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### Current Problems of Social Europe

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## Current Problems of Social Europe\*

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### 1. Introduction

The main difficulty of Theology lies in the fact that the very existence of its subject-matter, God, may be put into question. Talking about Social Europe has something of a theological dimension. The aim of this article is to contribute into the debate, by putting into perspective some of the latest manifestations of social Europe.

The need for the pursuance of social policies at the European level is now more pressing than ever (para 2). The EU, however, as it now stands, is the direct evolutionary result of the predominantly economic entity created back in 1957. This explains that the social policies pursued at the European level are piecemeal and often impregnated with market concerns (para. 3). From an instrumental point of view, EU social policy is being pursued concomitantly by secondary legislation (hard law) in the fields where the EU does have the relevant competences and by softer means of cooperation (soft law) in several other fields. Hard law has given the occasion to the European Court of Justice (ECJ), in a series of recent judgments, of putting to the fore the concept of a 'social market' (para. 4). Soft cooperation has been formalised into the infamous Lisbon Strategy and has been the main object of experimentation with the open method of coordination (OMC) (para. 5). The advances achieved in the above ways, however, do not offer firm answers to basic questions concerning the future development of the European social identity (para. 6)

### 2. Social policy – why now?

#### 2.1. In general about social policy

For the purposes of the present analysis, we may use the very simple idea that social policy is the use of political power to achieve results which the economic system would not achieve on its own, guided by non-market values. Social policy actions may be preventive or corrective. Modern social policy has been developed in an effort to counter the effects of industrialisation. It is aimed at correcting market failures in the redistribution of wealth, in order to avoid extreme cases of poverty and exclusion. This is why social policy is usually thought of as being 'market correcting'. Since social policy is aimed at correcting market failures, it may neither follow market values, nor be administered according to market mechanisms.

Social policy is governed by solidarity. Solidarity is both a guiding principle and a means of organising and running the various aspects of social policy. Solidarity may only exist between members of a group which share some basic characteristics, history, identity features, interests, or at least, sympathy. Historically, social policy has developed in the framework of national States and in tandem with them.

Contrary to God, social policy is not one and indivisible; rather it recovers various distinct policies. The policies through which social policy materialises are mainly: a) *healthcare* for all, organised on a universal access basis, b) *pensions* for the elderly, the incapacitated etc, c) *allowances* for the unemployed, the underpaid, the young, families with many children etc, d) subsidised *housing* for several categories of the population, e) *education*, aiming to eliminate cultural gaps and to prepare a better qualified workforce, f) *employment* policies, aiming either to foster employment or to compensate for employment insecurity and instability, or both, g) other policies.

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## 2.2. The founding Treaties are silent

The founding Treaties of the EEC were silent on all the above policies. Public *health* only appeared as a ground for exception from the basic market freedoms, while *pensions* were marginally touched by Regulation 1408/71,<sup>1</sup> only to the extent necessary to secure the free movement of workers. The only aspect of the founding Treaties which had a pronounced social character was the objective of free movement of workers – an *employment* policy, allowing offer to meet demand. Further, the French pressure for more general EC powers in the social field, resulted in the inclusion of Article 119 EC, securing gender equality. This was important for France, since female employment was already higher and on more favourable terms than in any other founding State and the French were worried that the single market could force them to lower their protection standards.

Two economic arguments had been used, at the time of the Treaty negotiations, in order to justify the lack of strong social commitments in the Treaty. First, the so called 'Spaak Report' of 1956, specifically drafted for the purposes of the EEC, supported the view that harmonisation in the social field would ensue from – and should not come as a precondition of – the single market. In parallel, the 1956 'Ohlin Report' prepared under the auspices of the International Labour Organisation (ILO), explained that national exchange rates reflect productivity and, hence, offset the advantages of low-wage States. Therefore, States with higher levels of social protection and higher wages should not fear competition from low cost countries. This explains the fact that Articles 117 and 118 EC are 'soft' in nature, while the 'hard' Articles 119 and 120 EC have a limited scope.

However, despite this apparent disdain of the founding fathers for social issues, the Commission in its very first General Report on the activities of the Community, back in 1958, stated with remarkable foresight that '*in the future the Community will be judged by a large part of public opinion on the basis of its direct and indirect success in the social field*'.<sup>2</sup>

## 2.2. The current conjecture requires the EU to unfold some basic social policies

The above statement by the Commission is now more accurate than ever. The debates leading to the near-annihilation of the services Directive<sup>3</sup> and to the failure of the Constitutional Treaty have shown that if the EU is to gain credibility and support from its citizens, it needs to deliver in the social field. Several factors, which did not exist back in 1957, currently require the EU to take action in the social field.

First, at a macro level, the economies of member States have constantly evolved together since 1957, and even more so since the setting up of (the conditions for) the Economic and Monetary Union (EMU), after 1992. Together with the economies, the social realities and challenges of member States have been brought closer. This movement has been strengthened by the globalisation of the economy, on the one hand, and by the creation and strengthening of European-wide trade-unions, on the other. This *de facto* bringing together makes common action in the social field more plausible, despite the fundamental differences existing between the social systems of member States.

Second, under the current conditions of EMU, regulatory competition and the risk of race to the bottom concerning the level of social protection offered, is more present than ever. From an economic point of view, member States have lost command of *demand side policies* through which they could deal with unfavorable economic conjectures. First, the budgetary restrictions imposed by the convergence criteria of the Euro and the Stability and Growth

<sup>1</sup> Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. This Regulation has been modified at least thirty times, the last important modification extending its personal scope to cover nationals of non Member States legally residing within the EU, see Council Regulation (EC) 859/2003 of 14 May 2003, OJ L 124/1. It has recently been codified and repealed by Regulation (EC) 883/2004 of 29 April 2004, OJ L 166/1.

<sup>2</sup> Para. 103.

<sup>3</sup> Directive 2006/123/EC, [2006] OJ L 376/36; See between many on this issue, V. Hatzopoulos, 'Qu'est-ce qui reste de la Directive sur les services' (2007) CDE, forthcoming, already available at <http://www.coleurop.be/template.asp?pagename=lawpapers>; see U. Do, 'La proposition de directive relative aux services dans le marché intérieur... définitivement hors service?', (2006) *RDUE*, 111 et seq.

Pact<sup>4</sup> do not allow for any systematic policy of public investment. Further, the existence of a single currency and its management by the European Central Bank exclude any form of monetary and interest rate policies, aiming at the reinforcement of national competitiveness. Moreover, the Ohlin argument, according to which lower productivity is reflected in (and offset by) lower currency exchange rates, is no more valid for the Euro countries. Consequently, the only way for member States to face negative economic conjunctures and/or increase competitiveness, is through the adoption of *supply side policies*: stimulate productivity through the creation of a favorable business environment.<sup>5</sup> Cutting down on red tape and ensuring a user-friendly regulatory environment,<sup>6</sup> could be part of such a policy. Further, States may be tempted to reduce the unitary costs of production, through the reduction of welfare costs and/or the protection of workers. In conditions of extended economic recession, as the present one, the danger exists that member States engage in 'negative competition' (race to the bottom) in an effort to ensure a competitive advantage, bringing about a substantial blow to the 'European social model'<sup>7,8</sup>. This risk is exacerbated by the fact that, now more than in the past, 'it pays' for member States to openly or covertly cheat on their partners over 'common' policies, be it for a limited period of time.<sup>9</sup> In order to avoid such a development, or

<sup>4</sup> See J. V. Louis, 'The Reform of the Stability and Growth Pact' (2006) CMLRev 85-106; F. Mariatte, Procédures pour déficits publics excessifs et mise en œuvre du Pacte de stabilité et de croissance : match nul, balle au centre ?, *Europe* (10/2004) 25-29 ; and before that V. Hatzopoulos, The Stability and Growth Pact Five Years Later: Cornerstone or Trammel for the EMU? *Droits de l'Homme* (16/2002) 1069-1080.

<sup>5</sup> For an in depth analysis of the issue see F. Scharpf, The European Social Model: Coping with the Challenges of Diversity, *JCMS* (4/2002) 645-670.

<sup>6</sup> Which is based on simplification of the various administrative procedures, reduction of red tape and, more generally, substantial regulatory reform. Such initiatives are supported both by the OECD and by the EC, in the framework of the Lisbon Strategy, see *infra* para. 5.

<sup>7</sup> If we accept that such a thing does exist. The term was first used by the EC Commission in its White Paper European Social Policy – A way Forward for the Union (COM 1994/333 final) under the instigation of its then President J. Delors. See also, Defending the European Model of Society, in Commission of the European Communities, DG V, *Combating Social Exclusion, Fostering Integration*, Brussels (1992) 49, where this model is defined through a mixed economy with the participation of all citizens, where market forces are combined with government and social dialogue. The 2003 Greek Presidency called an International Conference on «The modernization of the European Social Model», which led to the publication of a lengthy general report entitled *Connecting Welfare Diversity Within the European Social Model*, published by Intersentia (2004). In the same vein see F. Sharpf, The European Social Model... (supra n. 5) and J. Shaw, A Strong Europe is a Social Europe, *Federal Trust online paper 05/03*, available at [http://www.fedtrust.co.uk/eu\\_constitution](http://www.fedtrust.co.uk/eu_constitution). Righters such as E. Mossialos and M. McKee, EU Law and the Social Character of Health Care, *PIE Peter Lang* (2002) 27-41 and, more recently, D. Wincott, The Idea of the European Social Model: Limits and Paradoxes of Europeanization, in K. Featherstone & C. Radaelli (eds) *The Politics of Europeanization*, Oxford (2003) ch. 12, after seriously questioning the existence of a European social model, have answered in the affirmative. In recent years some writers have raised the issue of the externalities produced by the European social model, see e.g. A. Lindbeck, The European Social Model: Lessons for Developing Countries, Economics and Research Department, Asian and Development Bank, Working Paper series n. 11, available at [www.adb.org/Documents/ERD/Working\\_Papers/wp011.pdf](http://www.adb.org/Documents/ERD/Working_Papers/wp011.pdf) and W. Busse & A. Hemerijck, Deepening Social Europe in an Enlarged Union, available at [www.fesportal.fes.de/pls/portal30/docs/FOLDER/POLITIKALANALYSE/wwHemerijck.pdf](http://www.fesportal.fes.de/pls/portal30/docs/FOLDER/POLITIKALANALYSE/wwHemerijck.pdf).

