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# **Social Security in the Convention**

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# SOCIAL SECURITY IN THE CONVENTION

## 1. The Poll

It is only natural and self-evident that the social dimension of the European Union and social security are at the focal point of the European Convention on the Future of Europe. As a substitute member of this Convention and a member of National Parliament I sent all my colleagues of the national Parliaments as well as the members of European Parliament a questionnaire in order to obtain their vision on the future of the social security aspects of the European Union. The questionnaire was aimed at finding out what it is exactly that we want before we can start to inquire into the legal means we have at our disposal to achieve our goals.

Of the approximately 8000 questionnaires that were sent out, always in the mother tongue of the recipient, only some hundred thirty were returned to us. That is certainly a low percentage. Yet, we find we can still draw a number of conclusions from these answers.

Of course, the answers do not determine our stance where the questions of the questionnaire are concerned. A study of the answers received can be used to find out which proposals will have the highest chance of success and which ones would probably be rejected by a large majority of the European people and their representatives.

The questionnaire consisted of one complex and one simple question.

The first question inquired into who should be responsible for a number of aspects of social security: the member states and/or the European Union? If the European Union had a role to play, we also asked for the way in which this responsibility ought to be implemented, while suggesting a large number of ways of intervention:

- a) Formulating general principles/setting a general framework
- b) Formulating fundamental social rights
- c) Formulating minimum standards
- d) Formulating bench marks/points of reference
- e) Creating financial incentives
- f) Setting standard terminology
- g) Setting common goals for the member states
- h) Granting the European Union full and exclusive authority for this matter
- I) Granting the European Union full and competing authority in addition to the full and secondary authority of the member states
- j) Granting the European Union the authority, subject to the primary authority of the member states
- k) The European Union joins existing international bodies for these matters.

Our second question concerned the way in which European policy-making processes should be organised for social security matters. Which role should the different European institutions play? Should the Commission, the Council of Ministers, European Parliament and their social partners be more or less involved than they are today? Should the regions or the national parliaments play a more important role in the creation of a European social security zone?

The questionnaire was anonymous, yet we asked the respondents to give some more information about their country of origin, the assembly they are part of and the political family they belong to.

## **2. The Results**

In view of the relatively limited number of answers we must be very careful with figures; still we have noticed a number of quite interesting trends which we would like to discuss below.

A first and very noticeable trend is that the members of European Parliament – and more so than their national colleagues - clearly want the affirmation of the exclusive authority of the member states for social security. The Members of Parliament of the candidate member states are most in favour of a shared responsibility. When asked about the level on which social security financing is set, nearly all EP respondents replied that it should be exclusively the member state whereas still a third of the national members of parliament for member states and candidate member states are in favour of a shared way of financing. More than half of the EP members find that the safeguarding of legal social security rights should be guaranteed exclusively on a national level whereas that point of view is less apparent among the national members of parliament of the member states (less than half of them) and of the candidate member states (less than a third).

A clear majority of all groups of respondents consider the co-ordination of the social security systems as an exclusive matter for the community and not only for the benefit of migrating employees but also in favour of all people who legally migrate through the European Union. Surprisingly though, a clear majority of all national members of parliaments of member states and candidate member states are in favour of the creation by the European Union of a specific social security system for persons working throughout the European Union.

Approximately two thirds of the European and National members of Parliament find that the decisions on the combinations of public and private protection against social risks (the so-called public/private mix) is the responsibility of each member state separately.

When asked for the level on which the protection should be implemented for the different social risks, a large majority is in favour of a national implementation; often the EP members are more in favour thereof than the members of the national parliaments. This trend is seen for all risks, except for the access to and the availability of health care: nearly half of the national members of parliament of the member states are in favour of non-exclusive national authority. The other members of parliament follow the described pattern they also show for the other social risks. Concerning the promotion of employment opportunities (including professional training etc.) more than half of EP members as well as members of national parliaments (together or exclusively) see a role for the Union.

Where the protection of the income of employees in case of insolvency of their employers – for which the Community has already issued a directive- only the national members of parliament of the member states show a slight majority to make this matter not exclusive for the member states.

Two thirds of the EP members put the authority for the prevention of social risks exclusively with the member states; nearly half of the national members of parliament would also be in favour of an additional or exclusive authority of the EU where prevention is concerned. The national members of parliament adopt a similar attitude concerning the authority for safety and health at work, surprisingly enough a majority of the EP members would favour shared responsibility and a quarter is in favour of exclusive community authority!

