CURRENT DEVELOPMENTS

EUROPEAN COMMUNITY LAW

Edited by Joe McMahon

I. Free Movement of Goods

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I. FREE MOVEMENT OF GOODS

A. MARKET MANAGEMENT

Since the expiry of the deadline for the completion of the internal market at the end of 1992, the Commission has shifted its focus away from piloting an intense rule-making burst through the Community legislative system. As part of its quest to establish reliable methods for managing the internal market, the Commission is now overtly concerned to improve the quality of those adopted laws, for example by securing simplification and consolidation, and it is intent on investigating more rigorously how a closer match may be made between the relevant laws on paper and their practical application on the ground.[1] In short, the Commission is focusing its energies on ensuring that the legal framework which has been adopted is treated by commercial operators and consumers in the market as a viable and trustworthy basis for an integrated market. Accordingly much of the Commission's work since the last survey of the law relating to the free movement of goods has been at first sight relatively unglamorous. It largely concerns soft law initiatives and attempts to improve administrative co-ordination designed to underpin the practice of market management, both vertically (Commission/Member State) and horizontally (Member State/Member State). This forms the core of the strategy for the internal market covering the next five years, published on 24 November 1999.[2] Nonetheless, even though these initiatives might not immediately strike the lawyer accustomed to a fountain of legislative activity as worthy of close inspection, it is clearly the case that the Commission regards its medium-term mission to stabilise the management of the internal market as best pursued by a gradual approach designed to improve practical compliance.

The "Single Market Scoreboard", periodically published by the Commission in an attempt to name and shame defaulting Member States so as to prompt improvement in their practices, has revealed improving rates of compliance with

1. See e.g. on "Better lawmaking" COM (97) 626, COM (98) 715, COM (99) 562; and on the simplification programme, COM (99) 88. For survey of earlier initiatives see (1999) 48 I.C.L.Q. 217, 219, (1997) 46 I.C.L.Q. 704, 710; and Weatherill, "New Strategies for Managing the EC's Internal Market" (2000) Current Legal Problems (forthcoming).

2. COM (99) 642.

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the obligation to transpose Directives. This trend appears to be at an end. The Scoreboard published on 22 May 2000 states that 13 per cent of internal market Directives which had required transposition by 15 April 2000 remained untransposed in at least one Member State (194 out of 1489). Four Member States – Greece, Portugal, France and Luxembourg – have failure rates exceeding 4 per cent. Finland holds the gold medal, with only 1.4 per cent of Directives outstanding. The Scoreboard remains limited in its capacity to tell the complete story of Member State fidelity to obligations undertaken at EC level for it records only compliance "on paper" and tells us nothing of practice, but the current sluggish record on rooting out obstinate violations even of the obligation to adopt implementing legislation was described by Commissioner Bolkestein as "disheartening".

B. THE TREATY PROVISIONS ON FREE MOVEMENT

Academic European Community lawyers might occasionally deserve the criticism that their accounts of the shaping of the EC legal order tend to over-emphasise the decisions of the European Court at the expense of scrutiny of the network of secondary legislation which has been constructed over the last 40 years and the associated institutional structures established for the preparation and implementation of legislative initiatives. Nevertheless the field of the free movement of goods has always remained one in which the profile of the Court is properly treated as high, and this is particularly true of late as the commitment to the adoption of binding legislation which characterised the pre-1992 phase has been displaced by the new emphasis on improving the quality of laws and their effective enforcement. The practical, "grass-roots" endeavours of the Commission, though certainly significant, tend to leave the limelight to the continuing contribution of the Court in fixing the ground rules of the internal market game, and in the period under review the Court has handed down several judgments which deepen our understanding of its approach.

No case decided by the Court has attracted more attention than "*Cassis de Dijon*" in which the Court established that disparities between national laws may themselves be treated as measures having equivalent effect to quantitative restrictions potentially caught by Article 28 EC.[3] A State is able to apply a technical regulation to exclude from its market a product made or marketed in another State where traditions or tastes are different *only* provided it is able to show a sufficiently strong reason for its local rule which operates in the public interest and is of a sufficient weight to override the impetus towards market integration. This principle of "mutual recognition", albeit not absolute in character, serves to deregulate the Community-wide market by opening up national markets to products originating in other States with divergent regulatory regimes and, in so far as national-level public regulation of the market is superseded by commercial freedom and a wider consumer choice among newly available products, there is a strong whiff of private autonomy at the expense of the "nanny State" pervading this line of jurisprudence.

3. Case 120/78 *Cassis de Dijon* [1979] E.C.R. 649.

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Two distinct issues have dominated the development of the case law over the two decades that have passed since the Court decided *Cassis de Dijon*. First, what type of barrier to trade must be shown before the regulating State is called on to demonstrate a justification for its intervention which is recognised and accepted under Community law? And second, what is the nature of that process of justification, under which the advantages of trade integration are weighed against the values that underpin the preferences of the national regulator?

1. Identifying a trade barrier potentially subject to Article 28

On the first point, the *Cassis de Dijon* case was a perfectly clear example of how the setting of a technical standard may obstruct cross-border trade. The French-made product was excluded from the German market simply because it complied only with the local French practice and not with the (different) German rule. However, the Court took a notorious wrong turning in its case law in the 1980s when it subjected to the requirement of justification even national rules that inhibited the exercise of commercial freedom which had no direct association with the process of European market-building. In the so-called "Sunday Trading" cases rules restricting shop opening hours were treated as contrary to Article 28 unless shown to be justified even though, as the Court's judgment itself reveals, the ban "applied to domestic and imported products alike and did not put imported products at any disadvantage".[4] There was a severe risk that Article 28 had been pushed beyond its function in eliminating impediments to the integration of the markets of the Member States towards a general charter for attacking any inhibition on economic freedom, which in turn threatened to destabilise the division of competence between the Community and its Member States. So the Court took a step back. In *Keck and Mithouard* it was confronted with the submission that French rules forbidding resale of particular goods at a loss fell foul of Article 28, and it took the opportunity to reject the deployment of the law of free movement of goods in circumstances which were frankly remote from the quest to construct an integrated market.[5] The Court stated that "the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States . . . , provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States".[6]

The quest to understand precisely how this formula would and should be applied engaged the furious attention of commentators,[7] but at a general level it

4. Case 145/88 *Torfaen BC* v. *B & Q plc* [1989] E.C.R. 765, para. 6 of the judgment. The "follow-up" is Case C–169/91 *Stoke on Trent and Norwich City Councils* v. *B & Q plc* [1992] E.C.R. I–6635.

5. Cases C–267 and C–268/91 *Keck and Mithouard* [1993] E.C.R. I–6097.

6. *Ibid*., para. 16 of the judgment

7. For a recent discussion which instructively critiques some of that which has gone before, see Oliver, "Some Further Reflections on the Scope of Articles 28–30 (ex 30–36) EC" (1999) 36 C.M.L.Rev. 783.

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was plain that the Court had effected a retreat in its reading of the scope of Article 28 and had thereby expanded the area of regulatory space left in the hands of national authorities beyond the reach of Article 28 EC. The Court went so far as to declare previous rulings overruled. It did not name them. *Cassis de Dijon* is certainly untouched.[8] But it is beyond doubt that the "Sunday Trading" cases were overruled. Such restrictions would not represent trade barriers of the type requiring justification at all. Irrational though the rules were, it would be for national constitutional arrangements to correct them.[9]

So glittering is the prize for the trader able to require a regulating State to shoulder the heavy burden of having to justify the constraints it chooses to place on commercial freedom that the Court has inevitably been pressed to clarify the extent to which the ruling in *Keck* shelters States from the obligation to defend their practices from attacks loaded with the ammunition of Article 28. Whatever else *Keck* achieved, it did not stem the flood of inquiries from national courts about the interpretation of Article 28.[10] It merely shifted the groundrules. In *Schutzverband gegen unlauteren Wettbewerb* v. *TK Heimdienst* the Court examined Austrian rules requiring that sales on rounds be carried on in an Austrian administrative district only by traders with a permanent establishment in that district or in a neighbouring district.[11] The referring Austrian court explained its view that in the light of *Keck* the matter fell outwith the scope of Article 28, for the rule was not product-specific but rather regulated a particular mode of selling and applied equally to all traders operating in Austria. It merely restricted the size of the pool of authorised persons (just as *Keck* restricted the pool of permitted sales devices). The European Court was not persuaded. Traders based in other Member States would have to set up a permanent establishment in Austria in order to comply, while local operators would already meet the requirement of permanent establishment. The imposition of additional costs which this would involve meant that the rule "in fact impedes access to the market of the Member State of importation for products from other Member States more than it impedes access for domestic products". *Keck* notwithstanding, this was a barrier to inter-State trade and the Court saw no justification for it. The misperception of the referring national court is instructive and although the European Court was allowed to correct it in this instance, one might legitimately fear that an unduly narrow, literal reading of *Keck*, showing excessive reverence for the definitional role played by the imprecise notion of a "selling arrangement", might lead some national courts to reject well-founded submissions based on Article 28 EC without even involving the European Court.

The theme of inquiry into what type of restriction on trade in the EC is required before a national regulator falls under an obligation to justify choices made against the standards recognised by EC law is sure to endure. It is submitted that a judge should examine each case without preconceptions in order to discover

8. See e.g. Case C–315/92 *Clinique* [1994] E.C.R. I–317 and Case C–470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln eV* v. *Mars GmbH* [1995] E.C.R. I–1923.

9. For an important reading of the free movement case law under a constitutional perspective, see Maduro Poiares, *We, the Court* (1998).

