Social Europe: Still binding regulations?

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Abstract

We shall begin the paper with a quick reminder of the different steps of Social Europe to date, with an aim of placing the framework of the now-dominant discourse of the impossibility to adopt constraining legislation in Europe. Then, we shall corroborate this affirmation quantitatively and will demonstrate that we do not find this in figures. Then, we shall analyze three cases (revision of the regulation 1408/71, information/consultation at national level, anti-discrimination directives in terms of political process and content. The outcome is all of them - despite the requirement of unanimity for the anti-discrimination and the 1408/71 proposals – were adopted, and in all three cases bring substantial changes for some member States and cannot be considered as minimal directives.

Introduction

The history of European social policy is more a story of failure than great success Nevertheless since the beginning of the European Community at least five different attempts each with their own priorities, underlying logics and particular fields of interest (free movement of workers, social legislation or employment coordination for example) have followed one another. Many subsequent developments are the result of initial choices. Bea Cantillon (2004: 6) reminds us ‘Contrary to the US, the EEC chose in 1957 to leave the social policy to the national welfare states. This decision was taken on the basis of the Olhin report, which had been commissioned by the ILO, and which concluded that social policy differences between countries were sustainable, so the harmonisation of welfare state was deemed unnecessary’. After this initial decision, different attempts were nevertheless made to develop the social dimension of economic integration.

The first step, in the early 1960s, was limited to the free movement of workers. The logic was not to harmonise different national policies but to give the same rights to Community and national workers in each Member State. This included providing the possibility of cumulating benefits (e.g. pensions) acquired in different places (Pakaslahti and Pochet, 2003). In addition, the European Social Fund (ESF) was created in order to retrain workers affected by economic change, partly due to economic integration.

In the 1970s, the Community tried, in the words of the Treaty of Rome, to define a way 'to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained'. Several directives were adopted in a context of economic downturn and militant mobilisation at national level. Equality between men and women, health and safety in the workplace as well as certain aspects of labour law (collective redundancy, transfer of undertakings, and insolvency of the employer) were involved. The first European Social Program (1974) was adopted, which can be considered as the social side of the Werner Plan for a monetary union in 1980 and the creation of a political union at the same date (Magnusson and Stråth, 2001). Finally, some directives related to collective rights were adopted (collective redundancy, transfer of undertakings, insolvency, etc.). What is generally considered the 'golden age' of EU social policy corresponds (at national level) to the crisis of Keynesian economic management and the end of welfare state expansion.

The end of the 1970s was, then, a turning point. The Thatcher and Reagan governments indicated a neo-liberal turn, which led to a pause in social regulation at European level and a process of deregulation at national level. Different proposals (the Vredeling directive on information/participation in multinational companies, reduction of working time, regulation of atypical contracts) failed to be adopted at EU level.

The Single European Act (1985) expanded the Community's social competencies, allowing the adoption health and safety measures by qualified majority (this would permit considerable development in this domain). It also contained a rather vague provision on social dialogue which launched a dynamic of non-binding agreements (joint opinions) between the European social partners (European Trade Union Confederation ETUC, UNICE and CEEP for the private and public employers respectively) (see Didry and Mias, 2005). In an unfavourable political environment, it proved impossible to continue a process aiming at harmonising national social regulation. Instead, an initial debate over global competition (from US and Japan on the one hand and from the developing countries like Brazil, Taiwan, Korea on the other) fuelled controversies about social deregulation, social dumping and races to the bottom.

Thus, the end of the 1980s and the beginning of the 1990s were characterised by a strategy of defining minimum norms below which one should not descend in a period of triumphant neo-liberalism and globalisation. This is the true meaning of the Community Charter of the Fundamental Social Rights of Workers adopted in 1989 and the action programme, which

accompanied it (Jonckheer and Pochet, 1990). The basic idea was to develop a set of minimum legal regulations at European level. In the same period, the development of social dialogue led to the signature of the Social Agreement between the European social partners. This agreement was introduced as a protocol to the Maastricht Treaty, due to the opposition of the Conservative British government. It empowers the social partners and gives them the right to sign agreements that can be extended *erga omnes* by a Council directive or voluntary collective agreement implemented by their national affiliates. The strategic idea was to mirror the national situation where in most Member States the social partners can autonomously regulate aspects of labour relations.

After the victory of New Labour in UK and the Socialist Party in France, an Employment Title was included in the Amsterdam Treaty (tentatively modelled on the EMU procedures) and qualified majority voting was introduced in few social areas by the incorporation of the social protocol into the Treaty (van Riel and van der Meer, 2002; Jenson and Pochet, 2006). The resort to the Open Method of Co-ordination (OMC) was thus the fifth attempt to define the European social dimension. In a nutshell, the OMC is a flexible means of working towards shared European objectives via national plans, which are assessed in accordance with common criteria (indicators), following (in some but not all cases) guidelines and/or targets decided jointly by national ministers at European level.. .Without legal compulsion, peer pressure (and the force of public opinion) represents the means to ensure that national governments adhere to their European commitments. The exchange of good practices is supposed to improve knowledge and to lead to a learning process in order to improve public policies. This is an attempt to make official declarations made by Ministers at European level morally 'binding' at national level, by the implementation of a set of complex procedures. Within this framework, the European Parliament and the Court of Justice play a minor role. The OMC has already been applied to economic co-ordination (the Broad Economic Policy Guidelines), to employment (the Luxembourg Process or European Employment Strategy), poverty and social exclusion, pensions and health care (for a general overview, see Dehousse, 2004). The main objective is no longer to create a set of European rules distinct from national regulations but to favour an interaction between different levels of governance. The OMC mobilised the idea of diversity as an opportunity for improving national standards and converging on the best results (outcomes). The process through which this should be achieved is learning: a change-inducing process based on ideas (due in particular to the absence of legally binding powers). With this new multi-level arrangement, the European bodies have

created a new form of intervention, which is less aimed at harmonising institutions or legislation than at harmonising ideas, visions, conceptions, knowledge and norms of action, in order to have policy goals converging towards 'a common political vision'.

