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Proposals for social regulation at the level of the European Community have proved highly controversial. The Protocol and Agreement on Social Policy (SPA), agreed at Maastricht, provide the potential for a more expansive framework of Community social regulation by setting out wider express legal bases for social action than were previously available in the EC Treaty. The SPA also introduces into the decision making process an extended role for the representatives of management and labour, the "social partners" both in the creation and implementation of social regulation. This "social dialogue" process allows regulation to take the form either of legislation or collective agreements. The SPA applies to 14 of the 15 Member States, excluding the UK, whose Conservative Government remain staunchly opposed to increases in social regulation.

This thesis aims to consider the impact of the introduction of the social dialogue process on the creation of European social regulation. After an assessment of the background to the social dialogue, the new decision making process is examined in detail. Consideration is given to the scope of the new legal bases, the practical difficulties inherent within the consultation and negotiation processes and the possibilities for the adoption of European level collective agreements. The thesis then turns to a theoretical assessment of the social dialogue in the light of the European Community's commitments to subsidiarity and democracy.

The main conclusion drawn is that the SPA social dialogue has created the potential for the autonomous development of European collective labour law. However, a combination of the present inefficiencies of the social dialogue procedure and the personalities involved in the dialogue make the fulfilment of this potential unlikely in the near future.

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Chapter 1

INTRODUCTION

Since its inception proposals to extend the regulatory role of the European Community within the sphere of social law, and in particular those concerning industrial relations and labour law, have proved highly controversial.[1] Member States have been reluctant to relinquish sovereignty in these key areas which have been shaped by national historical, cultural and economic conditions. However, as European economic integration has progressed, and in particular since the completion of the Internal Market in 1992, companies have increasingly restructured along European, rather than national lines.[2] In consequence there have been increasing calls for both corresponding social regulation at European level and progress towards a European industrial relations system.[3]

The Protocol and Agreement on Social Policy[4] were introduced as annexes to the EC Treaty as part of the amendments made by the Treaty on European Union. The SPA provides the potential for a more expansive framework of European social regulation by setting out wider express legal bases for action.[5] In addition the SPA promotes an extended role for the representatives of management and labour, the "social partners", in the development and implementation of European social regulation through the social

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1 Eg Burrows and Mair, *European Social Law*, Wiley, 1996, at 5-12, and Nielsen and Szyszczak, *The Social Dimension of the European Community*, Handelshojskolens Forlag, 1993, at 18-36.

2 Ferner and Hyman, "Industrial Relations in the New Europe: Seventeen Types of Ambiguity", in Hyman and Ferner, *Industrial Relations in the New Europe*, Blackwell, 1992, at xvii-xviii and Marginson and Sisson, "The Structure of Transnational Capital in Europe: The Emerging Euro-Company and its Implications for Industrial Relations", in Hyman and Ferner, *New Frontiers in European Industrial Relations*, Blackwell, 1994.

3 Eg Kopke, "European Collective Bargaining: The New Configuration" in, *The European Dimensions of Collective Bargaining After Maastricht*, ETUI, 1992.

4 Hereafter referred to as the "Protocol" and the "SPA" respectively. Both documents are reproduced as Annex 1 below.

5 Art 2 SPA.

dialogue procedure.[6] The term "social dialogue" refers to the wide-ranging consultations between the social partners and also between the social partners and the Commission of the EC which existed prior to the SPA.[7] The social dialogue procedure provides a legal framework with the potential for the development of European social regulation which takes greater account of the practical needs of the two sides of industry[8] and which strikes a balance between legislation and collective agreements negotiated by the social partners. As such Padraig Flynn, Commissioner for Employment and Social Affairs, has stated that the social dialogue is probably the best means to respond to the constantly evolving needs of European society.[9]

This thesis aims to consider the impact of the new social dialogue procedure on the creation of European level social regulation. After an assessment of the background to the social dialogue, the new regulatory procedure will be described in detail. Conclusions will be drawn as to how the input of the social partners will affect the initiation and substantive content of European social regulation and also as to whether future regulation is likely to take the form of binding legislation or collective agreements. The input of the social partners into the Community decision-making process will also be assessed in light of the Community's commitment to the principles of subsidiarity and democracy.

The situation of the social dialogue procedure within the SPA and therefore outside the main body of the EC Treaty, as an annex to the Protocol on Social Policy, means that the effects of the involvement of the social partners cannot be treated in isolation. Consideration will therefore also be given to the legal status of the Protocol and SPA and the measures arising from them. The conclusions drawn will consider the role of the

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6 Arts 3 and 4 SPA.

7 See Chapter 2.

8 Council Resolution on Certain Aspects for a European Union Social Policy: A Contribution to Economic and Social Convergence in the Union, 1994 OJ C 368/03, 23 December 1994, Part II, para 3 encourages the use of agreements since "they are as a rule closer to social reality and to social problems". See also Roberts, "Industrial Relations and the European Community", (1992) 23 IRJ, 3-31, at 9.

9 "Social Dialogue - The Situation in the Community in 1995", Social Europe 2/95, 5.

social dialogue within the Community regulatory process and make some suggestions as to how this role may develop in the future.

Although it is recognised that the social partners make a substantial input into the creation of European public policy[10] the scope of this thesis will be limited to a consideration of the regulatory role of the social dialogue under the SPA. In consequence the thesis will be concerned with the intersectoral social dialogue, rather than the sectoral[11] or enterprise level dialogue.[12]

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10 Eg the contribution of the social partners to the development of a European Confidence Pact for Employment.

11 Eg Bercusson, "European Labour Law and Sectoral Bargaining", (1993) 24 IRJ, 257-272.

12 Eg Roberts, "Multinational Collective Bargaining: A European Prospect?", (1973) 11 BJIR, 1-19.

Chapter 2

THE CHANGING ROLE OF THE SOCIAL DIALOGUE AT EUROPEAN LEVEL

Introduction

The Treaty establishing the EEC was largely focussed on economic, rather than social, integration. "An accelerated raising of the standard of living" was to occur as a consequence of "establishing a Common Market and progressively approximating the economic policies of the Member States".[1] However, despite this focus on *economic* integration, since its inception the Community has recognised the positive input that could be made by some form of dialogue with the social partners.[2] The role of the social partners within the SPA is the product of a continually evolving concept of this social dialogue.

This chapter proposes to trace the historical background of the social dialogue at European level and assess the changes in its nature and role within the Community decision-making process. Since the focus of this thesis concerns the new role accorded to the social dialogue by the SPA this chapter will present a simplified account centring on the difficulties encountered in the creation of a forum for successful cross-industry social dialogue.

Phase 1 : The Economic and Social Committee

The original Treaty of Rome provided a formal, consultative role for the social partners as part of the Economic and Social Committee (ECOSOC).[3] ECOSOC was set up as a

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1 Art 2 EEC.

2 Spyropoulos, "Labour Law and Labour Relations in Tomorrow's Social Europe", (1990) 29 International Labour Review, 733-750, at 741.

3 Arts 193-198 EEC.

mouthpiece for a variety of economic and social interests so that these views could be conveyed to the European institutions involved in the establishment of the Common Market. The Committee consists of "representatives of the various categories of economic and social activity",[4] which can, in practice, be divided into three distinct groups; the employers' group, the workers' group and the various interests' group.[5] The various interests' group includes representatives of farmers, traders, craftsmen, members of co-operatives, small businessmen, members of the professions, consumers, conservationists and the general public.

ECOSOC has a right to be consulted on a variety of subjects where the Treaty so provides,[6] notably, for our purposes, under Articles 118 and 118a, and may also be consulted by the Council or Commission in other cases where "they consider it appropriate".[7] Its views are set out in Opinions adopted at Plenary Sessions by a straight majority vote and subsequently published in the Official Journal of the EC. Such Opinions enable the Commission to ascertain the likely impact of proposals on those most directly concerned. Consultation occurs before adoption of the particular measure and hence allows ECOSOC to suggest amendments.

However, in its early years considerable dissatisfaction with the functioning of ECOSOC was registered. At the very first meeting in May 1958[8] its members expressed disappointment with the committee's mere "advisory status",[9] a limited role which permits the Council of Ministers to ignore or disregard an Opinion without giving reasons. This consultative role was originally further restricted by the ECOSOC's lack of a right to express Opinions of its own initiative, but only when called upon to do so

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4 Art 193 EEC.

5 "The Economic and Social Committee", ESC-94-013-EN, Brussels, 1994.

6 Art 198 EEC.

7 Art 198 EEC.

8 Barnouin, *The European Labour Movement and European Integration*, Frances Pinter, 1986, at 80.

9 Art 193 EEC.

by the Council and Commission. It was not until October 1972 at the meeting of the Heads of Government of the European Community in Paris that this right of initiative was secured.[10] In addition, consultation occurred after the Commission had adopted a draft proposal, limiting ECOSOC's influence on the broad policy principles behind the proposal.[11] As a result Opinions became increasingly technical, informative documents. [12]

Early dissatisfaction was also expressed by the workers' group regarding the composition of ECOSOC. The workers group had serious reservations about the presence of the various interests' group, many of whom they considered to be representatives of employers. Such resentment led to claims by the ETUC[13] of under-representation.

Phase 2: Social Dialogue As A Response to Recession

Dissatisfied with the role of ECOSOC, the social partners proposed the creation of an additional forum where the social dialogue could contribute to the preparation of Community economic and social policy decisions. Concerned about high levels of unemployment,[14] the Commission agreed to discuss the proposal as it was anxious to involve the social partners in policy making in an attempt to achieve a more effective employment policy which would bring job supply and demand further into line. A reflection of the social partners increasing policy-making role, in 1970 the Commission's proposal to the Council on the phasing in of economic and monetary union stressed the

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10 "The First Summit Conference of the Enlarged Community", Bulletin of the EC, 10-1972. The decision of the Council did not become official until February 1974, after the relevant changes in internal procedures had been made. However, the right of initiative has been utilised by ECOSOC since the date of the Paris meeting in October 1972. This right of initiative has now been given Treaty recognition in Art 198 EC, as amended by the Treaty on European Union. See Barnouin, op cit, at 81.

11 Social Europe 1988, Special Edition, at 108. Interest groups prefer to lobby the Commission or individual members of the Council of Ministers during the process of formulating a proposal. See, for example, Harlow, "A Community of Interests? Making the Most of European Law", (1992) 55 MLR, 331-350.

12 Social Europe 1988, Special Edition.

13 European Trade Union Congress.

14 See Annex 2.

importance of working closely with both sides of industry on the general directions of economic policy.[15]

In response a tripartite conference was convened in Luxembourg on 27-28 April 1970.[16] The conference decided that similar tripartite conferences should take place regularly and agreed to the formation of the Standing Committee on Employment (SCE), a committee which has since met two to three times a year,[17] and whose task it is to "ensure close contact at European Level... with the representatives of the employers' and workers' organisations to facilitate co-ordination by the Member States of their employment policies in harmony with the objectives of the Community."[18] The conference also concluded that the employment situation could be improved through a more effective use of existing labour reserves. Before any new policy could be formulated, however, the new SCE was charged with carrying out statistical work concerning the structure of unemployment in national labour markets since existing national, independently collected, statistical data could not effectively be compared.

The SCE allows consultation and dialogue between the four parties involved, the representatives of workers, employers, the Council and Commission,[19] and is presided over by the labour minister of the country holding the Council presidency. Although a mere consultative body with no decision-making authority, a feature which has detracted from the effectiveness of the SCE,[20] as ECOSOC, dialogue within the SCE has not been completely without success. Several clauses of the 1975 Collective Redundancies

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15 COM(70) 1250, 29 October 1970.

16 Barnouin, ibid, at 6.

17 Although not from 1972-5. See below.

18 Council Decision on the Creation of a Permanent Committee on Employment, OJ 1970 L 273/25, 17 December 1970. See also Bulletin of the EC, 7-1970, 64.

19 Social Europe 2/84, at 10-11 and Social Europe 1988, Special Edition, at 109.

20 Social Europe 2/95, 15.

Directive,[21] for example, emerged as a result of negotiations within the SCE.[22]

Despite the SCE's wide remit, however, the ETUC still found that social issues tended to be treated too narrowly, attention being focussed on examination of the labour market rather than the wider issues affecting unemployment. Again unhappy with the composition of the workers' representation,[23] the ETUC staged a boycott in 1972 and the Committee remained dormant until it was relaunched in January 1975 after representation had been revised.[24]

Tripartite Conferences

Even after changes in the composition of the workers representatives in the SCE, the Committee achieved little. During the boycott the ETUC had channelled its energy into the ad hoc tripartite conferences convened in response to the positive attitude given to the social dialogue by the Commission in its 1973 Social Action Programme.[25] These conferences were composed of representatives of the two sides of industry, the EEC institutions and representatives of the Member State governments. The government representatives included both ministers for labour and social affairs and economic and finance ministers, a composition which appealed to the ETUC since it allowed a wide discussion on unemployment matters to be undertaken.

