

Working Group XI

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Working Group XI “Social Europe”

**Subject: Comments on paragraphs 4 to 7 of the Mandate
by Mr David O’Sullivan**

Members of Working Group XI on “Social Europe” will find hereafter a paper by Mr David O’Sullivan, alternate member of the Convention.



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Contribution to the Working Group XI of the European Convention

Social Europe

Comments by David O’Sullivan on Questions 4-7 of the Working Group’s mandate

Question 4 *What role could be given to the open method of coordination and what would be its place in the Constitutional Treaty?*

The “open method of coordination” is now a familiar term of political shorthand, but has never been defined precisely in legal terms. It is generally understood to mean a process which draws, in certain respects, upon the coordination methods used in particular areas such as the broad economic policy guidelines (Article 99) and the coordination of national employment policies (Article 128), with the following objectives:

- to define at EU level certain common objectives to be turned into concrete action at national level;
- to fix a timetable and performance indicators to evaluate whether this national action will meet the objectives;
- to exchange best practice.

In its White Paper on European Governance,¹ the Commission defined when Community action might be complemented or reinforced by the use of the open method:

- The open method of coordination is used on a case by case basis. It is a way of encouraging co-operation, the exchange of best practice and agreeing common targets and guidelines for Member States, sometimes backed up by national action plans as in the case of employment and social exclusion. It relies on regular monitoring of progress to meet those targets, allowing Member States to compare their efforts and learn from the experience of others.

In some areas, such as employment and social policy or immigration policy, it sits alongside the programme-based and legislative approach; in others, it adds value at a European level where there is little scope for legislative solutions. This is the case, for example, with work at a European level defining future objectives for national education systems.

- The Commission plays an active co-ordinating role already and is prepared to do so in the future, but the use of the method must not upset the institutional balance nor dilute the achievement of common objectives in the Treaty. In particular, it should not exclude the European Parliament from a European policy process. The open method of coordination should be a complement, rather than a replacement, for Community action.

The White Paper also laid out the circumstances under which the open method should be used:

- The use of the open method of coordination must not dilute the achievement of common objectives in the Treaty or the political responsibility of the Institutions. It should not be used when legislative action under the Community method is possible; it should ensure overall accountability in line with the following requirements:

¹ COM(2001) 428 final, adopted by the Commission on 21 July 2001

- It should be used to achieve defined Treaty objectives;
- Regular mechanisms for reporting to the European Parliament should be established;
- The Commission should be closely involved and play a coordinating role;
- The data and information generated should be widely available. It should provide the basis for determining whether legislative or programme-based action is needed to overcome particular problems highlighted.

From a procedural point of view, there is a key difference between procedures of coordination of national policies provided for explicitly in the Treaty, and those set up simply on the basis of a political agreement (such as European Council conclusions). Procedures under the Treaty (for example, a requirement that Member States make reports or forward information) are obligatory and may provide for the Union's institutions to make specific recommendations to the Member States, and can even provide for sanctions on Member States that do not follow agreed policy lines.

In the area of social policy, the progress of the European employment strategy provides clear evidence of how EU policy-making can be helped by the process of agreeing objectives at European level and designing and implementing policies at national level which contribute to the overall European objective.

The question which now arises is whether it would be useful to consolidate the open method in the Constitution as a horizontal instrument, or to incorporate it sector by sector. In its recent Communication,¹ the Commission concluded that:

“The Union must have at its disposal a range of instruments to implement its policies. The non-binding options include in particular the **open method of coordination** whereby common guidelines can be given for certain areas which lie outside the Union's legislative powers. The constitutional treaty should mention this method and guarantee that the way it is applied is consistent with the Community method.”

In conclusion, it would be advisable to give the open method of coordination a clear basis in the Constitution as one of the instruments to achieve the Union's objectives. This is of clear relevance to social policy. As explained before, however, this reference should not affect those coordination processes provided for explicitly in certain areas (such as Article 99, 104 and 128 TEC) and should not be used in cases where the Union's objectives could better be achieved through legislation.

¹ Communication of the Commission on the institutional architecture: For the European Union – Peace, Freedom, Solidarity (COM(2002) 728, 5.12.2002).

