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Malitiis non est indulgendum

On The European Union's Alleged Neo-Liberal Bias

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Summary: The EU, as a political project, has suffered immense damage from the accusation of being a neo-liberal entity pursuing neo-liberal policies. The neo-liberal caricature is highly unfortunate as not only the legal provisions upon which the EU is founded do not embody any neo-liberal bias, there is also little evidence to support that EU policies encourage a race to the bottom. In most instances, fantasies rather than facts govern the discussion as it is politically more convenient to blame an indeterminate “foreign” entity, and eventually foreigners, than to confront national vested interests or address national failures to enforce the law of the land. The EU should not be seen as a foreign body with its own (neo-liberal) will. It is a framework the Member States can rely on to confront collective challenges and threats. It is up to the Member States to ultimately agree on the definition of sound policies in order for Europe to preserve itself from unregulated economic competition. The provisions of the current Treaties, and *a fortiori* the provisions of the Constitutional Treaty, offer a balanced set of values and objectives. They do not presage, in themselves, a neo-liberal or socialist orientation. Instead of denouncing the supposed neo-liberal nature of the European Treaties, left-leaning critics should realise that ideological conflicts and divergent national interests are the genuine obstacles to European “re-regulation” in the direction of a more “social Europe”.

Keywords: EU Constitutional Treaty; European Law; European Integration; Neo-liberalism; Market Economy; Competition; Free movement; Services Directive; “Race to the Bottom”; “Fiscal Dumping”; “Social Dumping”.

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On The European Union's Alleged Neo-Liberal Bias

“It is clear that the neo-liberal economic agenda is now firmly enshrined within the draft constitution. The thrust of its commercial policy is clearly to optimise profit-making opportunities for business, at the expense of public welfare and the public good”

Patricia McKenna, MEP¹

“In the American Constitution, the Bill of Rights stipulates that individual rights prevail over the collectivist rights and the power of the State. In the European Constitution, the new European statisticians turn it on its head, and collectivist or group “rights” trump individuals and individual rights. This is the “New Europe”. It’s the world Orwell, a socialist, warned about 50 years ago. In the name of some vague utopian goal, the lifeblood of society is drained. Society becomes an empty shell, obedient only to the order of the state”

Richard Pollock²

1. To put it concisely, the EU Constitutional Treaty,³ in itself, is neither neo-liberal nor socialist. It remains a balanced framework embodying the values and objectives of the so-called “European social model”.⁴ While there is no authoritative definition of such a model, the European Council described it as a model based on good economic performance, competitiveness, a high level of

¹ Quoted by Paul Cullen, “Warning that treaty could destroy public funding”, *The Irish Times*, December 12, 2003.

² “The New Europe Looks a Little Like ‘1984’”, Cato Institute, July 8, 2003 (available at <http://www.cato.org/dailys/07-08-03.html>).

³ Its formal title is “Treaty establishing a Constitution for Europe” but is commonly known as the “EU Constitutional Treaty” or as the “EU Constitution”. It was adopted by the 25 Heads of State and Government in Brussels on 17 and 18 June 2004 and was formally signed in Rome on 29 October 2004. It is based on an initial draft prepared by the European Convention and presented to the Thessaloniki European Council on 20 June 2003. The full text of the Constitution is available on the website: <http://europa.eu.int/futurum>. If unanimously ratified, this Treaty establishing a Constitution for Europe shall repeal the Treaty establishing the European Community (TEC) and the Treaty on European Union (TEU). However, since it was rejected by referendum in both France and the Netherlands, it may well never enter into force. For a brief overview of the ratification conundrum, see L. Pech, “Non-sense: France’s No to the European Constitution”, available at: <http://jurist.law.pitt.edu/forumy/2005/05/non-sense-frances-no-to-european.php>.

⁴ For an argument that similarities in industrial relations, social budgets, social protection systems and the organisation of services of general interest “have sculpted a typically European way of conceptualising and promoting social protection”, see Marjorie Jouen and Catherine Papat, *Social Europe in the throes of enlargement*, *Notre Europe*, Policy Papers No. 15, July 2005 (available at: www.notre-europe.asso.fr), p. 4.

social protection and education and social dialogue.⁵ The Council also noted that the European social model allows for a diversity of approaches in order to achieve shared European values and objectives and that this diversity should be treated as an asset and a source of strength.⁶

2. The Constitutional Treaty does not depart from this model. Social values and objectives complement economic requirements. Reproducing the rules of the current Treaties, the EU is granted with the power to complement the action of the Member States in a certain number of enumerated fields. As with the present Treaties, the constitutional text does not pre-empt the political direction of future EU intervention. In other words, it is left to European institutions, and in particular the Member States within the Council of Ministers, to subsequently balance competing objectives and define sound public policies. To denounce the constitutional text or the current Treaties as a neo-liberal plot does not simply make sense. The charge is particularly ridiculous when considered in light of the incorporation of the EU Charter of Fundamental Rights into the Constitutional Treaty, a Charter that has been presented, especially in the United Kingdom, as a socialist enterprise with its guarantee of socio-economic rights.

3. A brief and preliminary digression on liberalism may be useful. The word itself has become quite pejorative in some quarters. This is certainly a troubling trend. Politically speaking, indeed, all constitutional democracies embody liberalism. A constitution, for instance, is the emblematic set of rules of any authentic liberal regime. Historically, as a political doctrine, liberalism is characterised by its emphasis on individual freedom, the free selection of governors and economic freedom. As an economic doctrine, the philosophy of liberalism can be summed up by the expression “*laissez-faire*”, meaning that the advocates of such philosophy oppose, as a matter of principle, governmental regulation of commerce beyond the minimum necessary for a free-enterprise system to operate according to the laws of supply and demand. From a vision stressing the limited role the state should play in the economy, the advocates of liberalism have been arguing that the state should have a minimal role following the crisis of the “welfare state” since the mid-seventies. In this context, the neologism “neo-liberalism” has gained an extreme popularity, in particular since the strengthening of “anti-globalisation” movements in the last decade. The exact meaning of neo-liberalism remains nonetheless ambiguous. At a minimum, it

⁵ European Council of Barcelona, March 15-16, 2002, Presidency Conclusions, at 9 (available at: http://europa.eu.int/european_council/conclusions/index_en.htm).

⁶ See European Social Agenda, Annex I, European Council of Nice, December 7-9, 2002, Presidency Conclusions (available at: http://europa.eu.int/european_council/conclusions/index_en.htm).

can loosely be described as a policy orientation favouring liberalisation, privatisation and deregulation. Irrespective of its precise meaning, it has been used as a powerful rhetorical tool to undermine public support in European integration in general and in the Constitutional Treaty in particular.

I. – The Entrenchment of *Laissez-Faire*

4. One remarkable feature of the French referendum campaign on the Constitutional Treaty was the focus of critics on the Third Part of this text, which deals with the policies and the functioning of the EU. Many left-leaning critics were allegedly alarmed to discover detailed provisions guaranteeing not only the free movement of goods and capital but also free and undistorted competition throughout Europe. Those provisions, the argument runs, clearly confirm the neo-liberal bias of the EU. To give a typical example of the still prevalent Manichaeism in the debate on the Constitutional Treaty, Susan George, a Franco-American academic and vice-president of ATTAC France (Association for the Taxation of Financial Transactions for the Aid of Citizens), found the choice to be clear-cut:

“I believe people in France have understood a momentous truth. We were being asked to choose between a Europe which would, in the fullness of time, ensure that we were all subjected to an American-style, neo-liberal model based on competition and the survival of the fittest, accompanied by huge inequality; or that we had one final chance to defend a genuine European model of solidarity and social justice.”⁷

5. Such reactions and manifest exaggerations are certainly surprising in so far as the very idea of a common market in Europe demands free movement and free competition. And indeed, since its origins, the aim of the Treaty of Rome has been to eliminate all obstacles to intra-community trade in order to merge national markets into a single market, with the hope of maximizing consumer welfare and ensuring the most efficient use of our resources. As we shall see, left-leaning critics have clearly demonstrated their prejudice towards the EU as they based their “analysis” too often on a very limited set of legal rules found in the current Treaties and in the Constitutional Treaty, to the exception of rules likely to demonstrate the fallacious character of their thesis.

⁷ Susan George, “France’s “non” marks just the beginning of our campaign”, *Europe’s World*, Autumn 2005, p. 50.

6. This is not to say that the EU cannot be criticised. Furthermore, the range and content of its public policies ought to be constantly scrutinised and debated. To denounce, however, the inherent neo-liberal nature of European integration does not do justice to the values and objectives upon which the EU is founded and the numerous public policies that illustrate its social dimension. In the end, it must always be remembered that “Brussels” may act only if it has the power to do so. In other words, it is for the Member States to decide whether or not they want to grant the EU with more powers in the social field. This could represent a positive evolution but unsurprisingly, most, if not all the Member States, are very reluctant to transfer any of their welfare-state functions. Accordingly, the EU may have a more dominant “economic” dimension because the Member States predominantly want the EU to be an economic entity. Yet, to identify the fulfilment of these economic responsibilities with a neo-liberal agenda illustrates a seriously misguided attempt. This charge completely betrays the past and current efforts of balancing the economic and social dimension of European integration and further illustrates a profound miscomprehension of the limited mandate of the EU.

A. – The Social Market Economy

7. The reference to a “social market economy” at Article I-3(3) of the Constitutional Treaty has revealed deep and embarrassing ignorance. This reference to a market economy has been presented as a distressing novelty. However, Article 4 TEC, Article 98 TEC and Article 105 TEC already refer to the concept of an open market economy.⁸ Particularly ridiculous was the argument raised by some non-Weberian “experts” according to which the Constitutional Treaty is the capitalistic equivalent of the USSR Constitution. For those critics, these two texts are the only

⁸ Article 4(1) TEC reads as follows: “For the purposes set out in Article 2, the activities of the Member States and the Community shall include ... the adoption of an economic policy which is based on the close coordination of Member States’ economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.” Article 98 TEC provides that the Member States and the Community, when conducting their economic policies, “shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 4.” And according to Article 105(1) TEC, the European system of central banks “shall support the general economic policies in the Community with a view to contributing to the achievement of the objectives of the Community as laid down in Article 2” and “shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 4.”

examples of constitutions embodying the economic principle upon which the society is organised. It is difficult to know where to begin with this kind of statement. First of all, pragmatically, one may ask if there is an effective alternative to a market economy such as a North Korean or a Cuban type of socialism perhaps? An astonishing aspect of the French political debate was the violence of the attacks on the constitutional reference to a social market economy. It appears that many advocates of the no-camp feigned not to realise that the French economy is also a market economy and quite a productive one. Yet, no major political leader was forthcoming in an explanation that a market economy means no more than an economic system where factors of production are privately owned and where supply and demand determine to a certain extent the allocation of resources.

8. Second, the comparison with the USSR Constitution is beyond belief. It is actually in light of the German constitutional experience that Article I-3(3) of the Constitutional Treaty was elaborated. To the author's knowledge, no reference was however ever made in mainstream French media to the German constitutional "principle of social statehood" as embodied in Article 20(1) of the German Basic Law: "The Federal Republic of Germany is a democratic and social federal state".⁹ As the EU could not be compared to a state, the drafters of the Constitutional Treaty apparently contented themselves with a reference to a "social market economy". But again, the latter expression is "a concept with a long German history" and "is understood to be an approach to fulfil the task of the German state to perform as a "social state."¹⁰ According to a German Professor of Economics, Alfred Müller-Armack, who invented the term in 1946, a social market economy promotes interventionist state measures and redistributive policies.¹¹ The subtlety is that social goals cannot be attained through instruments undermining the functionality of market mechanisms. In any case, it is astonishing to condemn the term "social market economy" for its alleged neo-liberal overtone. The term in itself does not favour public policies promoting privatisation and deregulation. It merely describes the current economic framework of European countries: they are all market economies with a high level of social protection. Besides, to say no to the Constitutional Treaty leads to a paradoxical result. Indeed, it means that the

⁹ See Christian Joerges and Florian Rödl, "Social Market Economy" as Europe's Social Model?", EUI Working Paper Law No. 2004/8 (available at: www.iue.it), p. 10.

¹⁰ *Ibid.*, p. 11. The authors also signal that the expression "social market economy" was legalised in the Treaty on the Unification of Germany (1990) as the basis of the economic unification.

¹¹ *Ibid.*, p. 16.

current supposedly “neo-liberal” provisions according to which the Member States are to adopt an economic policy conducted in accordance with the principle of an open market economy with free competition, are simply maintained.

9. The dishonesty of the neo-liberal charge becomes particularly apparent once Article I-3(3) of the Constitutional Treaty is read in its entirety:

“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.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.”

10. The Constitutional Treaty therefore speaks of a competitive European market economy because it is actually a means to fulfil social goals, which happen to be innovative ones. The criticism stressing that a market economy cannot be referred to as a constitutional objective is therefore surprising and misguided. Indeed, Article I-3 merely provides that the EU is *based on* a market economy as this is the best framework to attain a series of social objectives. And to answer criticism coming from the self-proclaimed “progressists” who highlight the fact there is no constitutional precedent with regard to the inclusion of the notion of “market economy”, one may ask *a contrario* with no historical precedent in the constitutional texts of democratic societies, should the reference to “social progress”, “social exclusion” or “solidarity between generations” also be found illegitimate? Comparisons with current national constitutions should not be one-sided if one’s goal is to genuinely inform the citizenry. It is therefore dishonest in order to demonstrate the reality of a neo-liberal conspiracy to solely emphasise that the reference to a social market economy is somewhat constitutionally unprecedented. The Constitutional Treaty also offers an original and impressive list of social objectives, which would hardly be found in the constitutional wish list of a neo-liberal.

11. Leading left-leaning politicians and commentators are mysteriously selective in their reading of the constitutional text in light of the current European Treaties. If they undertook, in good

faith, a genuine reading of this document they might well have discovered among the “provisions of general application”,¹² an *unprecedented* affirmation that the EU’s policies must contribute to the achievement of a set of social objectives:

“In defining and implementing the policies and actions referred to this Part [*Part III on the policies and functioning of the EU*], 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.”¹³

12. Is it worth mentioning that other “provisions of general application” would oblige the EU, were the Constitutional Treaty to be ratified, to pursue the following objectives: to eliminate inequalities, to combat discrimination, to promote sustainable development and take into account consumer protection as well as animal welfare. The added-value of the constitutional text, therefore, is to treat these objectives as *horizontal* ones, i.e. they must govern the definition and implementation of all EU policies such as, for instance, monetary policy. In addition to these innovative “provisions of general application” and in particular, the general “social clause”, the section on social policy may be also examined. Again, an extensive set of social objectives are enumerated:

“the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.”¹⁴

13. To the likely horror of some ideological defenders of a “free market”, it is further specified at Article III-210 of the Constitutional Treaty that in order to achieve these objectives, the Union shall support and complement the activities of the Member States in the following fields:

- (a) improvement in particular of the working environment to protect workers’ health and safety;
- (b) working conditions;
- (c) social security and social protection of workers;
- (d) protection of workers where their employment contract is terminated;
- (e) the information and consultation of workers;

¹² See Articles III-115 to III-122.