However the very existence of a (single) social model has been questioned by many writers in view of a) the considerable divergences in the social stratification and the organisation of the social services in member states, see e.g. McKee, Mossialos above and b) the secondary role that social matters play in the EU's common policies, see e.g. Ch. Joerges & F. Rödl, 'Social Market Economy' as Europe's Social Model?, *EU Working Paper 2004/8* and Ch. Joerges, The Market Without the State? The 'Economic Constitution' of the EC and the Rebirth of Regulatory Politics, *European Integration Online Papers (EIOp)* 1997/19. The debate is still open, both at the academic and at the political level: see the two most recent contributions by L. Mullally & N. O'Brien (eds), *Beyond the Social Europe*, (2006) Open Europe, available online at <http://www.openeurope.org.uk/media-centre/pressrelease.aspx?pressreleaseid=14> and P.N. Rasmussen & J. Delors, *The New Social Europe*, (2007) Party of European Socialists available at <http://www.pes.org/content/view/262/138>.

<sup>8</sup> The same logic of preventing a 'race to the bottom' has prevailed during the negotiation of the founding Treaties, at a time when France recognized more extensive social rights to workers than the other founding states. Thus, in Article 117 EEC (Treaty of Rome numbering), the member states identify the necessity and recognize the possibility that the common market may lead to the approximation of their respective social security systems, see C. Barnard, EC Social Policy in P. Craig and G. de Burca (eds), *The Evolution of EU Law*, OUP (1999) 479-516, 481.

<sup>9</sup> Member States are tempted to maintain what they consider to be their 'competitive advantage' for as long as possible, at the cost of ignoring common policies. The derogations negotiated and the violations inflicted to the common rules opening up the utilities markets, offer a good illustration of the above point. The persistence of several states in violating the Stability and Growth pact, offers yet another very strong illustration. This point

at least organize it in a rational and coordinated way, this decade presents the challenge of formulating common directions of social policy into an unswerving necessity for the EU.

Third, in view of the persisting high unemployment in the whole of the European economic space, the EU has devised its own employment policy (EES, 1997), later completed by the Lisbon strategy (2000). Both strategies are aimed at the goal of a highly skilled, highly productive and high-wage economy. By the same token, 3D (dirty, dangerous, degrading) employments are to be reformed and/or abandoned. These objectives have led the EU both at some harmonization and at some substantial coordination between national employment policies.

Fourth, in this last decade one of the aims pursued by both the legislature and the judiciary is that of fostering European citizenship.<sup>10</sup> Directive 2004/38/EC (the citizenship Directive),<sup>11</sup> which modifies the basic Regulation (EC) 1612/68 and replaces no less than nine directives, thus consolidating the status of European citizens is only an example. Directive 2005/63/EC<sup>12</sup> on the mutual recognition of professional qualifications and experience is yet another example. A further example is to be found in Directive 2003/109/EC<sup>13</sup> on long term residents from third countries, instituting what several writers have called the 'civic citizenship'. The judiciary, from its part, has taken the boldest steps during these last years to flesh up and strengthen European citizenship.<sup>14</sup> Citizenship is not only about civil and political rights, but also – and to a large extent – about social rights.

Fifth, all the above arguments become more pressing after the recent twelve-strong enlargement of the EU.

All these reasons call for a stronger involvement of the EU in the social field. They may all be summed up by the need for the EU to gain in acceptability and support among European citizens, a condition necessary for any further step in the European integration project.

### 3. Aspects of a European social policy

#### 3.1. Mapping European social policy

All the above do not suggest that the EU has been completely idle in the field of social policy and that it now has to start from scratch. Quite to the contrary, the first actions of the EU in the social field date almost as far back as the creation of the EEC itself. Ever since, the social action of the EU has diversified and increased. However, such action has been sporadic and ill-coordinated, if at all. As a consequence of the lack of a general legal basis in the EC/EU Treaty, action at the European level has had to develop in a piecemeal way. With retrospect we may acknowledge that, well before terms such as 'active social policies', 'employability' and 'flexicurity' were invented, many of the 'social' actions of the EC/EU did in fact pursue such objectives.

a) The single most important social policy of the EC has been securing the *free movement of workers*, then European citizens, within the EC territory. This has been pursued by hefty and complicated legislation (think of all the directives and regulations repealed by the recent 'citizenship Directive', of Regulation 1408/71 and its numerous amendments leading to the codifying Regulation 883/2004<sup>15</sup> and of the 'General Systems' for the mutual recognition of professional qualifications codified in Directive 2005/63) and by even heftier case law of the ECJ.

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has been excellently made by S. Collignon in his oral presentation in the CEPS commemorative conference for the 50 years of the Treaty of Rome, 'From Rome to Berlin', Madrid, 19-20 juin 2007.

<sup>10</sup> For the most recent and fuller account of the issues relating to European citizenship see J. Shaw, *The Transformation of Citizenship in the EU*, CUP (2007) Cambridge; see also F. Jacobs, 'Citizenship of the EU – A Legal Analysis' (2007) ELJ 591-610, as well as all the other articles of this same issue of the ELJ exclusively dedicated to the issue of citizenship.

<sup>11</sup> Directive 2004/38/EC of the EP and the Council of 29 April 2004, [2004] OJ L 158/77.

<sup>12</sup> Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, [2005] OJ 255/22.

<sup>13</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/44.

<sup>14</sup> See n. 10 above and the developments below para. 4.

<sup>15</sup> Regulation (EC) 883/2004 of the EP and the Council of 29 April 2004 [2004] OJ L 166/1.

b) Following the Court's judgments in *Defrenne*,<sup>16</sup> the objective of *gender equality* has entered the EC agenda. This has been pursued by Directives 75/117 on equal pay<sup>17</sup> and 76/207 on equal access to employment and working conditions.<sup>18</sup> Only in 2000 has the principle of non discrimination overcome this narrow framework of analysis, to cover discrimination based on other criteria (race, religion, handicap, age, sexual orientation),<sup>19</sup> and to expand in fields other than employment.<sup>20</sup> Even today, however, discrimination on the basis of nationality (for third country nationals) is not prohibited under EU law.

c) Further in the field of employment, the EC has strived to secure minimum *health and security regulations*.<sup>21</sup> More controversially, the EC has also managed to regulate working time within the Member States.<sup>22</sup>

d) Moreover, the EU has put into place some own initiatives (as opposed to the EES, which consists of the coordination of national employment policies) for the promotion of *employment*. In this respect, the creation of the European Employment Service (EURES), centralizing all existing employment offer and demand, has been one of the core measures. These have been completed by programmes, such as ERGO, ADAPT, STAGE etc, for the promotion of employment at the member State level.

e) These initiatives have been complemented by measures on *education and training*. The creation of the European Centre for Training (Centre Europeen de Formation Professionnelle, CEDEFOP) and the financing of programmes such as SOCRATES with its sub-programmes Erasmus, Lingua, Leonardo etc are some of the most important initiatives in this field.

f) The only EU action in the social field, which is only indirectly and vaguely connected to employment, is the European *social cohesion policy*. Social cohesion between the various regions of the EU is mainly pursued through the European Social Fund (ESF) which finances projects in the regions coming under the three objectives defined by Regulation (EC) 1260/99.<sup>23</sup> The European Investment Bank further finances or guarantees loans for the development of these same regions. Further, programmes such as URBAN, EQUAL etc may be used to bridge regional disparities.

The image would not be complete without a mention of the EU's regional and industrial policies.

This brief overview of the main EU's actions in the social field leads to two observations. First, that EU actions come as the manifestations of different, often unrelated, EU policies. Therefore, the issue of coordination is key. Second, that social policies pursued at the EU level are rarely exclusively 'market correcting', but tend to be essentially 'market making' or at least 'market enhancing'.<sup>24</sup> Both these characteristics may be due to the limited nature of EU competences in the social field and to the efforts of the EU to expand in the social field indirectly, through recourse to other more 'economic' policies in which its competences are undisputed.

A closer look at the content of the EU's social policy shows that the objectives pursued are, in order: a) creating a level playing field for national markets to integrate, b) promote employment and c) combat social exclusion. This is due a) to the particular (functional)

<sup>16</sup> Cases 43/75 *Defrenne II* [1976] ECR 455 and C-149/77 *Defrenne III* [1978] ECR 1365.

<sup>17</sup> Directive 75/117/EEC of the Council of 10 February 1975 [1975] OJ L 45/19.

<sup>18</sup> Directive 76/207/EEC of the Council of 9 February 1976 [1976] OJ L 39/40; this latter directive has recently been modified by directive 2002/73/EC of the EP and the Council of 23 September 2002 [2002] OJ L 269/15

<sup>19</sup> Directive 2000/78/EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

<sup>20</sup> Directive 2000/43/EC of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

<sup>21</sup> See e.g. Council Directives 89/654/EEC on safety at the workplace (1989) OJ L 393/1, 89/655/EEC on safety of work equipment (1989) L 393/13, 90/270/EEC on safety of VDUs (1990) OJ L 156/14, 90/269/EEC on manual handling of loads (1990) OJ L 156/14.

<sup>22</sup> Directive 93/104/EC [1993] OJ L 307/18, later repealed and replaced by Directive 2003/88/EC [2003] OJ L 299/9.

<sup>23</sup> Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (1999) OJ L 161/1; according to this Regulation, the three objectives are as follows: 'Objective 1: promoting the development and structural adjustment of regions whose development is lagging behind', 'Objective 2: supporting the economic and social conversion of areas facing structural difficulties' and 'Objective 3: supporting the adaptation and modernisation of policies and systems of education, training and employment'; see also Regulation (EC) No 1784/1999 of the EP and of the Council of 12 July 1999 on the European Social Fund, (1999) OJ L 213/5.

