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## **EU pension policies: changing paradigms**

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Two fundamental tensions are at the heart of the EU: the tension between market liberalization and social integration, that is, between ‘economic Europe’ and ‘social Europe’; and the tension between the national level (policies by member states) and the supranational level (EU policies) in a multi-level system of government. Most conflicts in the EU revolve around these two tensions and much of EU activities can be seen as ways of reconciling the poles (the national and the supranational; the economic and the social). The two lines of conflict may be related, e.g. when a country seeks to shield its highly developed welfare state against ‘neoliberal’ inroads by EU agencies, then the national level is seen as ‘social’ in a positive sense while the EU level is seen as ‘economic’ in a negative sense. Or vice versa, people may call for more social activities by EU agencies to fight economic insecurities of liberalized markets in their home countries.

Pension policy is also affected by the two lines of conflict. Some scholars expect an increasing significance of the supranational level and of the ‘social’ in supranational pension policy, that is, they assume a formative influence of the EU on the member states, and, at the same time, a strong ‘social’ orientation of EU policies. In the early 1990s, Rainer Pitschas, for example — an academic and expert in administrative and social law — had a clear vision about an emerging pension policy promoted at the EU level by EU institutions. Pitschas (1993: 97) pointed out that the phenomenon of demographic ageing, which affects all European countries, could cause severe social conflicts in mid- or long-term perspective, and that these conflicts would probably be dealt with by EU institutions: “If, by the year 2025, about 17% of Europe’s population will be above 65 years of age, this is most likely to influence the development of a genuine European pension policy” (transl. U.D./L.L.). In 2002, Eberhard Eichenhofer — another expert in social law — concurred: Social protection, so he said, was by now a matter covered by EU law; the Charter of Fundamental Freedoms included an individual right to pension provision: “This right has to be implemented by community law” (Eichenhofer, 2002: 329; transl. U.D./L.L.). Eichenhofer added that, today, traces of social policy were also to be found in other EU policy areas, such as financial policy, monetary policy, or the interpretation of the freedoms guaranteed by the EC Treaty.

This article will take these remarks as a starting point. The remarks imply that social policy grew stronger and stronger on EU level. They also imply that there is a genuine EU pension policy in the making. The article will concentrate on three questions. First: What are the legal powers of the EU with respect to the three pillars of pension

systems, the statutory or public schemes (first pillar), the occupational pension schemes (second pillar), and the personal or individual schemes (third pillar)?<sup>1</sup> Second: What is the role of social policy within the framework established by the EC Treaty? Is there a paradigm specifically encouraging the emergence of a genuine EU pension policy? Third: What are the concepts determining EU pension policy? How did the Community act? My analysis will be based on legal documents and policy papers authored by EU institutions, primarily by the Commission and the Council of the EU.

In brief, the answer to the first question is: Legal powers of EU institutions with respect to social protection<sup>2</sup> have always been and still are very limited. The answer to the second question is: Over time, actors on EU level favoured differing paradigms pertaining to the function of social policy. The prevalent paradigm of the 1950s was different from the paradigm prevailing in the 1980s and 1990s, and that again is different from the current one: There has been a shift from liberalism to a 'social' concept, and another shift back to neo-liberalism as the currently dominating form of liberal thinking. The answer to the third question is: As it now stands, EU pension policy draws heavily upon neo-liberal thinking. Social protection policy is clearly influenced by economic policy, and not the other way round.

## 1 Pension policies before Lisbon: Separating pillars

### 1.1 Legislative powers of the Community in the social field

Basically, there are three types of authorisations embodied in Community law that relate to social protection issues: authorisations specifically concerned with social policy, authorisations relating to the four market freedoms, and the residuary authorisation under Article 308 (formerly: Article 235) of the Treaty.

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<sup>1</sup> In language used by EU institutions, the term "pension system" refers to a complete set of arrangements for the provision of pensions ("pension schemes"), including public and private schemes. For details *see* Commission, 2001b: 3 and Commission, 2000c: 2.

<sup>2</sup> The term "social protection", as used in EU documents, is broader than "social security systems". The term "social protection" relates to certain social risks (such as old age, retirement, the death of a provider, disability, sickness, maternity, unemployment, care for the frail), and it covers at least systems of social security and systems providing for social assistance. For details *see, e.g.*, Commission, 2003c: 3; Commission, 1995: 1b; Council Recommendation of 24 June 1992 on common criteria concerning sufficient resources and social assistance in social protection systems, Official Journal (O.J.) 1992 L 245/46; Council Recommendation of 27 July 1992 on the convergence of social protection objectives and policies, O.J. 1992 L 245/49.

Most significantly, legislative powers derive from the title of the EC Treaty explicitly dedicated to social policy. In its 1957 version, the Treaty<sup>3</sup> already stipulated that the Community's task was not confined to establishing a common market and to promoting economic activities, but also extended to an accelerated raising of the standard of living of Europe's people (Article 2). However, Member States could not agree to raise the standard of living of Europe's people by creating Community powers with a view to social protection. Under the 1957 Treaty, the Commission was simply authorised to promote "close co-operation between Member States in the social field" (Article 118 para. 1), and to do so "by making studies, delivering opinions and arranging consultations" (Article 118 para. 2). Things did not really change when the 1986 European Single Act<sup>4</sup> entered into force. The Council was then authorised to adopt Directives with respect to the health and safety of workers (Article 118a). 'Social security' or 'social protection' were still exempt from Community legislation. Things changed when the 1992 Social Policy Agreement<sup>5</sup> was incorporated into Community law by the 1997 Treaty of Amsterdam.<sup>6</sup> Since then, one of the Community's tasks is to promote "a high level of employment and of social protection" as well as "economic and social cohesion" (Article 2). The Council was given new legislative powers, *inter alia*, in the field of "social security and social protection of workers" (Article 118 paras. 1 and 3).<sup>7</sup> Yet, the Council was confined to adopting Directives by unanimous vote and to supporting and complementing the activities of the Member States in this field (Article 118 para. 1).<sup>8</sup> The 2001 Treaty of Nice<sup>9</sup> did not lift any of these constraints, though the wording and the structure of the provisions have indeed been changed slightly (Article 137 para. 1 and 2). Legislative action still requires unanimity and may not aim at full harmonisation of national social protection systems (Streinz, 2005: 38). The Commission never made use of these powers.

Second, some legislative powers in the area of social policy and of pension provision in particular relate to the freedoms guaranteed by EU law, especially to the freedom of movement of workers, the freedom to provide services, and the freedom of mo-

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<sup>3</sup> Treaty establishing the European Economic Community, Rome, 25 March 1957.