10. See this survey, (1997) 46 I.C.L.Q. 704, (1996) 45 I.C.L.Q. 213, (1994) I.C.L.Q. 207.

11. Case C–254/98 [2000] E.C.R. I–151.

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whether the national measure in question exerts a sufficiently damaging impact on the dynamic process of market-building in Europe to require justification. Legal formulae that direct that attention be paid to selling arrangements, impediments to market access or to the remoteness of the rule from the process of integration should be interpreted as reflecting this underlying economic and social rationale.[12]

2. Justifying a trade barrier

Once it is established that a trade barrier of the type required to cross the threshold is at stake it is for the regulating State to justify its practices. This is notoriously difficult. The burden is on the State.[13] And it is often plain that the challenged practices constitute no more than the deadwood that accumulates over time on the statute books of any country and have no place in an integrating late 20th and early 21st century European market. In any event, in the vast majority of cases the Court is evidently highly sceptical of the justifications advanced before it, as is well illustrated by *Cassis de Dijon* itself in which wholly unconvincing claims were made on behalf of the German authorities about the need to suppress the availability to consumers of untypically weak imported alcoholic drinks.

The Court's readiness to uphold private autonomy by using Article 28 as a lever to eject the public regulator from the market has the potential to become acutely sensitive in harder cases in which the Court may be perceived as using Article 28 to ride roughshod over local regulatory preferences which have been validated by domestic democratic processes. This draws attention to the intriguing issue of measuring the room that Article 28 leaves to permissible protection of specific local preferences which restrict trade—even if elsewhere in the Community such preferences are of little or no concern. The Court has insisted that it does not use the law of free movement to drive down regulatory protection to the lowest common denominator found among the Member States."[T]he fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law".[14] *Cassis de Dijon* does not enshrine a principle of absolute mutual recognition or unqualified home country control. Regulatory diversity among the Member States is in principle respected (pending possible legislative intervention by the EC). However, in practice a regulating authority must persuade the Court that its particular regulatory eccentricities are underpinned by an adequate justification and one may readily suppose that this will be difficult where other States show no comparable concern to intervene. Germany in particular has rarely succeeded in persuading the Court that its uniquely interventionist system of unfair competition law serves an interest of sufficient weight to prevail when

12. Some of these issues also arise in connection with the development of the law of free movement of persons and services, although they neither are nor should be necessarily resolved in the same way as prevails in the area of goods. See e.g. Case C–190/98 *Volker Graf* v. *Filzmoser Maschinenbau GmbH* [2000] E.C.R. I–513, and see O'Keeffe and Bavasso, Ch. 34 in O'Keeffe (ed), *Judicial Review in European Union Law: Liber Amicorum Gordon Slynn* (2000).

13. Case 227/82 *Leendert van Bennekom* [1983] E.C.R. 3883.

14. The quote is taken from a case concerning the free movement of services, Case C–3/95 *Reisebüro Broede* v. *Gerd Sanker* [1996] E.C.R. I–6511; see in connection with goods Case 53/80 *Eyssen* [1981] E.C.R. 4091.

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shown to obstruct cross-border trade. Probably rightly so—European market integration brings regulatory reform and the consumer interest should be assessed in a context extending beyond the setting of a purely national market. But where are the limits of deregulation?[15]

In *Estee Lauder Cosmetics* the Court was asked to decide whether the suppression of a practice under national rules as "misleading" could be justified in circumstances where the intervention impeded cross-border trade.[16] The Court observed that "it is necessary to take into account the presumed expectations of an average consumer who is reasonably well informed, reasonably observant and circumspect".[17] This benchmark is capable of being applied as a general Community standard which deprives local regulators of the competence to obstruct trade simply because they consider their own consumers to be rather less attentive than the Court reckons is the "average consumer". However, the Court added the qualification that "social, cultural or linguistic factors" may justify special local anxiety about particular practices tolerated elsewhere.[18] The Court gave every indication that it is becoming rather fed up with being asked (in particular by German courts) to dot every i and cross every t in these cases of consumer confusion. German case law requires 10–15 per cent of consumers to be misled before intervention is justified; does, the Landgericht in Cologne inquired, EC law demand a higher percentage? The Court tersely asserted that it is for the national court to decide the appropriate percentage "in the light of its own national law", if appropriate after drawing on expert opinion or a survey of public opinion. By contrast in *Verein gegen Unwesen in Handel und Gewerbe Koln* v. *Adolf Darbo AG*, in which Article 28 case law was cited in a case dealing on its facts with Directive 79/112 on the labelling of foodstuffs, the Court repeated its test of an "average consumer". However, it felt that it had before it sufficient information to declare that its benchmark consumer would not be misled by the presence on a label of the term "naturally pure" simply because the jam contained pectin gelling agent, the presence of which was indicated in the list of ingredients, which (the Court stated) the consumer would read.[19] This ruling echoes that in *Mars* in which the Court was as terse as it was to be subsequently in the above-mentioned *Estee Lauder* decision, except that its brief instructions insisted the "reasonably circumspect consumer" would not be misled by the challenged marketing practice, allowing no room for the national court to make up its own mind on the compatibility of the trade barrier with Article 28.[20] In *Geffroy* the Court made it explicit that it would leave to the national court the decision on

15. For recent surveys, see Weatherill, "Recent case law concerning the free movement of goods: mapping the frontiers of market deregulation" (1999) 36 C.M.L.Rev. 51 and Poiares Maduro, "Striking the elusive balance between economic freedom and social rights in the EU", Chap. 13 in Alston (ed), The EU and Human Rights (1999).

16. Case C–220/98 [2000] E.C.R. I–117.

17. Case C–210/96 *Gut Springenheide* [1998] E.C.R. I–4657 is cited as the source of this test; a less elaborate version of it may be found in the still earlier ruling in Case C–470/93 *Mars*, *supra* n. 8. The test has also been deployed to determine whether a trademark is apt to mislead: e.g. Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] E.C.R. I–3819.

18. In his Opinion Advocate General Fennelly makes more effort than the Court to explore what these may constitute.

19. Case C–465/98 judgment of 4 April 2000.

20. Case C–470/93, *supra* n.8.

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whether labelling is likely to mislead consumers unless the information at its disposal in Luxembourg is adequate and the solution clear.[21]

C. NOTIFICATION OF DRAFT TECHNICAL REGULATIONS

The Commission's emphasis on effective market management, mentioned above, includes a quest for transparency. Directive 98/34, which superseded Directive 83/189, provides for Member States to give advance notice to the Commission and other Member States of plans to introduce new product specifications.[22] This is an "early warning system", designed to forestall the introduction of trade restrictions rather than having to tackle them *ex post facto*, and Member States are required to refrain from applying planned measures falling within the scope of the Directive for a defined standstill period. The Court decided in *CIA Security International SA* v. *Signalson SA and Securitel Sprl* that breach of the procedural obligation to notify robs the measure of enforceability in proceedings before national courts involving third parties.[23] Accordingly a trader was unable to rely on Belgian law to secure a court order against another trader dealing in products that were not in conformity with a Belgian technical regulation that had not been notified to the Commission. An ingenious attempt to exploit this ruling failed in *Johannes Martinus Lemmens* where the Court ruled that a conviction for driving while drunk could not be challenged on the basis that the equipment for recording the level of intoxication was designed according to standards that had not been notified under the Directive.[24] This was a step too far and the Court observed that failure to notify rendered regulations inapplicable only inasmuch as they hindered the use or marketing of non-conforming products. The latest case in this series adheres to this rationale, yet it is rather surprising in its result. It is *Unilever Italia SpA* v. *Central Food SpA*.[25] Unilever had supplied Central Food with a quantity of virgin olive oil. Central Food rejected the goods on the basis that they were not labelled in accordance with a relevant Italian law. This law had been notified to the Commission but Italy had not observed the Directive's "standstill" obligation. Unilever submitted that the law should not be applied in the light of the ruling in *CIA Security* and sued its reluctant customer for the price of the goods. This, then, was a contractual dispute between private parties. The Court pointed out that were the Italian rules applied they would have the effect of hindering trade in a product not complying with the rules. The Court acknowledged that its own case law denies that a Directive can of itself impose obligations on an individual, but stated that that case law does not apply where violation of

21. Case C–366/98 judgment of 12 Sept. 2000.

22. (1998) O.J. L204/37, itself amended by Directive 98/48 (1998) O.J. L217/18. See Weatherill, "Compulsory notification of draft technical regulations: the contribution of Directive 83/189 to the management of the internal market" (1996) 16 Y.E.L. 129, Jans, "National Legislative Autonomy? The Procedural Constraints of European Law" L.I.E.I. [1998/1] 25 and Weatherill, "A Case Study in Judicial Activism in the 1990s: the Status before national courts of measures wrongfully un-notified to the Commission", Chap. 31 in O'Keeffe (ed), *supra* n. 12.

23. Case C–194/94 [1996] E.C.R. I–2201; see (1997) 46 I.C.L.Q. 704, 709

24. Case C–226/97 [1998] E.C.R. I–3711; see (1998) 48 I.C.L.Q. 217.

25. Case C–443/98 judgment of 26 Sept. 2000.

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the obligations of notification arising under (what was) Directive 83/189 renders a national measure inapplicable. The Court asserted that the Directive "does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. It creates neither rights nor obligations for individuals".

