**Working Paper 1**

## Constitutional Implications of EU Employment Policy

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As this paper evolved in the course of composition, it should more properly have been entitled 'Constitutional questions highlighted by a consideration of EU Employment Policy'. Also, although the term 'employment policy' normally refers to strategic action of the kind covered by the Luxembourg process,[1] the paper includes under the heading most of the areas dealt with by the European Parliament's Committee on Employment and Social Affairs.[2] It therefore makes mention both of aspects of the internal market and of social policy, this being the terminology used for much of what we understand as labour law. The reasons for this approach are twofold. First, all three are closely inter-related. Second, a fuller picture can emerge of the constitutional issues involved.

To date, the internal market, action on employment, and social policy have all been developed as shared competences, that is to say areas where Member States may legislate only insofar as the Community has not done so. Much of social policy is already covered by Community law. Examples in the context of labour law include a whole raft of measures relating to health and safety at work, including those on working time, and on equal treatment in employment.[3] Explaining the idea of a shared competence simply in terms of legislative capacity is, however, rather misleading. For employment matters, in the strategic sense of improving its levels – both in terms of quantity and of quality, fall within the area in which the EU co-ordinates national

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1 The European Employment Strategy (EES) was launched at the Luxembourg Summit in November 1997, following discussions initiated by the publication of the 'Delors' White Book' (on Growth, Competitiveness and Employment COM(93) 700 final, Brussels (5 December 1993)). It anticipated the coming into effect of the Treaty of Amsterdam and the provisions in Articles 125-130.

2 Basically, the Committee's remit covers three topics: first, free movement of workers; second, employment policy in the strategic sense; third, social policy, including antidiscrimination (at work), social exclusion, health and safety at work, other types of worker protection (including information and consultation), and social protection systems, such as pensions.

3 Various areas are excluded: pay (except in relation to equal pay for work of equal value), the right of association, to strike, and to impose lock-outs.

policies. Similar developments have occurred in relation to various aspects of social policy.

Further, although all three are seen as shared competences, the emphasis is different. The employment aspects of the internal market, namely the free movement of workers, is dealt with under Title III of the Treaty. Here, the concentration is primarily on legislation. Employment policy in the strategic sense comes under Title VIII and, as already indicated, places the emphasis on coordination. Social policy is a matter for Title XI, which also covers education, vocational training and youth.[4] Under Article 137 of Title XI, the Community shall 'support and complement' the activities of Member States in relation to health and safety, working conditions, information and consultation of workers, integration of persons excluded from the labour market, and equality of treatment of men and women in the labour market and at work. By comparison with matters of free movement, which are regarded as fundamental, social policy is a relative latecomer to the European stage, dating effectively from the Maastricht Treaty in 1992.[5] This has led to many regarding employment and social policy as something 'complementing or flanking the single area', which I take to mean the single market.[6] This creates problems that are both legal and political.

If one looks at the free movement provisions of the Treaty (Articles 39-42) one can see that they allow for a whole range of actions, from the recognition of professional qualifications, through the coordination of social security to the encouragement of exchanges of young workers and, most recently, the Commission's plan for mobility and the proposed introduction of an EU health card. One of the matters at stake would seem to be whether it is appropriate for a certain aspect of free movement to be dealt with by way of Regulation, and thus be directly binding on Member States, or by way of a Directive or by other means. Choices of this kind may also affect whether the Council decides unanimously or by qualified majority, and whether Parliament has co-decision powers or is only consulted.

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[4] Of these, only vocational training is within the direct remit of the Employment and Social Affairs Committee.

[5] Treaty on European Union and Final Act, 7 February 1992, and the Protocol on Social Policy, at which time the UK maintained an opt-out.

The coordination of social security is, for example, the subject of a Regulation. The procedure, under Article 42 of the Treaty, involves unanimity in Council but co-decision with Parliament – an unusual combination. The purpose of the Regulation is not to interfere with the way in which national social security systems are organised but, rather, to ensure that migrant workers do not lose protection or receive less favourable treatment than others. The relevant Regulation, 1408/71, is undergoing comprehensive revision.[7] One matter that exercised Parliament recently was the Council of Minister's desire to deal with social security as it affects third country nationals outside of Article 42, thus excluding it from the ambit of Parliament's co-decision powers. The rationale seemed to be that it is to be seen as a matter of immigration policy rather than as a free movement question, thus falling under Article 63(4) EC.[8]

Classifications, accordingly, may affect not only the type of measure undertaken – which may variously be a Regulation, a Directive (leaving leeway for implementation by Member States), a Recommendation, or some form of co-operation such as joint programmes or the open method of coordination – but also the very legal base of the measure, the actual procedures involved being intimately interconnected with both.