The progressively dominating analysis of the last ten years is that European law (directive or regulation) is no longer adapted to the situation of diversity of the national systems and to the uncertainty underlying the economic and social evolutions. This leads to a reflection focusing mainly on the modernization of national systems and the implementation of instruments that are supposedly more reflective of the 'soft law'. Training, evaluation, comparison, imitation are some of the words of the new vocabulary of the Social Europe (see amongst others de la Porte and Pochet, 2002; Zeitlin and Pochet, 2005). Furthermore, the critical analysis of law also underlines its flaws to modify behaviours, as shown for instance by the unrelenting difference of remuneration between men and women despite an increasing legislative arsenal (Rubery *et al.*, 2003).

Goetschy (2006:63-64) explained 'The move from a formerly predominantly legal perspective (headway is of course still being made on that ground, but more slowly) to a perspective of European governance of national social and employment policies may result from a feeling that the limit of what is legally necessary or desirable – or even politically feasible has been reached (the 2000-05 Community agenda is explicit on this point) (…).'.

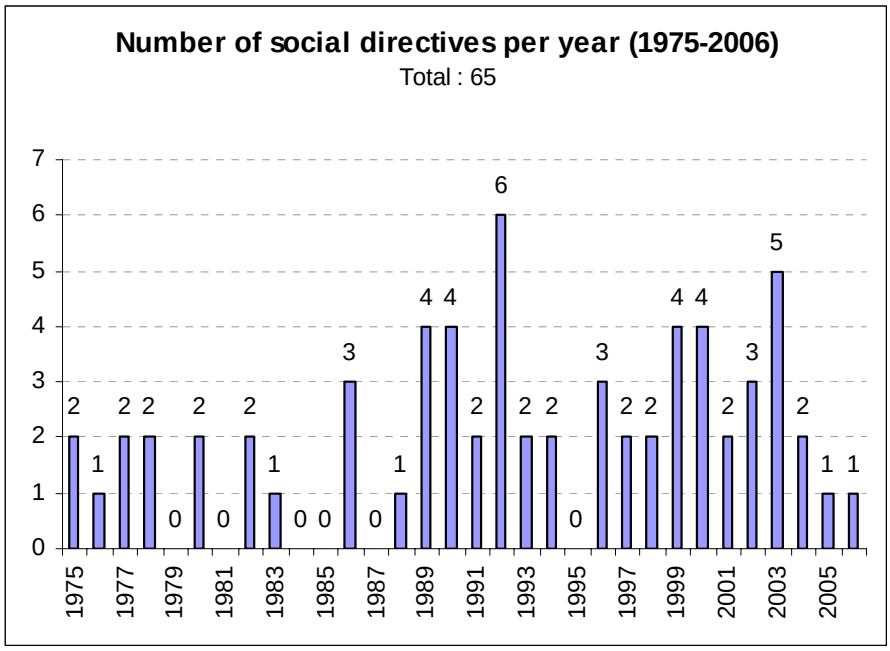
Hemerijck, (2004:122) underlines 'As an alternative to 'hard law', i.e. to legalistic regulations and directives, these 'soft law' instruments have become preferable to and more effective than 'watered down' directives'.

For a long time it was accepted by most of the academic community (including myself) that we had fewer and fewer social directives and in case they were adopted they are minimalist In consequence of that, OMC was partly considered as the appropriate answer of the lack of political support for EU social regulations. .

Falkners and her colleagues (2005) in their book on implementation of four EU directives and two collective agreements adopted in the 90' were the first to underline that the number of EU hard law regulations had not declined but remained rather stable (their data stops in 2002 and they do not present the list of directives they consider). We controlled the figures (there are minor differences between our figures and the Falkner et al ones) and updated them until 2006 (see table 1 below).

Number of social directives per year (1975-2006)

TOTAL: 65 DIRECTIVES (SEE THE FULL LIST IN ANNEX)



Source: European Social Observatory

Contrary to generally accepted ideas, the number of directives is not decreasing in the second half of the 90' and first years of the new millennium; but what about their quality? On the one hand, it is obvious that most new directives relate to health and safety, which confirms a trend that has existed since the mid-seventies and which was reinforced at the 1989 framework directive. But other texts were also adopted which came from sectoral collective agreements for example (working time), collective right (information consultation at national level, European company), anti-discrimination directives etc. Moreover, we shall also find texts that have significant and structural impact (for some member States). By structural, we understand that they question some fundamental aspects of the national social approach.

On the other hand, it is also clear that what had been underlined in the survey by Falkner et al is an internal diversification of directives comprising binding, optional, and non-constraining aspects. As the authors indicate: 'Next to binding rules we now find provisions that allow for

certain exceptions or further specification of details in the member States as well as non binding recommendations' (Falkner et al., 2005:55).