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21 Directive 75/129, OJ 1975 L 48/29, 17 February 1975.

22 Interview with Carlo Savoini, Social Europe 2/95, 7.

23 Barnouin, ibid, at 88 and Carley, "Social Dialogue" in Gold (ed), *The Social Dimension - Employment Policy in the European Community*, Macmillan, 1993, at 107. The Socialist and Christian trade unions resented the presence of the French and Italian communist trade unions on both ideological grounds and also because they were national organisations without a transnational structure at Community level, making them unrepresentative.

24 Council Decision of 20 January 1975, OJ 1975 L 21/17. This decision was taken in response to discussions regarding the SCE at the Tripartite Conference of 14 December 1974 (see below).

25 24 October 1973.

Although the first three conferences[26] produced no concrete agreements, they were perceived as successful[27] since genuine discussion had been conducted on a wide range of issues. Results were achieved, however, at the fourth conference on 24 June 1976 which concentrated on the employment situation. For the first time the social dialogue concluded with a joint economic programme in which targets for employment creation and price stability were reached, a Joint Declaration agreed upon[28] and a steering committee set up to monitor progress. Although the Declaration had no legally binding force, the targets were subsequently reiterated in the Commission's 1977 medium-term economic policy programme[29] and the Annual Report on the EEC's economic situation.[30]

However, the momentum was slowed when it became clear that the targets set at the fourth conference were unrealistic. The fifth conference on 27 June 1977 on the subject of growth, stability and employment and which reviewed progress in the achievement of the targets was disappointing. A final conference took place on 9 November 1978 concerned with the redistribution of available work. The lack of positive results this time prompted the ETUC's decision not to participate in any future similar conferences unless the possibility of reaching EC-level agreements was considered. Despite the adoption by the Council of measures improving the functioning of the conferences, none have since been held.

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26 18 November 1975 concerning the economic and social situation in the Community, 16 December 1974 on the economic recession, employment and equal treatment and 18 November 1975 concerning a search for Community solutions to employment problems. See Social Europe 1988, Special Edition.

27 Barnouin, op cit, at 91.

28 "Joint statement by the Conference on the restoration of full employment and stability in the Community", Commission, 24 June 1976.

29 EC Commission, Fourth Medium-Term Economic Policy Programme, OJ 1977 L 101, 25 April 1977.

30 EC Commission, Annual Report on the Economic Situation in the Community, Brussels, 29 Dec 1976.

Phase 3: Social Dialogue As A Response to the Deadlock of the 1980s

With unemployment rising sharply at the beginning of the 1980s the enthusiasm for social dialogue continued. On 5 April 1984 the President of the Council of Ministers, the French Prime Minister, M Pierre Mauroy reiterated the "urgent need for a trustful dialogue between the European government and both sides of industry. The dialogue must not only be trustful but also constructive, with about 11% of the working population in the Community currently unemployed."[31]

However, initially a response to the problem of unemployment, the focus of the social dialogue began to shift in the years after the Thatcher Conservative Government came into power in 1979.

The Deadlock in Social Action

Social action pursuant to the Commission's Social Action Programme of 1974[32] had been relatively successful between 1975 and 1980 with the enactment of several Directives on social policy.[33] However, progress effectively ended after 1979 when the Thatcher Conservative Government of the UK came into power.[34] Heavily influenced by free market economics,[35] the national labour law policy of the UK Conservative government promoted a high degree of flexibility within the employment relationship in order to

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31 ETUC Conference on Employment, Strasbourg, 5 April 1984.

32 OJ 1974 C 12, 9 February 1974.

33 Eg Council Directive 75/129/EEC, OJ 1975 L48/29, 17 February 1975 (Collective Redundancies); Council Directive 77/187/EEC, OJ 1977 L61/27, 14 February 1977 (Transfer of Undertakings); Council Directive 80/987/EEC, OJ 1980 L283/23, 20 October 1980 (Insolvency).

34 See Gold, "Overview of the Social Dimension", in Gold, *The Social Dimension - Employment Policy in the European Community*, Macmillan, 1993 and Lange, "The Politics of the Social Dimension", in Sbragia, *Euro-Politics: Institutions and Policymaking in the "New" European Community*, Brookings Institution, Washington, 1992, at 241.

35 Painter and Puttick, *Employment Rights*, Pluto Press, 1993, at 3; Wedderburn, *Employment Rights in Britain and Europe*, Insititute of Employment Rights, 1991; Deakin and Morris, *Labour Law*, Butterworths, 1995 and Teague and Grahl, *Industrial Relations and European Integration*, London: Lawrence and Wishart, 1992, at 77.

permit employers to adapt quickly to changes in the economic climate, allowing them to compete more effectively in international markets.

In order to protect the integrity of this drive for flexibility the Conservatives have forcefully pursued their own national agenda at European level. Due to the requirement of unanimity in the Council of Ministers under the legal basis for legislative action of Article 100 EEC, the UK was able to veto proposed Directives on part-time work and temporary work,[36] parental leave[37] and the Vredeling Directive[38] on information and consultation in multinationals, amongst others.[39] The UK continually opposed *dirgiste* employment policies on the basis that economic and employment growth could only be achieved by a reduction in burdens on business. Such burdens in the form of excessive labour regulation and the attendant increases in the unit costs of labour would, in the view of the Conservatives, decrease the competitiveness of European industry in international markets.[40] As a result the only employment initiative which was successful during this period was a Directive on the introduction of measures to encourage improvements in the health and safety of workers.[41]

The Delors Initiative

In January 1985 Jacques Delors took up the position of President of the European Commission and provided the enthusiasm for a new type of social dialogue. While previous initiatives had involved the social partners in a consultative, policy-making role tailored towards the achievement of a social consensus in order to alleviate

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36 COM(90) 228, OJ 1990 C 224/90, 8 September 1990.

37 OJ 1983 C 333, 9 December 1983, amended version OJ 1984 C 316, 27 November 1984.

38 OJ 1980 C 297, 15 November 1980, amended version OJ 1983 C 217, 12 August 1983.

39 However, see Whiteford, "W(h)ither Social Policy?", in Shaw and More, *New Legal Dynamics of European Union*, Clarendon: Oxford, 1995, at 115 who argues the UK may not have been the only Member State reluctant to agree to the adoption of social policy measures.

40 See Teague and Grahl, ibid, at 77.

41 Directive 89/391/EEC, OJ 1989 L 183/1, 12 June 1989.

unemployment, Delors visualised an autonomous regulatory role for the social dialogue as a response to the social policy deadlock.[42] Declarations of his high hopes for the social dialogue were presented in the Commission's programme to the European Parliament in March 1985[43] where he stated that "a European collective agreement is not just an empty slogan. It would provide a dynamic framework, one that respected differing views - a spur to initiative, not a source of paralysing uniformity"[44] and that reforms to employment and labour market policies "must be negotiated by the two sides of industry, in other words collective bargaining must remain one of the cornerstones of our economy, and efforts must be made to secure some harmonisation at Community level."[45]

This vision of European collective bargaining formed part of Delors' *espace sociale* in which agreements achieved by consensus between the social partners could form the basis of Community legislative action.[46] It seems that Delors hoped that such agreements would be more acceptable to the UK due to the input and consent of the representatives of employers.[47] In this respect Delors is reported to have made a statement to the social partners that the Commission was prepared to cease developing new social policy proposals if the parties entered into such a dialogue.[48]

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42 Carley, ibid, at 108; Teague, "Constitution of Regime? The Social Dimension to the 1992 Project", (1989) BJIR, 310-328, at 318 and Hepple, "European Social Dialogue - Alibi or Opportunity?", Institute of Employment Rights, 1993, at 12.

43 "The Thrust of Commission Policy", Statement by Jacques Delors, President of the Commission, to the European Parliament, Strasbourg, 14-15 January 1985, Bulletin of the EC, Supp 1/85.

44 Delors, ibid, at 9.

45 Delors, ibid, at 11.

46 "The Social Dimension of the Internal Market", Information Memo, Brussels, 7 September 1988, stated that "the Commission is convinced that the social dialogue is essential to progress in building Europe, since it leads to agreements that can subsequently be transformed into proposals for Community regulations."

47 Streeck, "European Social Policy After Maastricht: The 'Social Dialogue' and 'Subsidiarity'", (1994) 15 Economic and Industrial Democracy, 151-177, at 166, Teague, "Constitution or Regime? The Social Dimension to the 1992 Project", op cit, 318.

48 Teague, *The European Community: The Social Dimension*, London: Kogan Page, 1989, at 69.

The Val Duchesse Social Dialogue

In order to put this vision of the social dialogue into operation Delors initiated talks between representatives of the ETUC, UNICE,[49] CEEP[50] and the Commission at Val Duchesse, a palace outside Brussels, on 31 January 1985, where talks took place on the structural and cyclical aspects of the current economic and social situation.[51]

It was not until a second meeting on 12 November 1985, where discussion centred on "the co-operative growth strategy for more employment",[52] that any concrete action resulted. At the end of the meeting the social partners adopted a joint declaration on the social dialogue and new technologies[53] and agreed on the establishment of two working parties, the first, the "macroeconomics working party", to examine growth, employment and investment in the Community and the second, the "new technologies working party", to look at the possibility of a Community approach to social dialogue on the introduction of new technologies.[54] These working parties were set up in Spring 1986, made up of representatives of the trade unions and employers, with one representative from each category from each Member State, and chaired by a member of the Commission.[55] Both proved successful in concluding agreements in the form of Joint Opinions.[56] The social partners and the Commission met again on 7 May 1987 when these Joint Opinions were

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49 Union des Confederations de l'Industries des Employeurs d'Europe.

50 Centre Europeen des Moyennes Entreprises.

51 Bulletin of the EC, 1-1985, point 2.4.19.

52 Social Europe 1988, Special Edition, at 110.

53 Commission, Joint Opinions, European Social Dialogue Series, 1991.

54 Bulletin of the EC 11-1985, point 2.5.15.

55 See Carley, op cit, at 114-115 for details of the composition and action of the working parties.

56 The New Technologies Working Party concluded a Joint Opinion on Training, Motivation, Information and Consultation Relating to New Technologies on 6 March 1987. The macroeconomic working party concluded a Joint Opinion in which UNICE, ETUC and CEEP reaffirmed their support for the strategy set out in Commission's 1986-7 Annual Economic Report on 6 March 1987 and a Joint Opinion on Co-operative Growth Strategy on 6 November 1986. See Bulletin of the EC, 3-1987, para 2.1.93 and Bulletin of the EC, 5-1987, para 2.1.100 and Roberts, "Industrial Relations and the European Community", (1992) 23 IRJ, 3-13, at 5.

endorsed and the President of the Council, Mr Wilfred Martins, announced his intentions to forward the agreements to the European Council on 29-30 June.[57]

However, this initial outward success of the "Val Duchesse dialogue"[58] was impaired by the fact that UNICE had insisted from the outset that the Commission should make assurances that any agreements reached should not be used as a basis for proposals for legislation.[59] While the Commission had agreed to this proviso in order that the talks should still take place, the conclusion of agreements which committed none of the parties to any action and could not be used as a platform for future Community action, seriously undermined the original purpose of the Delors social dialogue.[60] The Joint Opinions had no legally binding effect, but functioned merely as "an expression of views on a particular issue".[61] A study conducted by the Directorate-General for Employment and Social Affairs[62] noted that the social dialogue "remained in Brussels", as, after agreement, no further impetus by the Commission or the social Partners provided any follow up action.

Subsequent meetings of the working groups failed to produce additional Joint Opinions. The macroeconomics group convened in 1988, but no agreement was reached on the Commission's 1988-89 Annual Economic Report and, despite numerous meetings, the new technologies group failed to reach agreement on an Opinion.

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57 Social Europe, 3/87, at 5.

58 For a positive view of the outcome of Val Duchesse see Spyropoulos, op cit, 733-750 and Roberts, op cit, at 6 who notes that Val Duchesse was important for the social partners to "become accustomed to systematic and structures European-level contacts and deliberations".

59 Teague, "Constitution or Regime? The Social Dimension to the 1992 Project", op cit, at 318.

60 Teague, "Constitution or Regime? The Social Dimension to the 1992 Project", ibid, at 318.

61 Teague and Grahl, op cit, at 82.

62 Commission,"Eight Years of Intersectoral Social Dialogue at Community Level", November 1992, as quoted in Hepple, op cit, at 17.

Relaunching the Social Dialogue

The Single European Act of 1986 provided Treaty recognition for the concept of social dialogue. Article 118b of the amended Treaty of Rome states that, "the Commission shall endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement". However, the provision was criticised as a weak, "political gesture",[63] since it provided no procedures for the functioning of the dialogue and caused ambiguity over the dialogue's legal results.