<sup>4</sup> European Single Act, The Hague, 28 February 1986, O.J. 1987 L 169.

<sup>5</sup> Agreement on social policy concluded between the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland, 7 February 1992, O.J. 1992 C 191/91.

<sup>6</sup> Treaty of Amsterdam amending the Treaty on the European Union, the Treaties establishing the European Communities and certain related Acts, Amsterdam, 2 October 1997, O.J. 1997 C 340.

<sup>7</sup> Article 137 para. 3 of the consolidated version of the EC Treaty.

<sup>8</sup> *Ibid.*, Article 137 para. 1.

<sup>9</sup> Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, O.J. 2001 C 80/1.

vement of capital: In 1957, Member States had already agreed that the freedom of movement would be worthless unless the right to reside and to take up employment in another Member State was backed by provisions ensuring the portability of rights acquired under social security schemes: Who would migrate to another Member State if acquired social rights were lost by the pure fact of leaving the home Member State? The Community was authorised to act accordingly (today: Article 42 of the Treaty). The freedom to provide services and the freedom of movement of capital include, in combination with other Articles (such as Articles 94 and 95 of the Treaty), the power to complete the internal market with respect to all sorts of services rendered by institutions managing occupational or individual pension schemes. Third, legislative powers may derive from Article 308 of the Treaty, whereby the Council is authorised to act unanimously if such action — although not explicitly permitted — proves necessary to attain one of the Treaty's objectives (residual legislative power).

## 1.2 Legislative action with respect to old age security

These Community powers indeed prompted legislation with respect to old age provision, long before the Community initiated the Lisbon process in the Spring of 2000. However, Community action remained piecemeal. Community action was not based on a comprehensive approach relating or connecting the three pillars of pension provision to each other. On the contrary, statutory, occupational and personal pension schemes were dealt with separately:

Regulation 1408/71<sup>10</sup> aimed at co-ordinating social security schemes in the case of cross-border-movement of workers, self-employed, students, or pensioners. Under that Regulation, Member States are obliged to accept periods of membership in schemes of other Member States as if those periods were periods under their own laws, at least with regard to the acquisition of pension rights.<sup>11</sup> And Member States are obliged to ensure the payment of benefits to persons residing in another Member State; States are not allowed to suspend payments or to reduce the amount.<sup>12</sup> The Regulation also contains rules on the calculation of the retirement benefits based on pension rights acquired in several Member States. But: Regulation 1408/71 is concerned with statutory schemes only.

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<sup>10</sup> Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, O.J. 1971 L 149/2, as amended by Regulation (EC) No. 631/2004 of 31 March 2004, O.J. 2004 L 100/1.

<sup>11</sup> Article 45 of the Regulation.

<sup>12</sup> *Ibid.*, Article 10.

Occupational pension schemes were covered by a 1986 Directive<sup>13</sup> prohibiting discrimination on account of sex, especially with regard to the conditions of access to such schemes, the obligation to make contributions, the retirement age, the calculation of benefits, and the conditions relating to the duration of benefits.<sup>14</sup> Remarkably, the Directive still accepts some gender differences in the level of benefits if the differences are justified on actuarial grounds.<sup>15</sup> When called upon to interpret the principle of equal pay (today: Article 141 of the Treaty) in the context of occupational pensions, the position of the European Court of Justice was clear and rather uncompromising: Part-time workers must not be excluded from access to the schemes. Occupational pension rights qualify as pay under Article 141; rules restricting the access to the schemes to full-time employees (indirectly) discriminate against women.<sup>16</sup> With respect to retirement age and the requirements for a survivor's benefit, states or private actors are not allowed to differentiate according to sex.<sup>17</sup> The application of differing actuarial principles does not violate Treaty obligations if it (only) pertains to the calculation of the employers' contributions.<sup>18</sup>

The most important categories of personal pensions were covered by several Life Assurance Directives.<sup>19</sup> These Directives primarily aim at facilitating the freedom to provide services: It was supposed to become easier for assurance companies to operate throughout all Member States, and, for individuals, it was supposed to become easier to take out a policy with a company not established in their home country. In order to achieve this, the Directives require that the taking up of a life assurance bu-

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<sup>13</sup> Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, O.J. 1986 L 225/40, as amended by Council Directive 96/97/EC of 20 December 1996, O.J. 1997 L 46/20.

<sup>14</sup> Article 6(1) of the Directive.

<sup>15</sup> *Ibid.*, Article 6(1)(h)–(i), Article 9(c).

<sup>16</sup> *See, e.g.*, Court of Justice, judgement of 13 May 1986, *Bilka* C-170/84, 1986 ECR 1607; Court of Justice, judgement of 10 February 2000, *Deutsche Telekom* C-234/96, 2000 ECR I 799.

<sup>17</sup> *See, e.g.*, Court of Justice, judgement of 17 May 1990, C-262/88 *Barber*, 1990 ECR I 1889; Court of Justice, judgement of 9 October 2001, C-379/99 *Pensionskasse für die Angestellten der Barmer Ersatzkasse VVaG*, 2001 ECR I 7275.

<sup>18</sup> *See, e.g.*, Court of Justice, judgement of 28 September 1994, C-200/91 *Coloroll*, 1994 ECR I 4389.

<sup>19</sup> First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance, O.J. 1979 L 63/1; Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC, O.J. 1990 L 330/50; Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive), O.J. 1992 L 360/1. Finally: Directive 2002/83/EC of 5 November 2002 concerning life assurance, O.J. 2002 L 345/1.

business be based on an authorisation, but on one authorisation only, namely the authorisation by the home Member State of the company which is then deemed valid throughout the Community; other Member States are obliged to recognise that authorisation. In turn, the home Member State is required to supervise the companies according to some specified 'prudential rules' relating to technical provisions, investment, insolvency margins, winding-up, etc. Those common standards are thought to promote the mutual recognition of companies.

It is quite apparent that the approach of the 1980s and 1990s entailed major gaps (Commission, 1991; Commission, 1995; Commission, 1997b). First: Community law did not touch upon the aim and the functions of pension systems. That was entirely left to the interpretation of the Member States. Second: Community law did not deal with barriers to the freedom of movement of persons caused by occupational pension systems. Long vesting periods or methods for the evaluation of accrued rights, which are detrimental to early leavers, certainly do not encourage workers to take up employment in another Member State. Yet, the Council did not act.<sup>20</sup> Third: The Community did not act upon the obstacles created by divergent national tax systems: If contributions made to pension schemes are not tax deductible unless the scheme is established in that Member State, the schemes established in other Member States are clearly disadvantaged. Who would like to join them? Fourth: While the market for life assurances has indeed been harmonised, there were no such rules for pension funds. That meant: It was very difficult, often even impossible, for employees to join a scheme established in another Member State. And: National legal provisions on how to invest seriously interfered with the free movement of capital since pension fund managers were not free to choose the form of their investment.