We will analyse three directives (two anti-discrimination (2000), information consultation (2002) and one regulation 1408/71 (2004) which were adopted the last years. We will present the political process of adoption of the directive and detail the content. In conclusion we will summarise the key elements of the cases and develop the conditions which explain the adoption. It should be noted that each of these text corresponds to a particular period of the EU social policy as presented in the introduction. The regulation 1408 came from the first phase and is linked to the free movement of person, information/consultation to the attempt in the 70 to develop collective rights. Finally, anti-discrimination directives are based on a more individual approach and concern new social problems (like stress at work, harassment and violence at work all being subject to autonomous agreement between social partners in the 2000')

1. THE REGULATION 1408/71

Regulation 1408/71 (Council of the European Union, 1971) is considered as being part of the first period of European social policies. The latter essentially aimed at ensuring the free circulation through the recognition of the equal treatment between national and Community workers within each national system. It allows migrant Community workers to ensure that the working periods in the different member States will be validated. For social protection matters, the debate on the harmonisation was concluded before the signature of the Rome Treaty. As Peter Hall underlines (2001), it was probably the only moment when a harmonisation process was possible. Such a path would have led to a radically different configuration of the European integration. The coordination was therefore built on the double movement of internal harmonisation of the rights and duties of the national and Community workers (which is now prolonged to non-Community workers) and the recognition of diversities. These diversities have multiplied through - on the one hand - successive enlargements and the fractioning of the social protection between the private and public sectors. Furthermore, some directives (equality between men and women for instance) have had transversal effects in every member States. The indirect impact on the national coordination systems was very significant (see Liebfried and Pierson, 1995). The growing complexity due to the fact of ever-growing diversity led to – often ad hoc – multiple revisions

of the regulation or more important amendments (for instance the former revision that extended its application to non-community workers (on this point Ghailani 2003). On the other hand, the national actors have also been particularly active, as Sindbjerg Martinsen underlines for Germany (2005a: 1046).

German national courts have taken a very active part in questioning and enhancing the scope, impact and effectiveness of EC law. Over the three decades during which Regulation 1408 has been in force, German national courts have persistently questioned the scope and content of the regulation, as well as the compatibility between national policies and European obligations (…).'

The simplification of the Regulation relative to the coordination of national security regimes was first edited with the Commission proposal of 21 December 1998 (European Commission ,1998a, JO C 38 12/02/1999) (see special issue of the *Revue belge de sécurité sociale*, 2004)[1] . The Commission proposal was analysed, chapter by chapter, for two years and four successive presidencies: Finland, Portugal, France, and Sweden. This examination did not immediately lead to an agreement, but it was a necessary step for the identification of issues.

In 2001, The European Council (European Council, 2001, para 33) set that:
'Based on the technical tasks undertaken by the experts, considering all the above-mentioned factors, the European Council invites the Council to set, by the end of 2001 and under the light of a re-examination of the proposed options, parameters aiming at modernizing Regulation 1408/71 on the coordination of social security regimes. This will allow the Council and the European Parliament to accelerate its adoption'.

Seven general horizontal functioning principles were elaborated. They were called 'general parameters'. The other five parameters applicable to the different areas of social security were called 'particular parameters'. The horizontal parameters were broad political guidelines which should help for changing very technical provisions. They gave the agreed goals to be reached by the negotiators when analysing the details of the regulation.
For exemple, Parameter one stated that the main objective of modernisation of coordination of social security systems is simplification for citizen, without disproportionate complication

[1] The next paragraphs are largely inspired by Pernot (2004) for the political process and Verschueren (2004) for the content.

for administration. Parameter 2: in principle coordination should apply to any person who is or has been subject to social security legislation of one or more Member States. With regard to nationals of non-Member States, the discussion on extension will be held in parallel with the instruction from the Tampere European Council. Etc.
The principles on which the modernization rests remained the same: a) Unity of applicable legislation: b) equality of treatment; c) preservation of acquired rights, meaning the possibility of exporting social security services; d) the total of periods of insurance, residence or completed work in another member State in view of the extension of a right in another member State.

From presidency to presidency, partial agreements were reached:

- on the horizontal functioning general provisions under the Spanish presidency (Titles I and II) June 2002; (European Council, 2002b)
- on sickness, maternity, accidents at work, occupational illnesses and death grants under the Danish presidency (Title III) December 2002; (European Council, 2002a)
- on disability, retirement and survivors pensions under the Greek presidency (Titles III, chapters 4, 5, and 8) June 2003; (European Council, 2003b)
- on early retirement and family allowance under the Italian presidency (Title III, chapters 7 and 8) December 2003. (European Council, 2003a)

The jurisprudence of the European Court of Justice decreed during these years of negotiations often exerted a determining influence on these negotiations. For instance, the jurisprudence for the free circulation of patients (Kohll and Decker (C-158/96 and C-120/95), Vanbraekel et al (c-368/98), Smits, and Peerbooms (C-157/99), Muller-Fauré and Van Riet (C-385/99), Inizan (C-56/01) to the list of non exportable services (Jauch (C-215/99), Leclere and Deoconescu (C-43/99), the assimilation of facts and events (Duchon (C-290-00) to the qualification of health insurance such as sickness benefit (Molenaar (C-160/96), Jauch) and as legal basis for the application of the coordination of the social security for nationals of non-community members (Khalil (C-_95/99).

On 3 September 2003, the European Parliament ended its first reading by proposing 47 amendments. On 10 October 2003, the Commission approved the amended proposal. On 26 January 2004, the Council approved the common position.

A definite approbation was meant to come through before the end of April if the actors wanted to avoid having to go through the whole process again.
Two events will hasten the conclusion of negotiations. On the one hand, the dissolution of the European Parliament, and on the other hand, the enlargement of the Council to 25 member States from 1 May 2004 and the European elections of 13 June 2004.

On 20 April 2004, the European parliament approved two amendments to the common position. These were approved by the Council. The Regulation 883/2004 of the European Parliament and the Council was definitively approved on 29 April 2004, replacing Regulation 1408/73, or two days prior to enlargement. (European Council and European Parliament, 2004).