As a response to the new Article 118b the Val Duchesse social dialogue was relaunched by Jacques Delors and the new Commissioner for Social Affairs, Vasso Papandreou, on 12 January 1989[64] with a meeting of the Commission and the social partners at the Palais d'Egmont. With the creation of a Steering Committee made up of representatives of the social partners and chaired by the Commission, the social dialogue to some extent gained the formal stability it had previously been lacking.[65] This group was to promote new social dialogue initiatives and to evaluate and provide an impetus for action as a follow up to Joint Opinions.[66] Delors suggested in his opening speech that discussions should take place as a priority on the issues of permanent vocational training and problems arising from the creation of a European labour market. Ms Papandreou reported that the Commission would issue an annual report on the employment situation and trends within the Community for discussion by the social partners.[67]

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63 Hepple, ibid, at 16.

64 Bulletin of the EC, 1-1989, points 1.2.1-1.2.7.

65 Carley, op cit, at 115.

66 Conclusions of the President of the Commission, Bulletin of the EC, 1-1989, point 1.2.7.

67 The first of these reports was submitted in July 1989.

Results were encouraging.[68] In its first meeting[69] the Steering Group established two working groups,[70] the first concerned with education and training, which subsequently produced four Joint Opinions,[71] and the second with prospects for a European Labour Market, which also produced two Joint Opinions.[72] The group also held discussions concerning promotion of Joint Opinions. However, the issue as to whether these Opinions could attain the status of framework agreements under Art 118b EEC was still rejected by the UNICE.

The Social Charter

Had the Social Charter[73] been adopted at the Strasbourg Summit,[74] the social dialogue would have gained a greater Community legitimacy, with the explicit possibility of concluding binding agreements.[75] The Charter declared that "dialogue between the two sides of industry at European level... may, if the parties deem it desirable, result in contractual relations."[76] The Charter also recognised collective agreements as a means of guaranteeing the social rights outlined.[77] However, the Social Charter was not adopted,

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68 Spyropoulos, op cit, at 743.

69 21 March 1989.

70 These groups held their first meetings in April 1989.

71 Joint Opinion on Education and Training, 19 June 1990, Joint Opinion on the Transition from School to Adult and Working Life, 6 November 1990, Joint Opinion on Access to Training, September 1991, Joint Opinion on Qualifications and Certification, May-June 1991.

72 Joint Opinion on the Creation of a European Occupational and Geographical Mobility Area and Improving the Operation of the Labour Market in Europe, 13 February 1990, Joint Opinion on New Technologies, Work Organisation and Adaptability of the Labour Market, 10 January 1991.

73 Community Charter of the Fundamental Social Rights of Workers, Social Europe, 1/90, 46.

74 December 1989.

75 On the Social Charter generally see Vogel Polsky, "What Future is there for a Social Europe Following the Strasbourg Summit?" (1990) 19 ILJ 65-80 and Wedderburn, "The Social Charter, European Company and Employment Rights: An Outline Agenda", Institute of Employment Rights, 1990.

76 Art 12(2).

77 Title II, Art 27.

only a Solemn Declaration by the 11 Member States (excluding the UK) ensued, which was not binding on the Council, Commission or the Member States. An Action Programme[78] did, however, follow and the social dialogue Steering Committee was consulted by the Commission on all legislation proposed.[79]

On 16 September 1990 the ETUC and CEEP signed the "European Framework Agreement"[80] which had as its aim to enhance the Joint Opinions already agreed upon, in connection with public enterprises.[81] The notable absence of UNICE underlined its objection to the conclusion of European level agreements, especially if binding.

This uncooperative attitude of UNICE added to the pre-existing difficulties surrounding the dialogue. Despite the successful agreement of several Joint Opinions in this phase of the history of social dialogue, progress was limited due to the generality of their subject matter,[82] the fact that they were confined to topics geared towards economic integration[83] and their lack of binding legal status, with no requirement for the signatory parties to provide any follow up at national level.

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78 COM(89) 568, 19 November 1989.

79 Hepple, op cit, at 18.

80 "ETUC/CEEP European Framework Agreement", (1991) 205 EIRR, 30-31.

81 Rath, "The Co-ordinates of Trade Union Policy For Europe", in Lecher, *Trade Unions in the European Union*, London: Lawrence and Wishart, 1994, at 272 notes that this agreement was less significant for its content, more by the fact that "its opening page bore the (previously studiously avoided) term "agreement"."

82 Carley, op cit, at 124.

83 Davies, "The Emergence of a European Labour Law", in McCarthy, *Legal Intervention in Industrial Relations*, Blackwell, 1992.

The Maastricht Treaty

In May 1991 at the ETUC Congress Delors stated the Commission was open to a strengthening of the role of the social partners.[84] He suggested that framework agreements could be used as a mechanism for achieving Treaty aims. Surprisingly in October 1991, as a result of an ad hoc meeting between UNICE, CEEP and ETUC set up by the social dialogue Steering Committee, UNICE agreed with the other social partner organisations on a joint approach to the role of social dialogue which proposed this strengthened role for the social partners in the formulation and implementation of social policy. This agreement was submitted as a proposal[85] to the Presidents of the Council and Commission and the Inter-Governmental Conference on Political Union. The Commission put forward its proposals in May 1991 which included the extension of qualified majority voting in the area of social policy and called for a balance to be struck between regulation by legislation and by collective agreement. The agreement of UNICE demonstrated a significant change of heart with respect to the status of agreements conclude under the social dialogue. The agreement itself proposed, inter alia, that agreements concluded at Community level may be implemented either through national collective bargaining or be given legal status as a Council decision.[86] This shift in attitude may be attributable to the fact that, with legislation threatened in many social areas, UNICE saw joint regulation under the social dialogue as the lesser of two evils.[87]

The proposals of the social partners were incorporated almost verbatim in the Social Policy Agreement (SPA) agreed upon at the Maastricht European Council, 9-10 December. The SPA pledges to consult the social partners before taking measures in the

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84 See Editorial, "Social Partners and Social Policy", (1992) 2 JESP, 144-145 and Delors, "Defining the European Social Model", Report of speech to the ETUC, 7th Statutory Congress of the ETUC, Trade Union Information Bulletin 3/91.

85 Agreement of ETUC, UNICE and CEEP of 31 October 1991, Agence Europe 5603, 6 November 1991, 12, as set out in Annex 3 below.

86 Agreement of 31 October 1991, Art 118b.

87 Carley, op cit, at 25.

social policy field and lays down a procedure for doing so.[88] The SPA also allows a Member State to entrust the social partners with the implementation of Directives[89] and gives recognition to agreements concluded at European level, with the possibility of implementation by Council decisions.[90] However, the social partners agreement originally took the form of a proposal for amendments to Articles 118, 118a and 118b of the Treaty of Rome. The objections of the UK Conservative Government to any extension of action at Community level within the social policy field led to its "opting-out" of these provisions.[91] As a result the proposals of the social partners were adopted by only 11 of the, then 12, Member States within the SPA which stands outside the EC Treaty.[92]

At a subsequent meeting of the social partners on 3 July 1992 at the Palais d'Egmont, at the invitation of Delors, the CEEP, ETUC and UNICE held a social dialogue summit to examine the future operation of the mechanisms provided for in the SPA. A Joint Statement on the future of social dialogue was adopted[93] which declared, inter alia, the parties' "determination to give a high profile to the social dialogue" and that the existing Steering Group and ad hoc working group to be replaced by a Social Dialogue Committee.[94] Both the Commission and the social partners again confirmed their committment to the social dialogue by the opening of the European Centre for Industrial

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88 Art 3(1) SPA.

89 Art 2(4) SPA.

90 Art 4(2) SPA.

91 On the position of the UK see Towers, "Two Speed Ahead: Social Europe and the UK After Maastricht", (1992) 23 IRJ, 83-89.

92 On the motives of the 11 in agreeing to the Protocol and SPA see Lange, "Maastricht and the Social Protocol: Why did they do it?", (1993) 21 Politics and Society, 5-36.

93 Commission, Joint Opinions, European Social Dialogue Series, 1991.

94 The Social Dialogue Committee was created on 3 July 1992 and has since met on several occasions for discussions on the subjects of the Commission White Paper on "Growth, Competitiveness and Employment" (19 October and 30 November 1993 and 11 February 1994), the results of the European Council in Corfu (7 July 1994) and the conclusions of the Essen Summit (20 February 1995). For details see Commission, *Community Social Policy*, January 1996, 346-347.

Relations on 20 October 1995. This centre will serve as a focal point for research and training in social dialogue at European level.[95]

Conclusion

The SPA represents a significant increase in the status of the social dialogue at European level. The role of the social partners has evolved from one of narrow consultation within the ECOSOC to their current central role within the formulation and implementation of European social policy. However, judged in concrete terms the historical background to the social dialogue is not impressive with few examples of agreement between the social partners. Previous initiatives have revealed difficulties in identifying a role for the social dialogue and creating a forum which satisfies all parties. In addition problems have been encountered in securing any form of agreement between the two sides of industry and in attributing binding status to the few agreements concluded.

The social partners are now significant actors within the procedure for the creation and implementation of EU social regulation for the 14 Member State signatories of the SPA. The importance attributed to their views has been underlined by the creation of a formal, institutionalised, Treaty basis[96] outlining the procedure for social dialogue. The following three chapters detail the role accorded to the social partners within this new legislative procedure.

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95 Social Europe 2/95, at 8.

96 See Chapter 2 for a discussion as to whether the SPA forms an amendment to the EC Treaty.

Chapter 3

THE PROTOCOL AND AGREEMENT ON SOCIAL POLICY

Introduction

The difficulties encountered in achieving agreement with the UK on social policy at Maastricht resulted in the conclusion of a compromise solution unprecedented in the history of the Community. In an arrangement that constitutes an example of Europe *a la carte*[1] the Protocol on Social Policy, annexed to the amended Treaty of Rome, states that all of the, then 12, Member States agree to authorise the Member States in agreement[2] to "continue along the path laid down in the 1989 Social Charter".[3] In turn annexed to the Protocol, the SPA, which was signed by the, then 11, participating Member States, provides the necessary extension of legal bases in the social policy field so that they may achieve this objective. After the accession to the European Community of Austria, Sweden and Finland the Protocol and Agreement now apply to 14 Member States.[4]

The Protocol notes that the 14 are authorised to "have recourse to the institutions, procedures and mechanisms of the Treaty for the purposes of taking amongst themselves and applying as far as they are concerned the acts and decisions"[5] which give effect to the

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1 For a discussion of the problems associated with a "two-speed" Europe see Grabitz and Langeheine, "Legal Problems Related to a Proposed Two-Tier System of Integration Within the European Community", (1981) 18 CML Rev, 33-48; Ehlermann, "How Flexible is Community Law? An Unusual Approach to the Concept of Two-Speeds", (1984-5) Michigan Law Rev, 1274-1293 and Lipsius, "The 1996 Intergovernmental Conference", (1995) EL Rev, 235-267. See also Bercusson and Van Dijk, "The Implementation of the Protocol and Agreement on Social Policy of the Treaty on European Union", (1995) IJCLLIR, 3-32, at 5-6 who note the difference between Europe "*a la carte*" and the concept of a "two-speed" Europe.

2 With the exception of the UK.

3 Protocol, Preamble.

4 Council Decision 95/1, amending the Treaty of Accession OJ 1995 L 1/1, 1 January 1995. Although the Protocol itself refers to only 11 Member States, in the light of the above decision it will be treated as if it refers to the 14 Member States in agreement.

5 Protocol, para 1.

SPA. The SPA itself provides the 14 with a greater potential for social policy action than is available under the EC Treaty. Article 1[6] sets out new general objectives to be achieved through the adoption of measures under the legal bases set out in Article 2. This is followed up in Articles 3 and 4 by the creation of a two stage procedure for consultation with the social partners before the submission of proposals. The SPA states that the social dialogue may lead to "contractual relations, including agreements"[7] and enables the social partners to avoid the adoption of binding Community legislation by the conclusion of collective agreements amongst themselves.

The Protocol and SPA set out a framework for the operation of the new social policy competences and the social dialogue procedure. However, a subsequent Commission Communication[8] provides a detailed explanation as to how these competences are to operate in practice.

The Position of the UK

As far as the UK is concerned its representatives in the Council of Ministers "shall not take part in the deliberations and adoption by the Council of Commission proposals made on the basis of this Protocol and... Agreement".[9] In addition "acts adopted by the Council and any financial consequences other than administrative costs entailed for the institutions shall not be applicable"[10] to the UK. [11] With respect to participation in the

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6 All references are assumed to refer the SPA unless otherwise specified.

7 Art 4(1).

8 Communication concerning the application of the Agreement on social policy presented by the Commission to the Council and European Parliament, COM(93) 600 final, 14 December 1993, hereafter known as the "Communication".