The reasoning of the Court on this point is surprisingly brief. It is at least arguable that this decision marks an extension in the legal effect of an unimplemented Directive in proceedings involving private parties. *CIA Security* had been capable of being regarded as a case involving a quasi-regulatory power placed in the hands of a private party under Belgian law, but this explanation has been exposed as inadequate in the mind of the Court in *Unilever*, a case concerning a contract between private parties which it treated as disclosing a factual pattern materially indistinguishable from that arising in *CIA Security*. It now seems that the Court is willing to entertain a broader notion of the private enforceability of Directives which are not observed by public authorities, even where the consequence is felt directly by another private party. Advocate General Jacobs had advised that the Court refuse to allow an individual to rely on the State's failure to comply with the procedural obligations imposed by the Directive in proceedings involving another individual, alerting the Court to the potential damage to the legal certainty of traders, but the Court's formula appears to pay scant regard to this caution. The laconic reasoning deployed by the Court in *Unilever* seems likely to generate new attempts to subvert the Court's denial of the constitutional capacity of Directives to exert horizontal direct effect. And for traders relying on statutory product specifications which have apparently been adopted in conformity with domestic procedures there is a new peril.

D. THE VALIDITY OF COMMUNITY LEGISLATION: "TOBACCO ADVERTISING"

The focus of attention in the Court's case law has long been the compatibility of *national* measures that restrict trade with the Treaty provisions governing the free movement of goods. Although it is constitutionally clear that *Community* legislative measures must themselves comply with the Treaty, there are relatively few examples of judicial challenge to Community interventions on the basis that an unlawful restriction to trade has been imposed.[26] For this reason, though there are others, the Court's October 2000 decision in *Germany* v. *Parliament and Council* demands attention.[27] The Court annulled the "Tobacco Advertising Directive".[28] It is impossible to do justice to this remarkably rich decision within the confines of this Survey and accordingly the purpose of this comment is simply to alert the reader to the principal features of the judgment. The Directive had been adopted under Articles 57(2), 66 and 100a as a measure designed to advance the building of an internal market. It imposed harmonised rules governing

26. E.g. Case C–51/93 *Meyhui NV* v. *Schott Zwiesel Glaswerke AG* [1994] E.C.R. I–3879. See (1996) 45 I.C.L.Q. 213, 217 and Weatherill and Beaumont, EU Law, 3rd ed. (1999), pp.554–56.

27. Case C–376/98 judgment of 5 Oct. 2000.

28. Directive 98/43 (1998) O.J. L213/9.

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tobacco advertising, although in content it aimed at suppressing such advertising, allowing only limited exceptions. Germany had voted against the measure in Council but it had been adopted by qualified majority vote, as stipulated in the Treaty for measures advanced under Article 100a. Before the Court, Germany argued *inter alia* that national laws in the field subject to harmonisation exerted no appreciable effect on the internal market and that the Directive was truly a measure of health policy. It therefore submitted that Article 100a was not an appropriate base for its adoption. And although the Treaty permits the Community to act in the field of public health policy the relevant Treaty provision, which was then Article 129(4) and is now Article 152(4) EC, would plainly not support the imposition of common rules of the type contained in the Tobacco Advertising Directive, for it expressly places harmonisation beyond the Community's competence under that Article.

It is settled law that the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors that are amenable to judicial review.[29] The Court has, however, applied a rather soft standard of review in the small number of cases in which it has been asked to upset the readiness of a majority of Member States to select a particular legal basis.[30] In *Tobacco Advertising*, by contrast, it annulled the measure. The Court insisted that Article 100a does not create a general power to regulate the internal market, but rather it permits the adoption of measures designed to improve the conditions for the establishment and functioning of the internal market. There is no *carte blanche* to harmonise national laws and the Court is scrupulous in expressing its fidelity to the constitutional rule that the limits of the competence conferred on the Community are defined by the Treaty. The Court was unpersuaded that the Directive actually contributed to eliminating obstacles to the free movement of goods and services and to removing appreciable distortions of competition. It did not at all deny that harmonisation policy should take account of public health policy. This indeed is clearly required under the Treaty, via (what are now) Articles 95(3) and 152(1). The objection in the case was to the extension of the prohibition to cover advertising of tobacco products on posters, ashtrays and parasols, where facilitation of cross-border trade would not be brought about by a harmonised ban. But the Court, having annulled the Directive in the light of the general nature of restrictions imposed, expressly accepted that harmonised rules banning advertising of tobacco products in magazines might be validly based on Article 95 as a contribution to fostering an integrated market. The Court has not been lured down a path which envisages the internal market being built by the EC only on the basis of market freedoms unfettered by regulatory prohibition. The banning of certain forms of advertising and sponsorship of tobacco products remains possible by legislative act under what is now Article 95. The Court has clipped the Community legislature's wings but has given it a steer towards what may be permissible in future.

29. E.g. Case C–155/91 *Commission* v. *Council* [1993] E.C.R. I–939; Case C–209/97 *Commission* v. *Council* [1999] E.C.R. I–8067. See Mischo, "The Contribution of the Court of Justice to the protection of the 'federal balance' in the EC", Chap. 5 in O'Keeffe (ed.), *supra* n.12.

30. E.g. Case C–84/94 *United Kingdom* v. *Council* [1996] E.C.R. I–5755.

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Even though the Court avoided tackling a number of awkward questions,[31] the ruling will certainly attract intense interest. The very fact that a Member State, having lost the political debate about the desirability of such intervention in Council, was willing to convert its opposition into a legal challenge to the validity of the measure demonstrates the current sensitivity to the question of demarcating the limits of Community competence. In the early days of the Community unanimous voting in Council was the norm. The veto ensured that there were no States disgruntled by perceived excessive regulatory ambition practised by their partners. The Single European Act injected qualified majority voting in Council as the norm in a number of areas of Community activity, and the dominance of "QMV" has been confirmed by extensions made to the scope of its application in the Treaties of Maastricht and Amsterdam which entered into force in 1993 and 1999 respectively. Such a voting rule is plainly vital to get things done in an expanding Community, yet it increases the likelihood of dissentient States with an incentive to craft a judicial challenge to the validity of Community measures which they have failed to block in Council. In the light of these tensions, it is submitted that the addressees of the Court's ruling in *Tobacco Advertising* should be seen as the Community's political institutions (and, via the Council, the political elites of the Member States). They have been made aware that the Court is willing to invalidate egregious excesses of legislative ambition. But the Court is also sending a message to national *courts* that it, the European Court, is serious about patrolling the limits of Community competence. This demonstrates the Court's awareness that (some) national courts have become anxious lest the limits of Community competence be treated with disdain by the Community legislature and are willing, should that occur, to perform their own national-level constitutional check.[32] Were the validity of Community law to vary State by State in accordance with the different views of local courts then the integrity of the Community legal order would be seriously jeopardised. It is therefore plausible that the Court's rigour in *Tobacco Advertising* is in part an invitation to national courts to trust it, the European Court, with the exclusive function of reviewing the validity of Community laws. It is the rise of qualified majority voting in Council which has created the political conditions in which "competence sensitivity" has spilled over into the legal arena, and there is every reason to suppose that these trends will endure as the Community wends its way further down the path of geographical and functional expansion.

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31. E.g. Advocate General Fennelly took the view that subsidiarity had no role to play in the adoption of measures under Article 95 (ex 100a), for this falls within the exclusive competence of the Community. Having annulled the Directive, the Court had no need to address this point and it did not do so.

32. See collected essays in Slaughter, Stone Sweet and Weiler, *The European Courts and National Courts* (1998).

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II. FREE MOVEMENT OF PERSONS

The Amsterdam Treaty

As mentioned in the previous note[1] the Amsterdam Treaty significantly alters the treaty structure as regards the free movement of persons. The EC treaty now has, as one of its formal activities as set out in article 3(1)(d), "measures concerning the entry and movement of persons as provided for in Title IV". The creation of a new Title IV in the EC Treaty on establishing an area of freedom, security and justice moves a corpus of subject matter[2] from the inter-governmental pillar on Justice and Home Affairs to the Treaty of Rome. The aim clearly set out is to establish, within five years, all the measures necessary to create "an area without frontiers" in accordance with Article 14[3] together with "flanking measures with respect to external board of controls of asylum and immigration" as well as "measures to prevent and combat crime in accordance with the provisions of Article 31(e) of the Treaty on European Union".[4] Co-operation between the Member States is also to be strengthened and encouraged[5] as well as measures in the field of police and judicial co-operation in criminal matters though the latter is in accordance with the provisions of the Treaty on the European Union.[6]

Article 62 requires the Council to act within five years in order to adopt, in accordance with Article 14, measures to ensure the absence of any control on persons be they citizens of the union or nationals of third countries when crossing internal borders. It also requires the adoption of measures for dealing with external borders; including rules on checks on persons; rules on visas for less than three months stay, and free movement of third country nationals for periods of under three months.

Article 63 requires the Council to adopt, in a period of five years,[7] measures on asylum and refugees and immigration policy in the areas of conditions of entry and residence and procedures for long term visas and issuance of residence permits including for family reunion purposes. It must also act on illegal immigration of illegal residents including repatriation of illegal residents and

1. Lonbay, J., "Free movement of persons, recognition of qualifications, and working conditions" (1998) 47 I.C.L.Q. 224 at 228.

2. Visas, asylum, immigration and other policies related to free movement of persons. Art. 65 deals with judicial co-operation of civil matters. As such it is beyond the scope of this note. Art. 66 requires co-operation between administration of the Member States in the areas covered by the new Title IV.

3. Art. 61 then requires that within five years measures necessary to ensure free movement of persons in accordance with Article 14 are adopted.