The piecemeal architecture crumbled when the Community moved to re-define the role of social policy within the whole spectrum of Community policies in the late 1990s.

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<sup>20</sup> Some Member States claimed that portability of occupational pension rights would clearly undermine the whole point of these pensions schemes. Occupational pension rights were primarily meant to respond to the loyalty of employees; once they were gone, the employer was free from all responsibilities. Other Member States claimed that occupational pension schemes were basically a matter for collective bargaining of both sides of industry; neither the Community nor governments should interfere.

## 2 Shifts of paradigms

### 2.1 From a liberal to a 'social' concept

The 1957 version of the EC Treaty was certainly inspired by liberal thinking. While Member States could easily agree on the need of improving the standard of living for workers (Article 2, Article 117 para. 1), there was no consensus that social standards should be harmonised (Currall and Pipkorn, 1991: 3283). France favoured harmonisation because she saw her industry disadvantaged by the comparatively high social expenditures French employers had to shoulder. Germany objected (Birkelbach, 1957). According to Germany, those fears were hardly based on facts. Germany contended that it was — at that point — not possible to foresee whether some Member States would be disadvantaged by differences in social security schemes: A disadvantage in one social area might be compensated by an advantage in another area. And any case, States would be able to compensate disadvantages through adjustments in the exchange rates. In the end, Germany's position prevailed. The compromise that was finally found assumed that harmonisation of social systems would mainly result from the smooth functioning of the common market. Legislative action would not prove necessary. The Social Fund was designed to (indirectly) care for those who would indeed be crowded out of their businesses and jobs. The Fund was supposed to support Member States in their efforts to improve the employment opportunities for workers (Articles 123 through 128 of the 1957 Treaty).

For decades, commentators complained about the liberal bias of the Treaty (Schulte, 1990; Currall and Pipkorn, 1991: 3274; Pitschas, 1993: 93, 95; Joussem, 2000). Integration was perceived as being mainly linked to economic activities, the notion of the common market as being mainly related to business men and bankers.

The 'social dimension' became an issue when the Community launched the concept of the internal market. In 1988, the Commission vigorously emphasised: "The social dimension . . . is a fundamental component of this project" (Commission, 1988: Foreword). The Commission added that the internal market was not only about strengthening economic growth (in the face of emerging global markets), but also about a fair share-out of the advantages deriving from the internal market. The idea of a social dimension equal in rank with other priorities of the Community (such as economic integration, monetary integration, financial integration) was confirmed by the 1989 Community Charter of Fundamental Social Rights<sup>21</sup> and, with respect to all

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<sup>21</sup> COM(89) 471 final.



Member States, by the 1997 Treaty of Amsterdam<sup>22</sup> that finally seemed to establish a European social model.

Political consensus on the social dimension of the internal market was broad: Even the most fierce supporters of the 'internal market' knew that the implementation of the concept would be costly for some branches of industry, and many thought that the process of re-structuring the national economies would be easier if there was a strong national social safety net (supported by the European Social Fund).<sup>23</sup> Even the most fierce supporters of the 'internal market' knew that there was a wide-spread fear that social standards might be threatened by economic rationality. Many thought that the legitimacy of the Union might suffer unless there was a firm commitment to certain social standards.<sup>24</sup> Others again thought that now was a perfect time for incorporating some important 'social' elements into Community law.<sup>25</sup> The 'social dimension' was supposed to signal that the Community was finally ready to accept responsibility for a fair distribution of chances and wealth, and thus act as a safeguard of 'social' ideas.

In the 1990s, the language of Community documents indeed changed. The Commission and the European Parliament referred to economic and social integration as separate, but equally important Community goals (Commission, 1994: 2; Commission, 1995; Commission, 1997a).<sup>26</sup> Despite high unemployment rates and the growing belief that a high level of social security expenditures might in fact hamper employment, the Commission endorsed the principle of solidarity, although with a concession (Commission, 1994: 4; Commission, 1997a 5): The Commission contended that, in the past, solidarity as promoted by the Member States had basically been devoted to replace the incomes of large inactive groups in society. Therefore, solidarity had been primarily passive solidarity. Now, the emphasis ought to be on active solidarity, meaning that emphasis ought to be on measures enabling people to re-integrate into the labour market (such as training or instruments avoiding financial disincentives to

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<sup>22</sup> *Supra* note 6.

<sup>23</sup> Commission, 1988: 10, 14, 17.

<sup>24</sup> Corbett, 1993: 198 (Conference of Parliaments of the European Community), 202 (European People's Party), 235 (proposal of the Commission on the social dimension and the development of human resources), 324 (Luxembourg European Council, June 1991, Presidency conclusions).

<sup>25</sup> Corbett, 1993: 159 (Danish Government Memorandum), 165 (Opinion of the Commission).

<sup>26</sup> *See also* the 1996 French Memorandum on a European social model; Resolution of the Council of 2 December 1996 on the role of social protection systems in the fight against unemployment, O.J. 1996 C 386/3; Resolution of the European Parliament of 6 November 1997 on the Commission communication on modernising and improving social protection in the European Union [COM(97) 102], O.J. 1997 C 358/51.

take up work).<sup>27</sup> In the mid-1990s, the Commission was also quite optimistic that higher employment rates would ease the pressure on social protection systems: Financing of the systems depended on jobs; thus, the creation of jobs was to be given highest priority (Commission, 1994: 4).<sup>28</sup> The active 'social' approach eventually inspired the European Employment Strategy introduced by the 1997 Treaty of Amsterdam and the 1998 Luxembourg process<sup>29</sup> defining common objectives and means with respect to (national) employment policies (Kohl and Vahlpahl, 2004).