As for the content, the new regulation will apply to every insured of the member States, regardless of their status (employee, self-employed, student…). In a first while, this means a significant simplification (it is no longer necessary to have sophisticated definitions to know whether one is employee or self-employed or different provisions for the different categories of insured). The regulation also becomes an instrument for all the European citizens moving within the Union, and no longer solely for workers.

On certain points, the text of the new regulation brings important simplifications in accordance to the horizontal parameters adopted to guide the negotiation. For example, a certain number of principles of the coordination of social security were gathered in general provision so that the principles for each branch would no longer need to be repeated. This is also valid for the principle of equal treatment (art. 4), the equal treatment of benefits, income, facts, or events of other member States (art. 5) and the aggregation of periods (art. 6). The section covering the rules for determination of the application of the legislation (title II, articles 11 to 16) was drastically simplified.

Among other important innovations: regarding family allowance, the removal of the distinction between, on the one hand, employees and self-employed, and, on the other hand, the retired. The adoption of more explicit criteria to determine for what services criteria of residence may eventually be instituted (non-exportability, article 70) and the new provisions for the compulsory administrative collaboration between member States, particularly during the determination of the rights of the interested parties.

On the other hand, the jurisprudence of the Court of Justice relative to the access right to cross-border healthcare was not incorporated in the new regulation.

2. EU Information/consultation Directive

The European Commission's 1995 medium-term Social Action Programme (European Commission, 1995) had a proposal on an EU-level framework action for employee information and consultation. The closure of the Renault plant at Vilvoorde in Belgium in 1997 launched the debate on the appropriate legislation (beyond the European Work Council) and was seen by many to have demonstrated the inadequacies of current EU legislation. In June, the Commission initiated a first round of consultations of the European-level social partners on the advisability of legislation in this area. The European Trade Union Confederation (ETUC) and the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP) welcomed this consultation and supported an EU action in this field. The Union of Industrial and Employers' Confederations of Europe (UNICE, now BussinessEurope) argued that EU-level action in this area was unnecessary, as an extensive framework of provision for worker information and consultation already exists at national and trans-national levels and there is no real argument in favour of a EU legislation (Arcq and Pochet, 1998).

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In November 1997, the Commission opened a second round of consultations on the content of possible EU legislation on this issue. The social partners had an opportunity at this stage to decide (or not) to negotiate a framework agreement. From 1995 until the autumn of 1998, developments revolved around whether or not UNICE could be persuaded to engage in negotiations over a possible Community-level agreement. Finally, they decided not to enter into negotiation[2].

The Commission then decided to act and adopted in November 1998 a proposal (European Commission, 1998b) for a Directive establishing a general framework for improving information and consultation rights of employees in the European Community. The draft

[2] The information presented is mainly based on European Work Council bulletin (2002) and Degryse (2003).

Directive provides for rules on the information and consultation of workers at national level – based on collective agreement or legislation..

The UK had not such institution and the New Labour government was strongly opposed to the draft directive. It had secured the support of the German government to block the proposal in the Council. The agreement between the two governments was that the German government would back the UK in opposing the draft Directive, in return for which the UK would support the German position in the European Company debate.

The European Parliament had its first reading in April 1999 but because of the Anglo-German 'deal' – this topic was not on the Council's agenda until June 2000. Then, the Portuguese presidency eventually initiated the discussion of the proposal. Under the French presidency during the second half of 2000, extensive discussion took place. The majority of member states supported the Commission's proposal but the UK, German, Ireland and Denmark – gathering enough votes to constitute a 'blocking minority'– maintained reservations, preventing the adoption of a Council 'common position'.

Once political agreement had been reached on the European Company Statute – in December 2000 – it became clear that the German government would not continue its opposition to adopting the Directive beyond the UK general election. Denmark and Ireland's concerns were accommodated by revisions to the text. Faced with the disintegration of the blocking minority, the UK government was forced to abandon its opposition to the Directive following the June 2001 general election, though it secured concessions in the common position on the timetable for applying its requirements to smaller undertakings. Council formally adopted its common position in July 2001.

In October 2001, the European Parliament adopted a series of amendments on second reading designed to toughen the common position's requirements that were rejected by the Council. This prompted the convening of a joint Parliament-Council conciliation committee that, on 17 December, agreed a final joint text of the Directive. Seven years after the social action program, the EU Directive (European Parliament and Council, 2002) was formally adopted in February 2002 by the European Parliament and Council, which ratified the joint text agreed by the Parliament-Council conciliation committee in December.

The key amendment adopted by the conciliation committee was to Article 10(b), reducing from seven to six years the transitional period within which countries without 'general, permanent and statutory' systems of information and consultation and employee

representation. UK and Ireland could phase in the Directive's requirements, applying them in three stages to progressively smaller undertakings or establishments. The other three changes were relatively minor.

Concerning the content, depending on the choice made by Member States, the Directive is to apply to undertakings with at least 50 employees in one Member State, or establishments with at least 20 employees. The directive defines minimum standard that, information/consultation must cover: Consultation, must take place at an appropriate time and using appropriate means, at the relevant management and representation level, and on the basis of relevant information provided by the employer and the opinion, which the employees' representatives are entitled to formulate. It must seek to reach an agreement on the relevant decisions, which come under the employer's prerogative (work organisation, contracts of employment).
The Directive allows Member States to give the social partners the choice of defining by collective agreement, the procedures for informing and consulting employees.
If an employer is in serious breach of his information and consultation obligations, and takes decisions, which have substantial consequences in terms of termination of contracts or employment relations, the Member States must provide for these decisions to have no legal effect on the employment contracts or employment relationships of the employees affected. This non-production of legal effects '*will continue until such time as the employer has fulfilled his obligations or, if this is no longer possible, adequate redress has been established*', under arrangements and procedures to be determined. This was a problem with the previous directives on collective redundancies or European Work Council for which no sanction were foreseen in case of non respect of the information/consultation procedures.
So the three main key points in this Directive are the threshold for the undertakings concerned (markedly less than the figure of 100 workers originally envisaged), the fact that the social partners are given an important place in the implementation of the legislation, and finally the dissuasive measures in terms of sanctions in cases where employers fail to meet their obligations (to the extent of depriving the decisions concerned of any legal effect).

