

Opportunities, threats and unintended consequences: The impact on national welfare states of three EU policy processes

Deborah Mabbett, Birkbeck, University of London and Waltraud Schelkle, European Institute, LSE

Introduction

It is a commonplace of economic sociology that markets are social constructions, yet many accounts of EU social policy persist in casting ‘social Europe’ as a counterweight to economic integration, waiting to be built on the foundation of deeper political integration. This paper starts from the premise that we already have a European social policy: it has not waited for a new political future. This premise is shared by critics who see Europe building a neoliberal social policy: a minimal framework for integrated markets. It is also shared by those who, following Majone (1993), notice the high level of ‘social regulation’ in the EU. However, we differ from both these groups in seeing EU social policy as something more than neoliberalism, and also as impinging on national ‘budgetary social policy’ rather than developing an autonomous regulatory sphere. In this paper, we aim to show that the EU has developed a distinctive normative basis for advancing its contribution to social policy, based not only on the attainment of allocative efficiency and growth but also on the norm of nondiscrimination. The implications of the nondiscrimination norm for social policy are not well-understood, partly because the effects of nondiscrimination norms on established welfare states are hard to predict. To some extent, nondiscrimination is a resource for national actors seeking to reform welfare states, but EU policy processes also impinge on national welfare states in unexpected and potentially detrimental ways.

Our starting point is Majone’s (1993) account of how the EU has developed ‘social regulation’ in the course of promoting market integration. In our view, Majone is right to suggest that the EU has contributed to the development of modernised regulatory policies that promote allocative efficiency and growth, and to argue that it can claim a certain technocratic legitimacy for this. However, Majone underestimated the limitations of the EU’s legitimacy in this field, partly because he overstated the distinction between social regulation and budgetary social policy. As market integration has deepened, so it has become more ‘social’. This is evident in the policy issues arising from integration of labour markets (for example: posted workers), in the way that the boundaries of market integration increasingly encroach on traditional areas of welfare state provision (for example in health services), and in the effects of market openness and competition in markets with high levels of national-level government regulation or self-regulation for social purposes. Furthermore, as member states have reformed their welfare states and substituted privatised (but regulated) provision for budget-financed public provision, so the distinction between regulatory and budgetary policy has become less and less tenable. These issues are apparent in several policy areas, but in this paper we focus on insurance, where market integration and EU-level re-regulation have run into the sands of the blurred distinction between social regulation and social policy.

We trace the insurance case through three policy processes. The creation of a single market in insurance proceeded through the traditional ‘Community Method’ of intergovernmental agreement in Council on directives which are then implemented by

national governments. Issues about the scope of these directives were also addressed through supranational regulation in the form of decisions of the European Court of Justice (ECJ). Some of the central issues about the regulation of private insurance and the reform of social insurance are also addressed in the various deliberative fora that the EU now provides for nongovernmental as well as government policy actors to participate in exchanges about policy approaches, share information and resolve common problems. These fora include the European Employment Strategy (EES) and other OMCs.

Our purpose in drawing attention to the interrelated impact of these three processes on this policy area is to challenge any assumption that social policy is addressed in the soft law processes of the OMCs while economic integration remains the domain of the hard processes of directives and legal cases. It is true that the OMCs work primarily as 'reform levers' providing ideational resources (and sometimes more) for member state governments seeking to reform their welfare states. However, these levers are also pulled by directives and Court decisions, so we see all three processes as affecting social policy through national-level policy shifts and responses to EU-level re-regulation.

Furthermore, all three processes exhibit common elements on the ideational level. As Scharpf (2006) argues, the capacity of the intergovernmental Community Method to produce agreement on new policies is enhanced by generating positive-sum games, and this has contributed to an emphasis on the part of the Commission (in its capacity as agenda-setter) on promoting allocative efficiency and growth through market integration. We find the same theme in the OMCs with their repeated emphasis on 'social policy as a productive factor'. The judicial process, for its part, has exhibited a strong orientation towards the promotion of competition, which is based not only on an idea that competition serves allocative efficiency and growth, but also on the principle of nondiscrimination, entailing the opening of market access to excluded groups. This principle, for its part, has been developed in directives as well as appearing as a recurring theme in the OMCs. Thus we find not only operational linkages between the economic and the social, but also ideational ones, in the form of these two key themes which guide social as well as economic policy.

The first part of this paper focuses on the first theme, of competition, allocative efficiency and growth. It briefly reviews the measures adopted pursuant to creating a single market in insurance, and seeks to explain why the provision of insurance to households continues to be organised primarily at the national level. National insurance markets have developed in the shadow of social insurance, and continue to be heavily shaped by national social regulation.

The second part of the paper presents an account of how the parallel agenda of non-discrimination is contributing to the development of EU social policy through the three processes. The EU's activism in nondiscrimination policy has not gone unnoticed, but nondiscrimination is widely seen as an essentially legal norm which is promoted through judicial intervention. Furthermore, some commentators are critical of the individualistic and legalistic nature of the nondiscrimination agenda, seeing it as a symptom of the Americanisation of EU social policy (Leibfried 2005: 256; Rosanvallon 2000: 35-37).

In our view, these commentators are right to point out the legal-constitutional logic of the nondiscrimination norm. Nondiscrimination expresses an approach to relationships between citizens which emphasises individual autonomy and rights rather than solidarity and collectivity. It can be seen as a countermajoritarian norm which speaks more to the fragmentation of communities than to providing a rationale for redistribution. However, we show that nondiscrimination can serve as a principle in policy-making as well as a ground for the individual assertion of rights. In the EU, nondiscrimination has not only been pursued through the supranational judicial decision mode but has also been implemented through directives and promoted through the various deliberative coordination regimes. In these guises, it has a variety of implications and effects. It has served as a lever for various modernising reforms to national welfare states and as the basis for some re-regulatory initiatives at the EU level. As in the first part of the paper, we illustrate these points with reference to insurance and social security.