## 2.2 From a 'social' concept to neo-liberal restructuring

Paradigm shifted again around the year 2000. In the late 1990s, economic indicators had improved slightly on EU average.<sup>30</sup> Unemployment dropped, employment rates increased, growth rates increased. Nonetheless, at EU level, expectations were not very high: The Lisbon European Council noted that the employment rate (then 61% on average) was still too low, especially among women and older workers, that the services sector was underdeveloped, and that European countries were facing a serious skills gap, especially with regard to information technology.<sup>31</sup> Determined to improve economic data further, the Union committed itself to a new strategic goal for the next decade, namely to become the most competitive and dynamic knowledge-based economy in the world (Lisbon process).<sup>32</sup> The employment rate was to be raised to 70% by 2010, the employment rate of women from an average of 51% to 60%, and the rate for older workers to 50% (Lisbon targets).<sup>33</sup> The Barcelona summit added another goal: Until 2010, the effective average retirement age was to increase by 5 years.<sup>34</sup>

Around that time, actors on EU level apparently became convinced that economic growth and a rise in employment rates would not suffice to make social protection systems financially sustainable. That conviction was strengthened by the fact, that economic growth slowed down between 2001 and 2004. Community documents be-

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<sup>27</sup> See also Resolution of the Council, *supra* note 26; Resolution of the European Parliament of 19 February 1997 on the Commission Communication [COM(95) 466], O.J. 1997 C 85/63.

<sup>28</sup> See also Resolution of the European Parliament of 14 March 1997 on the Commission's report on the demographic situation in the European Union [COM(96) 60], O.J. 1997 C 115/238; Commission 1999c: 10.

<sup>29</sup> Extraordinary Luxembourg European Council, November 1997, Presidency Conclusions.

<sup>30</sup> Vienna European Council, December 1998, Presidency Conclusions, para. 28; Nice European Council, December 2000, Presidency Conclusions, para. 17.

<sup>31</sup> Lisbon European Council, March 2000, Presidency Conclusions, para. 4.

<sup>32</sup> *Ibid.*, para. 5.

<sup>33</sup> *Ibid.*, para. 30; Stockholm European Council, March 2001, Presidency conclusions, para. 9.

<sup>34</sup> Barcelona European Council, March 2002, Presidency Conclusions, para. 32.

gan to use the metaphor of a triangle linking social policy to employment policy on the one hand and to economic policy on the other.<sup>35</sup> While some documents still asserted that these policy fields were mutually reinforcing,<sup>36</sup> the debate on the ‘modernisation of social protection’ — initiated by the Commission in 1999<sup>37</sup> — quickly revealed that the essential elements of social policy had changed. There was no mention of securing a fair share-out of wealth any longer. A high level of living standard was not listed amongst the key priorities. Instead, actors indicated that ‘modernising the European social model’ was a euphemism for re-evaluating a concept that had been developed under very different circumstances (Commission, 2000a). The new motto read: Growth is a prerequisite for social cohesion.<sup>38</sup> Since social cohesion requires growth, the main function of social policy is to support economic growth to the greatest possible extent.<sup>39</sup> To support growth, social policy is supposed to make work pay (strand of the active welfare state), to contain public expenditures, especially in the field of pensions and health care (strand of adapting social protection), and to prevent poverty (strand of combating social exclusion).<sup>40</sup> These are the three basic essentials of a “highly competitive market economy” (Commission, 2005a: 2), a concept that reflects once again the key elements of neo-liberal thinking: Traditional social policy is perceived as being at odds with economic policy, mainly because social protection systems are too burdensome and because they distort the efficient

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<sup>35</sup> Commission, 2000a: 6; Resolution of the European Parliament of 25 October 2000 on the Commission communication on the social policy agenda [COM(2000) 379], O.J. 2000 C 197/180; Commission, 2001b: 9; Commission, 2003c: 3; High Level Group, 2004a: 30.

<sup>36</sup> Commission, 2000a: 6; Stockholm European Council, March 2001, Presidency Conclusions, para. 2; Commission, 2001b: 9.

<sup>37</sup> Commission, 1999c.

<sup>38</sup> See, e.g., Commission, 2000a: 6: “Sustained economic growth with low inflation and sound public finances is crucial for increasing employment and social cohesion”. See also Brussels European Council, March 2005, Presidency Conclusions: “[The] European social model [is] based on the quest for full employment and greater social cohesion” (para. 29). “Raising employment rates and extending working life, coupled with reform of social protection systems, provide the best way of maintaining the present level of social protection” (para. 30).

<sup>39</sup> The Brussels European Council, March 2003, Presidency Conclusions, para. 43, urged Member States to focus, *inter alia*, on “reforms in tax and benefit systems and their interaction, so that they promote participation in the labour force and tackle poverty and unemployment traps, and increase labour demand and participation, in particular of those with low earning prospects”. According to High Level Group, 2004a: 7, the next social agenda is supposed to “improve the contribution of social policy to growth, competitiveness and social cohesion by developing lifelong learning, modernising work organisation and reforming social protection”.

<sup>40</sup> Brussels European Council, March 2003, Presidency Conclusions, paras. 41–52; Brussels European Council, March 2005, Presidency Conclusions, para. 31.

functioning of the labour market.<sup>41</sup> Since state provision is not viable, individuals are expected to gain confidence in their own ability to manage crises.<sup>42</sup>

### 3 Pension policies after Lisbon: Integrating pillars

#### 3.1 Changing issues of social policy

When the 'social dimension' of the internal market was high on the political agenda, Community documents recommended that workers ought to be provided with a retirement income reflecting their standard of living in a reasonable manner in accordance with their participation in social security schemes.<sup>43</sup> Ten years later, all important actors on EU level concentrated on demographic ageing and the problems caused by this phenomenon:

The Commission released data indicating dire predicaments to ensue: Due to increases in life-expectancy, low fertility rates, and the retirement of the baby boomer generation, the demographic dependency ratio<sup>44</sup> was expected to rise from 49% in 2005 to 66% in 2030,<sup>45</sup> the average ratio of persons in retirement compared with those of working age to double from 24% to almost 50% in 2050.<sup>46</sup> There was, therefore, a growing imbalance between the size of the working population and non-working population. The number of people aged between 65 and 79 was supposed to increase significantly after 2010 (by 37%), the number of the very elderly to increase even more (by 57%).<sup>47</sup>

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<sup>41</sup> See, e.g., Commission, 2000c: 2: "Population ageing will be on such a scale that, in the absence of appropriate reforms, it risks undermining the European social model as well as economic growth and stability in the European Union"; Commission, 2003f: 6: "The primary function of social protection institutions consists in providing security against risk and hazards of life. In fulfilling this function, tax and benefit programmes may have potentially distorting effects on the efficient functioning of the labour market."

<sup>42</sup> Commission, 2005b: 3: "Through modernising social policies, the measures proposed are designed to enable citizens to gain confidence in their own ability to effectively manage these changes [*i.e.*, increased competition in a global context, technological development, population ageing]".