The directive has to be implemented for 2005 (3-years delay) but the transitional arrangements available to member states without established statutory systems of employee consultation and representation namely the UK and Ireland. Step by step they should arrive to cover all undertakings with 50 or more employees (or establishments with 20 or more employees) in 2008 (instead of 2005). In UK, the Regulations implementing the directive are

based on a framework which was agreed by the CBI (employers) and the TUC. They apply to business with 150+ employees from 6 April 2005, to those with 100+ employees from 6 April 2007, and to those with 50+ employees from 6 April 2008 (DTI 2006).
The Directive had biggest impact in the UK and Ireland. However, interesting enough will have also an impact in highly regulated Belgium where the bodies of information/consultation in the SMEs were on the agenda for a while.

3. Antidiscrimination directives

Although the principle of eliminating all forms of discrimination is included in the 1989 Community Charter of the Fundamental Social Rights of Workers, it was only in the mid 90' that a growing number of advocacy groups and NGOs supported the introduction of anti-discrimination measures (for example the umbrella organisation Starting Line Group) at EU level. They were able to rephrase the initial demand from migrant groups (particularly the Migrant Forum) for a citizenship based on residence (instead of nationality) in a demand for adopting anti-discrimination policy. They used arguments already considered as legitimate in the EU discourse on the one hand on the parallelism with equality between men and women and on the other hand the internal market and the improvement of enterprise's performance by non discrimination (on this point see De Schutter, 2001, on a much more detailed account Guiraudon, 2004).

During the negotiation of the Amsterdam Treaty, attention becomes more focused on the issue of devising a more solid legal framework for anti-discrimination initiatives. The result was the adoption of a new anti-discrimination article - Article 13 (old numbering). At the time, this Article was criticised because it maintained unanimity in Council and consultation of the European Parliament.

Once the treaty adopted in 1999, it was expected that the Commission would speedily issue new proposals. However, the process was put on hold by Commission's resignation in March 1999. The new Commission took office in September 1999. The new Commissioner in charge of social policy, Anna Diamantopoulou, presented immediately these proposals. On 25 November 1999, a new anti-discrimination package of proposals was issued. Based on Article 13 of the Amsterdam Treaty, the new proposals aim to help combat discrimination on a much wider range of grounds than existing EU legislation. A Communication from the

Commission (European Commission, 1999b) introduces the proposals explaining the background, general context and reasons why the Commission believes that Community-level action in this area is appropriate;

The package consists of three elements:

a) The aim of this horizontal Directive is to establish a general framework for the respect of the principle of equal treatment between persons, irrespective of race or ethnic origin, religion or belief, disability, age or sexual orientation. It applies to access to employment, self-employment and occupation, including selection criteria, recruitment conditions and promotion; access to all types and levels of vocational guidance, vocational training, advanced vocational training and retraining; employment and working conditions, including dismissals and pay; and membership of, and benefits from, any workers', employers' or professional organisation. The proposal covers both direct and indirect discrimination. However, some differences of treatment may be allowed by Member States if they are based on a genuine occupational qualification, which is strictly necessary for the performance of the activities concerned. The proposal also contains a positive action clause, allowing Member States to undertake positive actions to compensate for disadvantages in the case of certain groups of people. The Member States must ensure that appropriate judicial and/or administrative enforcement procedures are available to all those who consider themselves to have been a victim of discrimination. In the case of the infringement of these provisions, Member States should provide for sanctions, which are ‘effective, proportionate and dissuasive

b) The (vertical) Directive on equal treatment irrespective of racial or ethic origin is, in its wording, in many ways similar to the abovementioned draft framework Directive. However, it differs both in focus and in scope. Its focus is solely the implementation of the principle of equal treatment between people of different racial or ethnic origins and therefore sets out a minimum framework for the prohibition of such discrimination, while also providing for a minimum level of legal protection for victims of this type of discrimination. Its scope is wider than the draft framework Directive (for an analysis article by article by an actor see Tyson, 2001). It covers all of the four employment-related areas mentioned by the framework Directive, in addition to the following areas: social protection and social security; social advantages, such as concessionary travel on public transport, reduced prices for access to cultural or other events and subsidised school meals for children from low-income families;

education, including the award of grants and scholarships; access to the supply of goods and services; and cultural activities. The proposal covers both direct and indirect discrimination in these areas, but allows Member States to provide that differences of treatment would be allowable if 'based on a relevant characteristic related to racial or ethnic origin'. Member States are also allowed to take positive actions in order to compensate for disadvantages suffered by members of groups of a particular racial or ethnic origin.

The proposal obliges Member States to set up an independent body to promote the principle of equal treatment between people of different racial or ethnic origins, which must include among their responsibilities provision of assistance to victims of discrimination (Bell, 2002). These bodies should also publish reports and make recommendations on issues relating to this kind of discrimination. A further linkage between Member States and private actors is created by providing that the Member States should encourage and promote the social partners and non-governmental organisations to engage in dialogue on combating race (….) and promoting equality.

c) These two draft Directives are accompanied by a proposal for a Council Decision to set up a six-year action programme 2001-2006 (European Commission, 1999a). Also based on Article 13 of the Treaty, the goal of such programme was to support Member States in their efforts to develop policies and practices in the area of prohibiting discrimination.