The final part of the paper turns to the questions of legitimacy which must be addressed in any analysis of the building of EU social policy. We argue that nondiscrimination has a distinctive basis for legitimation which has allowed it to thrive at the EU level. Furthermore, we can see how it is a useful norm for reform-minded governments. However, the intersection of nondiscrimination with national social policy also presents some problems, which we briefly outline.

1. National welfare states in the face of market integration: the single market in insurance

Majone's (1993) account of social regulation was based on the economic theory of market failure. He drew a distinction between 'allocative' rationales for government intervention arising from externalities and other problems of market incompleteness, and intervention to redistribute income. He argued at that time that the EU's regulatory activity centred on the 'allocative' function of promoting efficiency by combating market failure and by providing the public good of uniform or compatible standards. In so doing, Community institutions were building a social Europe unnoticed by observers who were fixated on budgetary social policy. Furthermore, this was a 'modern regulatory approach' which applied 'advanced principles' to create a legitimate sphere for European social policy (1993: 167). Decisions about redistribution involving 'delicate value judgments about the appropriate balance of efficiency and equity' (ibid) could only be made legitimately within homogenous communities; by contrast market failure-correcting regulation did not involve such balancing and could be done effectively by technical experts at the European level.

A difficulty with Majone's argument is that it assumed that a modern regulatory approach to market failure correction could be uncontentionally implemented, either because the regulatory area itself was new ('unclaimed territory' in national policy¹) or because 'advanced principles' of regulation were widely recognised as superior. However, in some policy areas member states had their own systems of regulation

¹ The term is Streeck's (1995: 400). He argued that the 'exceptional effectiveness of Community policy on sexual equality' arose in part because 'equality between men and women has not traditionally been central to national states' social policy concerns; the Community could relatively easily enter this unclaimed territory..'

which, furthermore, were enmeshed with redistributive objectives and budgetary social policy. There is a well-established theory of market failure in insurance which focuses on adverse selection and moral hazard, but, rather than identifying ‘modern’ regulatory solutions, it implies that traditional social insurance can be understood as an institutional arrangement for surmounting the problems that beset private provision (Barr 1992).

These analytical difficulties did not detain European policy-makers in the first phase of market integration in insurance. Instead, the approach taken was to define a ‘market’ sphere which was separate from ‘insurance forming part of a statutory system of social security’², and to exempt the latter from the scope of the single market. This meant that the process of regulatory harmonisation could focus on the types of market failure that are typical of financial services generally, notably consumer protection against unfair contract terms and the financial security of insurance providers. Everson (2002a: 102) argues that the Court’s approach in this phase of the creation of the single market relied on the possibility of substituting ‘technical schemes of rationalising regulation’ which would be consistent with a single European market, for old systems based on market corporatism, seen as ‘an expendable historical legacy’.

The opening-up of wholesale reinsurance and coinsurance markets proceeded apace through the 1980s. In the mid-1980s the Commission endeavoured to galvanise some action in the area of insurance provision to households with a series of compliance actions in the ECJ. It was largely successful in promoting the claim that national regulations could be replaced by supranational measures on prudential control, for example by adopting harmonised rules on reserve requirements. The Court ruled that states could (only) maintain regulatory barriers to the extent necessary to protect policyholders and insured persons.³ One implication of this formulation is that regulation should not extend to protecting people who found themselves excluded from insurance coverage. In particular, the ECJ ruled that Germany’s regulations on ‘open enrolment’, whereby insurers were obliged to take on ‘all comers’ regardless of their risk characteristics, could not be sustained. Open enrolment was deemed to be part of an anticompetitive system in which risk classification and tariff structures were regulated.

These challenges to national social regulation sometimes arose from compliance cases brought by the Commission, which saw them as a barrier to market integration. However, cases were also brought by domestic actors who saw the opportunity to challenge insurance monopolies by creating cases that could be referred to the ECJ. The leading cases of *Poucet and Pistre* and *FFSA* reflected campaigns in France to reduce the burden of social insurance on small businesses⁴ and to open up financial service

² Article 1 of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance (Third Non-life Insurance Directive)

³ C-220/83, *Commission v. France*, [1986] ECR 3663 and C-205/84 *Commission v. Germany*, [1986] ECR I-3755, esp. p. 3807.

⁴ The background to the cases was a non-payment campaign being waged by a French small business association (the Confédération de Défense des Commerçants et Artisans) seeking to challenge compulsory participation in the French old age pension scheme for artisans (*Poucet*) and sickness and maternity insurance for the self-employed (*Pistre*). The plaintiffs argued that the providers enjoyed a dominant position in the insurance market which they abused by levying premiums at a higher rate than the plaintiffs would face if they were free to buy their insurance elsewhere.

provision to competitors. In some examples, actors within national regulatory systems used evolving single market law in a ‘two-level game’ of reform. A case involving the Italian accident insurance provider, INAIL⁵, arose in the context of an opinion given by the Italian Antitrust Authority which was critical of INAIL’s monopoly (Giubboni 2001), while Everson (1996) notes that German advocates of market-oriented deregulation moved their focus to the Competition Directorate of the Commission having had little domestic success in reforming the Federal Supervisory Authority for Insurance.

