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Working Group XI

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Working group XI "Social Europe"

**Subject: Comments by Mr. D. O'Sullivan -
The European Commission**



EUROPEAN COMMISSION

Brussels, December 18, 2002

Contribution to the Working Group XI of the European Convention

Social Europe

**Extracts from the Contribution to the preliminary draft Constitution presented as a
Contribution by David O'Sullivan**

I. Working Group Social Europe

Members of the Working Group will recall that at the meeting on 10 December, the Chairman invited me to circulate draft articles linked to the Working Group's mandate, extracted from a working document recently prepared as a "Contribution to the preliminary draft Constitution".

I would like to take this opportunity to recall that the "Contribution to the preliminary draft Constitution" is a working document prepared by a group of experts at the request of President Prodi and Commissioners Barnier and Vitorino. It is a working draft which does not in any way commit the Commission. Consequently, to the extent that the content of certain policies may appear to be affected by the drafting of this text, it should be understood that it has not been endorsed by the Commission. The Commission fully reserves its right to submit alternative proposals on the substance in the course of the Convention.

The purpose of the document was to give a general idea of the content of a future Constitution of the European Union – not only the institutional part, but also the policies to be carried out. The text also aimed at simplifying the present Treaty provisions. One of the principles underlying the simplification of existing policies was that this was a technical rewriting, modernising the terminology without touching the substance. The assumption was that the areas of competence were unchanged, i.e. no new areas of action and no new powers. At most a consolidation or reinforcement of existing actions is reflected in an adaptation of the legal foundations (for example, health). This was also the method envisaged by the preliminary draft of the Treaty drawn up by the Praesidium of the Convention.

The attached extracts are taken from Part I (Principles) and Part III (Policies) of the text.

David O'Sullivan

I – PRINCIPLES

TITLE I FOUNDATIONS

Article 1 **European Union**

The European Union consists of the States and peoples of Europe who in a spirit of solidarity share a community of values and commit themselves to promoting peace, security and progress in Europe and the world.

The Union is founded on the principles of liberty, democracy, the rule of law, respect for human rights and fundamental freedoms and for spiritual and moral values, principles which are common to the Member States.

On the basis of the *acquis communautaire*, the Union shall “*closely coordinate the policies of the Member States and manage certain shared powers on a federal model*”.¹

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TITLE II TASKS

Article 9 **Objectives**

The Union shall seek to promote the European model of society by a sustainable development of economic and social activities, the flowering of the cultures of the Member States, a high degree of protection of the environment and solidarity between all its regions, whether they be central, peripheral or insular.

¹ Speech by Valéry Giscard d'Estaing, President of the Convention, College of Europe, Bruges, 2 October 2002.

The Union shall offer every person who is in its territory an area of freedom, security and justice.

On the basis of the *acquis communautaire* consisting of an area without internal frontiers and of the single currency, the euro, the Union shall endeavour to ensure a high level of employment and greater social cohesion. To that end it shall promote the competitiveness of the European economy and the acquisition of knowledge by everybody.

The Union shall speak with a single voice on the international scene, shall act in consistency and solidarity, shall exercise the responsibilities of a world power and shall defend its independence and security.

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CHAPTER 2 FLANKING POLICIES

Article 19

Social policy and employment

The Union shall draw up a policy on social matters, employment and equal treatment for men and women, designed to improve living and working conditions, to ensure adequate social protection and a high level of employment and to combat exclusion. The Union shall promote social dialogue.

