application* (who is covered? to which branches of social security does the Regulation apply?) and the *general principles* governing the co-ordination of social security (the aggregation of insured periods, equal treatment and the determination of the competent State – "which law applies"?). From July onwards, the Danish Presidency will continue negotiations on the specific chapters of the Regulation. As things are now, we may well find an agreement on a new co-ordination mechanism, at least at the level of the Council, by the end of next year.

In this context, we also reached an important political agreement on the conditions for the extension of Regulation (EEC) No 1408/71 to third-country nationals. Such an agreement would not have been possible without the strong support of the European Commission. The purpose of this extension is to enable third-country nationals in the future to export their social security rights built up in one Member State to another when moving within the EU. Until now, this has only been possible for EU nationals.

An example can illustrate the consequences that this has on the current situation: the daughter of a Moroccan employee working in France is going to study in London. Her

²⁶ See the "Opinion of the Social Protection Committee" on the Commission Recommendation for the 2002 Broad Guidelines of the Economic Policies, May 16, 2002.

father has been working in France for thirty years. Yet, in principle, he loses the right to child benefit, despite faithfully paying all his social security contributions.

Last year in December, the Ministers of Social Affairs agreed firstly on the apparently trivial but politically difficult question of the legal basis for the extension of 1408/71 to third-country nationals; secondly on the principle that such an extension should apply to the social security systems of all the Member States. This implies that the United Kingdom and Ireland have the possibility to join the other Member States in the extension of the Regulation to third-country nationals by using their right to “opt in”. Thirdly, the Ministers agreed on the fact that the co-ordination applicable to third-country nationals should give them a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union.

Thanks to the important efforts of the Spanish Presidency and the fact that the UK and Ireland have indeed decided to opt in, the Social Affairs Council of June 3 2002 reached a political agreement on this extension of Regulation 1408/71 to third-country nationals. It is not an exaggeration to say that this agreement represents a milestone in the objective of the European Union to achieve more equality between EU and non-EU nationals. It will diminish legal and administrative difficulties for the social security institutions and should contribute to the establishment of solidarity as well as to a socially just Europe. I call upon the European Parliament to take up its political responsibility and quickly deliver their obligatory yet non-binding opinion on this dossier, so that it can take immediate effect in all Member States from the beginning of next year.

2.5. Open co-ordination on health care and care for the elderly

In addition to social inclusion and pensions, a third area has been identified as being eligible for applying open co-ordination: health care and care for the elderly. Since the pension challenge is compounded by the increasing cost of health and elderly care in our societies, an adequate assessment of future social protection requires an integrated approach. By the next spring European Council, in March of next year, the European Commission will prepare a full report on this issue, which will give us sufficient elements to decide upon the conditions for launching an open method of co-ordination in this field.

Even though we should be careful not to start applying the open method of co-ordination to new areas simply for the sake of “doing something”, I do indeed believe that the growing impact of European integration on national health care systems to which I have referred, does justify the preparation of some form of European open co-ordination in this field. Ideally, trilateral co-operation between the Social Protection Committee, the Economic Policy Committee and a specific Committee (yet to be created) of the Council of European Health Ministers would be highly interesting, to provide input for the Commission and the Council. The different Committees involved could focus each on one of the principles of accessibility, financial sustainability and quality, identified by the European Council as the main challenges in this field. But the absence of such an elaborate advisory structure does not mean we cannot get started.

2.6. The legislative agenda: a focus on delivery

My focus in Part 3 of this paper on the work in Convention and the next IGC should not let us forget that we should be able to round up the Social Policy Agenda agreed in Nice (December 2000) before then. This agenda encompassed, amongst other things, a certain amount of legislative activity in the social field (in this section I

include employment policy in my discussion of social policy). Having said this, and engaging in a little crystal ball gazing, I consider it unlikely that EU legislation in the social field will develop very significantly over the next few years. This does not mean that EU legislation so far has been unsuccessful. Just to give two recent examples: the Directives on information and consultation and on the involvement of workers in European companies²⁷, were adopted last year.

