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THE FUTURE OF EUROPE: "SOCIAL EUROPE"

WITH EVIDENCE

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By the Select Committee appointed to consider European Union documents and other matters relating to the European Union.

ORDERED TO REPORT

THE FUTURE OF EUROPE: "SOCIAL EUROPE"

CONV 516/03 Final Report of Working Group XI on "Social Europe"

Social policy presents particular difficulty in establishing a satisfactory balance between action by the Union and action by the Member States. It will require close attention in the Convention on the Future of Europe.

A strong case has not been made for the extension of Community competence in this area, except in the field of public health. But it is important that the opportunity is taken to clarify and simplify the legal base of EU social policy.

The Government are opposed to the extension of Qualified Majority Voting in the social policy area, but it is doubtful whether in a Union of 25 Members it will be possible to make progress effectively by unanimity.

The Open Method of Co-ordination is an effective way of co-ordinating Member States' social policies. It should be given a Treaty base, but not in such a way as to circumscribe its flexibility.

Further consideration needs to be given to the role of the social partners and civil society in the development of social policy.

CHAPTER 1: INTRODUCTION

1. The position of social policy in the development of the European Union (EU) has always been controversial. The debate originally centred on whether and to what extent the European Community (EC), which was conceived as a primarily economic organisation, should have competence over the sensitive area of social policy, or whether it should be left to the Member States. There is now a measure of consensus that there is a distinctive "European social model", which the Conclusions of the Barcelona European Council in March 2000 characterised as based on "good economic performance, a high level of social protection and education and social dialogue".[1] In evidence to us Mr Peter Hain, the Government Representative on the Convention on the Future of Europe, said that he thought it was a helpful model containing "genuine social values that are distinctly European".[2]

2. With the European Community being gradually granted more powers in this field, and these powers subject to a broad interpretation by the Court of Justice, the debate has shifted to include the relationship between social and economic policy: should the former be subordinate to the latter, or should both have equal standing? The question that now arises is what place social policy should have in the new draft Constitutional Treaty being prepared by the Convention on the Future of Europe.

3. Although these issues have become prominent in the Future of Europe debate, it is striking that the examination of social policy *per se* was initially omitted from the Convention Working Groups. Growing pressure to examine social policy in its own right led, however, to the creation, at the end of 2002, of a Working Group on "Social Europe", in an attempt, as one commentator put it, to "rescue social policy from its traditional 'Cinderella status' in the EU legal and political framework".[3] The Group's mandate was to examine the following issues:

- the basic values in the social field to be included in Article 2 of the draft Constitutional Treaty, taking into account those already contained in the EU Charter of Fundamental Rights
- the social objectives to be included in Article 3 of the draft Treaty
- the need to define EC/EU competences in respect of social matters and the possible addition of new competences
- the role of the "Open Method of Co-ordination" and its place in the Constitutional Treaty
- the relationship between economic and social policy co-ordination
- the possible extension of qualified majority voting to areas where unanimity is required at present
- the role of the "social partners", as it could be incorporated in Title VI of the draft Constitutional Treaty dealing with the democratic life of Union.

4. Although the creation of the "Social Europe" Working Group was a positive step towards addressing these issues, its conditions of working were not ideal. As the same commentator has pointed out, "starting its work after all the other Working Groups had completed theirs and squeezed within a crowded timetable … the Social Europe Working Group had an unfortunate position to contend with as … an afterthought within the constitution-building process".[4] This resulted in very tight deadlines and the holding of only limited hearings of outside experts. She noted, however, that, "while the Group declined direct advice from civil society, it would seem that many of its members did listen carefully to and make substantial use of submissions which came from civil society groups".[5]

5. The lateness of the Group's establishment is regrettable. It meant that its deliberations could not be taken into account in the drafting of Articles 1-16 of the Constitutional Treaty, which include provisions on the values, objectives and competences of the Union. It remains

[1] Paragraph 22.

[2] Q 3.

[3] Jo Shaw, *A Strong Europe is a Social Europe*, paper delivered at the first Workshop of the UACES Study Group on the debate on the Future of Europe, Federal Trust, 7 March 2003, available at www.fedtrust.co.uk/eu_constitution.

[4] *Ibid.*

[5] *Ibid.*

to be seen whether in the subsequent debate its recommendations will have any impact on the formulation of these Articles.

6. The Committee decided to undertake this inquiry before the specific draft Treaty Articles on social policy had been produced, as a contribution to the continuing debate in the Convention and in the United Kingdom on a difficult and controversial area of policy. This Report examines both the main issues considered by the Working Group and the general draft Treaty Articles relevant to them that have so far been published. As the Committee has already produced a report on Articles 1-16,[6] this Report examines the social policy provisions (especially those on values and objectives) only to the extent that they are not covered in our previous Report.