<sup>43</sup> Council Recommendation of 27 July 1992 on the convergence of social protection objectives and policies, O.J. 1992 L 245/49, Rec. A.1.d.

<sup>44</sup> Ratio of the population aged 0 to 14 and over 65 to the population aged between 15 and 64 years.

<sup>45</sup> See recently Commission, 2005c: 4.

<sup>46</sup> High Level Group, 2004b: 13.

<sup>47</sup> Commission, 2005c: 9.

The impact of demographic ageing was deemed very serious: According to projections, Europe will face a decreasing labour force even if the Lisbon targets are met,<sup>48</sup> growth rates will fall by the pure impact of ageing populations,<sup>49</sup> and public expenditure will grow (on EU average by 3.2 percentage points).<sup>50</sup> The Commission wanted the problems connected to demographic ageing to be addressed in several contexts, including employment policy, social policies, health policies, policies against discrimination and exclusion, and so forth (Commission, 1999b: 5). Actors, nonetheless, focused quickly on pension policy as pension policy is most immediately affected by population ageing while also being linked to employment and growth: Policies encouraging or discouraging early retirement directly influence employment rates. The expected increase in public spending (which, in turn, is expected to undermine stability) is supposed to be mainly due to pension expenditures. Finally, the pensions sector impresses by its sheer magnitude. Expenditures on social protection account for 27-28% of Community GDP, a large share of which is spent on public pensions.<sup>51</sup> However, pension policy was not solely conceived of as a root cause for certain problems: Even if, in many Member States, retirement incomes are mainly provided for by public pension schemes,<sup>52</sup> the assets held by (occupational) pension funds and life assurance companies amount to more than 40% of the national GDP in some Member States.<sup>53</sup> That, again, is an enormous segment of the capital market, a market waiting to be fully liberalised.

From the beginning, reflections on the content of an EU pension policy aimed at finding a new relationship between the three pillars of retirement provision. Future pension policy was deemed likely to result in greater reliance on second and third pillar provision (Commission, 1997b: I), with a view to alleviating the burden on public budgets and on those in work.<sup>54</sup> In the context of pension policy, the term 'modernising' thus refers to a "sustainable mix of mutually supporting pension pillars based on legislation, collective agreement and private contract" (Commission, 1999b: 15). With respect to standards, especially income replacement rates, early EU documents re-

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<sup>48</sup> High Level Group, 2004a: 21. According to Commission, 2000c: 5 the number of working-age people per pensioner will halve by the year 2050 going from 3,5 to 1,8 at EU level.

<sup>49</sup> High Level Group, 2004b: 13.

<sup>50</sup> Joint report, 2003: 63–64.

<sup>51</sup> Commission, 1999c: 5; Commission, 2003c: 3. *See also* the bleak comment in: Employment Taskforce, 2003: 8: "The rapid ageing of the population is calling into question Europe's ability to remain competitive and achieve higher employment and economic growth in the future".

<sup>52</sup> Social Protection Committee, 2005: 9.

<sup>53</sup> For details *see* Social Protection Committee, 2005: 13. In 1999, the Commission estimated that assets in the field of supplementary pensions amounted to 23% of EU GDP (Commission, 1999a: 10).

<sup>54</sup> On the concept of "pillared" pension provision *see generally* Ring and McKinnon, 2002.

mained vague. After a while, however, it became apparent that second and third pillar income was meant to compensate for losses suffered from a reduction of first pillar income.<sup>55</sup> It was also clear from the beginning that striking a new balance between the pension pillars would enhance the need for a regulatory framework. The Commission emphasised that the re-arrangement of pension pillars implied a shift in responsibility for retirement income from the governments towards employers and employees and towards individuals; as the importance of supplementary pensions increased, so would the need for governments to provide a secure environment for the sound operation of the supplementary funded schemes (Commission, 1997b: 5).

Given the limitations of the Community's powers, Community institutions opted for two strategies: With regard to first pillar pensions and the overall framework of the pension system, the Community introduced a (soft) cyclical procedure of setting common objectives, national reports on the implementation, benchmarking and identifying best practices, mutual learning, and monitoring (open method of co-ordination).<sup>56</sup> With regard to second and third pillar pensions, the Community was able to draw on legislative powers, given the fact that pension provision in these areas touches upon the internal market, the mobility of workers, and questions of gender equality.

## 3.2 Open method of co-ordination: Ends and means of pension policy

### 3.2.1 Objectives

The open method of co-ordination was formally introduced in the field of pensions in March 2001.<sup>57</sup> The Commission launched a preparatory Communication in October 2000 and another one in July 2001 to start the first cycle of the process (Commission, 2000c, 2001b).<sup>58</sup>

When the first cycle began it was beyond doubt that 'sustainability' was at the heart of the pension policy launched under the open method of co-ordination.<sup>59</sup> Yet at first,

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<sup>55</sup> See, e.g., Commission, 2000d: 58–59.

<sup>56</sup> For details on the open method of co-ordination see Eichenhofer, 2002; Devetzi and Schmitt, 2002; Schulte, 2002; Heidel, 2003; Kohl and Vahlpahl, 2004; Devetzi, 2005.

<sup>57</sup> Stockholm European Council, March 2001, Presidency Conclusions, para. 32.

<sup>58</sup> The proposals were endorsed by the Social Protection Committee, the Economic Policy Committee, the Council and the European Council. See Social Protection Committee and Economic Policy Committee, 2001; Göteborg European Council, June 2001, Presidency Conclusions, para. 43; Laeken European Council, December 2001, para. 30.

<sup>59</sup> See the first reference to sustainability in: Santa Maria da Feira European Council, June 2000, Presidency Conclusions, para. 35: "as regards the future evolution of social protection, particular attention should be given to the sustainability of pension schemes".

there was some confusion about what exactly was meant by 'sustainability' of pension systems, especially how to balance social policy standards, *e.g.*, the presumed level of retirement income, against budgetary soundness: Should budgetary soundness have priority over decency of retirement incomes? Eventually, the actors agreed that pension policy promoted under the open method of co-ordination should be based on 11 objectives, grouped under three headings: Adequacy of pensions, financial sustainability of pension systems, and modernisation of pension systems in response to changing needs of the economy, society and individuals. Adequacy of pensions refers to ensuring that pensioners are not placed at risk of poverty and, through public or private arrangements, can enjoy a decent standard of living. It also refers to promoting solidarity within and between generations. Financial sustainability is to be achieved through a bundle of employment-related measures, such as high employment rates or disincentives to early retirement, and through public pension reform curbing benefits. Modernisation of pension systems refers to adapting the systems to modern working and family patterns, such as part-time jobs, changing jobs, career breaks, responsibilities with regard to care, and others.