It is mainly because this substantive *acquis* exists that I think an increased focus on *implementation* is in order right now. I think there are two related reasons: firstly, the major differences between the current Member States in their performance in transposing EU legislation into their national legislation, and, more importantly, the prospect of enlargement.

In this context it seems only to make sense to say that we should now give priority to the *effective implementation* of the current *acquis*, which is already quite solid and will thus imply enormous and sustained efforts, especially on the part of the new Member States. The focus thus is now on *delivery*. Clearly, what has been decided in the Social Agenda, at the Nice European Summit, must be carried out.

For certain existing legislative acts the Social Agenda saw scope for *revision* and *updating*. This is the case for the Directives on insolvency²⁸, exposure to asbestos²⁹, and equal treatment of men and women with regard to employment³⁰. Within the same remit falls the simplification and modernisation of the third Regulation ever to be issued by the Union, now regulated by Regulation 1408/71, which I discussed earlier.

The Social Agenda also called for limited *new* legislative initiatives. The proposal for a Directive on temporary work³¹ was recently presented by the European Commission. Negotiations on the Directives concerning the protection of workers from the risk of vibrations³² and noise³³ as well as that on the activities of institutions for occupational retirement provisions are close to being or have already been rounded up successfully³⁴.

2.7. European social dialogue

The European social dialogue covers on the one hand (bipartite) interprofessional and sectoral *negotiations* and on the other (tripartite) *consultation* on a wide range of

²⁷ Council Directive with regard to the involvement of workers in the European Company, PBEG 8 10 2001.

²⁸ The modification mainly consists of adapting the existing Directive to the transnational character of some enterprises: employees will only have to address one employer to find out which reserve fund his or her last wages will be paid from.

²⁹ The modification of the "Directive concerning the protection of workers from risks related to exposure to asbestos at work" mainly consists of introducing maximum levels of exposure and improvement of protection of workers in certain cases (eg. demolition).

³⁰ The main modifications of this Directive (dating from 1976) deal with equal treatment between women and men as far as working conditions are concerned.

³¹ Negotiations are taking place on a new Directive on the working conditions of agency workers (*travail intérimaire*), following the failure of negotiations between the European social partners.

³² Directive on minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (vibrations).

³³ Directive on minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise).

³⁴ The "Vibrations" Directive was adopted after conciliation with the European Parliament. A political agreement has been reached in the Council on the "Noise" Directive, which now goes into conciliation with the European Parliament. Adoption is likely to take place during the Danish Presidency (2nd half of 2002).

issues. Those who have called social dialogue at European level a success, most often refer to the bipartite sectoral bargaining between employers and trade unions, which covers no less than 27 sectors and has produced a range of binding and less binding agreements. Others, referring to the result of interprofessional negotiation, consider the European social dialogue to be in its infancy. The fact of the matter is that since the launching of the “Val Duchesse social dialogue” in 1985, we have progressed from the stage of a mere discussion between the European social partners to the explicit recognition of their role in the Treaty and, furthermore, the recognition of the primacy of bargaining channels over legislative channels. Despite this, interprofessional bargaining has delivered few tangible results. Today, we are far removed from a true European handling of industrial relations: only three collective agreements have been reached.

Yet, on the eve of the Laeken European Council, the social partners issued a declaration in which they expressed their willingness to develop social dialogue by jointly drawing up a multi-annual work programme, and agreed on the need to develop and improve co-ordination of tripartite consultation on the various aspects of the Lisbon strategy. In addition, the recent Barcelona European Council urged the social partners to place their strategies at the service of the Lisbon Strategy and Objectives. To that end, they are being asked to produce an annual report on their efforts both at national and at European level, and to present this to the Social Affairs summit, which from now on will be held before each spring European Council.

The EU has therefore expressed its willingness on several occasions to grant responsibility to the social partners. Today, I think it is safe to say that further development in this area will have to be triggered mainly by the social partners themselves. It is in the first place up to them to prove that they in turn are willing and able to become real players at European level. On the other hand, there are certain arguments in favour of amending the Treaty so as to facilitate European social dialogue, as I will suggest in Section 3.5.