<sup>24</sup> For the use of this terminology see C. Barnard, EC Social Policy, above n. 8.

properties of the European integration project, b) to the principle of the attribution of powers and c) to the lack of an ideological background, in the form of a Treaty preamble, a declaration etc, on which EU social policy could be based. This latter point was partly, but inadequately, addressed by the adoption of the 1989 Community Charter of Fundamental Social Rights. This, however, was not a binding text and was further weakened by the UK's initial refusal to sign it.<sup>25</sup> The European Charter of Fundamental Rights, jointly proclaimed by the EU Institutions in 2000, could have remedied this vacuum, but at the insistence of several member States this also was non-binding. The introduction of the Charter in the Constitutional Treaty has been self-defeating, since it was one of the main reasons for the British opposition. Similarly, the Reform Treaty negotiations could only get started after the UK obtained that the Charter be only annexed to it, without binding (or else direct) effects.

### 3.2. European social policy from a regulatory perspective

Against this background it becomes crucial to analyse the EU's 'social policy' from a regulatory viewpoint. Two distinctions may be drawn. From the viewpoint of the means used, some EU actions take the form of hard law instruments, while others are only put forward through funding programmes or soft coordination. From the viewpoint of the objective pursued, some EU initiatives aim at creating proper EU social policy, which adds up to that of member States, while other initiatives are restricted to coordinating national social policies. It is true that most measures of hard law tend to create new social norms, while soft law is mostly used for coordination purposes, but the two distinctions do not fit perfectly.

If the above distinction is applied to the fields of EU social policy identified above (in para. 3.1) a broad – and imperfect – dichotomy may be drawn. On the one hand, the EU is pursuing its own social agenda in the fields of a) free movement of workers, b) safety and security in the working place and c) non discrimination. On the other hand, the EU is striving to coordinate national policies in the areas of a) employment, b) training and education and c) social cohesion. This broad distinction is only approximate, since hard and soft law are not mutually exclusive and that EU policies are often accompanied by coordination of national ones. However, this imperfect distinction may serve for making out the main actors and identifying the key challenges in the development of the EU's social policy. Indeed, hard law has received a new light by the late activism of the ECJ, in the direction of securing social rights (para. 4 below). Soft law, on its part, has been offering increasingly credible solutions and has been attracting attention, since the launch and the formalization of the Open Method(s) of Coordination (para. 5 below).

### 4. Social Market? The role of the Court

The ECJ has shown social awareness in many fields of EU law. Starting with the *Defrenne* judgments, the ECJ developed a rich body of case law concerning a) gender equality,<sup>26</sup> b) the equitable application of Regulation 1408/71 on the mobility of pension and healthcare rights,<sup>27</sup> c) the application of Directive 80/987<sup>28</sup> on the protection of employees in the event of insolvency of their employer,<sup>29</sup> d) equal terms of access in education, training and relative benefits<sup>30</sup> etc. However, in the recent case law of the ECJ we can distinguish three trends, which clearly illustrate the irresistible evolution of the internal market from a purely economic

<sup>25</sup> The UK signed the Charter only after the election of the labour government in 1998.

<sup>26</sup> For the abundant case law on this issue see, among many, T. Hervey & D. O'Keeffe (eds), *Sex Equality Law in the EU*, Wiley Chancery (1996) as well as H. Fenwick & T. Hervey, *Sex Equality in the Single Market: New Directions for the ECJ*, *CMLRev* (1995) 433, J. Shaw, *Women, Work and Care: Women's Dual Role and Double Burden in EC Sex Equality Law*, *Journal of European Social Policy* (1998) 43-63, G. More, *The Principle of Equal Treatment: From Market Unifier to Fundamental Right?*, in P. Craig & G. de Burca, (eds) *The Evolution of EU Law* (1999) OUP 517-553. See also V. Hatzopoulos, *La protection des minorités sexuelles par les juridictions européennes*, *Revue Hellénique des Droits de l'Homme* (15/2002) 709-756.

<sup>27</sup> See e.g. Cases 182/78 *Pierrik II* [1979] ECR 1977, C-120/95 *Decker* [1998] ECR I-1831, C-158/96 *Kohll* [1998] ECR I-1931 and many more; see below under 2.1.3.

<sup>28</sup> Directive 80/987/EEC [1980] OJ L 283/23.

<sup>29</sup> See e.g. cases C-6 & 9/90 *Francovich* [1991] ECR I-5357 and C-479/93 *Francovich II* [1995] ECR I-3843 and more recently case C-520/03 *Olaso Valero* [2004] ECR I-12065.

<sup>30</sup> Starting with judgments of the Court in cases 293/83 *Gravier* [1985] ECR 593 and 24/86 *Blaizot* [1998] ECR 379 and culminating in cases C-224/98 *D'Hoop* [2002] ECR I-6191 and C-209/03 *Bidar*, [2005] ECR I-2119.

area to one where the law takes into account the social parameters of the unifying process: the complete abolition of reverse discrimination in the free movement of persons (4.1), the enhanced portability of health care rights (4.2) and the full recognition of professional qualifications (4.3). These developments have made several writers wonder whether the internal market prescribed by the Treaty is not a 'social market'.<sup>31</sup>

#### 4.1. Direct effect of the European citizenship and the abolition of reverse discrimination

The introduction of the European citizenship by the Treaty of Maastricht (1992) was faced with circumspection by many writers. The main criticism expressed was that the 'rights' attached to citizenship added nothing to the already existing 'acquis' in relation to the free movement of persons.<sup>32</sup> Such criticisms were nourished by the early case law of the ECJ itself.<sup>33</sup> However, in a series of recent judgments the ECJ re-powered citizenship, by recognizing that the relevant EC provisions grant EU citizens autonomous rights, independently from the Treaty freedoms on free movement. Rights accruing from citizenship, as it were, by hypothesis embody the social principle. Hence, the direct application of the Treaty provisions on citizenship entails the generalization of the principle of equal treatment and the abolition of reverse discrimination (4.1.1), leads to the consecration, under EU law, of the fundamental right to family life (4.1.2) and goes as far as the recognition of rights of a purely social nature, such as access to the welfare system of other member states (4.1.3).

##### 4.1.1. Abolition of reverse discriminations

The case law of ECJ according to which EU law only applies to situations where some cross-border element is present and does not cover reverse discrimination, has been extensively commented upon.<sup>34</sup> The institution, by the Treaty of Maastricht, of the European citizenship, has been instrumental in gradually restricting – and eventually eliminating – the scope of reverse discriminations.

The ECJ made the first step towards recognizing the possibility for a national of a member State to invoke EU rights against his/her own State, in *Surinder Singh*.<sup>35</sup> Despite the fact that Mr. Singh, of Indian nationality, did not have a residence right under the British legislation, the Court held that he drew such a right from Directive 73/148,<sup>36</sup> under his capacity as the spouse of an EU worker previously established in another member State. The far-reaching effects of this judgment have been identified by many writers,<sup>37</sup> but did not materialize until ten years later, in *Carpenter*.<sup>38</sup> In this case right of residence in the UK was claimed in favor of the

<sup>31</sup> See M. Poires Maduro 'Europe's Social Self: 'The Sickness unto Death' (2/2000) Constitutional web paper, available at [http://les1.man.ac.uk/con\\_w eb/](http://les1.man.ac.uk/con_w eb/); Ch. Joerges, 'Social Market Economy as Europe's Social Model?' (2004/8) EUI Working Paper Law; for a more general and extensive discussion of the underlying issues see J. Baquero-Cruz, *Between Competition and Free Movement, The Economic Constitutional Law of the European Community* (2002) Hart Publishing, Portland.

<sup>32</sup> See among many J. Weiler, Citizenship and Human Rights, in J. Winter e.a. (eds) *Reforming the TEU: The Legal Debate*, Kluwer (1996).

<sup>33</sup> Cases C-378/97 *Wijzenbeek* [1999] ECR I-6207 and C-356/98 *Kaba I* [2000] ECR I-2623.

<sup>34</sup> N. Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to move on?' (2002) CMLrev 731-771; G. Gaja, Les discriminations à rebours : un revirement souhaitable, in *Mélanges en hommage à Michel Waelbroeck*, Vol. II, Bruylant, Bruxelles (1999) 993-1000 and H. Tagaras, Règles Communautaires de libre circulation, discriminations à rebours et situations dites 'purement internes' , in the same *Mélanges*, 1499-1538. See also, D. Simon & F. Lagondet, Libre circulation des marchandises et situations purement internes: chronique d'une mort annoncée, *Europe* (1997), chron. 9; A. Canizzaro, Producing "Reverse Discrimination" through the Exercise of EC Competences, YEL (1997), A. Somek, Reverse Discrimination Revisited, Coping with Incongruity between Community Law and Member State Legislation, at <http://www.univie.ac.at/juridicum/forschung/wp09.pdf>

<sup>35</sup> Case C-370/90 *Surinder Singh* [1992] ECR I-4265.

<sup>36</sup> Directive 73/148/EEC of the Council of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] OJ L 172/14. This directive, together with numerous other acts of secondary legislation concerning the freedom of movement and of establishment of community workers has been recently repealed and replaced by directive 2004/38/EC of the EP and the Council of 29 April 2004, 'the citizenship directive' [2004] OJ L 158/77.

<sup>37</sup> See e.g. R. White in ELRev (1993) 527-532 and H. Cullen in The Journal of Social Welfare Law (1993) 77-82.

<sup>38</sup> Case C-60/00 *Carpenter* [2002] I-6279.



Filipino spouse of a British citizen who lived normally within the UK and offered services, some of which had addressees in other member States. The ECJ found the British citizen to be a 'service provider' in the sense of Article 49 EC. Hence, he was entitled under EU law to claim for his spouse a right of residence in the State where he was established, even if this were his own State of origin. In order to reach this conclusion the ECJ expressly referred itself to article of 8 ECHR, on family life, which it elevated to the status of a general principle of EU law.<sup>39</sup> This reference to the ECHR together with the (well established) extensive interpretation of the notion of services to include cross-border flows which are only *potential*,<sup>40</sup> opens up the possibility of invoking the internal market rules as against one's own state of origin, in a virtually unlimited number of cases.

This tendency in the case law of the ECJ is being confirmed by the judgment of the Court in *D'Hoop*, delivered the same day with *Carpenter*.

