Manifesto for a Social Constitution:
8 options for the European Union

edited by
Brian Bercusson

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A contribution by the ETUI-REHS Research Group
on Transnational Trade Union Rights

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Foreword

The Constitutional Treaty proposed for ratification by the EU Member States included crucial elements recognising the social dimension of the European Union and, in particular, the fundamental social rights contained in the EU Charter unanimously proclaimed at Nice in December 2000. On that basis, the ETUC gave its support to the Constitutional Treaty.

The negative referenda in France and the Netherlands led to a process of reflection. Following the Berlin Declaration of 25 March 2007 on the 50th anniversary of the Treaty of Rome, reflection is now turning to action to revive the constitutional process.

Much attention has rightly focussed on the need to enhance the social elements of the Constitutional Treaty to ensure its appeal to the people of Europe.

Yet this encounters opposition from those who seek to narrow the debate to technocratic improvements in the efficiency of decision-making. This is unlikely to achieve the approval of the people of Europe, even less so if it is part of a project merely to promote further market liberalisation.

The ETUC stands by the social commitments of the Constitutional Treaty, not least the Charter of Fundamental Rights. These commitments led a majority of Member States to proceed to ratify the Constitution. Any retreat would undermine their consent, alienate their populations and would be opposed by the ETUC.

There are those who would be content with stalemate, or to retreat from the social commitments made in the Constitutional Treaty, arguing for a reduction in the social dimension of European integration. For example, they would advocate a technocratic "mini-Treaty", without the EU Charter, indifferent to the rising popular discontent with the

absence of social policy in the European project. Their objective is to block the road to a European Social Constitution.

However, the road is not closed. On the contrary, the Berlin Declaration's intention to revive the constitutional process offers an opportunity to both counter rising popular discontent and promote the European project by elaborating the Member States' commitment to a Social Europe.

To develop the options available towards the achievement of a European social constitution was the task undertaken by the ETUI-REHS Research Group on Transnational Trade Union Rights, comprising labour law academics from eight EU Member States – Brian Bercusson (UK) (co-ordinator), Thomas Blanke (Germany), Niklas Bruun (Finland), Filip Dorssemont (Belgium), Antoine Jacobs (Netherlands), Yota Kravaritou (Greece), Klaus Lörcher (Germany), Bruno Veneziani (Italy), and Christophe Vigneau (France), with Isabelle Schömann from the ETUI-REHS.

The ETUI Research Group has produced a range of eight options which offer to Member States the prospect of promoting a Social Europe.

1. Parts I and II of the proposed Constitutional Treaty, separated from Part III;
2. a "Social Protocol";
3. "enhanced cooperation";
4. the "Schengen" model;
5. constitutionalisation through the European Court of Justice, in particular, using the EU Charter;
6. a non-binding "Social Declaration";
7. an "interpretative" instrument;
8. inserting a reference to a legally binding EU Charter in Part I.

The options vary in their ambitions. As not all Member States may agree to an enhanced social dimension, a number of options allow for progress by those willing to go forward. Other options focus on the unanimously proclaimed EU Charter of Fundamental Rights and look to its implementation as a central pillar of a European social constitution. Political realities might produce only a non-binding Social Declaration. All eight options presented seek to promote the social dimension, the lack of which is creating disillusion and poisoning the popular desire for social welfare and security among the peoples of Europe.

The purpose of this publication is to produce options for those who wish to proceed to develop a constitutional framework for the EU. The eight options demonstrate that there can be no excuse for failure to progress, by all, most, or many EU Member States towards a European social constitution. The paths are clearly signposted. If there is a will, there are now at least eight ways…

We are particularly indebted to the authors of this publication for their hard work. Theirs is an important contribution to promoting a social constitution for the European Union.

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ETUC
General Secretary

Maria Jepsen
ETUI-REHS
Head of Research Department

Brussels, April 2007

Brian Bercusson

Introduction

1. On 25 March 2007, the 50th anniversary of the Treaty of Rome, the 27 Member States of the European Union meeting in Berlin acknowledged the need to "always renew the political shape of Europe in keeping with the times".[1] They declared their united objective of "placing the European Union on a renewed common basis (*bases communes rénovées*[2]) before the European Parliament elections in 2009".

2. The die is cast. Following the debacle of the rejection by France and the Netherlands in 2005 of the proposed Treaty establishing a Constitution for Europe,[3] a final effort is being launched.

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[1] "adapter la construction politique de l'Europe aux realités nouvelles".

[2] The *Financial Times* reported a senior aide to the German Chancellor, Angela Merkel, to the effect that: "The [German] chancellery crafted this diplomatic formulation to avoid mentioning the planned European constitution by name, something to which the Czech Republic, but also Poland and the UK had objected. 'We decided very early on that we did not want to have a hefty controversy this weekend', said another Merkel aide. 'Now is not the time. We will talk about it in June, when we have a new partner in Paris,' he added, alluding to the imminent French presidential election." "Merkel heals rift with Prague on EU celebration", *Financial Times*, 24-25 March 2007, p. 8.

[3] The Convention on the Future of Europe submitted the proposal for a Constitutional Treaty in July 2003. Draft Constitution proposed by the Convention on the Future of Europe, Draft Treaty establishing a Constitution for Europe, CONV 850/03, Brussels, 18 July 2003. This was adopted, with some amendments, by the Member States at a summit in June 2004. Treaty establishing a Constitution for Europe adopted by the Member States in the Intergovernmental Conference meeting in Brussels 17-18 June 2004, OJ C 310/1 of 16 December 2004. Although ratified by most Member States, the rejection of the proposed Constitution by referenda in France and the Netherlands in May 2005 led to a period of reflection.

3. The stakes are high. The coming months will be critical. At the press conference concluding the 50th anniversary celebrations, the German Chancellor, Angela Merkel, declared her intention that the June 2007 summit under the German Presidency should agree a road map. The new draft Treaty/Constitution is to be elaborated during the coming Portuguese Presidency of the Council so as to be ready by the end of 2007. It will be ratified thereafter by the Member States during the period up to the European Parliament elections in June 2009.

4. The Berlin Declaration asserts that the European model "combines economic success and social responsibility (*solidarité sociale*)". Will the outcome of this renewed effort to establish the EU on the foundation of a new Treaty/Constitution adequately reflect the social dimension of the EU? The European trade union movement has a major stake and an important role to play in the decisions to be made in the coming period over the social dimension of the European Union.

5. The concerns over "Social Europe" during the preparation of the Constitutional Treaty led to the inclusion of explicit social values,[4] social and employment objectives,[5] fundamental social rights[6],

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[4] Part I, Article I-2: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

[5] Part I, Article I-3(3): "The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child".

[6] Part II, EU Charter, and Article I-9(1): "The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II". Part II amended the initial Charter; see Charter of Fundamental Rights of the European Union, proclaimed at the meeting of the European Council held in Nice from 7 to 9 December 2000, and adopted by the Commission, the Council and the Member States, OJ C 364/01 of 18 December 2000.

recognition of the role of the social partners [7] and a "mainstreaming" social clause.[8] Nonetheless, anxieties about the adequacy of the social dimension of the Constitutional Treaty were highlighted in the referenda which rejected it in May 2005.

6. Shortly afterwards, in mid-December 2005, the German Chancellor, Angela Merkel, proposed adding a "social protocol" to the Constitution, though she declared this would not be legally binding. The European Parliament's Plenary debate (16-19 January 2006) on the Duff/ Voggenhuber Report[9] referred to the suggestion that "declarations or extra protocols… be added to the constitutional Treaty".[10] The German Presidency proposal of a "Protocol on the Social Dimension of Europe" was intended as a vehicle for enhanced cooperation by a "core group". A proposal along these lines was the basis of a discussion at an ETUC Workshop in Berlin on 28 March 2006.[11]

7. During this period the ETUI-REHS Research Group on Transnational Trade Union Rights had prepared a number of papers analysing the

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[7] Part I, Article I-48: "The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy. The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue".

[8] Part III, Article III-117: "In defining and implementing the policies and actions referred to in this Part, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health".

[9] European Parliament, Committee on Constitutional Affairs, *Report on the period of reflection: the structure, subjects and context for an assessment of the debate on the European Union*, Co-rapporteurs, Andrew Duff and Johannes Voggenhuber, Final, A6-0414/2005, 16.12.2005.

[10] The text of the Parliament's Resolution adopted on 19 January 2006 refers to a number of options including "seeking to clarify or add to the present text" (paragraph 28).

[11] Draft prepared by Andreas Maurer of the WSZ-Berlin proposing a text entailing a substantial broadening of competences in the social field to which Member States, who 'wish to go jointly further in the social field' can subscribe (or not).

social dimension of the proposed Constitution.[12] During 2006, the Research Group considered a number of options available to the Member States wishing to make progress towards a Constitution for the EU which recognised the importance of the social dimension.[13] A number of these options were presented and discussed at a second ETUC workshop in Brussels on 27 February 2007.

8. The purpose of the formulation of these options and their publication here is:

   a. generally, to illustrate the variety of options available to those who wish to proceed to develop a constitutional framework for the EU; and

   b. specifically, to demonstrate how the social dimension can be strengthened under the various options.

9. Eight options are presented:[14]

   1. Parts I and II of the proposed Constitutional Treaty, separated from Part III (*Klaus Lörcher*);

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[12] "Introduction" (Brian Bercusson), "Values and Objectives in the Constitutional Treaty" (Yota Kravaritou), "The Services of General Interest in the Debate on a Constitutional Treaty for Europe" (Antoine Jacobs), "The Role of Social Partners in Europe" (Bruno Veneziani), "New Challenges for the European Trade Union Movement after the Constitution" (Christophe Vigneau), "New Legal Instruments and the Principle of Subsidiarity in the Treaty Establishing a Constitution for Europe" (Thomas Blanke), "Social Competences" (Klaus Lörcher), "The European Court of Justice and the Constitutional Treaty" (Brian Bercusson), "Appendix: Comparative Tables of a Selection of Articles of the Treaty Establishing a Constitution for Europe" (Isabelle Schömann).

[13] Meetings on 15 June, 9 October and 24 November 2006 and 14 February 2007.

[14] These options were initially considered by the Research Group as a whole, and then allocated to a member of the Research Group to prepare a first draft. This draft was the subject of intensive and critical discussion, and, following further drafts, was edited by Brian Bercusson, the co-ordinator of the Research Group. Though the option is presented below under the name of the member of the Research Group who undertook to prepare the initial draft, the final version is the undoubted product of this collaborative effort.

2. a "Social Protocol" (*Brian Bercusson*);
3. "enhanced cooperation" (*Antoine Jacobs*);
4. the "Schengen model" (*Isabelle Schömann*);
5. constitutionalisation through the European Court of Justice, in particular, using the EU Charter (*Bruno Veneziani and Niklas Bruun*);
6. a non-binding "Social Declaration" (*Yota Kravaritou*);
7. An "interpretative" instrument (*Brian Bercusson*);
8. Inserting a reference to a legally binding EU Charter in Part I (*Brian Bercusson).*

10. There is a summary of the eight options, followed by a short version describing the main features of each option.

11. The remainder of this Introduction draws together some general points and identifies a number of features emerging from the various constitutional options canvassed.

Minimum/ maximum options

12. There is no clear hierarchy among all the options as to which achieves the maximum social dimension. The options aim to offer different pathways to achieving a social Constitution.[15]

13. However, some options may be seen as more ambitious than others.

14. The option of Parts I and II aims to preserve much of what was achieved in the Convention on the Future of Europe.

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[15] Though it may be, for example, that failure to agree on Parts I and II or to a Social Protocol could lead some Member States to resort to enhanced cooperation or a Schengen model.

15. The Social Protocol option would aim for this at least, and possibly more as regards those Member States party to the Protocol. Similarly, the options of enhanced cooperation and the Schengen model would take the *acquis* of the proposed Constitution as a starting point and progress from there.

16. The options focussing on constitutionalisation through the European Court of Justice and the interpretative instrument and inserting a reference to a legally binding Charter in Part I rely less on Member State consent and more on a dynamic European Court.

17. The option of a non-binding social declaration may appear to be the least ambitious for lawyers, but its political impact may nonetheless be substantial.

All or few Member States

18. Some of the 8 options aim to ensure that all Member States are bound. For example, all Member States might accept Parts I and II only. Similarly, all would be bound by decisions of the constitutionalising European Court and an interpretative instrument and a reference to a legally binding EU Charter. A social declaration, while its status would be non-binding, would again cover all Member States.

19. However, a number of options presuppose the unwillingness of some Member States to sign up to the social dimension desired by other Member States. The options of a Social Protocol, of enhanced cooperation and of the Schengen model aim to enable those Member States wishing to progress to do so. All of these, nonetheless, leave the door open to all Member States to adhere to the social dimension of which they are the *avant-garde*.

Legally binding or not

20. Most of the options proposed entail legally binding effects, either on all the Member States (the option of Parts I and II), or those who

choose to be bound (the options of the Social Protocol, of enhanced cooperation and of the Schengen model).

21. Similarly, the mandate of the European Court would legally bind all Member States, whether the Court acted independently, for example, invoking the EU Charter, or through the interpretative instrument or through a reference to a legally binding EU Charter in Part I.

22. Only the option of a Social Declaration is, by definition, not legally binding.

Mixed options

23. Although the options are presented as separate, a combination of different options is not to be ruled out.

24. Acceptance of Parts I and II by all Member States does not rule out the possibility that some might embark *additionally* on the process of enhanced cooperation in the social field.

25. Similarly, the options involving Member States, whether all (Parts I and II), or some (Social Protocol, enhanced cooperation, the Schengen model), do not preclude the European Court independently undertaking to advance a constitutional social agenda.

Centrality of the EU Charter of Fundamental Rights

26. The ETUC has repeatedly insisted that the fundamental social rights in the EU Charter of Fundamental Rights, including freedom of association, the rights to information and consultation in the enterprise and the right to collective bargaining and collective action, including strike action, are a cornerstone of the European social constitution.

27. The option of Parts I and II, by definition, includes the Charter. The Social Protocol option would bind those Member States

adhering to it to the Charter. The options of enhanced cooperation and of the Schengen model could accommodate a binding role for the Charter, though this would be a matter of delicate formulation.

28. It is important that the legal status of the Charter, as legally binding and directly enforceable in the courts of the Member States and of the EU, should be unequivocally clear. Proposals to include mere references to it in the Treaty would undermine the clear status it achieved in the proposed Constitutional Treaty unless such a reference made it unequivocally clear that the Charter was legally binding.[16]

29. The options of a Social Protocol or of enhanced cooperation might allow for a review of the amendments to the Charter inserted by the Convention on the Future of Europe, and further by the Member States which adopted the draft Constitutional Treaty in June 2004.[17] These amendments qualified the rights in the EU Charter by changing the final "General Provisions" and adding further "Explanations". The outcome differs in potentially significant ways from the Charter proclaimed in December 2000.[18] Although these amendments are explicitly stated not to be intended to change the Charter in any way, but merely to clarify it, the Member States wishing to advance along the path to Social Europe could take the opportunity to restore the original provisions of the Charter removed by those unlikely to join them.

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[16] The *Financial Times* report on the 50th anniversary celebrations states: "Diplomats in Berlin said yesterday they expected a new treaty to be much smaller and rebranded under a different name. Elements considered to give the EU the trappings of statehood - such as an anthem and flag – could be dropped, while a charter of fundamental rights would be put to one side". "Merkel lays out tight Europe treaty timetable", *Financial Times*, 26 March 2007, p. 6.

[17] See B. Bercusson (ed), *European Labour Law and the EU Charter of Fundamental Rights*, Nomos, Baden-Baden, 2006, "Postscript: The EU Charter of Fundamental Rights and the Constitution of the European Union", at pp. 455-530.

[18] Charter of Fundamental Rights of the European Union, proclaimed at the meeting of the European Council held in Nice from 7 to 9 December 2000, and adopted by the Commission, the Council and the Member States, OJ C 364/01 of 18 December 2000.

30. A similar problem faces the option of constitutionalisation through the European Court of Justice. The Court will confront the challenge of deciding which Charter to apply: that adopted in December 2000 or the Charter as subsequently amended. Again, an interpretative instrument might also refer to the Charter, raising questions as to which Charter, and the status of the accompanying "Explanations". This would be one major advantage of the option of a reference in Part I to the EU Charter of December 2000 being legally binding.

The role of the European Court

31. The role of the European Court is central to the options looking to constitutionalisation through litigation and the use of an interpretative instrument and a reference in Part I to a legally binding Charter. But the Court will inevitably play a central role in interpreting Parts I and II, a Social Protocol or provisions on enhanced co-operation, should those options be pursued.

32. It is a priority for trade unions to obtain greater access to the Court, to be formally acknowledged as constitutionally recognised social partners under the Treaty and as such entitled to a privileged position before the Court, and to formulate coherent strategies to ensure the Court is informed as to the interests of trade unions in the many constitutional cases that will come before the Court.

Future dynamics

33. The European Trade Union Confederation is recognised by the European Union as the only representative cross-sectoral trade union organisation at European level. The ETUC presently has in its membership 78 National Trade Union Confederations from a total of 34 European countries, as well as 11 European Industry Federations, making a total of 60 million members. In the coming months when the constitutional future of the EU is being decided, the ETUC and its affiliates in the Member States should play a major role.

34. It will be important to seek allies in the EU institutions, particularly the European Parliament. The recent success of the ETUC in working together with the Parliament to ensure that the Services Directive respects the labour law of the Member States, collective agreements and fundamental rights,[19] illustrates the potential for such an alliance to secure a Constitutional Treaty which respects, and builds on the *acquis communautaire social*. The EU constitution is to reflect the *ordre communautaire social*: insofar as labour is not a commodity like others (goods, capital), it is essential to pursue the objective of improved working conditions, respecting the fundamental rights of workers as human beings, acknowledging the central role of social dialogue and social partnership at EU and national levels, and adhering to the strict principle of equal treatment without regard to nationality.

35. Member States may attempt to appropriate the exclusive power to determine the constitutional settlement. Chancellor Merkel's press conference statement referred to plans for an Intergovernmental Conference by the end of 2007. The European Parliament will not stand by as a passive observer and should be encouraged to take initiatives. The ETUC should similarly act to protect its institutional position in the EU constitutional framework, reflected in the Treaties and in the proposed Constitutional Treaty.

36. Developments in the Member States will also determine strategies. In the aftermath of the French rejection of the Constitutional Treaty, the result of the French presidential election is widely expected to have an important if not decisive influence in determining which options have greater prospects, e.g. a "mini-Treaty" (Sarkozy) or a more ambitious social dimension for the constitution (Royal[20]).

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[19] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L376/26 of 27.12.2006.

[20] Ségolène Royal's 100 propositions in her "pacte Présidentiel" include at no. 90: "Tirer vers le haut le niveau de vie et la protection sociale dans tous les pays européens grâce à

37. Decisions of the European Court may also be decisive. The European Court has now twice referred to the EU Charter of Fundamental Rights. In *European Parliament v. Council*, decided 27 June 2006, the Court stated:[21]

> "While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance… the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court... and of the European Court of Human Rights"'.

38. In other words, while not legally binding itself, the Charter reaffirms rights which are legally binding due to their provenance from other sources which are recognised by Community law as legally binding sources.

39. In two cases referred to the European Court of Justice at the end of 2005: the *Viking* case, referred by the English Court of Appeal[22] and the *Laval (Vaxholm)* case, referred by the Swedish Labour Court,[23] the issue raised is whether EU law includes a fundamental right to take

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un protocole social", and at no. 91: "Négocier un traité institutionnel soumis à referendum pour que l'Europe fonctionne de manière plus démocratique et plus efficace".

21 Case C-540/03, paragraph 38. The Court again referred to the Charter in a second case, *Unibet*, Case C-432/05, decided 13 March 2007.