7. The inquiry was undertaken by Sub-Committee F of the Select Committee on the European Union, the membership of which is shown at Appendix 1. The Committee took oral evidence from Mr Peter Hain, the Government's representative in the Convention on the Future of Europe, and received written submissions from a number of bodies, which are listed in Appendix 2 We are indebted to all of them for submitting evidence at very short notice to the call for evidence that we issued on 14 February, which is reproduced in Appendix 3. We are particularly grateful for the help we received from our Specialist Adviser, Professor Erika Szyszczak, Professor of European and Competition Law, University of Leicester.

[6] *The Future of Europe: Constitutional Treaty - Draft* Equal Opportunities Commission *Articles 1-16*, 9th Report 2002-03, HL Paper 61.

CHAPTER 2: VALUES, OBJECTIVES AND COMPETENCES

Values

8. As mentioned above (paragraph 6), we have already considered the provisions of the draft Constitutional Treaty on the values of the Union in the context of our examination of Articles 1-16. These are important provisions. It is essential to have clarity in the Treaty on the values and objectives of the European Union—not least on those relating to social policy—and to avoid overlap between them. The Working Group recommended inclusion in the Treaty, as values of the EU, of social justice, solidarity, and equality, in particular equality between men and women. This list of values was supported by most of our witnesses.[7] Article 2 of the draft Treaty, however, includes only "solidarity" from this list. The omission of equality was criticised by the European Disability Forum, which also called for explicit reference to non-discrimination and disability to be included in the first part of the Constitutional Treaty.[8] Equality between men and women appears as an objective (see below) but the inclusion of equality in the list of values merits further consideration in the Convention.

Objectives

9. The Working Group saw a need to establish a better balance between the economic and social policies and processes of the Union.[9] It recommended that this aim should be reinforced in the Constitutional Treaty, in both the initial constitutional principles which underpin the objectives of the Union and the later substantive clauses setting out the policies of the Union. The inclusion in Article 3(2) of the draft Treaty of sustainable development "based on balanced economic growth and social justice" as a Union objective is an important step in this direction.[10]

10. Article 3(2) of the draft Treaty includes, as objectives of the EU, social justice, social cohesion, equality between women and men, social protection, equal opportunities for all and "full employment". This list is much narrower than that proposed by the Working Group.[11] Although the inclusion of full employment (in place of the current term "a high level of employment") was welcomed by many of our witnesses including the Government,[12] we are concerned as to how the objective of full employment can be defined. It would be very difficult to establish a common definition of "full employment" in Europe, given differences in cultural attitudes towards participation in the paid labour market, labour market policies, economic structures, migration patterns, and policies towards migrant labour in Europe. We note in this context that at the Lisbon European Council the target of full employment was defined as raising the employment rate as close as possible to 70 per cent by 2010 and increasing the number of women in work to more than 60 per cent by 2010. There is a need for greater transparency, however, about how (and by whom) these targets are defined, what is meant by "work", and the means of ensuring that the Member States achieve the targets.

11. We also note that full employment may be impossible to achieve at some stages of the economic cycle. There is therefore a risk that, if, for example, there were a need—say for economic reasons—to take measures that had the effect of increasing unemployment in the short or medium term, the EU could find itself pursuing policies that ran counter to its own constitutional objectives.

Competences

12. The Working Group's Report concludes that, broadly speaking, the existing EU competences in the field of social policy are adequate. This view has been endorsed by witnesses as diverse as the Government,[13] the CBI[14] and the TUC, which also suggested that existing competences should be streamlined and updated.[15] Peter Hain told us that the

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[7] Including the Government (p 1), the Equal Opportunities Commission (p 11) and the TUC (p 17).

[8] p 14.

[9] Paragraphs 48-52 of the Final Report.

[10] As we noted in our Report on Articles 1-16, the wording signifies a departure from Article 2 EC, which refers to "harmonious, balanced and sustainable development of economic activities" (paragraph 17).

[11] The Working Group's list also included social justice "leading to social peace", quality of work, lifelong learning, social inclusion, children's rights, a high level of public health and efficient and high quality social services and services of general interest. It also included a reference to "social market economy", which is replaced in Article 3(2) by a reference to a "free single market".

[12] p 1, Q 5; and also the TUC (p 17).

[13] p 2.

[14] p 9.

[15] p 17.