From the outset, the Commissioner explained that the two new draft Directives could be adopted independently of one another, opening the possibility to speed-up the adoption of the "race directive". Indeed, it was adopted in seven month which is a record for a social directive for which "no member state was opposed in principle (…) (But) a number of Governments had serious difficulties with particular points (Tyson, 2001:201) .

The main explaining factor is Haïder and the integration of the extreme-right into the government in Austria. This explains why the French delegation took the lead for a directive which is based on a different vision than the traditional republican approach (see Guiraudon, 2004 for a much more subtle and complex presentation). The German delegation adopted a low profile to avoid to be criticized and associated with neo-Nazi declaration in Austria. The initial reaction of the UK government was positive.

As Guiraudon underlines (2006:289) “at the end of the day (…) the ‘race’ directive of June 2000 – adopted in record time – corresponds in great part to the British and Dutch approaches and makes the numerous amendments of the French legislation necessary’. But the proposals would also require the UK to tighten up legislation in other areas, such as age discrimination, where the government has opted for a voluntary code of practice, in preference to legislation. Guiraudon (2006) also argues that the directives were adopted when these anti-discrimination policies were challenged in UK and the Netherlands. They had an involuntary positive impact impeding the Dutch government to abandon totally its anti-discrimination approach.

Conclusion

If the OMC has been at the centre of academic and political attention these last years, at the same time other important developments occurred which have attracted less notice. The Charter of Fundamental Rights, which codifies social rights at European level, was adopted at the Nice European Council (European Council, 2000) and is now integrated in the proposed Constitutional Treaty. Furthermore, the social partners adopted in 2003 their own three-year autonomous work program and have signed three autonomous agreements (respectively on tele-working, stress at work, and violence at work). There are also interesting developments at sectoral level (Pochet *et al.*, 2004, Pochet, 2007). Yet, what we have shown in this paper is that hard law has continued on the same pace until 2005.

Hence, it appears that some conjunction may allow for the adoption of a substantial directive/regulation despite the necessity of reaching unanimity at the Council and despite the co- decision procedure between Parliament and Council.

Concerning the unanimous approval of the modification of Regulation 1408/71, three factors appear to have been decisive for the adoption of the new regulation .

Firstly, the fear that any change would be impossible at 25 Member States and therefore the feeling that a compromise had to be reached rather than risking no change whatsoever, at least for some time.

Secondly, the end of the legislature of the European Parliament which would also have postponed the examination of changes to a much later point in time; this facilitated the

common task in the framework of the co-decision procedure and allowed to avoid institutional blockages.

Finally, the revision method adopted in the long reform process, reviewing chapter by chapter, had increased awareness around the necessity of reaching the States occupying the EU presidency which had to manage and encourage the progression of this assuredly very technical dossier. To some extent, this reinforced the coalition of the Member States that wanted a solution and allowed finding multiple compromises spread out over time.

Concerning the two directives on non-discrimination, which were based on article 13 (former numbering), the time needed for their adoption was extremely short. In this case (in the context of the Austrian alliance of far right/conservatives), the cost of not doing anything was becoming higher than the costs of adopting a compromise in this dossier (de Schutter, 2001). The shock was the presence of the far right in the Austrian government and the orchestration of the directives to that effect. Yet, there were also facilitating factors present.
According to Geddes and Guiraudon (2004:350) '[t]he two main factors that explain why an anti-discrimination Directive with a distinct Anglo-Dutch flavour was adopted are policy and ideational linkages to the fight against xenophobia and an equal opportunity frame inherited from the EU gender and equal treatment legislation.' Concerning this last point, there was simultaneously a conceptual arsenal which was possible to mobilize and there were reflections on the possibilities of going beyond the problems incurred.

The information/consultation directive at national level derives from the shock of the closure of Renault Vilvoorde. However, we should wait for the resolution of another proposal (European Society) to witness the minority of blockage – and principally Germany – defect. From then on, the United Kingdom may only ask for transposition delays.

Comment [I1]: This is not very clear !?

From the viewpoint of the content, these three proposals are not completely anecdotic. When comparing the United Kingdom with the cluster of liberal countries (United States, Canada, and New Zealand), the influence of European social right clearly appears. The Information/consultations is not a collective right in these countries (Bamber and Pochet, 2006). The "race" directive introduced important changes in different member countries, particularly in France. The new regulation 883/2004 took partly stock of the judgements of the Court of Justice but will also have dynamic and unpredictable effects in the future.

These considerations send us back to the golden age of social policy. In the 1970s numerous directives were adopted – despite the unanimity foreseen by the Treaty of Rome – following the political will emerging from a troubled social context. It is still this troubled context (Vilvoorde, the far right) that constitutes the trigger for or the adaptation to the judgements of the Court of Justice (man/women equality, regulation 1408/73).

The new directives are hybrid with provisions on actors (trade unions and employers for the information/consultation; NGOs and social actors for non-discrimination). The latter created institutions to make the rights more effective. The exception to this is the modification of Regulation 1408/71. Coordination is an issue in a non-stable, progressive environment. For the past few years – as we have seen in the introduction – there has been an emergence of processes going beyond subsidiary and aiming at producing convergence effects through the open method of coordination (Pochet, 2004). This affects the areas of pension, unemployment (and employment), healthcare and social exclusion in poverty. In other terms, areas subject to coordination between states are also subject to open coordination processes. However, there is no explicit link between these processes and coordination in the sense of Regulation 1408/71. It would rather appear that they are two independent spheres.

In conclusion, the second half of the 1990s and the first years of the new century were to a greater extent characterised by a mix of different modes of governance than by a complete move from hard to soft law (Kilpatrick, 2006, Ferrera, 2005).