While the French small business challenge to social insurance was largely dismissed by the Court, the legal principles that it developed in hearing these cases were not very robust in establishing a clear boundary between private and social insurance (Mabbett 2000). This became clear in a set of Dutch cases which brought home the difficulties of defining ‘insurance forming part of a statutory system of social security’. The schemes in question were founded on collective agreements between unions and a subset of employers in an industry, extended by Ministerial order to cover all firms in the sector. Thus they were not exactly statutory and, in providing only for workers in a particular industry, not manifestly ‘social’ either. In many ways, they emulated occupational insurance schemes that, in other countries, would be designated as ‘private’.

There are a number of interesting aspects of the Court’s decision in *Albany* that have attracted extensive commentary (see e.g. Mabbett 1999; Vousden 2000; Everson 2002b; Barnard 2006: 764-769). For present purposes, a key feature was that the schemes were deemed to have a special character due to the role of collective bargaining in their formation. The Court found that agreements between unions and employers which regulated employment terms and conditions could not be struck down on the grounds that they were anticompetitive. It also deferred to the public interest justification for regulation put forward by the Dutch government. The decision can be seen as an acknowledgement of the limitations of the technical and legal processes which had driven forward market liberalisation and the promotion of competition.

The challenge posed by *Albany* was how any process of market integration could be sustained, given that social partnership is primarily organised at the national level, while acknowledgement of public interest arguments for anticompetitive regulation would also tend to point to maintaining national systems of regulation. In giving special recognition to collective bargaining, the Court observed that Community acts and measures themselves sought to promote ‘social dialogue’ and also provided a procedure whereby agreements reached by the social partners could be given legislative force by the Council. Thus it is arguable that the Court’s decision reflected its continuing commitment to integration, but in a new guise which took cognisance of the existence of enhanced institutions for social policy-making at the EU level.

Following Scharpf (1999: ch.2) *inter alia*, the prospects for EU-level social dialogue to arrive at a uniform system for regulating the competitive openness of pension schemes would seem to be bleak. Each member state has a different configuration:

⁵ *Cisal di Battistello Venanzio v INAIL*, Case 218/00.

some have more solidarity than others, and some have insurance providers who see opportunities in a single market while others see only threats. However, it is not the case that EU-level activity has been entirely blocked on these issues. Rather, it has taken a more 'open' form. Processes of social regulation at the EU level now work in part by allowing wide discretion in implementation at the member state level. Directives can be formulated in such a way that amendments to legislation are optional for national governments, a process that Streeck (1996) has termed 'neo-voluntarism'.

Closely related to neo-voluntarism are the processes of the 'Open Method of Coordination' (OMC). These aim to promote common directions of reform in the diverse social policies of the member states by facilitating policy learning and transfer; the assumption is that exchanges between the member states can produce 'better' policies. In principle, therefore, an OMC is 'open' as to the policy directions it promotes. In practice, however, the social policy OMCs, notably the European Employment Strategy (EES), have had quite a clear direction, summed up in the phrase 'social policy as a productive factor'.

The method of the EES and other OMCs is to agree on fairly uncontentious economic and social goals, and then develop policy ideas which emphasise the complementarities between the goals and de-emphasise potential conflicts. There is a normative consensus that many features of existing welfare states are detrimental to economic efficiency. Problematic features include, for example, an overreliance on financing from wage-related contributions rather than taxes levied on broader bases, earnings-related benefits that carry high implicit rates of return for some contributors while leaving others unprotected, eligibility conditions that facilitate premature withdrawal from the labour force, and so on. As Levy (1999: 240) points out, these features enable reform programmes to adopt a 'vice-into-virtue approach [which] targets inequities within the welfare system'. Reforms to address inequitable and inefficient 'vices' can release resources for virtuous expenditure on the poor and needy, 'softening [...] the supposedly ineluctable tradeoff between efficiency and equity'.

One implication of the reform agenda is that traditional social insurance should be cut back, and fiscal resources targeted to achieve a greater redistributive impact. Such cuts would also imply that higher-income groups would seek expanded coverage from private insurance, particularly funded pension schemes. The Commission is a strong advocate of reforming pension systems to increase the share of private funded provision which, in turn, should be promoted in the context of an integrated European capital market. More generally, redrawing the boundaries of social and private insurance would seem to offer opportunities to promote the development of Europe-wide private insurance markets, whereas the current arrangements have proved irredeemably national.

However, it has also become clear that reform does not mean convergence or, to be more specific, that all member states will adopt the same approach to social regulation in newly-privatised areas of insurance. Divergent developments have been well-documented in the evolution of regulatory systems for health insurance, where a wide-ranging exemption from single market reforms has been established. While some states have national health systems and others maintain fully socialised systems of insurance, several states have major private components in their systems which are highly regulated

to achieve desired levels of coverage. Article 54 of the Third Non-Life Insurance Directive provided that contracts covering health risks which served ‘as a partial or complete alternative to health cover provided by the statutory social security system’ could be subject to regulation by the host member state to protect the ‘general good’. Examples of regulations permitted by this measure have included requirements to maintain open enrolment with community rating (ie no differentiation of the community according to risk characteristics), to provide standardised benefits and to cross-subsidise between groups with different policies (Thomson and Mossialos 2007). Member states have undertaken numerous reforms to their substitutive health insurance systems but this seems to have produced a proliferation of regulatory devices rather than convergence. With the expansion of private substitutive insurance in other areas, the potential scope of Article 54 has widened and parallel issues have arisen in other areas of insurance such as pensions, as we now show.