Government saw the present mix of competences as useful in maintaining diversity between the different social systems in the Member States; and that further harmonisation that did not take account of that diversity could undermine the Lisbon objectives of creating more jobs and reforming the European economy.[16]

13. The Working Group did, however, recommend a specific extension to existing competences in one area, that of *public health*. This recommendation has been cautiously welcomed by the Government, which acknowledge that there may be a case for enhancing Community action in areas such as bio-terrorism and communicable disease control, and that it would be beneficial to rationalise existing Community powers to deliver health objectives more effectively, such as on tobacco control.[17] It may, however, be difficult to determine what is included under EU action in "public health"—whether, for example, it should cover areas such as tobacco advertising and the mobility of patients across the EU—and clarity will be needed when drafting the relevant Title of the Treaty. This is particularly important in view of the legitimate concern of Member States—expressed in the Government's evidence to us—to retain control over the way that their national health systems are run.[18] The Commission was, however, confident that a provision on public health could be drafted "to make clear that Union action would in no way impinge on the competence of the Member States to manage and finance their own health systems".[19]

14. We regret that the Working Group missed an opportunity to make recommendations for clarifying and simplifying the legal base of social policy in the EU, especially by drawing distinctions between employment and social policy matters, and we hope that even now this can be picked up in the Convention. There is a pressing need for clarification. The legal base for current Community competence for social policy is complex, resulting from longstanding disagreements about the need for Community competence in this area and the purpose of a Community social policy.

15. Without such clarification the legal base is likely to be further complicated by the delimitation of competences in Articles 11-16 of the draft Treaty. At present "social policy", "economic and social cohesion" and "public health" appear as areas of shared competence in Article 12(4). "Employment", on the other hand, is an area of "supporting action" under Article 15(2).[20] Article 15(3) further states that the Member States "shall co-ordinate their national employment policies within the Union". There are three issues that may be controversial here:

- The distinction between what comes under "social policy", which is a shared competence, and what comes under "employment", which is an area of supporting action. The distinction is significant, as it has a considerable impact on the discretion of Member States to legislate.
- Whether all or only some aspects of "social policy" are areas of shared competence. At present Article 137 EC grants the Community supporting—rather than shared—competence on a wide range of issues (including social security and the protection of workers). On the other hand, Article 141 EC enables the European Parliament and the Council, acting jointly, to adopt measures to ensure the principle of equal pay for male and female workers (a shared competence).[21] A shared competence may mean that Member States are not free to act in these matters if the Union has already done so. As we pointed out in our earlier report, the division of competences in Articles 10-15 of the new Constitutional Treaty is sometimes unclear and confusing.[22] This is of

[16] Q 2.

[17] p 2.

[18] p 2. While the Court of Justice continues to accept that the Member States retain sovereignty over the organisation, funding and delivery of national health services and social security systems recent challenges to the Member States' sovereignty in this area have questioned the compatibility of this exercise of sovereignty with the internal market and competition law rules of the EC Treaty. See Vassilis G. Hatzopoulos, "*Killing* National Health and Insurance Systems but *Healing* Patients? The European Market for Health Care Services after the Judgments of the ECJ in Vanbraekel and Peerbooms" (2002) 39 *Common Market Law Review* 683; E. Steyger, "National Health Care Systems under Fire (but not too heavily)" (2002) 29(1) *Legal Issues of European Integration* 97.

[19] p 13.

[20] Under draft Article 10(2), where competence is shared "both the European Union and the Member States have power to legislate but the Member States shall exercise their competence only if and to the extent that the Union has not exercised its". Under draft Article 10(5) supporting action "does not supersede Member State competence".

[21] Anti-discrimination measures under Article 13 EC would also be a shared competence.

[22] *Op cit,* paragraphs 62-70.

particular concern in relation to social policy as it is not clear from the wording of Article 12 whether it is the intention to make all matters currently falling under the heading of "social policy" the subject of shared competence (thus limiting Member State action) or only some of them. We hope that this issue is clarified when the relevant Articles in Part Two of the new Treaty are published.

- In relation to public health, Article 152 of the EC Treaty provides for a mix of shared competence and supporting action. Now it appears that shared competence is proposed in all cases.

These are issues that need further careful examination in the Convention.

CHAPTER 3: VOTING ARRANGEMENTS

16. A controversial issue in the deliberations of the Working Group was the possible extension of qualified majority voting (QMV) to areas of social policy where unanimity is required at present. Most members of the Group advocated the extension of QMV, either across the board or with the exception of provisions relating to social security schemes and to conditions of employment for third country nationals (where unanimity would still apply). These members saw the shift to QMV as essential on account of enlargement. An active minority of members (including British representatives) on the other hand opposed such extension, arguing that, for reasons of national diversity reflecting the particular traditions and cultures of Member States, QMV should not be extended to social security and employment relations, where Member States have different systems. As a result of this disagreement, the consensus reached by the Group was limited to the position that, as a minimum, the compromise achieved in the Nice Treaty should be upheld.[23] The Nice Treaty authorises the Council to agree unanimously a changeover into co-decision and QMV specifically for the protection of workers where their employment contract is terminated, for representation and collective defence of the interests of workers and employers, and for conditions of employment for legally resident third country nationals.