4. Judicial co-operation in civil matters has also been communitised; Arts 61 and 65.

5. Art. 61 and Art. 66.

6. Art. 64 explicitly reserves to Member States their role with regard to maintenance of law and order and the safeguarding of internal security.

7. Measures dealing with sharing the burden on receiving and bearing the consequence of receiving refugees and immigration conditions of entry and residence and legal residence are not subject to the five year period.

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finally also measures for dealing with the rights of residence of third country nationals.

This process is to be made easier by the adoption of the Schengen *acquis*[8] in accordance with the Schengen Protocol, but also more complex as there is scope for the UK, Ireland and Denmark to opt in to the Schengen *acquis*. There are also special Protocols giving complete opt-outs to the same three countries[9] with regard to the removal of internal frontiers and replacing them with common external frontiers.[10]

A. Limitations regarding Title IV

1. Opt-outs

Title IV is subject to severe limitations[11] by virtue of Protocols to the Treaties which allow complete opt outs to the U.K., Ireland and Denmark with regard to the removal of internal frontiers. This means that Community law is fundamentally split in this area, meaning different things in different Member States.

2. Procedural matters

Article 67 establishes that for five years the Council shall act unanimously[12] on proposals from either the Commission or from a Member State. The European Parliament is only consulted. Thus the Commission's exclusive power of initiation of measures is shared with the Member States. After the period of five years the Commission regains its exclusive right of initiative though must examine any request by a Member State for a proposal.

3. ECJ jurisdiction

Article 234 only applies in a limited form. Any courts or tribunals of Member States (against whose decision there is no judicial remedy under national law) shall request the Court to give a ruling thereon. The Court's jurisdiction is expressly excluded in relation to any measures or decisions taken under article 62(1) relating to the maintenance of law and order and the safeguarding of internal security.[13]

Additionally the Council or Commission or a Member State can request the Court to give a ruling on interpretation of this Title or acts against institutions based on the Title. Any ruling given by the Court in response to such a request

8. See Peers (1999) 48 I.C.L.Q.
9. Art. 69.
10. See Walker in (1998) 47 I.C.L.Q. 231 at 237.
11. The real dampener to this advance for the area of freedom, justice and security is found in Art. 69 which reads:

> The application of this Title shall be subject to the provisions of the Protocol on the position of the United Kingdom and Ireland and to the Protocol on the position of Denmark and without prejudice to the Protocol on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and to Ireland.

12. There are exceptions recognised in Art. 67(3).
13. Art. 68(2).

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does not apply to judgments of Courts or tribunals which have become *res judicata*.[14]

B. Mutual Recognition of Diplomas

A common position has been reached on the SLIM amendments to, *inter alia*, Directive 89/48 which was amended to incorporate the *Vlassopoulou* doctrine[15] causing the Competent Authorities of Member States to take into account knowledge and experience as well as qualifications,[16] and the notion of regulated education and training previously only found in Directive 92/51/EEC, amongst other changes.

In *Tereas Fernández de Bobadilla v. Prado Museum*[17] a Spanish art restorer with, *inter alia*, UK qualifications had worked for the Prado in Madrid on a short-term contract and was then refused entry to a competition for a permanent post on the grounds that she did not hold a relevant Spanish qualification, and that her U.K. qualification had not been recognised as equivalent (i.e. homologated).

1. Regulated profession

The first issue was to know whether the profession was regulated and thus fell within the scope of Directive 89/48/EEC. The qualification requirement arose from a collective agreement. The European Court ruled that, in principle, a collective agreement, if generally applied, could amount to "regulation". The case strongly reinforces a wide view of regulated profession, as it is clear that, whilst collective agreements only applying to a single employer might not amount to regulation, if several were affected it would probably amount to regulation. This interpretation extends the reach of the general diploma directives (89/48/EEC and 92/52/EEC).

2. Homologation requirements

The European Court of Justice went on to rule that if the general diplomas directives applied (i.e. the profession was regulated) then the homologation requirement itself would be unlawful.[18] In situations where the Directives did not apply, EC law would require a full assessment of knowledge and skills acquired by

14. Art. 68(3).

15. Case 340/89 *Vlassopoulou* [1991] E.C.R. I–2357; See Lonbay (1992) 41 I.C.L.Q. 212 at 215, and Lonbay "Picking over the bones; rights of establishment reviewed" (1991) 16 E.L.Rev. 507.

16. Common Position (EC) No. 20/2000 of 20 March 2000 adopted by the Council, acting in accordance with the procedure referred to in Art. 251 of the Treaty establishing the European Community, with a view to adopting a Directive of the European Parliament and of the Council amending Council Directives 89/48/EEC and 92/51/EEC on the general system for the recognition of professional qualifications and Council Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC and 93/16/EEC concerning the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor (Text with EEA relevance) O.J. C 119/1.

17. Case C–234/97 *Teresa Fernández de Bobadilla* v. *Prado Museum* [1999] E.C.R. I– (8 July 1999).

18. *Idem*, at para 27.

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the migrant, taking into account other courses undertaken and experience that the migrant might possess in addition to that attested by the diploma in question.

The finding that homologation of qualifications must include an assessment of the holder's other knowledge and experience is a very important and difficult development. This might be an unfamiliar task in the many countries with homologation regimes. The academic authorities (often Ministry of Education officials) performing the assessment may in fact have little knowledge of the knowledge and skills required by a particular profession to which the applicant may be applying. It is likely that new administrative arrangements will have to be made in many Member States as a result of this ruling.

One can foresee problems with this mixed approach. What if a migrant when applying for homologation does not intend to pursue a regulated profession? Then the old mode of pure "academic" assessment will be made, perhaps resulting in a negative decision. If the migrant subsequently wishes to pursue a profession, the old homologation decision would need revision to take account of the migrant's other knowledge and experience. The fears that EC law could make a mockery of academic degrees expressed in the *Aranitis* case[19] by A. G. Léger seem to be with us. In *Aranitis* he stated the Directive should not be used to "turn truth upside down by allowing persons who do not possess a certain diploma to make use of a diploma which they do not have".[20] Either one has an equivalent degree or one does not. The degree attests to well established concrete academic achievements. The ECJ would have been better to say that the national homologation decision should not bind a Competent Authority.[21] This means, in effect, overthrowing a homologation requirement, at least for non-nationals. There would be no "interference" with the national professional requirements themselves, merely in the way in which they were evidenced by non-nationals. Either way EC law in this field seems bound to upset the traditional way of doing things, by requiring a holistic view of migrants' abilities.

Either the homologation requirement is entirely rejected (in the case of a migrant seeking access to a regulated profession) or the homologation becomes more than a matter of comparing degrees, but includes the requirement to assess the total knowledge and skills acquired by a migrant in relation to a job s/he is pursuing. As mentioned above, the difficulty with the latter approach is that the administrative arrangements in place are largely not suited to this task. A degree may be homologated or not depending on which job an applicant applies for! This does not seem a rational way of dealing with the problems caused by differences in professional requirements between Member States.

19. C–164/94 *Aranitis* v. *Land Berlin* [1996] E.C.R. I–135; see further Lonbay (1998) 47 I.C.L.Q. 224 at 231.

20. Para. 45.

21. I.e. the authority that authorises the practice of a particular profession.

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C. Revision of the Transitional Directives

In July 1999 the 35 transitional Directives were revised and consolidated by Directive 99/42/EC which incorporated the principle of recognition of qualifications, previously absent.[22]

D. The Lawyers' Establishment Rights Directive

The lawyers' establishment rights directive[23] will have a revolutionary effect once properly implemented by the Member States. Implementation was due by 14 March 2000.[24]

This directive finally and unequivocally gives EU nationals who belong to designated legal professions[25] a right to establish in a host State and continue to practice under their home country title on a permanent basis,[26] if registered.[27] A right is granted by Article 2 which states that:

> Any lawyer shall be entitled to pursue on a permanent basis, in any other Member State under his home-country professional title, the activities specified in Article 5 . . .[28]

22. Directive 1999/42/EC establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications; [1999] O.J. L201/77.

23. Directive 98/5/EC of the European Parliament and of the Council of 16 Feb. 1998 to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. [1998] O.J. L77/36. See Lonbay "Lawyers bounding over the borders: the draft directive on lawyers' establishment" (1996) 21 E.L.Rev. 50–58.

24. Directive 98/5/EC, Art. 14. Less than half the Member States had notified the EC Commission of implementation measures by May 2000.

25. According to Art. 1(2)(a) "lawyer" means any person who is a national of a Member State and who is authorised to pursue his professional activities under one of the following professional titles:

Belgium	Avocat/Advocaat/Rechtsanwalt
Denmark	Advokat
Germany	Rechtsanwalt
Greece	Dikigoros
Spain	Abogado/Advocat/Avogado/Abokatu
France	Avocat
Ireland	Barrister/Solicitor
Italy	Avvocato
Luxembourg	Avocat
Netherlands	Advocaat
Austria	Rechtsanwalt
Portugal	Advogado
Finland	Asianajaja/Advokat
Sweden	Advokat
United Kingdom	Advocate/Barrister/Solicitor.

26. The Directive applies to both salaried and self-employed lawyers, subject to Art. 8 which allows practice as a salaried lawyer only if it is permissible by home State lawyers. This allows Belgium, for example, to maintain its rule against permitting employed lawyers.

27. Directive 98/5/EC Art. 3. In fact lawyers could establish in the U.K. under home State title even before this Directive without registering.

28. Art. 3(3) seeks to preserve the distinctions between barrister/advocate and solicitor in the U.K. and Ireland.

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In addition Article 2 allows possibility of integration into the local profession as a lawyer as set out in Article 10.