Underlying classification questions are two different but closely related political problems: those of subsidiarity and of differing agendas. The current proposal for a Directive on Temporary Work[9] provides a clear example of the arguments concerning subsidiarity. Some people would argue that the situation is so different in the different Member States (the UK being the most different of all) that controlling such agencies is best left to the Member States. There are two ripostes to this: first, that cross border

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6 See the Lamassoure Report cit at n. 24.

7 Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ English special edition: Series I Chapter 1971 (II) p. 416, last amended and consolidated by Council Regulation (EC) 118/97, OJ 1997, No. L 28/1.

8 An earlier proposal in 1997 was based on Articles 42 and 308 EC (old 52 and 235), with the use of 308 meaning unanimity without co-decision. In the light of the Tampere summit, however, the Council agreed that the correct legal base was Article 63(4) and the Commission brought forward a new proposal in February 2002 (ext. Regulation 1408/71, 574/72/EEC).

9 COM (2002) 149 final (OJ 2002 C203 E001, 27 August 2002), amended proposal (COM (2002) 701 final).

postings of temporary workers are already regulated at EU level; and, second, that it is one in a series of measures dealing with atypical workers, those on part-time workers and fixed-term workers being already in place. The response to this from those emphasising subsidiarity might well be that regulating these workers, too, should have been left to Member States.

The political problem with subsidiarity is that it tends to be in the eye of the beholder, with people invoking or rejecting the application of the principle depending on their degree of satisfaction with the state of play in their own Member State. Few approach the matter from the point of view of the necessity or otherwise of the measure to EU integration. And this ties in with political disagreement about the nature of the internal market. How far are matters of social policy simply a supplement and complement to it, and how far are they integral to it? Free movement of persons does seem to be accepted as being as essential as free movement of capital. But it is exceedingly moot whether the completion of the market requires only the liberalisation that allows free competition between enterprises, or whether it also requires the establishment of a level playing field on a much wider basis, including equivalent protection for workers across the EU.[10] (Indeed, there is a view to the effect that labour law issues should be addressed in their own right, on the basis that a common minimum level of working conditions is entailed by the notion of EU citizenship as such).

These different perspectives on the interrelationship between economic and social policy also play themselves out in different political interpretations of what is required by the Lisbon Strategy.[11] This is intended to make the EU the most dynamic, knowledge based economy in the world by 2010. In this context, the Strategy stresses the need for coordination of economic and employment policy, including the provision of more and better jobs. For some, this means stressing liberalisation and deregulation; for others, the maintenance and improvement of the European social model, and for yet others, an attempt to find a modus vivendi between the two.

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[10] These issues do not only play themselves out when social policy legislation is directly under consideration. They do so also in relation to the internal market, both in terms of the incorporation of social clauses in liberalising measures, and of the balancing of the enhancing of competition with the protection of services of general interest.

In practical terms, the Lisbon Strategy has brought together the Luxembourg, Cardiff and Cologne processes (to do with employment guidelines, structural reform, and enhanced dialogue on macroeconomic policy respectively). It has led, following the Barcelona Council in March 2002, to the 'streamlining' of the annual economic and employment policy coordination cycles. Lisbon also brought about the development of the kinds of procedure initiated by the Luxembourg process, now designated as the open method of coordination (OMC). OMC has been extended, for example, to include action to combat social exclusion, as agreed at Nice, and to achieve the sustainability of pension schemes, as agreed at Laeken, and to produce improvements in health care, as agreed at Brussels.