17. This difference of opinion regarding the extension of QMV to social policy was also reflected in the evidence we received. Support for the extension of QMV came from the TUC[24] and the Commission. The Commission highlighted the strong majority in the Working Group and the Convention Plenary in favour of such extension and noted that decision-making in the social field cannot be divorced from the wider issue of decision-making under the Constitutional Treaty. It argued that, "in a Union of 25 and more, we should not pretend that a competence constrained by the need for unanimity would be a real competence: the competence will be a 'virtual competence' only". In its view the Nice compromise fell short of what was required: as social policy is "unquestionably a core task of the Union", all relevant provisions should be subject to co-decision and QMV. The Commission supported QMV extension in Article 13 EC (non-discrimination) and Article 42 EC (social security measures to ensure free movement), but accepted that Article 137 EC (the core social policy provision covering mostly employment issues) "lies at the frontier between key areas of EU activity in the social field, and what is clearly a national responsibility for the fundamental principles governing social security systems and their financing". It argued that a reworking and modernisation of the Article could help to address Member States' sensitivities and pave the way to acceptance of QMV.[25]

18. Both the Government and the CBI[26] were opposed to the extension of QMV in the social field. The Government believe that the Nice compromise needs to be tested before any changes are contemplated. They are not convinced that more QMV will create more and better jobs or help further alleviate social exclusion. In their view unanimity has not been a bar to the adoption of necessary legislation in the social field and allows proportionate legislation to be adopted which respects the diversity of national traditions in EU Member States.[27]

19. The Government's concerns about the challenge that QMV may pose to national traditions and national social policy and to systems of industrial relations in the Member States are understandable. These concerns are exacerbated by the fact that, as noted above, the Working Group missed the opportunity to clarify what falls under Community competence in the area of social policy and what is reserved for the Member States. On the other hand, it is doubtful whether the retention of unanimity is viable way in view of enlargement. The Government argue that, in a Union whose membership ranged from six to 15, unanimity has not been a bar to the adoption of legislation in the social policy field. The only example of such legislation that Mr Hain could offer, however, was Regulation 1408/71 relating to social security, a proposal adopted more than 30 years ago when there were only six Member States in the European Community. This is a measure that, because of the need for unanimity, left a number of issues unresolved and has probably given rise to more litigation in the social policy field than any other. There have been other measures agreed under unanimity voting since then—the new Race Directive is the most recent example. But

[23] Paragraphs 6 and 59 of the Working Group's report.

[24] p 18.

[25] p 14.

[26] p 10.

[27] p 2.

with the EU enlarged to 25 Member States unanimous agreement in this area will be extremely difficult to achieve and the Commission's concerns on the creation of what may be merely a "virtual" EU competence in social policy must be taken seriously. Any discussion on extending QMV in social policy must, however, be accompanied by an attempt to clarify EU competence in this field.

CHAPTER 4: THE OPEN METHOD OF CO-ORDINATION

20. At the Lisbon European Council in March 2000, the EU set itself the goal of becoming "the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion".[28] To carry forward the social policy part of the strategy, the European Council formally introduced a new policy process termed the Open Method of Co-ordination, which attempts to assure a degree of commonality in policy approaches between Member States. In this process the Member States set out guidelines and quantitative or qualitative targets with common indicators to establish medium-term goals. Progress towards these goals is assessed against agreed targets by the Commission or the Council, on the basis of regular progress reports from the Member States. The Open Method of Co-ordination does not include coercive mechanisms other than peer group review and benchmarking. The process allows Member States to use national approaches to work towards common goals.[29]

21. Most of our witnesses saw the Open Method of Co-ordination as an appropriate method of achieving policy co-ordination in areas where competence has not been assigned to the Union by the Treaties, or where the policy issues are sensitive and complex. It has been used extensively in the area of social policy, in particular in developing the European Employment Strategy, and has also been applied to other areas of social policy, such as pensions, health, social inclusion and immigration. The CBI noted that in many areas of social policy "benchmarking, exchanges of experience and peer review are more valuable and effective tools than legislation because they recognise that different countries face different problems that are not susceptible to top-down solutions".[30] On the other hand, several witnesses argued that the Open Method of Co-ordination should not be used as a substitute for EU legislation when this is required.[31]

22. Experience suggests that the Open Method of Co-ordination can be successful in co-ordinating Member States' policies in the sensitive area of social policy. It allows social policy to complement and facilitate the aims of economic integration, without extending Union competence fully into areas where it may be difficult to reach consensus on EU regulation. This "lighter touch" approach is useful, and leaves open the possibility of translating policies agreed under the Open Method of Co-ordination into Community law at a later date when there is sufficient convergence and agreement over appropriate social policies. At the same time the Open Method of Co-ordination allows the Member States to maintain a high degree of control in sensitive social policy areas.