It stems from the above case law that, at least as far as 'personal freedoms' (i.e. free movement of persons and services) are concerned, the European citizenship henceforth prohibits reverse discriminations.<sup>41</sup>

#### **4.1.2. A fundamental right to family life**

The ECJ has steadily lent its support to family life, through an extensive interpretation of the rights and privileges recognized by the EC legislation to family members (right of residence, work, equal treatment, social protection etc). Thus the Court has held that the widow of a Community worker maintains her social entitlements even after the death of her spouse.<sup>42</sup> Moreover, the separated (yet not divorced) spouse of an European worker retains her right of stay in the member State of their common residence.<sup>43</sup> Further, the ECJ has held that, although unmarried couples do not constitute a family in the sense of the Treaty, the unmarried companion of an EU national may follow him/her in another member State, if this latter State recognizes legal effects to free partnerships.<sup>44</sup>

Further, the Court has recognized that family members of an EU citizen hold rights from him/her, even though the citizen in question a) has interrupted relations with his/her family, b) has moved to a third State outside the EU or c) is not or has never been a worker. In *Baumbast* the ECJ held *i.a.* that a) the German ex-worker who had moved to a third State could not claim any right of stay for him and his family in another member State under any specific rule of primary or secondary legislation, but could do so in his quality as an EU citizen, under Article 18 EC. Further, the ECJ held that b) children under the age of 18 who were enrolled in the educational system of a member State, where one of their parents was legally established, enjoy an autonomous right of stay until the end of their education, vocational training etc. Finally c) the ECJ found that the parent who is responsible for the child(ren) has a right of stay linked to that of the child(ren), which is completely independent from the nationality of both the parent in question and of the child(ren).<sup>45</sup> In order to reach the above conclusions the ECJ referred itself not only to Article 18 EC, but also, complementarily, to Article 8 ECHR on the right to a family life. This is, however, an extensive interpretation of the right to a family life, since rights of residence of family members a) may last longer than the family itself (in case of divorce), b) may overpass the duration of employment – or even

<sup>39</sup> See recit. 41 and 42 of the judgment, as well as the judgment of the Court in *D'Hoop*, above n. 30. See also cases C-413/99 *Baumbast* [2002] ECR I-7091, C-200/02 *Zhu & Chen* [2004] nyr.

<sup>40</sup> Case C-384/93 *Alpine Investments* [1995] ECR I-1141 and its annotation by V. Hatzopoulos in *CMLRev* (1995) 1427-1445.

<sup>41</sup> The same tendency, albeit in a more reserved way, is also to be observed in the case law of the ECJ in relation to free movement of goods and capital; see Joined cases C-321 to 324/94 *Pistre* [1997] ECR I-2343, recit. 44 and Case C-448/98 *Guimont* [2000] ECR I-10663 for goods and Joined cases 515, 519 to 524 and 526 to 540/99 *Reisch e.a.* [2002] ECR I-2157 for capitals. For a recent overview of all four freedoms and the interactions between them, see V. Hatzopoulos, *Trente ans après les arrêts fondamentaux de 1974, les quatre libertés: quatre?* in P. Demaret e.a. (eds.) *30 Years of European Legal Studies at the College of Europe - 30 ans d'études juridiques européennes au Collège d'Europe: Liber Professorum 1973/74-2003/04*, P.I.E.-Peter Lang, Bruxelles, 2005.

<sup>42</sup> Case 32/75 *Cristini v. SNCF* [1975] ECR 1085.

<sup>43</sup> Case 267/83 *Diatta* [1985] ECR 567.

<sup>44</sup> The ECJ held that the right of residence of the unmarried companion constituted for the EU worker a 'social advantage' in respect of which any discrimination is prohibited.

<sup>45</sup> These same rights are henceforth recognized by directive 2004/38, the 'citizenship directive', above n. 11.

residence – of the community national in the member state concerned and c) may acquire autonomous character, for a considerable duration.

More importantly still, in *Zhu and Chen* the ECJ found that a newly born infant having the European citizenship, did have a right of stay in another member State, despite the fact that it did not belong to any of the categories of free movement beneficiaries (workers, pensioners etc). The Chinese mother, from whom the infant depended, both in practical and sentimental terms, also gained a right of stay in the UK. This right is conditional, according to the ECJ, upon the beneficiaries not becoming a burden for the welfare and healthcare system of the receiving country. In this case this was granted, since a third person, who enjoyed no right whatsoever in the UK, i.e. the Chinese father, provided the necessary economic support. The judgment in *Zhu & Chen* is very important in that it marks the emancipation of European citizenship and of rights thereby attached, from the exercise of some economic activity. Contrary to the situation in *Baumbast*, where the basic beneficiary was the Community worker, from whom family members drew rights, in this case the basic beneficiary is the underage child which has the citizenship of a member State, while the alien worker only occupies an ‘auxiliary’ role by providing the necessary economic means, without himself drawing any right.

Summarizing the above case law, it can be said that the initial extensive interpretation of the rules on the free movement of persons, is gradually giving way and/or is being combined with a pro-active application of Article 18 EC, on European citizenship, in order to ensure the respect of family life, more extensively than Article 8 ECHR provides for. Hence, Article 18 EC acquires important added value for the application of the EC Treaty and ensures minimal enforceability to Article 7 of the EU Charter of Fundamental Rights.

#### **4.1.3. Access to the welfare system of other member states**

One of the founding principles of the EC is the abolition of discrimination between nationals of the member States, whether based on nationality or on other criteria. However, such a general principle does not flow directly from the Treaties. Despite lengthy legislation prohibiting various forms of discrimination,<sup>46</sup> only the 2000 directives<sup>47</sup> did attempt a generalized enactment of the principle of equal treatment. In the meantime, in order to cover the relevant legal vacuum, the ECJ, on the one hand recognized the principle of non-discrimination as a general principle of EC law<sup>48</sup> and, on the other hand, developed a rich body of case law defining the scope of the said principle in an extensive manner.<sup>49</sup>

A particularly delicate issue is the access of EU nationals to welfare benefits of other member States. It is beyond any doubt that the early directives on free movement, as well as the 1990 directives on the generalization of the right of residence specifically provided against any form of ‘social tourism’. This is why the former directives restricted the right of establishment only to those in employment (and hence those with resources equal to those of nationals of the member state concerned). In the same vein the 1990 directives made the right of stay conditional upon the beneficiary having sufficient income and medical insurance, in order for him/her not to become a burden for the welfare system of the receiving state. However, the gradual recognition of the status of European citizenship as an autonomous source of rights was bound to alter this position.

The first step in this direction was made by the ECJ in *Martinez Sala*.<sup>50</sup> She was Spanish legally resident in Germany, but she was refused a school allowance for her daughter, as she did not come within any of the categories of equal treatment beneficiaries provided for in EC secondary legislation: she was neither a worker any more, nor had she become a pensioner yet. The ECJ resorted to a subterfuge whereby, without recognizing that the European citizenship could be the source of autonomous rights, it reached an equivalent result. The ECJ held that any person who falls *ratione personae* within the scope of the Treaty, (e.g.

<sup>46</sup> See all the directives repealed and replaced by the ‘Citizenship Directive’, as well as Directives 75/117/EEC and 76/207/EEC, above n. 17 and 18.

<sup>47</sup> Directive 2000/43/EC of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22 and directive 2000/78/EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

<sup>48</sup> *Defrenne II* and mainly *Defrenne III*, above n. 16.

<sup>49</sup> See above n. 26.

<sup>50</sup> Case C-85/96 *Martinez Sala* [1988] ECR I-2691.

national of a member State legally residing in another member state), is able to invoke the rules *ratione materiae* of the same Treaty (e.g. the principle of non-discrimination and of equal access to family – and other social – benefits in the state of reception).<sup>51</sup>

The same distinction was also applied by the ECJ in its judgment in *Grzelczyk*.<sup>52</sup> This case concerned a French student residing in Belgium by virtue of Directive 93/36, who was claiming the minimal subsistence benefit (minimex). The Court found the Belgian legislation, which restricted the subsistence benefit solely to Belgian nationals, to be contrary to Article 12 EC, on equal treatment.<sup>53</sup>

The Court reiterated – but obliterated – this same distinction, between personal and material scope of the Treaty, in its judgment in *D'Hoop*. This concerned a Belgian girl who had completed high school in France, then returned to University in Belgium, where she claimed the 'waiting subsidy' before her first employment. In this case, the court recognized the direct effect of Article 18 EC, and observed that 'Union citizenship is destined to be the fundamental status of nationals of the member States, enabling those who find themselves in the same situation to enjoy within the scope *ratione materiae* of the Treaty the same treatment in law irrespective of their nationality'.<sup>54</sup> Hence, by applying Article 18 EC the Court recognized to the applicant the right to receive the waiting subsidy, in the face of the contrary national legislation.

In the judgment in *Collins*<sup>55</sup> the Court accepted that a national of a member State, who seeks employment in another member State,<sup>56</sup> may claim unemployment benefits from that latter (host) State. In the UK such benefits were only granted to persons having their usual residence within the national territory, i.e. mostly (but not exclusively) British nationals. The ECJ found that since Article 48 EC provides for a general right of EU citizens to seek employment in other member States, the contested measure did constitute discriminatory treatment contrary to Article 12 EC. However, the ECJ was ready to accept that such measures may be justified, to the extent that they ensure a genuine link between the applicant and the labor market in which he/she strives to integrate, avoiding thus phenomena of 'social tourism'.

More recently in *Bidar*<sup>57</sup> the Court took a further step, and held that the UK rule which made financial aid for maintenance expenses (not for fees) subject to a requirement of a three-year prior residence within the country, a discrimination prohibited under Article 12 EC. This finding of the Court is of particular significance, since in its 1988 judgments in *Brown* and *Lair*<sup>58</sup> the Court had found that maintenance grants are outside the scope of Article 12 (then 7) EC. This solution had been further crystallized in Article 3 of Directive 93/96 and has been maintained in the Citizenship Directive 2004/38 (Art. 24(2)). Therefore in this case the Court refers itself to the Treaty provisions on citizenship not merely in order to complete some loophole in the secondary legislation, but rather in order to circumvent precise rules of secondary legislation, henceforth deemed incompatible with the level of integration achieved. At a later stage of its reasoning the Court recognises that a member State may restrict such benefits to students who are 'sufficiently integrated' in the State in question, but not in a way as to exclude all non-national students, as the UK measure under review in fact did.