When we look at the political families of the respondents, we find that usually social-democratic members of the national parliaments of the member states situate the responsibilities for social policies more at the level of the EU or conceive them as a shared responsibility. Their EPP colleagues are more in favour of an exclusive authority of the member states.

Respondents from candidate member states follow the trends of their party colleagues in the member states, but they show a little more sympathy for EU responsibility or shared responsibility than their colleagues from the member states.

Striking is that the social democratic respondents in the European Parliament are less prepared than their colleagues in the national parliaments to take social policies away from the exclusive authority of the member states. National members of parliament seem to be more pro-European than their EP colleagues. That leads us to the following paradox: usually, national members of parliament fear a large limitation of their authorities by the EU yet they are the most willing to attribute these authorities to the EU (exclusively or shared). The EP members of corresponding political groups systematically prefer making certain social policy aspects an exclusive responsibility of the member states.

It would be dangerous to immediately try and find a reason for this paradox. Still, we will attempt to give a possible explanation. As a consequence of the economic integration and the influence thereof on traditional social policy aspects, the national members of parliament increasingly sense their powerlessness in social matters. It is their experience that when social security remains a national matter and economics a European one, a conflict between social and economic would immediately create a conflict between national and European. The European, hence the economic aspect, usually takes precedence. The national members of parliament realise that this vicious circle can only be broken by making Europe show its colours on a social level. On the other hand, the European Members of Parliament feel powerless as well where social matters are concerned. They fear it will be very difficult to obtain a wide consensus regarding social policy matters. Their experiences with colleagues from different member states has shown them that the breaks concerning social policy collide far more often with national boundaries than with European political families. The conclusion we could come to, should this analysis prove to be correct, is that we must at least transcend this general powerlessness on a social level. The real opposition will not be Europe or the member states, but the European Union should have more authority to allow the member states to implement their authority in a more efficient way.

The second question concerned the importance of the different institutions in the decision-making process for future social security policies. More specifically, we asked which bodies should have more and which ones should have less power when deciding about social policies compared to their current contribution. Especially the respondents from European Parliament would like to increase the role of the commission, the Members of Parliament from candidate member states are satisfied with the current importance of the European Union whereas national MPs would prefer to reduce the significance of the Commission. Remarkably though, the national MPs of the member states want to limit the role of the Council of Ministers in the future whereas other groups of respondents are quite satisfied with the current role of the Council in the social decision-making process. All respondents would like to increase the role of European Parliament. The Members of European Parliament as well as members of the parliaments of the member states prefer a status quo where the role of the social partners is concerned; most in favour of a larger responsibility of the social partners are the respondents from the candidate member states. We see an analogue pattern for the role of the regions in decision-making processes. Surprisingly, especially the members of European Parliament and to a lesser extent (yet still more than half of them) the respondents from the candidate member states would like to see the role of the national parliaments in European social decision-making increased. A slight majority of the respondents from the national parliaments of the member states are in favour of a status quo instead of giving more authority.

When we look at the answers given to the second question concerning the political orientation of the respondents, we can only find one main divergence, i.e. for the role of the social partners. Whereas social democrats and members of the European People's Party want more significance for the social partners, the liberals largely prefer a status quo or a decrease of importance for the social partners. That result is probably less surprising.

The main conclusion for the answers to the second question seems to be that there is wide support for a larger role of the European Parliament in social matters than it has today.

### **3. The Vision of the Belgian Minister of Social Affairs**

In a paper he presented at the Max-Planck-Institut für Gesellschaftsforschung in Cologne, Belgian Minister of Social Affairs Frank Vandembroucke gave his point of view of what the Convention should do for social protection and the European Union.

It is rather difficult to give a short summary of the opinions and suggestions of the minister because we are very likely to unwillingly wrong the ideas of the Minister of Social Affairs. I will give it a try anyway. I will mainly use the summary conclusion at the end of the paper and the press release given by the minister. I shall not discuss parts of the exposé that are exclusively related to aspects of social protection that are not linked to social security in a wider sense.

In his exposé at the German Max Planck Institute Minister of Social Affairs Frank Vandembroucke presented a vision of Europe's social policy to which he linked five specific proposals for a social adjustment of the current European Treaty. He wanted:

- (1) To point out that the Convention is a unique (and presumably the last) occasion to give social protection policies a fixed spot on the agenda of the European Union;
- (2) To formulate specific textual proposals concerning the future European Treaty, which he considers having priority, that are feasible provided there is sufficient political pressure;
- (3) To plead for a coherent vision of the role of the Union where social protection is concerned.