¹³ Article III-117.

¹⁴ Article III-209.

- (f) representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 6;¹⁵
- (g) conditions of employment for third-country nationals legally residing in Union territory;
- (h) the integration of persons excluded from the labour market, without prejudice to Article III-283;
- (i) equality between women and men with regard to labour market opportunities and treatment at work;
- (j) the combating of social exclusion;
- (k) the modernisation of social protection systems without prejudice to point (c).

It is important to highlight that the Constitutional Treaty, in this instance, only reproduces the current provisions of the EC Treaty signed in Rome in 1957. In other words, regarding social policy, the constitutional text does not alter the present allocation of competence between the EU and the Member States. European social policy has never been intended to replace national social policy. It is not entirely clear if this is the objective actually entertained by those denouncing the neo-liberal character of the Constitutional Treaty. If their criticism is based, however, on the fact the constitutional text does not encompass the creation of a European welfare state, one has to demonstrate, first, that there is a compelling majority of Member States willing to contemplate such a revolutionary objective. Generally speaking, the third part of the Constitutional Treaty preserves the existing – and already protective in the author’s view – *acquis communautaire*,¹⁶ while better emphasizing the social dimension of its policies. To give two examples of the preservation of the *acquis*: the constitutional text requires each Member State to “ensure that the principle of equal pay for female and male workers for equal work or work of equal value is applied”;¹⁷ the Member States are also encouraged “to maintain the existing equivalence between paid holiday schemes”.¹⁸

14. As for a better emphasis of the Union’s social dimension, the explicit recognition of the role of the social partners¹⁹ serves as a good example. Social partners have always been involved in the European decision-making process and several provisions of the EC Treaty make reference to them. Yet, a general provision recognising their role and the importance of social dialogue was

¹⁵ This Article shall not apply to pay, the right of association, the right to strike or the right to impose lockouts.

¹⁶ The body of common rights and obligations which bind all the Member States together within the European Union.

¹⁷ Article III-214 reproduces Article 141 TEC.

¹⁸ Article III-215 reproduces Article 142 TEC.

¹⁹ Principally the representatives of employers and employees.

missing. Article I-48 of the Constitutional Treaty remedies this shortcoming. It provides that the EU “shall recognise and promote the role of the social partners at its level, taking into account the diversity of national systems” and that it shall also facilitate social dialogue. Also formalised is the role played by the “Tripartite Social Summit for Growth and Employment”, a product of the so-called “Lisbon process”.²⁰ In practice, it means that European institutions should promote the consultation of management and labour and involve them in the decision-making process whenever the topic may be related to employment law and labour market regulation. To put it bluntly, this is hardly an innovation nor is it an improvement. From the start, the EU has paid attention to social actors and consulted them on proposals and on the implementation of Community social policies. One may refer, for instance, to the creation of the European Economic and Social Committee in 1957, modelled on a similar French body and which was created under the French Constitution of 1946 and maintained by the constitutional text now in force in France.²¹ Moreover, and to focus solely on the role of social partners, the EC Treaty already guarantees their involvement. The Commission must consult the representatives of “management and labour” before submitting proposals in the social policy field and Member States may entrust them with the implementation of certain directives.²² More ambitiously, employee and employer federations can negotiate collective agreements which can be given legal effect by a Council directive.²³

15. With these provisions in mind, it would seem difficult to argue that the Constitutional Treaty embodies a neo-liberal “rule of the jungle”, a model based on the survival of the fittest. It may certainly be argued it does not improve the current *status quo* on social policy as it merely reproduces provisions of the EC Treaty. This is not, however, the path taken by some born-again Marxists of the French socialist party. Unfortunately, a great deal of voters appeared to have been convinced that irrespective of the provisions mentioned above, the section on social policy was

²⁰ In March 2000, the EU Heads of States and Governments agreed in Lisbon to make the EU “the most competitive and dynamic knowledge-driven economy by 2010.” Among numerous initiatives, it was agreed that successive European Councils would offer management and labour the opportunity to give their point of view on the issues discussed by the Council.

²¹ The European Economic and Social Committee consists of representatives of the various economic and social components of organised civil society. It appears to function more effectively than its French counterpart which is too often staffed with politicians’ cronies.

²² See Articles 137-139 TEC.

²³ Six agreements, including two sectoral agreements, have been subject to this procedure: agreement on parental leave; agreement on part-time work; agreement on fixed-term contracts; agreement on the organisation of working time of mobile workers in civil aviation; agreement on the organisation of working time of workers at sea; agreement on teleworking.

no more than a fig-leaf on unrestrained neo-liberalism. In particular, two arguments have been advanced again and again. First, social harmonisation is left to the mercy of the market. Second, the EU's social objectives are in reality undermined by several references to economic principles.

16. Regarding the first argument, the focus of most criticism was the assertion according to which the fulfilment of the EU's social objectives "will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Constitution and from the approximation of provisions laid down by law, regulation or administrative action of the Member States".²⁴ The reference to the functioning of the internal market as a way to favour harmonisation was denounced by some French socialists as allowing a diminution of worker's rights and of social protection. Not mentioning the fact that this provision of the Constitutional Treaty purely duplicates Article 136 TEC, such critique does not do full justice to the exact wording of the provision. Public authorities will intervene to the extent market mechanisms have failed to achieve the desired outcome. And indeed, it is foreseen that the EU may establish minimum requirements in the fields mentioned in Article III-210, with the sole (and sound) condition that such intervention shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings. Again, the current Treaties as well as the Constitutional Treaty offer a balanced framework: social progress goes in hand with the recognition that the existence and nurturing of productive firms is a condition *sine qua non*. The following may be obvious to most people but the French debate makes it worth repeating: the lack of wealth creation can only lead to a situation where a welfare state is left without resources to redistribute.

17. This defence has been criticised on the ground it does not take into account a key-element: the condition of unanimity voting within the Council of Ministers.²⁵ It is argued that European intervention on social matters will continue to be a pure mirage and therefore, social standards

²⁴ Article III-209.

²⁵ As required by Article III-210(3). As under the current EC Treaty, *unanimity* in the Council of Ministers remains the norm in the following areas: social security and social protection of workers; protection of workers where their employment contract is terminated; representation and collective defence of the interests of workers and employers, including co-determination subject to paragraph 6; conditions of employment for third country nationals legally residing in Community territory; financial contributions for promotion of employment and job creation. It is however possible for the Council of Ministers, since the Nice Treaty, to relinquish unanimity voting in favour of majority voting in the areas of employment contract termination, of representation and collective defence of the interests of workers and employers and of conditions of employment for third country nationals.

will continue to be left to the market. This is certainly one way of looking at the unanimity requirement. It can also be interpreted as a guarantee for countries such as France or Sweden in order to avoid a “neo-liberal” harmonisation of social systems, i.e. harmonisation at a lower level. What if the United Kingdom were to convince a majority of the Member States to harmonise social systems according to its ideological preferences? The French would certainly then call for a unanimous vote. Besides, it is not reasonable for a Member State to denounce unanimity only in those areas where it is willing to go further against the will of some. France, for instance, is more or less the sole Member State keen on defending the notion of “public service”. And, as we shall see, its partners have always succumbed to French demands. Indeed, the present Treaties now preserve the freedom for each Member State to refuse the liberalisation of major sectors of the national economy. Finally, the unanimity requirement is not in reality prevalent across the board contrary to what is usually affirmed. Similarly with the current rules, unanimity is reserved to the “sensitive” areas most notably in the areas of social security; protection of workers where their employment contract is terminated; representation and collective defence of the interests of workers; conditions of employment for third country nationals residing within the EU. More fundamentally, regardless of the unanimity versus majority voting debate, the argumentation of the French Socialist Party and others is lacking sophistication and does not do full justice to the immense complexity of the area. As Fritz Scharpf perfectly explained it, the normative and structural diversity of national welfare states make uniform European legislation in the social-policy an impossible goal to reach.²⁶ If the level of relatively low minimal standards now being defined at the European level is judged not to be acceptable, one has to offer feasible solutions on how to accommodate the existing diversity of national welfare regimes with a potential “Europeanization” of social policies.²⁷

18. As for the undermining of the social objectives enunciated in the Constitutional Treaty, critics have principally focused on references to “the need to maintain the competitiveness of the Union economy” (Article III-209) or the commitment to free competition (e.g. Article III-177). The

²⁶ See his stimulating study, “The European Social Model: Coping with the Challenges of Diversity” (2002) 40 *Journal of Common Market Studies* 645.

²⁷ The so-called Open Method of Coordination is now being presented as *the* panacea to this conundrum. Briefly speaking, the Open Method of Coordination is aimed at encouraging Member States to co-ordinate their actions in a number of policy areas on a voluntary basis without resorting to European legislation. For a general overview in the social field, see D. Trubek and L. Trubek, “Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination” (2005) 11 *European Law Journal* 343.

merits of this claim will be addressed *infra*. Nonetheless, it should be said at this stage that it appears to illustrate, more generally, the difficulties of explaining a text which calls itself a “constitution” while it merely sets out rules for a non-state entity which has been granted more economic missions than social competences. In addition to this peculiar feature, one should also mention the particular understanding of the French population of what a constitutional text should be composed of. French constitutional history has led French citizens to associate the idea of a constitution with a “short” text that should include human rights and social objectives but no provisions on the economic system or the content of public policies. The drafters of the Constitutional Treaty, a document containing no less than 448 Articles with a whole part detailing EU policies, should have realised how difficult it would be to explain and defend such a document in the context of a referendum.

B. – A Market where Competition is Free and Undistorted

19. Often faced with unambiguous constitutional provisions that run counter to their thesis, the proponents of the neo-liberal bias generally attempt to demonstrate its validity by referring to the number of times the word “market” or the word “competition” appear in the constitutional text:

“The Constitution went into enormous detail concerning economic policies, stressing free market [78 references], competition [over 100] and stressed again and again the needs of capital over those of people.”²⁸

From these numbers, it is hence hastily concluded that the Constitutional Treaty embodies the quintessence of neo-liberalism. If there is a need to show the insipidity, or even, the stupidity of this line of reasoning sadly propagated by some academics as well as a former French socialist Prime Minister and his fans, one could refer to the number of times the words “employment” or “social” are mentioned. Our personal and rapid calculations indicate that “employment” is mentioned approximately 18 times with “social” winning the Palm d’Or as it appears more than 100 times. Certainly, in truth, it must be said that this huge number of references is very much explained by the number of times the Economic and Social Committee is alluded to. Yet, the same can be said about the term “market”. In most instances, the reference is to the “common

²⁸ Susan George, “France’s “non” marks just the beginning of our campaign”, *op. cit.*, p. 50.

market”, not to the market economy. More depressingly, the dispute about of how many times the words “market” and “competition” appear in the Constitutional Treaty has revealed the depth of popular misunderstanding regarding the missions conferred on the EU, strictly speaking the EC, and a common and distressing ignorance about the purpose of competition rules.

(1) A Common Market

20. To clarify first the term common market, it must be pointed out that the EU was created with the goal of constantly improving, according to the preamble of the Treaty of Rome, “the living and working conditions of their peoples”. To do so, the Member States have recognised the need to remove trade barriers and accordingly granted European institutions with the necessary competences to supervise this removal. It certainly cannot be denied that for a long time, the core of European activities were of economic nature, hence the formal name European Economic Community (EEC) used until 1992.²⁹ The primary objective of the EU was and still is to complete market integration. In other words, since the origin, the goal of creating a “common market” lies at the heart of European integration as Article 2 TEC makes so clear.³⁰

21. What does the notion more precisely encompass? When the Member States established the EEC, they agreed to create a market where all impediments to free movement of goods, persons, services and capital among themselves are removed and where a common external policy would govern trade with non-Member States. The underlying assumption is that there are huge economic benefits associated with the fact of operating in a wider and open market.³¹ Most economic textbooks contend that the free movement of goods, workers, services and capital – the

²⁹ Following the ratification of the Maastricht Treaty, the EEC was renamed the European Community (EC).

³⁰ Articles 3 TEC gives flesh to this goal by detailing further the ensuing activities of the Community: “1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

(a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
 (b) a common commercial policy;
 (c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;

...

(g) a system ensuring that competition in the internal market is not distorted; ...”

³¹ See in particular P. Cecchini, *The European Challenge 1992: The Benefits of a Single Market* (Aldershot, Wildwood House, 1988)

so-called “four freedoms” in EU context – maximize wealth-creation. In simple terms, the setting up of a common market increases potential sales for each company. Furthermore, an increase in competition leads to more investment to maintain competitiveness, and the bigger dimension of the market leads to economies of scale. In theory, the result is more economic growth and therefore, more jobs. In their quest for such positive results, European institutions have always been mostly preoccupied with making sure that all barriers to European trade are removed. As the European Court of Justice put it, a common market is aimed at – the negative feature of the enterprise should be noted – eliminating “all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market”.³² The signing of the Maastricht Treaty in 1992 illustrated the willingness of a majority of Member States to refine the common market goal by establishing an economic and monetary union. As a result, a single currency now governs the trade of twelve Member States and all Member States must conduct their economic policies with a view to contributing to the achievement of the objectives of the Community.

22. To recapitulate, the idea of a common market is inherently liberal and inevitably, of an economic nature. This may come as a shock to some. Yet, all democracies are “liberal” regimes functioning with an open market economy. As for the EU’s concern with economic matters, it is the result of Member States’ continuing choice and of their persistent refusal to transform the EU into some sort of state with a general competence over redistributive policies. Nevertheless, it would be incorrect to assume that European integration has no social dimension or that the goal of establishing a common market trumps everything else. In fact, in 1957, the EC Treaty included a Chapter on social provisions. The European Social Fund was further set up in 1958, in accordance with Article 146 TEC, with the mission of supporting measures which aim to prevent and combat unemployment, develop human resources and foster social integration in the labour market, in particular with regard to the disadvantaged sections of the population. To further contribute to the social and economic cohesion of the EU and create “a level playing field”

³² Case 15/81 *Gaston Schul* [1982] ECR 1409, para. 33.

following the liberalisation of intra-EU trade, a European Regional Development Fund later provided support mainly for public and private investments in infrastructure.³³

23. Ireland is a witness to European generosity and the importance of such policies in helping a national economy making the transition from a status of relatively low level of economic development to a high and sustainable level. To mention a few figures, during the period 1989-2001, Ireland received €12.4bn in structural funds from Brussels. This is the equivalent to 1.9 per cent of annual gross national product.³⁴ Even though European structural funds did not guarantee economic success, EC membership as well as EC financial grants must certainly be considered as decisive factors behind the emergence of the Celtic Tiger. This demonstrates that European integration is and ought to be based on solidarity between poor and rich Member States.