TITLE V INSTRUMENTS

CHAPTER 1 COMMON PROVISIONS

Article 72

Classification of acts

1. Effect shall be given to the Constitution by:

- a) International agreements, joint actions and declarations binding the Union at international level;
 - b) Institutional laws and European laws adopted jointly by the European Parliament and the Council;
 - c) Decisions adopted by the Council or by the Commission;
 - d) Recommendations made by the Council and by the Commission.
2. Effect shall be given to laws at the level of the Union by implementing regulations adopted by the Commission.
3. The institutions may also act by:
- a) Adopting non-binding acts: opinions, resolutions and communications;
 - b) Encouraging the conclusion of codes of good conduct or voluntary agreements, including between the social partners.
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CHAPTER 2 LAWS

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Article 83 **Recommendations**

1. A Recommendation shall give those to whom it is addressed guidance to be followed to attain a given result.

It shall not produce binding legal effects, unless the Constitution provides otherwise.

2. A Recommendation may be directed to encouraging a dynamic coordination method between the Member States in specific areas covered by different Union policies and action.

III- POLICIES

Article III-1

1. The Union shall pursue:
 - a) Policies for developing the European model of society,
 - b) an economic and monetary policy,
 - c) a policy for reinforcing the area of freedom, security and justice,
 - d) an external relations policy.
2. In defining and implementing its policies and action, the Union shall take account of the objectives of economic and social cohesion and of a high level of employment; it shall incorporate the requirements of protecting the environment and human health; it shall take into consideration the requirements of consumer protection and the diversity of cultural aspects.

In all its policies and actions, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

3. All action by the Union shall be based on the provisions of this Constitution corresponding to the main aims and content of that action.

Article III-2

The Union shall promote a model of sustainable development of economic and social activities in which the free play of competition is backed up by a set of rules enacted by the public authorities or negotiated between management and labour. Those rules shall ensure that relations between individuals, regions and States are built on mutual support and will thus contribute to the Union's identity in the world.

The European model of society rests on the creation of an internal market, supplemented by policies designed to facilitate its operation, capitalise on its benefits and ensure that it does not create disparities.

TITLE VI **SOCIAL POLICY AND EMPLOYMENT**

Article III- 32

In order to attain the objectives set out in Article 19 of this Constitution, the Union and the Member States shall implement measures to promote a high level of social protection and of employment which take account of national practices related to the responsibilities of management and labour and the need to boost the competitiveness of the Union economy. They shall also implement measures to guarantee equal treatment between men and women.

CHAPTER 1 **SOCIAL POLICY**

Article III- 33

1. The Union shall support and supplement the activities of the Member States in the following fields:
 - a) improvement of the working environment to protect workers' health and safety;
 - b) working conditions;
 - c) social security and social protection of workers;
 - d) protection of workers where their employment contract is terminated;
 - e) the information and consultation of workers;
 - f) representation and collective defence of the interests of workers and employers;
 - g) the integration of persons excluded from the labour market;
 - h) equality between men and women with regard to labour market opportunities and treatment at work;
 - i) the combating of social exclusion.
2. To this end, the following shall be laid down by Law:
 - a) measures designed to organise cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences;
 - b) minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States; such directives 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.

3. A Member State may entrust management and labour, at their joint request, with the implementation of Laws adopted pursuant to paragraph 2.

In this case, it shall ensure that, no later than the date on which a Law becomes applicable, management and labour have introduced the necessary measures by agreement. The Member State concerned shall take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that Law.

4. The provisions adopted pursuant to this Article:

- a) shall not affect the right of Member States to define the fundamental principles of their social security system and must not significantly affect the financial equilibrium thereof;
- b) shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Constitution.

5. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

Article III- 34

1. The Commission shall have the task of promoting the consultation of management and labour at Union level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties. To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action.

2. If, after such consultation, the Commission considers Union action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation.

3. On the occasion of such consultation, management and labour may inform the Commission of their wish to initiate the process provided for in Article III-35; the duration

of the procedure shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it.

Article III- 35

1. Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.
2. Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article III-33 and matters relating to pay, at the joint request of the signatory parties, by a Law.

Article III- 36

The Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this Title, particularly in matters relating to:

- a) employment;
- b) labour law and working conditions;
- c) basic and advanced vocational training;
- d) social security;
- e) prevention of occupational accidents and diseases;
- f) occupational hygiene;
- g) the right of association and collective bargaining between employers and workers.