22 Case C-438/05, *Viking Line Abp OU Viking Line Eesti v. The International Transport Workers' Federation, The Finnish Seamen's Union.* See Thomas Blanke, "The Viking case", (2006) *12 Transfer: European Review of Labour and Research* (No. 2, Summer 2006), pp. 251-266.

23 Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareforbundet, Svenska Byggnadsarbetareforbundet, Avdelning 1, Svenska Elektrikerforbundet.* See Kerstin Ahlberg, Niklas Bruun and Jonas Malmberg, "The Vaxholm case from a Swedish and European perspective ", (2006) 12 *Transfer: European Review of Labour and Research* (No. 2, Summer 2006), pp. 155-166.

collective action, including strike action, as declared in Article 28 of the EU Charter of Fundamental Rights. The Opinion of the Advocate General will, and the judgment of the Court may, be published in the coming months. Their judgment as to whether the fundamental right of workers and trade unions to take transnational collective action is protected by the EU Charter and the Community legal order may have a catalytic effect on the constitutional debate.[24]

The social partners, the social dialogue and labour law in the EU constitutional order

40. The achievement of the Maastricht Treaty was to establish the EU social partners and the European social dialogue as constitutional elements in the making of European social and labour law and policy. After a fruitful initial period, however, the dynamic of the social dialogue has ceased to function. This is not least due to the resistance of European employers' organisations. But it is also due to the institutional passivity of the Commission in confronting the many problems facing workers and employers in the operation of the labour market.

41. The achievement of the Barroso Commission in the area of labour law has been virtually nil, and that of the preceding years of the 21st century was extremely modest.[25] The poverty of its ambition was

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[24] See B. Bercusson, "The Trade Union Movement and the European Union: Judgment Day", (2007) 13 *European Law Journal* (No. 3, May), pp. 279-308.

[25] The last significant achievement was five years ago, in March 2002 (Council Directive No. 2002/14 establishing a framework for informing and consulting employees in the European Community. OJ 2002, L80/29). Previous developments were directives on discrimination (Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L303/16) aims at "combating discrimination on the ground of religion or belief, disability, age or sexual orientation as regards employment and occupation" (Article 1); Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L180/22); Council Directive 2002/73/EC (OJ 2002 No. L269/15) amended Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working

evident in its Communication of 9 February 2005 on the Social Agenda 2005-2010.[26] This included only one specific proposal which the Barroso Commission explicitly committed itself to adopting: on transnational collective bargaining.[27] And even this has been abandoned: in a conference organised by the Commission on 27 November 2006, the survey of transnational collective agreements conducted by D.-G. V was marginalised and the expert study proposing a directive was brusquely buried. Instead it was announced that no regulatory initiative was in prospect and the Commission planned at most another Communication in 2007.

42. The absence of achievement and lack of ambition are evident when compared with the European Commission's activity in the last decade of the 20th century. This saw the vast expansion of the EU's labour law and employment policy competences by the Treaties of Maastricht (1991) and Amsterdam (1997). In that ten-year period, the Commission's initiatives produced Directives on health and safety for temporary and agency workers (1991),[28] mandatory information on employment conditions for employees (1991),[29]

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conditions (OJ 1976, No. L39/40)). There was also consolidation of directives, such as on working time (Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time; OJ L299/9 of 18 November 2003 consolidated Council Directive 93/104/EC of 23 November 1993, OJ L307/18 of 13.12.93, as amended by Directive 2000/34 of 22 June 2000, OJ L195/41).

26 Communication from the Commission on the Social Agenda, COM(2005) 33 final, Brussels, 9.2.2005.

27 "The Commission plans to adopt a proposal designed to make it possible for the social partners to formalise the nature and results of transnational collective bargaining. The existence of this resource is essential but its use will remain optional and will depend entirely on the will of the social partners".

28 Council Directive 91/383 of 25 June 1991 supplementing the measures to encourage improvements in the safety and health of workers with a fixed-duration employment relationship or a temporary employment relationship, OJ 1991 L206/19.

29 Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. OJ L288/32 of 18.10.1991.

protection of pregnant and breastfeeding mothers (1992),[30] working time (1993),[31] European Works Councils (1994),[32] parental leave (1996),[33] part-time work (1997),[34] the burden of proof in cases of sex discrimination (1997),[35] fixed-term work (1999)[36] and substantive amendments to the Directives on collective dismissals (1992)[37] and transfers of undertakings (1998).[38]

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30 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding. OJ L348/1.

31 Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time; OJ L299/9 of 18 November 2003 consolidated Council Directive 93/104/EC of 23 November 1993, OJ L307/18 of 13.12.93, as amended by Directive 2000/34 of 22 June 2000, OJ L195/41.

32 Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. OJ L 254/64 of 30.9.94.

33 Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on parental leave concluded by UNICE, CEEP and the ETUC. OJ L 145/4 of 19.6.96.

34 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC. OJ L 14/9 of 20.1.98.

35 Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex. OJ L14/6.

36 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. OJ L175/43 of 10.7.1999.

37 Council Directive 75/129 of February 17, 1975 on the approximation of the laws of the Member States relating to collective dismissals, OJ L 48/29, as amended by Directive 92/56 of 24 June 1992, OJ L 245/92. Consolidated in Council Directive 98/59/EC of 20 July 1998, OJ L 225/16.

38 Council Directive 77/187 of February 14, 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 61/26, as amended by Directive 98/50/EC of 29 June 1998, OJ L 201/88 of 17.7.98. Consolidated in Directive 2001/23 of 12 March 2001, OJ L/82/16.

43. It was surprising, therefore, and perhaps suspicious, when the Barroso Commission appeared to have re-discovered ambition in a Green Paper entitled "Modernising labour law to meet the challenges of the 21st century".[39] In light of its record, it seems highly unlikely that this Commission has any intention of regulating labour markets. To the contrary, its record suggests, if anything, that "deregulation" is the driving force behind the "modernising" initiative of the Barroso Commission.

44. This can be seen by comparing the Green Paper with an earlier draft of September 2006.[40] The draft was entitled "Adapting labour law to ensure flexibility and security for all". The title of the final Green Paper is "Modernising labour law to meet the challenges of the 21st century". The draft version echoed the Commission's focus on employment policy, one of the mantras of which had been balancing flexibility and security (given the branding spin of "flexicurity"). Even this was too much for UNICE, however, which launched a ferocious attack on the draft, which led the General Secretary of the ETUC, John Monks, to write to Barroso on 12 October 2006 urging him not to draw back from the modest ambition of the Green Paper.

45. In the final Green Paper, much of the content is similar to the earlier draft, though there are important changes. But the Barroso Commission does appear to have lifted its sights from mere labour market reforms of balancing flexibility and security to the modernising of labour law as a whole. This transformation reflects UNICE's concerns and is most alarming. It projects a vision which seeks to transform the nature of labour law itself "to meet the challenges of the 21st century".

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[39] COM(2006) 798 final, Brussels, 22.11.2006.

[40] Communication from the Commission, Green Paper, "Adapting labour law to ensure flexibility and security for all" (n.d.).

46. The strategic response to this Green Paper should confront the vision presented by the Green Paper in the cold light of the reality of what can be expected of the Barroso Commission, but also signal what is expected from a future Commission which might take up where the Commissions of the 1990s left off.

47. As to the Barroso Commission, a response should present the critique which the Green Paper's vision deserves. Tactically, this Commission's congenital passivity in the social field should be encouraged. Since any measures which emerge are likely to reflect its deregulatory vision, they should be opposed. In a nutshell: given what it wants to do to labour law, it is better that the Barroso Commission continues to do nothing.

48. As to the future, the Green Paper offers some basis for proposals which a future Commission could usefully prepare to continue the development of the EU labour law required by the European social model.

49. In this context, the renewal of the constitutional project, and in particular the EU Charter of Fundamental Rights, may stimulate a future Commission to revive the social dimension of the EU, taking initiatives which could promote the social dialogue dynamic of "bargaining in the shadow of the law".

50. The ETUC announced its intention to launch a campaign for a stronger social dimension of the Constitutional Treaty to culminate at the ETUC Congress in Seville in May 2007. This publication of the 8 options formulated by the ETUI-REHS Research Group is intended to contribute to the debates at the Congress in Seville, and the process leading to the elaboration of a final Constitutional Treaty for the EU by the end of 2007.

Options for a European Social Constitution

Summaries

1. Parts I and II separated from Part III of the Constitutional Treaty

2. A "Social Protocol" to the Constitutional Treaty

3. "Enhanced cooperation"

4. The "Schengen" model

5. A Social Constitution through the European Court of Justice

6. A non-binding "Social Declaration"

7. An "interpretative" instrument

8. Inserting a reference to a legally binding EU Charter in Part I.

Option 1

Parts I and II Separated from Part III of the Constitutional Treaty

1. If, from the point of view of social and labour policy, Part II of the Constitution, the EU Charter, is the most important, then a Constitution comprising Parts I and II is better than (a) no Constitution; or (b) trying for an amended/improved Constitution, subject to a failed process of revision.

2. A Constitution comprising only Parts I and II faces certain problems:
   - Ratification prospects: new referenda in France/the Netherlands may be possible, but there are problems where Member States have ratified.
   - Elaboration: on the positive side, some social policy limitations of Part III would be deleted from Parts I and II, but inevitable drafting changes in Parts I and II would open up agreed compromises.
   - User friendly: the text would be shorter and more accessible, but still 120+ Articles; the problem remains of how the text relates to the former Part III.
   - Technical: Part III technical provisions are eliminated, but this requires re-drafting of Parts I and II; specifically the articles in those Parts referring to Part III.
   - Social: it is necessary to clarify the relationship between the new Constitution (Parts I and II) and the EC/EU Treaties (Part III); this could be very contentious.

3. This option is not a simple technical exercise. There are many sensitive issues:
   - Should the Constitution contain all, or only the main parts of Parts I and II?
   - Would the existing EC/EU treaties be retained, amended or replaced?

- What is the precise relationship between the new Constitution (Parts I and II) and the EC/EU Treaties: does the Constitution have priority?
- Who revises: an Intergovernmental Conference or a new Convention?

4. Achieving coherence between the new Constitution and the EC/EU Treaties could be difficult. The many references in Parts I and II to "the Constitution" (as a whole), or to "Part III" would have to be reformulated, re-opening compromises reached in the Convention.

5. There may be solutions to these problems which would imply no change in substance. One advantage of this option is that the major change in form/style of a Constitution including only Parts I and II might appeal more to those voting in referenda. The exclusion of Part III might avoid the many objections focused on that Part and produce successful ratification.

Option 2

A "Social Protocol" to the Constitutional Treaty

1. In 1991, the Protocol and Agreement on Social Policy broke the deadlock over the Maastricht Treaty. A Social Protocol could do the same for the Constitution.

2. As a binding Protocol, and thus part of the Constitutional Treaty, it must be agreed by *all* Member States. But, like the 1991 Protocol and Agreement, its provisions apply *only* to those who agree to be bound by it.

2. However, Member States opting-in to the Social Protocol must not be prejudiced by other Member States not bound by labour standards created under the Protocol. For example:

- enterprises *established* in *opt-in* Member States *remain* bound by these labour standards when moving to *opt-out* Member States.
- public procurement rules in opt-in Member States allow public authorities to stipulate the Social Protocol's labour standards as conditions for obtaining public contracts;
- Member States' imposition of labour standards in accordance with the Social Protocol is an acceptable justification where free movement of goods, services or establishment is affected.

4. A Social Protocol could cover a number of different social policy issues:
   - update and improve the Treaty provisions on European social dialogue;
   - provide an interpretative framework for social rights in the EU Charter;
   - propose a framework for macro-economic governance;
   - address hotly disputed issues: delocalisation, posted workers, competition over labour costs/labour standards, services of general interest, public procurement, employment policy…

5. Variable legal effects for different subjects covered in the Social Protocol are possible: not legally binding, an interpretative framework, legally binding on the EU institutions and/or Member States, legally binding as part of the Constitutional Treaty, justiciable before national courts or the ECJ, allowing for claims by social partners, including trade unions and the ETUC, etc.

6. The Social Protocol is entirely voluntary and applies only to those Member States who agree to be bound by it. Member States might agree to this option if it meant the obstacles to ratification of the Constitution might be overcome.

Option 3

Enhanced cooperation

1. Whenever the progress of European integration has been blocked, Member States have considered the alternative of enhanced co-operation between a smaller number of states. This technique may be used to overcome the current constitutional impasse.

2. The Treaty of Amsterdam formalised future initiatives in the form of enhanced cooperation. Enhanced cooperation was subjected to a number of conditions, including, among others, that at least half of the Member States should participate in enhanced cooperation.

3. Earlier experience with enhanced cooperation demonstrated that it provides a practical solution to problems blocking further integration. Without enhanced cooperation, European integration is seen as extremely slow to advance; the project loses credibility. Enhanced cooperation operates to prevent the stalemate where consensus is not likely to be easily obtained, and, consequently, important policies cannot be quickly implemented in the European Union. It is better than no progress at all.

4. Treaty provisions allow for enhanced cooperation by a majority of the Member States, in present circumstances, at least 14 Member States. Enhanced cooperation is subject to a number of conditions (Article 43): it must not undermine the internal market or economic and social cohesion, and should be in line with the aims of the EU, its laws and the "*acquis communautaire*".

5. The policy content of enhanced cooperation is potentially open-ended. The ETUC could provide a starting point for what could become the content of enhanced cooperation in social affairs including minimum wage legislation, standards for national social security benefits, co-determination over major managerial decisions, a well-

financed globalisation fund and direct effect of fundamental labour rights in the EU Charter.

6. Enhanced cooperation on social affairs would need to overcome a number of procedural obstacles in the present Treaties; for example, to bring all matters of social policy within the scope of qualified majority voting, to give the European Parliament a right of initiative in social and labour policy matters, to delete the reference to "pay" in the list of matters excluded in Article 137 of the EC Treaty.

7. Such proposals would give an important stimulus to the European social dialogue. Experience has shown that "bargaining in the shadow of the law" becomes a more fertile exercise when the shadow is bigger.

Option 4

The Schengen Model: "Variable Geometry"

1. The Schengen model emerged during the 1980s in a debate between the United Kingdom, hostile to the abolition of border controls, and the Benelux countries, where free movement of persons already existed. The Benelux countries decided, together with France and Germany, to work towards the gradual abolition of border controls. The 1985 Schengen Agreement among five EU Member States allowed them to proceed with a common policy on the temporary entry of persons and harmonisation of external border controls.

2. The Schengen Group represents a model of a European integration vanguard, the achievements of which could later be extended to other Member States. To date, a total of 28 European countries, including all EU Member States except Ireland and the UK, and also including non-EU states such as Iceland, Norway and Switzerland, have signed the Schengen Agreement.

3. In 1997, a Protocol attached to the Treaty of Amsterdam incorporated the advances developed by the Schengen Agreement into the legal framework of the European Union. The Schengen area thereby came within the legal and institutional framework of the EU. The Council took the place of the Executive Committee created under the Schengen Agreement.

4. The Council's task of incorporating the Schengen model into the EU legal framework was to select from among the provisions and measures adopted by the signatory states those which formed the *acquis*: the body of law which serves as the basis for further cooperation. A list of the elements which constitute the *acquis* was adopted on 20 May 1999. Member States that accede to the European Union are bound by the entire Schengen *acquis*.

5. A Schengen Information System (SIS) was developed to improve police and judicial cooperation in criminal matters and policy on visas, immigration and the free movement of persons in the EU. Analogous initiatives could be envisaged as regards access to and distribution of information on labour and social standards in the Member States should a similar model be adopted to extend European integration in social and labour policy.

6. The scenario of social policy integration among a small, but gradually expanding number of EU Member States raises issues of "variable geometry", as coverage of the policy area varies among Member States. This problem has been successfully addressed by the Schengen model as regards (i) integrating future Member States, (ii) accommodating EU Member States outside the Schengen system, and (iii) non-EU Member States within the system.

7. The Schengen model offers the prospect of successful development and gradual expansion of a complex policy area initially including only a small number of EU Member States to achieve the further integration of most of the EU Member States seeking to establish Social Europe.

Option 5

A Social Constitution through the European Court of Justice

1. The development of a social constitution for the EU could be accomplished in part through the European Court of Justice (ECJ). One central instrument is the EU Charter of Fundamental Rights of December 2000. The fundamental social and labour rights in the Charter could acquire constitutional status through decisions of the ECJ. The ECJ finally cited the EU Charter in Case C-540/03, *European Parliament v. Council*, decided 27 June 2006. The Court held that, while not legally binding itself, the Charter reaffirms rights which are legally binding due to their provenance from other sources which are recognised by Community law as legally binding sources.

2. The experience of the ECJ as a constitutional court offers the prospect of constitutionalisation of the social dimension through the Court. The Court overcame its early reluctance to protect fundamental rights by reference to the common constitutional traditions of the Member States and international treaties.

3. The legal sources for the ECJ as a constitutional court to develop Social Europe include the common traditions and legal and constitutional practices protecting fundamental social, labour and trade union rights in the laws of the Member States. The ECJ can also draw upon a range of sources in international law, in particular, ILO Conventions and Council of Europe measures which all Member States have ratified.

4. The ECJ could play a role in constitutionalising the EU social model by adopting a specific interpretative framework for EU law consistent with the evolution from an EC common market to an EU with a social policy.

5. This overriding interpretative framework, which may be called the *ordre communautaire social*, comprises the *acquis communautaire social*, the accumulated body of EU social and labour law aimed at protecting workers employed in the common market who are also citizens of the Union enjoying fundamental rights.

6. It would be essential for the ETUC and its affiliated organisations to develop a litigation strategy to obtain access to the European Court to ensure that the Court takes into account the implications of any cases raising important issues concerning the rights and interests of workers and trade unions.

Option 6

A Non-Binding Social Declaration

1. A purely "Social Declaration" allows for declaration of constitutional social principles and values not tied to the legacy of a market economy, which a binding legal text would be obliged to formally acknowledge.

2. A Social Declaration will have an impact on institutions. Other non-binding Charters: the 1989 Community Charter and the EU Charter of 2000 have influenced the Commission and the European Court. A Social Declaration accompanying a Constitutional Treaty would be linked to the constitutional development of the EU legal order, expressing and demarcating a *European* social policy different from others such as the USA or China.

3. The Social Declaration will have some legal impact, albeit non-binding, because it will overlap with Part II of the Constitutional Treaty (the EU Charter of Fundamental Rights), as well as social policy provisions in Part III. The Social Declaration may thereby impel a new dynamic to those parts of the Constitutional Treaty and stimulate their development. A formal Social Declaration needs an accompanying Action Programme, as in 1974 and 1989.

4. A Social Declaration will have a psychological impact on citizens, particularly if it reflects a trade union campaign. It will increase the identification of individuals with a social Europe and make them more willing to ratify the Constitutional Treaty. As a non-binding social declaration, the key need is for a Social Declaration which is capable of capturing the imagination of EU citizens and being integrated into their consciousness. It is their engagement which will produce the required impact on the institutions.

5. If the project of a legally binding Constitution fails, then a Social Declaration is at least an improvement.

Option 7

An Interpretative Instrument

1. The impact of a constitution of the European Union depends on its interpretation and application by the EU institutions. These include not only the judicial branch, the European Court of Justice, but also the legislative branch, the Commission, Parliament and Council, as well as the executive agencies of the EU.

2. The option proposed here seeks a middle path between the failure to agree a new constitutional text, and recourse to a non-binding declaration or the independent initiative of the European Court. This option would take the form of guidelines prescribed in a mandatory instrument to be provided to the institutions as to their approach to constitutional issues of social Europe in interpreting and applying the present Treaties.

3. The value of an instrument providing interpretative guidelines to the EU institutions is indicated in a number of measures already adopted by the institutions, in particular, decisions of the European Court, which have addressed constitutional issues of social Europe. These include interpretative guidelines protecting fundamental collective

rights, Member State improvements on EU minimum standards, effective enforcement of labour standards, fundamental individual rights of workers, collective agreements and trade union collective industrial action to combat "social dumping".