Vandembroucke says he will use this text to insist with his colleagues of the government, the members of the Convention and colleagues in other member states that those who think Europe should also have a social side must now clearly make their choices and jointly support a number of priority points of action. The minister did not want to stress the details of his suggestions; the legal texts he proposes are a practical illustration of how things could be formulated.

Vandembroucke's vision is based on two facts:

- The de facto loss of grip of the national authorities on social matters because of the integration of the European Market without an equivalent on a European (social) policy level. The problem will continue to grow because of the expansion, which will make it increasingly difficult to take the hurdle of unanimity during the decision-making process;

- Entering the European principles of free circulation and fair competition in areas that have been exclusively controlled by (national) social security. This could also lead to a more obtrusive attitude of the (unified) insurance market.

Of course, we can argue about nuances. Yet our earlier investigations confirm these phenomena: the undermining of the national authorities, without an expansion of European powers, the deadly effect of the required unanimity and the invasion of social matters by free economic circulation and competition principles.

Vandenbroucke does not find the answer in increasing the powers of the European Union and especially not in harmonisation for the sake of it. For him, the diversity of social protection systems should be maintained, yet member states should be encouraged to try to achieve a number of goals to shape the European social model.

This brings the minister to five more specific proposals:

- The incorporation of the Charter of Fundamental Rights in a constitutional treaty;
- The incorporation of current article 3 of the Treaty on the Overall Objectives of the Community, taking into account the requirements of social protection, especially in view of the promotion of a high quality, accessible and financially feasible social protection system that is based on solidarity.
- The creation of a legal basis in the Treaty for the open co-ordination method that should be applied in social matters. The results of the open co-ordination process should be incorporated into the Broad Economic Policy Guidelines;
- The replacement of the required unanimity by a qualified majority, at least where the co-ordination of national social security systems for the benefit of migrating employees is concerned;
- The exclusion of Collective Labour Agreements aiming at social policy objectives that are related to European laws on restrictive practices as well as the equal treatment of companies that deliver socially important services or general economic services. As such, the jurisdiction would already have been incorporated into the text of the Treaty itself.

It is not our intention to give an elaborate analysis of each of these proposals. Some comments:

From any point of view, the first two proposals are of a more symbolic nature; we can agree with them yet their legal vagueness could lead to a number of jurisprudential surprises. The minister says the citizens will not derive legal claims or “subjective rights” from the social basic principles, yet what will they derive then? Is he sure the European Court of Justice does not have a different opinion? Many years ago, the highest Irish judges started to interpret legal stipulations of the constitution in a completely different way than was explicitly intended.



The same can be said for the overall social objective of the Union. The minister refers to the problems encountered when incorporating social arguments such as experienced in the cases Kohll and Decker and Smits-Peerebooms. But will the general description of a social goal remedy that? And if so, which are the implications thereof? It is all very beautiful and social but we should speak openly, otherwise many authors and politicians, citizens and organisations will be very indignant again when the European Court of Justice gives an interpretation to the open terms that they don't like.

The third proposal intends to incorporate the "open co-ordination method" into the Treaty. After the Commission stopped discussing possible ways of harmonisation and left the concept of "convergence" alone, they started to suggest "open co-ordination" as the manner par excellence to deal with the tension between the diversity of the social protection systems on the one hand and the continuous economic, monetary and political integration on the other hand. At least the Commission managed to keep the debate on social security alive on a European level. In lack of unanimity and a solid legal basis to intervene on a European level, it was necessary to switch to a 'softer', lighter version of member state collaboration. They exchange information, assess each other's plans and experiences and sometimes they give out recommendations. Now, Minister Vandenbroucke suggests incorporating this open co-ordination method into the Treaty. I would somehow find that useless because that method was nothing but an Ersatz solution faute de mieux. If it makes sense to transform the current extra-treaty custom of the open co-ordination method into a recognized instrument of the treaty, it would be best to clearly define this method of open co-ordination and to provide the necessary guarantees of transparency and participation. We should have the ambition to ask the true questions and to provide means in the Treaty to find answers for them:

- Which type of minimum social protection do we want to guarantee for all citizens of the European Union?
- Which principles do we want to implement in all member states on a social level? In other words, what is the content of the often mentioned and rarely defined 'European social model'?
- What do we do when a member state wants to live up to its social obligations but claims to be unable to do so? Should we implement a special mechanism of solidarity?
- What do we do when a member state does not comply with one of the established social principles (minimum rights and content of the 'European Social Model') because that member state supports a different policy?