9 Protocol, para 2.

10 Protocol, para 2.

11 However, in practice, many multinational companies covered by the Council Directive 94/45/EC, OJ L 254/64, 22 September 1994, the European Works Council Directive, have voluntarily included their UK employees. See Leighton, "Despite the Maastricht Opt-Out: The 'Europeanisation' of UK Employment Practices", in Caiger and Floudas, *1996 Onwards: Lowering the Barriers Further*, Wiley, 1996 and Southey, "Opt-Out Fails To Halt Spread of

Council of Ministers, therefore, the UK "shall not take part in the deliberations and the adoption by the Council of Commission proposals made on the basis of this Protocol and the above-mentioned Agreement". The Protocol also amends the voting majorities needed for qualified majority voting (QMV) and unanimity to exclude the UK. Although the British delegates are not necessarily forced out of the room, it seems they must remain passive in deliberations and votes on SPA issues.[12]

As far as members of other EC institutions are concerned the Protocol is silent, making no changes as to composition. British members of the Commission, the Court of Justice and the European Parliament are in no way restricted by the Protocol on the basis that they are not the chosen representatives of their country, as are representatives of the Council.[13] While this seems reasonable for members of the Court and the Commission it is questionable with respect to Members of the European Parliament who are directly elected by members of their own country. The European Parliament has, however, elected to allow members from the UK to participate.[14]

The European social partner organisations have national affiliations from all over Europe, including both the UK and countries which are not members of the European Union.[15] With respect to the social dialogue procedure of the SPA the organisations have made special arrangements. Although UNICE would "normally seek a consensus among its members" and "not adopt a position if this is contrary to the vital and truly justified interests of one of its members" it has amended its Statutes to take into account the social dialogue. Article 7.1 of these Statutes states that "any draft agreement negotiated in the

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Works Councils", Financial Times, 12 July 1995. Similarly, many UK companies have voluntarily accepted the standards set out in the Parental Leave Agreement. See Taylor, "EU Landmark Social Accord", Financial Times, 7 November 1995.

12 Falkner, "The Maastricht Protocol on Social Policy: Theory and Practice", (1996) 6 JESP, 1-16, at 9.

13 Watson, "Social Policy After Maastricht", (1993) 30 CML Rev, 481-513, at 503.

14 (1994) 241 EIRR, 3.

15 Membership of the ETUC, for example, includes national trade union confederations from Cyprus, Iceland, Malta, Norway, Switzerland and Turkey.

framework of the dialogue between the social partners"is to be "approved by the Association on the basis of consensus among all the members *affected by the agreement in question*" (my emphasis).[16] Within the ETUC reform of its internal structure took place in 1991.[17] The Constitution states that "the decision shall have the support of at least two thirds of the member organisations *directly concerned* by the negotiations" (my emphasis).[18]

Within the negotiations concerning the European Works Council Directive[19] it was, however, agreed that representatives of the British CBI and TUC should take part. Ironically, although not directly affected by the Directive, the negotiations broke down as a result of the British. The CBI withdrew from the negotiations with only days to go before the end of the second consultation phase. Under UNICE's rules the CBI could not be outvoted and in addition the ETUC had made the CBI's presence a prerequisite.[20] Without their presence any agreement to proceed with the negotiation phase was impossible.

Since then the role of the CBI has been changed by an internal agreement within UNICE and approved by the ETUC. Although the CBI may continue to participate in negotiations, it no longer has a veto and will not be bound by an agreement which it has not approved.[21] In the subsequent negotiations concerning the issue of parental leave the CBI took part in the UNICE team only as an observer.[22] However, following the conclusion of an agreement under Article 4(1) SPA, the ETUC is calling on the CBI to

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16 UNICE statutes, Art 7.8.

17 See Bercusson, *European Labour Law*, Butterworths, 1996, at 570.

18 Art 11b.

19 Op cit.

20 Falkner, ibid, at 7 and "Information and Consultation Talks Fail," (1994) 243 EIRR, 3-4.

21 Falkner, ibid, at 7.

22 "Social Partners Continue Talks on Parental Leave", (1995) 261 EIRR, 3.

negotiate with the TUC on implementing the agreement voluntarily.[23]

The UK's opt-out itself seems to have been intended as a temporary measure in the hope that agreement could be secured in the future. As such the Protocol can be compared to another Protocol concerning Economic and Monetary Policy from which the UK has also opted-out.[24] In the case of the latter Protocol, however, it is specified that the UK "may change its notification at any time...",[25] which would immediately render it bound by that Protocol's terms. Although a mechanism for opting-in is not specified in the Protocol on Social Policy it seems that, should the UK chose to do so,[26] the SPA would be accommodated as an amendment to the EC Treaty, as originally proposed.[27]

Is SPA Legislation "Community Law"?

The uniqueness of the construction of the Protocol and the SPA has fuelled much discussion as to its legality.[28] For our purposes this is relevant in so far as it relates to the

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23 EIRR, Dec 1995.

24 Protocol No 11 on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland.

25 Protocol No 11, ibid, para 10.

26 For example, if the UK Labour Party were to gain power at the forthcoming UK elections. Incorporation of the SPA into the main body of the EC Treaty is advocated by the Commission in Commission Report for the Reflection Group, Intergovernmental Conference 1996, Luxembourg, 1995, 48.

27 See Bercusson, "Social Policy at the Crossroads: European Labour Law After Maastricht", in Dehousse (ed), *Europe After Maastricht: An Ever Closer Union?*, Law Books in Europe, Munich, 1994.

28 See, for example, Barnard, *EC Employment Law*, Wiley, 1995, 65-67; Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces", (1993) CML Rev, 17-69; Rhodes, "The Future of the 'Social Dimension': Labour Market Regulation in Post-1992 Europe", (1992) 30 JCMS, 23-51; Blanpain & Engels, *European Labour Law*, Kluwer, 1993; Szyszczak, "Social Policy: A Happy Ending or A Reworking of the Fairy Tale?" in O'Keeffe & Twomey, *Legal Issues of the Maastricht Treaty*, Wiley, 1994; Whiteford, "Social Policy After Maastricht", (1993) 18 EL Rev, 202-222; Gold, "Social Policy: the UK and Maastricht",139 National Institute Economic Review, 95-103; "Maastricht and Social Policy - Part Two", (1993) 239 EIRR, 19-24; Fitzpatrick, "Community Social Law After Maastricht", (1992) 21 ILJ, 199-213; Weiss, "The Significance of Maastricht for European Community Social Policy", (1992) IJCLLIR, 3-14; Barnard, "A Social Policy for Europe: Politicians 1:0 Lawyers", (1992) IJCLLIR, 15-31; Bercusson, "Maastricht: A Fundamental Change in European Labour Law", (1992) 23 IRJ, 177-

legal status of acts adopted under the SPA.

Argument has centred on whether the Protocol and SPA are amendments to the Treaty of Rome and therefore form part of Community law or whether they are mere intergovernmental agreements. Article 239 EC states that Protocols annexed to the Treaty "by common accord of the Member States shall form an integral part thereof". The requirement for "common accord" is satisfied in the case of the Protocol since it was signed by all of the, then 12, Member States. The Protocol may therefore be regarded as forming part of the Treaty. However, a greater deal of controversy surrounds the status of the SPA. On the one hand since the SPA is annexed to the Protocol, it may be seen as part of the Protocol and therefore, as a logical conclusion, part of the Treaty.[29] As a result any measures adopted under the SPA will also form part of Community law.

On the other hand, Article 236 EC[30] states that any amendments to the Treaty must occur by "common accord" and that they can enter into force only "after being ratified by all the Member States." Since the SPA was not signed by the UK, it is arguable that it cannot therefore form an amendment to the Treaty.[31] In this case the SPA must take the form of an intergovernmental agreement, an assertion which seems to be corroborated by the Preamble to the Protocol which notes that the Member States in agreement are authorised to "have recourse to the institutions, procedures and mechanisms" of the EC Treaty. As the SPA covers matters within an existing field of EC competence, the Protocol may then serve as a vehicle for the necessary consent of the UK to the

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190; Bercusson, "Social Policy at the Crossroads", ibid; Bercusson and Van Dijk, op cit; Bercusson, *European Labour* Law, op cit; Falkner, op cit and European Parliament, Opinion of the Committee on Social Affairs, Employment and the Working Environment, Doc EN/RR/205692, PE 155.44/fin/Part II, at 69.

29 See the views expressed in Gold, ibid; "Maastricht and Social Policy - Part Two", ibid; Fitzpatrick, ibid; Whiteford, ibid, and Watson, op cit.

30 Art 236 EC was repealed as part of the amendments made by the TEU. Art N TEU now covers the subject of amendments to the Treaty in almost identical wording.

31 See the views expressed by Barnard, op cit, at 18.

arrangement.[32] Any measures adopted under this intergovernmental agreement would be governed by public international law, rather than EC law and would require ratification in each case by each national Parliament.[33]

The legal status of the SPA seems, therefore to depend upon its relationship with the Protocol. However, while the Protocol declares that the Agreement is "annexed"[34] to it, it does not detail the precise legal relationship between the two documents. Since the arrangement is unprecedented within the history of the Community, the issue must, at present, remain unsettled.

Where the Social Chapter is considered to constitute an amendment to the EC Treaty, SPA directives can be defined by Article 189 EC as measures "binding, as to the result to be achieved". As such, in principle, individuals may enforce their Community rights by reliance on national implementing measures[35] and the remedies available at Community level. In the case that the SPA is instead an intergovernmental agreement, it has been argued that references to "directives" and "decisions" may not refer to their EC Treaty counterparts as defined by Article 189 EC and the attendant case law of the Court of Justice, or be consistent with them.[36] However, the Preamble to the Protocol states that "this Protocol and the said Agreement are without prejudice to the provisions

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32 See Opinion 1/76, *Re Draft Agreement Establishing a European Laying-up Fund for Inland Waterway Vessels*, [1977] ECR 741 which states that international agreements not involving all of the Member States in areas of Community competence constitute "a change in the internal constitution of the Community... not compatible with the requirements of unity and solidarity" (para 27). Such an agreement can only take place will the consent of the remaining Member States. See also Bercusson, "Social Policy at the Crossroads", op cit, at 158.

33 Fitzpatrick, op cit, 202; Falkner, op cit, 2.

34 Protocol, Preamble.

35 Case 6/60, *Humblet v Belgium,* [1960] ECR 559; and Case 13/68, *Salgoil v Italian Ministry for Foreign Trade*, [1973] ECR 453.

36 See the view of Eric Forth MP in House of Lords Select Committee on the European Communities, 7th Report, Session 1991-92, "Social Policy After Maastricht," HL Paper 42, HMSO, 1992, at 20 that a "Directive" adopted under the SPA would be a "*self-styled* Directive agreed by the 11, enforceable in the 11 countries but not Community law as such." See also Curtin, op cit, at 58. This argument is given extra weight in view of the confusion over the meaning of "decision" as used in Art 4(2) SPA and discussed below.

of this Treaty, particularly those which relate to social policy which constitute an integral part of the 'acquis communautaire'" and the Preamble to the SPA purports to implement the 1989 Social Charter "on the basis of the 'acquis communautaire'".[37] It is submitted that even if the SPA merely "borrows" the EC institutions, it also borrows its attendant principles and case law. Whether or not the SPA forms an amendment to the EC Treaty or an intergovernmental agreement, an individual may therefore be equally protected by both EC Treaty directives and SPA directives.[38]

Challenging the Status of the Protocol and Agreement

Although the European Court of Justice has expressed an Opinion upon the European Economic Area (EEA) Treaty,[39] it seems unlikely that a similar challenge could be made to the legal status of the SPA. The Opinion on the EEA was only possible since it was an agreement between the Community and an international organisation under Article 228 EC. The Commission was therefore able to obtain the opinion of the Court of Justice under the express power given to it in Article 228(6) EC. There is no similar express power in the Treaty which deals with the challenge to acts under Article 239 EC.

Grounds may, however, exist for a challenge based on the fact that the UK's opt-out is unconstitutional as inconsistent with EC Treaty principles.[40] The potential divergence in the rights of British workers and workers elsewhere in the Community seems to be in conflict with the requirement of Article 6 EC that "any discrimination on grounds of nationality shall be prohibited"[41] and possibly also with the concept of citizenship as

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37 See Gialdino, "Some Reflections on the Acquis Communautaire", (1995) 32 CML Rev, 1089-1122.