3. ANCHORING SOCIAL PROTECTION POLICY THROUGH THE EUROPEAN CONVENTION AND THE IGC: SIX PROPOSALS

In Part 1 of this paper I discussed the role the EU *should* play in the field of social protection, starting from the role it actually plays. In very general terms, I concluded that Europe should enable the Member States to develop active welfare states and encourage intelligent social investment, by indicating the broad objectives, both where employment and social protection are concerned. And cross-border mobility should create additional opportunities for intelligent welfare solutions, rather than make welfare policies more difficult to sustain. In Part 2 I presented the current EU agenda with regard to social protection, which has gained some momentum since the Lisbon Summit. My survey in Part 2 also underscores that this momentum depends very much on the political willingness of Member States’ governments to make progress, and thus remains politically and institutionally fragile. Moreover, the answers to important questions (such as the proper organisation of patient mobility) remain open, as the Treaty lacks an explicit balance between the principles of the single market and the principles pursued by national welfare states. And the efficiency of decision making in the field of social protection can be improved.

The European Convention and the forthcoming Intergovernmental Conference (IGC) provide a window of opportunity to anchor this approach to social protection policy to the EU’s architecture, and to find a new and explicit balance between the principles of the single market and the principles pursued by national welfare states. To give

social protection a proper place in the EU's architecture, six propositions must be considered. Although I know the Convention may lead to an entirely new text concept for a future basic Treaty, I have developed these propositions as amendments to the actual Treaty text, to make my argument as concrete as possible.

3.1. Including the Charter of Fundamental Rights into the constitutional Treaty

First, we would have to include the Charter of Fundamental Rights into the constitutional (basic) Treaty. I consider this rather uncontroversial, firstly, because basic rights are the essence of every constitution, and secondly, because there is widespread agreement on the content of the text. Even though this would not grant citizens legally binding entitlements with immediate effect, it would make the social principles horizontal and thereby give a clear indication of the fundamental European commitment to the idea that our citizens are not merely factors of production. More importantly, such an insertion of the Charter would imply that every action taken by the Union and every action taken by the Member States in the implementation of Union law, must respect the provisions of the Charter.

3.2. Including a statement of fundamental principles of social protection policy in the Treaty

In Section 1.1 I discussed the diminished legal authority of Member States, emphasizing the role of the European Court of Justice. By way of example I referred more particularly to the famous *Kohll* and *Decker* cases, which caused quite a stir throughout Europe because the Court stated that the special nature of medical services and goods does not remove them from the ambit of the fundamental principle of freedom of movement.³⁵ Now, it would certainly be simplistic to blame the European Court of Justice for the problems we are confronted with. Firstly, the ECJ can only apply the Treaty provisions by taking into account the objectives as recognised in the Treaty, but it can of course not create policy as such. Having said this, and this is my second point, it seems that the ECJ has in fact developed a coherent theory of social rights, which defines the limits of European economic integration much more than the EC legislation would suggest. In the *Kohll* and *Decker* cases, for example, the Court took into consideration the financial balance of the social security system. Still, in the cases under consideration, the balance tipped in favour of free movement because the Court found that the benefits sought, namely the reimbursement of a pair of spectacles in the *Decker* case and the reimbursement of orthodontic treatment in the *Kohll* case, were not of the kind to have significant effect on the financing of the national social security systems.³⁶

The *Kohll* and *Decker* Rulings were followed in July 2001 by the *Smits-Peerbooms* rulings which have further clarified the application of European law to Member States' health systems. In these judgements, the ECJ confirmed that all Member States must comply with Community law when exercising the power to organise their social security systems. The Court further confirmed that medical activities including *hospital* services fall within the scope of Article 50 of the Treaty (the freedom to provide services within the Community). But, the need to maintain the financial balance of social security systems and the maintenance of a balanced medical and hospital service open to all may justify a restriction such as is provided for under the system of prior authorisation. However, the Court stated that, in order for a prior

³⁵ *Decker*, para. 24; *Kohll*, para. 20.