1. The scope of activities

The activities specified in Article 5 are very broad and include "the same professional activities as a lawyer practising under the relevant professional title used in the host Member State". It is specified that the migrant lawyer can give advice on the law of his own State, on Community law, on International law and on the law of the host Member State. Paragraphs 2 and 3 of Article 5 restrain the migrant lawyer from pursuing the full range of activities where there is a "prescribed category of lawyer to prepare deeds for obtaining title to administer estates of deceased persons and for creating or transferring interests in the land" which in some Member States are reserved to professions other than that of lawyer. In these cases the Host State may exclude from such activities lawyers practising under a home country professional title. In practice this means that in the U.K., where such activities are reserved to lawyers, migrant lawyers from countries with a notarial system can be excluded from the practice, but lawyers from the Scandinavian countries, where the practice is not reserved to a separate category of professionals, will be able to access this reserved area. This provision will lead to some anomalous situations where lawyers will be entitled to act in this sphere depending on which country they migrate to rather than on their ability.

Article 5(3) allows States to maintain the reservation of activity of "representation or defence of their client in legal proceedings"; if the law of the host Member State reserves the activity to lawyers practising under the professional title of that State then the migrant lawyer must work in conjunction with a lawyer (or *avoué*) who practices before the judicial authority in question. Pleading before supreme courts can be reserved to specialist lawyers.

Article 6 of the Directive subjects the migrant lawyer to the rules of conduct of the host Member State in respect of all the activities he pursues in its territory.[29] As Adamson[30] points out, there is logic in this provision as the lawyer has been granted the right to carry out all the activities of the host State lawyer. Such local rules must, of course, comply with the *Gebhard* conditions.[31]

Article 10 provides the rules for integration into the host State's profession. Essentially Articles 10(1) and 10(3) provide two routes into the host State's profession. Article 10(2) reserves the right of lawyers to use Directive 89/48/EEC but the main aim of Article 10 is to allow lawyers to avoid the requirement of an aptitude test. Article 10(1) allows that a lawyer who has "effectively and regularly" practised in the host State for at least three years in the law of that State, including Community law, can be exempt from the conditions set out in the diplomas directive.[32] The lawyer must furnish the competent authority[33] in the

29. Art. 7 allows the application of the local disciplinary regime and provides for communication between the host State authorities and those in the home Member State.

30. Adamson, H., *Free Movement of Lawyers* (Butterworths, 2nd ed.) p.107.

31. See Lonbay (1998) 47 I.C.L.Q. 224 at 246; noted at (1996) 33 C.M.L.Rev. 1073.

32. Directive 89/48/EEC Art. 4(1)(b) which, in fact, has allowed the requirement of an aptitude test everywhere in the EU except Denmark.

33. These are likely to be the Bars and Law Societies in the U.K.

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host Member State with proof of effective regular pursuit for a period of at least three years on activity in the law of the host Member State. This is likely to be complex to administer and poses particular problems in the U.K. which hosts three separate legal orders.

Article 10(3) allows lawyers who have been "effectively and regularly" practising in the host State for at least three years but not always in host State law also to be exempt from the diplomas directive requirements to take an aptitude test but subject to some measure of control:

(a) The competent authority of the host Member State shall take into account the effective and regular professional activity pursued during the above mentioned period and any knowledge and professional experience of the law of the host Member State, and any attendance at lectures or seminars on the law of the host Member State, including the rules regulating professional practice and conduct.
(b) The lawyer shall provide the competent authority of the host Member State with any relevant information and documentation, in particular on the matters he has dealt with. Assessment of the lawyer's effective and regular activity in the host Member State and assessment of his capacity to continue the activity he has pursued there shall be carried out by means of an interview with the competent authority of the host Member State in order to verify the regular and effective nature of the activity pursued.

In both cases there are procedural rights to be given reasons and a right of appeal.[34]

The Directive has caused fears in some Member States that ill-educated lawyers, who, under the Directive, are entitled to practice home State law with no prior assessment of their competence, might swamp them.[35] Lawyers are however subject to host State rules of conduct[36] which almost certainly will include provisions prohibiting the taking of instructions where the lawyer is not competent in the matter.

Articles 11 and 12 of the Directive deal with group practice rights. It allows members of law firms[37] to practice in a host State and use the title of the home State law firm if the host State permits "joint practise" subject, if the fundamental rules of the two States clash, to a home State "public interest" prohibition on grounds of protecting clients and third parties. Article 11(2) and (3) provide that host States must permit certain types of joint practice if certain conditions are met.[38]

34. Art. 10(4) allows the possibility of a "public policy" based refusal.

35. Luxembourg has challenged the validity of the Directive before the European Court of Justice. The Advocate General M. Dámaso Ruiz-Jarabo Colomer has dismissed their arguments. Case C–168/98 *Luxembourg* v. *Council* (24 Feb. 2000) http://europa.eu.int/jurisp.

36. By virtue of Article 6 of the Directive these will prevail over any conflicting rules for activities in the host State territory.

37. Though the definition of "grouping" in Art. 1 includes a wider category of possible bodies.

38. Art. 11(5) provides a blocking power to prevent multi-disciplinary partnerships from operating in a host State.

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The Directive has been implemented in the U.K. by a statutory instrument under the European Communities Act 1972.[39] There has been a considerable amount of technical change to local professional regulations to take account of the new category of registered European lawyer.

Lawyers can, of course, still utilise the provisions of Directive 89/48/EEC to migrate.[40]

JULES LONBAY*

III. SOCIAL POLICY

A. Introduction

Since the 1997 Amsterdam Intergovernmental Conference a sea-change in the formulation and implementation of European Union Social Law and Policy has taken place in response to the demands made by economic, political and monetary union. The evolution of EU social law is an area which has developed within a process or framework of "differentiated integration",[1] not only between the Member States, but also the regions of the EU. Since its emergence in the EU Council's Conclusions of 22 June 1984[2] the concept of a "European Social Area" has slowly been created by the processes of "Europeanisation"[3] of social policy whereby through EU-led processes a "re-nationalisation"[4] of domestic policies has taken place. The process is similar to the ideas of "re-regulation" of national law in relation to the basic economic freedoms of the EC Treaty whereby a measure of national autonomy can only be retained through European Community law standards. It is striking how the Amsterdam IGC has led to a definite shift in the paradigm of EU social policy law with distinctive aims, values, processes, new legal tools and new political actors.

The lack of a clear and comprehensive legal base authorising EU competence in the area combined with a resistance towards harmonisation of social policy issues on the part of the Member States characterises the chequered history of an EU Social Policy. The Council Resolution of 6 December 1994,[5] in rejecting an

39. SI 2000:1119 The European Communities (Lawyer's Practice) Regulations 2000 and SI 2000: 121 The European Communities (Lawyers' Practice) (Scotland) Regulations.

40. This is expressly reserved in Art. 10(2) of Directive 98/5/EC.

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1. For a discussion of "differentiated integration" see N. Walker, "Sovereignty and Differentiated Integration in the European Union" (1998) *4 European Law Journal* 355.

2. "… differences between the institutions and social policies do not preclude the implementation of joint measures aimed at gradually promoting a European social area." O.J. 1984 C175/1.

3. Snyder identifies the process of "Europeanisation" as encompassing, *inter alia,* the effects of European integration on certain fields of national law, the elaboration of EU law so as to provide a new framework for, or sometimes to even replace, national laws, the interaction of piecemeal strands of EU law with national law and finally indirect and sometimes unintended consequences of European integration in relation to national law. F. Snyder, "Introduction" in F. Snyder (ed.), *The Europeanisation of Law* (2000), p.3.

4. See the use of this term by S. Sciarra, "Global or Re-Nationalised? Past and Future of European Labour Law" in Snyder, *ibid.*, pp.269–291.

5. *Certain Aspects for A European Union Social Policy: a Contribution to Economic and Social Convergence in the Union* O.J. 1994 C368/6.

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approach based upon "rigorous approximation of [social policy] laws", realised the need for differentiated integration of social policy at the Member State and regional level. This encouraged the Commission to formulate a number of policy documents which have increasingly been regarded as laying the basis for what might now be identified as a distinctive sixth stage in the evolution of EU social policy.[6] The aim of this note is to suggest some of the distinctive characteristics of this sixth phase in the evolution of EU social policy.

B. New Law, New Processes

First, it can be argued that this new definitive stage in EU social policy is characterised by decision-making using a wide range of soft law measures at the inter-governmental level inspired by the Commission's own soft law and policy setting documents. This process creates not only new forms of law[7] but also new "Processes" which contribute to the development of a "poly-centric" approach to European integration. The emergent legal order is fluid, with what Sciarra has described as a flow of messages between centre and periphery, with the constant reassessment of global, supra-national standards against the re-evaluation of national needs.[8] It is the creation of these Processes and new configurations of political actors that I shall argue distinguishes the sixth stage of the development of Community social policy law from the fifth stage identified by Cullen and Campbell.[9]

The factors underlying the distinctive approach of this sixth stage are led by the need to harness and discipline the Member States' economic, fiscal and social policies to meet the demands of Economic and Monetary Union, alongside the different and often conflicting pressures of globalisation and demands for more local autonomy. This gives social policy an external dimension as well as an internal, local dimension. All these factors were identified by the Commission in 1993 in the "economic" White Paper, *Growth, Competitiveness and Employment*.[10]

It has taken time for the new processes to emerge. The poly-centric dimension to EU social law has been developed and maintained by a series of inter-governmental decisions taken at Summit Meetings from the post-Maastricht era of Summits at Edinburgh, Brussels, Essen, Turin and Dublin to create what are now officially described as the new "Processes" of the Luxembourg, Cardiff and Cologne Summits.