24. Worker's rights have also figured prominently in Community's work since its origin. On the basis of the Treaty, extensive European legislation has been issued to guarantee that any national of a Member State is entitled to take up and engage in gainful employment on the territory of another Member State. Discrimination on the grounds of nationality is strictly prohibited. Furthermore, non-national workers are entitled to the same social and tax benefits as national workers. One may also mention that the Treaty of Rome itself, in 1957, provided for the principle of equality between men and woman, which means in particular that they should receive equal pay for equal work. One final element worth noting, thanks to an amendment introduced by the Amsterdam Treaty, the EC Treaty now requires the objectives of the Community's social policy to be consonant with the fundamental social rights set out in the European Social Charter 1961 and the Community Charter of the Fundamental Social Rights of Workers 1989.³⁵

25. Irrespective of these Treaty provisions and European policies, it is nonetheless legitimate to consider that the social dimension of the EU has long remained the focus of less interest than the economic dimension of European integration. The Amsterdam Treaty reflects, however, a clear shift of emphasis. Particularly symbolic was the introduction of a new Article 13 TEC which refers to the adoption of provisions on non-discrimination, and authorises the Council, acting unanimously, "to take appropriate action to combat any discrimination based on sex, race, ethnic

³³ Article 160 TEC: "The European Regional Development Fund is intended to help to redress the main regional imbalances in the Community through participation in the development and structural adjustment of regions whose development is lagging behind and in the conversion of declining industrial regions."

³⁴ "Ireland proves to be a shining example of membership", *The Financial Times*, April 22, 2004.

³⁵ See Article 136 TEC.

origin, religion or belief, disability, age or sexual orientation.” The principle of equality between men and women was also added to the list of Community objectives. It is now explicitly provided that in all its activities the Community must aim to eliminate inequalities, and to promote equality between men and women.³⁶ Among the other innovations introduced by the Amsterdam Treaty, and to specifically answer French concerns, a new Title VIII on “Employment” was inserted into the EC Treaty. Accordingly, employment policies of the Member States ought to be coordinated with a view of mixing better “economic” and “social” policies in order to achieve full employment. The objective is to reach a “high level of employment”. In order to attain this objective, the Community is given a new area of responsibility to complement the activities of the Member States, involving the development of a “coordinated strategy” for employment. Again, to answer French concerns, a new Article 16 TEC was also introduced to protect “public services”. As the issue will be addressed in more detail *infra*, it is enough to mention here that “services of general economic interest”, the EU name for “public services”, see their role recognised in promoting social and territorial cohesion.³⁷ Consequently, the Member States agreed to state that “the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.”³⁸

26. Now that it is clear that the EU had always had a strong social component, another contention needs to be answered. For left-leaning critics, the EU’s neo-liberal bias is clearly demonstrated by the fact that EU rules allow the common market goal to trump any other competing (social) objective. This is to forget that several provisions of the EC Treaty authorise the Member State to take national measures restraining the free movement of goods, persons, services or capital.³⁹ In practice, if national measures severely restraining free trade (e.g. a ban on imports) serve the public interest, in other words, if they can be justified in the name of public morality, public security, protection of health, etc., and if they are proportionate and do not constitute a means of disguised discrimination, they will not be prohibited by EU law. The European Court of Justice has also developed a list of further justifications in situations where a Member State limits intra-

³⁶ See Article 3(2) TEC.

³⁷ Article II-96.

³⁸ Article III-122.

³⁹ Articles 39(3), 46 and 55 TEC allow Member States to derogate respectively from the principle of free movement of workers, from the freedom of establishment and the freedom to provide and receive services. Article 58 TEC does the same regarding the principle of free movement of capital and payments.

EU trade in goods by imposing non-discriminatory rules which have an adverse impact on goods coming from other Member States. In other words, consumer protection, the protection of the environment, the pluralism of the press, etc., may justify national restrictions on European trade.

27. A recent case, *Schmidberger*,⁴⁰ shows, for instance, that the protection of fundamental rights should normally override free movement concerns. In this case, the Austrian authorities had closed the Brenner motorway for four days in order to allow an environmental group to organise a demonstration. Because the Brenner motorway is the major transit route for trade between Northern Europe and Italy, its closure led to a serious restriction on the free flow of goods between Member States with severe economic consequences for transport companies. The Austrian authorities had therefore to demonstrate that their action was justified under EC law. For the European Court of Justice, the protection of fundamental rights is a legitimate public interest which, in principle, justifies a restriction of the obligations imposed by EC law. In light of the facts of the case, the European Court of Justice ruled that a fair balance had been struck between the competing interests, i.e. the free movement of goods and freedom of assembly.

28. It may still surprise some that fundamental rights constitutionally protected at the national level ought to be balanced against the free movement of goods. Certainly, it is a constitutional imperative for Member States to protect fundamental rights. Yet, as always, the European Court of Justice must also make sure, in light of the facts of each particular case, that restrictions on free movement rights guaranteed by EC law are not disproportionate to the legitimate objective pursued by the relevant Member State. If not, it would always be tempting for national authorities or private parties to hide protectionist intent behind the legitimate objective of protecting fundamental rights as protected under national constitutions. There should therefore be no indignation towards the idea of balancing fundamental rights with competing interests such as the free movement of goods or the free movement of people. What matters is that the European Court of Justice plainly and obviously accepts that the necessity to respect national fundamental rights may justify restrictions on the application of EU rules.

29. More problematic than the content of the current Treaties or the overall direction of the case law is the vocabulary used at the European level. Indeed, it may create unnecessary scepticism about the ideological orientation of the EU. The so-called “four freedoms” – the free movement

⁴⁰ See Case C-112/00 [2003].

of goods, persons, services or capital – are also commonly described as the “fundamental freedoms” of the EC Treaty,⁴¹ hence creating, and quite legitimately so, some unease as it easily leads uninformed citizens to believe that these four freedoms should therefore override any competing public interest. This vocabulary undeniably favours the advocates of the neo-liberal bias as it requires time and effort to make sense of EC law. Accordingly, advocates of the neo-liberal thesis have an easy time arguing that the principle of free movement is merely a ruse to trump the real “fundamental freedoms”, meaning human rights. A bit of explanation about the terminology may therefore be useful. It is quite common for lawyers, in Germany or in France, to characterise human rights protected by the national constitution as “fundamental rights”, a term that includes rights (e.g. right to privacy) as well as freedoms (e.g. freedom of expression) without any distinction between the two. To call therefore the free movement of goods, persons, services or capital, “fundamental freedoms”, is unfortunate as it instinctively implies, for the citizens of some Member States at least, that the Community’s four freedoms can claim equal status with the human rights that are constitutionally protected. This is difficult to accept as respect for human rights is considered, politically speaking, the supreme value of any modern democratic system.⁴² For that reason, it would be beneficial to eventually find a substitute to the use of the term “fundamental freedom” to describe the Community’s “four freedoms”. While the free movement of capital may be a key principle in the establishment of a common market, to call it a “fundamental freedom” increases confusion amongst citizens. For an entity that does not suffer from excessive love, a change of vocabulary may be worth thinking of.

30. As previously mentioned, in light of its progressive development over the years, the Member States rightly decided in 1992 it was time to rename the European Economic Community to the European Community, to do justice to its transformation into an entity no longer predominantly concerned with the establishment of a common market. Indeed, among the policy areas where the EC may intervene, one may particularly signal the infamous area of agriculture but also asylum and immigration, transport, employment, trade, social welfare, consumer protection, research and technology, the environment and development aid. Furthermore, the EU was also invented to

⁴¹ This is actually what the Constitutional Treaty codifies. Under the title “fundamental freedoms”, Article I-4(1) provides that “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.”

⁴² For instance, the German Constitution stipulates that human rights form the basis of every human community (Article 1(2)) and the preamble of the French Constitution proclaims the French people’s attachment to the Rights of Man as defined by the Declaration of 1789.

incorporate the EC and the policies and forms of intergovernmental cooperation established outside it, i.e. the Common Foreign and Security Policy and Justice and Home Affairs pillars. The current Treaties cannot therefore be presented as embodying a framework with an exclusive economic dimension. And when it is stated that the EU's task is to create an area without internal frontiers, it is immediately followed by a provision emphasising the EU's duty to promote a high level of employment and of social protection, equality between men and women, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States. To denounce the current Treaties, or the Constitutional Treaty for that matter, as a "liberal corset", to repeat the daring analogy used by a French politician,⁴³ requires a good amount of bad faith. In the same way, the brawl about the reference to free and undistorted competition has revealed a worrying lack of knowledge.

(b) Free and Undistorted Competition

31. Surprisingly, many have labelled the European Constitutional Treaty a neo-liberal document on the grounds that it includes a commitment to offer European citizens "a single market where competition is free and undistorted."⁴⁴ While citizens can be forgiven for not knowing that this commitment has been in place since the signature of EC Treaty in 1957, nearly five decades ago, it is a depressing spectacle to see major politicians make loud protests about it even though, in some cases, they previously signed European treaties where the principle of free competition was obviously included. In any case, the principle of free and undistorted competition is a condition *sine qua non* for a European common market. There is no point removing barriers to trade if companies can subsequently allocate markets to each other on a national basis and compartmentalise markets according to national boundaries. Identically, national public authorities have to be submitted to the scrutiny of an impartial and supranational referee to make sure they will not subsidize inefficient national companies with the result of eliminating more efficient ones from other Member States. And it is precisely because each Member State is fully

⁴³ See Jean-Pierre Chevènement quoted by Jean-Louis Andreani and Thomas Ferenczi, "Les six thèmes-clés de la campagne", *Le Monde*, May 28, 2005.

⁴⁴ Article I-3(2).

aware of the imperative necessity of having an impartial actor to check that all the parties are playing by the rules, that the European Commission was instituted. Viewed in this light, it may be easier to understand why the EC Treaty has always provided that the Community shall have “a system ensuring that competition in the internal market is not distorted”⁴⁵ and why the enforcement of European competition law has been entrusted to the Commission.⁴⁶ As for the “constitutional” entrenchment of free competition, most French politicians have shown a singular lack of knowledge about their own law. Indeed, the French Constitutional Council also protects economic freedoms (freedom of movement and free competition) and in particular, it has given constitutional value to freedom of enterprise. Accordingly, it is not uncommon for French constitutional judges to balance freedom of enterprise with competing constitutional principles or rights, especially socio-economic rights.

32. Regardless of the constitutional entrenchment of the principle of free competition in most Member States, it may still be argued that such a principle should not be entertained. Indeed, according to many left-leaning critics in France, Ireland and elsewhere, the Constitutional Treaty opens the door to “untamed competition” (*concurrence sauvage*). The following excerpt is archetypical of this tendency:

“European politicians and commentators often speak (admiringly or accusingly) of Europe’s supposed “social model”. But the reality ... is that right-wing (or neo-liberal) economic policies are now dominant at EU level. This is evident in, among other things, an EU competition policy that can act against state provision of certain goods and services. As part of competition policy, the EU limits state aid to businesses (though there are certain egregious exceptions, such as the Common Agricultural Policy).”⁴⁷

It is therefore necessary to ask whether or not the pursuit of free competition may contradict a genuine respect of the social goals listed in other provisions of the Constitutional Treaty or in the current rules governing the EU. To answer the question, the main rationale behind competition policy must be understood – the promotion of economic efficiency or, as the economists would say, the optimum allocation of resources. The underlying assumption of competition law in all democracies is that there are economic benefits associated with a market economy organised on a

⁴⁵ Article 3(g) TEC.

⁴⁶ The power to enforce EC competition law on anti-competitive restrictions between undertakings and on abuses of a dominant position is shared with the Member State competition authorities and national courts by virtue of Regulation 1/2003. In other areas of competition law, it lies exclusively with the Commission (merger control when the merger has a Community dimension and monitoring of State aid).

⁴⁷ Andy Storey, Lecturer in Development Studies, “Another EU: possible and necessary”, *The Irish Times*, May 7, 2004.

competitive basis: competition favours innovation, reduces production costs and assures the consumer desired goods at the lowest price and the best quality possible, with the sacrifice of the fewest resources. It would be foolish to deny that the law protecting free competition has a direct role in the prosperity of our democratic societies. Similarly, it is difficult to understand why some see competition rules as a neo-liberal plot. In fact, it is because the practical functioning of the market economy is to some extent deficient that competition rules are required. Apparently, this is a point that left-wing critics of the Constitutional Treaty have a hard time understanding. If the market could function in a situation of perfect competition,⁴⁸ no external referee would be needed. However, because the market does not function perfectly in real life – the number of buyers or sellers is often reduced, information about products and services is never complete, barriers to entry into a specific market often exist, etc. – national public authorities must intervene to make sure that firms and also local authorities, play by the rules of the game. In other words, competition rules are there to regulate the functioning of the market, not to promote “untamed competition”.

33. To “attack” the constitutional text on the ground that it includes provisions aimed at ensuring competition serves to illustrate a rudimentary knowledge of the functioning of a modern economy.⁴⁹ If critics were consistent, they should then formulate an alternative to an economy governed by competition under a regulatory framework defined by public authorities. Too often, criticism aimed at the “neo-liberal Europe” often masks affection for discredited economic philosophies and systems. And, as a matter of fact, the Constitutional Treaty merely reproduces the current provisions of the Treaty of Rome.⁵⁰ Briefly exposed, European competition law forbids agreements between firms which restrict competition (e.g. price-fixing agreements between competitors) and abuses of a dominant position (e.g. when a dominant firm exploits consumers or tries to annihilate competition through illegal behaviour). The European Commission has also the power to control mergers between firms to avoid any excessive

⁴⁸ “Perfect competition” is usually broadly defined as a market structure in which there are large numbers of both buyers and sellers, homogeneous products, perfect information about the price of each firm’s product and no barriers to market entry.

⁴⁹ See generally the website of the *Association for the Taxation of Financial Transactions for the Aid of Citizens* (ATTAC: www.attac.org) for an immense panoply of arguments mainly emphasising the fact that the European Union should not be based on the principle of free trade and free competition but rather on a principle of “cooperation” between the Member States. In this author’s opinion, although the extent and modes of implementation of free trade and free competition may legitimately be debated, the apparent desire to re-apply the economic doctrine of the defunct USSR is rather troubling.