³⁶ *Decker*, para. 40; *Kohll*, para. 42.

administrative authorisation scheme to be justified, even though it derogates from a fundamental freedom, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion so that it is not used arbitrarily.³⁷

The ECJ undoubtedly tries to weigh up the social objectives of the national systems when deciding upon the applicability of market rules, but it does not have the possibility of taking into account all the possible – direct but also mainly indirect – consequences of its decisions without clearer guidance from the Treaty. Moreover, we cannot be entirely sure in which direction the Court's rulings will develop in future.

Therefore I fully share the view of Elias Mossialos that we need to agree at the highest political level on a statement of fundamental principles that enshrines the values and objectives of European health systems, thus creating a common framework, without however diminishing the Member States' current degree of autonomy in shaping and reforming their health care systems.³⁸ These principles should be incorporated into a future Treaty, thus balancing the internal market with social goals pursued by Member States' health care systems.

However, we should not confine the scope of this re-balancing act to health care, but broaden it to the full realm of social policy. In order to be able to clearly express the idea that the social dimension is part and parcel of the Union, we should strive for a reformulation of the general principles of the European Community, as laid down in Articles 2 and 3 of the Treaty. The best way to do this would be to amend, or rather, complete, Article 3, § 2 which deals with the promotion of equality between men and women. This new Article could usefully integrate the social *acquis jurisprudentiel* of the European Court of Justice. In practice, the new Article could be formulated as follows: "In all the activities referred to in this Article, the Community shall aim to eliminate inequalities and to promote equality between men and women, and shall take into account social protection requirements, in particular with a view to promoting accessible and financially sustainable social protection of high quality, organised on the basis of solidarity".

³⁷ Mrs Smits-Geraets sought reimbursement from her Dutch insurance fund for treatment for Parkinson's disease she received in Germany. Reimbursement was refused on the grounds that adequate treatment for Parkinson's disease was available through a contracted provider. The claimant argued that the quality of clinical care offered by the German clinic was superior to that available in The Netherlands. In a separate case, Mr Peerbooms was referred for experimental neuro-stimulation therapy in Innsbruck, Austria, for which he would not have been eligible in The Netherlands which currently reserves this treatment for patients under 25 years of age. Mr Peerbooms recovered full consciousness after the treatment in Austria. However, reimbursement was requested and refused on the grounds that appropriate care could have been obtained from a contracted provider.

In practice, in the Smits-Peerbooms cases the ECJ followed the Dutch authorities' view. The Court considered the conditions in the Dutch legislation under which authorisation should be given as being consistent with EU-law in so far as the requirement that the treatment must be regarded as 'normal' is construed to the effect that authorisation cannot be refused on that ground where it appears that the treatment concerned is sufficiently tried and tested by international medical science, and in so far as authorisation can be refused on the ground of lack of medical necessity only if the same or equally effective treatment can be obtained *without undue delay* at an establishment having a contractual arrangement with the insured person's sickness insurance fund. While the idea of 'undue delay' has not been completely defined, it should be noted that some Member States with lengthy waiting times for a number of medical conditions may find it difficult to justify refusing authorisation for treatment abroad.

³⁸ I refer again to E. Mossialos et. al., o.c.

Text proposal

Including a statement of fundamental principles of social protection in the Treaty

Article 3, § 2 concerning equality between men and women (the reference is to the Amsterdam Treaty) should be completed as follows:

“In all the activities referred to in this Article, the Community shall aim to eliminate inequalities and to promote equality between men and women and shall take into account social protection requirements, in particular with a view to promoting accessible and financially sustainable social protection of high quality organised on the basis of solidarity”.

For the sake of consistency, the current Article 6 concerning environmental protection and the promotion of sustainable development should become Article 3 § 3.