23. The main issue in relation to the draft Treaty is whether the Open Method of Co-ordination should be given a specific Treaty base. In agreement with the Working Groups on Economic Governance[32] and on Simplification,[33] the "Social Europe" Working Group recommended conferring constitutional status on the Open Method of Co-ordination. This has also been welcomed by most of our witnesses.

24. The argument for including the Open Method of Co-ordination in the Treaty is that in its current form it fits uneasily with the constitutional premises of democracy, transparency and accountability which underpin the Union. At present it is not easy to determine how policies are developed or who has influenced decision-making under the Open Method of Co-ordination. We endorse the Working Group's proposal to include the Open Method of Co-ordination in the Treaty as this would undoubtedly improve transparency and democratic accountability by identifying more clearly the parties involved in the various policy decision-making processes and by providing more detail of their respective roles.

25. The Working Group further suggests that to increase accountability the Commission could discuss its analysis of Member State Action Plans with national parliaments and the European Parliament. The TUC called for more parliamentary scrutiny of this activity,[34] and

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[28] Presidency Conclusions: http://ue.eu.int.

[29] E. Szyszczak, "The New Social Policy Paradigm: A Virtuous Circle?" 38 Common Market Law Review p 1125; and "Social Policy In the Post-Nice Era" in A. Arnull and D. Wincott, (eds) Accountability and Legitimacy in the European Union, Oxford, OUP, 2002.

[30] p 10.

[31] Including the Equal Opportunities Commission in relation to gender equality (p 11), the Commission (p 13), and the TUC (p 17).

[32] CONV 357/02.

[33] CONV 424/02.

[34] p 17.

we would welcome the involvement of national parliaments in the process. However, we believe that in addition national parliaments should have the opportunity to scrutinise any proposal for policy co-ordination at an earlier stage of the process. In order for national parliaments to fulfil their role of scrutiny effectively, it is important that they are able to take up any issues of concern with their governments before Action Plans are sent to Brussels. We believe that a procedure should be developed to enable this to take place. Such a process would significantly enhance democratic accountability of decision-making and bring national parliamentary scrutiny of decisions made through the Open Method of Co-ordination up to the scrutiny level of those made in accordance with more traditional procedures. The Local Government International Board drew attention to the importance of consultation during the formulation of policy as well as during the implementation phase, and this would fit in well with a procedure that enabled scrutiny at an earlier stage of the process.[35]

26. The argument against making specific provision in the Treaty for the Open Method of Co-ordination is that undue formalisation would undermine its practical effectiveness. The Government point out that the Open Method of Co-ordination is a flexible tool which is used in different ways in different circumstances.[36] We believe this flexibility has contributed considerably to its effectiveness. Too much rigidity imposed on the rules of the process through Treaty inclusion could diminish its usefulness. However, Articles 125-130 EC, introduced by the Treaty of Amsterdam in 1997, which set out the legal base for employment policy in the EU, have provided a successful model for a formalised Open Method of Co-ordination. We therefore believe that inclusion of the Open Method of Co-ordination in the Constitutional Treaty need not limit its flexible application. It would be sufficient for the Treaty to include a clause setting out only general principles for the application of the Open Method of Co-ordination, allowing more detailed arrangements regarding institutions, participants and the legal status of outcomes to be determined on the basis of what would be most appropriate for specific policy areas. We believe that this would strike the right balance.

[35] p 16.

[36] p 2.

CHAPTER 5: THE "SOCIAL PARTNERS" AND "CIVIL SOCIETY"

27. Representatives of employers and of workers and employed persons (generally known as the "social partners") have played a part in the development of aspects of social policy in the EU, ever since their role of consultation and participation in the creation of social policy was formally recognised in the Social Policy Protocol and Agreement annexed to the EC Treaty at Maastricht. To date, however, their formal legal role has been focused on only a relatively narrow aspect of social policy, namely employment law. Under the Open Method of Co-ordination the social partners have been granted an important role in the formulation and implementation of social policy at the national level. This provides a useful model for showing how a wider range of participants can be brought into the evolving decision-making processes of the EU.[37] There are arguments for further extending the role of the social partners. Unfortunately the Working Group's Report did not provide details of the problems and limitations currently faced by the social partners in attempting to develop social policy and social law under the EC Treaty and did not identify clearly how their current role might be enhanced and facilitated.[38]