⁵⁰ See Articles 81-87 TEC.

domination of a particular market. State aid is also monitored in order to make sure no Member State uses public funds to favour national firms or artificially keep a loss-making national firm in business even though there may be no real prospect of recovery. Finally, regardless of the debate surrounding the Constitutional Treaty, it is important to identify who are the beneficiaries of a free and undistorted competition. Contrary to what is propagated by the self-proclaimed defenders of the weak and poor against the allegedly EU's "neo-liberal" policies, rather than big "evil" firms, citizens and small and medium-sized firms are the direct beneficiaries of competition rules. In the words of Mario Monti, the former European Commissioner in charge of competition policy:

"The competition policy pursued by the European Commission has a direct impact on the daily life of the citizens of the EU. The reduction of telephone charges, wider access to air transport and the possibility of buying a car in the EU country in which prices are lowest are tangible results. ... Whether they be consumers, savers, users of public services, employees or taxpayers, the Union's citizens enjoy the fruits of the competition policy in the various aspects of their everyday life."⁵¹

34. A few examples suffice to prove Mr. Monti right, in particular the European Commission decision against Microsoft issued in 2004.⁵² After a long investigation and despite a huge team of well-paid lawyers employed by Microsoft, the Commission fined Microsoft €97 million, the biggest fine ever levied by the Commission, for abusing its market power. Concretely speaking, Microsoft abused its dominant position by deliberately restricting the possibility of using its products with the products of other competitors and by tying its Windows Media Player with its ubiquitous Windows operating system. In short, thanks to its virtual monopoly in PC operating systems, as stated by the Commission, Microsoft had been illegally trying to shut competitors out of the market and to artificially alter consumer choice in favour of Microsoft's products. It should be clear therefore that the direct beneficiaries of a strict enforcement of competition rules are certainly consumers and small and medium firms.

35. French citizens may be about to realise that competition law is the only alternative to excessive private power in the context of the so-called "Yalta of the mobile phone". It recently transpired that the three dominant companies of the sector in France met monthly between 1997

⁵¹ European Commission, *Competition Policy in Europe and the Citizen* (Luxembourg: Office for Official Publications of the European Communities, 2000), p. 4.

⁵² Commission Decision of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty: Case COMP/C-3/37.792 Microsoft.

and 2003 to fix prices and share market. Interestingly, and reminiscent of the worst aspect of Berlusconi's Italy where public officials have been abusing their powers to protect personal and dodgy business interests, the French Finance Minister supervising the investigation in 2005 is the former president of France Telecom and therefore a direct actor behind this manifest illegal scheme. An additional comment must be made. It could very well be argued that no Member State on its own would have had the courage to stand against Microsoft for fear of economic retaliation, or could have resisted intense lobbying and financial contribution to governing political parties. Indeed, thanks to its political clout, Microsoft escaped condemnation in the United States. In Europe, the independence of the European Commission has allowed a thorough investigation into well-known suspicious business practices.

36. European rules on state aid must also be briefly explored as national politicians often deliberately misinterpret them. This time around, though, criticism mainly originates from the right-wing of the political spectrum. What is usually denounced is the interference of "Brussels" in what should be a "sovereign" definition of national industrial policy. More modestly, EC law forbids state aid that distorts intra-Community competition by favouring certain companies or the production of certain goods. The rationale behind such prohibition is straightforward. By giving certain national companies or goods favoured treatment, a Member State unfairly discriminates against companies that operate unaided. Such a policy could lead to unemployment in other Member States where unaided companies may have to close down as they cannot compete with subsidized ones, irrespective of the fact that they may be more efficient. This, in turn, reduces the general competitiveness of Europe as a whole.⁵³ Efficiency is not, however, the cardinal and unique value of the EU. Too often, the national media forget to mention that state aid can be considered acceptable when it has useful social purposes, when it contributes to the development of regions with low levels of development, when it encourages certain activities and practices that are of common interest or, without being exhaustive, when it seeks to remedy a serious disturbance in the economy of a Member State.⁵⁴ European rules on state aid, therefore, cannot be presented as being of an absolutist nature. In practice, the great majority of aid schemes are

⁵³ The stud fee tax exemption is a good example. The tax exemption has helped to make the Irish bloodstock industry the biggest in Europe. Not only do Irish taxpayers foot the bill for a cost of approximately of €3 million annually, it has helped decimate the bloodstock industry in other Member States where the sector had less political clout. See Mark Brennock, "EU Commission could demand an end to tax free stud fees", *The Irish Times*, February 4, 2005.

⁵⁴ See Article 87(2) and (3) TEC.

indeed approved by the Commission. The hysteria surrounding the proposal to grant state aid to Intel's operation in Ireland was beyond belief.⁵⁵ Not mentioning the following ridiculous withdrawal of the aid operated by the Irish Government before any formal inquiry by the European Commission, there was no authoritative voice to remind the public that giving taxpayer's money (apparently between €50 and €100 million) to a highly *profitable* and *dominant* American giant firm was from the start a questionable choice. Worse, the purpose was not to create new jobs or support innovation but rather to respond to Intel's threat to move its production out of the country, a despicable yet classic business move nowadays. Moreover, one could imagine the nationalistic screams if another Member State would pursue a similar strategy, leading to the closure of the Irish plant. To attract foreign investment, the Celtic Tiger already benefits from a low tax rate on business profits, a trait already denounced as unfair competition by some Member States.⁵⁶ It is hard to see a pressing need to subsidize profitable businesses, if only to use public money to enrich private shareholders. More pragmatically, if it were not for the European Commission, Ireland would not be able to compete against bigger economies where the temptation to attract foreign investments may also easily lead to granting huge sums of public subsidies. Finally, while European (or national) competition rules may not be perfect, they are nonetheless indispensable tools to retain fair competition and prohibit distorting practises, detrimental to the public as a whole, from public authorities as well as private actors.

37. To sum up, contrary to the fear vehemently expressed by many French citizens during the referendum campaign of 2005, competition rules are in reality protective of consumers and of taxpayers. It is the lack of competition rules or the lack of robust enforcement of such rules which actually leads to the "untamed competition". There is, however, an argument which has yet to be explored. It is often argued that European competition rules are of an "absolutist" in nature, meaning that they override any competing public interest. As we shall see below, the European Commission and the European Court of Justice have always sought to balance efficiency concerns and competing goals, such as social objectives. To be sure, competition is only one policy among others, and the maintenance of competition ought to be read in light of the entire EC Treaty or the Constitutional Treaty for that matter. First remark, the notion of competition is understood pragmatically. According to the European Court of Justice, the EC Treaty is aimed at

⁵⁵ Opinion, "New Realities of Investment Aid", *The Irish Times*, March 3, 2005.

⁵⁶ For more details on taxation, see *infra* The "Race to the Bottom".

achieving a “workable competition”, “that is to say the degree of competition necessary to ensure the observance of the basic requirements and attainment of the objectives of the Treaty”.⁵⁷ To put it differently, the objective is to attain sufficient competition in a real world where perfect competition is not achievable while taking into account other public interests. Accordingly, as we shall now see, European competition rules may be set aside in order for a Member State to fulfil social objectives.

38. Left-leaning critics never mention that the European Court of Justice has recognised the “social” dimension of the common market, and the necessity to give this equal weight to the economic dimension of market integration. A few cases are worth mentioning to demonstrate the simplistic character of the neo-liberal bias thesis. In a case decided in 1999, *Albany International*,⁵⁸ the European Court of Justice recognised the need to balance the social and economic objectives of the EC:

“ [I]t is important to bear in mind that ... the activities of the Community are to include not only a ‘system ensuring that competition in the internal market is not distorted’ but also ‘a policy in the social sphere’. Article 2 of the EC Treaty provides that a particular task of the Community is ‘to promote throughout the Community a harmonious and balanced development of economic activities’ and ‘a high level of employment and of social protection’.”⁵⁹

39. As a result, the Court held that agreements concluded in the context of collective negotiations between management and labour in pursuit of social policy objectives must, by virtue of their nature and purpose, not be subject to competition rules. In this particular case, it was therefore decided that a private employer cannot invoke competition rules to opt-out of a compulsory sectoral pension scheme drawn up by the social partners. As the agreement made a direct contribution to the improvement of work end employment conditions in the EU, this type of agreement cannot be evaluated in light of European competition law.

40. Another case, *Sievers*,⁶⁰ decided in 2000, can also help demonstrate that fundamental rights have primacy over the principle of free competition. Faced with a situation where part-time workers were excluded from a retirement pension scheme, the European Court of Justice recalled its *Defrenne II* ruling according to which the principle of equal pay for male and female workers,

⁵⁷ Case 26/76 *Metro* [1977] ECR 1875, para. 20.

⁵⁸ Case C-67/96 *Albany International* [1999] ECR I-5751.

⁵⁹ *Ibid.*, para. 54.

⁶⁰ Case C-270/97 *Sievers* [2000] ECR I-929.

guaranteed at Article 141 TEC, pursues a twofold purpose, both economic and social. First, in view of the different stages of development of social legislation in the various Member States, the aim of the Treaty provision “is to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay”.⁶¹ Secondly, the Court has stressed that the principle of equal pay for male and female workers “forms part of the social objectives of the Community, *which is not merely an economic union* [emphasis added] but is at the same time intended, by common action, to ensure social progress and seek constant improvement of the living and working conditions of the peoples of Europe, as is emphasised in the Preamble to the Treaty”.⁶² In light of these observations, the European Court of Justice concluded that the economic aim pursued by Article 141 is *secondary* to the social aim pursued by the same provision, namely the right not to be discriminated against on the ground of sex, which is a fundamental human right.⁶³

41. In other words, regarding the alleged absolutist application of competition rules, the case law of the European Court of Justice actually demonstrates the partiality of those denouncing the neo-liberal predisposition of European institutions. The need to balance the goal of a single market where competition is free with a wide range of social objectives has been formally recognised by EU institutions.

(3) The Situation with “Public Services”

42. To further raise our case, the situation with “public services” should be examined. Indeed, due to a romanticised attachment to “public services” in countries such as France, a critique often heard is that the EU is eager to apply competition rules without paying due attention to the specificities of those services. The Constitutional Treaty has been therefore described as the last

⁶¹ *Ibid.*, para. 54, referring to Case 43/75 “*Defrenne II*” [1976] ECR 455, para. 9.

⁶² *Ibid.*, para. 55, referring to “*Defrenne II*”, para. 10.

⁶³ *Ibid.*, para. 57. Accordingly, for the European Court of Justice, part-time workers are entitled to retroactive membership of an occupational pension scheme and to receive a pension under that scheme, notwithstanding the risk of distortions of competition between economic operators of the various Member States to the detriment of employers established in the first Member State.

act before complete privatisation of what remains under public control at the national level. In the author's view, and this is rarely advocated even by "neo-liberal" economists, it is clear that competition rules ought not to be applied to all sectors of a market economy. Indeed, it is obvious that a free market cannot provide all public goods or services a society may be in need of (e.g. defence, public infrastructure, etc.). A free market may also be unable to satisfy needs with limited or no solvency. In any case, the fact that the European Commission has been trying to liberalise some sector of activities has been constantly presented by left-leaning critics as a threat to the idea of "*service public*".

43. Even though the French like to claim paternity over the concept, all societies obviously operate a hierarchy between social activities and exclude some of these, from a market where competition is free and undistorted. Such policy choices are contingent and would vary according to the axiological preferences of each society. There may be, however, a public service *à la française* in the sense that this idea is also treated as a legal concept in France. In simple terms, it has been used by some legal scholars to identify the scope of French administrative law. The unfortunate aspect of the success of the term "service public" is that it tends to be confused with the idea of public monopoly and the exclusive use of administrative law. Also striking is the fact that most citizens associate "public services" with the exclusion of market mechanisms. To a great extent, this vision amounts to a myth entertained by the left. Indeed, legally speaking, numerous French "public services" had always been governed by private law by as early as the end of the 19th century. Similarly, it was common in the past, and it obviously is common today, to delegate the management of "public services" to private individuals and firms while imposing a certain number of specific obligations on them.

44. Viewed in this light, the "threatening" neo-liberal record of EU law seems less compelling. Indeed, not only are European competition rules *excluded* where the relevant activities are not of an *economic* nature,⁶⁴ what EU law essentially requires the reconciliation of market mechanisms with "*commercial*" public services, i.e. energy, telecommunication, transport, postal services, etc., not to bring the idea of public services to an end. Hence, EU law plainly accepts that

⁶⁴ For instance, when the activities of a public (or private for that matter) entity, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers which are typically those of a public authority, European competition rules cannot be applied. See e.g. Case C-364/92, *Eurocontrol* [1994] ECR I-43. The situation is identical for organisations involved in the management of the public social security system, which fulfil an exclusively social function and perform an activity based on the principle of national solidarity which is entirely non-profit-making. See e.g. Case C-159/91, *Poucet* [1993] ECR I-637.

national public authorities and European institutions may have to restrain the work of market forces. However, they ought to justify the extent to which they do so regarding commercial activities “which the public authorities class as being of general interest and subject to specific public services obligations”.⁶⁵ Ultimately, what is essential is that activities of an economic nature, which may be said to be “of general interest”, are obliged by public authorities to comply with specific public-service obligations such as universality and equality of access, continuity, affordability, etc. Public ownership and/or the grant of a monopoly should not be seen as being inherent to the idea of “public service” or in Eurospeak, of “services of general economic interest”. Indeed, in commercial sectors, rather than directly acting as service providers, public authorities should pursue the more effective option to impose on the competing private entities common public-service obligations to guarantee access for all, whatever the economic, social or geographical situation, to a service of a specified quality at an affordable price. Accordingly, rather than excluding the implementation of competition rules to sectors of an economic nature, the objective should be to strike the right balance between public service missions and the operation of market mechanisms, with a view of promoting Europe’s general interest.

45. This conclusion can easily be deduced from Treaty Articles and the case law of the European Court of Justice. Article 16 TEC, introduced by the Amsterdam Treaty, deals precisely with “services of general economic interest”, the EU name for “public services”, and provides that “the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.” This somewhat tortuous formulation might be considered insufficiently protective. Yet, Article 86(2) TEC further reserves the situation of those firms entrusted with the operation of services of general economic interest. The application of competition rules should *not* “obstruct the performance, in law or in fact, of the particular tasks assigned to them.” True, the same Article sets a condition: “the development of trade must not be affected to such an extent as would be contrary to the interests of the Community”. This should not lead to excessive worry. Indeed, this condition has a marginal importance since the Commission had never successfully relied on it before the European Court of Justice. More fundamentally, the European Court of

⁶⁵ Commission Green Paper of 21 May 2003 on services of general interest, COM(2003) 270 final, para. 16, OJ C 76 of 25 March 2004.

Justice interprets Article 86(2) in a manner that authorises public authorities to temper market forces in all commercial sectors to the extent it is necessary to fulfil “universal service” obligations, obligations that are not in themselves profitable.⁶⁶

46. Generally speaking, for the European Court of Justice, competition rules can be set aside if their implementation will obstruct the performance of the special obligations incumbent upon the undertaking entrusted with the management of services of general economic interest, under economically acceptable conditions.⁶⁷ Finally, the European Court of Justice defines the notion of “universal service” in line with the French tradition. In other words, a common set of obligations governs any undertaking entrusted with the management of a public service. In particular, the public service should be made available at a specified quality to all consumers and users throughout the territory of a Member State, independently of geographical location, and, in the light of specific national conditions, at an affordable price.⁶⁸

47. And contrary to what the defenders of public services *à la française* have been arguing over and over, the Constitutional Treaty strengthens the importance of services of general interest as one of the pillars of the European model of society and the need to ensure the provision of high-quality and affordable services of general interest to all citizens and enterprises in the EU. For instance, access to services of general economic interest, “as provided for in national laws and practices” and in accordance with the current Treaty rules, becomes a *new* fundamental right under Article II-96 of the Constitutional Treaty. The aim, reflecting the current content of Article 16 TEC, is to promote the social and territorial cohesion of the Union. As for the further details set out in Article III-122 of the Constitutional Treaty, even though the provision could have been more clearly formulated, the Member States agreed to underline the national competence for the provision of public services and the possibility for each Member State “to provide, to commission and to fund such services” is guaranteed. At the end of the day, the denigration of the EU on the ground that it supposedly condemns public services is another example of serious prejudice.