4. The interpretative instrument aims to require a constitutional perspective on interpretation of the Treaties. Economic provisions of the Treaty have to be interpreted in light of changes in the scope of activities of the EU from a purely economic Community establishing a common market to a European Union with a social policy aimed at protecting workers employed in the common market who are also citizens of the Union. The rationale for this interpretative approach lies in the view that social Europe is consistent with the effective functioning of the internal market. For example, market efficiency requires collective action by workers and trade unions to ensure their voice is heard and their interests are taken account of.

5. The purpose of the interpretative instrument would be to provide an authoritative guide for the EU institutions on interpretation and application of the Treaties consistently with the social dimension of the EU. The Treaty's provisions are to be interpreted consistently with protection of the social dimension elaborated in more specific guidelines.

Option 8

Inserting a reference to a legally binding EU Charter in Part I of the Constitutional Treaty

1. As an alternative to the Charter being integrated as a whole into Part II of the Constitutional Treaty, a reference to a legally binding EU Charter could be inserted into Part I.

2. In making the Charter legally binding by a reference in Part I, much depends on the precise formulation. There are precedents: Art. 136

TEC ("having in mind"), Arts. 6(1) and 6(2) of the TEU ("is founded on", shall respect") and Article I-9 of the Constitutional Treaty ("shall recognise", "as guaranteed by", "shall constitute general principles of the Union's law"), as well as references in the EU Charter itself.

3. The legal consequences of a reference in Part I are unpredictable. It would probably enhance the legal status of the Charter, which has already achieved some recognition by all Advocates General and the European Court of First Instance. Also, by the European Court of Justice itself (27 June 2006 and 13 March 2007), despite the Constitutional Treaty not being ratified by all Member States, and even rejected by the referenda in France and the Netherlands. The ECJ has declared that, while not legally binding itself, the Charter reaffirms rights which are legally binding due to their provenance from other sources which are recognised by Community law as legally binding sources. Even as a mere political declaration, the EU Charter appears to be accepted by the European courts as reflecting fundamental rights which are an integral part of the EU legal order.

4. It may be expected that an explicit reference to the Charter in Part I could reinforce the Court's use of the Charter. On the other hand, the Court might be influenced the other way by the Charter's "demotion" from the text of the Constitution to a mere reference. One major advantage of a reference in Part I would be if the reference was clearly made to the original Charter as prepared by the Convention which drafted it, avoiding the changes inserted both by the Convention on the Future of Europe and the Member States at the summit of June 2004. There should be no mention of the "Explanations" to the Charter.

5. A formulation most likely to appeal to the Court should build on Art. I-9(1) of the Constitutional Treaty, Art. 136 TEC, Art. 6(2) TEU and the language of the Court:

"The Union and the Member States shall recognise and respect fundamental rights, freedoms and principles as guaranteed by the EU Charter of Fundamental Rights (OJ C 364/01 of 18 December 2000), hereby confirmed as a legally binding part of this Treaty/Constitution, which shall constitute an integral part of the general principles of the Union's law inspired by the constitutional traditions common to the Member States, the protection of which is ensured by the European Court of Justice".

Klaus Lörcher[1]

Option 1

Parts I and II separated from Part III of the Constitutional Treaty

1. This option consists of reducing the Constitutional Treaty to an instrument containing only Parts I, II (and IV), separating them from Part III. Part III includes most of, and was probably meant to replace, the existing EU/EC Treaties.

2. The main reason for this option is the negative results of the two referenda in France and the Netherlands. This seems to preclude the possibility of putting the same text to the vote a second time in those two countries.

3. The argument for this option is that it would avoid the objections which led to the negative result in the referenda. This assumes that a major objection was the lack of a social dimension.[2]

4. Choosing this option requires a judgment of whether, from the point of view of social and labour policy, the most important element of the Constitution is Part II - the EU Charter (which is unlikely to be excluded from whatever Constitution is agreed). If so, then, as long as the Charter is included, the main social policy objective will have been achieved. A Constitution comprising Parts

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1 The first draft of this paper was prepared by Klaus Lörcher while he was Legal Officer of the German trade union, Ver.di (Vereinte Dienstleistungsgewerkschaft - United Services Union) and legal adviser of the ETUC. It is contributed by him in his personal capacity.

2 The reasons for rejection are not clearly analysed or universally shared.

I and II (thus including the Charter in Part II) is better than (a) no Constitution;[3] or (b) trying for an amended/improved Constitution, subject to a prolonged and possibly failed process of revision.

5. The following table outlines possible advantages and disadvantages of a Constitution comprising only Parts I and II (leaving Part IV aside for the moment), *without* any changes in social provisions.

Areas	**Advantages**	**Disadvantages**
Ratification prospects – (referenda)	A new text comprising only Parts I and II offers a good possibility for new referenda in France and the Netherlands. The ratification procedure could be scheduled as a 'one day' ratification date for all Member States.	1. The majority of States having already ratified the 'old' text may face a politically difficult situation. 2. The existing EU/EC treaties would need to be amended and, therefore, also ratified. Constitutional problems might arise in some Member States if only the 'new' Constitution was put to a vote (referendum).
Elaboration	Separating Parts I and II from the constraints of Part III might allow some possibilities, e.g. deleting the reference to Part III limiting social policy competence in Article I-14(b); revisiting the amended "horizontal" Articles in Part II (the EU Charter, Articles II-111 and II-112(2)); or even inserting social dialogue agreements into Part I among the legal acts of the Union.	Very sensitive decisions would still have to be made in drafting the new text (see below). Changing the old text of Parts I and II agreed by the Convention on the Future of Europe could lead to problems of legitimacy if made by an Intergovernmental Conference (IGC) drafting the new text.

[3] Unless the European Court's decision citing the EU Charter in Case 540/03, *Parliament v. Council*, on 27 June 2006, anticipates the Charter being given effect even in the absence of a Constitution. This might suggest focusing on enforcement of the EU Charter: see Option 5: "A Social Constitution through the European Court of Justice".

User-friendly approach	The new text of the Constitution would be much shorter. It would be more accessible to the public and more understandable.	1. There would still be more than 120 articles, some of which would still be very long and complex (e.g. Articles I-39, I-40, I-43, II-112. 2. There could be confusion as to the legal and practical consequences if the new text (Parts I and II) continues to refer to Part III (the EC/EU Treaties).
Technical issues	The number of technical provisions (mainly in Part III, the EC/EU Treaties) would be drastically reduced.	1. The re-drafting of Part III (the EC/EU Treaties) may require re-formulations of (new) political compromises. 2. The references in the new Constitution (Parts I and II) to Part III (the EC/EU Treaties) will mean either (i) re-drafting provisions in Part III (delicate reformulation of (new) political compromises), or (ii) leaving the problems unresolved.
Social dimension	Clarifying the relationship between the new Constitution (Parts I and II) and the EC/EU Treaties by affirming the new Constitution's priority over the amended treaties.	Such clarification would be very contentious. There would probably be a threat of veto by the UK and others insisting on agreement on the lowest common denominator, probably involving sacrifice of the social dimension.

6. Even this brief overview reveals that the option of a new Constitution confined to Parts I, II (and IV) will not be a simple technical exercise to be quickly proposed by a future Intergovernmental Conference. Many sensitive issues will be raised, debated and have to be resolved again. Questions include:
   - Should the new Constitution contain all, or only the main parts (reflecting the main compromises achieved) of Parts I, II and IV?
   - To what extent would the existing EC/EU treaties be retained, or only amended; or should they be replaced entirely by a new Treaty

(Part III) with its compromises on the policy provisions and institutional provisions?[4]

- How should the relationship between the new Constitution (Parts I and II) and the excluded Part III (or the amended EC/EU Treaties) be defined (priority)?
- How would the revision procedure be organized for the new Constitution (IGC or a new Convention)? Similarly for Part III or the amended EC/EU Treaties?

7. If Parts I and II became the new Constitution, it would be necessary not only to define its relationship to the excluded Part III (or the amended EC/EU treaties), but also to ensure coherence between the two texts.

8. For example, at what seems a purely technical level, but also raises substantive issues, there are many references in Parts I and II to "the Constitution" (as a whole), or to "Part III". These would have to be reformulated.[5] Each reformulation would have to be discussed and clarified. This could open the "Pandora's box" of compromises reached in the Convention.

9. One apparently simple solution would be to reformulate these references as follows: references in the new Constitution (Parts I and II) to "the Constitution" would be rephrased to refer to the new Constitution *and* the new Part III Treaty (or amended EU/EC Treaties). References to Part III or its specific articles would be rephrased to refer to the new Part III Treaty (or amended EU/EC Treaties).

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[4] E.g. would the improvements in Part III (horizontal clauses, social security of migrant workers) be secured?

[5] It is calculated that Parts I and II contain 48 references to the Constitution as a whole (41 in Part I and 7 in Part II). Part I contains 13 references to Part III as a whole, and 22 references to specific articles of Part III. The Table attached to this paper lists these references, including those in Part IV of the Constitutional Treaty.

10. On the one hand, this would imply no change in substance. But there would be a big difference in form/style. The new Constitution would include only Parts I and II. This might appeal more to those voting in referenda.

11. On the other hand, it might be objected that any new referenda would be voting on substantially the same text, even though Part III (the present EC/EU Treaties) is not part of the Constitution. But the exclusion of Part III might avoid the many objections focused on that Part and produce successful ratification.

Table

References in Parts I, II and IV to the Constitution as a whole, to Part III as a whole and to specific articles in Part III

Article	Title of article	N°	(1) References to the Constitution as a whole	N°	(2) References to Part III as a whole	N°	(3) Ref. to sp. articles
	PART I						
I-1 (1)	Establishment of the Union	1.	Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. …				
I-3 (5)	The Union's objectives	2.	The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Constitution.				
I-4 (1)	Fundamental freedoms and non-discrimination	3.	The free movement of persons, services, goods and capital, and freedom of establishment shall be guaranteed within and by the Union, in accordance with the Constitution.				
I-4 (2)	Fundamental freedoms and non-discrimination	4.	Within the scope of the Constitution, and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited				
I-5 (2)	Relations between the Union and the Member States	5.	Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution.				
I-5 (2)	Relations between the Union and the Member States	6.	The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Constitution or resulting from the acts of the institutions of the Union.				

Article	Title of article	N°	(1) References to the Constitution as a whole	N°	(2) References to Part III as a whole	N°	(3) Ref. to sp. articles
I-6	Union law	7.	The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.				
I-9 (2)	Fundamental rights	8.	The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.				
I-10 (2)	Citizenship of the Union	9.	Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Constitution. They shall have: … These rights shall be exercised in accordance with the conditions and limits defined by the Constitution and by the measures adopted thereunder.				
I-11 (2)	Fundamental principles	10.	Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States.				
I-11 (4)	Fundamental principles	11.	Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution				
I-12 (1)	Categories of competence	12.	When the Constitution confers on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.				

Article	Title of article	N°	(1) References to the Constitution as a whole	N°	(2) References to Part III as a whole	N°	(3) Ref. to sp. articles
I-12 (2)	Categories of competence	13.	When the Constitution confers on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence.				
I-12 (3)	Categories of competence (Coordination of economic and employment policies)			1.	The Member States shall coordinate their economic and employment policies within arrangements as determined by Part III, which the Union shall have competence to provide.		
I-12 (5) subpara. 1	Categories of competence	14.	In certain areas and under the conditions laid down in the Constitution, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.				
I-12 (5) subpara. 2	Categories of competence (Restrictions on legally binding acts)			2.	Legally binding acts of the Union adopted on the basis of the provisions in Part III relating to these areas shall not entail harmonisation of Member States' laws or regulations.		
I-12 (6)	Categories of competence (Determination of competences)			3.	The scope of and arrangements for exercising the Union's competences shall be determined by the provisions relating to each area in Part III.		

Article	Title of article	N°	(1) References to the Constitution as a whole	N°	(2) References to Part III as a whole	N°	(3) Ref. to sp. articles
I-14 (1)	Areas of shared competence	15.	The Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles I-13 and I-17.				
I-14 (2) (b)	Areas of shared competence (social policy)			4.	Shared competence between the Union and the Member States applies in the following principal areas: (b) social policy, for the aspects defined in Part III;		
I-14 (2) (k)	Areas of shared competence (public health)			5.	(k) common safety concerns in public health matters, for the aspects defined in Part III		
I-18 (1)	Flexibility clause	16.	If action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.	6.	If action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.		
I-18 (3)	Flexibility clause	17.	Measures based on this Article shall not entail harmonisation of				

Article	Title of article	N°	(1) References to the Constitution as a whole	N°	(2) References to Part III as a whole	N°	(3) Ref. to sp. articles
			Member States' laws or regulations in cases where the Constitution excludes such harmonisation.				
I-19 (2)	The Union's institutions	18.	Each institution shall act within the limits of the powers conferred on it in the Constitution, and in conformity with the procedures and conditions set out in it. The institutions shall practise mutual sincere cooperation.				
I-20 (1)	The European Parliament	19.	The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Constitution. It shall elect the President of the Commission.				
I-21 (4)	The European Council	20.	Except where the Constitution provides otherwise, decisions of the European Council shall be taken by consensus.				
I-23 (1)	The Council of Ministers	21.	The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Constitution				
I-23 (3)	The Council of Ministers	22.	The Council shall act by a qualified majority except where the Constitution provides otherwise.				
I-26 (1)	The European Commission	23.	The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Constitution, and measures adopted by the institutions pursuant to the Constitution. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Constitution. With the exception of the common foreign and security policy, and other cases provided for in the Constitution, it shall ensure the Union's external representation. It shall initiate the Union's				

Article	Title of article	N°	(1) References to the Constitution as a whole	N°	(2) References to Part III as a whole	N°	(3) Ref. to sp. articles
			annual and multiannual programming with a view to achieving interinstitutional agreements.				
I-26 (2)	The European Commission	24.	Union legislative acts may be adopted only on the basis of a Commission proposal, except where the Constitution provides otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Constitution so provides				
I-26 (5)	The European Commission	25.	The first Commission appointed under the provisions of the Constitution shall consist of one national of each Member State, including its President and the Union Minister for Foreign Affairs who shall be one of its Vice-Presidents.				
I-26 (8)	The European Commission					1.	III-340
I-29 (1)	Court of Justice	26.	The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Constitution the law is observed.				
I-29 (2)	Court of Justice					2.	III-355 and III-356
I-29 (3)	Court of Justice	27.	(c) rule in other cases provided for in the Constitution.	7.	The Court of Justice of the European Union shall in accordance with Part III: (a) rule on actions brought by a Member State, an institution or a natural or legal person; (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union		

Article	Title of article	N°	(1) References to the Constitution as a whole	N°	(2) References to Part III as a whole	N°	(3) Ref. to sp. articles
					law or the validity of acts adopted by the institutions;		
I-30 (2)	European Central Bank			8.	The European System of Central Banks shall be governed by the decision-making bodies of the European Central Bank. The primary objective of the European System of Central Banks shall be to maintain price stability. Without prejudice to that objective, it shall support the general economic policies in the Union in order to contribute to the achievement of the latter's objectives. It shall conduct other Central Bank tasks in accordance with Part III and the Statute of the European System of Central Banks and of the European Central Bank.		
I-30 (4)	European Central Bank					3.	III-185 to III-191 and III-196
I-30 (6)	European Central Bank					4.	III-382 and III-383
I-32 (5)	The Union's advisory bodies					5.	III-386 to III-392

Article	Title of article	N°	(1) References to the Constitution as a whole	N°	(2) References to Part III as a whole	N°	(3) Ref. to sp. articles
I-33 (1)	Legal acts of the Union	28.	A European regulation shall be a non-legislative act of general application for the implementation of legislative acts and of certain provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.	9.	To exercise the Union's competences the institutions shall use as legal instruments, in accordance with Part III, European laws, European framework laws, European regulations, European decisions, recommendations and opinions.		
I-34 (2)	Legislative acts	29.	In the specific cases provided for in the Constitution, European laws and framework laws shall be adopted by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, in accordance with special legislative procedures.				
I-34 (3)	Legislative acts	30.	In the specific cases provided for in the Constitution, European laws and framework laws may be adopted at the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank.				
I-35 (1)	Non-legislative acts	31.	The European Council shall adopt European decisions in the cases provided for in the Constitution.				
I-35 (2)	Non-legislative acts	32.	The Council and the Commission, in particular in the cases referred to in articles I-36 and I-37, and the European Central Bank in the specific cases provided for in the Constitution, shall adopt European regulations and decisions..				
I-35 (3)	Non-legislative acts	33.	The Council shall adopt recommendations. It shall act on a proposal from the Commission in all cases where the Constitution provides that it shall adopt acts on a proposal from				

Article	Title of article	N°	(1) References to the Constitution as a whole	N°	(2) References to Part III as a whole	N°	(3) Ref. to sp. articles
			the Commission. It shall act unanimously in those areas in which unanimity is required for the adoption of a Union act. The Commission, and the European Central Bank in the specific cases provided for in the Constitution, shall adopt recommendations				
I-38 (1)	Principles common to the Union's legal acts	34.	Where the Constitution does not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality referred to in Article I-11.				
I-38 (2)	Principles common to the Union's legal acts	35.	Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Constitution.				
I-40 (2)	Specific provisions relating to the common foreign and security policy			10.	The European Council shall identify the Union's strategic interests and determine the objectives of its common foreign and security policy. The Council shall frame this policy within the framework of the strategic guidelines established by the European Council and in accordance with Part III.		
I-40 (6)	Specific provisions relating to the common foreign and security policy			11.	European decisions relating to the common foreign and security policy shall be adopted by the European Council and the Council unanimously, except in the cases referred to in Part III.		

Article	Title of article	N°	(1) References to the Constitution as a whole	N°	(2) References to Part III as a whole	N°	(3) Ref. to sp. articles
I-40 (7)	Specific provisions relating to the common foreign and security policy			12.	The European Council may, unanimously, adopt a European decision authorising the Council to act by a qualified majority in cases other than those referred to in Part III.		
I-41 (5)	Specific provisions relating to the common security and defence policy					6.	III-310
I-41 (6)	Specific provisions relating to the common security and defence policy					7.	III-312
I-41 (6)	Specific provisions relating to the common security and defence policy					8.	III-309
I-42 (2)	Specific provisions relating to the area of freedom, security and justice					9.	III-260
I-42 (2)	Specific provisions relating to the area of freedom, security and justice					10.	III-276 and III-273

Article	Title of article	N°	(1) References to the Constitution as a whole	N°	(2) References to Part III as a whole	N°	(3) Ref. to sp. articles
I-42 (3)	Specific provisions relating to the area of freedom, security and justice					11.	III-264
I-44 (1)	Enhanced cooperation					12.	III-416 to III-423
I-44 (1)	Enhanced cooperation					13.	III-418
I-44 (2)	Enhanced cooperation					14.	III-419
I-47 (4)	The principle of participatory democracy	36.	Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution. European laws shall determine the provisions for the procedures and conditions required for such a citizens' initiative, including the minimum number of Member States from which such citizens must come.			15.	
I-49	The European Ombudsman	37.	A European Ombudsman elected by the European Parliament shall receive, examine and report on complaints about maladministration in the activities of the Union institutions, bodies, offices or agencies, under the conditions laid down in the Constitution. The European Ombudsman shall be completely independent in the performance of his or her duties.			16.	
I-53(3)	Budgetary and financial principles			13.		17.	III-412

Article	Title of article	N°	(1) References to the Constitution as a whole	N°	(2) References to Part III as a whole	N°	(3) Ref. to sp. articles
I-53(4)	Budgetary and financial principles			14.		18.	III-412
I-53(7)	Budgetary and financial principles			15.		19.	III-415
I-55 (1)	The multiannual financial framework			16.		20.	III-402
I-56	The Union's budget			17.		21.	III-404
I-59 (3) subpara. (1)	Suspension of certain rights resulting from Union membership	38.	Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may adopt a European decision suspending certain of the rights deriving from the application of the Constitution to the Member State in question, including the voting rights of the member of the Council representing that State. The Council shall take into account the possible consequences of such a suspension for the rights and obligations of natural and legal persons.				
I-59 (3) subpara. (2)	Suspension of certain rights resulting from Union membership	39.	In any case, that State shall continue to be bound by its obligations under the Constitution.				
I-59 (5) subpara. (3)	Suspension of certain rights resulting from Union membership	40.	Where, following a decision to suspend voting rights adopted pursuant to paragraph 3, the Council acts by a qualified majority on the basis of a provision of the Constitution, that qualified majority shall be defined as in the second subparagraph, or, where the Council acts on a proposal from the Commission or from the Union Minister for Foreign Affairs, as at least 55 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States. In the latter case, a blocking minority must include at least the minimum number of Council members representing				

Article	Title of article	N°	(1) References to the Constitution as a whole	N°	(2) References to Part III as a whole	N°	(3) Ref. to sp. articles
			more than 35 % of the population of the participating Member States, plus one member, failing which the qualified majority shall be deemed attained.				
I-60 (2)	Voluntary withdrawal from the Union					22.	III-325(3)
I-60 (3)	Voluntary withdrawal from the Union	41.	The Constitution shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.				
	PART II						
II-78	Right to asylum	42.	The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Constitution.				
II-81 (2)	Non-discrimination	43.	Within the scope of application of the Constitution and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited.				
II-96	Access to services of general economic interest	44.	The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Constitution, in order to promote the social and territorial cohesion of the Union.				
II-105 (2)	Freedom of movement and of residence	45.	Freedom of movement and residence may be granted, in accordance with the Constitution, to nationals of third countries legally resident in the territory of a Member State.				