28. Nor did it identify how the role of "civil society", the term used to describe the wider social community, including the voluntary sector, might be enhanced, in order to promote its greater involvement in social issues and its greater participation in decision-making processes. There are many important issues that would need to be addressed if there were to be a greater involvement of civil society in the decision-making processes of the Union, including:

- the definition of what constitutes "civil society";
- the different functions that civil society can perform in the Union,
- the difference in outcomes between greater consultation of civil society and greater involvement in decision-making processes;
- how civil society would be supported by the Union;
- the criteria for deciding which groups from civil society should be given a greater role to play in the Union; and
- whether there is a role for "pan-European" representation of civil society (and of the social partners) given the greater processes of European integration.

29. We cannot do more than flag up these as issues that will need to be addressed if, in order to secure greater diversity in the governance structures and processes of the Union, the Union wishes to accord a greater role to the social partners and civil society.[39]

[37] Szyszczak, *op. cit.*

[38] The Committee did not receive any evidence on the practical difficulties currently experienced by the social partners. Some evidence of the problems is to be found in A. Jacobs, "The Role of EU Institutions" in P. Olsson, et al. *Transnational Trade Union Rights in the European Union,* Arbetslivsrapporter 1998:36 (Arbetslivsisitutet, Stockholm, 1998).

[39] In a recent report on new proposals for employment and social policy in the European Union the Committee on Employment and Social Affairs of the European Parliament called for the participation of civil society to be strengthened. It called on Member States to "develop mechanisms aimed at ensuring the involvement of representative non-governmental organisations in the preparation and evaluation of National Action Plans" (PE 316.404, paragraph 25).

CHAPTER 6: SERVICES OF GENERAL INTEREST

30. The Working Group recommended that the Convention should consider the revision of Article 16 EC relating to services of general interest. "Services of general interest" is a term used in EC law to refer (broadly) to public services.[40] Provisions relating to them are controversial because of conflicting pressures either to protect public services from, or subject them to, competition. They have traditionally been examined in EC law from a competition law perspective. Under certain circumstances national services of general economic interest are exempted from EC competition rules.[41] However, as a result of increasing litigation attacking the provision of public services by public undertakings, the negotiations leading to the Amsterdam Treaty were marked by a debate on whether services of general interest should be covered more extensively by EC law.[42] In its 1996 Communication on the subject, the Commission argued that these services form a central element in European societies, stating that:

> "European societies are committed to the general interest services they have created which meet basic needs. These services play an important role as social cement over and above practical considerations. They also have a symbolic value, reflecting a sense of community that people can identify with. They form part of the cultural identity of everyday life in all European countries".[43]

31. The Commission's task was complicated by the substantial differences of view between Member States on how services of general interest should be defined and regulated, and whether the EC should have greater competence in this field. The result was the insertion in the Amsterdam Treaty of a compromise provision on services of general interest—Article 16 EC. Commenting on this provision, Andrew Duff commented that "… there is no more stark exposure in the Treaty of the division … between those who wish to regulate to protect public utilities and those who wish to make them competitive".[44]

32. The wording of Article 16 is vague. It states that, without prejudice to the Treaty provisions on transport, competition and state aids,

> " and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of the application of this Treaty, shall take care that such services operate on the basis of principles and conditions, which enable them to fulfil their tasks."

33. The lack of clarity in the wording of Article 16 has led to differences of view about its scope and legal nature.[45] It is not clear where the line is, or should be, drawn between Community competence and the Member States' powers in the field of public services. Where the activity is seen to be the purely "social" provision of such services by the State, it may fall outside the competence of the EC Treaty altogether.[46] But where the activity is deemed to be "economic", the provision of public services may be caught by the Treaty rules but still be exempted (or "justified") under either Article 86(2) EC or the internal market rules.[47] It has been argued that Article 16 already imposes a positive duty upon the Community to *promote* services of general interest providing a greater social citizenship dimension to the free market rules of the EC Treaty.[48] But it may detract from the Member

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[40] Services of general interest are "services considered to be in the general interest by the public authorities and accordingly subjected to specific public-service obligations. They include non-market services (e.g. compulsory education, social protection), obligations of the State (e.g. security and justice) and services of general economic interest (e.g. energy and communications)". (Commission glossary).

[41] The legal base for this derogation is Article 86 (2) EC (which prohibits Member States from enacting or maintaining anti-competitive measures on public undertakings unless they can be shown to be necessary to provide a service of general economic interest).