Member States were requested to present national strategy reports by the end of 2002, elaborating on how they expected to meet the common objectives. A first joint report of the Commission and the Council evaluating the Member States' policies was delivered in the Spring of 2003 (Joint Report, 2003).

### 3.2.2 Outcomes

So far, the outcome of the first cycle of the open method of co-ordination is meagre.<sup>60</sup> It remains unclear where pension policy is heading to, and many Member States proved reluctant when it came to the implementation of policy objectives.

First: Eichenhofer (2002: 330) assumed that the open method of co-ordination would encourage actors to reflect upon the basic goals of pension provision: Is pension about preventing poverty, is it about maintaining a certain standard of living achieved during employment, or is it about solidarity and equity? The first cycle did not bring any answers. The joint report of the Commission and the Council concluded that all Member States provided a minimum income guarantee for older people, either through their public pension schemes or through social assistance (Joint Report, 2003: 31). The report also stated that maintaining a certain level of living standard was an objective shared by Member States (*ibid.*). The report noted however, that

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<sup>60</sup> The second cycle of the process was initiated in January 2005. See Social Protection Committee and Economic Policy Committee, 2005. Member States were requested to submit their National Strategy Reports by July 2005.

Member States employed very different methods to achieve this: In some Member States, high income replacement rates were ensured by public pension schemes, whereas in other Member States high income replacement rates completely depended on second and third pillar income (*ibid.*: 32). For the time being, national strategy reports would not allow systematic comparisons of current and future replacement levels in the Member States (*ibid.*: 36). Finally, the report observed a growing tendency for statutory schemes to become less generous (Joint Report, 2003: 35). Yet, the report did not even try to guess where the government's responsibility ought to end: Was responsibility supposed to end when — after a full career based on average earnings — first pillar income reached the poverty line or are governments expected to provide for more? The report remains silent on that point.

Second: The joint report of the Commission and the Council admits that the growing importance of second and third pillar schemes entails a growing need for a regulatory framework, in particular with respect to affordability of the schemes, efficiency, and security, *e.g.* in cases of insolvency (Joint Report, 2003: 79). The report addresses many important questions, such as: Should legislation ensure that second and third pillar schemes reach high coverage rates? What exactly is the role of solidarity and redistribution in the context of second and third pillar schemes? How are the risks (of low returns or inflation) to be shared between employers and employees, the ones that contribute, and the ones that eventually receive the payments? According to which standards are the managers supposed to invest the assets? How to minimise the risk of insolvency? How to ensure transparency? The conclusions of the report (*ibid.*: 86) signal, however, that, with a few exceptions, the Community is not yet prepared to set any common standards. The concepts of solidarity, redistribution, and risk management remain utterly elusive. The exceptions relate to the management of pension funds, the portability of rights, tax problems, and gender equality. These issues will be dealt with shortly.

Third: State performance with regard to the financial sustainability of pension systems was quite openly criticised by the Commission and the Council. The joint report (2003: 61, 75) concluded that employment rates, especially among older workers, were still low and that further pension reforms were urgently needed in most Member States. Criticism grew even stronger in the course of 2003 and 2004, when it became undeniable that most Member States would miss the Lisbon employment targets, unless all actors stepped up their efforts.<sup>61</sup> In November 2004, a working group

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<sup>61</sup> Commission, 2003: 11; Employment Taskforce, 2003; High Level Group, 2004a; High Level Group, 2004b.



chaired by Wim Kok drew a very dark picture of Europe's future: "If Europe cannot adapt, cannot modernise its systems and cannot increase growth and employment fast enough then it will be impossible to sustain these choices [*i.e.*: the European social model]". The Community acted promptly and determined. In the Spring of 2003, the European Employment Strategy was revised in order to synchronise economic and employment policy (introduction of a parallel three years cycle, re-arrangement of objectives).<sup>62</sup> The various open methods of co-ordination employed in the field of social protection (covering social inclusion, pensions, and health and long-term care) were streamlined and reorganised in the Fall of 2003.<sup>63</sup> In the Spring of 2005, the Lisbon process was re-launched with a clear emphasis on growth and employment.<sup>64</sup> The impact of all these changes remains to be seen.

### 3.3 Legislative acts: Completing the internal market

The Community acted very differently in the arena of its genuine legislative powers. The Commission, in particular, took an unambiguous stand. Actors on EU level were preoccupied by the fact that the assets held by institutions managing second and third pillar pension schemes constitute a large segment of the financial market, a market that was, with the exception of the market for life assurances, all but fully integrated. For a variety of reasons, the situation was deemed detrimental (Commission, 1991; Commission, 1997b; Commission, 1999a): Individuals were not really able to choose the scheme best suited to their needs, and institutions were not really able to choose the investments yielding the highest returns, since both were tied to domestic markets. Therefore, the Commission fought fiercely for the completion of the internal market, primarily in the field of occupational pension schemes. Social policy goals played a minor role in that setting. Advantages for future pensioners (*e.g.* an increase in their income caused by an increase in investment returns) were welcome, but they were welcome as a by-product of the completion of the internal market (Stevens, Gieselink and van Buggenhout, 2002: 32). The Commission made four sig-

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<sup>62</sup> See Commission, 2003a, endorsed by the Brussels European Council, March 2003, Presidency Conclusions, para. 41.

<sup>63</sup> See Commission, 2003c proposing to switch to a 3 years cycle synchronised with the cycles in the field of employment and economy, to merge the reporting and monitoring procedures in the area of social inclusion, pensions and health and care into a single procedure, operating under an integrated set of objectives, and to replace three joint reports of the Commission and the Council by a single report, covering all relevant issues. The proposal was endorsed by the Brussels European Council, October 2003, Presidency Conclusions, p. 8 and adopted by the Council on 20 October 2003, Bulletin EU 10-2003, 1.3.23.

<sup>64</sup> Commission, 2005a, endorsed by the Brussels European Council, March 2005, Presidency Conclusions, para. 8.

nificant moves: Three aimed at setting market forces free, one aimed at safeguarding gender equality in the context of services.

### 3.3.1 *Managing funds*

The Commission's move on the activities of institutions for occupational retirement provision (2000b) proved to be the most successful.