⁶⁶ The concept of universal service refers to a set of general interest requirements ensuring that certain services are made available at a specified quality to all consumers and users throughout the territory of a Member State, independently of geographical location, and, in the light of specific national conditions, at an affordable price. It has been developed specifically for some of the network industries (e.g. telecommunications, electricity, and postal services). See Article 3(1) of Directive 2002/22/EC of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108/51, April 24, 2002.

⁶⁷ See e.g. Case C-159/94 *Commission v. France* [1997] ECR I-5815.

⁶⁸ See e.g. Case C-393/92 *Almelo* [1994] ECR I-1477.

48. To conclude on the neo-liberal thesis, neither the current Treaties nor the Constitutional Treaty can be seriously identified as instruments of “ultra-liberalism”. When examined in their details, the evidence put forward by left-leaning critics reveal astonishing incoherence. Indeed, in most cases, they seem not to realise that they are actually denouncing principles at the foundation of the EU since the signature of the Treaty of Rome in 1957, for instance, the principle of a free and undistorted competition, without understanding its rationale and without linking it to the fact that one essential purpose of the EU was to complete and to guarantee the proper functioning of a common market. The economic dimension of European integration is merely the direct expression of the limited missions conferred on the EU by the Member States, and certainly not the fruit of some mysterious neo-liberal conspiracy.

49. Amusingly, in a popular book,⁶⁹ it has been argued, on the contrary, that “behind the formal rules which govern the decision-making process of the European Union, the French have imposed their will to an extraordinary extent.” Accordingly, for some, the EU resembles a socialist Leviathan in the image of the French State while for other critics, it embodies a neo-liberal experiment. Irrespective of the ridiculous nature of both accusations, it has to be said that the constitutional text certainly offers some “progress” or, to put it more neutrally, change, in terms of Union’s values and objectives. If it is ever ratified, the EU will then be expressly founded on the values of equality and solidarity. Among many others “social” provisions, one may note that the Constitutional Treaty expressly stipulates that the EU shall combat social exclusion and shall promote social justice. Clearly, this amounts to a restatement, yet in a clearer and concise manner, of the current values and objectives of the Union. These values and objectives could hardly belong to a purportedly neo-liberal entity.

50. The fact that the Constitutional Treaty has suffered the criticism of free-marketers as well as neo-Marxists may amount to the ultimate evidence that it offers a balanced framework. In reality, it would be easier to understand the argument that the constitutional text will make Europe more “socialist” as it authorises a better inclusion of social goals. Indeed, in one innovative move, the drafters of the Constitutional Treaty have included the so-called “consistency clause” according to which the EU must ensure consistency between the entire set of European policies and activities, taking all of its objectives into account.⁷⁰ Among these objectives, as previously

⁶⁹ Larry Siedentop, *Democracy in Europe* (London, Penguin, 2000), p. 30.

⁷⁰ See Article III-115.

exposed, any reader will discover an exhaustive series of social and societal objectives. If this new clause is not enough, a general “social clause” is also included to oblige the EU, when defining and implementing all of its policies, to take into account the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, etc.⁷¹ Also of significant importance is the incorporation of the EU Charter of Fundamental Rights into the Constitutional Treaty, with its exhaustive list of socio-economic rights. This can hardly exemplify the neo-liberal “dream house” that some left-leaning critics have depicted. Indeed, as formulated by the working group of the European Convention on Social Europe:

“European policy in the economic and social sphere is aimed at creating conditions for the fullest development of the individual in society in such a manner that ultimately the free development of each one becomes a condition for the free development of all.”⁷²

Therefore, to accuse the EU of being a neo-liberal entity completely betrays the past and current efforts of balancing the economic and social dimension of European integration and further illustrates a profound miscomprehension of the limited mandate of the EU. Rather than agreeing to the creation of a European welfare state, the democratically elected representatives of the Member States have agreed to push for the completion of an internal market. The former goal may be legitimately entertained, yet political fiction is not the concern of the present study.

51. If the Constitutional Treaty cannot be seriously described as a neo-liberal instrument, it cannot be denied that the neo-liberal charge found a special resonance in the hearts and minds of many French voters. Unfortunately but expectedly, the Constitutional Treaty has also served as a red herring to contest alleged social or fiscal dumping. In short, this time, it is not the content of the legal provisions governing the EU that is condemned but rather the substance of public policies defined at Union level. The reality of a European-organised “race to the bottom” must hence be examined. In this instance, the arguments raised against European integration appear *prima facie* much more substantiated.

⁷¹ See Article III-117.

⁷² The European Convention, Final Report of Working Group XI on “Social Europe”, CONV 516/1/03, Brussels, February 4, 2003, p. 29.

II. – The Race to the Bottom

52. While it has been common to denounce “Brussels” for its neo-liberal policies, widespread fears of social dumping and outsourcing were somewhat unanticipated by the proponents of the Constitutional Treaty. It is now clear however that allegations of social dumping and outsourcing has found deep resonance in France. It was somewhat nonetheless unsurprising as the social dumping charge had been asserted for years by an influential association of “alter-globalizers” in its fights against the World Trade Organisation.⁷³ It may well be described as the most effective allegation raised against the Constitutional Treaty. It would be excessive, however, to condemn the EU on the grounds that it organises social dumping or to use another popular expression, a race to the bottom leading to the dismantlement of the welfare state and the watering down of social standards.

53. The picture is, unfortunately, more complex. While it can be affirmed that European integration has created general constraints on national policy choices, the genuine threat to the preservation of European welfare states seems rather to predominantly derive from structural and national problems (e.g. unfavourable demographic trends, massive unemployment, etc.). And the pressure to reform the welfare state generally originates from national groups unwilling to continue to pay high taxes for preserving existing levels of welfare protection. As for watering down social standards, it is difficult to find a binding piece of European legislation harmonising social standards at the lowest common denominator. This is not to categorically refute that European rules on free movement of goods, persons, services and capital might favour “regulatory competition” between the Member States and indirectly add downward pressure on workers’ salaries. To precisely prove that this regulatory competition actually leads to a race to the bottom in Europe remains, however, an arduous challenge. We shall try to demonstrate this point in light of the heated debate surrounding European-wide harmonisation of taxation and the recent “Bolkestein” proposal emanating from the European Commission and aimed at liberalising services throughout Europe.

(1) The Reality of Regulatory Competition between the Member States

⁷³ See www.atac.org.

54. Before examining the EU's responsibility, if any, in organising a "race to the bottom", the expression must be put into context. The classic diagnosis is usually formulated as follows: the completion of the European common market and the development of economic globalisation have led to a "regulatory competition" between Member States leading, in turn, to a "race to the bottom".

(a) The European Dimension of the "Delaware Effect"

55. This is hardly an entirely new problem. Indeed, it is common in the United States to discuss the so-called "Delaware effect".⁷⁴ In short, critics of Delaware's corporate laws have argued that most large American firms establish themselves in this US State simply because its rules are the least demanding. Evoking this problem of companies establishing in states where the cost was lowest and the laws least restrictive, Justice Brandeis spoke in 1933 of a "race" between US states which "was one not of diligence but of laxity".⁷⁵

56. To recapitulate the origin of the current situation, it is necessary to return to the "stagflation" crisis of the seventies. Following the huge increases in oil prices in the seventies and the implosion of the Bretton Woods regime of fixed exchange rates, all major industrialised nations suffered inflation and unemployment. To deal with the economic crisis, the liberalisation of trade and free movement of capital have been promoted. Generally speaking, the influence of economic liberalism has greatly benefited from from the demise of communism and the apparent failure of classic Keynesian remedies, i.e. the stimulation of the economy through expansionary fiscal policy or monetary policy. In accordance with the liberal mantra, most nation states have since then voluntarily given up their individual capacity to control capital transfers, trade in goods and services, etc., and hence the development of a globalised economy. Parallel to this trend, the establishment of a common market in Europe has obliged the Member States of the EU to abolish obstacles to the free movement of goods, persons, services and capital.

⁷⁴ For a recent look at the relevance of the question whether or not state-to-state competitive pressures on Delaware make for a race to the top or to the bottom, see Mark Roe, "Delaware's Competition" (2003) 117 *Harvard Law Review* 590.

⁷⁵ *Liggett Co. v. Lee*, 288 U.S. 517, at 559.

57. These developments, it is often alleged, threaten the viability of the welfare state as well as high social standards. In simple terms, the argument goes that in an environment where free trade, free competition and free movement of the factors of production are all promoted and, in the case of the EU, legally guaranteed over national laws, national authorities have no choice but to offer national firms, capital owners or highly skilled workers, the best regulatory environment, some would say the least constraining one, to retain them and eventually attract foreign firms, capital and workers. This process is known as regulatory competition.⁷⁶ Although the process can be positively defended from a theoretical point of view,⁷⁷ it has been forcefully argued by Fritz Scharpf, in his classic book *Governing in Europe*, that regulatory competition is not without damaging consequences from a social point of view:

“As all countries are now competing to attract or retain investment capital and producing firms, all are trying to reduce the regulatory and tax burdens on capital and firms, and all are tempted to reduce the claims of those groups – the young, the sick, the unemployed, and the old – that most depend on public services and welfare transfers.”⁷⁸

58. If you add the temptation for national governments, in the name of retaining competitiveness, to make the labour market more “flexible” by lowering, for instance, workers’ legal protection against dismissal, this is exactly the race to the bottom most European citizens instinctively fear. And indeed, it is widely believed today, at least by the citizenry of some Member States in the “old Europe” that regulatory competition is progressively leading to a situation where Member States compete on the basis of low standards. The recent enlargement contributed decisively to the diffusion of this view.

59. To solely focus on the European dimension of the problem, critics contend that the EU *inherently* favours a race to the bottom by adding to the constraints on policy choices brought upon nation states by the liberalisation of trade under the auspices of the World Trade

⁷⁶ Jeanne-Mey Sun and Jacques Pelkmans define it as follows: “Regulatory competition is the alteration of national regulation in response to the actual or expected impact of internationally mobile goods, services, or factors on national economic activity,” “Regulatory Competition in the Single Market” (1995) 33 *Journal of Common Market Studies* 67, at 68-69.

⁷⁷ Three justifications are normally given for regulatory competition: “firstly, it allows the content of rules to be matched more effectively to the preferences or *wants* of the consumers of laws (citizens and others affected); secondly, it promotes diversity and experimentation in the search for effective legal solutions; and thirdly, by providing mechanisms for preferences to be expressed and alternative solutions compared, it promotes the flow of information on effective law making”, Catherine Barnard and Simon Deakin, “Market Access and Regulatory Competition” in Catherine Barnard and Joanne Scott (ed), *The Law of the Single European Market* (Oxford, Hart, 2002), p. 199.

⁷⁸ Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford, Oxford University Press, 1999), p. 176.

Organisation. To understand the nature of Europe's constraint, the common distinction between negative integration to positive integration must be understood. In short, negative integration is about removing barriers to trade by imposing prohibitions on the Member States in terms of the free movement of the factors of production. As previously mentioned, the European Court of Justice has always considered that the purpose of the Treaty provisions dealing with the "four freedoms" is to eliminate "all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market".⁷⁹ By contrast, positive integration "refers to the reconstruction of a system of economic regulation at the level of the larger economic unit."⁸⁰ The argument runs that "the main beneficiary of supranational European law has been negative integration".⁸¹ Undeniably, the European Commission, in association with the European Court of Justice, has greatly favoured market integration by making sure that Member States do not infringe Treaty provisions prohibiting them from protecting domestic producers or from restricting the freedom of national firms and workers to move to another Member State. In doing so, it is correct to argue that the European Commission pushed for an extensive interpretation of the relevant Treaty provisions and that, in most cases, the European Court of Justice concurred.

60. To appreciate the force of negative integration as a constraint on Member State's regulatory autonomy, a succinct examination of the celebrated *Cassis de Dijon* case⁸² should be undertaken. Faced with a German law that prohibited selling fruit liqueur unless it contains a certain minimum amount of alcohol content, the European Court of Justice were easily convinced by the Commission that the German law served a protectionist intent rather than the defence of public interests such as the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions or the defence of the consumer:

"It is clear ... that the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and as such to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community."⁸³

⁷⁹ Case 15/81 *Gaston Schul* [1982] ECR 1409, para. 33.

⁸⁰ Fritz Scharpf, *Governing in Europe*, *op. cit.*, p. 45.

⁸¹ *Ibid.*, p. 50.

⁸² Case 120/78 [1979] ECR 649.

⁸³ *Ibid.*, para. 14. One may note in particular the ludicrous argument raised by the German Government as regards the protection of public health. To defend its legislation, it argued that the purpose of fixing minimum alcohol content is

The case is remarkable less for the protection it afforded *Cassis de Dijon* – a splendid French liqueur – against German attempts at restricting its sale than for the European Court of Justice’s interpretation of Article 28 TEC. This Article forbids “quantitative restrictions on imports and all measures having equivalent effect” on imports between the Member States. By setting out the principle that this Treaty provision prohibits discriminatory national rules and also non-discriminatory ones unless justified, the European Court of Justice granted itself control over the regulatory choices of the Member States. In other words, when an apparent “neutral” national trading rule, i.e. a non-discriminatory rule, has the effect of hindering intra-EU trade, the Member State must also justify its existence. As we shall see when the “Bolkestein” Directive on Services will be dealt with, the European Court of Justice has adopted a similar approach in the context of free movement of workers and services.

61. The second remarkable aspect of this decision is that by further announcing the new principle of mutual recognition, i.e. the principle according to which products lawfully manufactured and marketed in one Member State must be admitted in all Member States, the European Court of Justice empowered the consumer and promoted market integration to the detriment of Member States’ autonomy to regulate trade in the absence of European harmonisation. To summarise, *Cassis de Dijon* opened the door to European scrutiny of all national regulations that can be viewed as obstacles to the free movement of goods between the Member States. In order to survive European scrutiny, national measures must be “reasonable”, meaning they must be justified by the defence of a public interest and must be proportionate in their scope.