Article III- 37

1. Each Member State shall ensure that the principle of equal pay for men and women for equal work or work of equal value is applied.
2. 'Pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

- a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

b) that pay for work at time rates shall be the same for the same job.

3. Measures shall be adopted by Law to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

CHAPTER 2 COORDINATED STRATEGY FOR EMPLOYMENT

Article III- 38

The Union and the Member States shall work towards developing a coordinated strategy for employment in order to attain the objectives set out in Article 19 of this Constitution. This strategy shall be consistent with the broad multiannual guidelines for economic policies provided for in Article III-66.

Taking account of national practices related to the responsibilities of management and labour, Member States shall regard promoting employment and coordinating social and employment policies as a matter of common concern and shall coordinate their action in this respect within the Council.

Article III- 39

1. The European Council shall each year consider the employment situation in the Union and adopt conclusions, on the basis of a joint report by the Council and the Commission.

2. On the basis of the conclusions of the European Council, the Council, on a proposal from the Commission and after consulting the European Parliament, shall each year draw up guidelines, in the form of recommendations, which the Member States shall take into account in their employment policies.

3. Each Member State shall provide the Commission with an annual report on the

principal measures taken to implement its employment policy in the light of the guidelines for employment.

On the basis of these reports, the European Parliament and the Council shall each year carry out an examination of the implementation of the employment policies of the Member States. The Council, on a proposal from the Commission and after consulting the European Parliament, may make recommendations to Member States.

Article III- 40

The Commission may adopt incentive measures designed to encourage cooperation between Member States and to support their action in the field of employment:

- a) through initiatives aimed at developing exchanges of information and best practices;
- b) by providing comparative analysis and advice;
- c) by promoting innovative approaches;
- d) by evaluating experiences, in particular by recourse to pilot projects.

Article III- 41

An Employment Committee with advisory status shall be established to promote coordination between Member States on employment and labour market policies. The composition and tasks of the Committee are set out in Additional Act No 4.

CHAPTER 3 **SOCIAL PROTECTION**

Article III-42

The Union and the Member States shall work towards developing a coordinated strategy for social protection with a view to achieving the objectives set out in Article 19 of the Constitution.

Member States, having regard to national practices related to the responsibilities of management and labour, shall regard the modernisation of systems of social protection as a matter of common concern and shall coordinate their action in this respect within the Council. That coordination shall not affect the prerogative of the Member States to define

the fundamental principles of their system of social protection.

Article III- 43

1. The European Council shall each year consider the social protection situation and adopt conclusions on the basis of a joint report by the Council and the Commission.
2. On the basis of the conclusions of the European Council, the Council, acting on a proposal from the Commission and after consulting the European Parliament, shall adopt common objectives and, where appropriate, draw up in the form of recommendations, guidelines on the modernisation of systems of social protection which the Member States shall take into account in their policies.
3. Each Member State shall provide the Commission with a periodic report on the principal measures it has taken to implement the modernisation of its system of social protection in the light of the objectives and, where appropriate, guidelines for the modernisation of systems of social protection.

On the basis of those reports, European Parliament and the Council shall periodically carry out an examination of the implementation of the modernisation of systems of social protection of the Member States.

Article III- 44

A Social Protection Committee with advisory status shall be established to promote cooperation on social protection policies between Member States and with the Commission. The composition and tasks of the committee are set out in Additional Act No 4.

CHAPTER 4 THE EUROPEAN SOCIAL FUND

Article III- 45

1. The aim of the European Social Fund shall be to render the employment of workers easier and to increase their geographical and occupational mobility and to facilitate their adaptation to industrial changes and to changes in production systems, in particular through vocational training and retraining.

2. The tasks and organisational principles of the European Social Fund shall be laid down by Law. The criteria for assistance from the Fund shall be laid down by that Law.