38 See Chapter 5.

39 Opinion 1/91, *Re the Draft Treaty on the European Economic Area,* [1992] 1 CMLR 245.

40 Barnard, *EC Employment Law*, op cit, 67.

41 European Parliament, Opinion of the Committee on Social Affairs, Employment and the Working Environment, op cit, at 69.

outlined in Article 8 EC.[42] Alternatively, the UK's opt-out may distort EC competition policy[43] by putting the Member State signatories to the SPA at a competitive disadvantage in comparison to the UK.[44]

Since the President of the Commission, Jacques Delors, was instrumental in the creation of the Social Chapter and in view of the responses of the Commission to Parliamentary questions[45] it seems unlikely that such a challenge would emanate from the Community institutions. It seems more likely that a challenge would come from a third party employer or trade union, if at all.[46]

Irrespective of legal arguments, in practice it seems that the will of the actors[47] involved may have prevailed.[48] The Council and Commission have replied to questions from the European Parliament stating that measures based on the SPA are regarded as part of Community law.[49] In addition the European Works Council Directive [50]and the Directive on Parental Leave[51] have both been adopted without any challenge to their legal status or basis. Also on the basis of the SPA the Council has adopted a Resolution on certain

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42 Gold, "Social Policy: The UK and Maastricht", op cit, at 100.

43 Arts 85-94 EC.

44 Barnard, "A Social Policy For Europe: Politicians 1:0 Lawyers", op cit, at 21 and Gold, "Social Policy: The UK and Maastricht", op cit, at 100.

45 See above, note 25.

46 Gold, "Social Policy: The UK and Maastricht", op cit, at 100.

47 Blanpain & Engels, op cit, at 231 note that there is no doubt that the political will of the Member States was that the Agreement should belong to Community law.

48 Falkner, op cit, at 2.

49 OJ 1992 C 289/20, 5 November 1992, OJ 1993 C 40/12, 15 February 1993 and OJ 1993 C 95/17, 5 April 1993.

50 Op cit.

51 Council Directive 96/34/EC on the Framework Agreement on Parental Leave Concluded by UNICE, ETUC and CEEP, OJ 1996 L 145, 19 June 1996..

aspects for a European Union Social Policy,[52] and the social dialogue procedure has been initiated on the subjects of part time and temporary workers,[53] the burden of proof in the case of sex discrimination,[54] national information and consultation[55] and sexual harassment,[56] again without challenge.

The Legal Bases for Social Policy Action

The Protocol notes that both it and the Agreement are "without prejudice" to the provisions of the EC Treaty.[57] Community social policy is now "subject to two free standing, but complementary frames of reference".[58] Acts may therefore be proposed under either the EC Treaty or the SPA.

Social policy action under the EC Treaty has been limited by its legal bases and voting requirements.[59] Article 118 EC provides that the Commission shall have the task of "promoting close cooperation between Member States" in matters relating to, inter alia,

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52 Council Resolution on Certain Aspects for a European Union Social Policy: A Contribution to Economic and Social Convergence in the Union, op cit.

53 The first stage of consultations took place between 27 September and 8 November 1995 (see Agence Europe 6572, 28 September 1995, 15 and (1995) EIRR 262, 3). Negotiations on an agreement opened on 4 July 1996 (see Agence Europe 6754, 22 June 1996, 14 and Agence Europe 6763, 4 July 1996, 15).

54 The first stage of consultations took place between 5 July and 16 August 1995 (see Agence Europe, 6516, 6 July 1995, 15). The second stage began on 7 February 1996 (see Agence Europe 6662, 8 February 1996, 13). However, the social partners decided not to open negotiations on this subject because of the considerable divergence remaining between them (see Agence Europe 6773, 18 July 1996, 13). The Commission has subsequently adopted a draft proposal for a Council Directive on the burden of proof in case of sex discrimination based on Art 2(2) SPA (see Midday Express, http://europa.eu.int, 18 July 1996).

55 The first stage of consultation was initiated by the Communication From the Commission on Worker Information and Consultation, COM(95) 547 final, 14 November 1995, Part I, para 3. See also "Social Policy State of Play", (1996) 264 EIRR, 14-20, at 15.

56 Agence Europe 6778, 26 July 1996, 8.

57 Protocol, Preamble.

58 Communication, ibid, para 8.

59 Roberts, op cit, at 3.

employment, labour law and working conditions and the right of association and collective bargaining between employers and workers. However, the Commission's role does not involve the proposal of binding legislation in these areas.[60]

A legal base is provided for the enactment of such Directives in Article 118a EC. Here directives are subject to qualified majority voting[61] only, but are limited to "encouraging improvements, especially in the working environment, as regards the health and safety of workers".[62] Although Article 100a allows QMV for matters concerning the "approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishing and functioning of the internal market", Article 100a(2) states that this may not apply to "the rights and interests of employed persons". In industrial relations areas other than health and safety therefore, including the areas set out in Article 118 EC, the Commission has been forced to rely on Article 100 EC[63] which provides for "directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market" and Article 235 EC[64] which allows the Community to act where "necessary to attain... one of the objectives of the Community" where the Treaty has not provided such powers. However, action under both Articles 100 and 235 EC is restricted by the requirement of unanimity in Council.[65]

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60 Art 118 EC states that the role of the Commission is to "act in close contact with Member States by making studies, delivering opinions and arranging consultations..." See Roberts, ibid, at 3, who characterises the Commission as having a "liaison, consultation and promotional role..."

61 Hereafter known as "QMV".

62 Art 118a, para 1. Directives adopted on the basis of Art 118a EC include Council Directive 89/391/EEC, OJ 1989 L 183/1, 12 June 1989 (Health and Safety) and the Directive 93/104, OJ 1994 C 3-7/18, 23 November 1993 (Working Time). See also Case C-84/94, *United Kingdom v Council of the Euuropean Union*, judgment of 12 November 1996.

63 Directives enacted on this basis include Council Directive 75/129, OJ 1975 L 48/29, 17 February 1975 (Collective Redundancies); Council Directive 77/187, OJ 1977 L 61/27, 14 February 1977 (Transfer of Undertakings) and Council Directive 80/987, OJ 1980 L 283/23, 20 October 1980 (Insolvency).

64 Art 235 EC was cited as a legal basis for Council Directive 86/378, OJ 1986 L 225/40, 24 July 1986 (Equal Treatment in Occupational Social Security Schemes).

65 For a review of the use of EC Treaty legal bases see Lo Faro, "EC Social Policy and 1993: The Dark Side of European Integration", (1992) 4 Comparative Labor Law Journal, 1-32.

Unlike Article 118a EC, Article 1 SPA notes that both "the Community and Member States shall implement measures." The objectives laid down in Article 1[66] are wider than those laid down in Article 118 EC, therefore allowing more scope for Community action. Article 2 lists the areas in which the Council may enact legislation in the social field. The Council may adopt Directives by QMV in the fields of "improvement in particular of the working environment to protect workers' health and safety,[67] working conditions, the information and consultation of workers, equality between men and women with regard to labour market opportunities and treatment at work (and) the integration of persons excluded from the labour market."[68] All of the above areas except health and safety provisions are restricted by the requirement of unanimity under the EC Treaty. Also, within the subject-matter covered, the scope of "working conditions" could prove particularly wide, potentially covering all areas of labour regulation except for those specified in Articles 2(3) and 2(6).[69]

Article 2(3) provides that unanimity is, however, required for action concerning "social security and social protection of workers, protection of workers where their employment contract is terminated, representation and collective defence of the interests of workers and employers, including co-determination,... conditions of employment for third-country nationals legally residing in Community territory (and) financial contributions for

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66 Art 1 lists as objectives "the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combatting of exclusion".

67 The CEEP has expressed concern that the SPA may represent a regression in the standards of regulation applying to health and safety. While Art 118a EC referred to "harmonisation of conditions", Art 2 SPA merely requires the Community to "support and complement the activities of the Member States" (European Report 2016, 15 February 1995. European Parliament, Opinion of the Committee on Social Affairs, Employment and the Working Environment, ibid, at 69 also regrets the abandonment of the concept of "levelling up".

68 Art 2(1).

69 Gold, "Social Policy: The UK and Maastricht", op cit, at 9, Lange, "Maastricht and the Social Protocol: Why Did They Do It?", op cit, at 10 and Opinion of Committee on Social Affairs, Employment and the Working Environment, op cit, at 69. Bercusson, "Maastricht: A Fundamental Change in European Labour Law", op cit, at 183, notes that the apparent overlap between the fields of competence may give rise to much debate as to the correct legal basis to be used when measures are proposed by the Commission.

promotion of employment and job creation...".[70] Even taking into account this requirement of unanimity it seems that without the UK's veto there is potential for more action. Article 2(6) excludes from the scope of the SPA[71] action concerning "pay, the right of association, the right to strike or the right to impose lock-outs."[72]

These legal bases are expressly significantly wider than under the EC Treaty. However, given the political will of the Member State governments within the Council of Ministers, Article 100 EC could cover all the areas of potential action set out in Article 2 SPA. Since the Protocol notes that the SPA is "without prejudice to the provisions of this Treaty"[73] (ie the EC Treaty) there seems to be no reason[74] why even the matters excluded from Article 2(6) could not be proposed under the EC Treaty. In this respect it could be argued that the legal competences set out in the SPA are, in fact, narrower than the EC Treaty which does not exclude these subjects from potential Community action.[75]

It is, however, the enlarged use of QMV which may provide the greatest step forward under the SPA since it removes the power of veto of any one Member State. It may also raise the standards of social protection of measures adopted. Without the requirement for unanimity there is less need to make compromises which dilute the content of proposals to the lowest commonly accepted standard.[76] The Protocol specifies[77] that an amended

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70 Art 2(3).

71 However, see the view of Bercusson, *European Labour Law*, op cit, at 546-547 who states that exclusion of subjects under Art 2(6) from "this Article", ie Art 2, may mean that the competences are not excluded form Arts 3 and 4.

72 European Parliament, Opinion of Committee on Social Affairs, Employment and the Working Environment, op cit, at 69 states that it is regrettable that fields as important as the right to strike and the right to remuneration have been excluded from the SPA.

73 Protocol, Preamble.

74 However, see Weiss, op cit, at 6, who argues that the Art 2(6) areas have been excluded completely from the competence of the Community.

75 Davies, op cit, at 348.

76 Roberts, "Industrial Relations and the European Community", op cit, at 3.

77 Protocol, para 2.

version of the system for QMV to that laid down in Article 148(2) EC is to apply so as to take into consideration the UK's opt-out. The 10 votes allocated to the UK[78] have simply been subtracted from the equation, so that the required majority is 52 out of a total of 77 votes under the SPA.[79] This means that a qualified majority now potentially corresponds to the support of only 6 out of the 14 Member States.[80] The strength of the blocking minority required to reject a measure[81] may accelerate progress even in controversial areas.

Without the presence of the UK it is more likely anyway that unanimous support may be found in many areas since 11 of the Member States have made at least a political commitment to strengthening social policy by signing the Social Charter.[82] However, the opinions of the 3 new accessions, Finland, Sweden and Austria, are not known.[83] In addition, since the British veto has been so predictable the true reservations of other Member States may have been discreetly hidden during previous negotiations on particular issues.[84] QMV may yet, therefore, provide a useful tool for gaining agreement between the 14.

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78 Art 148(2) EC.

79 Barnard, *EC Employment Law*, op cit, at 68.

80 Lo Faro, op cit, at 29.

81 Kellner states that "without Britain playing the role of the licensed sceptic, there will be few, if any, occasions when that figure will be reached. The worried, poorer states - Spain, Portugal, Greece and Ireland - have a combined strength of only 21 votes: without Britain, they lack the muscle to block any measure the rest want to enact," in "Maastricht, Where Major Made His Big Mistake" The Independent, 13 December 1991.

82 Without the agreement of the UK, the Social Charter took the form of a Solemn Declaration rather than a legally binding instrument. See, for example, Vogel-Polsky, "What Future is there for a Social Europe Following the Strasbourg Summit?", op cit.

83 See Nielsen, *Employers' Prerogatives*, Copenhagen: Handelshojskolens Forlag, 1996.

84 Teague, "Constitution or Regime?", op cit, at 317 and Whiteford, "W(h)ither Social Policy?", op cit, 114.

Without the possibility for the initiation of substantial social action, however, it is premature to talk of the possibility of large-scale adoption. Until now, initiatives have been dependent on the Commission's conception of the need for legislation in any particular area and of the nature of the subsequent proposal made to the Council. To some extent Article 4 relieves the Commission of this monopoly by creating the potential for the social partners to bargain independently on matters which later may be converted into binding European legislation.[85] However, UNICE has adopted a restrictive attitude, insisting that negotiations on Community level agreements should only follow a formal Commission initiative.[86]

This position reflects the minimalistic attitude of UNICE to the whole social dialogue process. As an organisation representing European employers, its interests in social policy are essentially negative, preferring free markets to inhibiting regulation.[87] In view of its previous consistent opinion that social matters should be left to national legislation and bargaining, the surprise agreement of UNICE to participate in the social dialogue[88] at all may have been more to do with a preference for an arrangement which they could directly influence rather than systematic legislation they could not.[89] On the trade union side, however, there also seem to be reservations. The ETUC has indicated a preference for collective bargaining at the sectoral level, rather than interprofessional.[90] It seems

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85 Article 4(2) allows agreements between the social partners to be implemented by a Council decision on a proposal from the Commission. See Chapter 4.