62. Clearly, it is up to the European Court of Justice to ultimately define not only what should be viewed as an obstacle to free trade and once an obstacle is determined, to accept or not a Member State’s defence of it. True to what its critics often assert, the European Court of Justice showed some dogmatism in this exercise. First, it has broadly interpreted the remit of Article 28 TEC. Second, it has frequently adjudicated in favour of market integration rather than in favour of the societal goals raised by the Member States. However, since the beginning of the nineties, its case law illustrates more judicial self-restraint and the readiness of the European Court of Justice to set aside free movement rules in order to preserve national regulatory autonomy. To begin with, all national business regulations dealing with “marketing modalities” or “selling arrangements”, e.g.

to avoid the proliferation of alcoholic beverages with a low alcohol content since such products, in the view of the German government, may more easily induce a tolerance towards alcohol than more highly alcoholic beverages.

restrictions on advertising, restrictions on sales outlets, etc., are now excluded, as a matter of principle, from European scrutiny.⁸⁴ If a national regulation falls within the scope of EC law, a Member State can now refer to an extensive list of public interests to defend it. In addition to those public interests enunciated in *Cassis*, the European Court of Justice has recognised that a Member State can justify a “neutral” regulation having an adverse impact on trade on the following grounds: the protection of the working environment; the protection of cinema as form of cultural expression; the protection of national or regional socio-cultural characteristics; the maintenance of the plurality of the press; preventing the risk of seriously undermining the financial balance of the social security system; the protection of fundamental rights.⁸⁵ In addition, it should not be forgotten that even discriminatory measures can be justified by reference to the exceptions contained in Article 30 TEC: public morality; public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures and the protection of industrial and commercial policy. Finally, and most importantly, at the balancing stage, when a national measure restricting trade has to be justified, the European Court of Justice now admits more easily that the free movement of goods can be restricted in order to accommodate, for instance, social rights and policies.⁸⁶

63. To conclude on “negative integration”, *Cassis de Dijon* should not be understood as opening the way to a destructive regulatory competition. Undeniably, “if applied without any qualification, there is a danger that mutual recognition would lead to a race to the bottom, and to a deregulation of standards”.⁸⁷ However, “the danger of a race to the bottom is acknowledged within EC law on free movement”⁸⁸ as it allows Member States to preserve discriminatory or indirectly discriminatory regulations when such rules are necessary for the defence of a public interest. The somewhat uncompromising attitude of the European Court of Justice until the beginning of the nineties, in the majority of cases dealing with free movement of goods, has to be

⁸⁴ See Cases C-267-8/91 *Keck and Mithouard* [1993] ECR I-6097. This is not to say that the case law is always consistent or straightforward.

⁸⁵ See respectively Case 155/80 *Oebel* [1981] ECR 3409; Case 60/84 *Cinethèque* [1985] ECR 2605; Case 145/88 *Torfaen Borough Council v. B & Q* [1989] ECR 3851; Case C-368/95 *Vereinigte Familiapress* [1997] ECR I-3689; Case C-120/95 *Decker v Caisse de Maladie des Employés Privés* [1998] ECR I-1831; Case C-112/00 *Schmidberger* [2003].

⁸⁶ For a stimulating account, see Miguel Poiars Maduro, “Striking the Elusive Balance between Economic Freedom and Social Rights in the EU”, in Philip Alston (ed), *The EU and Human Rights* (Oxford, OUP, 1999), p. 449.

⁸⁷ Catherine Barnard and Simon Deakin, “Market Access and Regulatory Competition”, *op. cit.*, p. 203.

⁸⁸ *Ibid.*

understood in light of the ever present temptation for national authorities to unfairly defend national producers by hiding behind the alleged defence of a public interest.

64. A comical example is provided by the “beer purity” case decided in 1987.⁸⁹ Germany tried to stop the importation of foreign beers on the ground that they failed to meet its beer purity standards. German authorities defended the legislation by arguing that additives could constitute a public health risk for a person who drinks in excess of 1,000 litres of beer a year.⁹⁰ To preserve the benefits of a common market and limit the potentiality of any “free-rider” strategy, the European Court of Justice had to make sure Member States play by the rules defined in 1957 and which have been further refined by a succession of amending Treaties. It does not mean, for instance, that “pure beers” cannot be produced in Germany. It merely forbids Germany to prohibit the importation of “impure” beers and leaves to the German consumer the freedom to choose.

65. To be sure, the Member States only express discontent when they are the object of European scrutiny. Indeed, not unsurprisingly but hardly ever noticed, when their partners are censured for hindering the selling of the goods they produce, there is no more talk about the European Court of Justice’s dogmatism. In any case, the European Court of Justice is now more sensitive to the dangers arising from the direct (legal) effect of negative integration on national problem-solving capacities. In the sectors of social and process regulations discussed in Scharpf’s work,⁹¹ the broad picture is one of a careful Court unwilling to condemn national regulations unless the protectionist intent or effect is manifest. Furthermore, as Miguel Poiares Maduro points it out, “if one takes the Europe majority policy as the yardstick by which to judge the impact of free movement rules on regulation, then there has been hardly any deregulation as a consequence of the application of free movement provisions.”⁹² Were the Constitutional Treaty to enter into force, the European Court of Justice will be formally obliged to take into account the new general social clause and therefore, to continue balancing the goal of market integration with a broad set of public interests.

⁸⁹ Case 178/84 *Commission v. Germany* [1987] ECR 1227.

⁹⁰ See the opinion of the Advocate General Slynn.

⁹¹ *Governing in Europe, op. cit.*

⁹² “Striking the Elusive Balance between Economic Freedom and Social Rights in the EU”, *op. cit.*, p. 455.

66. Even if the Treaty provisions aimed at removing trade barriers are now well and effectively balanced with a wide range of competing objectives and interests, it is further argued by social-democrat critics of the EU, that the ease with which capital and work can move from a state to another continues to lead to regulatory competition, increasing the pressure on the Member States willing to defend existing levels of national regulation and social protection. The unfortunate aspect of European integration, it is alleged, is that national authorities cannot rely on any European “re-regulation” to regain some room for manoeuvre. Indeed, due to the cumbersome character of the European decision-making process and deep ideological differences among Member States, interventionist policies aimed at managing regulatory competition can hardly be defined and much less agreed upon. To quote once again Fritz Scharpf, at the European level, the institutional capacity for negative integration is supposedly “stronger than the capacity for positive integration, interventionist policies, and the interests they could serve, are systematically disadvantaged in the process of European integration”.⁹³

67. Before exploring further the reality of a “race to the bottom”, a preliminary caveat must be introduced. In the author’s opinion, much in line with Scharpf’s own reasoning, negative integration should be accompanied by “positive” measures not only to make sure the market functions properly but also to eventually correct regulatory competition through harmonisation measures, e.g. in the form of minimum European standards. From such an “interventionist” perspective, European legislation should at the very least provide common standards to guarantee a level playing field and avoid social or fiscal dumping. Yet, before discussing any eventual European “re-regulation” and the delicate issue of when disparities between the laws of the Member States give a competitive advantage to states with lower standards, the reality of a race to the bottom should be first substantiated.

(2) The Issue of “Fiscal Dumping”

68. To the probable surprise of many well-intentioned critics, a “race to the top” seems in reality to prevail in Europe in some significant areas such as health and industrial safety, environmental

⁹³ Fritz Scharpf, *Governing in Europe, op. cit.*, p. 49.

risks, gender equality and consumer protection.⁹⁴ Yet, regarding taxation, such a race to the top does not appear to have materialised. On the contrary, Member States give the impression of competing against each other to attract or to retain capital by lowering their corporate tax rate. How can these two different situations be explained? To follow the insightful analysis of Andrew Moravcsik,

“[t]he major difference between apparently intractable issues of EU discussion such as social and tax harmonization, and similar issues where European regulation is effective, such as worker health and safety, appears not to lie in constitutional structure but in the precise nature of conflicts of interest among national governments. In the case of taxation, some governments remain deeply opposed to the harmonization of taxation and social welfare, whereas there are few die-hard defenders of unilateralism in matters of worker health and safety or pollution abatement.”⁹⁵

Accordingly, the EU cannot be said to *inherently* suffer from a neo-liberal bias, embodied in its constitutional structure. To simplify, the EU can merely accomplish what a super-majority of Member States want it to accomplish and then, a race to the top is feasible. Furthermore, even in the taxation field, it is tempting to argue that the reality of a race to the bottom is not as clear-cut as commonly assumed. It is important to stress that critics here complain about the lack of European harmonisation. When examining the 2004 Commission’s proposal on the liberalisation of services, we shall discover that the same critics also complain about European harmonisation when it does not fit their ideological preferences. But let’s focus for the moment on the fiscal dumping now allegedly taking place in Europe.

69. Small Member States have been tempted to cut corporate tax rates to attract firms. It is a sensible strategy as long as the reduction is accompanied by an increase in total revenue. Ireland successfully implemented this strategy after deciding to introduce a 12.5 per cent uniform rate of profits tax. Several new Member States are busy trying to emulate the example of the Celtic Tiger. Estonia went as far as giving up any taxation on profits while Poland is experiencing an increasing popular solution: the flat tax system where income tax, corporation tax, and VAT are subject to the same rate of 18 per cent. The corporate tax rate is respectively 35 and 33 per cent in

⁹⁴ On the competitive pressures on national regulatory systems induced by economic introduction, see the special issue of the *Journal of European Public Policy* with in particular an introductory presentation by Fritz Scharpf, “Introduction: The Problem Solving Capacity of Multi-level Governance” (1997) 4 *Journal of European Public Policy* 520.

⁹⁵ Andrew Moravcsik, “In Defence of the ‘Democratic Deficit: Reassessing Legitimacy in the European Union” (2002) 40 *Journal of Common Market Studies* 603, at 618-619.

Germany and France. To retain their firms and possibly attract foreign investments, France and Germany have also envisaged bringing down their corporate tax rates. Speaking for Angela Merkel, in the 2005 German federal elections campaign, Mr Kirchhof, a university professor and a former judge of the Federal Constitutional Court, called for a new flat income tax of 25 per cent and a corporate tax cut to 22 per cent. Furthermore, in stark contrast to the position adopted by the former German Chancellor Gerhard Schröder and constant French policy, he controversially declared that he “would never support guidelines against so-called tax dumping. Every country has autonomy in the sense of its own legislation and every country should strive to be better than the others.”⁹⁶

70. From the point of view of those willing to preserve a sufficiently large tax base to maintain a viable welfare system and convinced that social justice and equity justify substantial taxes on capital, this trend amounts to a vicious circle as all Member States will eventually end up with less revenue from capital owners.⁹⁷ Worse, in the name of job creation or job maintenance, Member States are always tempted to subsidize firms as the Intel affair in Ireland demonstrates. The result is that not only do states collect less money from capital owners, they also give away taxpayers’ money. Regarding the latter aspect, thanks to the EC Treaty, the European Commission is empowered to control state subsidies with the principle of undistorted competition. However, and it can be perfectly be regretted, “no such criteria are as yet applied to competitive *general* reductions of the tax rates applying to capital incomes and businesses.”⁹⁸ I should note in passing this again demonstrates that competition law should not be seen as the enemy of social protection. On the contrary, what is needed is a stronger enforcement of the current provisions against abuses of private power and unfair public subsidies as well as a broadening of its scope at the European level, to cover “competitive *general* reductions of the tax rates” suggested by Fritz Scharpf. It may then be easier for citizens to understand that competition law is all about guaranteeing a level playing field.

⁹⁶ Quoted by Derek Scally, “CDU rejects tax harmonisation”, *The Irish Times*, September 6, 2005. The policy choices advocated by Paul Kirchhof proved to be so controversial and politically damaging for Angela Merkel that the shadow Finance Minister had to publicly declare before polling day that he will remain in the academia.

⁹⁷ For the moment, however, Ireland enjoys the benefits of being one of the few countries pursuing a strategy of development based on a low corporation tax rate. In 2002, Ireland raised more corporate taxes as a percentage of GDP (about 3.7 per cent) than any of the other 15 countries reviewed in the 2005 Report of the Irish National Competitiveness Council. By contrast, in Germany, corporate taxes do not even reach 1 per cent of GDP while, in France, they represent close to 3 per cent. See National Competitiveness Council, *The Competitiveness Challenge 2005*, figure 2.1, p. 24, report available at: www.forfas.ie/ncc.

⁹⁸ Fritz Scharpf, *Governing in Europe, op. cit.*, p. 100.

71. The vehement opposition of Ireland and the United Kingdom to any harmonisation of corporate taxation at the EU level makes it highly unlikely that Member States will ever agree to such an extension of the scope of European competition law. Yet, to remedy to what it sees as fiscal or tax dumping, the French government has proposed the harmonisation of the rules under which corporate tax is calculated throughout the EU. Four Member States out of twenty five have expressed their opposition, as they do not want the emergence of harmonised corporate tax rates through the back door. Ireland and the United Kingdom were, of course, part of this group, along with Malta and Slovakia.⁹⁹ Mr McCreevy, then the Irish finance minister said:

“We are against it. Any methodology that would lead to harmonised tax rates, either through the front door or through the backdoor, is against the EU constitution.”¹⁰⁰

And truly, Mr McCreevy is right. More exactly, the Constitutional Treaty does not alter the current situation: unanimity remains the general rule for all tax-related matters. Were the Constitutional Treaty to enter into force, the preservation of the current status quo is therefore to be expected. Quite shamefully, when the constitutional text was being drafted, Ireland went as far as to constantly oppose harmonisation in matters relating to tax fraud and tax evasion. The fear of opening the door to more harmonisation overrode any consideration of the common good. On the other hand, it is clear that France intends to use its proposal as a first step to fight for the issue of taxation harmonisation.

72. Another proposal is worth mentioning. Mr Nicolas Sarkozy suggested that Member States with an unusual low corporate tax rates should not benefit from European structural funds, these funds representing a third of the EU's budget. This call was widely denounced and rightly so. First and foremost, policies embodying European solidarity should be preserved and implemented exclusively with regard to socio-economic criteria. Second, a country may need to compensate for other handicaps it may have in order to attract investment. In the case of Ireland or Estonia, for instance, their geographical isolation ought to be compensated in some way. Yet, these Member States must realise they play a dangerous game when they oppose, not on ideological grounds but merely to preserve their competitive advantage, any proposal to introduce a minimum corporate tax throughout the EU, say, a 10 per cent rate for the poorest countries with a superior threshold for the richest countries. A minimum corporate tax rate would demonstrate

⁹⁹ Denis Staunton, “Ministers move to harmonise corporate tax rules”, *The Irish Times*, September 13, 2004.

¹⁰⁰ *Ibid.*

that all Member States realise that Europe is a community of destiny and that national well-being cannot be sought at the expense of your neighbours.