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TITLE I COORDINATION OF ECONOMIC POLICIES

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Article III-66

1. The Council, on a proposal from the Commission and after obtaining the opinion of the European Parliament, shall formulate a draft for the broad multiannual guidelines for the economic policies of the Member States, the euro area and the Union.²

The broad guidelines shall take account of the guidelines for employment adopted in accordance with Article III-39.

2. The European Council, acting on the basis of the draft from the Council, shall discuss a conclusion on the broad guidelines.

Taking into account the conclusion of the European Council, the Council shall adopt the broad guidelines in the form of a recommendation.

On the basis of an annual report from the Commission on the application of the broad guidelines, the Council shall decide, on a proposal from the Commission, on any adjustments that are necessary to the broad guidelines.

3. In order to ensure closer coordination of economic policies and sustained convergence of the economic performances of the Member States, the Commission and Council shall, on the basis of reports submitted by the Commission, monitor economic developments in each of the Member States, in the euro area and in the Union as well as the consistency of

² [These broad guidelines shall include action at Union and national level which the Member States shall undertake to implement in order to achieve objectives linked to growth, competitiveness, employment, savings and investment, and the development of public expenditure.]

economic policies with the broad guidelines, and regularly carry out an overall assessment .

For the purpose of this multilateral surveillance, Member States shall inform the Commission of the measures envisaged to give effect to the recommendations adopted by the Council and actions decided on to this end.

4. Where it is established that the economic policies of a Member State are not consistent with the broad guidelines or that they risk jeopardising the proper functioning of the Union, the Commission may address a warning to the Member State concerned.

The Council may also, on a proposal from the Commission, make the necessary recommendations to the Member State concerned.

The Commission shall report to the European Parliament and the Council on the results of multilateral surveillance.

5. If a Member State persists in failing to put into practice the Council's recommendations, the Council may, acting by a reinforced qualified majority on a proposal from the Commission, decide upon measures appropriate to the situation.

6. The Council may, on a proposal from the Commission and after obtaining the opinion of the European Parliament, adopt detailed rules for the multilateral surveillance procedure referred to in paragraphs 3, 4 and 5.

7. Any Member State concerned by the deliberations provided for in paragraphs 4 and 5 shall not participate in the vote.

ADDITIONAL ACT TO THE CONSTITUTION NO 4

SUPPLEMENTARY INSTITUTIONAL PROVISIONS

TITLE X	EMPLOYMENT COMMITTEE AND SOCIAL PROTECTION COMMITTEE
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Article 50
Employment Committee

1. The tasks of the Employment Committee shall be :
 - (a) to keep under review the employment situation and labour policy situations in the Member States and in the Union;
 - (b) to deliver opinions at the request of the Council or of the Commission, or on its own initiative, and to contribute to the preparation of the deliberations of the Council referred to in Article III-39.
2. Each Member State and the Commission shall appoint two members of the Committee.
3. In fulfilling its mandate the Committee shall consult the social partners.
- 4.

Article 51
Social Protection Committee

1. The tasks of the Social Protection Committee shall be :
 - (a) to monitor the social situation keep and the development of social protection policies in the Member States and in the Union;
 - (b) to promote exchanges of information, experience and good practice between Member States and with the Commission;
 - (c) to prepare reports, formulate opinions or undertake other work within its fields of competence, at the request of either the Council or the Commission or on its own initiative.
2. Each Member State and the Commission shall appoint two members of the Committee.
3. In fulfilling its mandate the Committee shall establish appropriate contacts with the social partners.



EUROPEAN COMMISSION

Brussels, December 18, 2002

Contribution to the Working Group XI of the European Convention

Social Europe

Contribution by David O'Sullivan on Services of General Interest

Services of General Interest

The intention of this note is to summarise the Commission's assessment of how current Treaty provisions and current legislation affect services of general interest.