86 Hall, "Industrial Relations and the Social Dimension of European Integration: Before and After Maastricht" in Hyman and Ferner (eds), *New Frontiers in European Industrial Relations*, Blackwell, 1994, 305 and Rath, op cit, at 271.

87 Streeck, ibid, at 170; Teague, "Constitution or Regime?", op cit, at 312 and Spyropoulos, "Labour Law and Labour Relations in Tomorrow's Social Europe", op cit, at 745.

88 Agreement of October 31 1991, as set out in Annex 3 below.

89 Streeck, op cit, at 170.

90 "European Collective Bargaining - ETUC Strategy", ETUC, 1993. On this point see Hall, "Industrial Relations and the Social Dimension of European Integration", op cit, at 305.

unlikely for the present that the impetus for European regulation will originate from the social partners.

The use of the SPA therefore depends to a large extent on a Commission initiative for binding legislation. The ambitious proposals for labour protection enunciated by the 11 in the Social Charter[91] would suggest that, less restricted by the UK's veto, the 14 would be keen to pursue an intense policy of labour regulation under the SPA. However, it seems that the Commission's increasing concerns with the level of unemployment within the EC[92] have encouraged a focus more oriented towards competitiveness than a high level of employment protection.

The Commission's Medium-Term Social Action Programme 1995-97[93] picks up the themes of the two White Papers which preceeded it, *European Social Policy - A Way Forward for the Union*[94] and before that *Growth, Competitiveness and Employment*[95]. Both of these White Papers highlighted the problems within the EC of high and persistent unemployment, low growth rates and increased competition from outside the Community. Attention was drawn to the need to develop a social policy which respected competitiveness and which took special account of the problems facing small and medium-sized enterprises.[96] The conclusions of the Essen summit[97] again focussed on the issue of unemployment, requesting the Employment and Social Affairs Council and the Commission to closely monitor Community employment trends.

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91 Op cit.

92 See Annex 2 below.

93 COM(95) 134, 12 April 1995, hereafter referred to as "SAP".

94 COM(94) 333 final, 27 July 1994.

95 COM(93) 700 final, 5 December 1993.

96 Burrows and Mair, op cit, at 10.

97 Bulletin of the EU, 12-94.

Respecting these concerns the Social Action Programme for 1995-97 laid stress on the fact that the creation of jobs is "top priority" and that "a new balance must be achieved between the economic and social dimensions, in which they are treated as mutually reinforcing, rather than conflicting objectives".[98] The practical consequences of this new "mutually enforcing" objective seems to be less and less binding regulation.

The Action Programme itself set out few new binding legislative proposals in comparison with the Social Charter Action Programme[99] which had proposed 17 new directives. The introduction observed that "there is at present less scope, or need, for a wide-ranging programme of new legislative proposals".[100] Instead the Commission intends to increase its action in the areas of analysis and research and initiate a wide range of debates and studies on particular issues.[101] Non-binding solutions will also be found to the problems of homeworking, flexibility and work organisation and illegal work[102] in the form of Recommendations, Communications and Green Papers. Only two brand new legislative initatives are proposed concerning the establishment of a general framework to protect individual rights acquired in occupational or supplementary pension schemes for migrant workers[103] and on health and safety risks from explosive atmospheres.[104] Where the Action Programme did set out initiatives these were mostly concerned with unresolved issues, many dating back to the 1989 Social Charter Action Programme.

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98 SAP, op cit, at 9.

99 COM(89) 568.

100 SAP, op cit, at 10.

101 SAP, ibid, at 10.

102 SAP, ibid, at 19.

103 SAP, ibid, at 3.1.1.

104 SAP, ibid, at 4.2.6.

The SPA and the EC Treaty

The proposal of action under the SPA invites the potential for regulation which affects only 14 Member States. Article 3(1) imposes upon the Commission "the task of promoting the consultation of management and labour at Community level". However, this obligation does not seem to have been interpreted as compelling the Commission to consider themselves primarily bound by the SPA, rather than Articles 117-121 EC.[105] Instead the Commission has treated the SPA as an alternative legal base.

Although it is clear that the SPA has been and will be made use of when necessary[106] the Commission has shown some initial reservations about the proposal of action affecting only 14 Member States. There is obvious reluctance in the proposal of measures which advance the creation of a "two speed Europe" and which add to the anxiety concerning "social dumping".[107] The Commission White Paper, *The Future of Social Policy*[108] expressed the wish that standards should be developed "for *all* members of the Union" and the Commission's Communication confirms that one of the main considerations to be taken into account in deciding whether to initiate action under the SPA is "the possibility for all 12 [now 15] Member States to move forward together" under the EC Treaty.[109]

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105 Weiss, op cit, 6 is of the opinion that Art 3(1) does impose such an obligation. Bercusson, "Social Policy at the Crossroads", op cit, 165 questions whether the social partners could challenge the legal basis of a Directive adopted under the EC Treaty rather than the SPA as unnecessarily excluding them. This may apply to the Directive on Posted Workers, recently adopted by qualified majority under the EC Treaty. See (1996) 545 IRLB, 16.

106 "Although it is preferable to take decisions which are valid in all 12 [now 15] Member States, the procedure of the Social Protocol will be followed whenever necessary", Statement of Social Policy Priorities of the Belgian Presidency, (1993) EIRR 235, August 1993. See also Commission White Paper, *European Social Policy -A Way Forward for the Union*, op cit, in which the Commission argues that the desire for the UK's participation cannot be used as an excuse for standing still.

107 "Maastricht and Social Policy - Part Two", op cit, at 24. On social dumping generally see Erickson and Kuruvilla, "Labor Costs and the Social Dumping Debate in the European Union", (1994) 48 Industrial and Labor Relations Review, 28-47.

108 Op cit.

109 Communication, para 8.

Padraig Flynn, Commissioner responsible for Social Affairs, has stated that the SPA will therefore be used as "an instrument of last resort".[110] Until recently proposals for action have first been drawn up under the EC Treaty. Attempts to involve all Member States by basing social policy under the EC Treaty, in most cases requires unanimity in the Council.[111] The presence of the UK ensures considerable compromise and lowering of standards of social protection in any measures adopted on this basis.[112] The European Parliament has indicated that it is unsatisfied with this arrangement since it would prefer "a good directive by 11 [now 14] countries to a bad one by 12 [now 15]"[113] The Council Report on the Functioning of the Union has also revealed discontent.[114] The proposal on the subject of part-time and temporary workers, for example, was reduced to a "bare bones minimum measure"[115] in order to attempt to gain the agreement of the UK.[116]

Irrespective of the compromises that have to be made in the form of lowering of standards due to the requirement of unanimity under Article 100 EC and the presence of the UK in deliberations, it has seemed that action under the EC Treaty is to be preferred. Only when it has been made clear that any form of action was impossible as 15 has a second attempt been made at adoption by proposal of a similar measure under the SPA.

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110 CBI conference on the future of EC Social Policy, 14 October 1993. See also Council Resolution on Certain Aspects for a European Union Social Policy: A Contribution to Economic and Social Convergence in the Union, op cit, para 12 and Commission Report for the Reflection Group, Intergovernmental Conference 1996, Luxembourg, 1995, at 48.

111 Art 100 EC.

112 Szyszczak, "Future Directions in European Union Social Law", (1995) 24 ILJ, 19-32, at 23.

113 Agence Europe, 15 January 1994, 8.

114 Council Report on the Functioning of the Union, SN 1821/95, 14 March 1995, point 41.

115 Padraig Flynn, as quoted by Taylor, in "UK Blocks Part-Time Work Directive", Financial Times, 7 December 1994. See also Agence Europe 6373, 8 December 1994, 15.

116 European Report 475, 2 December 1994 notes that the German Presidency divided up the texts concerning part-time workers into Resolutions with derogatory clauses in order to the make them more palatable to the UK. See also "Portillo 'Trick' Astonished EU", Financial Times, 8 December 1994.

While the present UK Conservative Government remain in office, however, it seems unlikely that agreement will be reached on social policy proposals[117] under the EC Treaty irrespective of the compromises made since the UK are opposed to extending the social dimension *in principle*, rather than opposed to specific directives or their specific substantive content. Measures rejected under the EC Treaty are then forwarded for proposal under the SPA.

There are, however, signs that the Commission's "last resort" policy may be changing. Since the episode concerning the directive on part-time workers the Commission has referred matters under the SPA on a further two occasions. In the case of the first proposal, concerning national information and consultation of workers, the Commission has issued a Communication which serves to consult the EU institutions and the social partners for the purposes of the EC Treaty as well as signalling the start of the first consultation of the social partners under the SPA.[118] In the case of the subsequent proposal on sexual harassment the Commission has been prepared to go further by proposing action solely and primarily on the basis of the SPA.[119]

However, since the proposal of action under the SPA does not affect all Member States and guarantees an opportunity for the social partners to conclude a collective agreement on the proposed subject, there may be issues which are better suited to adoption under the EC Treaty,[120] additional to maintaining a coherent social policy within the Community. For example, in the case of the Directive on Posted Workers the Commission indicated that, if agreement was impossible under the EC Treaty, it would be prepared to propose action under the SPA. This draft directive was aimed at ensuring that workers posted to

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117 Except, perhaps, those concerning health and safety in the workplace.

118 Communication from the Commission on Worker Information and Consultation, ibid, Part I, para 3. See also "Social Policy State of Play", (1996) EIRR 264, 14-20, at 19. The UK Conservative government has since rejected outline proposals from the Commission on this subject. See Taylor and Parker, "Lang Rejects EU Proposal" Financial Times, 23 May 1996.

119 Agence Europe 6778, 26 July 1996, 8.

120 Cullen and Campbell, "The Future of Social Policy-making in the European Union", in Craig and Harlow, *Lawmaking in the European Union*, Butterworths, forthcoming.

another Member State were given the same rights within the host State as home workers. Since the main source of such workers is the United Kingdom, the adoption of a directive by only 14 Member States under the SPA would have avoided much of the problem.[121] The draft Directive on the burden of proof in the case of sex discrimination[122] raised other problems. The directive addressed questions concerning the procedure of the Court of Justice, rather than issues which directly affected the day to day functioning of the members of the social partner organisations. Although the problem raised moral and social questions on which the social partner organisations should have been allowed to comment, it is arguable that such an issue was unsuitable as the subject of a collective agreement and hence a procedure should never have begun in which such an outcome was possible.

Conclusion

The SPA provides the opportunity for the 14 to adopt amongst themselves a substantial body of Community social law (or at least measures which may be treated as Community law). Although the social policy competences set out in the SPA are not substantively wider than those of the EC Treaty, the chance of their adoption is greater due to the absence of the UK from negotiations. Since UNICE have made it clear that they are unwilling to negotiate on an agreement without the impetus of a Commission proposal, it seems that the Commission has in practice retained its monopoly over the regulatory initiative. The latest Social Action Programme has revealed that the Commission is hesitant about the proposal of large scale social action due to concerns over the high levels of unemployment within the Community. Many of the proposals it has made have concerned outstanding issues, previously rejected by the UK. Even where proposals have been made, preference has been shown for action by all Member States under the EC Treaty, rather than by the 14 under the SPA.

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121 However, a qualified majority did in fact agree upon the draft Directive on Posted Workers. See (1996) 545 IRLB, 16.

122 Agence Europe 6773, 18 July 1996, 13.

The Commission's policy seems to have been to use the SPA as a "clearing house", a mechanism to be used as a last resort by which to secure the adoption of the UK's rejected measures. However, this policy is open to criticism since it ensures a narrow use of the SPA based on the EC Treaty, ignoring the fact that Article 1 sets out fresh social policy objectives for the 14. If the Commission were to adopt a more realistic attitude and accept the fact of the UK veto it could develop a more strategic social policy geared towards effective protection rather than possibilities for British acceptance.[123]

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123 Hall, "Industrial Relations and the Social Dimension of European Integration", op cit, at 303.

Chapter 4

CONSULTATION AND NEGOTIATION UNDER THE SOCIAL POLICY AGREEMENT

Introduction

Article 3 provides for a two-stage consultation procedure[1] with the social partners, the first stage on the "possible direction" of Community action and the second on "the content of the envisaged proposal". It is on the occasion of this second consultation procedure that the social partners may decide to begin negotiations under Article 4 in an attempt to conclude an agreement between themselves. This role potentially allows the social partners to exert great influence over the formulation of Community social legislation.