73. Nevertheless, the extent of tax dumping should not be overstated. Investments and the maintenance of jobs do not exclusively depend on taxation rates. France, where you find the most vociferous voices against “globalisation”, is still among the group of countries receiving the largest share of foreign investments. In 2002, for instance, it ranked number two worldwide for investment inflows just behind China. It also ranked number two in Europe, behind the United Kingdom and in front of Ireland, for job creation from foreign direct investment.¹⁰¹ In addition, the exodus of jobs to low-cost destinations appears unfounded despite the fears propagated by the former Socialist prime minister of France, Mr Laurent Fabius, who spent his time during the referendum campaign arguing that the ratification of the Constitutional Treaty would further favour the relocation of French companies to low tax countries in Central and Eastern Europe. A recent study, analysing a period running from 1995 to 2001, claims that only 2.4 per cent of the 3.9 million of people employed in France in the manufacturing sector have been “outsourced” during this period.¹⁰² To put it differently, merely 0.35 per cent of industrial jobs were suppressed to be created abroad, and that means, in absolute numbers, approximately one job out of three hundred. Another unexpected conclusion is that only half of these jobs created abroad are actually located in “low-cost” countries. The other jobs emigrated to Spain, Italy, Germany and the United States. Although authoritative figures have yet to be offered, it is extremely unlikely that the 2004 enlargement has resulted in a massive exodus of jobs from the “old” to the “new” Europe.

74. Irrespective of the complex and surprising realities of outsourcing, it cannot be denied that taxes on business and capital incomes, a trend initiated at the beginning of the eighties, have progressively and continuously diminished as a source of government revenue in the “old” Member States with extensive welfare obligations, to the detriment of immobile factors of production, meaning the workers. To guarantee existing levels of public services while maintaining a decent level of public debt, taxes on labour and/or taxes on consumption have

¹⁰¹ See www.investinfrance.org.

¹⁰² See, Patrick Aubert et Patrick Sillard, *Délocalisations et réductions d'effectifs dans l'industrie française (1995-2001)*, INSEE, No. G 2005/03, April 2005, available at: www.insee.fr. Another very informative report largely confirms these findings and exposes the numerous myths associated with “outsourcing”: Assemblée des Chambres Françaises de Commerce et d'Industrie, “Délocalisations: La peur n'est pas la solution”, November 2005, available at: www.acfci.cci.fr.

increased to compensate for the amount lost with regard to companies and capital owners. Assuming that tax competition ought to be blamed, and it appears indeed that despite the reduction in corporate income tax rates, the revenue from corporate taxation is increasing in Ireland or in the new Member States, what are the potential solutions as far as Europe is concerned? A first solution may lie in the setting up of a minimum corporate tax rate at Union level or different thresholds that would be linked to the level of development.¹⁰³ Alternatively, if no agreement is possible for ideological or purely selfish reasons, the Member States should seek to develop a law of “unfair regulatory competition”. It has been suggested that the Commission and the European Court of Justice should be empowered to intervene “against competitive tax concessions, competitive forms of deregulation, and similar practices. The criterion in every case would be Kantian: given the preferences of the adopting country, would measures of this kind become self-defeating if they were simultaneously adopted by all other countries?”¹⁰⁴

75. Ideologically compatible with economic liberalism, it would be much more difficult for Ireland and the United Kingdom to oppose, normatively and politically speaking, the development of a set of rules aimed at guaranteeing “fair competition” than to reject proposals to directly harmonise taxation at the European level. The EU would then be in the position to limit eventual tax dumping, with the political advantage that citizens may come to better realise that the EU is a genuine community of shared destiny and an effective framework to manage the most perturbing changes induced by the globalisation of the economy. In the areas of social-policy regulation (e.g. working hours, employment security), ironically, it is not the lack of European rules that many have come to regret. On the contrary, the European Commission is now being accused of actively favouring “social dumping” by pushing forward a draft Directive aimed at liberalising services throughout Europe.

B. – The “Frankenstein” Draft Directive on Services

¹⁰³ See e.g. Ruud de Mooij, “Does the Enlarged European Union Need a Minimum Corporate Tax Rate?” (2004) 39 *Intereconomics* 180. The author argues that by putting a floor on the tax rate, Europe may avoid a potential harmful tax race to the bottom. As long as the minimum rate is not too “high”, the disciplining impact of tax competition will not be lost.

¹⁰⁴ Fritz Scharpf, *Governing in Europe, op. cit.*, p. 198.

76. In addition to propagating fears about imminent job losses to the benefit of the new “low-cost” Member States, some prominent French socialists took the debate on the Constitutional Treaty to spread, to the visible delight of Jean-Marie Le Pen, fantasies about the likely invasion of “Polish plumbers”. More recently, in Ireland, the Labour Party leader, Pat Rabbitte, decided to emulate his humanist colleagues from the French left. He suggested without any hard evidence that migrant workers from Eastern Europe were causing a displacement of Irish workers and the erosion of pay and working conditions in Ireland; hence the so-called “race to the bottom”.¹⁰⁵ This is not obviously the first time critics misrepresented the EU in light of the enlargement in May 2004 to ten Eastern European countries. Before the social dumping discourse, some unprincipled leaders made it their personal business to emphasise the fact that hordes of “welfare tourists” were about to abuse our cherished national welfare systems. It obviously did not happen and similarly, the adoption of the so-called “Bolkestein Directive” on services in the internal market, also labelled the “Frankenstein Directive” by some inspired commentators, would not lead to a race to the bottom.¹⁰⁶

77. To put the proposed draft Directive into context, it is worth remembering that the free movement of services is one the four fundamental principles underpinning the EU common market since 1957. Yet, almost fifty years later, cross-border trade in services still lags behind the trade in goods. Indeed, although services account for more than 70 per cent of the GDP in most Member States, cross-border trade in services only amounts to about 20 per cent of trade within the EU thanks to a good deal of protectionism and red tape. Convinced that greater economic growth and more jobs would follow greater trade and competition – the number of 600,000 jobs has been put forward – the Commission issued a draft Directive in January 2004 which seeks to encourage greater cross-border trade in services by providing a legal framework that will eliminate obstacles to the *freedom of establishment*, i.e. the right for service providers to establish their business in any Member State for an indefinite period, and to the *freedom to provide services*, i.e. the right to provide services on a temporary or periodical basis in a Member State in which the provider of services is not established.

¹⁰⁵ See e.g. Editorial, “Attitude towards migrant workers”, *The Irish Times*, January 23, 2006.

¹⁰⁶ Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market SEC(2004)21.

78. The Bolkestein Directive has raised strident protests as regards the second objective. It has been widely alleged that the proposed liberalisation of the freedom to provide services, under the auspices of the “country of origin principle”, is likely to initiate a race to the bottom. A characteristic example of the (inaccurate) claims one may effortlessly find in the press is given by David Begg, general secretary of the Irish Congress of Trade Unions:

“What does not make sense is to allow service industries to base themselves in the low-cost accession countries and from there outsource jobs to provide services in the EU 15, on pay rates and conditions of employment which apply in the base country. This is a crazy proposition which would cause great resentment and potentially undermine support for the European project. ... Unless our social model is robust enough to protect these most vulnerable people, it is only a matter of time before everyone joins the “race to the bottom”.”¹⁰⁷

79. Before exposing the statement’s inaccuracies, the rationale behind the country of origin principle should be exposed. It is important to bear in mind that the European Parliament adopted, by a large majority, in February 2006, a largely revised version of the Commission’s initial draft proposal. The country of origin principle has been formally dropped. MEPs have replaced it with a new clause entitled “freedom to provide services”. It remains to be seen however if this new clause is more than a terminological change. Furthermore, the Council of Ministers has yet to decide its positions and it retains the power to reject any of the European Parliament’s amendments. The debate on the “country of origin principle is therefore likely to stir up passions for a little while.

(1) The Country of Origin Principle

80. The country of origin principle is aimed at helping small and medium sized enterprises to test the market before eventually setting up in business on a permanent basis. To ease the burdens involved with doing business in another Member State, it is foreseen that any company which provides services in one country is automatically qualified to provide services in any other Member State on the basis – here is the Gordian knot – of home-country regulation. Under this principle, a business which provides services in the Member State in which it is established is

¹⁰⁷ David Begg, “Barroso intent on shifting EU to right of centre”, *The Irish Times*, February 7, 2005.

qualified to provide services on a *temporary* basis in any other Member State according to the regulations of its home Member State. Although the 2004 draft Directive includes provision for a number of important exceptions to the application of the principle (consumer contracts for instance) as well as complete derogations (twenty three in total) for sectors such as health and other “public services”, opponents continue to express fears about social dumping. In short, the argument runs “that if the new EU Member States can compete in the market for services on an equal basis without applying the often higher social rights as well as health and safety and environmental standards of some of the EU 15, the lowest level of standards in the European Union will become the norm.”¹⁰⁸

81. The key issue is obviously how to interpret the country of origin principle and whether or not it is a new principle. Before addressing the concerns about the country of origin principle, the right of establishment and the freedom to provide services must be briefly distinguished from each other. The right of establishment is well-established.¹⁰⁹ As previously mentioned, the right of establishment ensures that nationals and companies of one Member State can freely move to another Member State in order to carry out activities as self-employed persons and to set up and manage companies. Also protected by the EC Treaty since 1957,¹¹⁰ the freedom to provide services implies that any self-employed person has the right to undertake, *on a temporary basis*, an important feature often neglected by the usual pundits, any economic activity normally performed for remuneration within the EU. In both cases, it is well established that EU law prohibits, unless justified by a public interest requirement, discriminatory but also non-discriminatory national measures when they constitute an impediment to freedom of movement.

82. The “country of origin principle” is only concerned with the freedom to provide services and *not* the right of establishment. This is an important point, too often misunderstood. Indeed, in the latter case, it is crystal-clear that any company willing to do business on a *permanent* basis in any Member State should do so through a fixed establishment and comply with all the rules of the host Member State. As for the fact that the draft Directive protects the right of companies of providing services on a *temporary* basis, i.e. without the need of establishing themselves in the

¹⁰⁸ House of Lords, European Union Committee, *Completing the Internal Market in Services*, 6th Report of Session 2005-06, 21 July 2005, para. 7. This Report should be singled out not only for the brilliant synthesis it operates but also for the diversity of evidence it offers.

¹⁰⁹ See Articles 43 to 48 TEC.

¹¹⁰ See Articles 49 to 55 TEC.

Member States where they trade, there is nothing new here. It is argued, however, that the Bolkestein Directive goes further to the extent that the right to provide services would now guarantee a brand new country of origin principle. This is not entirely accurate. Indeed, not only does the principle already appear in several pieces of legislation,¹¹¹ the European Court of Justice has applied a similar principle in the field of the goods since 1978. As we have seen, in *Cassis de Dijon*, the European Court of Justice ruled that, in the absence of European rules, goods should freely circulate between Member States provided that they have been lawfully produced and marketed in one of the Member States. This idea is known as the principle of mutual recognition. The application of national rules hindering trade can only be justified by reference to a mandatory public interest. A similar logic governs the case law dealing with the freedom to provide services. For the European Court of Justice, in the absence of European-wide harmonisation, national rules hindering the freedom to provide services violate EU law unless they can be justified by the regulating state by overriding reasons relating to the public interest. More specifically, the Court has held that the application of the national legislation to foreign persons providing services ought to be strictly justified whenever that the requirements embodied in legislation are already satisfied by the rules imposed on those persons in the Member State in which they are established.”¹¹²

83. Even though the country of origin principle is not a complete novelty, it is nonetheless reasonable to consider that the Bolkestein Directive, if adopted without drastic amendments, will denote an important policy shift as far as the regulation of the internal market is concerned. Faced with the political and legal intricacies of any attempt at harmonising the provision of services across Europe through a numerous set of sectoral directives, the Commission appears to have considered the country of origin principle as a second-best solution to revitalize the EU's economy in a single shot. By eliminating a great deal of prior administrative authorisations, any EU-based company would be indeed automatically qualified (unless the sector falls within one of the many derogations explicitly provided for by the draft Directive) to provide services in any other Member State on the basis of home-country regulation. As a result, the Bolkestein Directive has been presented as a neo-liberal plot. More worrisome, some peculiar French left-wing humanists have propagated the view that it paves the way for an invasion of “Polish plumbers”.

¹¹¹ See the TV without frontiers Directive (89/552/CEE) and the E-Commerce Directive (2000/31/CE).

¹¹² Case C-288/89 “*Gouda*” [1991] ECR I-4007, para. 13.

In less xenophobic terms, the argument runs that the application of the country of origin principle is going to lead to a race to the bottom most notably in the fields of workers' rights and health and safety standards. For this author, the potential impact of the "Frankenstein Directive" has been undeniably exaggerated and it would be more appropriate to lay the blame at each country's door for tolerating extravagant abuses of national labour standards.

(2) The Issue of Social Dumping

84. In defence of the "Bolkestein Directive", it must first be said that critics forget that there is a great deal of European legislation setting minimum standards health and safety standards. The same is true regarding environmental protection. Accordingly, liberalisation of services cannot lead to a situation where a Member State lowers its health and safety standards or environmental standards to gain competitive advantage below the current European minimum standards. As for workers' rights, it is astonishing to see that most critics do not realise that the Posted Workers Directive issued in 1996 regulates this area and precisely *excludes* the country of origin principle.¹¹³ In the terms of the Directive, it is intended to promote the transnational provision of services in a "climate of fair competition and measures guaranteeing respect for the rights of workers".¹¹⁴ And this is what it does by stipulating that posted workers will enjoy the application of certain minimum protective provisions in force in the Member State to which they are posted, regardless of the law applicable to the employment relationship. Accordingly, it provides that employees that are posted temporarily to a Member State other than their own will be subject to the labour law of the country in which they are employed. Rules dealing with working time, minimum paid annual holidays, minimum rates of pay, the conditions of hiring-out of workers and health, safety and hygiene at work should therefore be governed by the Member State in which they are employed.¹¹⁵

¹¹³ Directive 96/71/EC. A posted worker is defined as one who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works.

¹¹⁴ Recital 5.

¹¹⁵ Article 3(1) of the Directive lays down the mandatory rules to be observed by employers during the period of posting in regard to the following issues: maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay, the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings, health, safety and hygiene at work, protective measures with regard to the

85. In light of this Directive, the European Court of Justice has constantly emphasised that “Community law does not preclude a Member State from requiring an undertaking established in another Member State which provides services in the territory of the first Member State to pay its workers the minimum remuneration laid down by the national rules of that State.”¹¹⁶ When a French company set up by a Portuguese firm was caught in 2005 employing on a permanent basis, in France, Portuguese workers on almost Dickensian-type conditions on behalf of a major French firm, France Telecom, it was an obvious and shocking violation of French law *as well as* European law.¹¹⁷ The trouble, in France, and this is certainly true in most Member States, is that the manpower of the French labour inspectorate, the department whose mission is to inspect companies for potential violation of labour regulations, has considerably shrunk over the years. Accordingly, numerous labour abuses, unlawful under national as well as European law, go unnoticed. Furthermore, in a situation of high unemployment, it is far from unusual to see politicians exerting great pressure on civil servants in order to convince them to show some “flexibility” when dealing with violating firms. They are often told that they should not “discourage” investment.