The open method of coordination typically involves the issuing of guidelines, usually incorporating, as appropriate, targets, benchmarks and indicators, and the development of national action plans, as well as the exchange of best practice. The involvement of the European Commission in formulating the guidelines and monitoring outcomes, together with the use of qualified majority voting in Council, takes the method beyond one of intergovernmentalism. Yet its voluntary character[12] means that it does not have the supranational character normally associated with the Community method. Further, the intended (if not always effective) involvement of stakeholders, including, in the area of employment, the social partners, in both the formulating and the implementing of policy, adds a new dimension. It has been said of the European Employment Strategy, for example, that it is 'a promising example of *multi-level governance*. It is not a matter of either supranational or intergovernmental policy making, but precisely an *interplay between different levels of governance*'.[13]

Clearly, tensions can arise variously between formal and such 'soft' methods of policy formulation and implementation, between strategies in different areas and within any

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[11] Developed at the Lisbon Summit in March, 2000.

[12] Other than economic policy coordination for those in the Eurozone.

[13] Kerstin Jacobsson and Herman Schmid, 'The European Employment Strategy at the Crossroads: contribution to the evaluation' in David Foden and Lars Magnusson (eds) *Five Years Experience of the Luxembourg Employment Strategy*, European Trade Union Institute (ETUI), Brussels 2003, p. 113.

individual strategy.[14] Increasing use of the open method of coordination does, however, suggest that it is attended by some measure of success, even given disagreements about the best way to resolve these tensions and the fact that targets are not always met.[15] One of the merits of the method is also usually considered to be the extent to which it is compatible with the demands of subsidiarity.[16] It does, however, raise one major constitutional concern. This is the potential it has to increase the democratic deficit in Europe, at least where elected representatives are concerned. The method does not, of itself, fully involve either the European Parliament or parliaments within Member States. Numerous reports from the European Parliament have called for improvements in both respects.[17]

Issues of the kind noted above have led to calls for inclusion of a horizontal clause, defining the open method of coordination, amongst the new Treaty articles formulated by the Convention on the Future of Europe. Such calls have come from both the Parliament and the Social Europe Working Group on the Convention.[18] The view is not, however, a unanimous one amongst politicians, since some see the method as decreasing rather than increasing European integration through its soft approach and the eschewing of the use of formal legal instruments. Nor is there a consensus amongst those who do support ‘constitutionalisation’ as to the amount of detail to be incorporated.[19] The main concern is that too much detail could lead to the method becoming rigid, when its flexibility is widely regarded as one of its major virtues.[20]

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14 For a consideration in relation to employment issues, see Sally Ball, ‘The European Employment Strategy: The Will but not the Way’ (2001) 30:4 *Industrial Law Journal*, 353-374.

15 Much work has been done in analysing and evaluating the method, notably by the New Governance Project at the University of Madison-Wisconsin. For a recent comparison of European and American approaches see Jonathan Zeitlin and David Trubek (eds.) *Governing Work and Welfare in a New Economy: European and American Experiments*, OUP 2003.

16 Some differ about its compatibility with subsidiarity. On issues to do with the OMC and European integration, see Janine Goetschy, ‘The Employment Strategy and European integration’ in *Five Years Experience of the European Employment Strategy*, above n. 13, p. 96

17 Including most recently, as debated in the Strasbourg session of June 2003, the Smet Report on the Open Method of Coordination (A5-0187/2003) and the Schmid Report on the Employment Guidelines (A5-0143/2003).

18 Reinforced by a joint letter to the Praesidium from the members of the working group (with reservations by three members) and the Chair of, and the Political Group Co-ordinators on, the Employment and Social Affairs Committee of the Parliament.

19 For example, Anne Jensen, a Danish MEP, has called for the details to be established by way of inter-institutional agreement.

20 The issues are explored by Gráinne de Búrca and Jonathan Zeitlin in a paper ‘Constitutionalising the Open Method of Coordination: A Note for the Convention’, which concludes by recommending the

*footnote continued on next page*

Indeed, the whole matter of parliamentary involvement in European decision-making has been a major topic for the Convention. For the open method of coordination is not the only way in which the Parliament can be bypassed. For example, under Article 139 of the Treaty, agreements between the social partners on the matters covered by Article 137 can – on their request and following a proposal by the Commission – be converted into a Council Decision. This does not leave much room for the Parliament. Indeed, the only reason that the Parliament is involved in the proposal for a Directive concerning Temporary Work is because the social partners failed to reach an agreement for themselves.