Article	Title of article	N°	(1) References to the Constitution as a whole	N°	(2) References to Part III as a whole	N°	(3) Ref. to sp. articles
II-111 (1)	Field of application	46.	The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution.				
II-111 (1)	Field of application	47.	This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution				
II-112 (2)	Scope and interpretation of rights and principles	48.	Rights recognised by this Charter for which provision is made in other Parts of the Constitution shall be exercised under the conditions and within the limits defined by these relevant Parts.				
	Part IV						
IV-437 (1)	Repeal of earlier Treaties	49.	This Treaty establishing a Constitution for Europe shall repeal the Treaty establishing the European Community, the Treaty on European Union and, under the conditions laid down in the Protocol on the acts and treaties having supplemented or amended the Treaty establishing the European Community and the Treaty on European Union, the acts and treaties which have supplemented or amended them, subject to paragraph 2 of this Article.				
IV-438 (4)	Succession and legal continuity	50.	The case-law of the Court of Justice of the European Communities and of the Court of First Instance on the interpretation and application of the treaties and acts repealed by Article IV-437, as well as of the acts and conventions adopted for their application, shall remain, *mutatis mutandis*, the source of				

Article	Title of article	N°	(1) References to the Constitution as a whole	N°	(2) References to Part III as a whole	N°	(3) Ref. to sp. articles
			interpretation of Union law and in particular of the comparable provisions of the Constitution.				
IV-438 (5)	Succession and legal continuity	51.	Continuity in administrative and legal procedures commenced prior to the date of entry into force of this Treaty shall be ensured in compliance with the Constitution. The institutions, bodies, offices and agencies responsible for those procedures shall take all appropriate measures to that effect.				
IV-440 (2)	Scope					23.	III-424
IV-440 (3)	Scope			18.	The special arrangements for association set out in Title IV of Part III shall apply to the overseas countries and territories listed in Annex II. …		
IV-444 (1)	Simplified revision procedure			19.	Where Part III provides for the Council to act by unanimity in a given area or case, the European Council may adopt a European decision authorising the Council to act by a qualified majority in that area or in that case. …		
IV-444 (2)	Simplified revision procedure			20.	Where Part III provides for European laws and framework laws to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a European decision allowing for the adoption of		

Article	**Title of article**	**N°**	**(1) References to the Constitution as a whole**	**N°**	**(2) References to Part III as a whole**	**N°**	**(3) Ref. to sp. articles**
					such European laws or framework laws in accordance with the ordinary legislative procedure.		
IV-445 (1)	Simplified revision procedure concerning internal Union policies and action			21.	The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Title III of Part III on the internal policies and action of the Union.		
IV-445 (2)	Simplified revision procedure concerning internal Union policies and action			22.	The European Council may adopt a European decision amending all or part of the provisions of Title III of Part III. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. …		

Brian Bercusson

Option 2

A "Social Protocol" to the Constitutional Treaty

What kind of "Social Protocol"?

1. In mid-December 2005, the German Chancellor, Angela Merkel, proposed adding a "social protocol" to the Constitution, though she declared this would not be legally binding. The European Parliament's Plenary debate (16-19 January 2006) on the Duff/Voggenhuber Report[1] referred to the suggestion that "declarations or extra protocols… be added to the constitutional Treaty".[2]

2. The German Presidency proposal of a "Protocol on the Social Dimension of Europe" is intended as a vehicle for the enhanced cooperation by a "core group". In a draft prepared by Andreas Maurer of the WSZ-Berlin, he proposed as a second option, "Consolidation": "i.e. a text entailing a substantial broadening of the concerned competences in the social field to which Member States, who 'wish to go jointly further in the social field' can subscribe (or not). An option quite similar to the 1991 Protocol and Agreement on Social Policy".

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1 European Parliament, Committee on Constitutional Affairs, *Report on the period of reflection: the structure, subjects and context for an assessment of the debate on the European Union*, Co-rapporteurs, Andrew Duff and Johannes Voggenhuber, Final, A6-0414/2005, 16.12.2005.

2 The text of the Parliament's Resolution adopted on 19 January 2006 refers to a number of options including "seeking to clarify or add to the present text" (paragraph 28).

The model of the 1991 Protocol and Agreement on Social Policy

3. The Maurer "Consolidation" option may be seen as a variant of enhanced cooperation, relaxing the conditions for a group of Member States to advance. The 1991 Social Policy Protocol/ Agreement formed part of the EC Treaty (with all commensurate obligations: binding effect, etc.), allowing those who agreed to be bound by it to use the machinery of the EC (institutions) to adopt measures. Unlike enhanced cooperation, which allows for a group of Member States to progress, but subject to many conditions, the Protocol creates separate social constitutions, one for all Member States, the other for some.

4. In 1991, this was a way out of legislative deadlock; now it is a way out of constitutional deadlock. But with possibly more complex implications.

i. Opting-in, not opting out

5. Member States can choose to opt in to the Protocol to the Constitution. It then becomes binding on them: the French/Dutch "social" price for ratifying the rest of the Constitution, including Part III.

ii. Opting-in is irrevocable

6. The opt-in may be made irrevocable.[3]

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[3] As per the UK's proposal regarding opt-out of Working Time Directive's Article 6 (maximum weekly working time); once a Member State chooses to renounce the opt-out, it is irrevocable. On 21 November 2005 the UK presented its proposals (UK Presidency, Amended proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time, Brussels, 21 November 2005, Doc. 14687/05). As regards the opt-out (pp. 3-4): "The Presidency has therefore come up with a proposal to accommodate those concerns in a balanced way. The principle of the Directive – that no worker should be forced to work longer than 48 hours a week – remains paramount. However, those Member States that wish to allow their citizens

iii. No social dumping

7. Member States opting-in are not to be prejudiced by social dumping of others.[4]

iv. Restraining delocalisation

8. Enterprises established in opt-in Member States remain bound by social/labour standards of the Protocol when moving to opt-out Member States (thus a constraint on delocalisation).[5]

v. Social clauses in public procurement

9. Public procurement rules in opted-in Member States may reflect the Protocol, and allow public authorities to impose social/labour conditions.

vi. Social policy justifies restrictions on free movement

10. Where free movement of goods, services or establishment is affected by opt-in Member States' imposition of social and labour standards under the Protocol, this is an acceptable justification.[6]

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to choose to work longer, either now or in the future, would be able to do so. Those Member states that wanted to remove the possibility of the opt-out on their territory would be able irrevocably to renounce it."

4 Again, as per the UK's proposal on the working time opt-out: workers in opted-in Member States cannot avail themselves of standards applying in their home Member State. UK Presidency, Amended proposal; *ibid.*: "Furthermore, to address the concerns of Member States about opted-out workers coming in from other countries, Member States would be able to ban workers from using the opt-out on their territory even if they had signed it elsewhere."

5 If other Member States opt-in, then this constraint does not apply, thus encouraging other Member States to opt-in and retain whatever is their competitive advantage.

6 As per Case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649 (*Cassis de Dijon*)*;* and see now Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareforbundet, Svenska Byggnadsarbetareforbundet, Avdelning 1, Svenska*

Further questions

11. The idea of a substantial social protocol is an option for the ETUC to consider. But a number of questions arise.

***Not* "enhanced" cooperation**

12. This is *not* "enhanced cooperation" on social policy among a core group of Member States under Article 43 EC. Article 43 allows for "enhanced" co-operation, but subject to a number of conditions. These include the requirement that it not undermine the internal market or economic and social cohesion. This proposal for a Protocol is an analogous but alternative option.

A binding Protocol but an optional Agreement

13. The Protocol is not aimed at all Member States, nor even a specific minimum number of Member States. As a binding Protocol, and thus part of the (Constitutional) Treaty, it must be agreed by *all* Member States. But, like the 1991 Protocol and Agreement on Social Policy attached to the Maastricht Treaty on European Union and binding on all Member States, its provisions apply *only* to those who agree to be bound by the Agreement (in 1991, the UK opted out of the Social Policy Agreement).

14. The 1991 Agreement on Social Policy was negotiated by ETUC, UNICE and CEEP. Ideally, this experience could be repeated. As in 1991, this would put pressure on Member States to opt in where the national employers' organisations and trade union confederations had agreed to it.

Elektrikerforbundet ; Case C-438/05, *Viking Line Abp OU Viking Line Eesti v. The International Transport Workers' Federation, The Finnish Seamen's Union.*

Social partners may also opt-out

15. However, if ETUC, UNICE and CEEP could not achieve consensus among all their affiliates, the agreement could become optional also for affiliates. Member States where the national employers' organisations and trade union confederations had refused to sign up would be unlikely to opt-in and be bound by the new Agreement.

The target negotiators/Member States

16. The target negotiators for such an agreement would be those affiliates of the EU social partners, the national social partners' organisations, in Member States which might be expected to opt-in to the new Agreement. If a Member State's national social partners were willing to support a Social Policy Protocol/Agreement attached to the Constitution, that Member State would be under pressure to accept a Protocol and opt-in to the Agreement.

Varying legal effects of different parts of the Social Protocol

17. There are a number of possible options for the legal effect of such a Social Protocol, including: not legally binding, an interpretative framework, to be taken into consideration, legally binding on the EU institutions and/or Member States, legally binding as part of the Treaty, justiciable before national courts or the ECJ, allowing for claims by trade unions and the ETUC, etc.

18. It is worth considering the possibility that a Protocol could include a number of different subjects related to social policy (see e.g., the list below: developing the EU social dialogue, interpreting the EU Charter, a framework for economic governance, social control of transnational economic free movement, *ordre communautaire social*…). The legal effect attributed to different parts of the Protocol could vary. They need not all be strictly legally binding. There are other options, as described above: legally binding on the EU institutions

only, an interpretative framework for Treaty provisions, justiciable rights before the courts, etc.[7]

An example: the precedent of the Interinstitutional Agreement on Better Law-Making (IABL)

19. An illustration of one legal effect is the Interinstitutional Agreement on Better Law-making (IABL) between the European Parliament, the Council and the Commission.[8] This binds the EU institutions to follow detailed legislative practices and procedures including mutual information and consultation. An equivalent legal effect in a Social Protocol agreed by the Member States could bind the institutions to more detailed and effective consultation practices and procedures with the social partners in accordance with the Constitution's provisions on social dialogue.[9]

The content of the Social Protocol

20. Given the precedent of the 1991 Agreement, the obvious subject of a Social Protocol to the Constitutional Treaty would be to build on that Agreement's constitutional foundation for the European social dialogue. But other subjects could and should also be addressed.

- *developing the EU social dialogue*

21. At present, the proposed Constitutional Treaty merely repeats the skeleton provisions of the EC Treaty on the EU social dialogue in Part III.[10] The EC Treaty provisions on social dialogue originate in,

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7 For example, the intersectoral social dialogue framework agreements have different parts: Preamble, General Considerations, binding clauses of the agreement itself…

8 Of 16 December 2003. OJ No. C 321/2003 of 31 December 2003.

9 Thus combating the Commission's increasingly frequent substitution of consultation of the social partners by "internet consultation" of civil society, including the social partners.

10 The social partners at EU level (Articles III-211-212) and in the Member States (Article III-210(4)) are acknowledged as active participants in the formulation and implementation of EU social and labour policy. Treaty establishing a Constitution for Europe, OJ 2004 C 310/1. Articles relevant to the social partners include, in Part I, Article I-48, in Part III, Chapter III, Section 2: Social Policy", Articles III-209-219.

and mirror, the social partners' agreement of 31 October 1991. Drafting a Social Protocol to the Constitutional Treaty provides the opportunity for the social partners to negotiate an agreement to update and improve the skeletal provisions in the 1991 agreement.

22. For example, the Constitutional Treaty did introduce some changes to the EC Treaty's provisions on the social dialogue. The Constitutional Treaty changed the legal instruments implementing social dialogue agreements.[11] This change led to an amendment reinstating the possibility of articulation of EU framework agreements with national industrial relations systems.

23. If the social dialogue increasingly produces texts which are not binding agreements, but take other forms, revised provisions on social dialogue could spell out the precise implications of the requirement in the Treaty that such texts "shall be implemented" in accordance with the first path indicated in Article 139(1) EC: the practices and procedures of labour and management and the Member States.[12]

Compare the EC Treaty, Articles 136-140 (as amended by the Treaty of Nice). Some proposals (Andreas Maurer) suggest incorporating some provisions of Part III of the Constitutional Treaty into a Social Protocol. The failure of the proposed Constitution to advance on the social dialogue provisions of the EC Treaty reflects the general failure of the Convention on the Future of Europe to adequately consider the social dimension of the EU. The Convention decided only on 22 November 2002 to establish a Social Policy Working Group. This late decision meant work had to proceed very rapidly. The first constitutive meeting of the Working Group was held on 10 December 2002, the second meeting on 10 January 2003. Working Group XI produced draft reports and presented its Final Report to the Plenary of the Convention on 6 February 2003, to be considered by the Plenary during its final deliberations in the following months. The proposals of Working Group XI might be a source of inspiration for the content of a Social Protocol to the Constitution.

11 This change was the subject of dispute and led to late amendment of the relevant provision in the Constitutional Treaty.

12 Again, the proposals in the report of Working Group XI are interesting in this respect, including the support for using a reinforced open method of coordination to make the texts effective.

24. There is no lack of burning questions of the EU social dialogue which the social partners negotiating a Social Protocol to the Constitutional Treaty could address. It could cover the *actors,*[13] the *processes*[14] and the *outcomes*[15] of social dialogue.

25. Two specific examples of the broad scope of a possible Social Protocol may be suggested. First, provisions dealing with sectoral social dialogue could provide a legal framework appropriate for its development.[16] Second, the Commission's Social Agenda 2005-2010 proposes the adoption of a voluntary legal framework for transnational collective bargaining; this is a potential subject for negotiations between the social partners to be included in a Social Protocol.[17]

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[13] Who are the intersectoral and sectoral (especially employers') sectoral organisations; their representativeness; the role of the Commission, not least to provide specific resources needed; the social partners' internal constitutional arrangements for voting to ratify agreements reached (majority voting)…

[14] Reinforcing the Commission's consultation processes (e.g. building on the principles of the information and consultation provisions of the framework Directive 2002/14; to avoid the failures revealed by the Commission's "internet" consultation on revision of the Working Time Directive and the European Works Councils' Directive); a role for the European Parliament; the specific competences of negotiating and drafting groups of the social partners; the role and integration of the national affiliates in the EU social dialogue process, the use of "social summits" to break deadlocks…

[15] Legal status (different for different kinds of texts/instruments); procedures of implementation and enforcement through national collective bargaining systems, through the open method of coordination; through judicial processes (e.g. a special EU social dialogue tribunal/labour court)…

[16] The establishment of sectoral social dialogue committees is merely a first step: the actors, processes and outcomes of sectoral social dialogue would benefit from a tailor-made legal framework. The negotiators of such a framework might engage the social partners at EU sectoral level (e.g. the ETUC's industry federations).

[17] *Communication from the Commission on the Social Agenda*, COM(2005) 33 final, Brussels, 9 February 2005, Section 2: "The Two Priority Areas". The Commission itself stipulates "Providing an optional framework for transnational collective bargaining at either *enterprise* level or sectoral level". The revision of the European Works Councils is on hold. But given the economic power of multinational enterprises,

26. Finally, it is not necessary, though it may be desirable, for a new social partners' agreement in the proposed Social Protocol to have the same legal status as its predecessor. It should revisit the content of that agreement and strengthen and improve it. But its legal status could be limited to being a binding interpretative framework for the Constitutional Treaty's basic provisions on social dialogue.

- ***interpreting the EU Charter***

27. Any future Constitutional Treaty is likely to include the EU Charter of Fundamental Rights. These include provisions of direct interest to the social partners (Article 27: information and consultation in the enterprise, Article 28: collective bargaining and collective action, including strike action). Inevitably, questions will arise as to the interpretation of these provisions.[18] A Social Protocol negotiated by the social partners could offer important guidance as an interpretative framework (or more) for the fundamental rights in the EU Charter.[19]

- ***a framework for economic governance***

28. The ETUC, among others, had proposals relating to economic governance during the process of drafting the Constitutional Treaty. These could be the subject of provisions in a Social Protocol.[20]

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many bigger than some Member States, it may be time they were "constitutionalised" by a legal framework in a Social Protocol.

[18] Article 28 is at the heart of two cases referred to the European Court of Justice (ECJ) at the end of 2005; *Viking* (Case C-438/05, *Viking Line Abp OU Viking Line Eesti v. The International Transport Workers' Federation, The Finnish Seamen's Union*),and *Laval/Vaxholm* (Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareforbundet, Svenska Byggnadsarbetareforbundet, Avdelning 1, Svenska Elektrikerforbundet*).

[19] Or even some procedural requirements; e.g. as in the existing EU framework agreements, the Commission is to request the opinion of the EU social partners when a question of interpretation comes before the European Court of Justice.

[20] The role of the annual Tripartite Social Summit (preparation, procedures, outcomes), relation to the European Central Bank; transnational coordination of collective

- ***social control of transnational economic free movement***

29. A number of issues have been the subject of major disputes among Member States and some were factors blocking ratification of the Constitutional Treaty. For example:
    - transnational relocation of production and services (delocalisation),
    - posted workers,
    - the potential conflict between new and old Member States over the competitive advantage of labour costs,
    - services of general interest,
    - social clauses in public procurement,
    - state aids and social policy,
    - regulation of new forms of employment.

30. A Social Protocol negotiated by the social partners may be more capable of addressing and able to agree upon some of these issues, which could be considered to be of constitutional interest.