Each "Process" has a definitive objective but the processes are designed to work in tandem co-ordinating economic, political and social development in the EU.

6. See R. Nielsen and E. Szyszczak, *The Social Dimension of the EU* (1997).

7. On the need to create a typology of this new form of soft law see E. Szyszczak, "The Evolving European Employment Strategy" in J. Shaw (ed.), *Social Law and Policy in an Evolving European Law* (forthcoming).

8. *Supra* n.4.

9. H. Cullen and E. Campbell, "The Future of Social Policy-Making in the European Union" in P. Craig and C. Harlow (eds), *Lawmaking in the European Union* (1998), pp.262–284.

10. COM (93) 700.

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The first Process to emerge was at the Special Luxembourg Jobs Summit of November 1997. Here the new Title VIII on "Employment" created by the Treaty of Amsterdam was fast-tracked into operation, the aim of the Luxembourg Process being the *co-ordination* of employment policies of the Member States in order to comply with the objectives of economic and monetary union conceived at Maastricht. Article 126 EC specifically states that all employment policies must remain coherent with the macroeconomic policy of the EU and this is confirmed in Article 99.2 EC. From this a new and co-ordinated "European Employment Strategy" (EES) has emerged whereby both the EU and the Member States enjoy legislative competence. Although called an "Employment Strategy" the Process goes much further. It is the culmination and implementation of attempts by the Commission to create a different and better mix of "economic" and "social" policies in the EU which emphasises the inter-dependence of the two. This stress upon inter-dependence was central to the Commission's discourse on social policy during the 1990s but until the Treaty of Amsterdam it was not officially or constitutionally recognised as such in the EC Treaty and the political means whereby the inter-dependence could be realised was lacking.[11] However, it is argued below that despite recognition of the inter-dependence of the "economic" and the "social" the two have continued to develop under separate processes.

The agenda for the EES is essentially an "economic" strategy. Fundamentally it is based upon the four pillars of the Luxembourg Process: entrepreneurship, gender, employability and adaptability. These central pillars are expanded upon in the Employment Guidelines drawn up by the Commission and approved by the Council and Recommendations of the Council which are directed at the Member States. The implementation of these policies at the national level is through National Action Plans (NAPs) which are monitored through the scrutiny of the Employment Committee and the publication of the annual Joint Employment Report demanded by Article 128 EC.

Lawyers have raised concerns over the way Title VIII has been implemented, for example, whether *convergence* of labour market policies is the real aim of the Commission, rather than the policy of *co-ordination* which is used in Article 125 EC,[12] what are the legal rights to participation, transparency and accountability at the EU level, and in the National Action Plans, what is the legal status of the "Recommendations" which are created in Article 128.4 EC?

Despite these concerns the Luxembourg Process has gathered its own momentum and received endorsement at the global level.[13] At the EU level three

11. This is seen in the attempts to develop a co-ordinated employment and social policy (or strategy) from the Essen Council Summit 1994 onwards. Although the Commission introduced a monitoring procedure and benchmarking exercises for the Member States' policies, the lack of institutional co-ordination mechanisms and evaluation of policies reduced the EU's commitment to a "State-watching" role.

12. See M. Biagi, "The Implementation of the Amsterdam Treaty With Regard to Employment: Co-ordination or Convergence?" (1998) 14 *The International Journal of Comparative Labour Law and Industrial Relations* 325.

13. The Labour Ministers of the G8 countries, the European Commission, alongside representatives of ILO, OECD, IMF (as well as representatives from the two sides of industry) met in Washington, DC on 24–26 Feb. 1999 in a conference entitled "Labour Polices in a Rapidly Changing Global Economy". Here they endorsed the EU approach, the G8 countries seeing the EES as being an effective instrument to enhance employment.

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Joint Employment Reports have been prepared by the Commission. The Employment Guidelines have remained stable and assumed almost a normative quality. At the Lisbon Summit, 23–24 March 2000, the Commission was asked to prepare a mid-term assessment of the Luxembourg Process. Two new processes have been created to act in tandem with the Luxembourg Process. At the Cardiff Summit of June 1998 a second process was introduced, the aim this time to create a comprehensive approach to structural reforms in services, product and capital markets. Finally, the Cologne Process emerged from the Cologne Summit of June 1999 and created the European Pact for Employment, whose aim is to create a new dialogue between all actors responsible for wage negotiations, monetary, budgetary and fiscal policies.

At the Lisbon Summit[14] there was a remarkable degree of consensus between the Member States for the EU to continue to develop these Processes focusing upon the strict link between economic growth, employment and social cohesion in the new framework of a knowledge-based economy and society.[15] Claims were made in the Joint Employment Report 2000 that: "... a new paradigm is emerging, based on strengthened commitment to achieve full employment through consistent efforts promoting knowledge, innovation and social cohesion."[16]

One item on the agenda of the impending Nice Summit of December 2000 is the adoption of a new Social Policy Agenda that will steer the European Employment Strategy towards new and more ambitious goals. The shift from the Treaty of Amsterdam's aim of a "high level of employment" to the Lisbon Summit's goal of "full" employment is an ambitious target to reach. The new values inherent in this phase of EU social policy are discussed further below.

The result of these new Processes has been to involve new sets of actors, including the Social Partners and the European Central Bank, the Committee of the Regions, as well as local representatives of the two sides of industry, regional and local decision-making bodies, in new political configurations. As a result new sites of negotiation and decision-making have emerged at the EU, national, local, regional and trans-national levels.[17]

"Processes" are in effect more than a series of carefully staged, as well as *ad hoc*, meetings on the European stage. They create new *EU fora* in which new institutional actors decide upon the general policy framework and direction of EU/Community/Member State action in the political, economic and social sphere. The aim is to define, implement and co-ordinate EU strategies through a plethora of legal, political and persuasive techniques. These Processes are designed to work alongside and in tandem with the Broad Economic Guidelines

14. The title of the Summit was "Employment, Economic Reforms and Social Cohesion—for a Europe of Innovation and Knowledge". See www.portugal.ue-2000.pt/uk/docmne-main02.htm

15. "The Lisbon European Council—An Agenda of Economic and Social Renewal for Europe" contribution of the EC Commission to the Special European Council in Lisbon, 23–24 Mar. 2000, DOC/007, Brussels, 28 Feb. 2000. See also the Commission's Social Policy Agenda which uses this as a recurring theme: COM (2000) 379. This aspect of the "Europeanisation" of EU and national labour law is explored in R. Nielsen, *European Labour Law* (2000).

16. COM (2000) 551 final, p.6.

17. See E. Szyszczak, *EC Labour Law* (2000), Chap. 1.

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set out in Article 99.2 EC to which they are ultimately subservient.[18] It was agreed at the Lisbon Summit that no new Processes in addition to those now in force would be required to implement the European Employment Strategy. Since the success of the Internal Market project, setting a timetable for its completion, the EU has perhaps learnt to restrict its strategies to within defined time scales.

In addition to new institutional actors we have new decision-making processes within different tiers of the EU. Thus new sources of law are being created with different and often uncertain legal effects.[19] This in turn creates new political relationships between, within and across the Member States. The close linkage between EMU and social policy is a valuable tool for analysing the general shape and direction of the EU legal and political order.[20] Snyder has made the claim that the emergence of EMU has led to a re-contextualising and re-orientation of political, constitutional and economic powers.[21] But now the "spill-over" of the demands of EMU is seen in other EU policies, most notably EU social policy reflecting centralising and de-centralising tendencies in the emergent EU polity.

On the one hand there has been a significant expansion of *central* powers within the Euro-zone. This is seen, for example, in the transfer of monetary independence to the European Central Bank and the constraints placed upon the Member States on the conduct of fiscal policy. On the other hand, as we shall see in the next section, there has also been a countervailing tendency towards a de-centralisation of power with the emergence of new power bases at the local level.

C. New Political Actors

The official actors in the Luxembourg Process are the Member States, the Council and the European Council. The NAPs also involve a plethora of national actors, including in some cases the social partners. A new institutional actor at the EU level has emerged in the form of the Employment Committee.[22] This has a

18. Article 126 EC states "Member States, through their employment policies, shall contribute to the achievement of the objectives referred to in Article 125 in a way consistent with the broad guidelines of the economic policies of the Member States and of the Community adopted pursuant to Article 99(2)." Note the difference between the Joint Employment Report (*supra* n. 16) where an upbeat message on employment and economic growth is delivered and the Commission's sterner message in the proposed Broad Economic Guidelines (COM (2000) 214) where the message is that economic growth is weak and that the employment rate disappointingly lower than expected.

19. See S. Sciarra, "The Employment Title in the Amsterdam Treaty. A Multi-Language Legal Discourse" in D. O'Keeffe and P. Twomey (eds), *The Treaty of Amsterdam* (1999), pp.157–170.

20. See M. C. Rodriguez-Piñero Royo "Flexibility and European Law: A Labour Law Lawyer's View" in G. de Búrca and J. Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (2000) pp.219–235 and Szyszczak, *supra* n.17.

21. F. Snyder, "EMU Revisited: Are We Making a Constitution? What Constitution Are We Making?" in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (1999), pp.417–78.