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ANNEX 1[3]

Council Directives – Social Policy

Update : May 2007-05-15

DATE	N°	TITEL	SUBJECT
25/02/1964	64/221/EEC	On the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. **Abrogated** **SEE ALSO 72/194** **SEE ALSO 75/34 and 75/35** **SEE ALSO 2004/38**	Free movement of workers
15/10/1968	68/360/EEC	On the abolition of restrictions on movement and residence within the Community for workers of Member States and their families. **Abrogated** **SEE ALSO 2004/38**	Free movement of workers
21/05/1973	73/148/EEC	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. **Abrogated** **SEE ALSO 2004/38**	Free movement of workers
17/12/1974	75/34/EEC	Concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity **Abrogated** **SEE ALSO 2004/38**	Free movement of workers
10/02/1975	75/117/EEC	On the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women**.**	Equal pay Gender Equality
17/02/1975	75/129/EEC	On the approximation of the laws of the Member States relating to collective redundancies. **SEE ALSO 92/56 and 98/59**	Labour Law Collective redundancies
09/02/1976	76/207/EEC	On the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. **SEE ALSO 2002/73/CE**	Gender Equality Equal access to employment

[3] I would like to thank Dominique Jadot, Observatoire social européen, who prepared this table

14/02/1977	77/187/EEC	On the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses **SEE ALSO 98/50 and 2001/23**	Labour Law Transfers of undertakings
25/07/1977	77/486/EEC	On the education of the children of migrant workers	Free movement of workers
29/06/1978	78/610/EEC	On the approximation of the laws, regulations and administrative provisions of the Member States on the protection of the health of workers exposed to vinyl chloride monomer. **Abrogated the 29/04/2003**	Health and Safety at work
19/12/1978	79/07/EEC	On the progressive implementation of the principle of equal treatment for men and women in matters of social security	Gender equality Social Security
20/10/1980	80/987/EEC	On the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer **See also 2002/74**	Labour law Insolvency of the employer
27/11/1980	80/1107/EEC	On the protection of workers from the risks related to exposure to chemical, physical and biological agents at work **Abrogated the 5/5/2001** **See also 88/642 (abrogated)** **See also 91/322** **See also 96/94** **See also 98/24**	Health and Safety at work
15/02/1982	82/130/EEC	Relating to electrical equipment intended for use in explosive atmospheres in mines susceptible to fire damp **Abrogated the 1/7/2003** **See also 88/35 (abrogated)** **See also 91/269 (abrogated)** **See also 94/44 (abrogated)** **See also 98/65 (abrogated)**	Health and Safety at work
28/07/1982	82/605/EEC	On the protection of workers from the risks related to exposure to metallic lead and its ionic compounds at work (first individual Directive within the meaning of Article 8 of Directive 80/1107/EEC) (82/605/EEC) **Abrogated the 5/5/2001**	Health and Safety at work
19/09/1983	83/477/EEC	On the protection of workers from the risks related to exposure to asbestos at work (second individual Directive within the meaning of Article 8 of Directive 80/1107/EEC) **See also 91/382** **See also 2003/18**	Health and Safety at work
12/05/1986	86/188/EEC	On the protection of workers from the risks related to exposure to noise at work	Health and Safety at work

24/07/1986	86/378/EEC	On the implementation of the principle of equal treatment for men and women in occupational social security schemes **See also 96/97**	Gender equality Social Security
11/12/1986	86/613/EEC	On the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood	Gender equality Self-employed Motherhood
09/06/1988	88/364/EEC	On the protection of workers by the banning of certain specified agents and/or certain work activities (Fourth individual Directive within the meaning of Article 8 of Directive 80/1107/EEC) **Abrogated the 5/5/2001**	Health and Safety at work
21/12/1988	89/48/EEC	On a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration **See also 92/51**	Free movement of workers
21/12/1988	89/105/EEC	Relating to the transparency of measures regulating the prices of medicinal products for human use and their inclusion in the scope of national health insurance systems	Labour law Worker's protection Health insurance
29/06/1989	89/391/EEC	On the introduction of measures to encourage improvements in the safety and health of workers at work	Health and Safety at work
30/11/1989	89/654/EEC	Concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC)	Health and Safety at work
30/11/1989	89/655/EEC	Concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) **See also 95/63** **See also 2001/45**	Health and Safety at work
30/11/1989	89/656/EEC	On the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace (third individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC)	Health and Safety at work
29/05/1990	90/269/EEC	On the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers (fourth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)	Health and Safety at work
29/05/1990	90/270/EEC	On the minimum safety and health requirements for work with display screen equipment (fifth individual Directive within the meaning of Article 16 (1) of Directive	Health and Safety at work

		89/391/EEC)	
28/06/1990	90/394/EEC	On the protection of workers from the risks related to exposure to carcinogens at work (Sixth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) **Abrogated** **See also 97/42 abrogated** **See also 99/38 abrogated** **See also 2004/37**	Health and Safety at work
04/12/1990	90/641/Euratom	On the operational protection of outside workers exposed to the risk of ionizing radiation during their activities in controlled areas	Health and Safety at work **EURATOM 1**
26/11/1990	90/679/EEC	On the protection of workers from risks related to exposure to biological agents at work (seventh individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) **Abrogated** **See also 93/88 – 95/30 – 97/65 – 97/59 abrogated** **See also 200/54**	Health and Safety at work
29/05/1991	91/322/EEC	On establishing indicative limit values by implementing Council Directive 80/1107/EEC on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work	Health and Safety at work
25/06/1991	91/383/EEC	Supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed- duration employment relationship or a temporary employment relationship	Health and Safety at work
14/10/1991	91/533/EEC	On an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship	Labour law Information Labour contract
23/12/1991	91/692/EEC	Standardizing and rationalizing reports on the implementation of certain directives relating to the environment	Health and Safety at work Environment
31/03/1992	92/29/EEC	On the minimum safety and health requirements for improved medical treatment on board vessels	Health and Safety at work
24/06/1992	92/57/EEC	On the implementation of minimum safety and health requirements at temporary or mobile construction sites (eighth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)	Health and Safety at work
24/06/1992	92/58/EEC	On the minimum requirements for the provision of safety and/or health signs at work (ninth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)	Health and Safety at work
19/10/1992	92/85/EEC	On the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and	Health and Safety at work Motherhood

		workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)	
3/11/1992	92/91/EEC	Concerning the minimum requirements for improving the safety and health protection of workers in the mineral- extracting industries through drilling (eleventh individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)	Health and Safety at work
3/12/1992	92/104/EEC	On the minimum requirements for improving the safety and health protection of workers in surface and underground mineral-extracting industries (twelfth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)	Health and Safety at work
23/11/1993	93/103/EEC	Concerning the minimum safety and health requirements for work on board fishing vessels (thirteenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)	Health and Safety at work
23/11/1993	93/104/EEC	concerning certain aspects of the organisation of working time.	Labour Law Working time
22/06/1994	94/33/EEC	On the protection of young people at work	Health and Safety at work Young people
22/09/1994	94/45/EEC	On the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees **See also 97/74**	Labour Law Consultation Labour relations
13/05/1996	96/29/Euratom	Laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation	Health and Safety at work **EURATOM 2**
03/06/1996	96/34/EEC	On the framework agreement on parental leave concluded by. UNICE, CEEP and the ETUC	Gender Equality Parental leave
16/12/1996	96/71/EEC	Concerning the posting of workers in the framework of the provision of services	Labour Law Posting of workers
9/12/1996	96/82/EEC	On the control of major-accident hazards involving dangerous substances	Health and Safety at work
18/12/1996	96/94/EEC	Establishing a second list of indicative limit values in implementation of Council Directive 80/1107/EEC on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work (Text with EEA relevance) **Abrogated the 31/12/2001**	Health and Safety at work
15/12/1997	97/80/EEC	On the burden of proof in cases of discrimination based on sex	Gender Equality Discrimination Burden of proof
15/12/1997	97/81/EEC	Concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC	Labour Law Part-time work

		See also 98/23	
07/04/1998	98/24/EEC	On the protection of the health and safety of workers from the risks related to chemical agents at work (fourteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Safety and Health at work
29/06/1998	98/49/EEC	On safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community	Free movement of workers
07/06/1999	1999/42/EEC	Establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications	Free movement of workers
21/06/1999	1999/63/EEC	Concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) **See also 2000/34**	Labour Law Working time
28/06/1999	1999/70/EEC	Concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP	Labour Law Fixed-term work
16/12/1999	1999/92/EEC	On minimum requirements for improving the safety and health protection of workers potentially at risk from explosive atmospheres (15th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Health and Safety at work
13/12/1999	1999/95/EEC	Concerning the enforcement of provisions in respect of seafarers' hours of work on board ships calling at Community ports	Labour Law Working time
08/06/2000	2000/39/EEC	Establishing a first list of indicative occupational exposure limit values in implementation of Council Directive 98/24/EC on the protection of the health and safety of workers from the risks related to chemical agents at work (Text with EEA relevance)	Health and Safety at work
29/06/2000	2000/43/EEC	Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin	Non-discrimination Equal treatment
27/11/2000	2000/78/EEC	Establishing a general framework for equal treatment in employment and occupation	Labour Law Non-discrimination Equal treatment
27/11/2000	2000/79/EEC	Concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA) (Text with EEA relevance)	Labour Law Working time

04/04/2001	2001/25/EEC	On the minimum level of training of seafarers	Labour Law Training
08/10/2001	2001/86/EEC	Supplementing the Statute for a European company with regard to the involvement of employees	Labour Law Consultation European Company
11/03/2002	2002/14/EEC	Establishing a general framework for informing and consulting employees in the European Community	Labour Law Information Consultation
11/03/2002	2002/15/EEC	On the organisation of the working time of persons performing mobile road transport activities	Labour Law Working time
25/06/2002	2002/44/EEC	On the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (vibration) (sixteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) - Joint Statement by the European Parliament and the Council	Health and Safety at work
06/02/2003	2003/10/EEC	On the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise) (Seventeenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Health and Safety at work
03/06/2003	2003/41/EEC	On the activities and supervision of institutions for occupational retirement provision	Labour Law Protection
22/07/2003	2003/72/EEC	Supplementing the Statute for a European Cooperative Society with regard to the involvement of employees	Labour Law Consultation European Company
04/11/2003	2003/88/EEC	Concerning certain aspects of the organisation of working time	Labour Law Working time
22/12/2003	2003/122/Eurat om	On the control of high-activity sealed radioactive sources and orphan sources	Health and Safety at work **EURATOM 3**
29/04/2003	2004/38/EEC	On the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC	Free movement of workers
29/04/2004	2004/40/EEC	On the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields) (18th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Health and Safety at work
13/12/2004	2004/113/EEC	Implementing the principle of equal treatment between men and women in the access to and supply of goods and services	Gender Equality Equal treatment
18/07/2005	2005/47/EEC	On the Agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions of mobile workers engaged in	Labour Law Working Time

		interoperable cross-border services in the railway sector - Agreement concluded by the European Transport Workers' Federation (ETF) and the Community of European Railways (CER) on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services	
05/05/2006	2006/25/EEC	On the minimum health and safety requirements regarding the exposure of workers to risks arising from physical agents (artificial optical radiation) (19th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)	Health and Safety at work