1. Services of general economic interest are explicitly addressed in *Article 16 and Article 86 (2) of the Treaty*. In addition, in Article 36 of the European *Charter of Fundamental Rights*, access to services of general interest is recognised as a fundamental right.
2. *Article 16* was introduced by the Treaty of Amsterdam. Whilst fully respecting the principle of subsidiarity, this provision explicitly confirms the place of services of general interest among the shared values of the Union and their role in promoting social and territorial cohesion.
3. *Article 86 (2)* sets out the fundamental principle that services of general interest can continue to be provided and developed in the internal market. It provides that «*undertakings entrusted with the operation of services of general economic interest ... are only subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.*» This means that providers of services of general interest are exempted from the application of the internal market and competition rules to the extent that this is necessary to allow them to fulfil their general interest mission. Therefore, in case of a conflict, the fulfilment of a public service mission effectively prevails over the application of Community rules, including internal market and competition rules.
4. The application of Article 86 by the Community institutions is guided by three principles:
 - (1) **Neutrality** as regards the public or private ownership of companies (Article 295). On the one hand, this means that the Community has no position on whether undertakings providing services of general interest are public or private. It does not require the privatisation of public undertakings. On the other hand, it means that the Treaty rules apply regardless of the (public or private) ownership of the undertaking.

(2) Member States have the *freedom to define what they regard as services of general interest and how they are operated*. In areas that are not covered by specific Community law, the Member States have a wide margin to shape their policies. However, the exception of Article 86 (2) can only apply in cases where the public service mission is clearly defined and explicitly entrusted through an act of a public authority.

(3) The application of Article 86 (2) is subject to the principle of *proportionality*. This means that restrictions of competition and limitations of the internal market must not exceed what is necessary to guarantee the effective fulfilment of the public service mission.

5. Where the Community has adopted *sector-specific legislation on services of general interest*, such as in the electricity and gas, postal services or telecommunications sectors, this legislation systematically sets out or allows for very ambitious public service objectives. Relevant provisions relate in particular to universal service and access, affordability, rights to information, participation rights, quality of service, specifications for contracts, rights of choice, rights of redress, and specific measures for disabled or handicapped people and for people with low incomes or with special social needs. For instance, the new telecoms regulatory framework includes a specific directive on universal service and users' rights relating to electronic communications networks and services (Directive 2002/22).

In addition, the Commission is now examining the possibility of improving and clarifying the coherent and harmonious articulation between the public service principles underlying Article 16 and the other Treaty objectives in a horizontal approach (framework directive). This is the purpose of the Green Paper that the Commission is currently preparing.

6. At the level of the Treaty, the Commission has consistently suggested the insertion of a reference to the promotion of services of general interest in the Treaty by adding a new subparagraph to *Article 3* to read as follows:

“ a contribution to the promotion of services of general interest.”

The ambition to draft a new Constitution makes such detailed amendments dependent on decisions concerning the style to be adopted and the balance between the different parts of

the text. But the proposal remains relevant since the insertion of this new subparagraph would also place the good performance of these services clearly among the objectives of the Community.

7. In practice, our experience has been a positive one: the application of the Treaty rules has in many cases contributed significantly to ensuring lower prices and an improved availability, quality and choice of such services to the benefit of consumers and business users. At the same time, the existing Treaty rules have proven to be sufficiently flexible so as to enable the specificities of services of general interest to be taken into account including, where necessary, country-specific differences. In fact, the Treaty has never impeded the provision of services of general interest but has helped to improve the efficiency and the quality of many of these services. As a result, in terms of efficiency and quality, the provision of general interest services in the European Union often compares favourably with provision in other areas of the world.



EUROPEAN COMMISSION

Brussels, December 18, 2002

Contribution to the Working Group XI of the European Convention

Social Europe

Contribution by David O'Sullivan on the treatment of pay at European Union level

THE TREATMENT OF PAY AT EUROPEAN UNION LEVEL

The Working Group will recall that at its last meeting, the issue of the treatment of pay under article 137(6) was discussed. This note seeks to summarise the extent to which pay is dealt with in the EU context. A number of Community instruments include provisions dealing with pay.