All actions undertaken by the Union would then have to take these principles into account, as well as the fact that Member States want to preserve their capacity to implement them via welfare state services and measures. This includes the application and interpretation of internal market and competition rules by the European Commission, the European Court of Justice and the Member States, but even more generally the establishment of Broad Economic Policy Guidelines, Employment Guidelines, etc.

Agreement on such general principles could build upon the mutual understanding we are now developing by means of the open method of co-ordination, and would in turn specify the framework for the Member States when they further develop the details of the open method of co-ordination in different areas.

3.3. Anchoring the open method of co-ordination on social policy to the EU's architecture

A potential weakness of open co-ordination as it has developed today, is that this kind of intergovernmental collaboration tends to be highly dependent on the coincidental political constellation of the moment. In view of the fact that the open method of co-ordination is not part of the formal *acquis* we need to think of ways of ensuring that that this soft *acquis* remains valid after enlargement. The soft *acquis* should not be seen as yet another hurdle to be overcome, but as strong support for social policies in the accession countries and the tangible outcome of the voice social ministers have in the European policy formation process. Without a doubt the accession countries will be glad to hear that this voice sounds different as far as social policy is concerned to the voices of international bodies that they have become accustomed to, such as the IMF and the World Bank.

The enlargement of the EU to 25 Member States will certainly make the processes of 'peer review' and evaluation in the open method of co-ordination more complicated. Practical feasibility will require simplification (and maybe a revision of the frequency) and possibly integration of the various processes. I will not elaborate upon this, since my concern here is with the legal entrenchment of the open method of co-ordination in the field of social protection.

Given the ambition to establish a coherent and transparent new Treaty, it seems logical to argue, within the Convention, for the inclusion of the open method of co-ordination as one of the *general* instruments of the Union. This could be done in the planned article of the constitutional Treaty that would describe all the Union's instruments. This general article would give a description of the basic features of the open method of co-ordination. Such a 'generic' article could even encompass the processes of policy co-ordination which are already established in the actual Treaty, such as the employment process (art. 128). The specific application of the open method of co-ordination to employment could then be developed in more detail in the employment chapter of the Treaty, the specific application to social protection and social inclusion could be developed in the social provisions of the Treaty, etc. One should engage in such a 'generic definition' exercise with due precaution, since there are political risks involved: for instance, proposing a 'bottom line' description of all types of co-ordination in the EU might damage what has already been achieved with regard to co-ordination in the field of employment.

Whether or not such a generic definition of open co-ordination is indicated in the new Treaty is beyond the brief of this paper. Hence, I will not venture into this horizontal exercise here, but confine myself to proposing a legal basis for open co-ordination as specifically applied in the field of social protection and social inclusion. This legal basis should build upon the learning process which we are now experiencing, and which I therefore set out in Part 2, and should meet the following requirements:

- make it clear that open co-ordination applies to two specific subject matters in the broad social policy field: the modernisation of social protection and the promotion of social inclusion (to signal that we do not want open co-ordination to replace 'hard EU law', in those domains where a 'hard law' approach is indicated);
- make it unambiguously clear that open co-ordination on subject matters will not depend on political good will, but be stated as an obligation by the Treaty (hence the expression "shall");
- give an active role to the Commission, yet taking into account the prominent and positive role played by the Social Protection Committee in shaping the social ministers' common political identity over the past two years;
- define the role of the European Parliament, and of the social partners (called 'management and labour' in the Treaty's jargon);
- provide for the possibility, yet not the obligation, of developing guidelines (it seems easier, at this stage, to envisage the development of guidelines with regard to social inclusion, than with regard to a highly sensitive area such as pensions);
- require the incorporation of the results of the process into the Broad Economic Policy Guidelines (for convenience, I use the expression 'Broad Economic Policy Guidelines', referring to the Treaty as it stands today; maybe the Convention will opt for a broader concept, such as 'Broad Economic and Employment Guidelines').

Since the Nice Treaty has introduced the Social Protection Committee via article 144 I suggest to label this new article '144bis'; given the ambition to reshape the whole Treaty, this is obviously merely a matter of presentation here.