- ***ordre communautaire social***

31. A Social Protocol to the Constitutional Treaty could aim to define the scope and content of the *acquis communautaire* social. It could seek to establish an interpretative framework for a Constitution for Social Europe: *ordre communautaire social*.[21]

Conclusion

32. Finally, to summarise:
    - Member States can choose to opt in to the Social Protocol to the Constitution.

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bargaining; regulation of international capital flows; corporate social responsibility (constitutionalisation of corporate governance)…

21 Including, for example, a non-regression principle.

- It then becomes binding on them and may be made irrevocable.
- Member States opting-in are not to be prejudiced by social dumping of others.
- Enterprises established in opt-in Member States remain bound by social/labour standards of the Protocol when moving to opt-out Member States (thus a constraint on delocalisation).
- Public procurement rules in opted-in Member States may reflect the Protocol, and allow contracting authorities to impose social/labour conditions on tenderers for public contracts.
- Where free movement of goods, services or establishment is affected by opt-in Member States' imposition of social and labour standards under the Protocol, this is an acceptable justification.

33. In sum, in the aftermath of the successful amendment of the Services Directive, the "country of origin" principle is thoroughly discredited. Member States opting in to higher social and labour standards under a Constitutional Protocol are to be protected from competition by enterprises in Member States which have not opted in.[22]

34. As opting-in to this Protocol is entirely voluntary, Member States should not object, especially as it means the obstacles to ratification of the Constitution might be overcome.

[22] This could be taken further as benefits of the internal market were withdrawn from non-signatory Member States to this Protocol. The present conditions and limitations on enhanced cooperation (in Article 43 EC) could be avoided by a separate Social Protocol.

Antoine Jacobs

Option 3

Enhanced cooperation

Introduction

1. Whenever the progress of European integration has been blocked, Member States have considered the alternative of moving forward with a smaller number of states. The potential use of this technique to overcome the current constitutional impasse has many precedents.

2. The birth of the European Economic Community in the 1950s itself is an illustration. At the end of the 1940s, it appeared that the United Kingdom was unwilling to go beyond the loose form of cooperation envisaged by the Council of Europe. France, Germany, Italy and the Benelux countries decided to proceed along the path of further integration with the creation of the European Coal and Steel Community and the EEC.

3. In 1985, the proposal to remove inland border controls within the EU was rejected by Britain, Italy, Ireland, Greece and Denmark. Again, the other Member States decided to move forward under the Schengen Agreement.[1]

4. Another example is when the United Kingdom blocked the insertion of a more ambitious chapter on social policy in the Treaty on European Union in 1991. The other Member States decided to incorporate the new social policy text in a Social Protocol, binding all Member States except the United Kingdom.

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[1] For details, see Option 4 below on the Schengen model.

5. Yet another example was the introduction of the Euro, implemented while Britain, Denmark and Sweden stood apart. Most recent is the example in the area of justice and home affairs.

6. In many of these cases, "enhanced cooperation" is realised via the institutions and instruments of the EU. Yet, despite this extensive history of its use, the idea of a "multi-speed Europe" has always been contested. Its opponents believe that it amounts to a betrayal of the essential quality of European integration - unity. Pragmatists, however, have never been willing to exclude it when it can serve to avoid stagnation of the process of European integration.

7. The Treaty of Amsterdam of 1997 made an attempt to formalise future initiatives in the form of enhanced cooperation between Member States. However, in order to satisfy those critical of this method, enhanced cooperation was subjected to a number of conditions, including, among others, that at least half of the Member States should participate in enhanced cooperation.[2] The Treaty of Nice of 2001 further amended these provisions, notably by including common foreign and security policies, with the exception of military or defence matters.[3]

8. The proposed Constitutional Treaty preserved the formula of "enhanced cooperation".[4] Articles I-44 and III-416-III-423 largely replicate the existing Treaty provisions on enhanced cooperation, with two important changes. First, in the future enhanced cooperation may be undertaken if at least one third of the Member States participate. Secondly, the Constitution deleted the exclusion of military and defence matters from the potential scope of enhanced cooperation.

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[2] See Art. 40-45 TEU and 11 TEC.

[3] See Art. 1.6, 1.10-14 and 2.1 of the Treaty of Nice; K. Langner, *Verstärkte Zusammenarbeit in der Europäischen Union*, Frankfurt a/Main, 2004.

[4] F. Chaltiel, 'Constitution européenne et coopérations renforcées – A propos des travaux de la Convention', *Revue du Marché commun et de l'Union européenne*, 2003, p. 290-292.

9. Earlier experience with enhanced cooperation has demonstrated that it provides a practical solution to problems blocking further integration. It may now be used again to better secure the so-called Rhineland and Scandinavian models of the European welfare state whose survival is threatened by present trends of economic globalisation dominated by unfettered market forces.

Advantages and disadvantages of enhanced cooperation.

10. Enhanced cooperation as an objective in itself is not the official policy of the EU institutions, neither of the European Commission nor the European Parliament, nor is it the aim of organisations such as the European Trade Union Confederation. Enhanced cooperation is always an *'entr'acte'*, an interim solution. The ultimate objective is to extend the undertaking of the *entr'acte* to all the Member States.

11. Enhanced cooperation may be seen as a variant of the use of the mechanism of cooperation known as the "open method of co-ordination" in order to achieve the fruits of further integration. If at least half of the Member States are so convinced of the benefits of a certain common approach to an issue to undertake enhanced cooperation, they trust that the other Member States will follow in due course.

12. The main advantage of the strategy of "enhanced cooperation", therefore, is that action towards integration need not wait until all Member States have been convinced. The protracted delay entailed in waiting for unanimous agreement before further cooperation is possible has the enormous disadvantage that Europe is seen as unable to deliver the benefits its citizens expect from integration.

13. Without enhanced cooperation, European integration is seen as extremely slow to advance; the project loses credibility. If it is necessary to wait until every Member State supports a step forward, necessary action becomes subject to the temptation to water down policy aspirations in order to win the support of the hesitant Member States. The strategy of enhanced cooperation allows for the marriage

of a high level of aspirations with real progress by those Member States seeking advanced integration of their policies.

14. These same advantages are evident wherever the institutional framework of the European Union requires unanimity or quasi-unanimity in order to take decisions. They are also present inside the European Trade Union Confederation and European employers' organisations, where very often decision-making requires unanimity or quasi-unanimity.

15. It is sometimes argued that enhanced cooperation destroys the consensual approach needed in the European Union. This is too negative a vision. Enhanced cooperation is pursued precisely because there is no consensus among the Member States. It operates to prevent the stalemate where consensus is not likely to be easily obtained, and, consequently, important policies cannot be quickly implemented in the European Union.

16. Of course, enhanced cooperation is also a demonstration of disagreement among the Member States and may jeopardise the solidarity of the European Union. These are certainly weaknesses. Enhanced cooperation is not the ideal process of unifying Europe. It is conceded, therefore, that it is an "evil"; nonetheless, it may be a lesser "evil", and better than no progress at all.

17. There may be fears that enhanced cooperation in social affairs could lead to '"social dumping". There are concerns that enterprises could opt for investment in Member States with lower social and labour costs than those Member States participating in enhanced cooperation in social affairs. Or that the markets of Member States participating in enhanced cooperation on social affairs could be flooded with cheaper goods and services produced in Member States outside enhanced cooperation.

18. Such possibilities are not to be dismissed altogether. On the other hand, however, it is far from certain that these risks will emerge on any large scale. A number of economic studies have already shown

that a high level of social protection is not incompatible with a high level of employment and wealth.[5] Member States with a high level of social protection are better equipped to defend their systems of welfare and labour standards against threats from pure market forces when they cooperate closely together than when they struggle alone.

Undertaking enhanced cooperation: Articles 43-45 TEU.

19. Enhanced cooperation in social affairs must be undertaken in accordance with the provisions of the existing Treaties. As the Constitutional Treaty has not been unanimously ratified and entered into force, the governing provisions are those laid down by the Treaty of Amsterdam, as modified by the Treaty of Nice: now Articles 43-45 TEU.

20. These provisions allow for enhanced cooperation by a majority of the Member States, provided this cooperation complies with a number of conditions (Art. 43). The majority of these conditions require that enhanced cooperation must not undermine the internal market or economic and social cohesion, and that it be in line with the aims of the EU, its laws and the "*acquis communautaire*".

21. Enhanced cooperation requires that at least a majority of the Member States participate. This requirement clearly establishes a threshold for the strategy of enhanced cooperation towards European integration. In present circumstances, at least 14 Member States must agree to enhanced cooperation. A further condition is that enhanced cooperation be open to all Member States.[6] This requirement is not a problem; indeed, it would be the aim of the enhanced cooperation in social affairs proposed here.

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[5] See, for instance, the recent ETUC study by R. Janssen, *The Economic Case Against Employment Protection Legislation: A Non Case*, Brussels, 2006.

[6] Art. 43(j) and Art. 43B TEU.

22. A final condition is that of *ultimum remedium* (Art. 43A) or last resort. Again, in principle, this does not pose any problem. The starting point of enhanced cooperation on social affairs, as proposed here, would be a social policy programme addressed to all Member States. Only after an outcome whereby the programme is not acceptable to a number of Member States would enhanced cooperation be considered.

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23. The policy content of enhanced cooperation is potentially open-ended. The scope of its ambition depends on the decisions of governments and pressure groups. The European Trade Union Confederation may be expected to provide a blueprint for further steps towards a Social Europe. This blueprint could provide a starting point for what could become the content of enhanced cooperation in social affairs.

24. Such a blueprint could specify a number of concrete proposals aimed at promoting the interests of working people in the Member States. By way of example, these could include:
    - establishing a legally binding European standard for national minimum wage legislation at the level of 60% of the national net average wage in each Member State. The Committee on Social Rights comprising experts on the European Social Charter already applies a "decency threshold" of ca. 60% of the national net average wage in the Member States which have ratified Article 4 (1) of the European Social Charter;
    - establishing a legally binding standard for national social security systems to offer benefits amounting to at least 50% of the national minimum wage for all citizens (beneficiaries considered alone) in all the classic branches of social security. This standard has already been set in the (as yet) non-legally binding Revised Code of Social Security of the Council of Europe, adopted in 1990;
    - co-determination powers for workers' representatives in major companies regarding crucial managerial decisions, such as acqui-

sitions, relocation, closures and sales of establishments, corporate mergers, etc;

- a well-financed globalisation fund to secure alternative employment in the same area for workers who are victims of the loss of employment due to globalisation and "social dumping" within the EU;
- the direct effect, vertical and horizontal, of certain social provisions of the EU Charter of Fundamental Rights, such as the right of every worker to protection against unjustified dismissal (Article 30).

25. In order to achieve the dynamic implementation of these ambitious policies, enhanced cooperation on social affairs would need to overcome a number of procedural obstacles in the present Treaties, both the EU Treaty and the EC Treaty:
    - to bring all matters of social policy referred to in Article 137 of the EC Treaty within the scope of qualified majority voting in the Council of Ministers. This was the intention of an initial proposal of the Praesidium of the Convention that drew up the European Constitution[7], but was not preserved in its final text;
    - to give the European Parliament a right of initiative in social and labour policy matters;
    - to delete the reference to "pay" in the list of matters excluded from the EU's power to adopt social policy directives in Article 137 of the EC Treaty.

26. Such proposals allowing for substantive policy measures and eliminating procedural blockages would greatly improve the prospects for legislative initiatives on social matters by the institutions of the European Union.

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[7] See CONV 725/03 p. 67 on Art. III-99 (ex Art. 137 TEC). Unfortunately this text is no longer available on the web-site of the Convention (http://european-convention.eu.int.) in most of the EU languages. It is, however, available on that website in the Dutch, Danish and German languages!

27. Moreover, it will also give an important stimulus to the European social dialogue. As decision making through enhanced cooperation on social affairs becomes less difficult than it is in the EU as a whole, bargaining within the context of the European social dialogue may become much more productive. Experience has shown that "bargaining in the shadow of the law" becomes a more fertile exercise when the shadow is bigger.

Enhanced cooperation vs. a Social Protocol

28. All the above proposals as to substantive policy initiatives and procedural improvements may be considered within the coming negotiations on the future of the European Constitution. As suggested in option 2, they could be incorporated into a Social Protocol to the European Constitution. However, for such a Social Protocol to acquire legally binding effect would require the approval of all 27 Member States' governments and ratification by all 27 Member States.

29. Such a process could take many more years. Such an outcome would be linked to the project of the European Constitution itself, which is the subject of much debate. During this potentially lengthy period, the development of European social policy would progress, if at all, very slowly, probably unacceptably slowly.

30. Therefore, there is great attraction in providing for enhanced cooperation in social affairs through an agreement among those Member States willing to undertake this advance. This could be approved and enter into force reasonably quickly on the basis of the existing provision on enhanced cooperation in the present Treaties.

31. Naturally, it would be preferable if all the Member States would immediately agree to take such a step towards enhanced cooperation on social policy. This would enter into force by way of amendments to the existing Treaties without waiting on the outcome of further debates on the project of the European Constitution.

32. However, it is more realistic to assume that a number of Member States may resist taking such a step. It is therefore worthwhile actively considering the option of enhanced cooperation by a smaller group of Member States.

Procedure

33. A text embodying the desired social policy of a future European Constitution should be prepared by the ETUC. It could be circulated for discussion and revision to the organisations of workers in the Member States. A final agreed text, adopted by the ETUC, would be presented to politicians in all Member States and pressures brought to bear for its acceptance. Member States will make clear whether they are prepared to incorporate such a text into a new Constitutional Treaty.

34. If not, this text would provide the basis for enhanced cooperation. A smaller group of Member States, willing to accept the text, could agree to move forward by way of enhanced cooperation in social affairs.

Isabelle Schömann

Option 4

The Schengen Model: "Variable Geometry"

Introduction

1. The Schengen model[1] emerged during the 1980s, when a debate developed regarding the free movement of persons. Some Member States argued that free movement should apply only to EU citizens. This entailed maintaining control over movement within the Community, keeping internal border checks. Other Member States argued that free movement should apply to everybody within the Community. This would mean an end to internal border controls altogether.

2. The outcome of his debate pitted the United Kingdom, hostile to the abolition of border controls, against the Benelux countries, where free movement of persons already existed. The Benelux countries therefore suggested that, together with France and Germany, they work towards the gradual abolition of border controls. In 1985, they decided to create an area of free movement without internal borders.

3. The 1985 Schengen Agreement was an agreement among five EU Member States. It allowed them to proceed with a common policy on the temporary entry of persons and harmonisation of external

[1] Including the Schengen Convention itself and the 1985 Schengen Agreement, the accession protocols with Italy, Spain, Portugal, Greece, Austria, Denmark, Finland and Sweden and the decisions and declarations adopted by the Schengen bodies.

border controls.[2] Since not all Member States wished to take part, the Schengen Group represents a model of a European integration vanguard, the achievements of which could later be extended to other Member States.

4. Like all models of advanced European integration, there have been continual adjustments. The implementation of the Schengen Agreement, planned for 1 January 1993, encountered a number of difficulties.[3] As a result, implementation of the Schengen Agreement was delayed until 26 March 1995. From then onwards, however, it was gradually applied to the signatory Member States and associated countries.

5. In 1997, a Protocol attached to the Treaty of Amsterdam incorporated the advances developed by the group of Member States party to the

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[2] Among the main measures are: 1. the removal of checks at common borders, replacing them with external border checks; 2. a common definition of the rules for crossing external borders with uniform rules and procedures for such external border controls; 3. the separation in air terminals and ports of people traveling within the Schengen area from those arriving from countries outside the area; 4. harmonisation of the rules regarding conditions of entry and visas for short stays; 5. coordination between administrations on surveillance of borders (liaison officers, harmonisation of instructions and staff training); 6. the definition of the role of carriers in measures to combat illegal immigration; 7. a requirement for all non-EU nationals moving from one country to another to lodge a declaration; 8. the drawing up of rules for asylum seekers; 9. the introduction of cross-border rights of surveillance and hot pursuit for police forces in the Schengen states; 10. the strengthening of legal cooperation through a speedier extradition system and faster distribution of information regarding the implementation of judgments in criminal cases; 11. the creation of the Schengen Information System (SIS). A further convention (the Implementing Convention) was signed in 1990 and came into effect in 1995. It abolished the internal borders of the signatory states and created a single external border where immigration controls for the Schengen area are carried out in accordance with a single set of rules.

[3] For example, its application included provision for temporary derogation. Italy and Greece have invoked the derogation clauses because of difficulties encountered in monitoring their maritime borders. France invoked the derogation clause during terrorist attacks in 1995 and continues to do so today in order to monitor its borders with Belgium and Luxembourg, due to drug trafficking originating in the Netherlands.

Schengen Agreement into the legal framework of the European Union. The Schengen area thereby came within the legal and institutional framework of the EU. The Schengen model attains the objective of the free movement of persons enshrined in the Single European Act of 1986.

The *acquis* of the Schengen model

6. The Schengen model now comes under the parliamentary and judicial scrutiny of the EU institutions. As set out in the Treaty of Amsterdam, the Council took the place of the Executive Committee created under the Schengen Agreement. In order to make this extension of European integration possible, the Council of the European Union took a number of decisions.

7. One of the Council's most important tasks in incorporating the Schengen model into the EU legal framework was to select from among the provisions and measures adopted by the signatory states those which formed a genuine *acquis*. This *acquis* constitutes the body of law which serves as the basis for further cooperation. A list of the elements which constitute the *acquis*, setting out the corresponding legal basis in the Treaties for each element, was adopted on 20 May 1999.

8. One important consequence of the Schengen model is that Member States that accede to the European Union are bound by the entire Schengen *acquis*. These Member States apply all the provisions of the Schengen *acquis* relating to police and judicial cooperation that are not directly linked with the removal of border controls. However, certain other provisions will apply to them only after border controls have been abolished.

9. Another development of the model is the Schengen Information System (SIS), which operates in 13 EU Member States, plus Norway and Iceland. Analogous initiatives could be envisaged as regards access to and distribution of information on labour and

social standards in the Member States should a similar model be adopted to extend European integration in social and labour policy.

10. As the SIS was not designed to operate in more than fifteen countries, a new second-generation Schengen Information System (SIS II) has had to be put in place to enable other Member States to use the system. Accordingly, on 6 December 2001, the Council adopted two instruments making the Commission responsible for developing SIS II.[4] The use of EU institutions, such as the Commission, to extend the scope of the Schengen model of European integration is illustrated by the Commission's attempt to extend the application of the Schengen Information System.

11. The purpose of the SIS under the Schengen model is to improve police and judicial cooperation in criminal matters[5] and the policy on visas, immigration and the free movement of persons in the EU.[6] On 31 May 2005, the Commission adopted three proposals for legislative instruments to replace provisions of the Schengen Convention relating to the SIS.[7] The latest Commission progress report of December 2005 on the development of the second generation Schengen Information System specified that discussions on the three legislative proposals were still continuing and that they

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4 Council Regulation (EC) n. 2424.2001 on the development of the second-generation Schengen information system (SIS II) based on Article 66 of the Treaty establishing the European Community; Council Decision 2001/866/JHA on the development of the second-generation Schengen information system (SIS II) based on Articles 30(1), 31 and 34 of the Treaty on European Union.

5 Covered by Title VI of the Treaty on European Union.

6 Covered by Title IV of the Treaty establishing the European Community.

7 Proposal for a Regulation of the European Parliament and of the Council on the establishment, operation and use of the second-generation Schengen Information System (SIS II), COM (2005) 236; Proposal for a Council Decision on the establishment, operation and use of the second-generation Schengen Information System (SIS II), COM (2005) 230 final; Proposal for a Regulation of the European Parliament and of the Council regarding access to the second-generation Schengen Information System (SIS II) by the services in the Member States responsible for issuing vehicle registration certificates, COM (2005) 237 final.

should be adopted by mid-2006 in order to allow Member States to fulfill any necessary national implementing procedures. Substantial progress had been made towards completing a first reading of the proposals by the end of December 2005, but intensive discussions were continuing with the aim of having a first reading agreement followed by adoption by mid-2006. However, until November 2006, no further progress had been made.