A similar reasoning was followed by the Court in *Trojani*.<sup>59</sup> This case concerned the refusal of a Belgian fund to grant the minimal subsistence benefit (minimex) to a Frenchman who worked in a reintegration programme in the Salvation Army in Belgium. The ECJ avoided to

<sup>51</sup> Recitals 62-64 of the judgment.

<sup>52</sup> Case C-184/99 *Grzelczyk* [2001] ECR I-6193.

<sup>53</sup> The ECJ held that the host State has the right not to renew or to recall the authorization of residence if the conditions of directive 93/96 – and the requirement of sufficient economic resources in particular – are no more fulfilled. However, member states may not proceed to the above actions merely because the person concerned has applied for the minimal benefit of subsistence.

<sup>54</sup> *D'Hoop* recit. 28, where the Court refers itself to recit. 31 of the judgment in case C-184/99 *Grzelczyk* [2001] ECR I-6193.

<sup>55</sup> Case C-138/02 *Collins* [2004] ECR I-2703.

<sup>56</sup> That is to say, the person concerned has not yet worked in the host country and hence does not come within the scope of Regulation 1612/68, which could entitle him/her to such a benefit.

<sup>57</sup> Case C-209/03 *Bidar*, [2005] ECR I-2119.

<sup>58</sup> Cases 39/86 *Brown* [1988] ECR 3161 and 197/86 *Lair* [1988] ECR 3205.

<sup>59</sup> Case C-456/02 *Trojani* [2004] ECR I-7573.

rule on whether this constituted actual and real work, in the sense of articles 39 et seq. EC,<sup>60</sup> but turned to the rights arising from citizenship. The Court held that Article 18 EC constitutes some kind of 'presumption' in favor of the right of residence in other member States, a right which may be restricted in a way respectful of proportionality. However, insofar as the host State has not restricted the right of residence of a national of another member State (even if it would be proportional to do so),<sup>61</sup> this State cannot ignore its obligation to treat equally all EU citizens established in its territory. Both the factual situation and the findings of the Court in this case are very similar to the ones pertaining in *Grzelczyk*, *Collins* and *Bidar*. What should not be overlooked, however, is that in these three cases the applicant drew his right of stay within the host member State from a specific provision of the Treaty or of secondary legislation. On the other hand, Mr. Trojani, who did not clearly qualify as a worker, held the same right of stay directly from Article 18 EC.

From the above case law it stems that the principle of equal treatment coupled with the rights of citizenship occasionally serve the ECJ as means of 'positive action', whereby social benefits are being recognized to beneficiaries on a territorial – not a national – basis. In this way the Court takes a step forward from negative integration and promotes solutions leading to positive integration. Solutions which are not unknown to national social systems<sup>62</sup> and which have been crystallized, to some extent, in Directive 2003/109 on long term migrants.<sup>63</sup> In this way, equal treatment is more than merely a principle, as it gives rise to concrete subjective rights of second (right to a family life) and of third (social benefits) generation. In order to reach the above results, the ECJ occasionally refers itself to provisions of the ECHR, the EU Charter of Fundamental Rights, the European Social Charter or other texts of international law, but always in an incidental way. The core reasoning of the Court is based on an extensive interpretation of the fundamental Treaty freedoms, complemented by fully-fledged citizenship rights and the principle of equal treatment.

#### 4.2. Portability of health rights of EU citizens

In order to make possible the limited movement of capital, at a time where the relevant Treaty freedom was completely idle, the ECJ held that payments for services received in another member state should be free of any restriction. By the same token the Court recognized that medical patients, students and tourists moving to another member State are service recipients, in the sense of Article 49 EC, and should be allowed to carry around the necessary moneys.<sup>64</sup>

In this indirect, almost unconscious, way the ECJ established that healthcare services constitute services in the sense of the Treaty.<sup>65</sup> This led to spectacular developments in the last seven years. This case law, lengthy, highly technical and politically controversial, has been presented in detail by several authors and does not find its place here.<sup>66</sup> It is reminded,

<sup>60</sup> For the relative requirement, see *i.a.* cases 53/81 *Levin* [1982] ECR 1035; 196/87 *Steyman* [1988] ECR 1659 and 344/87 *Betray* [1989] ECR 1621.

<sup>61</sup> In fact Belgium had issued Mr. Trojani a residence permit.

<sup>62</sup> Both the UK and Belgian legislation did not altogether exclude foreigners from the relevant benefits, but imposed extremely restrictive conditions.

<sup>63</sup> Directive 2003/109/EC [2003] OJ L 16/44. This directive establishes a permanent right of residence for long term immigrants and their families, after five years of legal residence, even if they no longer fulfill any of the conditions for which they were admitted within the EU (employment, studies, economic independence); it further allows for limited recourse to the host State's social benefits during the first (5 year) period.

<sup>64</sup> Joined cases 286/82 and 26/83 *Luisi & Carbonne* [1984] ECR 377.

<sup>65</sup> The same conclusion was also reached by the Court in case C-159/90 *SPUC v. Grogan* [1991] ECR I-4685. In this case however, the Court avoided applying the relevant Treaty rules, as it was unable to identify any consideration for the services offered.

<sup>66</sup> See V. 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) CML Rev, 683-729, and more recently 'Health law and policy, the impact of the EU', in G. De Burca (Ed.), *EU Law and the Welfare State: In Search of Solidarity*, EU/OUP (2005), pp. 123-160. See also G. Davies, 'Welfare as a service', (2002) *LIEI* 27-40; P. Cabral, 'The Internal Market and the right to cross-border medical care', (2004) *ELRev*, 673-685, and van der Mei, 'Cross-border access to health care within the EU: Some reflections on *Geraets-Smits and Peerbooms* and *Vanbraekel*', (2002) *ML*, 289-215 and 'Cross-border access to medical care: Non-hospital care and waiting lists', (2004) *LIEI*, 57-67. More recently see A. Dawes, 'Bonjour Herr Doctor: national healthcare systems, the Internal Market and cross-border medical care within the EU', (2006) *LIEI*, 167-182. For a full account of the relationships between EU and Health Law see T. Hervey and J. McHale, *Health Law and the European Union*, CUP (Cambridge, 2004).

however, that a patient from any member State moving abroad, may, next to urgent treatment provided by virtue of the European Insurance Card (ex document E 111):

a) receive outpatient treatment<sup>67</sup> in any other member State and obtain refund from their home State, at the tariffs applicable in this latter State; no prior authorisation is necessary for such a refund to be obtained, since the relevant right stems directly from Article 49 EC;

b) receive any kind of treatment in other member States in the same conditions (tariffs, refund, indemnity etc – but for the duration) as patients of the host State, provided they have obtained prior authorisation (document E 112) by their home institution, according to Article 22 of Regulation 1408/71;

c) force the delivery of the above authorisation (for receiving treatment abroad) whenever the treatment objectively necessary for their medical condition<sup>68</sup> is not available in their home State or is not available within a reasonable waiting time, taking into consideration the specific needs of each particular patient;<sup>69</sup> this is also a right directly stemming from Article 49 EC.

These rights benefit all people insured with the competent institution of one member State, irrespectively of whether the home State<sup>70</sup> a) operates a refund system, like the one followed (principally) in France, Germany and Luxembourg,<sup>71</sup> b) operates a benefits-in-kind system by contracted in physicians and hospitals, as is the case in the Netherlands,<sup>72</sup> or c) offers benefits-in-kind by essentially public institutions, as it is the case in the UK and Italy<sup>73</sup>.

As a consequence of the above case law<sup>74</sup> mobility of patients across the EU countries is greatly facilitated. This, however, has not led up till now to opening the floodgates of 'peripatetic' patients picking and choosing healthcare services in various member States.<sup>75</sup> By facilitating the free movement of patients, the ECJ subjects the national/insurance health systems to indirect competition amongst them, hence pushing them to rationalize and promote efficiency. At a time where all the systems of social insurance in Europe go through a profound crisis – for economic, demographic, political and other reasons – this choice of the ECJ may prove particularly burdensome, at least in the short-term. However, from the viewpoint of the European citizen the case law of the Court may only be seen as a positive development. For, it ensures the right to health, anywhere within in the EC, without unjustifiable administrative or other burdens.

### 4.3. Recognition of titles of study and experience

Directly linked to the operation of the internal market is the issue of mutual recognition of professional qualifications. In this field too, the recent case law of the ECJ has proven particularly progressive. In a first generation of 'foundational' judgments,<sup>76</sup> the ECJ established the obligation of member States to recognize the diplomas and professional experience acquired in another member State, by virtue of the Treaty provisions on free movement (articles 39, 41 and 49 EC). In its most recent case law the ECJ follows two directions: on one hand, it considerably extends the scope and enhances the effectiveness of the mutual recognition directives – mainly the General Systems –<sup>77</sup> and, on the other hand, it insists on the parallel and complementary application of the rules of primary legislation.

<sup>67</sup> Inpatient treatment has been restrictively defined, see Case C-8/02 *Leichtle* [2004] ECR I- 2641.

<sup>68</sup> For the objective assessment of the necessity of the treatment, independently from national preferences, see Case C-368/98, *Vanbraekel*, [2001] ECR I-5363.

<sup>69</sup> Case C-385/99, *Müller-Fauré*, [2003] ECR I-4509 and Case C-372/04, *Watts* [2006] ECR I-4325.

<sup>70</sup> The threefold classification which follows is simplistic, for the needs of demonstration, and does not account for the special characteristics of each one of the national systems.

<sup>71</sup> See Case C-158/96, *Kohll*, [1998] ECR I-1931; Case C-56/01, *Inizan*, [2003] ECR I-12403; Case C-193/03, *Bosch*, [2004] ECR I-9911.

<sup>72</sup> *Smits & Peerbooms, Vanbraekel et Müller-Fauré*, all cited above.

<sup>73</sup> *Watts*, above.

<sup>74</sup> For a comprehensive presentation of the relevant case law and its implications for the organization of health services in the member states see V. Hatzopoulos, *Health Law and Policy: the Impact of the EU*, in G. de Burca, *EU Law and the Welfare State: In Search of Solidarity (Collected Courses of the Academy of European Law) 2005*, EU/OUP.