2. Deepening social regulation in the EU: the nondiscrimination agenda

The Treaty of Rome and its successors commit the member states of the EU to integrating their economies by opening their markets to competition and removing rules, standards and practices that discriminate against suppliers from other states. Article 6 of the original Treaty prohibited any discrimination on grounds of nationality within the scope of application of the Treaty, and this is the founding principle for ensuring market access for goods and services providers domiciled in other states and promoting labour mobility.

The Treaty also provided that men and women should receive equal pay for equal work (Article 119), a measure introduced at the insistence of France, which argued that female-dominated industries in countries which maintained discrimination would have an unfair competitive advantage (Barnard 2006: 298). While this article is nowadays seen as founding a robust strand of European equality policy, it is notable that its original rationale was analogous to that of Article 6: of ensuring that fair competition could take place in open markets. As Barnard notes, economic justifications for gender equality have continued to play a large role in the formulations put forward by the Commission, as discrimination is presented as a market distortion that interferes with the efficient utilisation of the Union’s productive resources. On this logic, nondiscrimination could be subsumed within the general framework of policies to promote allocative efficiency.

To explain the current scope of nondiscrimination law in the EU, it is necessary to understand how the two strands represented by the original Articles 6 and 119 have come to be linked. They still survive in renumbered form in their original locations, the former in the first part of the Treaty setting out the ‘founding principles’, which now include ‘citizenship of the Union’ and the latter in the Social Policy chapter. For many purposes, the Social Policy chapter defines the parameters of EU social policy as centred on the regulation of employment conditions, including provisions for regulation by the social partners. However, provisions under the citizenship title have enabled the EU to bring forward measures against discrimination which are not confined to the sphere of employment and occupation. This title now includes Article 13, relating to discrimination on a wide range of grounds.

The supranational decision processes of the ECJ have played a vital role in developing the application of the principle of nondiscrimination in the EU. A number of cases in the 1970s and early 1980s established that the scope of EU equality law extended to occupational pensions and, under some circumstances, to social security. For example in *Drake* (C-150/85), the UK Child Poverty Action Group backed a case which successfully challenged a provision under which allowances for caring for a disabled relative were not payable to married women. Member states have attempted to regulate the impact of equality law on their social security schemes, notably in Directive 79/7 which aimed at the *progressive* (i.e. not immediate) implementation of the principle of equal treatment. This Directive protected unequal state retirement ages from being immediately struck down (Barnard 2006: 500), but nonetheless established an expectation that states would gradually reform their systems to bring about gender equality.

Member states endeavoured to regulate the impact of sex equality law on occupational pensions (ie pensions which are part of remuneration, rather than falling within the sphere of 'a statutory system of social security') in Directive 86/378. On one hand, the Directive listed a number of provisions as discriminatory, including maintaining unequal retirement ages and setting different conditions for the granting of benefits. On the other hand, it listed a number of derogations by which discrimination would continue to be allowed, including allowing equality in retirement ages in occupational pensions to be deferred in line with its progressive implementation in state social security schemes. However, in the *Barber* case (C-262/88), the Court disrupted member states' attempts to maintain their unequal retirement ages by ruling that occupational pensions were part of remuneration and therefore subject to the Treaty provisions on equality, in effect invalidating part of the Directive. While this decision was subject to an intense lobbying campaign to limit its retroactive application, 'the impact of the Court's rulings was still dramatic' (Leibfried 2005: 248).

Recent years have been marked less by major Court decisions on equality and more by intergovernmental processes which have widened the grounds for anti-discriminatory action. Article 13 provides that '...the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.' The Article is, therefore, framed as a grant of competence rather than as a directly justiciable measure. Given that unanimity is required, the competence formulation was seen by some commentators as ensuring that Article 13 would be merely declaratory and symbolic (see e.g. Quinn, 1999: 315).

However, the Commission put forward two draft directives under Article 13 in 1999, and in 2000 both were approved by Council. The framework Equal Treatment Directive (FETD) established a general framework for equal treatment in employment and occupation and outlawed discrimination based on religion, belief, disability, age and sexual orientation (Council Directive 2000/78/EC). The Race Directive (Council Directive 2000/43/EC) prohibited discrimination on the grounds of race or ethnic origin in the areas of employment, social protection, education and goods and services, including housing. Thus the Race Directive utilised the wide scope of Article 13 by applying to citizens in a wide range of economic and social activities, and not just to

workers in employment, while the FETD complied with the established narrower focus of social policy on employment-related matters.

In 2003, the Commission presented a proposal for a sex equality directive applying to access to goods and services, utilising Article 13 to widen existing provisions which were confined to the sphere of employment and occupation. In the draft directive, the Commission addressed sex discrimination in insurance, and proposed outlawing all risk classification based on sex. The question of whether insurance should be included or exempted from sex discrimination law had come up before. Directive 86/378 on occupational pensions contained a derogation allowing the use of different actuarial factors to calculate pensions for men and women. As women live longer on average than men, a given pension fund will purchase a smaller annuity for a woman if discrimination is allowed, reflecting the higher risk that a woman will live a long life. In other types of insurance, the actuarial calculation may go the other way: there is a lower risk that a young woman will have a car accident than a young man, for example.

In the preamble to the proposal for a Directive in 2003, the Commission noted that member states have been increasing the role of private insurance in the course of reforming their pension systems and, following the 'substitutive' logic that was already applied to health insurance, regulation of risk classification in private schemes could therefore be necessary. However, whereas under Article 54 of the third insurance directive 'substitutive' regulation was a matter for each state to determine under the 'general good' exemption, here we find the Commission trying to initiate social regulation at the EU level. Indeed it is arguable that the Commission's move was a defensive one, in the light of decisions in some member states to require gender neutrality in substitutive private pensions. For example, the German Old-Age Income Act 2004 (*Alterseinkünftegesetz*) establishes that state-subsidised private pensions ('Riester Rente') are gender neutral, unisex life tables have also been part of pension reforms in Sweden and Finland, and France uses neutral actuarial factors in the market for annuities (Gilbert 2006).