For more than 10 years, the Commission had been arguing that the growing importance of second and third pillar pension schemes would lead to an increase in funds held by the institutions managing the assets (Commission, 1991: I). Since a further growth in government bonds was deemed unlikely, investment in equities and corporate or private bonds would have to increase to absorb the capital available. That was seen as a huge chance for European industry, a chance that was, however, undermined by national provisions. Under national law, pension funds were often obliged to invest high percentages of their assets in domestic government bonds; they were also often obliged to hold certain percentages of their assets in certain currencies. Those rules — so the Commission complained — hampered cross-country investment as well as investment in equities. The Commission conceded that today's consumers and tomorrow's pensioners ought to be protected since all investment decisions entailed risks. The Commission was, nonetheless, convinced that national provisions on investment and supervision went beyond what was necessary for consumers' protection. National provisions effectively favoured investment strategies yielding lower returns than strategies allowing for long-term investment in equities and in risk capital markets.

In 2003, the Commission finally succeeded. The Council adopted the Directive on pension funds,<sup>65</sup> setting minimum standards for the managing of pension funds. Under the Directive, Member States are obliged to ensure that institutions for occupational retirement provision operate under minimum prudential standards, including the duty to register in a national register, the duty to ensure management by persons of good repute, the duty to obtain certification of all technical provisions by specialists, the obligation to provide specified information to scheme members, and the duty to accept supervision by an independent authority. The Directive also requires Member States to adopt qualitative rather than quantitative investment rules: In principle, pension funds are supposed to invest in accordance with the 'prudent person' rule, implying that all assets are to be invested in the best interests of members and beneficiaries and in such a manner as to ensure the security, quality, liquidity

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<sup>65</sup> Directive 2003/41/EC of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision, O.J. 2003 L 235/10.

and profitability of the portfolio as a whole, that assets shall be predominantly invested on regulated markets, that assets shall be properly diversified, and that the investment in the sponsoring enterprise shall not be more than 5% of the portfolio.<sup>66</sup> Member States are explicitly not allowed to require pension funds to invest in particular assets,<sup>67</sup> and they are not allowed to prevent pension funds from investment in risk capital markets.<sup>68</sup> Cross-border activities are to be accepted by the home Member State and the host Member State, though these activities are subject to an authorisation by the home Member State and the supervision by the host Member State.<sup>69</sup> The Directive was to be implemented by 23 September 2005.

### 3.3.2 *Mobility*

Another initiative of the Commission dealt with barriers to the mobility of workers (Commission, 1997b: 14; 1999a: 26). That initiative was less successful.

Certain characteristics of second pillar pension schemes tend to discourage employees to leave their employers and to take up employment with another employer (Commission, 1997b: 14; Commission, 1999a: 5): Age requirements or waiting periods for membership and vesting periods for the acquisition of pension rights penalise employees who leave the system early. If employees leave employment prior to the specified time, they might be prevented from membership or from acquiring rights, as the case may be. These early leavers leave without gaining anything out of the pension scheme. Leaving employees who have in fact acquired rights under an occupational pension scheme, may lose these rights simply because they move to another Member State. If early leavers keep their rights or are able to opt for a cash transfer, their rights are to be evaluated (*e.g.* in order to calculate the amount of the cash transfer). And it might be that the early leavers are disadvantaged by the formula applied because future pay rises are not taken into account (though that would have been the case if they had stayed with their former employer) or because their entitlements are not indexed. Finally, it might happen that the pension scheme (of the former employer) does not provide for cross-border payment of benefits. Thus, the rights of all (former) employees who chose to move to another Member State after retirement are in effect suspended.

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<sup>66</sup> Article 18(1) of the Directive.

<sup>67</sup> *Ibid.*, Article 18(3).

<sup>68</sup> *Ibid.*, Article 18(5)(c). Within certain limits, Member States may, however, still lay down quantitative rules, provided these rules are “prudentially justified”. For details *see* Article 18(5) of the Directive.

<sup>69</sup> *Ibid.*, Article 20.

Although the Commission pushed hard for a removal of all those barriers to the free movement of workers, many of them still exist. A 1998 Directive<sup>70</sup> obliges Member States to ensure the preservation of acquired rights under a second pillar scheme for employees who moved to another Member State if and insofar as preservation also takes place for scheme members who leave their employer and remain in the Member State. That is not much. In addition to that, the Directive obliges Member States to ensure cross-border payments of benefits and to ensure that contributions for posted workers are accepted during the period of the posting in another Member State. The Directive does not deal with vesting periods, the evaluation of dormant rights, or the calculation of capital transfers. However, it seems as if the Commission has now been able to mediate a consensus amongst all relevant actors with a view to reducing vesting periods to only one year and with a view to adequate common actuarial principles for the evaluation of dormant rights and capital transfers (Commission, 2002; Commission, 2003d). Future action, though, might be confined to defined contribution schemes.

### 3.3.3 *Taxation*

Initiatives on tax obstacles relating to second and third pillar pensions were the least successful. There has been no legislative action at all.

Tax issues arise when workers residing and employed in one Member State join or stay in a pension scheme established in another Member State: Are contributions to the scheme tax deductible if contributions to schemes established in the country of residence are (scenario one)? Some Member States say no. Tax issues also arise when an employee and member of a pension schemes decides to move to another Member State after retirement: Is the income that he or she receives under the scheme liable to taxation even if contributions have already been taxed (scenario two)? Some Member States say yes. It seems obvious that scenario one hampers cross-border mobility as well as cross-border provision of services: Why would anyone join or stay in a pension scheme established in another Member State if contributions to the scheme are not tax deductible whereas contributions to domestic schemes are? Scenario two is more complex: If a pensioner leaves a Member State where contributions and returns are exempt from tax but benefits are taxed, and moves to a Member State taxing contributions but exempting benefits, neither contributions nor benefits are being taxed. If migration takes place the other way round, contributions as well as benefits will be liable to taxation.

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<sup>70</sup> Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community, O.J. 1998 L 209/46.

The Commission's move against tax obstacles (1999a, 2001a) was strongly backed by the Court of Justice. For several times, the Court held that the (discriminatory) refusal of deductibility of contributions paid to pension providers established in another Member State constituted a restriction of the freedom to provide services (Article 49 of the Treaty) that could not be justified by the coherence of national tax law.<sup>71</sup> The Commission (2001a: 13, 19) suggested to adopt a set of Community rules further elaborating on the principles affirmed by the Court. The Commission also proposed that all Member States should, on a voluntary basis, opt for a tax system ensuring deductibility of contributions and returns while taxing the payment of benefits. Though the Council reached favourable conclusions in the Fall of 2001,<sup>72</sup> no further action was taken. The Commission was, therefore, left with one option only, namely to monitor national tax rules and to bring the matter before the Court of Justice when national tax law is not in line with the Treaty obligations.<sup>73</sup>

#### 3.3.4 Gender equality

One of the Commission's initiatives pertaining to private pensions was not exclusively driven by the idea of completing the internal market.