[42] Jose Luis Buendia Sierra, *Exclusive Rights and State Monopolies under EC Law*, Oxford, OUP, 1999; E. Szyszczak, "Public Services in Competitive Markets" (2001) 20 *Yearbook of European Law* 35.

[43] *Services of General Interest in Europe*, [1996] OJ C281/03, paragraph 6.

[44] A. Duff, *The Treaty of Amsterdam,* (Federal Trust, Sweet and Maxwell, London, 1997) 84.

[45] M. Ross, "Article 16 E.C. and services of General Interest: From Derogation to Obligation?" (2000) 25 *European Law Review* 22; L. Flynn, "Competition and Public Services in EC Law after the Maastricht and Amsterdam Treaties" in D. O'Keeffe and P. Twomey (eds), *Legal Issues of the Amsterdam Treaty*, Hart Pub, Oxford, 1999.

[46] Case C-343/95 *Diego Cali v Servizi ecologici porto di Genova SpA [1997] ECR I-1580.*

[47] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie, [1999] ECR I-5751.*

[48] Ross, *op cit*.

States' sovereignty to define services of general interest and the way in which such services are delivered.

34. At present it appears that the definition of services of general interest is left to Member States. This is the view taken by the Court of Justice, the Court of First Instance and the various Communications from the Commission. The revised 2000 Commission Communication states that "it is above all the responsibility of public authorities at the appropriate local, regional or national level and in full transparency to define the missions of services of general interest and the way they will be fulfilled".[49] The Commission further notes that compatibility of national action with EC law in this field is based on Member States' freedom to define services of general interest.[50] The Communication does, however, provide a general criterion for distinguishing such services from ordinary services "in that public authorities consider that they need to be provided even where the market may not have sufficient incentives to do so".[51]

35. Peter Hain told us that proposals made in the Working Group to extend the legal base of Article 16 would entail a substantial expansion of EU competence in fields such as social security and education, and that the Government did not want competence in the area of public services to be introduced "by the back door". He added that, "The public services are an intimate part of the relationship between national governments and their citizens and so individual Member States should have the right to define their own services of general economic interest and the way in which they are delivered".[52]

36. In its evidence to the Committee's inquiry into its work programme for 2003, the Commission explained that it was proposing to produce a green paper on services of general interest and, in the light of reactions to it, to decide whether to propose a framework directive.[53] The Committee understands that the Commission has suspended work in the area because of uncertainty as to how the Community State Aid rules should be applied to fund services of general interest.[54] This is because several Advocates General have questioned earlier rulings of the Court of Justice which have held that such funding is exempt from notification under the State Aid rules by virtue of the exemption in Article 86 (2) EC. The Commission is waiting for the outcome of cases currently before the Court. [55] The Opinion of Advocate General Léger in one of these cases was delivered on 14 January 2003 and a final ruling from the Court of Justice is expected in the next month or so.

37. In view of this uncertainty, which may reflect the need to accommodate different national approaches, any recommendation to revise Article 16 EC in order to further enable EU legislation in the field of services of general interest would be a bold and potentially controversial step. It would have wide implications, transferring more competence for the regulation of public services to the Union. The Government point out that such a development would entail a substantial extension of Union competence in fields such as social security and education and argue that changes to Article 16 are not necessary since there is already an acceptable Treaty base for Community action on services of general economic interest in Article 86 EC, paragraph 3 of which provides that the Commission shall ensure the application of the provisions of this article…".[56]

38. However, Article 86(2) EC is a derogation from general EC law principles and does not provide a legal base for Community action. Whether there is a need for Community action is questionable, especially in view of the lack of clarity as to what constitutes a service of general interest. We note, however, that some aspects of Member States' sovereignty in this area have already been eroded through the liberalisation programmes of the Union and the case law of the Court of Justice. The risk therefore is that, without a specific provision in the Treaty, the Community will simply continue to chip away at this area of competence. The Committee concludes that a better approach is to give support to the Commission's

[49] COM (2000) 508 final, paragraph 2. Annex II of the Communication states that the term covers "market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations".

[50] *Ibid*, paragraph 3.

[51] The Communication also contains an indicative list of sectors where services of general economic interest operate: electronic communications, postal services, transport, energy, and radio and television.

[52] Q 9.

[53] *The Commission's Annual Work Programme 2003, 38th Report 2001-2002, HL Paper 188, QQ 39-42.*

[54] European Commission, Non-Paper, *Services of General Economic Interest and State Aid*, 12 November 2002.

[55] Case C-126/01 *GEMO* and Case C-280/00 *ALTMARK*.

[56] p 2.

current strategy of using Communications which clarify the position in general terms and propose Community action in the social policy field in specific sectors, only where there is a high degree of consensus on the need to establish a Community definition and the basis upon which such public services are delivered.