I happen to believe that this particular type of 'bottom up' approach to legislation is a good one – but there are indications of similar but more doubtful developments. For example, the Commission White Paper on Governance[21] promotes the idea of 'co-regulation' between itself and experts, largely though not necessarily exclusively at the level of implementation, which would seem to bypass parliamentary scrutiny at either European or Member State level. There are also instances of the Commission wishing to fill in 'technical gaps' without reference to the European Parliament.[22] Admittedly it claims that both are only suited to cases where fundamental rights or major political choices are not called into question. Some of the Commission's departures in these directions, however, have not reassured the European Parliament that the two institutions interpret what is covered by fundamental rights and major political choices in quite the same way.[23]

In sum, then, I hope I have shown how issues related to social and employment policy highlight a number of the questions that must be addressed where any future European

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retention of the existing processes in employment and economic policy, the introduction of a new specific process for social policy (along the lines proposed by the working group) and 'a flexible, generic enabling' provision for other areas.

[21] COM (2001) 428 final, 25.7.2001.

[22] See, for example, the Lamfalussy process adopted in February 2002 in relation to securities regulation (P5_TA(2002)0035) and its proposed extension to banking and insurance, with the Parliament insisting on a call back procedure as a precondition (P5_TA(2002)0565).

[23] Examples to which attention has been drawn by Diana Wallis MEP include public procurement and alternative dispute resolution. See 'Europe for Citizens – Can Europe Deliver?' in *Liberator* Summer 2001.

‘constitution’ is concerned. As with any constitution, the determinants are fundamentally political ones. What is the objective/what are the objectives? If there is more than one objective, are they such that they should be maintained in a flexible balance? Or should some be subordinated to others and a hierarchy entrenched? Who is best placed to ensure that the objective is/the objectives are achieved and by what methods? What should inform any decision as to who is so ‘best placed’?

With the Convention on the Future of Europe, we have the opportunity to answer these questions, assessing whether the process of evolution to date has indeed taken us where we want to go. We have to be very careful, however, how we do answer them as history teaches us that what is done is very difficult to undo.

The Convention published its final recommendations for the revision of the Treaties in time for the Thessaloniki Summit in June 2003, with the possibility of these being adopted by the Intergovernmental Conference planned for the end of the year – although, in the event, the IGC held during December 2003 failed to reach any agreement on the draft constitutional treaty. The provisional recommendations from the Convention include simplification, with a ‘constitutional treaty’ specifying a division of competences between the EU and Member States. This follows the approach of the European Parliament (the Lamassoure Report in May 2002),[24] although the Convention recommendations differ somewhat in terms of the specifics.

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[24] The Report identified three difference types of competences: those exclusive to the Union, those shared between the Union and the Member States and those exclusive to the Member States. The exclusive competences of the Union were argued to be: customs policy, external economic relations, the legal basis of the internal market (including the ‘four freedoms’ and financial services), competition policy, structural or cohesion policies, association treaties and – where the eurozone only is concerned – monetary policy. The Report recommended that these be maintained as exclusive to the Union, and did not propose the inclusion of any others. It did not offer a list of the exclusive competences of Member States, but took them to be all those that do not fall within the exclusive competences of the Union or the shared competences. Such shared competences, the Report argued, are of three different types: those in which the Union lays down general rules, those in which it intervenes only in a complementary or supplementary fashion, and those in which it co-ordinates national policies. The areas in which the Union should lay down general rules include ‘policies complementing or flanking the single area’. These cover, inter alia, social and employment policy, immigration policy, and other policies linked to the free movement of persons, and the promotion of equality between men and women.

Part One of the draft articles divides the competences into: those exclusive to the Union,[25] where Member States can only act if empowered by the Union or to implement Union acts; shared competences (as defined above), and those where the Union has a limited competence to engage in supporting, co-ordinating or complementary action, without superseding the competence of the Member States to act. The internal market (with the exception of competition policy which is an exclusive competence) and social policy remain as shared competences, although the latter only for aspects defined in Part Three. Supporting, co-ordinating or complementary competences involve: industry; protection and improvement of human health; education, vocational training, youth and sport, culture; and civil protection.

Employment policy is not listed as such in the division of competences but is covered by a provision to the effect that 'The Union shall adopt measures to ensure the coordination of the employment policies of Member States, in particular by adopting guidelines for these policies'.[26] In addition, 'the Union may adopt initiatives to ensure coordination of Member States' social policies'.[27] The move from the use of 'shall' in the former to 'may' in the latter is instructive. Interestingly, too, the draft Article on social policy in Part III retains the words 'the Union shall support and complement the activities of the Member States'.