Text proposal (article '144bis')

Anchoring the open method of co-ordination with regard to social protection and inclusion to the Treaty

In the fields referred to in Articles 137, paragraph 1, (j) and (k), (*)

the Council,

on the basis of the conclusions of the European Council,

pursuant to a consensus between the Member States, on a proposal from the Commission, which takes into account the opinion of the Social Protection Committee, and after consulting the European Parliament, management and labour, and the Social Protection Committee,

shall

- adopt a set of commonly agreed objectives and commonly agreed indicators,
- if appropriate, draw up guidelines which the Member States shall take into account in their policy,
- adopt reports on the implementation of this co-operation process.

The result of this process shall be incorporated into the Broad Economic Policy Guidelines.

(*) reference is to the Treaty establishing the European Community as amended by the Treaty of Nice)

One may note that the proposed legal base does not exclude co-operation between the Social Protection Committee and, for instance, the Economic Policy Committee, as has been the case so far (and with good effect) in the open co-ordination on pensions. In practice, it suffices that the European Council demands this co-operation.

3.4. Strengthening the social provisions of the Treaty

My fourth proposal deals with the social provisions of the Treaty, which can be found in Articles 136 and 137 of the Treaty³⁹. The new formulations of the social provisions since Amsterdam allow us to conclude that the social objectives of the Union are being accepted as independent ones, despite the fact that the central place of the subsidiarity principle still holds, meaning that social policy is still primarily a matter for Member States, as should be the case. The scope of these articles is in my view sufficiently large, and a wide range of subjects in the field of social policy fall within the scope of the provisions. However, we have to change the decision-making procedure applicable to the social provisions of the Treaty, some of which are still governed by the rule of unanimity in the Council. As said before, the perspective of enlargement calls for the generalisation of qualified majority voting (QMV), also in this area; as a *minimum minimorum* QMV should certainly apply to the technical co-ordination of social security systems (Regulation 1408/71; Art. 42 of the Treaty).

³⁹ Ex Articles 117 and 118.

I am aware that some (current and new) Member States consider the shift to qualified majority voting in all social provisions an attempt to oblige them to give up their competitive advantages in social terms, which they sometimes see as compensation for geographical and capital stock disadvantages. I would like to address this fear by mentioning three elements. My first argument is substantive: we should not forget that cumulative scientific evidence has further corroborated, since the Dutch Presidency in 1992, that social protection is a productive factor and not an impediment to competitiveness. My second argument is institutional: even if we were able to finally abandon the unanimity rule for decision-making on social policy at the next Intergovernmental Conference, it is clear that a broad coalition of the accession countries, possibly supported by one or two of the current Member States, could easily, and rightly, block decision-making in this respect. Rightly, indeed, since we would be making a bad start with the unification of Europe if the Union were to immediately twist the arms of the accession countries. Finally, I believe we can attach the necessary conditions to ensure that such an extension of QMV will not impose unacceptably high burdens on the Member States. The conditions that have already been agreed upon in Article 137 of the Treaty and which refer, amongst others, to *minimum* requirements and unnecessary administrative and financial constraints, can serve as a source of inspiration.⁴⁰

3.5 Facilitating European Social Dialogue

It can be argued that it is necessary to simplify the complicated Treaty-based legal framework surrounding social dialogue at European level. Indeed, in some cases *unanimity* is required to “declare generally binding/implement” the outcome of the negotiations in the Council, whereas in other cases *qualified majority* suffices. Most of the time different voting procedures apply to different aspects of one single agreement and quite often, legal services of the institutions involved do not agree on the relevant decisional procedures. Furthermore, the range of subjects on which bargaining can be initiated remains limited in the Treaty and excludes important aspects such as pay. Here, too, a great deal of legal uncertainty arises from the question of whether or not certain parts of potential agreements do or do not fall within the remit of the subjects on which negotiation is allowed.