CHAPTER 7: CONCLUSIONS

39. In the time available to us we have not had the opportunity to examine the issues in as much depth—or to take evidence from as wide a range of bodies—as we would have wished. We have not sought, therefore, to make firm recommendations but rather to draw some broad conclusions and identify some areas of concern, as a contribution to the continuing debate in and around the Convention. Our main conclusions are as follows:

- Further consideration needs to be given to whether "equality" should be included as a value of the Union (paragraph 10).
- If "full employment" is included as an objective, it will be important to establish a clear understanding of what it means (paragraphs 11).
- There is little pressure in the United Kingdom for any general extension of the competence of the EU in the social policy area, but there is a case for extending it to public health, provided that such an extension is confined to issues that are genuinely cross-border and does not impinge on Member States' control over how their health services are run (paragraph 14).
- There is a need to clarify (and simplify) the legal base of EU social policy, and in particular the extent to which different aspects of social policy are areas of shared competence (paragraph 15).
- It is doubtful whether in a Union of 25 unanimity will offer a practicable means of agreeing measures in the social policy field (paragraph 20).
- National parliaments should have an opportunity to scrutinise action taken under the Open Method of Co-ordination at an early stage in the process (paragraph 26).
- There would be advantage in giving the Open Method of Co-ordination a Treaty base, provided that it does not reduce the present flexibility of its application (paragraph 27).
- If the social partners and civil society are to be given a greater role in the decision-making of the Union, a number of important issues need to be clarified (paragraphs 28-29).
- Any amendment of Article 16 EC relating to services of general interest would be fraught with difficulty (paragraphs 38-39).

Recommendation

40. We make this report to the House for information.

Appendix 1

Sub-Committee F (Social Affairs, Education and Home Affairs)

The members of the Sub-Committee which conducted this inquiry were:

L. Corbett of Castle Vale
L. Dubs
B. Gibson of Market Rasen
L. Greaves
B. Greengross
L. Griffiths of Fforestfach
B. Harris of Richmond (Chairman)
L. King of West Bromwich
B. Knight of Collingtree
B. Stern
L. Wright of Richmond

Professor Erika Szyszczak, Professor of European and Competition Law, University of Leicester, Jean Monnet Professor of European Law *ad personam,* was appointed Specialist Adviser for the inquiry

Interests declared by Members in connection with the Inquiry:

Baroness Gibson of Market Rasen
Former Member, Trades Union Congress (TUC)

Baroness Greengross
Consultant/Adviser, European Movement
Vice-Chair, Britain in Europe

Lord King of West Bromwich
Alternate Member, Committee of the Regions and its external relations commission
Member, Sandwell Metropolitan Borough Council

Appendix 2

List of Witnesses

The following witnesses gave evidence. An * indicates that oral evidence was given.

Confederation of British Industry (CBI)
Equal Opportunities Commission (EOC)
European Commission
European Disability Forum
* HM Government
Ladybrook Nursery
Local Government International Bureau
Trades Union Congress (TUC)

Appendix 3

CONVENTION ON THE FUTURE OF EUROPE: INQUIRY INTO PROPOSALS ON "SOCIAL EUROPE"

Call for evidence

Sub-Committee F (Social Affairs, Education and Home Affairs) of the House of Lords Select Committee on the European Union is conducting a short inquiry into the social policy aspects of the Convention on the Future of Europe. Working Group XI of the Convention published its proposals at the end of January,[57] for consideration by the Convention in the preparation of draft Treaty articles.

The Working Group's main proposals are:

- the inclusion in the Treaty of a number of additional social values and objectives
- some extension of Community competences in the area of public health
- specific Treaty provision for the "open method of co-ordination"
- improved coherence between the economic and social processes
- explicit recognition in the Treaty of the role of the social partners (and civil society).

The Working Group proposes little change in the matters to which Qualified Majority Voting (QMV) should apply.

- The Sub-Committee would welcome evidence on these and other aspects of social policy relevant to amending the Treaties. It suggests that in submitting evidence witnesses should have in mind what it sees as the main questions underlying these issues:
- where to strike the balance between Member State and Community competence in social policy
- at what level social policy should be drawn up and implemented
- what flexibility Member States should have to adapt a Community social policy to their particular circumstances.

In order that its report can contribute to public debate on proposals under consideration by the Convention, the Sub-Committee plans to complete it by the end of March. In view of this very tight timetable the Sub-Committee will be relying primarily on written submissions and holding very few oral evidence sessions. It regrets that it has had to set such a short deadline for the submission of evidence.

[57] CONV 516/03, available on the Convention's web-site (http://european-convention.eu.int).