<sup>75</sup> See T. Hervey & J. McHale *Health Law and the EU CUP* (2004) 143-144.

<sup>76</sup> Cases 71/76 *Thieffry* [1977] ECR 765, 115/78 *Knoors* [1979] ECR 399, 222/86 *Heylens* [1987] ECR 4097, *Vlassopoulou* [1991] ECR I-2357, C-19/92 *Kraus* [1993] ECR I-1663, C-319/92 *Haim* [1994] ECR I-425, C-164/94 *Aranitis* [1996] ECR I-135.

<sup>77</sup> Directive 89/48/EEC (First General System) [1989] OJ L 19/16 and Directive 92/51/EC (Second General System) [1992] OJ L 209/25; now both repealed and replaced by Directive 2005/36 [2005] OJ 255/22.

### 4.3.1. The extensive application of the general systems

At least three tendencies may be discerned in the way in which the ECJ interprets and applies the two general systems on mutual recognition.

First, the ECJ proceeds in an increasingly extensive interpretation of the scope of application of the relevant directives. Therefore, in *Bobadilla*<sup>78</sup> the Court held that a collective labour agreement which fixes the terms of access to a specific employment in the public sector, may be assimilated to a 'legislative, regulatory or administrative act' in the sense of the first 'General System' Directive 89/48, thus rendering the corresponding activity a 'regulated profession'. The ECJ took a much bolder step in its judgment in *Burbaud*,<sup>79</sup> where it held that Directive 89/48 applies to the French system of selection of high-level civil servants (in the field of health). The ECJ, held that any study period which leads to a particular profession, even if it forms part of a specific recruitment procedure and it does not lead to the attribution of any 'degree', has to be compared to similar study periods in other member states. In this way, the ECJ extends the scope of application of the General Systems to cover professional access not only in the private and public sector of other member States, but also in the provision of public service itself. Hence, the exceptions of Articles 39(4) and 45 EC allowing member States to restrict the access of non-nationals to employment in the public sector receive a qualified blow.

This, together with the judgment of the Court in *Beuttenmüller*,<sup>80</sup> concerning the recruitment conditions in the Austrian public education system, also illustrate the *second* general tendency of the ECJ's case law in the field of professional qualifications, that is to say, the increasing invocation of the General Systems of recognition in the processes of recruitment in the public sector.

*Beuttenmüller* also stands for the *third* tendency of the case law of the ECJ in relation to the General Systems, the recognition of their direct applicability. In this case, for the first time ever, the Court gave judgment on whether the operational provisions of Directives 89/48 and 92/51 are sufficiently clear, precise and unconditional, so as to be directly applicable. The Court held that the provisions establishing the recognition obligation are directly effective. Most interestingly, the Court found that the provisions which allow member States to impose compensatory 'integration' measures (exams, training periods etc) cannot be relied upon by a state which has not yet/properly transposed the Directive. The same findings were reiterated, exclusively in relation to Directive 89/48, in the judgment of the Court in *Peros*<sup>81</sup>. In this way the Court dissociates two provisions, which were conceived as an indivisible whole (i.e. a right for individuals to have their qualifications recognized in other member States, tempered by a right for States to ensure minimal compliance with local professional practice). The criterion used is not the technically enforceable character of the provisions in question, but, rather, their addressees. The provisions having as their addressees individuals may be directly relied upon, while those giving rights to member States may not. This may be seen as a further application of the doctrine of *estoppel*.

### 4.3.2. Complementary application of rules of primary law

In order to cover possible lacunae, the ECJ considers the General Systems, as well as the sector-specific directives on recognition of professional qualifications to be specific expressions of the general Treaty rules. The ECJ constantly holds that 'those judgments are merely the expression in judicial decisions of a principle inherent in the fundamental freedoms of the Treaty, and that the legal effect of that principle cannot be reduced as a result of the adoption of directives on mutual recognition of diplomas'.<sup>82</sup> Hence, in *Hoczman* the Court held that the French medical association could not reject the application of a Spanish doctor, merely because he did not fall within the ambit of directive 93/16 on medical doctors.<sup>83</sup> On the

<sup>78</sup> Case C-234/97 *Bobadilla* [1999] ECR I-4773.

<sup>79</sup> Case C-285/01 *Burbaud* [2003] ECR I-8219.

<sup>80</sup> Case C-102/02 *Beuttenmüller v. Land Württemberg* [2004] ECR I-5405.

<sup>81</sup> Case C-141/04 *Peros v. TEE* [2005] ECR I-7163.

<sup>82</sup> Case C-31/00 *Dreessen* [2002] ECR I-663, recit. 25, where reference is also made to the earlier judgment in case C-238/98 *Hoczman* [2000] ECR I-6623, recits. 24 and 31.

<sup>83</sup> Directive 93/16/EC [1993] OJ L 165/1.

contrary, the medical association was under a duty, arising under the Treaty rules on free movement, to examine the substance of the applicant's qualifications and to take into account the degree of similarity or equivalence to the qualifications required. Similarly, in *Dreessen II*, the Court held that the Belgian 'Chamber of Architects' could not reject registration of a Belgian who had studied in Germany, merely because he was outside the scope of Directive 85/384 on architects.<sup>84</sup> A similar solution was adopted more recently by the Court in *Morgenbesser*,<sup>85</sup> in which a French law graduate sought to register as a trainee lawyer in Italy by virtue of the first General System. The Court found Directive 89/48 to be inapplicable but held that the Italian Bar Association had, nevertheless, to take into account the content of the applicant's studies, as well as any experience acquired thereafter in the host state.

The above case law of the Court should be seen in the light of two concomitant developments. First, the entire system of mutual recognition of professional qualifications has been reviewed, consolidated and extended by Directive 2005/36. On the other hand, in the run up to the creation of a 'European research space' and for the achievement of the Lisbon objectives, the Commission has already tabled the proposition to extend the system of mutual recognition of professional qualifications to third country nationals.<sup>86</sup>

These developments offer a stark example of the interaction between the EC judiciary and legislature. This interaction is present not only in the field of mutual recognition of professional qualifications, but also in almost all the fields described above. Hence, next to the Court's case law, the elimination of discrimination is also pursued by a series of recent legislative instruments: a) the citizenship Directive for European citizens and their families, b) the 2000 Directives on non-discrimination, applicable to all resident in the EU irrespective of nationality<sup>87</sup> and c) Directives 2003/86 on family reunification and 2003/109 on long-term residence, for third country nationals. Similarly, the mobility of patients in the EU is also a field in which the Commission is considering to take action.<sup>88</sup>

The above social awakening of the ECJ and the legislator, has been an ongoing process, based on the internal market rules, citizenship and the Court's creativity (activism, some will say). However, neither the Court nor the legislator could possibly intervene in fields where the EC has no competence. It has been described above why the EC has had essentially economic competences. Only after the Maastricht and Amsterdam Treaties, in 1992 and 1997, respectively, did the EC acquire some proper powers in the social field. These powers, however, are of a limited scope and may only exceptionally serve as a basis for harmonization. Rather, the Community may only complement and coordinate national social policies.<sup>89</sup>

## 5. Lisbon strategy and the Open Method of Coordination

The first field in which the EC took action was employment policy, already in 1997, when it put into place the so called Luxembourg and Cologne 'processes' for the coordination of national employment policies. It was the Lisbon Agenda, however, in 2000 which put forward a more comprehensive social ambition at the European level.<sup>90</sup>

### 5.1 The Lisbon objectives

<sup>84</sup> Directive 85/384/EEC [1985] OJ L 223/15.

<sup>85</sup> Case C-313/01 *Morgenbesser* [2003] ECR I-13467.

<sup>86</sup> See the Green Book 2004/811 final, on the management of economic immigration, where the Commission faces *i.a.* means for integrating the foreign workforce into the EU labor market.

<sup>87</sup> For which see above 3.1.

<sup>88</sup> See the Report of the European Parliament A6-0173/2007 FINAL, of May 10, 2007, on the impact and consequences of the exclusion of health services from the Directive on services in the internal market, Rapporteur B. Vergnaud, para. 71, which calls the Commission to take all necessary actions to include healthcare in the 'Services Directive' 2006/123/EC. The ensuing resolution 2006/2275 (INI), of May, 2007, however, is more reserved as it only asks for a codification (possibly in the form of a communication) of the Court's case law.

<sup>89</sup> It is true that already before the entry into force of the Maastricht and Amsterdam Treaties and the recognition, in favour of the EC, of competences in the social field, the EC had undertaken some sporadic actions in the social field; for health see T. Hervey, 'The Legal Basis of EC Public Health Policy', in: M. McKee et al. (eds.), *The Impact of EU Law on Health Care Systems* (2002), 23-55; in the field of education and vocational training programmes like Erasmus date as far back as 1987.

<sup>90</sup> See M. Daly, 'EU Social Policy after Lisbon' (2006) JCMS 461-481.

The Lisbon strategy, inaugurated in March 2000, has set the objective of making the European economy more knowledge-based and competitive. The main axes of this strategy are a) the acceleration of the overall EU growth rate and b) the increase of employment, c) under conditions of social cohesion and d) of respect of the environment. These objectives, broken down into numerous indicators and benchmarks, should, in theory, be achieved by 2010. However, the mid-term progress evaluation effectuated by the 2005 spring European Council, took note of considerable delays in the achievement of the proposed goals and redefined the overall priorities of the strategy, while resisting any further reference to the 2010 deadline.<sup>91</sup> Moreover, the 2005 European Council defined a more efficient framework of governance for the Lisbon programme and confirmed its will to review the progress made every year in the spring European Council.<sup>92</sup> The achievement of the Lisbon objectives involves at least six distinct policy areas:<sup>93</sup> a) the development of a knowledge-based society, where ample investment would be available for research and development (R&D), advanced Information and Communication Technologies (ICTs) easily accessible and life-long education should be generally available; b) the completion of internal market (this time for real!), in particular in respect of the free provision of services; c) the setting up of an attractive business environment, through the reduction of red tape;<sup>94</sup> d) the strengthening the labor market and ensuring social cohesion; e) high quality of environment and finally f) immigration policy will have to be adapted to the Lisbon objectives.