In addition, the old Article 137(2) is amended in a way that may have significant effects. Previously it was for the Council to adopt measures 'to encourage co-operation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States'. These are now to be established through European laws (formerly Regulations) or framework laws (formerly Directives).[28] This provision appears particularly, although not exclusively, directed to the combating of social exclusion and

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[25] Competition policy; monetary policy (for those who have adopted the euro); common commercial policy; customs union; and the conservation of marine biological resources under the common fisheries policy. (The last is problematic).

[26] Article I-14 3. This Article also covers the coordination of economic policies.

[27] Article I-14 4.

[28] Article III-99 2 (a).

the modernisation of social protection systems, where the open method of coordination is already in use. The second part remains effectively unchanged in allowing for a framework law to establish 'minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States' in the other areas covered by the Article.[29] It also provides that such a framework law shall 'avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium sized undertakings'.[30] The weight to be placed on the references to gradual implementation, conditions and technical rules in Member States and the effects for SMEs may, however, need to be reassessed in the light of the new requirement for impact assessments in advance of legislation.[31]

When it comes to areas for co-ordinating, supplementary or supporting action, the only clear scope for direct legislative action by the Union is in relation to common safety concerns in the area of public health.[32] It may be, however, that the article on industry allows such action, in specifying that the Union 'shall contribute to the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of the Constitution'.[33] For industry, further, a law or framework law may establish specific measures in support of action taken in Member States.[34] In addition, for public health, culture, education, youth, and sport, laws or framework laws may establish incentive measures, in all these cases excluding the harmonisation of the laws and regulations of Member States.[35] The articles on vocational training[36] and civil protection also allow for the passing of European laws and framework laws.[37]

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[29] With the caveat, under paragraph 3 that any legislation on social security and social protection of workers remains subject to unanimity in the Council and requires only consultation of Parliament.
[30] Article III-99 2 (b).
[31] See Paragraph 4 of the proposed Protocol on the Application of the Principles of Subsidiarity and Proportionality.
[32] Article III-174 4.
[33] Article III-175 3.
[34] Ibid.
[35] Articles III-174 5; III-176 5(a); III-177 4(a)
[36] Article III-178 4, which refers to laws or framework laws that 'shall contribute to the objectives referred to in this Article', with the same caveat about excluding harmonisation.
[37] Article III-179 2, involving 'measures to 'help encourage co-operation between Member States in achieving the objective of improving the effectiveness of systems'.

Specific mention of coordination is made only in relation to public health and industry. In the case of public health, it is for Member States, in liaison with the Commission, to co-ordinate their policies among themselves.[38] In that of industry, it is for Member States to consult each other in liaison with the Commission and 'where necessary, they shall co-ordinate their action'.[39] Far, therefore, from finding a horizontal provision on the open method of coordination in the proposed Treaty, the only cases in which there is any degree of specification of it are in the references to 'broad guidelines' in relation to economic policy,[40] and 'guidelines' in relation to employment policy.[41]

Of course, at the time of writing, the Convention recommendations have not been formally ratified. Some changes, at least, must be expected anyway, following further intergovernmental discussions, and come the expected Treaty. If, though, the outcome does resemble the draft constitutional treaty, then it would appear that a process started with European employment policy has led to the acceptance of a much wider operation of 'multi-level governance' at European level. It is not clear, however, how the existing less formal uses of the open method of coordination will be affected. It may be that there is room for establishing new procedures in such areas under the laws or framework laws of the kind referred to in preceding paragraphs. If so, then the problem of combining flexibility with transparency and participatory democracy could be on the way to being solved, even without a horizontal clause defining the method. Until such outcomes are known, however, the full constitutional ramifications of EU employment policy must still wait on a final assessment.

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[38] Article III-174 2. The Commission itself may take initiatives 'in close contact with the Member States'.

[39] Article II-175 2

[40] Article I-14 1.

[41] Under Article III-93 1, there is a requirement for Member States to act consistently with the economic guidelines in reaching employment objectives. The article also refers to Member States co-ordinating their actions within Council.