There are some arguments to say that social partners should be able to decide for themselves which issues relating to employment they want to negotiate on (or in other words: abandon the provisions in the Treaty that limit the scope of negotiations). Also, European social dialogue could be helped if all European collective agreements could be declared legally binding by QMV.

⁴⁰ Article 137, § 2 of the Nice Treaty explicitly mentions “excluding any harmonisation of the laws and regulations of the Member States” and “directives, *minimum* requirements for gradual implementation[...]. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation of small and medium-sized undertakings”.

Text proposal

Facilitating social dialogue at Community level

Article 139 TEC concerning the social dialogue should be amended as follows:

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

2. Agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and (sic) the Member States or, in matters covered by Article 137, including pay, the right of association, the right to strike or the right to impose lock-outs, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

The Council shall act by qualified majority, ~~except where the agreement in question contains one or more provisions relating to one of the areas referred to in Article 137(3), in which case it shall act unanimously~~”.

3.6. Respecting agreements between social partners at national level, and services of general interest

A final point before I conclude refers to the social dialogue at the level of the Member States, which is directly affected by European competition rules through two Treaty provisions.

Article 81 paragraph 1 of the Treaty prohibits “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market”. For a long time, there has been a lot of uncertainty about the status of agreements concluded in the framework of collective negotiations between social partners as far as the application of this Treaty Article is concerned. In recent years the European Court of Justice introduced important clarifications, for example in the *Albany* case, regarding the Dutch system of compulsory affiliation to an occupational pension scheme. In this famous case the Court stated, amongst others, that “the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article [81](1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment”.

A similar reasoning has been followed by the Court with regard to Article 86 paragraph 2 of the Treaty, which deals with undertakings entrusted with the operation of *services of general economic interest*. Recent Court rulings have given a rather flexible interpretation of the concept of “*service of general economic interest*”, which traditionally always covered services of a purely economic nature. Thus, the Court considers that “undertakings” (e.g. sectoral pension funds) entrusted with an essential social function or with a particular social task of general interest (e.g. when they play a major role in the national pensions system) have to be regarded as “undertakings entrusted with the operation of services of general economic interest”, which may benefit, pursuant to Article 86(2) EC, from a derogation of the competition rules of the Treaty.

In view of this case-law of the Court of Justice, it seems appropriate to insert a new provision in Article 81(1) EC according to which agreements concluded in the context of collective negotiations between management and labour in pursuit of social policy objectives do not fall within the scope of the Treaty provisions applying to undertakings. It would equally seem appropriate to reflect on the Court's flexible interpretation of the concept of "service of general economic interest in the Treaty".

Text proposal

Social dialogue at national level rules applying to undertakings - services of general interest

1. insert in Article 81 EC, the following provision:

"Agreements concluded in the context of collective negotiations between management and labour in pursuit of social policy objectives do not fall within the scope of Article 81(1) EC".

2. modify Article 86(2) EC in the following way:

"Undertakings entrusted with the operation of services of general economic interest or entrusted with a social task of general interest ...".

An alternative proposal would be to adapt Article 86(2) EC as follows:

"Undertakings entrusted with the operation of services of general economic or social interest ...".

A further alternative would be to delete the reference to "economic". Article 86(2) EC would then read as follows:

"Undertakings entrusted with the operation of services of general interest ...".

SUMMARY & CONCLUSION

My inquiry into the role the EU should play in the field of social protection started from an empirical question: what role *does* the EU play in the development of social protection? The facts point to two conclusions. Firstly, Member States have lost more control over national welfare policies in the face of pressures from integrated markets than the EU has *de facto* gained in transferred authority, substantial though the latter may be. Thus, there is a growing gap in our steering capacity with regard to welfare policy. This is problematic, since the combination of diminished Member State autonomy and authority and continued weakness in developing responses at EU level may restrict both the scope and the pressure for innovative social investment, which is needed everywhere given the common challenges created by the dynamics of demographic ageing. The problem will be exacerbated by EU enlargement because the requirement of unanimity in the Council for important areas of social policy entails the risk of paralysis of decision-making in the social field, and, probably even more importantly, because enlargement will bring about dramatic increases in the economic, social, politico-cultural and politico-institutional heterogeneity among EU Member States.