12. The procedures for extension of policies under the Schengen model encounter the usual problems of expanding the scope of European integration. For example, some legal problems arise from the resistance to the system of a number of European data protection commissioners, whose approval of SIS II is required. Their primary criticism of the system is that inadequate information is provided about how the data collected will be used by the police to track down individuals. Thus, for example, they have questioned how, in what manner and to what extent police investigators will have access to the biometric data generated by the new electronic passports. This issue, among others, has not yet been resolved.

13. Similar issues could be anticipated in applying the Schengen model to develop an information system on labour and social policy standards in the EU. Legislative measures could be proposed, problems encountered, and creative solutions may be found and gradually extended to Member States embracing the model.

"Variable geometry"

14. To date, a total of 28 European countries, including all EU Member States except Ireland and the UK, and also including non-EU states such as Iceland, Norway and Switzerland, have signed the Schengen Agreement.

15. However, the current position whereby some EU Member States remain outside the Schengen system, and some non-EU states are within the system, raises issues which might also arise should a Schengen model be used to initiate closer European integration in

social and labour policy. The scenario is of social policy integration among a small, but gradually expanding number of EU Member States, and others, but stopping short of including all EU Member States. Questions relevant to such policy integration have been addressed by the Schengen model. They include

(i) how to integrate future Member States,

(ii) how to accommodate EU Member States who remain outside the Schengen system, and

(iii) what is the specific position of non-EU Member States within the system?

16. In particular, this problem of the "variable geometry" of the coverage of a policy area of closer European integration raises specific legal difficulties. In the case of the Schengen policy area, the legal difficulties relate to the "variable geometry" that applies in the areas under Title IV of the Treaty, which stems from the Protocols annexed to the Treaty of Amsterdam on the participation of certain Member States of the European Union – Denmark, Ireland and the United Kingdom – in the Schengen area.

i. The integration of future Member States

17. Article 8 of the Schengen Protocol states:

> "For the purposes of the negotiations for the admission of new Member States into the European Union, the Schengen Acquis and further measures taken by the institutions within its scope shall be regarded as an Acquis which must be accepted in full by all States candidates for admission".

18. The entire Schengen *acquis*, therefore, including its subsequent developments, has to be accepted and implemented by new Member States. For example, in order to be part of the area without internal frontiers, a Member State must participate fully in the operational Schengen Information System. Such participation is an

essential prerequisite to lifting controls at the frontiers between the new Member State and the Member States that are already part of that area.

ii. Accommodating EU Member States outside the Schengen system

Ireland and United Kingdom

19. Ireland and the United Kingdom never signed up to the Schengen Convention and have thus not ended border controls with other EU Member States. The United Kingdom refused and still refuses to take part in Article 96 of the Schengen Convention or other provisions relating to the Schengen Information System. The exception is to the extent that they do not relate to Article 96 of the Schengen Convention concerning refusal of entry, which has its legal basis in Articles 62, 63 and 66 of the EC Treaty.

20. However, the United Kingdom does participate in those aspects of Schengen that entail cooperation between police forces and judicial cooperation. In accordance with the Protocol to the Treaty of Amsterdam, Ireland and the United Kingdom can take part in all or some of the Schengen arrangements if the Schengen group Member States and the government representative of the country in question vote unanimously in favour within the Council.

21. For example, in March 1999 the United Kingdom asked to take part in some aspects of Schengen, namely police and judicial cooperation in criminal matters, the fight against drugs and the corresponding Schengen Information System. Subsequently, a Council Decision 2000/365/EC approving the request by the United Kingdom was adopted.[8] Under Article 8(2) of the Decision, the United Kingdom is deemed irrevocably to have notified the President of the Council

[8] The process of its adoption was delayed, and was only concluded on 29 May 2000, due to an on-going dispute between Spain and the United Kingdom regarding Gibraltar.

under Article 5 of the Schengen Protocol that it wishes to take part in all proposals and initiatives which build upon the Schengen *acquis*, as authorised by the Decision. This therefore applies to proposals for the development of SIS II. However, the Council Decision 2000/365/EC specifies that the United Kingdom will not take part in Article 96 of the Schengen Convention or other provisions relating to SIS except to the extent that they do not relate to Article 96.

22. The position of Ireland should become the same, as the mechanism provided for in a draft Council decision currently under consideration is similar to that adopted for the United Kingdom.

23. The question of the possible participation of the United Kingdom and Ireland in new functions to be incorporated in SIS II will most probably be governed by the relevant Protocols annexed to the Treaty of Amsterdam and/or the provisions adopted in application of those Protocols.

Denmark

24. Although Denmark signed the Schengen Agreement, within the EU framework it retained the right to decide whether or not to apply any new decision taken under the Agreement. Here a distinction must be made between proposals based on Title VI of the EU Treaty (police and judicial cooperation in criminal matters, Articles 29–42) and proposals based on Title IV of the EC Treaty (visas, asylum, immigration and other policies related to free movement of persons, Articles 61–69). Denmark participates fully in the former but not in the latter. However, in the case of measures aimed to develop the Schengen *acquis*, under Article 5 of the Protocol, Demark has the right to decide whether to transpose such a measure into its national law within six months of its adoption by the Council.

iii. The position of non-EU Member States in the Schengen model

Iceland and Norway

25. Iceland and Norway, countries outside the EU, but members of the Nordic Passport Union, acceded to the Schengen area as associate members on 19 December 1996. They concluded an Association Agreement with the European Union on the establishment, application and development of the Schengen *acquis*.

26. On 1 December 2000 the Council decided that, as from 25 March 2001, the Schengen *acquis* arrangements would apply to the five countries of the Nordic Passport Union. In addition, the Schengen Information System arrangements were put into effect as from 1 January 2001. In order to check whether the SIS functioned and was properly applied, the decision provided for evaluation visits to be carried out in all the Nordic States. Reports on the visits submitted to the Council in March 2001 show that the SIS was being properly applied and that controls at external borders (in ports and airports) met the conditions laid down.

27. However, the debate on the new Schengen Information System (SIS II) raises the question of the participation of Iceland and Norway in the development of the Schengen *acquis* in respect of Articles 92 to 118 of the Schengen Convention, as part of the material scope of the Association Agreement. Legislative proposals to develop the new Schengen Information System II will be discussed in the Mixed Committee set up by the Association Agreement.

Switzerland

28. Switzerland concluded an Agreement with the European Union and the European Community in 2004 on the implementation, application and development of the Schengen *acquis*. Switzerland fully accepted the current *acquis* without exceptions, including judicial co-operation in criminal matters. However, Switzerland

received a guarantee that, in the area of direct taxation, banking secrecy remains protected. In the event that a future Schengen provision revokes the principle of double liability with regard to direct taxation offences, thus giving rise to an obligation of legal assistance with regard to offences of tax evasion, Switzerland received an opt-out without the need to withdraw from Schengen cooperation.

Conclusion

29. The Schengen model originated with an Agreement signed by only five EU Member States in 1985. This intergovernmental cooperation had expanded to include thirteen countries by 1997, following the signing of the Treaty of Amsterdam. On 1 May 1999, the Amsterdam Treaty incorporated into EU law the decisions taken since 1985 by the Schengen group members, as well as their associated working structures. In 2004, the ten new Member States and Switzerland joined the Schengen area. Bulgaria and Romania joined in 2007. To date, a total of 28 European countries, including all EU Member States except Ireland and the UK, and also including non-EU states such as Iceland, Norway and Switzerland, have signed the Schengen Agreement.

30. The Schengen model is one where an initiative for closer cooperation, launched by a small number of EU Member States, has grown to include now the vast majority of the EU Member States, except Ireland and the UK. These EU Member States signed and successfully operated an agreement for closer integration of an important and complex policy area. The Schengen model offers the prospect of gradual expansion of a policy area initially including only a small number of EU Member States to achieve the further integration of most of the EU Member States seeking to establish Social Europe.

Bruno Veneziani and Niklas Bruun

Option 5

A Social Constitution through the European Court of Justice

Introduction: the EU Charter as catalyst

1. The development of a social constitution for the EU could be accomplished in part through the European Court of Justice (ECJ).

2. One central instrument is the EU Charter of Fundamental Rights of December 2000. The fundamental social and labour rights in the Charter could acquire constitutional status through decisions of the ECJ faced with complaints that Member States or the EU institutions are failing to implement, or violating rights in the EU Charter. The Court has played this role in the past, relying on other fundamental freedoms, such as free movement of goods, services, capital and labour, which are guaranteed in the EC Treaty.

3. Since its proclamation on 7 December 2000, every Advocate General has cited the Charter in one or more Opinions, as has the Court of First Instance in a number of judgments.[1] The first judicial reference to the EU Charter was made by the Court of First Instance in a decision of 30 January 2002.[2] Five and a half years after its proclamation, the ECJ itself finally cited the EU Charter in

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[1] In the first 30 months of its existence, up to July 2003, there were 44 citations of the Charter before the European courts. For details of these 44 cases, see the Appendix, prepared by Stefan Clauwaert and Isabelle Schömann, in B. Bercusson (ed), *European Labour Law and the EU Charter of Fundamental Rights*, Nomos, Baden-Baden, 2006.

[2] Case T-54/99, *max.mobil Telekommunikation Service GmbH v. Commission,* [2002] ECR II-313, paragraphs 48 and 57.

European Parliament v. Council, decided 27 June 2006.[3] The key text in the judgment is under the rubric "Findings of the Court"[4] with regard to the issue "The rules of law in whose light the Directive's legality may be reviewed".[5] The Court states:[6]

> "The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court... and of the European Court of Human Rights'".

4. In other words, while not legally binding itself, the Charter reaffirms rights which are legally binding due to their provenance from other sources which are recognised by Community law as legally binding sources.[7]

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[3] Case C-540/03. In a second case, *Unibet*, Case C-432/05, decided 13 March 2007, the Grand Chambre of the Court stated (paragraph 37) that "the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States,… and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1)".

[4] Beginning paragraph 35.

[5] Beginning paragraph 30.

[6] *Ibid.*, paragraph 38.

[7] See also the following statement in the Opinion of Advocate General Kokott: (paragraph 108) "While the Charter still does not produce binding legal effects comparable to primary law, it does, as a material legal source, shed light on the fundamental rights which are protected by the Community legal order."

5. It is the experience of the ECJ as a constitutional court which offers the prospect of constitutionalisation of the social dimension through the Court.

The emergence of the role of ECJ as a constitutional court

6. In its early years, the ECJ was reluctant to address the protection of fundamental rights of the Member States or examine complaints of violation of constitutional principles in the Member States. However, there was a change of direction in *Stauder*, where the Court referred to "the fundamental human rights enshrined in the general principles of Community law and protected by the Court".[8] One year later, the Court was even more explicit. In *Internationale Handelsgesellschaft,* a German company challenged Community action as contrary to principles of *national* constitutional law. The Court held that the validity of the EC measure *cannot* be affected by a claim that it is contrary to fundamental rights or principles of *national* law. However, it went on to examine whether there were analogous elements in EC law, and stated:[9]

> "…respect for fundamental rights forms an integral part of the general principles of Community law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community… [respect for] rights of a fundamental nature… must be ensured in the Community legal system".

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[8] Case 29/69, *Stauder v. City of Ulm*, [1969] ECR 419; ECJ, paragraph 7. Advocate-General Roemer referred to "general legal principles of Community law in force" which were to be "guided by reference to the fundamental principles of national law". They were "an unwritten constituent part of Community law"; p. 428.

[9] Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel*, Case 11/70, [1970] ECR 1125, paragraph 4.

7. The sources of such judicial review were extended in *Nold*:[10]

> "As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. Safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States… Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law."

8. The explicit endorsement of fundamental rights in the EU legal order, thus supplemented by reference to the common constitutional traditions of the Member States and international treaties, is now reinforced by Article 6(2) of the Treaty on European Union:

> "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

The legal sources for the ECJ as a constitutional court to develop Social Europe

i. Fundamental social and labour rights in Member States

9. The Court's case law points to the need to identify the common traditions and legal and constitutional practices protecting fundamental social, labour and trade union rights in the laws of the Member States.

[10] Case 4/73, *Nold v. Commission*, [1974] ECR 491, paragraph 13.

10. For example, freedom of association in trade unions has acquired constitutional status in some Member States. Sometimes this is a part of a constitutional guarantee of a general right of association, sometimes, the guarantee is granted by ordinary legislation or "basic agreements" between the social partners. Does a trade union's "right to freedom of association" also include other collective trade union rights, such as the right to collective bargaining and collective agreements, the right to strike or take other industrial action? Different Member State concepts of "freedom of association" include some, many or even all of these elements. Concepts of freedom of association often overlap; that does not mean they are the same. Different Member States will include some elements and exclude others. But there are elements of trade union rights which all, or most, Member States agree are protected. These elements, on which there is consensus, can be assembled into a principle of "freedom of association" at EU level.[11]

11. Trade union freedom of association includes some rights recognised in all (or most) Member States. In a Member State, a claim to the right of association in the EU Charter, as a question of EU law, could be referred by a national court to the ECJ under Article 234 of the EC Treaty. In interpreting the right at EU level, the ECJ could draw upon a range of sources, including international law, in particular, ILO Conventions, Council of Europe measures and existing EC law.

[11] A narrow formulation of "freedom of association" might include a large number of Member States where such a formulation is acceptable. The *wider the range of rights*, the *lesser the number of Member States* which accept that those rights are within the scope of the fundamental trade union right of freedom of association. The aim is a formulation which includes fundamental trade union rights recognised in all (or most) Member States: a *common core* of elements of a right of "freedom of association" which is shared by all, or a majority of, the Member States.

ii. Fundamental social and labour rights in international treaties

12. The option of the ECJ playing a role in constitutionalising the social dimension of the EU cannot rely on the European Convention for the Protection of Human Rights (ECHR) of 1950. The ECHR is not focused on protection of the rights of workers.[12] Social and labour rights are the focus of the European Social Charter (ESC) 1961 (revised in 1996). All Member States (including the twelve recent accession States) have ratified *either* the 1961 or the 1996 Social Charters of the Council of Europe.

13. Similarly, ratification by all Member States (including the twelve recent accession States) of ILO Conventions No. 87 of 1948 (Freedom of Association and Protection of the Right to Organise) and No. 98 of 1949 (Application of the Principles of the Right to Organise and to Bargain Collectively) has produced a common foundation of trade union rights in all Member States.

14. These trade union rights have acquired constitutional status in some Member States. Though the ESC is within the category of the international treaties referred to in *Nold*, and, indeed, is explicitly referred to in Article 136 of the EC Treaty,[13] the Court has not yet been willing to invoke the ESC as it does the ECHR.

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[12] In Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzuge v. Republic of Austria*, [2003] ECR I-5659, the Court seemed willing to contemplate restrictions on freedom of expression or assembly, as allowed by the ECHR. In Case C-499/04, *Hans Werhof v. Freeway Traffic Systems GmbH & Co. KG,* decided 9 March 2006, the ECJ cited the ECHR as protecting the negative right of association of employers not to be bound by collective agreements, but did not refer to the decision of the European Court of Human Rights in *Wilson and Palmer v. United Kingdom*, [2002] IRLR 128 upholding the right of workers to freedom of association as protecting their adhesion to collective agreements.

[13] Article 136: "The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers…".

The constitutional framework: *Ordre communautaire social*

15. The ECJ could play a role in constitutionalising the EU social model by adopting a specific interpretative framework for relevant provisions of the Treaties and secondary legislation. This interpretation would be consistent with the evolving context of the EU from a purely economic Community establishing a common market to a European Union with a social policy aimed at protecting workers employed in the common market who are also citizens of the Union enjoying fundamental rights.[14]

16. From the beginning of the European Community, improvement of living and working conditions was stipulated as a social policy objective. EU and Member State regulation of social provisions "shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained" (Article 136 EC).

17. Additionally, since the adoption of the new social policy provisions of the Treaty of Maastricht: "Should management and labour so

[14] The ECJ recognised the implications of this transformation for the nature of the EU in a case concerning the exclusion of part-time workers from supplementary occupational pension schemes. As formulated by the national court posing the question for the ECJ, the claim for a retrospective application of the principle of equal pay would risk distortion of competition and have a detrimental economic impact on employers. Nonetheless the Court stated: '…it must be concluded that the economic aim pursued by Article 119 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'. (Case C-50/96, *Deutsche Telekom AG v Schroder* [2000] ECR I-743, paragraph 57). Economic provisions of the Treaty have come to be re-interpreted in light of changes in the scope of activities of the EU. The ECJ's decision in *Albany* is another example of a case in which the Court acknowledged that the EC Treaty provisions on competition policy must be conditioned by other Treaty provisions on social policy; specifically, collective action in the form of collective bargaining/social dialogue. *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, Case C-67/96; with Joined cases C-115/97, C-116/97 and C-117/97; [1999] ECR I-5751.

desire, the dialogue between them at Community level may lead to contractual relations, including agreements" (Article 139(1) EC) and "Agreements concluded at Community level shall be implemented…" (Article 139(2) EC). Insofar as regulation of living and working conditions is left to social dialogue, the process of negotiation between the social partners, a crucial element in this process, is Treaty-protected collective action.

18. This overriding interpretative framework comprises the accumulated body of EU social and labour law, the *acquis communautaire social*, including five principles of what may be called *ordre communautaire social*:

    a. a universal premise of international labour law based on the Constitution of the ILO to which all Member States belong: "labour is not a commodity";[15]

    b. the activities of the Community shall include "a policy in the social sphere" (Article 3(1)(j) EC) and the Community and the Member States "shall have as their objectives… improved living and working conditions" (Article 136 EC);

    c. respect for fundamental rights of workers reflected in the Community Charter of the Fundamental Social Rights of Workers 1989, the European Social Charter signed at Turin on 19 October 1961 (both cited in Article 136 EC), and the EU Charter of Fundamental Rights solemnly proclaimed by the European Parliament, the European Council and the Commission at Nice on 7 December 2000;

[15] The Philadelphia Conference of 1944 adopted a Declaration defining the aims of the International Labour Organisation subsequently incorporated into the ILO Constitution which affirmed: 'labour is not a commodity'. The Preamble to the Community Charter of the Fundamental Social Rights of Workers of 1989 states: 'Whereas inspiration should be drawn from the Conventions of the International Labour Organisation…'.

d. the distinctive characteristic of the European social model which attributes a central role to social dialogue at EU and national levels in the form of social partnership;[16]

e. the common market principle of equal treatment of all workers without discrimination based on nationality.

19. In brief, the ECJ is to interpret and apply EU law in the light of *ordre comunautaire social*: labour is not a commodity like others (goods, capital), free movement is subject to the objective of improved working conditions, respecting the fundamental rights of workers as human beings, acknowledging the central role of social dialogue and social partnership at EU and national levels, and adhering to the strict principle of equal treatment without regard to nationality.

Using the ECJ as a constitutional court

20. In general, the rights and interests of trade unions and workers in EC law are increasingly on the agenda of the European courts. Cases may arrive before these courts without trade unions being party to them or being forewarned that they raise issues of vital concern to them. Developing a social constitution through the ECJ directly engages the trade union movement. It is essential for the ETUC to have access to the European Court to ensure that the Court takes into account the implications of any decisions it may make for trade unions at European and national levels.

21. European trade unions need to take steps to develop a litigation strategy so that the ETUC or its affiliated organisations can intervene in judicial proceedings when the case raises important issues concerning the rights and interests of workers and trade unions.

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[16] See the "Overview" in B. Bercusson and N. Bruun, *European Industrial Relations Dictionary*, European Foundation for the Improvement of Living and Working Conditions, Luxembourg: Office for Official Publications of the European Communities, 2005, pp. 2-50, especially pp. 4-11.

22. There is also the possibility of direct action before the European Court by the ETUC using Article 230 of the EC Treaty. The special position of trade unions before the European Court is a consequence of their institutional role following from the social policy provisions in the EC Treaty (Articles 136-139). These provisions formalise the legislative role of the EU social partners in social policy and labour law. This has particular significance as regards the interpretation and application of the EU framework agreements concluded between the social partners and the directives which include these agreements.