1. Equal treatment between men and women

Article 141 of the Treaty provides for the fundamental principle of equal pay for equal work or work of same value. This principle has also been developed in directive 75/117/EC on the application of the principle of equal pay for men and women. Moreover, ECJ case law has further defined the concept of remuneration in this field, which *comprises any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer*³. In subsequent judgements, the Court also ruled that elements such as employers' contributions to a retirement benefits scheme⁴, benefits paid by an employer to a worker in connection to the latter's compulsory redundancy⁵ or a pension paid under a contracted-out private occupational scheme⁶, fall within the scope of article 141 of the Treaty.

2. Free movement of workers

As a corollary to freedom of movement of workers, enshrined in the Treaty, Community law establishes the principle of non-discrimination on grounds of nationality in this area. To this respect, Regulation 1612/68/EC, when referring to non-discrimination regarding employment conditions, explicitly mentions pay.

3. Labour law

The various instruments in this field aim at:

- *Guaranteeing workers' pay in specific circumstances.*

³ C-457/93, 6.2.1996

⁴ C-68/80, 11.3.1981

⁵ C-262/88, 17.05.1990

- For pregnant workers and workers having given birth on maternity leave (Directive 92/85/EC) [legal basis former art. 118a].
 - For workers in the case of employers' insolvency (Directive 2000/74/EC) [legal basis art. 137.2]. For the definition of pay, the directive refers to national legislation.
 - For workers in the case of transfer of undertaking. Directive 2001/23/EC [legal basis art. 94] provides for safeguarding of workers' rights arising from an employment relationship, which includes pay.
 - For workers in the case of secondment to another Member State. Directive 96/71/EC [legal basis art. 57.2 and 66] imposes the obligation to respect working conditions obtaining in the host Member State, and refers explicitly to minimum rates of pay as defined by national law.
- *Ensuring proper information to the workers on applicable working conditions.*
 - Directive 91/533/EC [legal basis former art. 100, now art.94] foresees that the employers shall be obliged to notify employees of the essential aspects of their contract, including remuneration.
 - *Ensuring the principle of non-discrimination between different kind of workers.*
 - Directives 97/81/EC and 99/70/EC on social partners framework agreements on part-time and fixed-term contracts [legal basis art. 139.2] provide for non-discrimination in employment conditions for part-time workers and workers on fixed-term contracts solely because their specific working patterns. Employment conditions include a variety of elements, amongst which it is commonly understood to include pay. This view has been taken also by social partners. However, it should be noted that it is the opinion of the UK Government that these directives do not cover pay (although when the directives were transposed into UK law, the principle of non-discrimination was extended to pay aspects of the employment relationship).
 - The current proposal on temporary agency workers, when referring to the principle of non-discrimination as regards employment conditions, refers explicitly to pay.

⁶ Idem

4. Anti-discrimination legislation

Two directives have been adopted on the basis of article 13 of the Treaty, Directive 2000/43/EC to implement equal treatment irrespective of racial or ethnic origin, and Directive 2000/78/EC establishing a framework for equal treatment in employment and occupation. Both directives apply to all natural persons and prohibit discrimination in employment, particularly with regard to working conditions, including dismissals and pay.

5. Coordination of economic policies

The Broad economic policy guidelines (BEPGs) adopted by the Council on a proposal from the Commission, [legal basis art. 99] explicitly refer to wages. The 2002 BEPGs included a section under the heading *policy recommendations* on wage developments, where such aspects as the consistency of wage trends with price stability as well as wage differentiation were addressed. On this basis, the European Council has also dealt with this issue⁷.

⁷ See for instance point 32 of the Barcelona European Council conclusions.