86. It should also be stressed that detractors of the Bolkestein Directive seem rather ignorant about the fact that it is *only* relevant for services provided (a) temporarily (b) by those who are not employed by others, i.e. self employed persons rather than employees. As previously shown, the 1996 Posting of Workers Directive regulates the situation of employees. Accordingly, no firm can send a contingent of low-paid workers to do a job (requiring a stay of more than 7 days) in another Member State without being bound by the laws of the host country. As for the situation of self-employed persons now, when they work directly for consumers, they are subject to derogation from the “country of origin principle”. This means that self-employed persons must provide services under Irish law in Ireland, under French law in France, etc. So much therefore for the “Polish plumber”. In any case, anyone with a property in France would certainly be keenly aware of the fact that French plumbers are so few and well off that they hardly ever

terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people.

¹¹⁶ See recently Case C-341/02, *Commission v. Germany*, April 14, 2005, para. 24. The European Court of Justice requires, however, that the application of such rules must be appropriate for securing the attainment of the objective which they pursue, that is to say, the protection of posted workers, and must not go beyond what is necessary in order to attain that objective. A case-by-case assessment is therefore required.

¹¹⁷ See “Manifestations contre le travail au rabais”, *Le Monde*, May 24, 2005.

answer your phone call for immediate help. If only Polish plumbers could be convinced to provide their services, French citizens would likely benefit from increased quality of services as well as lower prices. The Polish Embassy in Paris should be congratulated for its sense of humour. After all the unpleasant comments uttered by ignorant politicians, it launched a tourist campaign advertising a blonde hunk carrying a monkey-wrench, allegedly a Polish plumber, who beckons French people to visit his country with the following slogan: “I am staying in Poland. Come on over.”

87. In the end, *only* those who take on self-employed businesses providing a “commercial” service for a business customer in a different Member State will eventually come under the auspices of the country of origin principle. In this situation, were the Bolkestein Directive to be adopted in its 2004 version, the parties to a contract will be able to choose the law applicable to it. However, as previously said, if a company sends workers abroad to perform the contract for more than a week, the workers will then be subject to national labour laws. Furthermore, it is important to constantly stress that the application of the country of origin principle is linked to *temporary* provision of services in another country. Even though greater clarity is required about the precise meaning of “temporary” as opposed to “permanent”, the scope of liberalisation is therefore limited. Any firm or self-employed persons willing to do business in another Member State on a permanent basis must establish itself there and therefore is completely bound by the laws of the host country.

88. Finally, the argument according to which the Bolkestein Directive is going to favour “outsourcing”, meaning the evasion of national law by national companies or self-employed persons as they move abroad to more “welcoming” Member States, again reveals a high level of ignorance. Companies have already the freedom to establish themselves wherever they want to with great ease.¹¹⁸ However, it should also be stressed that according to the case-law of the European Court of Justice, a Member State is obviously entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, to improperly circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of EU law. In other words, national authorities can

¹¹⁸ See e.g. Case C-56/96 “VT4” [1997] ECR I-1459, para. 22: “The Treaty does not prohibit an undertaking from exercising the freedom to provide services if it does not offer services in the Member State in which it is established.”

take measures to prevent the exercise by a person providing services, whose activity is wholly or principally directed towards its territory, of the freedoms guaranteed by the EC Treaty for the purpose of avoiding the rules which would be applicable to him if he were established within that State.¹¹⁹ This is known as the “abuse evasion theory”.¹²⁰

89. In the same vein, under the Bolkestein Directive, an Irish company registering its permanent office in Latvia, while it is manifest that it intends to carry out most of its business in Ireland, will not be able to rely on Latvian law in Ireland. This is not feasible today and it will not be allowed under the Services Directive. As soon as a company carries out business in a Member State on a permanent basis, it is bound by national rules no matter where it is formally established. Many French self-employed persons were once tempted to establish themselves in the UK, but they soon discovered that under French tax law, no matter your (legal) place of establishment, you must pay taxes and are subject to the law of the country where you effectively carry out your economic activity. The country of origin principle will not change that as it does *not* apply to companies or self-employed persons providing services on a permanent basis in the host Member State. In the same way, an Irish company may be tempted to bring in Latvian workers. They will be subject, nonetheless, to Irish labour law if they work in Ireland for more than a few days. To conclude, linking “outsourcing” and the Bolkestein Directive illustrates a profound misunderstanding of the draft Directive’s scope. In the field of services, one can hardly imagine the situation of Irish plumbers establishing themselves in Slovakia and willing to fly from time to time to work in Ireland for a business customer. Certainly, they will be covered by Slovakian law under the country of origin principle but the benefit of doing so remains highly evasive. If they carry out most of their economic activity in Ireland, they have no other option than to be bound by Irish law. The situation is identical for non-national businesses or their workers as soon as they undertake economic activity on a non-temporary basis.

90. The discourse on “social dumping” eventually appears singularly misguided once one realises that the draft Directive on Services neither compels the Member States to liberalise public

¹¹⁹ See e.g. C-23/93 “*TV 10*” [1994] ECR I-4795.

¹²⁰ It remains, true, however that for the European Court of Justice, somewhat unconvincingly, a company which does not conduct any business in the Member State in which it has its registered office and pursues its activities only in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct. This does not mean that the Member State where business is being exclusively conducted cannot deny that company the benefit of the provisions of Community law relating to the right of establishment. The Court requires instead that national authorities must prove on a case-by-case basis abuse or fraudulent conduct on the part of the persons concerned. See Case C-212/97 “*Centros*” [1999] ECR I-1459

services nor does it regulate the situation of posted workers. It is understandable therefore that Charlie McCreevy, the European Commissioner for Internal Market and Services, has shown some irritation and said, in a statement to the European Parliament: “I don’t want to hear any more talk about so-called social dumping. This not what this proposal is about and we should put an end to this confusion.”¹²¹ The Commissioner is right. The draft Directive on Services will bring no change regarding the conditions and standards for workers. It will not allow companies to bring in “cheap” workers from other Member States and create a sort of unfair competition with national companies playing by the rules. In addition, it will not prevent the Member States from supervising companies and workers operating in their territory.

91. True, the draft Directive foresees the suppression of any prior administrative authorisation before workers can be posted in another Member State and the duties it imposes on companies may be in real need of some tightening up. Yet, the Member State is left with an entire freedom to enforce its labour laws by means of on-spot checks or demanding all relevant information from the company posting workers in the country. For this author, rather than obsessively focusing on the Bolkestein directive, the discussion should address the insufficient enforcement *by each individual Member State* of the 1996 Posting of Workers Directive. It is essential to tirelessly repeat that it is the responsibility of the host Member State to conduct inspections and to enforce its employment and working rules as well as the relevant EU standards. If it cannot be denied that the posting of workers is an important economic phenomenon. Before the enlargement in 2004, about 120,000 workers have been posted in France.¹²² Such a phenomenon, however, does not bear any link with persisting high unemployment even though it may tempting for failed and self-reproductive national elites to use this as a way of escaping their incompetence and predatory practices. The main problem, today, is the political unwillingness of most national governments to enforce these rules even in situations where violations of national rules are committed by or on behalf of national companies. The EU should not be blamed for the political preferences of national governments or their incompetence. The “Gama affair” illustrates this particularly well.

92. Thanks to Mr Higgins, Socialist Party TD, Irish citizens were astonished to learn that Turkish construction workers on Irish projects were being paid between €2 and €3 an hour while working

¹²¹ Statement to the European Parliament on Services Directive, speech/05/149, Strasbourg, March 8, 2005.

¹²² See the report issued by the French Senate on the Bolkestein Directive, Rapport d’information No. 206, session ordinaire de 2004-2005, 18 février 2005, p. 16.

for about eighty hours per week. Who is to blame for this “disgrace”, a term used by the Tánaiste, Ms Harney? Well, it seems that the Tánaiste herself is directly involved in this disgrace. Indeed, she failed during her period as Minister for Enterprise, Trade and Employment, to investigate complaints that she had received. Gama, a Turkish-based company, was actually bold enough to publicly affirm that it had come to Ireland on foot of an invitation by “some members of the Irish government and civil servants” who visited Turkey in June 2000.¹²³ Since its arrival at the end of 2000, the company has secured nearly €200 million worth of State contracts. EC law bears no responsibility whatsoever for this disgrace. Nor is it a question of insufficiently protective national legislation. Abuses of this sort will continue until something is done to make sure companies abide by the law, national and European for that matter. It all becomes a tragic joke when you actually realise how many workplace inspectors are employed by the Irish government – about 21 to police approximately two million workers.¹²⁴

93. The controversy surrounding Irish Ferries is also worth mentioning. David Begg offers once again a sad demonstration that the EU continues to be blamed even in situations where there is not the slightest reason to do so. For the general secretary of ICTU, if the proposed EU Services Directive becomes reality, “then the grotesque Irish Ferries scenario will become the norm”. To this extravagant nonsense, he added:

“If anybody was in any doubt as to the impact of this crazy proposition - the Services Directive - they need look no further than Irish Ferries. The chief executive of Irish Ferries earned €87,000 last year. But he wants to dump 543 workers and replace them with people on around €3 per hour... there’s something deeply obscene about that.”¹²⁵

It is not our intention to deny that the earnings of this chief executive are certainly obscene and more generally, that the greedy behaviour of most CEOs in the past few years has done much more damage to liberalism than any army of Karl Marx’s followers would have been able to inflict. Our concern is that the EU, a body with limited powers, has simply not got the competence to pass legislation on salaries. Likewise, it would impossible to associate the EU

¹²³ See Chris Dooley, “Gama secured 70% of PAYE relief scheme”, *The Irish Times*, May 18, 2005.

¹²⁴ See Paul Cullen, “Expansion of labour inspectorate planned”, *The Irish Times*, April 9, 2005. Since, the Minister for Enterprise, Micheál Martin has announced the appointment of 10 new labour inspectors, specifically to combat exploitation. See John Downes, “Gama case places the spotlight on our treatment of foreign workers”, *The Irish Times*, April 29, 2005.

¹²⁵ Quoted by Patsy McGarry, “Ahern sees no cause for gloom over EU’s future”, *The Irish Times*, September 28, 2005.

with the fact that the average CEO, in most developed nations, now generally makes between 300 and 500 times as much in pay as the average production-worker.¹²⁶ Compare this to the situation in the 70s, when the average CEO pay represented about 25 times the pay of an average production-worker. As for the draft Services Directive, one has to show an astonishing lack of understanding to find a link between what it proposes to achieve and the Irish Ferries scenario. It would be more adequate to underscore the shameful acceptance by all governments of the practice of “flag-hopping”. It is a well-known fact that the world’s largest fleets belong to the Bahamas, Panama and Liberia, allowing ship owners to avoid paying taxes and to avoid labour and safety standards. It is also well established that a significant number of members of our national elites and obviously most multinationals, not to mention the 9/11 terrorists, have been enjoying the benefits of tax havens and other offshore financial centres. Incidentally, regarding the taxation of multinationals, one should note that even the US press is now accusing Ireland of becoming the Bermuda of Europe to the detriment of American taxpayers.¹²⁷

94. Rather than fighting against these capitalistic deviances, trade unionists spend a great deal of their time portraying the EU as some sort of neo-liberal Leviathan. Both terms are false. Trade unionists, and the workers they allegedly represent, have really nothing to gain from representing the Union as the enemy. In the case of Ireland, it is indisputable that workers have gained more rights thanks to the EU. And in relation to the fear of social dumping, one must not forget that the Celtic Tiger miracle partially derives from the initial “low-cost” of its labour force. In any case, it is regrettable that media do not rigorously scrutinise the “arguments” put forward by the opponents to the Bolkestein Directive. The latter text, as initially drafted, is certainly not perfect. Furthermore, it cannot be categorically denied that the posting of non-national workers, under the 1996 Directive, is putting downward pressures on wages in some sectors where national workers used to get more than the minimum rates of pay. Yet, in all the cases of labour abuses agitating the media, the “disgrace” does not originate from the implementation of European norms but rather from the failure of the Member States to properly apply them alongside protective national legal standards.

¹²⁶ See *The Economist*, “Executive pay. Too many turkeys”, November 26, 2005.

¹²⁷ See e.g. Glenn R. Simpson, “Irish units lets Microsoft cut taxes in US, Europe”, *The Wall Street Journal*, November 7, 2005.

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95. The EU, as a political project, has suffered immense damage from the accusation of being a neo-liberal entity pursuing neo-liberal policies. Even its long-time devotees in Ireland or elsewhere lament the fact that the EU, “potentially the most civilised political project of our times”, has become the vehicle of a race to the bottom.¹²⁸ In claiming, however, that EU law allows for Latvian workers to work on less than half the minimum wage and without the protection of Irish labour law or in arguing that the Services Directive is now waved “around like holy scripture in which the almighty commission decrees that you can’t protect national standards of employment”,¹²⁹ commentators seem to trade stylistic considerations for accuracy.

96. The neo-liberal caricature is highly unfortunate as not only the legal provisions upon which the EU is founded do not embody any neo-liberal bias, there is also little evidence to support that EU policies encourage a race to the bottom. In most instances, fantasies rather than facts govern the discussion as it is politically more convenient to blame an indeterminate “foreign” entity and eventually foreigners, than to confront national vested interests or address national failures to enforce the law of the land. Persisting massive unemployment and the financial troubles of our welfare systems are structural problems that have little to do with economic globalisation or enlargement. Unfortunately, the temptation is always present for national governments to point the finger at the EU for all their countries’ ills. The EU should not be seen, however, as a foreign body with its own (neo-liberal) will. It is a framework the Member States can rely on to confront collective challenges and threats. It is up to the Member States to ultimately agree on the definition of sound policies in order for Europe to preserve itself from unregulated economic competition. The provisions of the current Treaties, and *a fortiori* the provisions of the Constitutional Treaty, offer a balanced set of values and objectives. They do not presage, in themselves, a neo-liberal or socialist orientation.

97. Instead of denouncing the supposed neo-liberal nature of the European Treaties, left-leaning critics should realise that ideological conflicts and divergent national interests are the genuine

¹²⁸ Fintan O’Toole, “A lot hangs on outcome of dispute”, *The Irish Times*, November 29, 2005.

¹²⁹ *Ibid.*

obstacles to European “re-regulation” in the direction of a more “social Europe”. As for the cases of labour exploitation, European law should not be blamed. They are due to companies not abiding by the law or abusing it in a context of persisting high unemployment and illegal immigration and can only persist thanks to an extraordinary unwillingness of national authorities to enforce their own labour standards. To point the finger at European integration, the EU Constitutional Treaty or the new Member States may be too tempting for unprincipled politicians, yet, the situation is unfortunately more complex and in most cases, the first step to take will be to hold national authorities accountable for their failure to enforce their own law and put an end to legal loopholes. Ultimately, the key question, as far as the EU is concerned, is a relatively simple one to formulate: who would benefit from its weakening or worse, its demise? Certainly not the weakest and smallest.