23. To *proactively* exploit the ECJ's role as a constitutional court, and to *defensively* intervene when trade unions' rights and interests are concerned, the ETUC should explore three options:

    a. a general right of **intervention** before the European Court;

    b. a right to take **direct** legal action before the Court;

    c. a **special** right of intervention with regard to EU framework agreements coming before the Court. [17]

[17] See B. Bercusson, "The ETUC and the European Court of Justice", (2000) *Transfer: European Review of Labour and Research,* (Winter), pp. 720-725. "Les syndicats européennes devant la Cour de Justice de Luxembourg", *Liaisons Sociales Europe* No. 14, (26 juillet au 12 septembre 2000), pp. 2-3.

Yota Kravaritou

Option 6

A Non-Binding Social Declaration

Introduction

1. The option is a "Social Declaration", not a legally binding measure, but one that does have a considerable legal impact.

2. This option, whereby the social dimension of the Constitutional Treaty would be without binding legal status, is usually considered the least desirable, compared to other options.

3. Nonetheless, it should be explored because the failure of other options may make this "option" the *de facto* situation over the coming period. What is more, this option is compatible with the process of European constitutionalisation in recent years, at least in relation to some social rights.

4. It may allow for declaration of constitutional social principles and values *not* tied to the legacy of a market economy, which a binding legal text would be obliged to formally acknowledge. Rather, it would be a *purely* social declaration and thereby free to express, without qualification, the most profound European social values.

Not legally binding, but not without impact

5. A non-binding Social Declaration is soft law. Its projected impact is twofold.

i. Impact on institutions

6. A Social Declaration will have an impact on institutions, perhaps even more so than hard law. Courts and law-making authorities will be held politically accountable if they fail in their activities to comply with the pronouncements in the Social Declaration. It is not clear that institutions would be more compliant if it were hard law. There have been other non-binding EC Charters: the 1989 Community Charter and the EU Charter of 2000, both of which have influenced the Commission and the European Court of Justice (ECJ).

7. The impact of a non-legally binding Social Declaration derives from the *context* in which it appears: specific *social* rights emerging in the context of the EU, and *human* rights in general.

8. This context includes the preceding work of the Convention on the Future of Europe and in the Member States. There is a background of texts and public debates on the social dimension of the EU, not least the proposals of Working Group XI on Social Europe.

9. The context of a Social Declaration would also include the fact that the Constitutional Treaty, including the EU Charter, has been ratified by a large majority of Member States.

10. In this context, a Social Declaration would not be an isolated and marginalized document but would become part of the constitutional continuity of the half century of development of the EU legal order, particularly in the decisions and doctrine of the ECJ and its acceptance in national legal orders. The text of the Treaties includes ever more frequent references to human rights. The Court constantly refers to human rights and principles and national constitutional traditions of fundamental rights.

11. The Social Declaration would express and demarcate the continuity of a *European* political civilization, different from others (such as the USA or China) and with a specifically European legal institutional tradition, legal culture and social model.

ii. Psychological impact

12. A Social Declaration will have a psychological impact on citizens. By increasing individuals' identification with Social Europe, it might make them more willing to ratify the Constitutional Treaty.

13. The psychological impact of declarations on individuals tends to follow in the wake of major events. This tendency towards identification reflects the struggle that led up to a Declaration.[1] An economic and social crisis creates the atmosphere needed for such a Social Declaration. A trade union campaign to achieve a Social Declaration could become a struggle that would lead workers to identify with the aims of such a Declaration, thereby enhancing its potential effects, in terms both of the subjectivity of citizens and also the objective effect on institutions.

14. There is an established, though relatively recent, historical memory of social rights. Social and economic rights are enshrined as values in the Constitutional Treaty and have specific meaning in the social dimension of the EU, different from the USA and China. After 50 years of EU consolidation, the constitutionalisation process reflects the living experience of workers. There is thus a solid legal constitutional tradition already embedded in memory and social rights are part of this historical memory.

15. The Social Declaration has a specific *purpose*: to prefigure a post-national polity with a political constitution different from a purely economic one. It aims to reinforce a European *identity and subjectivity* linked to European *social* values: the European social model and European social citizenship.

16. The Social Declaration, reflecting a specific dimension of a European civilization over centuries, becomes a link in a chain of historical

[1] Such as workers' struggles to achieve the 8-hour day, or trade union freedom, or works councils. Was the rejection of the Constitutional Treaty such an event?

events and texts. It differs from the competing models of the USA and China, but also from the *economic* model built up during the first fifty years of the European Union, a model constructed on legal texts.

17. The Social Declaration has a role in forming, and an impact on, the conscious subjectivity of the people of the European Community. It aims to create a community of common values, an ethical community in which people both can *feel* they belong, and to which they *wish* to belong: a post-national moral community based on a common social culture. The Social Declaration promotes a feeling of belonging to a common European *social* culture, whatever the particularities of Member States' national political cultures may be.

18. One purpose of the Social Declaration would be to highlight that the European polity does not aim to homogenise nation-states, which have their own characteristics and competences. Rather, the Social Declaration constitutionalizes *common* experience and thereby aims to construct a *subjective identification* of citizens with the EU, a feeling of *co-belonging* to the *EU*, in parallel to their *national* identity.

19. The *content* of the Social Declaration reflects a *European* social identity which contrasts with *national* culture and historical memory characterized by European civil wars. It aims to reconstruct this memory on the basis of a *non*-national perception and comprehension of the social order. It is similar to the shared experience of trade unionism and their common social demands, such as the right to work, freedom of association and workers' representation and participation.

20. As a non-binding instrument, the key need is for a Social Declaration which is capable of capturing the imagination of EU citizens and being integrated into their awareness. It is their engagement which will produce the required impact on the institutions.

21. The *impact* of the Social Declaration, while not legally binding, is to be felt in its projection of an image, such as to reinforce subjective

identification, of an imagined social community of European society, including institutions of solidarity, participation and industrial democracy.

22. The impact of the Social Declaration is not only symbolic. It becomes legal, concrete and binding through national and European legislation and court decisions on social rights and labour law.

Legal implications of a non-binding Declaration

23. The question remains of the *content* of a Social Declaration. But equally important, a formal Social Declaration needs an accompanying action programme.[2] To stimulate the struggle for the Social Declaration, an action programme should actively promote the engagement of trade unions, social NGOs and civil society organisations, not of Member State administrations alone.

24. The option of a non-legally binding Social Declaration envisages a different kind of engagement on the part of institutions and citizens, something perhaps even more profound than legally binding measures and constituting, in any case, a different approach. It focuses on the identification of citizens with the social project, on the psychological effect of the struggle to achieve it.

25. But there will also be an indirect legal impact. There is feedback: where there is a substantial social impact, legal institutions respond. The psychological identification will have a legal impact, for example, on the interpretation of hard law; not least, interpretation of the social rights in the EU Charter.

26. The Social Declaration will have some legal impact, even though this will be non-binding, because it will overlap with Part II of the Constitutional Treaty (the EU Charter of Fundamental Rights), as

[2] Like the Action Programme which aimed to implement the 1989 Community Charter of the Fundamental Social Rights of Workers.

well as social policy provisions in Part III. The Social Declaration may thereby give new impetus to those parts of the Constitutional Treaty and stimulate their development. This would be particularly true of the provisions of the EU Charter that include fundamental rights of workers and trade unions.

27. The Charter's provisions on the rights of working people are a reflection of the general social principles to be enunciated in the Social Declaration. Moreover, the Declaration aims to enhance the impact of these fundamental social rights by reinforcing their interiorization by the *individual subject*. The Charter's recognition also of *collective subjects* links individuals and collective subjects. It preserves and promotes the European social model which has, among its main collective institutions, trade unions and workers' representatives, collective bargaining and collective agreements.

Conclusion

28. The proposed Constitutional Treaty is a 19th century artefact. It describes, in formal language, legislative machinery, competences, legal outcomes. It reflects the absence of a real social and political constituency for the EU integration project, even though it was prepared by representatives of the people. It does not address the spirit.

29. There is a prospect that nothing may emerge from the constitutional process. There may be no formal Constitutional Treaty. There may remain only the existing Treaties. If the project of a legally binding Constitution fails, then a Social Declaration is at least some improvement.

Brian Bercusson

Option 7
An Interpretative Instrument

Introduction

1. The impact of a constitution of the European Union depends on its interpretation and application by the EU institutions. These include not only the judicial branch, the European Court of Justice, but also the legislative branch, the Commission, Parliament and Council, as well as the executive agencies of the EU.[1]

2. Five of the 8 constitutional options proposed look to the adoption of an agreed text: Parts I and II only, a Social Protocol, an agreement on enhanced cooperation, a Schengen model agreement or a simple reference to the EU Charter in Part I. Two options reflect the recognition that failure to reach an agreement on a constitutional text should not preclude other alternatives: constitutionalisation through the European Court of Justice and a non-binding "Social Declaration".

3. The option proposed here seeks a middle path between the failure to agree a new constitutional text, and recourse to a non-binding

[1] The interpretation and application of any EU constitution confronts central questions of constitutional substance as regards social and labour policy. These include: (1) 'Social dumping'. How are disparities in wages and working conditions among the Member States of the EU, exacerbated by the accession of new Member States, to be accommodated? (2) Subsidiarity: Are national social models and industrial relations systems to be protected? (3) Trade unions: Are the Treaty's provisions on the internal market to be interpreted so as to allow for the activities of trade unions? (4) Economic power: How does EU law affect the balance of economic power in an integrated transnational economy? (5) The courts: What is the role of courts in resolving disputes involving economic conflicts? The EU institutions will confront these questions even in the absence of a Constitutional Treaty. B. Bercusson, "The Trade Union Movement and the European Union: Judgment Day", (2007) 13 *European Law Journal* (No. 3, May), pp. 279-308.

declaration or the independent initiative of the European Court. This option would take the form of guidelines prescribed in a mandatory instrument to be provided to the institutions as to their approach to constitutional issues of social Europe in interpreting and applying the present Treaties.

An instrument providing interpretative guidelines

4. An instrument providing interpretative guidelines to the EU institutions could be a useful constitutional development. Its value is indicated in a number of measures adopted by the institutions, in particular, decisions of the European Court, which have addressed constitutional issues of social Europe.

An interpretative guideline protecting fundamental collective rights

5. Obstructions to free movement of agricultural produce from other countries caused by protesting farmers led to a complaint by the Commission against France for failing to take appropriate measures to guarantee free movement of goods.[2] At the same time, the Commission was considering a proposal emanating from D-G XV (Internal Market). This proposal sought to put pressure on Member States to take measures to remove obstacles when required by the Commission to do so.

6. Both these developments aroused considerable anxiety in trade unions, particularly in the transport sector, where industrial action could have similar effects on the free movement of goods. The outcome of lengthy consultations was a Regulation which includes the following provision (italics added):[3]

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[2] Case C-265/95, *Commission v. France*, [1997] ECR I-6959.

[3] Council Regulation (EC) No. 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States. OJ L337/8 of 12.12.98, Article 2.

> "This Regulation *may not be interpreted* as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States".

7. The EU institutions committed themselves to an interpretative instruction to refrain from asserting that EC regulatory power over the free movement of goods prevailed over national regulation of collective industrial action, at least insofar as these took the form of the exercise of fundamental rights.

An interpretative guideline protecting Member State improvements on EU minimum standards

8. In an Opinion of 28 April 1998 in the *Borsana* case,[4] Advocate General Mischo applied the principle of proportionality so as to annul Member State legislation imposing rules stricter than those required by health and safety directives. This Opinion aroused considerable disquiet among trade unions at EU and national levels.

9. In its decision in the *Borsana* case, handed down on 17 December 1998, the European Court rejected Advocate General Mischo's Opinion:[5]

> "Since the legislation at issue is a more stringent measure for the protection of working conditions compatible with the Treaty and results from the exercise by a Member State of the powers it has retained pursuant to Article 118a(3) [now Article 137(4) EC] of the Treaty, it is not for the Court to rule on whether such legislation and the penalties imposed therein are compatible with the principle of proportionality".

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4 *Società italiana petroli SpA (IP) v. Borsana Srl*, Case C-2/97 [1998] ECR I-8597.

5 *Ibid.* paragraph 40.

10. Contrary to the Advocate General, the Court laid down an interpretative principle precluding an application of the principle of proportionality to enable EC law to interfere with the discretion of Member States to improve upon EC regulatory standards in the field of health and safety.

An interpretative guideline protecting effective enforcement of labour standards

11. The Working Time Directive of 1993[6] was implemented in the UK by the Working Time Regulations 1998.[7] These Regulations implemented Articles 3 and 5 of the Directive which provided that an adult worker is entitled to daily and weekly rest periods. The UK's Department of Trade and Industry published a set of guidelines which included the following statement: "employers must make sure that workers can take their rest, but are not required to make sure that they do take their rest".

12. There had long been complaints about the UK's implementation of these provisions in the form of mere "entitlements", with no effective means of securing that workers could avail themselves of the mandatory rest periods deemed minimum requirements for their health and safety. The European Court upheld a Commission complaint against the UK based on the third paragraph of Article 249 EC[8] that these guidelines were "national measures likely to encourage a practice of non-compliance with [the Directive's] provisions

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6 Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time; OJ L307/18 of 13.12.93, as amended by Directive 2000/34 of 22 June 2000, OJ L195/41. Consolidated in Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time; OJ L299/9 of 18 November 2003.

7 The Working Time Regulations 1998. S.I. 1833.

8 "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".

relating to the daily and weekly rest rights of workers".[9] The Court stated that Articles 3 and 5 meant "that workers must actually benefit from the daily and weekly periods of rest provided for by the directive… Member States are under an obligation to guarantee that each of the minimum requirements laid down by the directive is observed, including the right to benefit from effective rest".[10]

An interpretative guideline protecting fundamental individual rights of workers

13. A British trade union, the Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU), challenged the UK Government's implementation of the Working Time Directive. The UK Government made the entitlement to four weeks' paid annual leave provided in Article 7 of the Directive conditional on a qualification period of 13 weeks' employment, though there was no such qualification in the Directive. BECTU complained because many of the union's members on short-term contracts were being deprived of their right to paid annual leave under EC law by the UK Government's legislation.

14. On 8 February 2001 Advocate General Tizzano delivered his advisory Opinion upholding BECTU's complaint.[11] The Advocate General looked at the right to paid annual leave "in the wider context of fundamental social rights' (paragraph 22). A worker's right to a period of paid annual leave is to be given the same fundamental status as other human rights and guaranteed absolute protection. Advocate General Tizzano pointed out that "Even more significant, it seems to me, is the fact that that right is now solemnly upheld in the Charter of Fundamental Rights of the European Union, published on 7 December 2000 by the European

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[9] *Commission of the European Communities v. United Kingdom*, Case C-484/04, decided 7 September 2006, paragraph 29.

[10] *Ibid.*, paragraphs 39-40.

[11] Case C-173/99, *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v. Secretary of State for Trade and Industry* [2001] ECR I-4881.

> Parliament, the Council and the Commission after approval by the Heads of State and Government of the Member States" (paragraph 26). He freely admits that "formally, [the EU Charter] is not in itself binding" (paragraph 27). However, he states unequivocally: (paragraph 28) (italics added)

"I think therefore that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as *a substantive point of reference* for all those involved – Member States, institutions, natural and legal persons – in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right".

15. This approach highlights the constitutional potential of fundamental social and labour rights in the EU Charter. The rights in the EU Charter are "a substantive point of reference", and not only for the Community institutions, but also for Member States, and even for private persons, human and corporate. EU legal measures are to be interpreted consistently with the fundamental rights in the EU Charter, part of the EU's social constitution.

An interpretative guideline protecting collective agreements

16. In *Albany*, the ECJ acknowledged that the EC Treaty provisions on competition policy must be conditioned by other Treaty provisions on social policy; specifically, collective action in the form of collective bargaining and social dialogue:[12] (italics added)

> 'It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy

[12] *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, Case C-67/96; with Joined cases C-115/97, C-116/97 and C-117/97; [1999] ECR I-5751, paragraphs 59-60.

> objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article [81(1)] of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.
>
> It therefore follows from an *interpretation of the provisions of the Treaty as a whole* which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article [81(1) EC]'.

17. The provisions on competition in the Treaty cannot be interpreted as negating the social policy objectives pursued by collective agreements by outlawing collective action.

An interpretative guideline protecting trade union collective industrial action to combat "social dumping"

18. Coincidentally, the legislative[13] and judicial[14] processes were recently simultaneously confronted with the issue of "social dumping".[15] The question was whether the free movement provisions of the

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[13] Proposal for a Directive on Services in the Internal Market, COM (2004) 2/3 final, adopted 13 January 2004. Now Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L376/26 of 27.12.2006.

[14] Case C-438/05 *Viking Line Abp OU Viking Line Eesti v The International Transport Workers' Federation, The Finnish Seamen's Union*; Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet, Svenska Byggnadsarbetareforbundet, Avdelning 1, Svenska Elektrikerforbundet*. This article focuses on the *Viking* case. For discussion of the *Laval* case, see K. Ahlberg, N. Bruun and J. Malmberg, 'The *Vaxholm* case from a Swedish and European perspective', (2006) 12 *Transfer: European Review of Labour and Research* (No. 2, Summer 2006) 155-166. For an earlier commentary on *Viking*, T. Blanke, 'The *Viking* case', (2006) 12 *Transfer: European Review of Labour and Research* (No. 2, Summer 2006) 251-266.

[15] The legislative process is now complete. The result of the judicial process is imminent. Written submissions in the two cases were made in 2006; oral submissions were made at the hearings in Luxembourg on 9 and 10 January 2007.

Treaty, including Articles 43 and 49, are to be interpreted as negating the social policy objectives pursued by collective agreements by outlawing collective action.

19. The submissions of a number of Member States to the European Court in the *Viking* case were that the free movement provisions in Title III of the Treaty are to be *interpreted* so as to be consistent with the social policy provisions of Title XI of the Treaty.

20. The Belgian government submitted that Community law cannot be interpreted in such a way that it would automatically impair exercise of the fundamental rights as recognised by the Union and the Member States. The French government, that Article 43 EC is to be interpreted as meaning that collective action taken by trade unions does not fall within their scope. The Swedish government, that Article 43 is not to be interpreted in such a way as to prevent a trade union or a federation of trade unions from taking collective measures to protect their members' interests. The German government noted that the ECJ had formulated a concept of restriction of fundamental freedoms in broad terms, but in this case there should be strict interpretation, to take into account principles of freedom of contract and freedom of association. The Irish government similarly argued that the right of establishment should not be interpreted so broadly as to call into question competence reserved to Member States under Title XI, and that core industrial relations activities fall within Title XI and should be regulated by national law. The Finnish government, citing *Albany*, argued that the social objectives of collective agreements may not be undermined by Community law. That would be the consequence if trade unions were unable to take industrial action to achieve a collective agreement. In its oral submission, the Commission was succinct: Articles 43 and 49 are to be interpreted so that social policy falls outside them.

A constitutional perspective on interpretation of the Treaties

21. In a letter attached to the ITF submission in the *Viking* case, the ETUC proposed a constitutional interpretation to the Treaties:[16]

> 'The ETUC considers that the relationship between economic freedoms of movement and fundamental social rights to collective action should be consistent with the evolution of the EU from a purely economic Community establishing a common market to a European Union with a social policy aimed at protecting workers employed in the common market who are also citizens of the Union…
>
> Economic provisions of the Treaty have to be interpreted in light of changes in the scope of activities of the EU…
>
> The ETUC considers that the correct analogy with *Albany* is that the free movement provisions of the Treaty must be interpreted consistently with the fundamental right to collective action, as a general principle of EC law, in accordance with *ordre communautaire social*, i.e. principles which reflect the general *acquis communautaire* of social policy of the EU and, in particular, the regulation of employment and industrial relations in the Treaty and relevant secondary legislation'.