Question 5 *What relationship can be established between the coordination of economic policies and the coordination of social policies?*

Economic growth, employment and social protection are all mentioned in the Treaty among the main tasks of the Community (Article 2). Economic policy is an area of common concern under the Treaty, and Article 99 defines the procedure for policy coordination. Under the employment title, the Treaty foresees a coordinated strategy for employment, which must be consistent with the broad economic policy guidelines (Article 128). Thus, in the area of employment and social policy coordination, these two Treaty-based instruments coexist with procedures that are based on requests from the European Council, applying the “open method of coordination” to fields such as social inclusion, pensions, and health care and care for the elderly.

- The Broad Economic Policy Guidelines (BEPGs) - introduced by the Maastricht Treaty and based on Treaty Article 99 (2) - are at the centre of economic policy co-ordination and provide the framework for overall economic policy orientations. There are strong linkages of substance between the BEPGs and processes subsequently developed in the field of employment and social policy, most notably with the Luxembourg process. Employment and the efficient functioning of labour markets are one of the elements of the BEPGs, which contain general labour market guidelines for all Member States, as well as country-specific labour market recommendations.
- The Luxembourg process - set up at the European Council in November 1997 and based on Treaty Article 128 - establishes the European Employment Strategy. This aims to strengthen the EU-level co-ordination of national employment policies and to bring employment to the forefront of the political agenda. As far as the content is concerned, the Employment Guidelines partially cover the same ground as the BEPGs, but in other areas go clearly beyond. While both cover the functioning of labour markets, the Employment Guidelines go into greater detail and “should cover a broad employment policy agenda in an integrated way”.¹
- There are a number of other initiatives which have brought economic and social policies together. The Lisbon European Council decided to apply the open method of coordination to social inclusion. At the same time, the Lisbon Conclusions stressed that existing processes, like the Luxembourg process, continued as before. Last year, the open method of co-ordination was introduced in the area of pensions by the Laeken European Council. The upcoming Joint Report on health care and long-term care, to be drawn up on the basis of replies to a questionnaire sent to Member States, will be the basis for further co-operation in this area. As specified in the mandate of the Social Protection Committee, cooperation should extend in time to the issue of “making work pay”.

The general perception of the existing policy coordination seems to be that the substance is dealt with in an adequate and satisfactory way. However, a distinction needs to be made between the BEPGs and the European Employment Strategy, both enshrined in the Treaty, on the one hand, and the more recent social protection elements, including the use of the open method of coordination in the fields of social inclusion and pensions, on the other.

As far as the Employment Strategy is concerned, the impact assessment demonstrated that this treaty-based annual process is well established and works to the satisfaction of both Member States and the Commission. The same can be said of the BEPGs. However, the European Council at

¹ Joint employment report 2002 (COM(2002) 621) adopted by the Commission on 13 November 2002

Barcelona, recognising the strong mutual interaction and interdependence of the two processes, asked the Council and the Commission to streamline and synchronise the calendars for the BEPGs and the Employment Guidelines. The Commission has therefore proposed to streamline the two processes, whilst preserving their autonomy. The goal would be to achieve greater coherence, transparency and effectiveness in policy co-ordination, and to improve the mutually supportive character and complementarity of the two sets of instruments. The Council has broadly endorsed the Commission's approach.

The social inclusion and pension processes, and projected closer cooperation stemming from the mandate of the Social Protection Committee in relation to health care, care for the elderly and "making work pay", are all important elements as part of a global and coherent approach towards the modernisation of social protection systems. Simplification and streamlining would also improve consistency and effectiveness in this area. An improved, modernised social protection system can best be achieved through maximising the coherence of EU policies and the synergies between the economic and employment policy co-ordination cycles.

Question 6 *Regarding procedures, to what extent should codecision and qualified-majority voting be extended to matters for which unanimity is currently required?*

Decision-making in the social field cannot be divorced from the wider issue of decision-making under the Constitution. As the Commission has recently made clear,¹ the need for a more efficient Union and the need for a simplified Union both require the adoption of codecision and qualified majority voting as a general rule.