Member States' performance in all the above sectors has been broken down into indicators and is being evaluated on a yearly basis by the spring European Council. The choice of indicators has given rise to vivid controversy<sup>95</sup> and they have been regularly modified. Since 2003 the Commission has adopted a system of concise presentation of the various indicators in 14 basic 'structural indicators'.<sup>96</sup> Among these, six are of an essentially social nature: a) employment rate, b) employment rate of older workers, c) public expenditure on education, d) at risk-of-poverty rate, e) long-term unemployment, f) dispersion of regional employment rates. Five structural indicators are economic in nature: a) GDP per capita, b) labor productivity, c) R&D expenditure, d) information technology expenditure, e) financial market integration. The remaining three indicators concern the environment: a) greenhouse gases emissions, b) energy intensity of the economy and c) volume of transport.

## **5.2. The means for the achievement of the Lisbon objectives – the Open Methods of Coordination (OMCs)**

### **5.2.1 A brief presentation of the OMCs**

The main means for the achievement of the Lisbon objectives is the OMC. Although advertised as such (notably by the Lisbon European Council), this method is hardly new. First, it corresponds to practices followed by other regional or international *fora* of economic coordination, such as the OECD, the IMF, etc.<sup>97</sup> Second, it is based both on earlier 'Processes' (such as the ones initiated in Luxembourg and Cologne for the employment policy, or in Cardiff for the environmental policy) and on previous Commission initiatives,

<sup>91</sup> See D. Gros, 'Prospects of the Lisbon Strategy, How to Increase the Competitiveness of the European Economy' (224/2005) CEPS working document, available at [www.ceps.be](http://www.ceps.be).

<sup>92</sup> The attainment of the Lisbon objectives may be seen, from a neo-functional point of view, as the next big 'bet' of the EU, nourishing and streamlining its integration process: after the completion of objectives such as the internal market (1992), EMU (1999), enlargement (2003-5) and in view of the unhappy fate of the Constitutional Treaty (due, to a large extent, to reasons of a social nature), the Lisbon strategy seems to be offering the necessary impetus for keeping the EU steaming ahead. That the Lisbon strategy is very high on the EU agenda, is clearly demonstrated by the fact that President Barroso has set up a Committee under his own leadership to coordinate the various policies involved.

<sup>93</sup> The five first fields of action follow roughly the presentation used in the Kok report, November 2004.

<sup>94</sup> For the precious experience already acquired and disseminated by the OECD in this field, see [http://www.oecd.org/topic/0,2686,en\\_2649\\_34141\\_1\\_1\\_1\\_1\\_37405,00.html](http://www.oecd.org/topic/0,2686,en_2649_34141_1_1_1_1_37405,00.html).

<sup>95</sup> See among many, J. Arrowsmith, K. Sisson and P. Marginson, What can 'Benchmarking' offer the Open Method of Coordination? *JEPP* (2004) 311-328, C. de la Porte & Ph. Pochet, Social Benchmarking, Policy Making and New Governance in the EU, *JESP* (2001) 291-307.

<sup>96</sup> Communication of the 8-10-2003, COM 2003/585 final.

<sup>97</sup> See A. Schaefer, "A New Effective Form of Governance? Comparing the OMC to Multilateral Surveillance by the IMF and the OECD" (2004) paper available by the Max Plank Institute at [www.mpi-fg-koeln.mpg.de](http://www.mpi-fg-koeln.mpg.de).



based on soft law, experience sharing, mutual learning, iterative evaluation of the policies pursued, etc.<sup>98</sup> Third, and more fundamentally, it may be seen as a further transformation of the traditional 'Community method', furthering the 1985 'new approach'.<sup>99</sup> Compared to the new approach,<sup>100</sup> the OMC constitutes an even more flexible form of cooperation, based on commonly agreed indicators and/or benchmarks (not standards), which (like standards) allow for diversification and (again, like many standards) are not binding. This new 'open' method is also quite dependent on the industry and on experts (for the choice and formulation of indicators and benchmarks), but is more political and more intergovernmental, in the sense that the last word is given by the Council and the member States. Notwithstanding, the OMC should under no circumstance be seen as a rupture, but rather as yet another transformation of the way the EU functions.

The OMC may be analysed as a multilevel process of governance, comprising at least four levels. First a) the European Council agrees on the general objectives to be achieved and offers general guidelines. Then, b) the Council of Ministers selects quantitative and/or qualitative indicators, for the evaluation of national practices. These indicators are selected upon a proposal by the Commission or by other independent bodies and agencies. Then follow c) the adoption of measures at the national or regional level (taking into consideration the local particularities) in view of the achievement of the set objectives and in pursuit of the indicators chosen. These are usually referred to as the 'National Action Plans' or NAPs. The process is completed with d) mutual evaluation and peer-review between member states (occasionally coupled with a system of naming and shaming/faming), at the Council level.

Since its official launch, in 2000, the OMC has been used or, at least, proposed as a means of coordination between EU member States in various fields. According to the most recent account, by E. Szyszczak,<sup>101</sup> thirteen (!) different OMCs may be said to be in place. She proposes a four-tier classification as follows: a) Developed areas (with a legal basis within the Treaty): Broad Economic Policy Guidelines (BEPGs) and European Employment Strategy (EES); b) Adjunct areas: Modernisation of social protection, Social inclusion, Pensions, Healthcare; c) Nascent areas: Innovation and R&D, Education, Information Society, Environment, Immigration, Enterprise Policy; and d) Unacknowledged: tax. Each one of these OMCs differs from the others in several respects: duration of each cycle of coordination, kind of outcomes, degree of compliance pressure imposed upon the participating States, stakeholders involved, role of the participating institutions etc.

These various OMCs have been classified from 'strong' to 'weak' by reference to three criteria: a) the degree of determinacy of the common guidelines, b) the possibility of sanctions and c) the degree of clarity regarding the roles of the various actors. Hence, it is accurate to state that 'there seem to be as many types of OMCs as there are policy areas'.<sup>102</sup> Therefore, the term OMCs, in the plural, more accurately depicts reality.

Also, there is a temporal dimension in all OMCs: they seem to be fluid and ever-evolving, both the European and the national components of the process being subject to change from a cycle to the next. The 2005 'streamlining' of the EES with the Broad Economic Policy Guidelines (BEPGs) is the most striking illustration of the overarching fluidity characterizing OMCs.<sup>103</sup>

<sup>98</sup> See D. Wincott, *Beyond Social Regulation? New Instruments and/or a New Agenda for Social Policy at Lisbon?* (2003) *Public Administration* 533-553 at 537.

<sup>99</sup> See V. Hatzopoulos, 'A (More) Social Europe: A Political Crossroad or a Legal One-way? Dialogues Between Luxembourg and Lisbon' (2005) *CMLRev* 1599-1635, 1630.

<sup>100</sup> Based on minimal harmonization (often through standardization) and mutual recognition, see Council Resolution of the 7 May 1985 for a new approach concerning technical harmonisation and standardisation [1985] OJ C 136/1.

<sup>101</sup> E. Szyszczak, 'Experimental Governance: The Open Method of Coordination' (2006) *ELJ* 486-502, at 494.

<sup>102</sup> S. Borràs & B. Greve in 'Concluding Remarks: New Method or Just Cheap Talk?' (2004) *JEPP* 329-336, 330. See also J. Zeitlin, 'The OMC in question' in J. Zeitlin and P. Pochet (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (2005) P.I.E.-Peter Lang, Brussels e.a., 19-33, at 20-21.

<sup>103</sup> Following the 2005 spring European Council the above procedure is being further rationalized, streamlined and brought closer to the institutionalized coordination procedures provided for in the EC Treaty. Thus, two three-year cycles (2005-2008-2011) are set for the attainment of the agreed objectives. Each of the two cycles is initiated by a) a Strategic Report submitted by the Commission to the spring European Council, which leads the latter Institution to the adoption of b) Policy Guidelines concerning the economic, social and environmental objectives to be pursued. Following this, the Council will adopt a set of c) Integrated Guidelines, consisting of c1) the Broad Economic Policy Guidelines (BEPGs) provided for in Article 99 EC and c2) the Employment Guidelines provided for in Article 128 EC. In this way these two, already existing, coordination instruments are

### 5.2.2. Pros and cons of the OMCs

The OMCs have been a hot topic for EU scholars, both in political sciences and, to a lesser extent, law. Writers are divided over the virtues and the drawbacks of the OMCs. Since there is no single OMC but several and that none of them has been in place for more than ten years now, it is difficult to proceed to definitive assessment thereof.

The main arguments in favour of the OMCs are as follows.<sup>104</sup>

*First*, OMCs allow for diversification and flexibility. These characteristics are to be seen as virtues in a Community of 27, where divergences may not be bridged or brought together at once. *Second*, OMCs, like any other means of soft law, have lower contracting costs, because they lead to no binding obligations. Hence it is easier to 'commit' member States in new fields, even in areas where any common competence is absent. Moreover, hard law rules are not necessary in all fields of common action, and may even be counter-productive: their adoption is time-consuming and (often) adversarial, their content is often imprecise as a result of intense negotiation, the rules they fix tend to delay development and their implementation often proves problematic. *Third*, OMCs offer a credible alternative to command-and-control methods of regulation, which have been stretched to their limits. OMCs are knowledge-based, evolutive and all-accommodating. Therefore, they may be particularly useful as means of regulating broad policy fields, where no set objective or clear direction are present. In fields like these policy makers are better off with regulatory instruments which allow some flexibility coupled with space for 'learning by doing', instead of the traditional instruments which are power – rather than knowledge – based. *Fourth*, OMCs allow (in theory at least) for broader participation of interested parties, stakeholders and the civil society in general. This, in turn, could lead to a higher and cheaper degree of compliance.