22. The rationale for this interpretative approach lies in the view that collective action by trade unions, like the free movement of undertakings, is consistent with the effective functioning of the internal market.

23. The rationale for free movement is market integration. Market integration is premised on market efficiency. Market efficiency requires collective action by workers and trade unions to ensure their voice is heard and their interests are taken account of.[17] The

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[16] Paragraphs 14, 16, 18 of the ETUC's letter.

[17] As stated in the ETUC's letter attached to the ITF's written submission: "Developments in EC law since 1957 support the view that EC law, like national legal and constitutional orders and international labour law, recognises and promotes collective self-regulation,

argument[18] is that 'voice' includes worker participation and collective action:[19]

> 'In this respect, the system requires a set of social rights that can be said to guarantee participation and representation in market decisions and, by internalizing costs which tend to be ignored in those decisions, increase efficiency. Those social rights are related to forms of voice and exit in the market... rights of participation and representation such as the freedom of association, the right to collective bargaining, and the right to collective action should be considered as instrumental to a fully functioning integrated market which can increase efficiency and wealth maximization'.[20]

24. The Commission constantly cites the role of social dialogue as central to the EU economic model.[21] There is no contradiction

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including the legality of collective action… More detailed regulation of labour standards and working conditions is normally to be left to social dialogue, negotiations between the social partners. EU law highly values this process of improvement of living and working conditions and therefore protects it in various ways". Paragraphs 9, 11.

18 Drawing on concepts developed by Albert Hirschman, *Exit, Voice and Loyalty - Responses to Decline in Firms, Organisations and States*, (Harvard University Press, 1970).

19 Miguel Poiares Maduro, 'Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU', in P. Alston (ed), *The EU and Human Rights* (Oxford University Press, 1999), pp. 449-472, at 470. As Maduro stated in his earlier book, *We The Court: The European Court of Justice and the European Economic Constitution* (Hart Publishing, 1998), at pp. 138-139: 'From a representative point of view, a market operating at its best will be a market where decisions are the result of voluntary transactions in which all the people affected participate, and in which all costs and benefits and alternative transactions are taken into account. Such a market would be an ideal decision-maker from the point of view of resource allocation efficiency. Of course this ideal market will rarely, if ever, exist. But for our purposes what is important is not determining when the market is the "best" or even when it is "at its best", but rather when it is "better" than the alternative available institutions'. See generally, Chapter 4: 'The Alternative Models of the European Economic Constitution', pp. 103-149.

20 Maduro points out that "labour lawyers try to reinstate the primacy of social rights over the market through common regulations at the European level". *Ibid.*, p. 465.

21 The introduction to the Commission's Communication on 'The European social dialogue, a force for innovation and change' (COM(2002) 341 final, Brussels, 26

between market integration, economic free movement and trade union collective action. The Treaty's provisions on free movement are to be so interpreted.[22]

25. The ECJ's decision in *Albany* is a crucial illustration where the Court acknowledged that the EC Treaty provisions on competition policy must be interpreted in light of other Treaty provisions on social policy; specifically, collective action in the form of collective bargaining/social dialogue.

26. This constitutional approach is also evident in the decisions of the legislative institutions. The recently adopted Services Directive provides that the rules on freedom of establishment and free movement of services are not to affect labour law and employment conditions.[23] That employment conditions, etc. are not affected by, and, conversely, do not affect, free movement is further supported by the provision in Article 16(3): (italics added)

'The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. *Nor shall that Member State be*

June 2002) states (p. 6): 'The social dialogue is rooted in the history of the European continent, and this distinguishes the Union from most other regions of the world'.

22 The ECJ recognised the implications of the transformation from the purely common market nature of the EU in Case C-50/96 *Deutsche Telekom AG v Schroder* [2000] ECR I-743. The Court concluded: (para 57) (italics added) '…it must be concluded that the *economic aim* pursued by Article 119 [now 141] 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*'. There is similar reasoning in the Opinion of Advocate General Tesauro and the judgment of the ECJ in Case C-13/94 *P. v S. and Cornwall County Council* [1996] ECR I-2143.

23 This is spelled out in Article 1 ('Subject matter'), para 6. See also Recital 14.

prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements'.[24]

27. In sum: this is not merely a limitation on the scope (subject matter) of the directive. It is recognition that employment conditions, including those laid down in collective agreements, are not considered to be restrictions on free movement within the meaning attributed to that phrase in Community law.

28. The argument over whether collective bargaining, collective agreements and collective action are essential to the effective and equitable functioning of the labour market goes to the heart of the debates over the European social constitution. Are the social models of the Member States, historically rooted in the social dialogue, sustainable unless the EU supports the collective dimension of labour relations? As put by the ETUC in its letter attached to the ITF's written submission: It cannot seriously be contended that the 1957 Treaty is to be interpreted, almost half a century later, to produce a violent overthrow of the norms established in national industrial relations systems…'.[25]

29. The *presumption* should be that economic freedoms *are* consistent with the exercise of fundamental rights. Both economic freedoms and the rights of workers to take collective action and to engage in collective bargaining are consistent with and necessary for the functioning of an efficient market. The free movement provisions of the Treaty are to be interpreted so as to respect fundamental rights.

An instrument providing guidance for constitutional interpretation of the Treaties

30. There remain questions of the specific content of the interpretative guidelines. There is also a question of the specific form the

[24] See also Recital 86.

[25] Paras 2, 7, 8.

instrument should take. Alteratives to be considered include a formal Declaration, a Proclamation,[26]an amendment to the Statute of the European Court, an amendment to Article 10 EC, an interinstitutional agreement…[27]

31. The purpose of this instrument would be to provide an authoritative guide for the EU institutions on interpretation and application of the Treaties consistently with the social dimension of the EU. The Treaty's provisions are to be interpreted consistently with protection of the social dimension elaborated in more specific guidelines, as illustrated in the examples provided above.

32. This is not a text stipulating only that fundamental social rights are supreme, or that social policy objectives are superior to economic freedoms. Rather, the courts are to apply an *interpretative principle*, that all Treaty provisions are to be interpreted consistently with these social rights and objectives.[28]

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[26] As with the EU Charter of Fundamental Rights of the European Union, proclaimed at the meeting of the European Council held in Nice from 7 to 9 December 2000, and adopted by the Commission, the Council and the Member States, OJ C 364/01 of 18 December 2000. Subsequently incorporated in the proposed Treaty establishing a Constitution for Europe adopted by the Member States in the Intergovernmental Conference meeting in Brussels 17-18 June 2004, OJ C 310/1 of 16 December 2004, Article II-88. See B. Bercusson (ed), *European Labour Law and the EU Charter of Fundamental Rights (*Nomos, 2006).

[27] An interinstitutional agreement on interpretation of the Treaties, along the lines of the *Interinstitutional Agreement on Better Law-Making* between the European Parliament, the Council of the European Union and the Commission of the European Communities, signed on 16 December 2003 and published in the Official Journal, (OJ No. C 321/2003) of 31 December 2003.

[28] It would be the equivalent of mainstreaming social policy through the activities of the Community (as done for equality between men and women in Article 3(2) EC). It would apply specifically to the activities of the courts interpreting or applying the Treaties.

Brian Bercusson

Option 8

Inserting a reference to a legally binding EU Charter into Part I of the Constitutional Treaty

Introduction

1. One option, as an alternative to integrating the EU Charter as a whole in Part II of the Constitution, is to include an article making the EU Charter legally binding inside Part I of the Constitutional Treaty.

The Charter *integrated as a whole in Part II*

2. In principle, there are advantages with the Charter integrated as Part II of the Constitutional Treaty. First, this would appear to secure it equal status to other fundamental provisions of Part I of the Constitution: values, objectives, competences, institutions, etc. It might perhaps even benefit from this greater prominence, being separately highlighted in addition to the reference to it in Article I-9. Secondly, this allows for a link between the Charter's fundamental collective rights in Article II-72 (freedom of association, the only reference to trade unions in the Charter) and Article II-88 (right of collective bargaining and action)) and Part I's Article I-48 on the social partners and the social dialogue.

The Charter *referred to in Part I*

3. Making the Charter legally binding by an article referring to it in Part I invites different proposals. There is the Dutch view, that "*un*

simple renvoi la charte des droits fondamentaux serait suffisant".[1] A variation is the Czech (UK) idea of "*une simple 'référence'*".[2]

4. Of course, much depends on the precise formulation. There are precedents. Article 136 of the EC Treaty:

> "The Community and the Member States, *having in mind* fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers".

Articles 6(1) and 6(2) of the Treaty on European Union:

> "1. The Union *is founded on* the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
>
> 2. The Union *shall respect* fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions

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[1] "Les Pays-Bas défendant un traité di Nice amendé", in *Le Monde* (12 June 2007, page 12), reporting on the view expressed by Frans Timmermans, the Dutch Minister of European Affairs, speaking to the Constitutional Affairs Committee of the European Parliament. It seems some Members of the Parliament were critical of this, but the report states that Parliament's Constitutional Affairs Committee was sympathetic to the simplified version of the Treaty proposed by Sarkozy.

[2] "Les Tchèques prêts à négocier un traité européen d'ici à 2009", in *Le Monde* (13 June 2007, page 13), which reports the view of the Czech Republic's Deputy Prime Minister, Alexandr Vondra, who "estime justifié les critiques de la Grande-Bretagne à l'égard de la charte des droits fondamentaux européens... Il estime qu'il faut la remplacer par une simple '*référence*' à la Convention européenne des droits de l'Homme du Conseil de l'Europe". This regresses to the UK's opposition in the original Convention drafting the Charter to the inclusion of social and economic rights. See also Charles Grant in the *Financial Times* (3 April 2007, page 15) reporting on the UK position and asserting that the Germans would accept that the Charter of Fundamental Rights "which worries many business leaders, would be axed".

> common to the Member States, as general principles of Community law".

And, of course, Article I-9 of the Constitutional Treaty itself:

> "1. The Union *shall recognise* the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II.
>
> 2. The Union *shall accede to* the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.
>
> 3. Fundamental rights, *as guaranteed by* the European Convention for the Protection of Human Rights and Fundamental Freedoms and *as they result from* the constitutional traditions common to the Member States, *shall constitute general principles* of the Union's law".

5. Various formulations recall the different references to rights in the EU Charter itself.[3] A reference to the Charter in Part I, however it

[3] As described in the chapter "Technical Note on Formulation of Rights in the EU Charter" in B. Bercusson, (ed), *European Labour Law and the EU Charter of Fundamental Rights*, Nomos, Baden-Baden, 2006 (728 pp.). Sometimes, "rights "are "guaranteed". Article 9: right to marry and right to found a family "***shall be guaranteed*** in accordance with the national laws governing the exercise of these rights". Article 18: right to asylum "***shall be guaranteed*** with due respect for the rules of the Geneva Convention...". Whereas freedoms are "respected". Article 11(2): freedom and pluralism of the media "***shall be respected"***. Article 14(3): freedom to found educational establishments and right of parents to ensure education "***shall be respected***, in accordance with the national laws...". Other formulations include: Article 1: "Human dignity is inviolable. It ***must be respected and protected***". Article 13: "The arts and scientific research shall be free of constraint. Academic freedom ***shall be respected***". Article 15(3): "Nationals of third countries who are authorised to work in the territories of the Member States ***are entitled to*** working conditions equivalent to those of citizens of the Union". Article 16: "The freedom to conduct a business in accordance with Community law and national laws and practices ***is recognised***". Article 17(2): "Intellectual property ***shall be protected***". Article 22: "The Union ***shall respect*** cultural, religious and linguistic diversity". Article 23: "Equality between men and women ***must be ensured*** in all areas, including employment, work and pay". Article 34(1): "The Union ***recognises and respects*** the entitlement to social

is formulated, raises the more general issue of the relation of the "mini-Treaty" to the existing but then separate EC and EU Treaties. In particular, a reference or *renvoi* in Part I of the mini-Treaty *only* to the EU Charter would raise questions of the status of the European Social Charter of the Council of Europe and the Community Charter of 1989 referred to in Article 136 TEC, now separated from the "Constitution".[4]

The legal effects of a reference to the Charter in Part I

6. The legal effects of a simple reference to the Charter in Part I are unpredictable.

7. It is probable that a reference to the Charter in Part I would enhance the legal status of the Charter, which has already achieved some recognition by the European Court.

8. Only 8 weeks after the Charter was proclaimed at Nice in December 2000, in Case C-173/99, Advocate General Tizzano stated:[5]

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security...". Also Article 34(3). Cf. Article 34(2): "Everyone residing and moving legally within the EU ***is entitled to*** social security...". Article 36: "The Union ***recognises and respects*** the access to services of general economic interest...". Article 37: "A high level of environmental protection... ***must be integrated into the policies of the Union and ensured***...". Article 38: "The Union ***shall ensure*** a high level of consumer protection". Article 44: "Every citizen of the Union shall... be ***entitled to protection*** by the diplomatic and consular authorities...".

4 It is unlikely to be sufficient for the reference or *renvoi* to simply replicate the language of Article 136 in referring to the Charter. There are different and opposing views of the legal effect of Article 136. Wolfgang Daubler attributes to it a legally binding force, unlike Antoine Lyon-Caen and Spiros Simitis, see P. Davies, A. Lyon-Caen (Paris), S. Sciarra, S. Simitis (eds), *European Community Labour Law: Principles and Perspectives, Liber Amicorum* Lord Wedderburn of Charlton, Clarendon Press, Oxford, 1996.

5 *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v. Secretary of State for Trade and Industry*, [2001] ECR I-4881, paragraph 28.

> "I think therefore that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved - Member States, institutions, natural and legal persons - in the Community context".

9. Without any Constitution having yet been ratified by all Member States, and even rejected by the referenda in France and the Netherlands, the European Court of Justice has already twice referred to the Charter: in Case C-540/03, *European Parliament v. Council*, decided 27 June 2006 (paragraph 28), and again, much more briefly, in a second case, *Unibet (London) Ltd v. Justiekanslern*, Case C-432/05, decided 13 March 2007 (paragraph 37).

10. While not legally binding itself, the Charter reaffirms rights which are legally binding due to their provenance from other sources which are recognised by Community law as legally binding sources.

11. So, on the one hand, it may be expected that an explicit reference to the Charter in Part I could reinforce the Court's use of the Charter.

12. On the other hand, the Court might be influenced the other way if it saw the Charter being "demoted" from the text of the Constitution itself (Part II) to a mere reference in Part I.

The precise formulation of a reference to the Charter in Part I

13. A formulation referring to the Charter would have to be consistent with the language already in Article I-9(1)[6] (unless this was to be replaced by the new provisions).

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[6] "1. The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II".

14. Language most likely to appeal to the Court should build on the approach adopted in the Court's case law on fundamental rights which must be protected by the EU legal order.

15. The Court's approach may be illustrated by its past record of assertion of the protection of fundamental rights in the EU's legal order.

16. One of the earliest seminal decisions was Case 29/69, where the Court referred to "the fundamental human rights enshrined in the general principles of Community law and protected by the Court". Advocate-General Roemer referred to "general legal principles of Community law in force" which were to be "guided by reference to the fundamental principles of national law". They were "an unwritten constituent part of Community law".[7]

17. A second decision was Case 11/70, where the Court stated:[8]

> "...respect for fundamental rights forms an integral part of the general principles of Community law protected by the European Court of Justice... inspired by the constitutional traditions common to the Member States...".

18. The explicit endorsement of fundamental rights in the EU legal order, supplemented by reference to the common constitutional traditions of the Member States, is now reinforced by Article 6(2) of the Treaty on European Union.[9]

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7 *Stauder v. City of Ulm*, [1969] ECR 419, paragraph 7 and page 428 (A-G)..

8 *Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle fur Getreide und Futtermittel*, [1970] ECR 1125, paragraph 4.

9 "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

19. Both the Court's jurisprudence and the Treaties point to the need to identify within Member States the common constitutional traditions regarding fundamental rights. This is of particular importance if future interpretations of the fundamental trade union rights in the EU Charter look to the legal and constitutional practices protecting these rights in the laws of the Member States.

20. Confirmation of this was forthcoming in a case in which the EU Charter was cited for the first time by the Court of First Instance (CFI). In a decision of 30 January 2002, the CFI twice referred to provisions of the EU Charter, first Article 41(1) (Right to good administration), and then Article 47 (Right to an effective remedy and to a fair trial) in the following terms:[10]

> "Such judicial review is also one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States, as is confirmed by Article 47 of the Charter of Fundamental Rights, under which any person whose rights guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal".

21. In sum, even as a mere political declaration, the EU Charter appears to be accepted by the European courts as reflecting fundamental rights which are an integral part of the EU legal order.

22. One major advantage of a reference in Part I, rather than incorporating the Charter as Part II, would be if the reference was clearly made to the original Charter as prepared by the Convention. This would avoid the changes inserted both by the Convention on the Future of Europe in the proposed draft Constitution of July

[10] Case T-54/99, *max.mobil Telekommunikation Service GmbH v. Commission*, [2002] ECR II-313, paragraphs 48 and 57.

2003, and the further changes made by the Member States at the summit of June 2004.[11]

23. If there is only a reference to the Charter in Part I, the following is proposed as one formulation, building on Article I-9(1) of the Constitutional Treaty, Article 136 of the EC Treaty, Article 6(2) of the TEU and the language used by the Court:

    The Union ***and the Member States shall recognise and respect*** fundamental rights, freedoms and principles ***as guaranteed by*** the EU Charter of Fundamental Rights ***(OJ C 364/01 of 18 December 2000), hereby confirmed as a legally binding part of this Treaty/ Constitution,*** which shall constitute ***an integral part*** of the general principles of the Union's law inspired by the constitutional traditions common to the Member States, the ***protection of which is ensured by the European Court of Justice.***[12]

24. A final point would be to ensure that the reference did not include any mention of the "Explanations" to the Charter. These were declared to be of no legal value by the Praesidium of the Convention

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[11] These changes to the Charter's General Provisions were resisted, unsuccessfully, by some members of the Convention on the Future of Europe who had also been members of the Convention which drafted the Charter.

[12] This goes *beyond* the fundamental rights protected by the European Convention on Human Rights. The EU Charter, Article 52(3), states: "Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection". One possible interpretation looks to the temporal dimension: the Charter is identical in meaning and scope to the *present* ECHR, which provides a minimum standard but may, *in the future* be interpreted so as to provide more extensive protection. There remains the question of reconciling this with Article 6(2) TEU: "The Union shall respect fundamental rights, as guaranteed by the ECHR... and as they result from the constitutional traditions common to the Member States, as general principles of Community law". See the discussion in "'Horizontal provisions': Title VII: General provisions governing the interpretation and application of the Charter (Articles 51-54)", in B. Bercusson (ed), *European Labour Law and the EU Charter of Fundamental Rights*, Nomos, Baden-Baden, 2006, pp. 401-421.

which drafted the Charter. But the Convention on the Future of Europe and, in particular, some Member States have attempted to both revise the "Explanations" (e.g. limiting the right to take collective action) and give them a higher legal profile, including inserting an explicit reference to them in the Charter included in Part II of the Constitutional Treaty.[13] Any reference to the "Explanations" should be avoided.[14]

[13] "Postscript: The EU Charter of Fundamental Rights and the Constitution of the European Union", in B. Bercusson, (ed), *European Labour Law and the EU Charter of Fundamental Rights*, Nomos, Baden-Baden, 2006, pp. 455-530.

[14] For example, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L376/26 of 27.12.2006, provides in Recital 15 (italics added): "This Directive respects the exercise of fundamental rights applicable in the Member States and as recognised in the Charter of Fundamental Rights of the European Union *and the accompanying explanations*, reconciling them with the fundamental freedoms laid down in Articles 43 and 49 of the Treaty. Those fundamental rights include the right to take industrial action in accordance with national law and practices which respect Community law".