The proposal for a Directive implementing gender equality in the access to and the supply of goods and services (Commission, 2003e) included a draft Article unconditionally prohibiting the use of sex as a factor in the calculation of premiums and benefits for the purpose of insurance and related financial services in all new contracts concluded after a specified date (draft Article 4). In its explanatory memorandum, the Commission specifically referred to the recent "trend in Member States to replace or supplement state provision in the field of pensions by private insurance".<sup>74</sup> That trend was considered worrisome since it was, so the Commission claimed, accompanied by a shift from sex-neutral state pension provision to a pension provision furthering gender inequality, by either openly differentiating according to sex or being less mindful of the special needs of women. The Commission wanted to counter-act this trend. But when the Commission's proposal was made public, it was met with considerable resistance by the insurance industry in Germany as well as in other

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<sup>71</sup> See Court of Justice, judgement of 28 April 1998, C-118/96 *Safir*, 1998 ECR I 1897; Court of Justice, judgement of 3 October 2002, C-136/00 *Danner*, 2002 ECR I 8147; Court of Justice, judgement of 26 June 2003, C-422/01 *Försäkringsaktiebolaget Skandia*, 2003 ECR I 6817; *but see also* Court of Justice, judgement of 28 January 1992, C-204/90 *Bachmann*, 1992 ECR I 249. For an overview on the Court's case law see Pieters, 2001 and Richter, 2003.

<sup>72</sup> Bulletin EU 10-2001, 1.3.36.

<sup>73</sup> See, e.g., the actions against Denmark and Belgium, O.J. 2004 C 190/3 and O.J. 2005 C 57/17.

<sup>74</sup> Commission, 2003e: 8.

Member States.<sup>75</sup> Eventually, the Council adopted an escape clause securing enormous leeway for reluctant Member States.<sup>76</sup> Under Article 5(2) of the 2004 Directive<sup>77</sup> Member States may permit “proportionate differences in individuals’ premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data”.

In the end, therefore, insurance companies had their way. Insurance industry had always been arguing that gender-related differences in premiums or benefits were factually justified as the risks pertaining to men (as a group) and women (as a group) differed widely; in the field of pensions, differences in premiums or benefits would simply mirror real differences in life expectancy. The Commission (2003e: 8) did not try to dispute statistical data. The Commission simply held that factual differences, e.g. in life expectancy, were “clearly morally unacceptable as a reason” for differences in treatment (*ibid.*). However, arguments based on moral standards had little weight when governments faced pressure from the insurance industry.

#### 4 Conclusions

What is the overall picture of EU pension policy? What shape does EU pension policy take? Four conclusions can be drawn from what has been said before.

First: In the years to come, Member States will be under increased pressure exerted by the EU to modernise their pension systems. The metaphor of the ‘triangle’ (connecting social policy, employment policy, and economic policy) helped creating a framework for subordinating social policy to economic and employment policy. Under that framework, pension expenditures are perceived as a major threat to growth and stability. If the re-launch of the Lisbon process indeed bears consequences, most Member States will be openly shamed for their reluctance to strive for pension cuts.

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<sup>75</sup> See, e.g., ‘Europa soll Vorreiter für Unisex-Tarife werden; Unternehmen tragen die Beweislast; Versicherungsbranche lehnt neuen Gesetzesvorschlag ab’ [Europe supposed to take the lead with respect to gender-neutral premiums; companies will bear the burden of proof; insurance industry opposes draft Directive], *Frankfurter Allgemeine Zeitung*, 6 November 2003, p. 16; J. Jahn, ‘Im Gleichheitswahn’ [Under the delusion of equality], *Frankfurter Allgemeine Zeitung*, 10 November 2003, p. 11; ‘Wenig Unterstützung für Unisex-Tarife’ [Little support for gender-neutral premiums], *Frankfurter Allgemeine Zeitung*, 29 May 2004.

<sup>76</sup> ‘Unisex-Tarife sind in der EU vom Tisch; Kompromißvorschlag; Einigung im EU-Ministerrat auf die neue Richtlinie dennoch unwahrscheinlich’ [Gender-neutral premiums stopped at EU level; compromise reached; Council agreement nonetheless improbable], *Frankfurter Allgemeine Zeitung*, 4 October 2004, p. 11.

<sup>77</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, O.J. 2004 L 373/37.

Second: There is no doubt that, in most Member States, public schemes will remain the most important source of retirement income. Nonetheless, the EU will continue to push for a further shift in the balance of the three pension pillars, favouring second and third pillar schemes. If first pillar income is in fact lowered, there is no other way to sustain what is called the 'adequacy of pensions'.

Third: EU institutions admit the need for a regulatory framework with respect to second and third pillar schemes. For the time being, regulation adopted at EU level is dominated by the idea of unleashing market forces. In other words: Regulation is about removing barriers with regard to the free flow of capital, the free provision of services, and the free movement of persons. Regulation primarily aims at creating, not correcting markets (*see Grande, in this volume*). What was used to be called social rights (understood as rights — addressed to the state — to be granted legally defined benefits) is partially replaced by legal provisions obliging private providers of services to pay attention to consumers' interests. But: Consumers' interests are taken into account by Community law only if safeguarding those interests does not infringe upon market freedoms too heavily. More than ever, adequacy of pensions will depend on the outcomes of the capital market. If and how the markets will respond to demographic ageing is still difficult to predict. If second and third pillar schemes yield low returns in the long run, consequences will have to be shouldered by individuals, not by the state.

Fourth: Pension systems heavily relying on second and third pillar schemes pay less attention to the principles of solidarity and equity. Second and third pillar schemes are scarcely characterised by redistributive elements, especially if the trend towards defined contribution schemes persists. Those schemes tend to disadvantage women since there are basically no mechanisms compensating for career breaks caused by the fact that they take care of children or other disabled relatives. And: Second and third pillar schemes will less effectively prevent the risk of poverty in old age. Empirical data show that the take-up of occupational and personal pensions by low income families is extremely low. Less well off citizens simply cannot afford more savings. There is, thus, a high probability that inequalities among pensioners will increase distinctly in the long run. It is to be seen if and how 'Social Europe' will respond to this tendency.

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