On the flip side, OMCs are questioned in at least four respects.<sup>105</sup> *First*, their effectiveness is strongly put into doubt.<sup>106</sup> Then, the argument goes, if their effects are non-existent or only indirect and uncertain, is it worth for the EU Institutions to invest their (extremely) limited and overburdened resources in running the OMCs? *Second*, the experimental generalisation of non-binding norms as a means of regulation the EU puts into stake the very foundations of the EU legal order and the ones which have made its success up till now: supremacy and direct effect. Moreover, the risk is present of gradually substituting soft norms to hard law, even in areas where proper regulation could have been possible and desirable. *Third*, the outcomes of OMCs are achieved through procedures which are not linear nor always transparent and it is very difficult – if not impossible – to identify their 'author'. This, in turn, has at least two problematic consequences. Public access to the documents may not be secured, since every Institution may only give access to its own documents, not other Institutions'. More importantly, judicial control may be side-stepped, since it is very difficult to identify a specific 'act' which alters the plaintiff's legal position, let alone issues of *locus standi* for non-privileged plaintiffs.<sup>107</sup> *Fourth*, empirical research shows that participation in the various OMCs up till now has been extremely limited, if non-existent. Participation is deemed to make it up for the lack of representation, since the OMCs are essentially run by the executive power aided by experts, while parliaments have only limited and indirect say on the outcomes. This lack of participation puts into question the very legitimacy of the OMCs.

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combined in a more coherent way, with a clear precedence of the former over the latter.<sup>103</sup> On the basis of these Integrated Guidelines member states shall draw up d) National Reform Programmes (NRPs) monitored by a national coordinator, while the Commission presents a e) Community Lisbon Programme, for the completion and the coordination of NRPs. Member states f) report yearly to the Commission on the progress achieved, and the Commission in turn proceeds to g) a global assessment, i) submitted for review by the European Council every spring. On the basis of this assessment the latter Institution may decide to review the Integrated Guidelines.

<sup>104</sup> This is a very brief and indicative enumeration of the advantages that may ensue from the OMCs, for more extensive developments see i.a. S. de la Rosa, 'The OMC in the New Member States – The Perspectives for its Use as a Tool of Soft Law' (2005) ELJ 618-640; D. Trubek & L. Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the OMC' (2005) ELJ 343-364.

<sup>105</sup> This is also a very brief overview of the criticisms of the OMCs; for more see V. Hatzopoulos 'Why the Open Method of Coordination is bad for you: a letter to the EU', (2007) ELJ 309-342.

<sup>106</sup> See the developments below 5.2.3.

<sup>107</sup> In this respect see J. Scott & S. Sturm, 'Courts as catalysts: rethinking the judicial role in new governance' (2007) Columbia JEL 565-594.

### 5.2.3. Effectiveness of the OMCs

In a paper published in the autumn of 2005,<sup>108</sup> K. Featherstone convincingly explained why 'soft' coordination at the EU level failed to subjugate, or else affect, 'hard' politics in Greece. Hence, the proposed pension reform never took place, despite the fact that all the actors involved were in agreement as to the necessity (although not the terms) of such a reform. He observed that 'instead of restructuring a bargaining game on distributional issues, affecting core interests, the EU stimulus was probably more evident at the cognitive level [...] in terms of policy style'.<sup>109</sup> Concomitantly, another London School of Economics originated paper, by M. Lodge, explored the impact of peer review and benchmarking, run under the auspices of the OECD, on regulatory innovation in participating States.<sup>110</sup> He examined the 'successful' case of Ireland and compared it with the less successful ones of Spain and the UK. He found 'only limited evidence of such a process, whether by affecting change directly by prescription and recommendation or by voluntary compliance to international best practice'. 'Policy transfer' and 'diffusion' played only a minor role in this area of government activity. Despite the benchmarking and 'comparative experience collection' functions of the OECD, detailed evaluation of other States' experiences was hardly evident.<sup>111</sup> Finally, the processes that supposedly promote the use of 'learning' and 'peer-group review', were of limited value in promoting effective implementation of particular policy templates or even broad policy ideas'.<sup>112</sup> These grim findings are firmly corroborated by the empirical 'national reports' on the effect of OMCs on employment and social inclusion policies in individual Member States, compiled by Zeitlin and Pochet.<sup>113</sup>

The above pessimistic analysis, however, needs to be tempered in view of the findings of a different study by M. López-Santana.<sup>114</sup> She looked into the EES and examined how the European guidelines have affected policymaking in three member states – Belgium, Sweden, and Spain. She acknowledged that 'the effect of nonbinding instruments on domestic settings does not necessarily include changes in legal frameworks.' She contended, however, that changes do occur in the *policy process framework*. Her argument is that 'by acting as a framer of employment policy, the supranational level has restrained several dimensions of employment policy and labour market policies in the member states, mainly by: (a) defining (and reinforcing) what problems domestic policy-makers should attack to increase member state competitiveness, and to deal with internal and external challenges; (b) pointing out and/or reinforcing the idea that a policy line is good or bad and necessary; (c) restricting and limiting the policy options and courses of action that domestic policy-makers should develop; and (d) providing potential courses of action that allow policy-makers to 'draw lessons' and to 'learn' about ways to solve or diminish the problem in question'.<sup>115</sup> Hence, change does not

<sup>108</sup> K. Featherstone, "Soft co-ordination meets 'hard' politics: the EU and pension reform in Greece" (2005) JEPP 733-750.

<sup>109</sup> *Id* 746-747.

<sup>110</sup> M. Lodge, 'The importance of being modern: international benchmarking and national regulatory innovation' (2005) JEPP 649-667. The extent to which the policy coordination taking place under the auspices of the OECD, on the one hand, and the EU OMC, on the other, are comparable is open to debate. Schafer above n. 97 identifies important similarities. Lodge, himself in his paper draws important parallels between the two processes. On other hand A. Hemerijck and J. Visser, 'Policy Learning in European Welfare States', available at [eucenter.wisc.edu/OMC/Papers/hemerijckVisser2.pdf](http://eucenter.wisc.edu/OMC/Papers/hemerijckVisser2.pdf), compare the EES with the OECD Jobs Strategy and identify differences, the most important being that in the latter case indicators and best practices are 'imposed' by external technocratic experts rather than by national representatives. This author's personal experience from participating in both the EU and OECD coordination exercises suggests that in both cases the indicators chosen are derived from the participating member's practices. Also, to the extent that the OECD constitutes a much more 'relaxed' legal order than the EU and has only indirect means of enforcement, it is difficult to see how its officials could ever 'impose' their own views if they are not supported by national practice.

<sup>111</sup> This is a problem also identified in the EU OMC, as some authors speak of a 'beauty contest', see S. Borrás & K. Jacobsson, 'The OMC and new governance patterns in the EU' (2004) JEPP 185-208 at 195.

<sup>112</sup> Lodge, at 662.

<sup>113</sup> J. Zeitlin and P. Pochet (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (2005) P.I.E.-Peter Lang, Brussels e.a.

<sup>114</sup> M. López-Santana, 'The Domestic Implications of European Soft Law: Framing and Transmitting Change in Employment Policy' (2006) JEPP 481-499; this paper is part of a much wider research conducted by the author and presented as her Ph.D. Thesis at the University of Michigan (unpublished, 2006): 'Soft Europeanization? The Influence of Europe in Employment Policies, Processes and Institutional Configurations in EU Member States'.

<sup>115</sup> López-Santana, 482.

occur in any spectacular way, but rather is related to transformations 'in early stages of the decision-making process by those who are responsible for managing policy on a daily basis'.<sup>116</sup> The EU framing effect manifests itself as it 'expands the courses of action available to policy-makers by providing information and opening new spaces for coordination, while simultaneously *restraining* their options by framing good and bad policy'.<sup>117</sup> At the end of her study, however, she acknowledges that 'changes in the early stages of the policy-making process cannot guarantee success outcomes'.<sup>118</sup>

Therefore, the OMC does have some effect on policy procedure, this effect being contingent upon several diversifying factors, such as the institutional and the ideational fit/misfit of the member State concerned by reference to the set objectives. It may also, with time and under propitious circumstances,<sup>119</sup> lead to the transformation of newly induced policy objectives into some kind of norm.

## 6. Concluding remarks

The EU has been gradually building a social profile, despite the fact that the corresponding empowering provisions in the Treaty are quite limited. This profile has been pioneered by the Court, which has used the limited – and essentially 'market making' – provisions of primary and secondary legislation, in order to create secondary 'market correcting' principles. The legislator has followed suite, but only to the extent provided for by the Treaty provisions. In this respect, the concept of European citizenship together with the new powers conferred to the EU by the Treaties of Maastricht and of Amsterdam gave an important boost to the EU's initiatives in this field. As some writer has put it, these events mark the passage from European 'social law' to European 'social policy'. This move has been further pursued under the Lisbon strategy.

Under the current economic and social conjecture, action of the EC in the social field is a one way road. In view of the limited powers that the EC possesses in this field and the missed opportunity for more comprehensive competences provided for by the Constitutional Treaty, action in this field is likely to proceed by 'new modes of governance' and some kind(s) of OMC(s). In this way the EC should gradually adapt its 'social model' in order to cope with ageing populations, restricted public finances and globalised economies.

With the profoundly divergent social systems of member States as starting points, it will be no easy task to face the above challenges with OMCs as the main regulatory means. In view of the inherent imperfections and deficiencies of the OMCs, it will be extremely difficult to respond to some fundamental questions, which may not yield to consensualism. Three questions at least will need to receive answers in the near future: a) which fields of social policy should be transferred at the European level, and to what extent? b) what social model should European social policy promote? And finally c) how should this model be put to work? These are highly political questions which may under no circumstances be answered by the Court. It is believed, however, that they may not be answered by soft coordination either, for at least two reasons. First, at the ideological level, if questions of this width are relegated to technocratic OMCs, then the role of politicians and politics will be annihilated. Second, at a more technical level, questions like the above may not be resolved through 'the invisible hand' of cyclical and periodical peer-reviews. Rather, they need a strong-hand to push them forward. Under the present institutional setting (of the 'Reform Treaty'), however, such a hand is unlikely to emerge, unless the political conjecture changes dramatically.

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<sup>116</sup> *Id* 486.

<sup>117</sup> *Ibid* 494.

<sup>118</sup> *Ibid* 495.

<sup>119</sup> Notably if the OMC recommendations are in line with the national reform programme already in place, see in this respect, except from López-Santana (above n. 114) and Lodge (above n. 110), C. De la Porte 'Is the OMC Appropriate for Organising Activities at European Level in Sensitive Policy Areas?' (2002) ELJ 38-58 at 50.



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