22. This precedent has led to the idea for a new Committee, The Social Protection Committee, which will bring together high level officials from the Member States to act as focal points for new forms of co-operation in "modernising social protection in the EU". COM (2000) 134 final. The Commission also proposes to invite other relevant actors to participate in this process: the European Parliament, the Economic and Social Committee, the Committee of the Regions, NGOs, and social security institutions.

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consultative role but in practice has assumed a far greater interrogative role in highlighting "best practice" amongst the Member States and, by default, in not finding a Member State to be implementing good practice, a role of condemnation.[23] The process of Europeanisation has led to new configurations of actors on the EU stage in the form of new triangles between the Central Banks, Finance Ministers and representatives of the two sides of industry. These new partnerships have bestowed a new status upon these actors, particularly the social partners, endowing them with a quasi-public function in the process of European integration.[24] But also, at the same time, Title VIII has side-lined one of the big "democratic" players, the European Parliament, which has no formal role to play under Title VIII and sits at the Member State and Commission's mercy waiting to be informed of developments.

The fast tracking of Title VIII, creating not only new policy but also new forms of decision-making, new political actors and new configurations of political actors on the European stage, has led to complex new forms of European governance. These can be characterised, on the one hand, as poly-centric, non-hierarchical, often appearing loose and open-textured.[25] Another way of describing these processes is that they form a kind of "horizontal subsidiarity". This sort of subsidiarity has emerged since the 1991 Maastricht Summit and has been harnessed as a new form of power creating new configurations of local, sub-national actors to give effect to EMU, the EES and the resulting creation of a European Social Area.[26] In these new configurations of actors and processes we also see the impact of the different demands of, on the one hand, globalisation, and on the other hand, local autonomy. Globalisation has brought with it new forms of economic, social and political networks creating a new mix of public and private power. This has had a fragmenting influence, particularly in the EU where new notions of political and economic constitutions are no longer bound by rigid concepts of the State.[27]

In addition to the increased role for new political actors the demand for greater local autonomy has created a new local agenda. The emergence of an EU cohesion policy with sub-regional actors has created a forum for formal representation of local governments in Brussels but also has increased the need to integrate the regional level actors into the EU institutional structure.[28] Thus new

23. See Biagi, *supra* n.12.

24. Arguments are made that the involvement of the social partners in the Stability Pact and the agenda of improving domestic competitiveness have weakened the traditional social corporatist arrangements in Western Europe, giving way to a much weaker social agenda. See M. Rhodes, *Competitive Corporatism* (1997) and P. Teague, "Monetary Union and Social Europe" (1998) 27 *Journal of Social Policy* 117.

25. See Sciarra, *supra* n. 4.

26. See the ESRC Project *One Europe or Several?* The Dynamics of Change Across Europe, Project Emerging Boundaries of European Collective Bargaining at Sector or Enterprise Level, www.one-europe.ac.uk/cgi-bin/esrc/world/db.cgi/proj.htm+24.

27. I.-J. Sand, "Understanding the New Forms of Governance: Mutually Interdependent, Reflexive, Destabilised and Competing Institutions" (1998) 4 *European Law Journal* 270.

28. See A. Benz and B. Eberlein, *Regions in European Governance: The Logic of Multilevel Interaction,* RSC Working Paper, No. 98/3 www.iue.it/ERPA/mainfiles/../../RSC/WP-Texts/98_31.html.

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and wider frameworks of "bottom-to-top—top-to-bottom processes" are emerging based upon agreements of local administrations, social partners, public and private economic actors. For example, representative offices and lobby groups have emerged to discuss various policy issues *directly* with the Commission in the creation, for example, of "The Capital Cities Group" and "Eurocities".[29] This in turn has manifested itself in local employment and development projects. Such initiatives have been around since the "economic" White Paper*, Growth, Competitiveness and Employment*, where the then various Directorates General of the Commission developed local employment and development projects[30] and in the Territorial Employment Pacts first introduced by the then President of the Commission, Jacques Santer, in a Communication, *A Confidence Pact for Employment*.[31] The NAPs of the EES are also viewed as an integral part of these bottom-to-top—top-to-bottom processes.[32] Swyngedouw has described the interaction between the "local" and the "global" creating new forms of multi-tiered governance as a new emergent process of "glocalisation".[33] The institutionalisation of these processes in the EU, sometimes through Treaty amendment, more often through custom and practice, is yet another aspect of the *sui generis* nature of the EU system.

From a labour lawyer's perspective the use of the social partners is instrumental in achieving a degree of acceptance of the EES. The social partners have been used under Title XI to give formal effect to measures relating to the regulation of the labour market in the form of new Collective Agreements/Directives on Part-Time Work[34] and Fixed-Term Work.[35] At the formal level the integration of the Social Policy Protocol and Agreement from the Maastricht IGC into a new Chapter XI of the EC Treaty fully legitimised the role of the social partners as new political actors in the formal decision-making process of the EU. But their legitimacy was immediately questioned from a constitutional perspective in *UEAPME* v. *Council.*[36] What is surprising is the amount of academic attention[37]

29. See, for example, www.eurocities.org.

30. European Commission, *European Strategy for Encouraging Local Development and Employment Initiatives* (1995).

31. *Action for Employment in Europe, A Confidence Pact*, Doc. CSE (96) 1 final, EU Bull. Supp. 4/96, p.30. The idea behind this is that the creation of new jobs can only be enhanced by confidence built in the economic field on the basis of concerted action by the different actors in the economic, social and political field in order to establish a co-ordinated employment strategy. The idea was taken up by the European Council at the Florence Summit of June 1996.

32. See Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, *Acting Locally For Employment: A Local Dimension For the European Employment Strategy* COM (2000) 196 final.

33. E. Swyngedouw, "The Mammon Quest: 'Globalisation,' Interspatial Competition and the Monetary Order: The Construction of New Scales" in M. Dunford and G. Kaflakis G. (eds*), Cities and Regions in the New Europe* (1992).

34. Council Directive 97/81/EC of 15 Dec. 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC, O.J. 1998 L14/9.

35. Council Directive 1999/70 of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, O.J. 1999 L175/143.

36. Case T–135/96 [1998] E.C.R. II–2335.

37. See, for example, B. Bercusson, "Democratic Legitimacy and European Labour Law" (1999) 28 *Industrial Law Journal* 153.

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placed upon questions of representativity of the social partners under Title XI whereas very little attention has been focused upon the *dynamics* of their role[38] or, more important, the role of the social partners and their participation in the new European Social Area. As is also true of the European Parliament, the Social Partners are not mentioned in Title VIII but the Commission and the Council have been keen to grant them a formal, yet informal, role in the deliberations over the Employment Guidelines and the creation and implementation of the new processes. From the Joint Employment Reports it is clear that the Social Partners have been active, in varying degrees, in the implementation of the NAPs, the particular role of the Social Partners reflecting national institutional structures rather than an EU-led standard to be followed. [39]

D. The Emergence of New Rights and Values

1. The "Economic" versus the "Social"?

Throughout the history of the EU there has been a tendency to see the "economic" and the "social" as separate and often competing goals and values in the European integration project. The Treaty of Amsterdam introduces new social policy objectives for the EU, which redress the almost dominance of the "economic" over the "social" in previous versions of the Treaty. But, as the EC Treaty is keen to stress, the new emphasis upon social policy objectives is still subservient to the need for respect for competitiveness of industrial firms and the economic system of the Community as a whole. While the new EES attempts to develop the *interdependence* of the "economic" and the "social" the primary focus of the EES has been upon improving the competitiveness of the European labour market. The need to "modernise" social protection and control public expenditure is part of this agenda but the discourse on this has had its own dynamic with new, but different actors, and processes as an *adjunct* to the EES.

The "social" dimension has also been orchestrated by Commission soft law Communications. The Commission's main strategy document, *A Concerted Action for Modernising Social Protection*[40] mirrors the processes and techniques used in the EES: reinforcing co-operation between the main actors at EU and local level, the legitimisation of the creation of a "European" social protection by conferring it with a socio-political and economic identity, the creation of four pillars,[41] or axes, around which the European model will be constructed using top-down-bottom-up institutional arrangements and political actors. Although "employment" is one of the core features of the new European social model, given the different institutions and actors involved in the "social" arena this has

38. By this I mean the organisation of the social partners at the national and transnational level, how mandates are achieved, processes of consultation, re-adjustment of mandates during the bargaining process etc.

39. *Supra* n.16, Part I, 4.3.

40. COM (1999) 347. Other "soft law" during 2000 includes the following Commission documents: COM (2000) 79 *Building An Inclusive Europe*; COM (2000) 78, *Policies in Support of Employment*; COM (2000) 163, *Report on Social Protection in Europe* and COM (2000) 368, *Proposal for a Decision to the European Parliament and Council Establishing a Programme of Community Action to Encourage Co-operation Between the Member States to Combat Social Exclusion*.

41. These comprise employment, health care, old age and social exclusion.

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inevitably led to a separate dynamic and discourse emerging to develop the complementary European social policies. The EU Council for Labour and Social Affairs of 29 November 1999 added equal opportunities and the constructive use of new technologies to the Commission's proposed pillars for the new social protection policy.[42] The Council meeting also established a new body, comprised of high-level officials from the Member States. The need for such a body reflects the sensitivity of social security issues, traditionally within the domain of Member State competence, but an important factor in any attempt to create pro-active employment measures and reduce public expenditure.