In the final version of the Goods and Services Directive (2004/113/EC), the formulation in Article 5 is that new contracts should not produce sex-related differences in premiums and benefits, but member states can derogate from this where sex can be said to be a determining factor in risk 'based on relevant and accurate actuarial and statistical data'. One interpretation of this outcome is that the Commission was defeated in its aim of achieving an outright ban on the use of sex in risk classification, and that this defeat arose because differences in social norms and practices in member states could not be resolved under the decision rule of unanimity. Thus we have an illustration of the difficulties of positive social regulation in Europe. We can also note that the effect in this case is not negative integration, because the default of mutual recognition is blocked by member states which are able to invoke 'general good' arguments. Instead the outcome is that insurance markets for households remain national rather than becoming European. Firms are subject to a variety of national-level regulations, including unisex tariffs for motor insurance in some countries as well as unisex annuity rates. The issues this raises are reflected in France's reservation on the amended directive, to the effect that different risk classification practices across member states 'must not give rise to distortions of competition [...] In particular, the legislation applicable in relation to parity in

premiums and benefits for men and women must be the same for all insurance companies operating in a given Member State, regardless of their countries of origin.’⁶

The Directive attracted vehement opposition from the insurance industry, which argued strongly that risk classification should not be subject to European-level regulation (CEA 2004, MacDonnell 2005). While the original proposal for an outright prohibition on sex discrimination was defeated, the eventual compromise does not remove the EU level from the regulatory process. In requiring that derogations from nondiscrimination should be ‘based on relevant and accurate actuarial and statistical data’, the Commission has established the basis for regulatory review, even while the substantive outcome is, for the moment, that insurers can continue their existing practices. Insurers themselves seem well aware of the importance of this procedural innovation, noting that risk classification is now subject to inspection, and the burden of proof has shifted onto insurers defending their practices and away from regulators seeking to change them (MacDonnell 2005: 48).

It is arguable that, in adopting this procedural formulation, the Commission was applying lessons learned in developing nondiscrimination principles in the OMC. Rubery (2005) argues that the EES has had significant procedural effects on gender equality policy. Perhaps most importantly, gender dimensions in target-setting and statistical monitoring have been established. The EES has also contributed to the establishment of ‘gender mainstreaming’ committees, units and advisory groups in a number of countries (2005: 397).

The approach taken in the EES highlights the potential complementarities between the processes of completing the internal market and developing new approaches to social policy. More open and ‘flexible’ labour markets are seen as facilitating integration by reducing barriers to the incorporation of women, migrant workers and other ‘outsiders’. Discrimination and exclusion are cast as the reasons why some groups have low employment rates. The emphasis of the resulting reform agenda is ‘productivist’, focusing on increasing the efficiency of the economy by reducing incentives to leave employment, but the distributional effects are also seen as desirable, as they favour groups which are excluded or discriminated against. Re-regulatory measures are also seen as consistent with the EES programme when they address ‘post-industrial’ issues such as equal rights for part-time workers and parental leave. A number of directives on these areas have been agreed. Insurers are probably right to suspect that the creation of monitoring capacity around sex discrimination in risk classification will have a substantive effect on regulation, although this may occur at the national rather than EU level.

3. The legitimacy of social regulation in the EU

The discussion so far has sought to show that social regulation in the EU has developed hand-in-hand with economic integration. This development has functional aspects: deep integration of economies with large welfare states inevitably entails resolving social-regulatory issues. But this explanation only goes so far; in particular, it cannot explain the current range and scope of EU nondiscrimination law.

⁶ Statement entered in the Council Minutes, EPSCO Council 4 Oct 2004, 13137/04 ADD 1

One account of how this aspect of social regulation has developed suggests that the supranational legal process has created an institutional dynamic with a range and scope that goes beyond anything that the member states would agree to in an intergovernmental process. This view of legal supranationalism is implied in Scharpf's account of negative integration (1999, 2006). An alternative account with less emphasis on the competition-promoting and market-conforming aspects of the Court's jurisprudence is provided by Leibfried (2005). In this section we argue that there is indeed a legal-constitutional logic to the nondiscrimination principle, but it has been carried forward in intergovernmental as well as supranational legal processes. One obvious problem with 'blaming' the ECJ for the range of nondiscrimination law is that member states have agreed to a number of key measures in intergovernmental fora, notably the insertion of Article 13 in the Treaty at Amsterdam and the subsequent unanimous adoption of directives under this Article. To explain this, we need to recognise the symbolic and rhetorical power of nondiscrimination principles as well as their legal resonance.

Joerges and Neyer (1997) provide an analysis of how the principle of nondiscrimination on grounds of nationality enhances the capacity of a supranational body to solve the common problems faced by its member states. They argue that nondiscrimination on grounds of nationality operated as a pre-political norm that facilitated agreement in settings where nationalism could defeat the ability of the parties to find consensual solutions. Acceptance of the nondiscrimination norm made deliberative agreement in supranational fora possible. National democracies represent domestic collective identities, they suffer from a deficient representation of 'foreign' interests in national decision-making processes, and they must counteract this deficiency if they are going to bridge the gap between their differing constituencies and their common concerns. 'Thus, the non-discrimination guarantee of Article 6 [on nationality] can be interpreted as aiming at compensating the particularism of national basic rights.' (Joerges and Neyer 1997: 611).