The consultation procedure adopted in the SPA was based almost word for word on the October 1991 Agreement of the social partners[2]. However, when this agreement was concluded the UK opt-out had not been considered. The opt-out affects the nature and quality of the social dialogue and will impact on the probability of the conclusion of agreements and their content. This chapter aims to show that a meaningful consultation and negotiation process between the social partners may be jeopardised by the Commission's reaction to this opt-out.

The Consultation Process

Article 3(2) states that "before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action". The Commission's Communication sets out clearly how this is to

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1 See "Operational Chart Showing the Implementation of the Agreement on Social Policy", reproduced in Annex 4, below.

2 See Annex 3, below.

occur. The consultation is initiated on receipt by each of the social partner organisations of a letter from the Commission outlining the proposed area for action. The parties then have six weeks within which to reply. Replies may be made individually by letter or, if the social partners so desire, an ad hoc meeting may be convened for the discussion of these issues.[3]

In the light of comments received in this first consultation stage the Commission must then decide whether to proceed to the second phase in which the social partners are consulted on "the *content* of the envisaged proposal".[4] The second phase of consultation is again initiated by the receipt of a letter from the Commission setting out the content of the planned proposal together with an indication of its possible legal basis.[5] The duration of this second phase is also set at 6 weeks. The social partners should then deliver to the Commission in writing and where they so wish through the convening of an ad hoc meeting, an opinion setting the points of agreement and disagreement in their respective positions on the draft text.[6]

The timing of the first stage of the consultation process, "*before* submitting proposals in the social policy field",[7] implies that it was intended that the social partners contribute to the very earliest stages of policy-formation. The earlier in the process of development of a proposal the social partners can participate the greater their potential influence over the principles and theories on which the proposal is based. The October 1991 Agreement referred to consultation "on the possible guidelines" for Community action.[8] Article 3(2) SPA refers to the "*possible direction*" of Community action. In its Opinion on the

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3 Communication, op cit, para 19.

4 Art 3(3).

5 Communication, op cit, para 19.

6 Communication, ibid, para 19.

7 Art 3(2).

8 October 1991 Agreement, op cit, Art 118a(1).

Communication[9] ECOSOC was concerned that this latter wording permitted several meanings, allowing the social partners greater or lesser influence: first, that no decision with regard to the broad issues contemplated had yet been taken by the Commission and that there were still alternatives to be canvassed, second, that the Commission had short-listed several possible directions for Community action which the social partners were to discuss and third, that consultation was limited to a critique of the Commission's chosen direction for Community action. Reports indicate that in reality the first consultation approximates to the third interpretation,[10] offering the social partners the least possible influence.

With regard to the second consultation document on the "*content*" of the envisaged proposal the Communication clearly contemplates that the content of these second documents should include a "draft text", "setting out the content of the planned proposal together with an indication of the possible legal basis",[11] to which the social partners can respond in the form of an opinion or, where appropriate, a recommendation.[12]

Back to the Drawing Board?

At present both consultation documents do, however, seem to represent something of a fiction. As has already been pointed out in Chapter 3, the issues thus far referred to the social partners have concerned subjects on which considerable Community attention has

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9 CES(94) 1310, 24 November 1994, para 3.1.4.

10 Agence Europe 6572, 28 September 1995, 15 reports that on the issue of part-time and temporary workers the social partners were invited to comment on the Commission's views that part-timers should have the same rights as full-time workers. For reports on the consultation papers issued in the cases of the European Works Council Directive, parental leave, the burden of proof in the case of sex discrimination and national level information and consultation see (1994) 241 EIRR, 3, Agence Europe, 22 February 1995 and Agence Europe 6516, 6 July 1995, 15, and Communication from the Commission on Worker Information and Consultation, op cit, respectively.

11 Communication, op cit, para 19.

12 Art 3(3) SPA.

already focussed,[13] in the form of legislative proposals which have not been adopted, largely due to the veto of the UK. These issues have therefore already been formulated into detailed legislative drafts for proposal under the EC Treaty. In addition the European Parliament will have been consulted under Article 235 EC and, for measures based on Articles 100 and 118a EC, this consultation requirement will have already extended to the social partners as part of ECOSOC. The Communication recognises the existence of such proposals and states that in the case that they are resubmitted under the legal basis of the SPA "the Commission will do everything possible... to ensure that work already done is being taken into account and thus to speed up the consultative process".[14]

Irrespective of the timing of the first consultation document it may be impossible for the social partners to participate in the formulation of general theories and principles underlying any proposal which has already been composed in connection with previous submissions under legal bases in the EC Treaty. Similarly at the second consultation stage it may be difficult for the social partners to go back to the drawing board when a detailed legislative proposal already exists.[15]

In the case of the European Works Council Directive,[16] for example, the original proposal,[17] which was developed as part of the Social Charter Action Programme, was heavily debated and amended after Opinions by ECOSOC and the European Parliament[18] before submission to the Council of 12 under Article 100 EC. It was against the background of this detailed proposal that the Social Partners were subsequently consulted on the "possible direction" of Community action, a seemingly impossible task

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13 "Social Europe: A New Agenda", (1996) Labour Research, March, 23-25 and "Social Policy State of Play", (1995) EIRR, 26-30, at 29.

14 Communication, op cit, para 8.

15 This problem was compounded in the case of the discussions on parental leave since the second consultation document closely followed the draft compromise Directive drawn up by the Belgian Presidency in order to attract the vote of the UK. See (1995) 258 EIRR, 3

16 Op cit.

17 COM(90)581 final, OJ 1991 C 39, 15 December 1991.

18 OJ 1991 C 336, 31 December 1991.

considering the already advanced state of existing documentation. Similarly previous failed EC Treaty proposals exist concerning parental leave,[19] part-time and temporary workers[20] the burden of proof in the case of sex discrimination[21] and national information and consultation of workers.[22] Although no legislative proposals have been drawn up on the subject of sexual harassment, there exists at Community level a Commission Recommendation on the subject, which may have the same effect.[23]

Padraig Flynn seems to have recognised the problem in the document submitted for consultation under Article 3(2) on the subject of the Reconciliation of Working and Family Life.[24] In its text[25] the Commission sought to widen the area for discussion to take into account more than simply the issue of parental leave, as had previously been proposed. The suggestion was made that other issues such as schemes which take into account the needs of parents with children, the need for widespread child care arrangements and greater flexibility in the organisation of work to allow men to participate in the family upbringing should be considered. However, the first consultation phase revealed that UNICE was not prepared to discuss anything other than the narrow issue of parental leave as originally proposed as action by all Member States.[26]

Without a pre-existing formal legislative proposal the social partners would be able to start with a clean slate and therefore be able to contribute more effectively, especially

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19 COM(84) 631 final.

20 Proposal for a Council Directive on Certain Employment Relationships With Regard to Working Conditions, OJ 1990 C 224, 8 August 1990 and OJ 1990 C 305, 5 December 1990.

21 Proposal for a Council Directive on the Burden of Proof in Sex Discrimination, COM(88) 269 final, OJ 1988 C 176/5, 27 May 1988.

22 Eg Proposed Fifth Directive on the Structure and Administration of Public Limited Companies, OJ 1972 C 131.

23 Commission Recommendation of 27 November 1991 on the Protection of the Dignity of Women and Men at Work, OJ 1992 L 49/1, 24 February 1992.

24 SEC(95) 276.

25 The contents of the text are outlined in Press note, IP/95/151, 22 February 1995.

26 Interview with Ms Deborah France, International Social Affairs Group, CBI, 10 August 1995.

with regard to the first stage of consultation on the "possible direction" of Community policy.

The Six Week Rule

The Commission's Communication states that the first period of consultation should not last longer than 6 weeks.[27] The European social partner organisations are highly complex bodies comprising many national federations which in turn comprise many sectoral and regional affiliates. While recognising the need for a time limit in order to avoid delay, 6 weeks seems to leave insufficient time for meaningful consultation with members.[28]

The result of this restriction on time within UNICE was the need to start negotiations on parental leave in an ad hoc group *before* the first consultation document was released, basing negotiations on an approximation of its likely content considering previous Article 100 EC initiatives.[29] While this seems the practical solution to the issue, it also exacerbates the problems associated with negotiations based on pre-existing EC Treaty proposals. The Commission has recently indicated that it intends to reconsider the time-limit for the first stage of consultations. It has proposed the introduction of an adaptable time limit to be fixed on a case by case basis according to "the nature and complexity of the subject".[30] However, whether the situation could be remedied by an extension of the time limit[31] is dubious given the difficulties outlined above of disregarding existing proposals, irrespective of time.

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27 Commission Communication, para 19.

28 "Maastricht and Social Policy - Part 3", op cit, at 32.

29 Interview with Ms Deborah France, International Social Affairs Group, CBI, 10 August 1995.

30 Commission, Communication Concerning the Development of the Social Dialogue at Community Level, COM(96) 448 prov, 18 September 1996.

31 ECOSOC has proposed that the time limit be increased to 8 weeks. See ECOSOC Opinion, at para 3.1.7.

From Consultation to Negotiation

Article 3(4) states that "on the occasion of such consultation, management and labour may inform the Commission of their wish to initiate the process provided for in Article 4". Article 4 allows the dialogue between the social partners to lead to "contractual relations, including agreements".[32] While the reference in Article 3(4) to "such consultation" may refer to the whole of the consultation process,[33] the Communication[34] suggests that it is envisaged that the social partners should initiate these negotiations during the second consultation stage.[35]

Negotiations take as their starting point the document sent out as the second stage consultation document. The social partners are not restricted to the content of the proposal or merely to making amendments to it. However, it must be borne in mind that "Community action can clearly not go beyond the areas covered by the Commission's proposal",[36] and that any action must take into account the SPA's protective provisions concerning small and medium-sized undertakings.[37] Excepting these requirements "such

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32 Note the view of Hepple, "European Social Dialogue - Alibi or Opportunity?", op cit, at 23, who is of the opinion that "contractual relations" is a translation of the French, *"relations conventionelles"*, meaning relations based on agreement. He suggests therefore that legally binding collective agreements were only one of the methods of implementation envisaged under this phrase.

33 See Bercusson, "The Dynamic of European Labour Law After Maastricht", (1993) 23 ILJ, 1-31, at 20 and Bercusson, *European Labour Law*, ibid, at 540.

34 Communication, Annex 4, Operational Chart Showing the Implementation of the Agreement on Social Policy, reproduced as Annex 3, below.

35 Although it does not seem that earlier initiation of the Art 4 procedure is out of the question. See Bercusson, "The Dynamic of European Labour Law After Maastricht", op cit, at 20 and ECOSOC Opinion, op cit, at para 4.1.2 who can see advantages in the social partners being able to initiate the Art 4 process at the first consultation stage.

36 Communication, op cit, para 31.

37 Art 2(2) states that directives adopted on the basis of Art 2(1) "shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings". The Communication confirms that "provisions regarding small and medium-sized undertakings referred to in Article 2(2) of the Agreement should be borne in mind by organisations which are signatory to the agreement".

agreement is entirely in the hands of the different organisations".[38]

In contrast with the elaborate checks and balances which apply to the legislative process, the manner in which the social partners are to conduct such bargaining and arrange voting procedures is not prescribed.[39] Although Article 3(1) requires the Commission to take any relevant measures to facilitate the dialogue, this would seem only to indicate administrative support and nothing as intrusive as rules of procedure.[40]

The duration of the negotiations is set at nine months, unless the social partners and the Commission jointly decide to extend it.[41] The Commission will consider a request for an extension on the basis of the probability that the social partners will arrive at an agreement and in doing so "will fully respect the social partners' independence".[42] The Commission's role was considered necessary in order to prevent the prolonging of futile negotiations or delaying tactics which would slow down the process of Community regulation.[43] However, it seems unlikely that the Commission would veto such an extension except where a request had been made after negotiations had obviously broken down.[44]

The social partners have clearly indicated their wish that, once the Article 4 process has begun, then the Commission's work on parallel proposals for legislation should be

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38 Communication, op cit, para 31.

39 Bercusson, *European Labour Law*, op cit, 540.

40 Bercusson, "The Dynamic of European Labour Law After Maastricht", op cit, at 25.

41 Art 3(4); Communication, op cit, para 32.

42 Communication, ibid, para 32.

43 Communication, ibid, para 32.

44 Guery, "European Collective Bargaining and the Maastricht Treaty", (1992) 131 International Labour Review, 581-599, at 587.

suspended.[45] However the Communication does not refer to this issue.[46] Suspension would, however, seem to be implied by the existence of the time limit[47] and the concern that the extension period should not allow futile negotiations "which would ultimately block the Commission's ability to regulate."[48] This does, however, raise the question as to whether legislative activities could resume in the case that negotiations irretrievably break down before the end of the nine month period or that negotiations do not begin at all. Although the issue is not dealt with in the Communication the concern with delay would also imply that such activities could resume.[49]

"Bargaining in the Shadow of the Law"

Negotiations for the conclusion of an agreement occur after the second stage of consultation on the "content" of the envisaged proposal. In several articles concerning the SPA and social dialogue Brian Bercusson has characterised the negotiations following this second consultation as "bargaining in the shadow of the law".[50] In his view the timing of the negotiations, after the Commission has presented its draft proposal within the second consultation document, means that the parties will be aware of the probable content of the legislation which would be enacted in the case of their failure to agree. The party less satisfied with the potential directive is therefore at a bargaining

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45 Proposals by the Social Partners for Implementation of the SPA, 29 October 1993, at para 10.1.