Social policy is unquestionably a core task of the Union, and there is no reason for it, or for aspects of it, to be an exception from the general rule. Although the Nice Treaty gives the Council the freedom to decide – by unanimity – to extend QMV in some areas, this falls short of what is required. All provisions should be subject to codecision and qualified majority voting.

Articles 42, 136 and 137 include a series of specifications defining the confines of Union competence and explaining the limited purpose of EU action, including the need to protect diverse forms of national practice and the specification that legislation under article 137 consists of "minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States".

Nevertheless, concern has been expressed in the past that EU action might interfere with the operation or financing of national social security systems. If further reassurance on this point is required, this should be secured in a way which does not prevent the EU from acting effectively where it has competence. Rather than retaining unanimity, it should come from a redrafting of the Treaty provisions to make clear that these matters do not fall within EU competence.

¹ Communication of the Commission on the institutional architecture: For the European Union – Peace, Freedom, Solidarity (COM(2002) 728, adopted by the Commission on 5 December 2002).

Question 7 *Title VI of the preliminary draft Constitutional Treaty deals with the democratic life of the Union. Should the role of the social partners appear in Title VI and, if so, what should this role be?*

Social dialogue is a core element of the European Social model¹ and its role has been enshrined in the Treaty (Articles 137-139).

First, social dialogue is a source of law. Social partners at European level are empowered to negotiate agreements to regulate social policy matters, in particular in the fields covered by Article 137.

According to the procedure foreseen in Articles 138 and 139 of the Treaty, at any moment of the consultation procedure launched by the Commission, social partners can announce their willingness to enter negotiations. If an agreement is reached, at their joint request, the Commission may submit it to the Council for implementation by way of a directive. The Council may adopt or reject the agreement.

Since the Maastricht Treaty came into force, six agreements, two of them sectoral, have been drawn up in this way:

- agreement on parental leave;
- agreement on part-time work;
- agreement on fixed-term work;
- agreement on the organisation of working time for mobile workers in civil aviation;
- agreement concerning the organisation of the working time of seafarers;
- agreement on telework.

The first five agreements have been implemented by way of a Council directive, while the last one, on telework, will be implemented in accordance with procedures and practices specific to social partners and the Member States.

Community law stemming from social partners' agreements results in acts that are better adapted to economic and social needs, while ensuring the fullest compliance with the principles of proportionality and subsidiarity.

Second, the obligation stemming from the Treaty (Article 138) for the Commission to consult social partners before submitting proposals in the area of social policy means that legislation is only required when other measures have proved ineffective. It also means that proposals can be tailored to take due account of the opinions expressed by the parties most closely concerned. In this way, social dialogue also plays a major role in upstream monitoring of compliance with subsidiarity and proportionality.

Social partners have also been involved in other ways, in particular as regards the implementation of the employment strategy, and more broadly the Lisbon agenda as a whole. A good example is the framework of action for lifelong development of competencies and qualifications which the social partners submitted to the Barcelona European Council.

¹ See in particular point 22 of the Barcelona European Council conclusions, which reads as follows : *"the European social model is based on good economic performance, a high level of social protection and education and social dialogue"*

Moreover, ETUC, CEEP and UNICE/UEAPME have agreed a work programme for the period 2003-2005, following a request from the Barcelona European Council, which goes well beyond their participation into the legislative process.

Taking into account the depth and the success of the social partners' involvement, their role should be clearly recognised in the Constitution. The question of whether this should best appear in title VI of the provisional draft Constitution will depend on whether the scope of this title goes beyond the relation of the citizen with the institutions to include representational structures. In any event, the *acquis* in terms of the social partners' involvement in the legislative process has to be preserved, and the mechanisms currently in force need to be confirmed.

In addition, a significant improvement could be made to the existing situation: when implementing a social partners agreement by way of a legislative instrument, the European Parliament should be on equal footing with the Council. The current imbalance should end.

Finally, following a joint declaration of the European social partners, the European Summit at Laeken in December 2001 requested the holding of a social partners summit on the eve of each Spring European Council. The Commission has presented a proposal for a decision on the creation of a Tripartite Social Summit for Growth and Employment, which would be the forum for consultation between the social partners and the EU institutions and Member States on the Lisbon strategy.