The principle of nondiscrimination also has some of the same formal properties as the principle of allocative efficiency in providing a guide to regulatory action which suits the institutional possibilities and legitimating logic of the EU. Whereas gains in allocative efficiency potentially bring benefits to everyone, nondiscrimination suggests a conception of the greater good that gives weight to those excluded from or underrepresented in ordinary democratic processes, such as women and migrants. This standpoint is given a technocratic rationale by associating nondiscrimination with the promotion of open competition and therefore with allocative efficiency. In arguing for the autonomy of technical regulation, Majone suggested that supranational institutions 'may in fact be the best advocates of diffuse interests which do not find adequate expression in national political systems' (Majone 1996: 78), thereby invoking the failings of popular politics in order to justify supranationalism as a mechanism for good policy-making. So also the nondiscrimination norm invokes the limitations of politics, specifically the failings of majoritarianism.

These arguments are salient to understanding the processes leading up to the adoption of Article 13 and the subsequent promulgation of the Race and Equal Treatment Directives, because constitutional problems and legal arguments served to structure political argument and mobilise political interests in particular ways. One strand of the

process came from legal debates about the need to strengthen the Union's constitutional foundations, particularly by incorporating adequate protection of fundamental human rights and developing the concept of 'citizenship of the Union'. This agenda was initially motivated by a judicial problem affecting the supremacy of Community law, as interpreted by the ECJ, over national constitutional law. Initiatives were brought forward by the Justice and Home Affairs directorate, rather than Employment and Social Affairs.

However, by insisting on the 'indivisibility' of civil, political and social rights, links could be drawn between the promulgation of fundamental human rights, largely viewed as a constitutional issue for the Union, and the promotion of social rights, which addressed issues about the re-regulation of the single market. The conformity of nondiscrimination with the ideals of open competition and market integration was emphasised by, for example, NGOs concerned with promoting the rights of migrants and ethnic minorities. 'Lawyer-activists' framed the policy campaign around the argument that extended anti-discrimination measures were a 'logical extension' of the existing provisions on nationality and gender equality (Geddes and Guiraudon 2004: 342).

The formulation adopted at Amsterdam, whereby the Council was granted competence to take action to counter discrimination, rather than establishing a prohibition on discrimination with direct legal effect, could be seen as reflecting the symbolic, declaratory aspect of the whole venture. However, the passage of Directives through Council poses a puzzle about why member states have agreed on measures which would seem to disrupt their domestic social policies and impose different distributional norms on their established arrangements. In their account of the progress of the Race Directive, Geddes and Guiraudon show that the election of Jörg Haider in Austria provided another issue linkage, between taking an anti-fascist stance and supporting nondiscrimination principles. They argue that the French backed themselves into a rhetorical trap 'with their richly symbolic opposition to Haider, making it nearly impossible for them to turn around and veto anti-discrimination measures' (2004: 348).

It is questionable whether legal logic and anti-racist rhetoric would have got the member states quite so far if they had seen the directives as having a profound effect on their own capacity to conduct social policy. It seems more likely that, if national representatives grasped the wider ramifications of the directives⁷, they would have seen them as introducing policy resources, rather than as imposing policy constraints. The directives required that member states would create equality units and undertake statistical monitoring. States were already becoming acquainted with these procedural innovations under the various OMCs, which require them to organise the participation of non-state actors in the preparation of National Action Plans, and also impose various requirements for statistical monitoring. Many commentators have applied a 'reform resource' interpretation in analysing the impact of the OMCs on national policies. Writing on the Netherlands, Visser (2005) describes the OMC as a 'selective amplifier for national strategies of reform', while Erhel et al identify a 'leverage effect' for France. The OMC, they argue, 'provides domestic actors with European resources

⁷ Which they may not have done: Geddes and Guiraudon point out that a legalistic approach dominated the analysis of the directives, possibly to the detriment of an understanding of their wider policy implications.

which might help them in their action at national level' (Erhel et al 2005: 217). Specifically on equal opportunities policy, Rubery argues that 'the inclusion of commitments at EU level opens up opportunities for national actors' while also noting that there is no automatic transmission mechanism: some issues get dropped or neglected (Rubery 2005: 394).

Furthermore, to a large extent, the reform processes generated by the application of nondiscrimination principles share the dynamic of normative agreement between all right-thinking people that Majone highlighted when he wrote of modernised regulatory practices implemented by technical experts., accountable for solving 'specific problems in the best possible way' (Majone 2005: 166-167). It is hard for any policy actor to advocate discrimination. For example, in the debate about unisex risk classification in insurance, insurers have found 'the use of gender .. cast as a relic of a superstitious past where prejudice and discrimination were more common and acceptable than they are today' (MacDonnell 2005: 49-50). Insurers are aware that they have been put on the back foot by nondiscrimination arguments, even while norms about the acceptability of various forms of discrimination differ widely across the member states.

The idea of a reform resource implies that policy-makers can take up a frame or symbol and mobilise particular venues when required to unblock the policy process. However, some critical commentators have seen the EU's burgeoning nondiscrimination law and jurisprudence as a threat to national welfare states, particularly when the ECJ imposes interpretations which cannot be selectively ignored. Leibfried (2005: 273) is among the more vociferous critics, particularly of the regime for social security rights for migrants, arguing that '[s]ignificant losses of autonomy and sovereignty [have] occurred without member governments paying a great deal of attention.' Leibfried recognises the 'reform resource' argument, noting that member governments are sometimes happy to blame the EU for unpopular retrenchment, but he argues that this has come at a high cost in restrictions on the social policy-making capacity of national governments.