The Convention probably does not intend to provide answers to all these questions but to create channels through which answers can be found. I do not believe that the Treaty can recognize the open co-ordination method as a serious approach of real-life problems. Should the open co-ordination method, which is very fashionable nowadays, be incorporated into the treaty, that would hinder a more solid approach. It would also increase the tension between the publicly proclaimed higher visions of a ‘European social model’ and what people see in their daily lives. An enlargement of the discrepancy between theory and practice, European discourse and national reality, politics and citizens will probably be the result thereof. For Vandembroucke, the open co-ordination method is a chance for the Union to tell a different story about social protection in the candidate member states than that of the World Bank and the International Monetary Fund. Those who follow the reality of these countries closely will know that this story will be shouted down by international financiers and that the only way to keep these countries on the social track is to link their membership of the Union to compliance with certain social standards. These should be given a clear, not a soft definition and should be maintained in old and new member states.

The fourth proposal of Vandembroucke is aimed at the replacement of the required unanimity by a qualified majority, at least for the co-ordination of national social security systems for the benefit of people who use their right of free circulation throughout the Union. We do agree with his proposal, yet we would like to use this opportunity to adjust that specific article 42 to the evolutions that have occurred since 1958: we no longer need a stipulation in the Treaty for the co-ordination of social insurance for the benefit of migrating employees (subjects of a member state) and their families using specific techniques but a treaty basis for the co-ordination of the social security of all people who migrate throughout the Union.

The fifth proposal was inspired by a number of jurisprudential problems caused by collective agreements providing for supplementary retirement schemes or health insurance. That caused a conflict with private suppliers of such products. The suggested equivalence of services implying a general social mission with the general economic missions seems fine with me. The exclusion of ‘agreements made within the framework of collective negotiations and aimed at a social policy goal’ of the domain of laws on restrictive practices seems to be less exact since we cannot approach agreements made between employers (organisations) and organisations of employees as agreements between companies. But should we allow them to just disregard all laws on restrictive practices in their agreement as well? More specific: it should be possible for a CLA to make a supplementary retirement scheme compulsory for all employers and employees involved. The CLA partners are free to develop their own schemes. When they use a private insurer, an insurance company, for the implementation of the retirement scheme or health insurance plan, they will have to respect the rules for fair competition when selecting the insurance company or companies that will execute the arrangement. The suggested text seems to give a green light yet that seems to be exaggerated for us.

#### **4. Which social security accents are required for the future activities of the Convention?**

Which accents do we need and do we want for social security during the future activities of the Convention, taking into account the trends we concluded from our poll?

Before answering that question, in all fairness, we have to remark that it is still not clear whether there will be room for the discussion of content-related aspects of texts and to adopt proposals. Although that may seem evident, the *modus operandi* of the Convention may decide otherwise.

We still need to find out how the Convention can function optimally where social matters are concerned. We will also need to form a wide front with all members of the Convention as well as of the Union because, in the words of former Commission president Delors “Europe must be social or it shall not be my Europe [translation]”.

Allow me to formulate a number of provisional conclusions:

- The legal basis for the co-ordination of the social security systems in the member states should be reviewed for the benefit of all those migrating within the Union.
- Symbolic interventions, such as the planned incorporation of basic social rights or concerning the objectives of the Union, may have a positive impact yet their legal effect remains unsure.
- Should the open co-ordination method be transformed into a Treaty instrument, we must define it better. The transparency of the process must be guaranteed. Still, the open method cannot be the ideal answer to the pressing questions caused by the tensions between an integrated economic Europe and a non-integrated social Europe.
- It is of utmost importance to shape the core elements of a social Europe, of what makes Europe so different from e.g. the United States or Japan, in a legally enforceable way. Only then can the entry into the European Union imply efficient support for social protection in the candidate member states at a time in which these countries are threatened by ultraliberal tendencies.

- When we take into account of the current political priorities or plain possibilities, we find a wider European authority concerning health care to be the most evident.

It would not be convincing to discuss the social dimension of the European unification as well as its crucial importance without granting the European Union the authority to take these discussions beyond a number of informal principles or an open method of co-ordination. That does not alter the conclusion that for a wide majority of the responsible politicians in Europe as well as for us, the primary responsibility for social security lies with the member countries and their states. However, when necessary or appropriate the European Union should be able to intervene effectively, to safeguard the national social security zone on a European legal level. Often, the choice is not between *or* Europe *or* the member state. We must decide whether we will give Europe merely an economic shape or whether we, member states and the Union together, have the ambition to create a multiform yet characteristic European social model.

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