Secondly, in a context of increased mobility, not just of workers and capital, but also of service organisations, care providers and patients, the Treaty constellation might prioritise two polarised trajectories, as Leibfried and Pierson fear: core welfare state components (redistribution, pay-as-you-go,...) would remain 'intervention-free', to the extent that they are 'pure' welfare; but the more these functions are provided by market-based services, the more the welfare state (in whole or in parts) would tilt towards the sphere of 'economic action' from the point of view of the EU institutions, thus becoming subject to single market principles and market regimes. Thereby the welfare state could gradually be submerged into a single European 'security' market, that is, a single market for personal protection and insurance instruments. Yet, although it would be unfair to blame 'Europe' for some of the difficulties facing national social policy makers if they choose to rely more on market or quasi-market mechanisms in their welfare provision, the Treaty provides no robust guarantee against such a polarised development.

However, the answer to this problem is not an additional transfer of national competencies to the EU, nor the imposition of uniformity, let alone harmonisation for the sake of harmonisation. Although I stress that the concept of 'a European social model' not only makes sense but should be specified by means of common objectives, I also think national diversity with regard to social protection systems cannot be treated as illegitimate. On the contrary, diversity is itself part of the legitimating structure of beliefs and practices supporting the multilevel European polity. Although there is a proper role for EU legislation in the social domain, social protection policy is and should primarily remain the responsibility of municipalities, regions and nation states. Nevertheless, Europe should enable the Member States to develop active welfare states and encourage intelligent social investment, by indicating the broad objectives, both where employment and social protection are concerned. And cross-border mobility should create additional opportunities for intelligent welfare solutions, rather than make welfare policies more difficult to sustain.

I hope to have shown in the second part of the paper that social protection policy – so conceived – has gained some momentum with the Lisbon Summit. Yet, this progress remains politically and institutionally fragile. Moreover, the answers to important questions (such as the proper organisation of patient mobility) remain

open, as the Treaty lacks an explicit balance between the principles of the single market and the principles pursued by national welfare states. And the efficiency of decision-making in the field of social protection can be improved.

Therefore, I table six proposals:

Firstly, we would have to include the Charter of Fundamental Rights into the constitutional Treaty.

Secondly, to express clearly the idea that the social dimension is part and parcel of the Union, it is crucial to reformulate the general principles of the European Community, as laid down in Articles 2 and 3 of the Treaty, to anchor a commitment to social protection to the new Treaty. Since this principle would have a 'horizontal' nature, *all* actions undertaken by the Union would have to take it into account, as well as the fact that Member States want to preserve their capacity to implement that principle via welfare services and measures.

Thirdly, we need a legal basis for the open method of co-ordination as it is to be applied in the field of social protection and social inclusion. This legal basis should build upon the learning process which we are now experiencing, and which I therefore set out in Part 2. It should spell out clearly the role of the European Parliament, the Commission, the Social Protection Committee, and the social partners. It should also guarantee the transfer of the results of the open method of co-ordination in the social domain to the economic and budgetary policy co-ordination on the level of the Broad Economic Policy Guidelines.

Fourthly, enlargement demands that we increase the efficiency of decision-making with regard to the social provisions of the Treaty, some of which are still governed by the rule of unanimity. As a *minimum minimumum* QMV should certainly apply to the technical co-ordination of social security systems.

Fifthly, social partners should be able to decide for themselves which issues relating to employment they want to negotiate, and European social dialogue could be helped if all European collective agreements could be declared legally binding by QMV.

Finally, in view of this case-law of the Court of Justice, it seems appropriate to insert a new provision in Article 81(1) EC according to which agreements concluded in the context of collective negotiations between management and labour in pursuit of social policy objectives do not fall within the scope of the Treaty provisions applying to undertakings. It would equally seem appropriate to reflect on the Court's flexible interpretation of the concept of "service of general economic interest in the Treaty".