Underlying this argument is a concern that EU-imposed norms conflict with the communal solidarities of national welfare states, and thereby raise profound issues of legitimacy (Wincott 2002). Scharpf (1999: ch 1) argued that redistribution in majoritarian democracies is legitimated by a 'thick' collective identity, Majone (1993: 167) that such decisions required 'homogenous communities'. It is striking that commentators who are concerned with welfare state *reform* rather than welfare state *building* dwell much less upon popular political processes. Most notably, Pierson (1994, 2001) has suggested that the politics of social policy-making have changed markedly with the maturation of welfare states. In place of highly-salient distributional politics organised around class cleavages which correspond to party-political alignments and/or corporate institutions of 'social partnership', we have processes dominated by institutionalised participants who create a policy environment characterised by specialist expertise and detailed technical knowledge. This is conducive to welfare state reform strategies which rely on consensus-formation among the specialist participants from different political parties, and where policies themselves involve complex packages of linked adjustments and the fine-tuning of instruments. Policies have distributional effects, but political debate does not necessarily mobilise around these because of uncertainty or lack of salience.

In this setting, processes of consensus-formation and policy learning have a much greater role than the account of social policy based on national solidarities would imply. Most evidently, governments of all stripes search for policies which mitigate distributional conflict by increasing the size of the 'cake': thus the Commission's efforts to promote 'social policy as a productive factor' find a receptive audience. Another reform strategy is to thaw the 'frozen terrain' of opposing interests in welfare state reform by highlighting cross-cutting issues such as gender equality or disability rights. New institutions such as Equal Opportunities Units or Equality Commissions may facilitate this if the right policy opportunities present themselves, although, as Rubery notes, they may also find themselves sidelined.

How serious is the threat of conflict between EU norms and the popular legitimation of national welfare states? Our own view is that welfare states are the product of compromise and mixed motives, and there is little evidence that nondiscrimination principles undermine popular support for redistribution or substantially restrict governments' policy options. However, there is potential for nondiscrimination principles to come into conflict with social policy practice in unexpected ways. The primary distributional logic of social policy is to discriminate on the basis of need, which is done by classifying the population according to economic status and personal and family circumstances. As the cases and directives on gender equality in social security indicate, this logic can produce direct discrimination on the basis of ascribed characteristics or identities. Arguably, it should be possible to eliminate discrimination on all identity grounds and replace it with categories based on substantive or 'achieved' rather than ascribed criteria, but this process is not without difficulty. Ascribed criteria may be adopted for political or administrative reasons, and substantive criteria may be indirectly discriminatory towards some ascribed characteristics.

The example of age discrimination shows how social regulation in the EU brings opportunities in reforming national social policies but also some hazards. The provisions in the FETD on age are framed in a way which seems to allow considerable scope for national governments to retain age classifications in their social policies, while at the same time the Directive can be drawn on as a reform resource by governments seeking to adjust policies in the light of population aging, for example by increasing retirement ages. But governments may not be able to control the application of nondiscrimination norms in respect of age and draw on them selectively at will. Once groups mobilise politically around discrimination grounds, the government no longer has complete control over the use of equality policy as a reform lever.

In the area of insurance, the possible effects of nondiscrimination principles are difficult to anticipate and evaluate. Critics of the Commission's original proposal pointed out that it seemed positively to encourage replacing sex discrimination with risk classification based on class indicators such as income, education or postcode, rather than using the nondiscrimination norm to argue for less differentiation and more solidarity generally. Another argument was that the regulation of 'substitutive' private insurance could undermine efforts to promote privatisation and cut back social insurance. Whether this effect is seen as good or bad, it cuts across other policy goals and reform processes in ways which the protagonists may not have expected.

Conclusion

This paper has used the example of insurance regulation to advance two main arguments about social policy in the EU. First, EU social policy is already with us. It has developed through regulatory rather than budgetary instruments, but this distinction has proved to be of much less import than Majone expected when he drew attention to it in the early 1990s. Regulatory and budgetary social policies shadow, constrain and shape each other. The resulting regulatory social policies are not just a minimal framework for market integration, although principles of market openness and competition are an important part of their normative foundation. These norms cut across traditional welfare state ideas of citizenship and solidarity. However, to see these effects simply as weakening the welfare state is to reify long-established arrangements and ignore the many reasons why welfare states are in need of reform.

Second, we find common themes in the ideational and normative foundations of EU social policy across three policy processes with very different institutional characteristics. This is not to claim that institutional aspects of EU social policy-making are unimportant. On the contrary, we can see that the ECJ carried forward the legal-constitutional logic of nondiscrimination at various points, and that intergovernmental processes are sometimes blocked by conflicts stemming from diversity in national preferences. However, our argument is that the impact of EU social policy must be expected primarily to work through effects on national welfare states. There are few ‘empty spaces’ or self-contained issue areas in social policy. Linkages across areas may arise from both the substantive and the symbolic content of policies. By recognising that all three EU policy processes work primarily on social policy by creating pressure for reform at the level of member states, we can appreciate how the normative coherence of EU social policy can co-exist with continued diversity at the national level.