The Portuguese Presidency, in tandem with the Commission, continued these new "social" processes.[43] Of significance is the Commission's important communication, *Strategic Objectives for 2000–2005, Shaping the New Europe.*[44] This Communication emphasises the need, recognised explicitly at the Lisbon Summit, to adapt to the "knowledge society" but also introduces new items onto the social agenda: pension reform and the struggle against exclusion. The latter, of course, is not entirely new since it was part of the Commission's earlier strategies and was twinned with tackling unemployment in the Essen priorities of 1994.[45] One of the achievements of the new processes is that in the past the Member States clung religiously to competence in this area whereas now, mirroring issues relating to employment and labour market policy, such issues can now appear legitimately on the EU political agenda where the new institutional arrangements with new configurations of political actors can tackle the issues. The High Level Group has met on a monthly basis during 2000 and was asked to establish a monitoring panel with indicators for monitoring social exclusion. The purpose of this is to establish European level long-term policy objectives. At the Employment and Social Policy Council meeting of 17 October 2000 the Council agreed, for the first time, a set of common objectives to combat social exclusion, which will be carried forward to the Nice IGC.[46]

42. *Council Conclusions on the Strengthening of Co-operation For Modernising and Improving Social Protection*, 226th Council Meeting of Labour and Social Affairs Ministers, Brussels, 29th Nov. 1999, 13457/99.

43. A prime concern has been the sustainability of pension schemes. One of the first mandates given to the High Level Group at the Lisbon Summit of Mar. 2000 was to prepare a study, based upon a Commission Communication, on the long-term evolution of social protection. Pensions are estimated to make up over 40% of social security budgets and all Member States face the common challenge of an ageing population. In contrast other policies from the Commission's 1999 Communication have not been followed up, for example, the Council has explicitly excluded public health issues from these processes (see COM (2000) 285), *strategies* for the new Accession of the Central and Eastern European States have not been fully refined beyond vague reference to the need to secure a balance between economic and social development in applicant States and new ground rules have not been established for alternative models for financing social security.

44. Commission Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, *Strategic Objectives for 2000–2005, Shaping the New Europe* COM (2000) 154.

45. For a wider discussion see E. Szyszczak, *EC Labour Law*, *supra* n.17, pp 17–18.

46. These four categories comprise 1. The basics (employment, good social protection, health care and housing); 2. Prevention of exclusion (use of new IT technologies, action for the disabled, prevention of debt, exclusion from school, homelessness); 3. Help for the most vulnerable (disabled, other groups, children); 4. Mobilisation of all parties (public authorities, social partners, NGOs, social responsibility of business).

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2. Social Rights and Citizenship Rights

In addition to the need to recognise the new forms of economic government, or governance, that have emerged in the EU, a complex range of processes has led to calls for new forms of citizenship and social rights. These calls have come from opposite directions, on the one side to give legitimacy to the aims of market integration and on the other side, to temper the dominance of "economic" concerns over the "social" concerns in European integration.

The introduction of a concept of Citizenship of the EU at the Maastricht IGC, whatever its numerous limitations, at least introduced a new lexicon into the official discourse on economic, social and political rights in the EU. Previously EU social law had created a central role for Courts in the formulation of social citizenship rights including procedural rights.[47] But the embryonic social citizenship, with a narrow focus upon market-based "economic" rights was easily criticised.[48]

The emergent European social area has brought with it a *concept* of a European *droit social* which has moved away from creating purely Internal Market based rights around the fundamental freedom based upon free movement of labour.[49] Post-Amsterdam we are beginning to see the establishment of a core of fundamental social and labour law rights and social values. Article 136 EC charges the Community to bear in mind fundamental social rights, particularly those rights set out in the 1961 European Social Charter and the 1989 Community Charter of the Fundamental Social Rights of Workers. However such rights are tempered by the need to maintain the competitiveness of the Community economy. The showcase of substantive rights will be the Charter of Fundamental Rights of the European Union. The once contested role of social rights has been resolved with a number of social and labour rights remaining in the final draft. But the issue of justiciability remains to be decided at the Nice Summit, and, inevitably, in future cases before the Court of Justice.

Another recent example of the emerging *droit social* is seen in the re-balancing of the "economic" and the "social" by the Court of Justice itself. In the famous statement from the *Second Defrenne* case[50] the Court introduced the concept of the "social" dimension to the Common Market into its jurisprudence, giving it an equal weight to the economic dimension. The shift in the paradigm is seen in two recent cases where the Court has altered this balance. In the first case, *Albany International,*[51] the Court recognises the equivalence of the social and economic objectives of the Treaty:

> . . . it is important to bear in mind that, under Article 3(g) EC and (i) of the EC Treaty (now after amendment, Article 3(1)(g) and (j) EC), the activities of the Community

47. See the use of horizontal direct effect of Article 39 EC in Case C–281/98 *Roman Angonese* v. *Cassa di Risparmio SpA* judgment of 6 June 2000, [2000] 2 CMLR 1120.

48. See B. Bercusson *et al.*, "A Manifesto for Social Europe" (1999) 3 *European Law Journal* 189.

49. The changes ushered in by the old Article 118A EC in the Single European Act 1987 were the legislative beginnings for such a process, although, of course, the lead was taken much earlier by the Court of Justice.

50. Case 43/75 [1976] E.C.R. 455.

51. Case C–67/96 *Albany International BV* v. *Stichting Bedrijfspensioenfonds Textielindustrie,* judgment of 21 Sept. 1999.

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> are to include not only a "system ensuring that competition in the internal market is not distorted" but also "a policy in the social sphere". Article 2 of the Treaty (now, after amendment, Article 2 EC) provides that a particular task of the Community is "to promote throughout the Community a harmonious and balanced development of economic activities" and "a high level of employment and social protection."[52]

The facts of this case concerned an attempt by a private employer to invoke the competition rules of the EC Treaty to opt-out of a sectoral pension scheme drawn up by the social partners. The Court of Justice referred to the new focus on the social partners to develop Community policy. The fact that the agreement made a direct contribution to the improvement of working conditions in the EU was used to justify the non-application of the competition rules to this area of "social" activity. The outcome of the case suggests that in certain situations the social aims of the Community take precedence over economic aims.

The second case where the Court has addressed the balance between the "economic" and the "social" is an equal pay claim concerning the exclusion of part-time workers from a German supplementary occupational retirement pension scheme, *Deutsche Telekom AG* v. *Lilli Schröder*.[53] Here the Court reviews the *Second Defrenne dicta* in the light of the subsequent case law recognising that the right not to be discriminated against on the grounds of sex is a fundamental right, the observance of which the Court has a duty to ensure.[54] In the light of this case law the Court makes the dramatic statement that:

> . . . it must be concluded that the economic aim pursued by Article 119[55] of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right.[56]

Another example showing the new alliance of the "economic" and the "social" is the Renault-Vilvoorde case. Renault attempted to close its factory in Vilvorde without consulting the Works Council. The Nanterre Court of First Instance was impressed by the references to the 1989 Community Charter of the Fundamental Social Rights of Workers in the agreement establishing the Works Council and regarded the failure to consult a breach of a fundamental right.[57] In addition to the important fundamental rights aspect to this case the impact was felt in the political and economic arena since it fostered the introduction of employment issues in the Growth and Stability Pact.[58]

Finally, another dimension to the "economic" and the "social" is found in the new idea introduced in the Treaty of Amsterdam of "mainstreaming" certain social and economic aims throughout the whole range of Community and

52. *Ibid,* para.54.
53. Case C–50/96, judgment of 10 Feb. 2000.
54. Case 149/77 *Defrenne III* [1978] E.C.R. 1365, paras 26 and 27; Joined Cases 75/82 and 117/82 *Razzouk and Beydoun* v. *Commission* [1984] E.C.R. 1509, para. 16; Case C–13/94 *P* v. *S and Cornwall CC* [1996] E.C.R. I–2143, para. 19.
55. Now Article 141 EC.
56. *Supra* n.53, para. 57.
57. See A. Moreau, "The Lessons of Renault" in P.-H.Olsson *et al.* (eds), *Transnational Trade Union Rights in the European Union* (1998).
58. See the Resolution of the European Council on the Stability and Growth Pact, 16 June 1997, OJ C 236/1 (2 Aug. 1997).

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Member State policies. This is seen, for example, in gender equality mainstreaming Article 3(2) EC: "In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women." This has been adopted in the EES where equal opportunities (relating to men and women but not race or ethnicity) are the third pillar of the EES as well as mainstreamed through other pillars.[59] A second area of mainstreaming is the task of the Community set out in Article 2 to promote a "high level of employment". Article 127.2 EC requires the objective of a high level of employment to be taken into consideration in the formulation and implementation of *all* Community policies and activities in *all* areas of Community competence. At the Lisbon Summit the Heads of State or Government altered this commitment to a goal of "full" employment.

E. Conclusion

This note was completed before the Nice IGC of December 2000 where major constitutional questions are facing the EU. From the lawyer's perspective the revision procedure of the Treaties ought to be reconsidered in the light of the evolutionary changes to which the European integration project is inevitably subject. The capacity to adapt and continually adjust the integration project to changes in the economic, social and political climate is one of the enduring features of the Western European integration project. Debates over the legal status of the proposed Charter of Fundamental Rights, optimal voting rights in the Council, the number of Commissioners and so on, fail to capture, and indeed obscure, the real need for a revision of the Treaties to embody the dramatic constitutional changes to multi-level constitutionalism which EMU and the current evolution of social policy have ushered in.

ERIKA SZYSZCZAK*

59. The Member States were slow to take this idea up, as is revealed in the Commission's 1999 Recommendations to the Member States COM (99) 442. But the 2000 Joint Report, (*supra* n.16, Part I, 4.5) suggests that there is greater interest (and success) in this field.

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