References

- Barnard, C. (2006) *EC Employment Law*, 3rd Edn (Oxford: OUP).
- Barr, N. (1992) ‘Economic Theory and the Welfare State: A Survey and Interpretation’, *Journal of Economic Literature*, Vol 30, pp.741-803.
- CEA (2004) ‘Gender Equality in Insurance: Frequently Asked Questions’, Comité Européen des Assurances, Note 19 January, <http://www.cea.assur.org/cea/v1.1/posi/pdf/uk/position195.pdf>
- Erhel, C., Mandin, L. and Palier, B. (2005) ‘The Leverage Effect. The Open Method of Coordination in France’ in Zeitlin, J. and Pochet, P. (eds) *The Open Method of Coordination in Action. The European Employment and Social Inclusion Strategies* (Bruxelles: P.I.E-Peter Lang).
- Everson, M. (1996) ‘The German Federal Supervisory Authority for Insurance’ in G. Majone (ed) *Regulating Europe*, (London, Routledge).

- Everson, M. (2002a) 'Social Pluralism and the European Court of Justice: A Court Between a Rock and a Hard Place' *Journal of Legislative Studies* Vol 8 Issue 4 pp.98-116
- Everson, M. (2002b) 'Adjudicating the Market' *European Law Journal* Vol 8 No 1 pp.152-171
- Geddes, A. and Guiraudon, V. (2004) 'Britain, France, and EU Anti-Discrimination Policy: The Emergence of an EU Policy Paradigm' *West European Politics* Vol 27 No 2 pp.334-353.
- Gilbert, N. (ed.) (2006) *Gender and Social Security Reform: What's Fair for Women?* (London: Transaction/ ISSA)
- Giubboni, S. (2001) 'Social Insurance Monopolies in Community Competition Law and the Italian Constitution: 'Practical' Convergences and 'Theoretical' Conflicts,' *European Law Journal* Vol 7 No 1 pp.69-94
- Joerges, C. and Neyer, J. (1997) 'Transforming strategic interaction into deliberative problem-solving: European comitology in the foodstuffs sector' *Journal of European Public Policy* Vol 4 No 4 pp.609-625.
- Leibfried, S. (2005) 'Social Policy: Left to the Judges and the Markets?' in: Wallace, H., Wallace, W. and Pollack, M. (eds) *Policymaking in the European Union* (Oxford: OUP)
- Levy, J. (1999) 'Vice into Virtue? Progressive Politics and Welfare Reform in Continental Europe' *Politics and Society* Vol 27 No 2 pp.239-273
- Mabbett D. (1999) 'The *Albany*, *Brentjens*' and *Drijvende Bokken* Judgments', *European Journal of Social Security* Vol 1, No 4, pp.407-412.
- Mabbett D. (2000) 'Social regulation and the social dimension in Europe: The example of insurance' *European Journal of Social Security* Vol 2, No 4, pp.241-257.
- Mabbett D. (2005) 'The Development of Rights-Based Social Policy in the European Union: The Example of Disability Rights' *Journal of Common Market Studies* Vol 43, No 1, pp.97-120.
- MacDonnell, P. (2005) 'Equal Treatment Directive Misunderstands Risk and Threatens Insurance Markets' *Economic Affairs*, March, pp.48-52
- Majone, G. (1993) 'The European Community Between Social Policy and Social Regulation' *Journal of Common Market Studies*, Vol 31, pp.153-170.
- Majone, G. (ed.) (1996) *Regulating Europe* (London: Routledge)
- Majone, G. (2005) *Dilemmas of European Integration* (Oxford: OUP)

- Pierson, P. (1994) *Dismantling the Welfare State? Thatcher, Reagan and the Politics of Retrenchment* (Cambridge: CUP)
- Pierson, P. (ed.) (2001) *The New Politics of the Welfare State* (Oxford: OUP)
- Quinn, G. (1999) 'The Human Rights of People with Disabilities under EU Law'. In Alston, P. (ed) *The EU and Human Rights* (Oxford: Oxford University Press).
- Rosanvallon, P. (2000) *The New Social Question: Rethinking the Welfare State* (Princeton: Princeton University Press)
- Rubery, J. (2005) 'Gender Mainstreaming and the OMC. Is the Open Method Too Open for Gender Equality Policy?' in Zeitlin, J. and Pochet, P. (eds) *The Open Method of Co-ordination in Action. The European Employment and Social Inclusion Strategies* (Bruxelles: P.I.E-Peter Lang).
- Scharpf, F. (1999) *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press).
- Scharpf, F. (2006) 'The Joint-Decision Trap Revisited' *JCMS* Vol 44 No 4 pp.845-864.
- Streeck, W. (1995) 'From Market Making to State Building? Reflections on the Political Economy of European Social Policy' in Leibfried, S. and Pierson, P. (eds) *European Social Policy* (Washington DC: The Brookings Institution)
- Streeck, W. (1996) 'Neo-Voluntarism: A New European Social Policy Regime?' In Marks, G., Scharpf, F., Schmitter, F. and Streeck, W. *Governance in the European Union* (London: Sage).
- Thomson, S. and E. Mossialos (2007) 'Regulating Private Health Insurance in the EU: The Implications of Single Market Legislation and Competition Policy' *Journal of European Integration* Vol 29 No 1 pp.89-107
- Visser, J. (2005) 'The OMC as Selective Amplifier for National Strategies of Reform. What the Netherlands Want to Learn from Europe', in Zeitlin, J. and Pochet, P. (eds) *The Open Method of Co-ordination in Action. The European Employment and Social Inclusion Strategies* (Bruxelles: P.I.E-Peter Lang).
- Vousden, S. (2000) 'Albany, Market Law and Social Exclusion' *Industrial Law Journal* Vol 29 pp.181-191
- Wincott, D. (2002) 'National States, European Union and Changing Dynamics in the Quest for Legitimacy' in Arnall, A. and Wincott, D. (eds) *Accountability and Legitimacy in the European Union* (Oxford: Oxford University Press).