46 Bercusson maintains that the Commission seems free to produce proposals after the initiation of the Article 4 procedure and even during it. In his opinion "it might even be that such a "twin-track" process would impart a certain dynamism to both Commission and social partners". See Bercusson, "The Dynamic of European Labour Law After Maastricht," op cit, at 22; "Social Policy at the Crossroads", op cit, at 175; *European Labour Law*, op cit, at 542; Barnard, *EC Employment Law*, op cit, at 74 and Hepple, "European Social Dialogue - Alibi or Opportunity?", op cit, at 22.

47 Guery, op cit, at 587; Fitzpatrick, op cit, at 205 and "Maastricht and Social Policy - Part 3," op cit, at 34.

48 Communication, op cit, para 32.

49 Guery, op cit, at 587.

50 See Bercusson, *European Labour Law*, op cit, at 540-541; "Maastricht: a Fundamental Change in European Labour Law", op cit; "The Dynamic of European Labour Law After Maastricht", op cit; "Social Policy at the Crossroads: European Labour Law After Maastricht", op cit and Bercusson and Van Dijk, op cit.

disadvantage, since it has more to lose if negotiations break down. This "bargaining in the shadow of the law" has particular implications for the employers' associations, UNICE and CEEP, who broadly favour deregulation of the labour market and so are most likely in each case to be the less satisfied party. The incentive for employers' organisations to bargain increases the higher or more rigid the standard set by the Commission in the second consultation document.[51] If a high standard means a high level of protection for employees, the Commission document will similarly provide a disincentive for trade unions to bargain, or at least a minimum standard below which they are unlikely to agree. The information conveyed in this second consultation document is therefore of great importance. The less such a document presents detailed proposals, the greater the potential for the conclusion of an agreement since parties will not wish to risk reliance on the unknown.[52] Bercusson suggests that the potentiality for agreement may therefore be greater if the Article 4 process could be initiated at the first stage of consultation, where the substantive content of the potential directive is a lesser known quantity.[53]

Bargaining in the Shadow of Which "Law"?

Bercusson's thesis rests on the fact that negotiations are centred on the draft as set out in the Commission's second consultation document. However, it has already been shown in Chapter 3, that many of the subjects so far referred to the social partners have been the subject of previous EC Treaty initiatives. It is submitted that discussions therefore begin from the starting point that failure to agree will almost certainly[54] result in the adoption of a Directive along the lines of these pre-existing proposals. This was made particularly clear before the dialogue began on the European Works Council Directive[55] where the 14

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51 Bercusson, *European Labour Law*, ibid, at 541.

52 Bercusson, "Maastricht: A Fundamental Change in European Labour Law", op cit, at 185.

53 Bercusson, "Maastricht: A Fundamental Change in European Labour Law", ibid, at 185 and *European Labour Law*, op cit, at 540.

54 Particularly in view of the increased potentiality for the use of QMV. See Chapter 3.

55 Op cit.

went as far as to draw up a Common Position to be adopted if no agreement was reached.[56] Although some trade offs may occur, any agreement is to a large extent likely to reflect the terms of these proposals, rather than any true consensus between the social partners based on the weapons of class struggle traditional to national level collective bargaining.[57] While it is suggested that "bargaining in the shadow of the law" is no less of a problem, it seems, however, that "the law" which may present the greatest difficulty in negotiations between the social partners is rather the pre-existing EC Treaty proposal. Reports indicate, in any case, that the Commission's second consultation document has had a tendency to reflect the Commission's own views as previously set out in these earlier proposals.[58]

The Parental Leave Agreement

The social dialogue has so far resulted in the formation of one agreement, on the subject of parental leave.[59] This agreement may, however, be more significant for the fact that it has been concluded than for its substantive content.[60] Existing national provisions on parental leave are, in most cases, superior to those set out in the agreement.[61] The agreement itself to a large extent resembles previous EC Treaty proposals[62] and, where it does deviate from these, seems more restrictive. The agreement allows both men and women the right to take parental leave on the grounds of the birth or adoption of a child, to enable them to care for that child for at least 3 months up until the child is 8 years

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56 Common Position 32/94, OJ 1994 C 244/4, 18 July 1994.

57 Bercusson, *European Labour Law*, op cit, at 540.

58 Europe, 2056, 8 July 1995, (1995) 258 EIRR, 3.

59 See Proposal for a Council Directive on the Framework Agreement Concluded by UNICE, CEEP and the ETUC, COM(96) 26 final, 31 January 1996.

60 (1995) 263 EIRR, 3.

61 Except in Belgium, Ireland and Luxembourg. See "Parental Leave in Europe", (1995) 262 EIRR, 14-17.

62 COM(83) 686 final, 24 November 1985, as amended by COM(84) 631 final, 15 November 1984.

old.[63] However, many important issues are left to be determined at the level of the Member State, for example the conditions for access to and income during[64] parental leave.[65]

The Agreement appears to have made significant sacrifices to the employers' associations.[66] With the spectre of the 1996 Intergovernmental Conference looming, the social partners may have felt a certain pressure to conclude an agreement as a justification of the new rights they have been given.[67] At the opening of the ETUC's 8th Congress, for example, Commission President Santer stated that the social partners "must show that the European constitutional legislator was right to trust them and give them considerable co-regulatory power".[68] This suggests that the chances of agreement look less sure for the subjects currently under discussion.

Where No Agreement is Reached

At or before the end of the 9 months the social partners must submit a report to the Commission.[69] If the report states that they are unable to reach an agreement then the Commission will examine whether a legislative instrument in the area would still be

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63 However, the agreement states at Clause 2, point 1 that parental leave may be taken "until a given age of *up to eight* years to be defined by Member States and/or Social Partners" (my emphasis). It is unclear whether a Member State could set a low age limit, eg one year.

64 Agence Europe 6603, 11 November 1995, 12 reports that the ETUC has subsequently requested Member States to take the necessary measures so that when the Agreement is implemented a minimum income is assured for all workers.

65 (1995) 263 EIRR, 3.

66 For example, clause 2, point 3 states that a Member State may "define the circumstances in which an employer... is allowed to postpone the granting of Parental Leave for justifiable reasons related to the operation of the undertaking (eg where the work is of a seasonal nature, where a replacement cannot be found within the notice period, where a significant proportion of the workforce applies for Parental Leave at the same time, where a specific function is of strategic importance)...".

67 See Falkner, op cit, at 8.

68 Agence Europe, 10 May 1995, 11 and European Report 2040, 10 May 1995.

69 Communication, op cit, para 33.

appropriate.[70] In this case the extent to which the advice received during the consultation process must be relied on or whether the Commission or Council may depart from it is unspecified.[71] However in the case of the European Works Council Directive the Commission was not willing to make the suggested amendments of the European Parliament on the basis of the negotiations of the social partners.[72] The status accorded to these negotiations, even where agreement could not be reached, is reflected by their being published as part of the Commission's final proposal for the directive.

Conclusion

The UK opt-out has important consequences for the consultation process. The existence of a pre-existing Commission proposal may make consultation on the "possible direction" and "content" of the proposed action difficult. It also creates the impression that the proposal has been "pre-cooked"[73] by the Commission and that the social dialogue can only achieve minor adjustments to the text. During the negotiation process the existence of a pre-existing EC Treaty proposal exacerbates the problem of "bargaining in the shadow of the law".

These problems may to some extent be relieved if the Commission were to treat the SPA as a legal basis of first resort, as it has done with regard to sexual harassment. The issues referred to the SPA so far have been "old chestnuts",[74] outstanding after UK rejection and hence a first resort policy would have gained little. However, future use of this policy where the subject matter is new at Community level may improve the quality and efficiency of the social dialogue process. While the proposal for action on sexual harassment may signal a turning point in the Commission's policy, previous declarations

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70 Communication, ibid, para 34.

71 Whiteford, "Social Policy After Maastricht", op cit, at 209.

72 Agence Europe, 6 May 1994, 11.

73 Interview with Ms Deborah France, International Social Affairs Group, CBI, 10 August 1995.

74 "Social Europe: A New Agenda", op cit, 24.

of its preference for action by all Member States seems to suggests that this latest referral is the exception and not the rule. In the long term the problem may only be resolved by putting an end the opt-out and introducing the SPA into the main body of the EC Treaty as an amendment to Articles 118, 118a and 118b. However, the UK Conservative Government remains "equally constant" on the issue: "The UK will not give up its opt-out and cannot be forced to do so".[75]

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75 "A Partnership of Nations: The British Approach to the European Intergovernmental Conference 1996", Cm 3181, HMSO, 1996. See also "The United Kingdom in Europe: People, Jobs and Progress", Department of Employment, September 1992.

Chapter 5

IMPLEMENTATION OF MEASURES BASED ON THE SOCIAL POLICY AGREEMENT

Introduction

The SPA envisages that measures resulting from the consultation and negotiation procedures may be "implemented[1] either in accordance with the procedures and practices specific to management and labour and the Member States or... by a Council decision on a proposal from the Commission". The method of implementation chosen defines the legal status of the text and of the rights and obligations it sets out. Implementation has particular consequences for individuals who may wish to rely on national measures as a guarantee of their rights. This chapter will detail the methods of implementation in the context of their consequences for individuals asserting rights on the basis of legislation or agreements based on the SPA and evaluate such protection against the background of that accorded by social policy measures under the EC Treaty.

Where There is No Agreement Under the Social Dialogue

Where the social partners did not initiate negotiations under Article 4 or where no agreement was reached in these negotiations, the Commission "will look into the possibility of proposing, in the light of the work done, a legislative instrument".[2] Proposed action on the basis of Article 2(1) must take the form of a directive. However, action under Article 2(3) does not seem to be so restricted. It may be that it was considered that action in the areas covered by Article 2(3) may lend itself to measures

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1 The word "implementation" typically refers to the adoption at Member State level of regulation putting into practice the obligations set out in a Community level measure. Its use therefore seems somewhat misplaced with regard to the Council decision method which converts an agreement by the social partners into a Community measure for implementation at the level of the Member State. However, the language of the SPA will be maintained for the purposes of this chapter.

2 Communication, op cit, para 34.

other than directives,[3] although the division of issues between Articles 2(1) and 2(3) rather seems to be motivated by voting procedures.

It has been suggested above[4] that it can be assumed that measures under the SPA may equate to their EC Treaty counterparts whether or not the SPA constitutes an amendment to the EC Treaty or an intergovernmental agreement. Directives may therefore be defined by Article 189 EC as measures "binding, as to the result to be achieved". As such, individuals may enforce their Community rights by reliance on national implementing measures. However, in the case of inadequate or non-implementation the Court of Justice has held that Directives may have vertical direct effect[5] and that, where implementing measures exist, national courts must interpret national legislation as far as possible in the light of directives.[6] Where the precise meaning of the directive is unclear national courts may request an interpretative ruling under Article 177 EC at all stages of the judicial process. States may also be liable in certain cases for failure to implement a directive.[7] National remedies must be proportionate[8] and effective,[9] with a deterrent

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3 Action in the area of social security has previously taken the form of regulations, eg Council Regulation 1408 on the Application of Social Security Schemes to Employed Persons, to Self-Employed persons and to Members of Their Families Moving Within the Community, OJ 1983 L 230/6, 14 June 1971.

4 See Chapter 3.

5 That is, are directly effective against an "emanation of the state". See eg Case 41/74, *Van Duyn v Home Office,* [1974] ECR 1337 and Case 106/77, *Simmenthal,* [1978] ECR 629.

6 Case 14/83, *Von Colson,* [1984] ECR 1891 and Case C-106/89, *Marleasing,* [1990] ECR I-4135.

7 Cases 6/90 and 9/90, *Francovich and Bonifaci v Italian State,* [1991] ECR I-5357, Cases C-46/93 and C-48/93, *Brasserie du Pecheur v Germany* and *R v Secretary of State for Transport, ex parte Factortame* [1996] ECR I-1029, Case C-392/93, *R v HM Treasury, ex parte British Telecommunications* [1996] ECR I-1631, Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Dillenkofer and Others v Federal Republic of Germany,* [1996] 3 CMLR 469 and Case C-5/94, *R v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas* [1996] ECR I-2553.

8 Eg Case 8/77, *Sagulo,* [1977] ECR 1495.

9 Case C-213/89, *R v Secretary of State for Transport ex p Factortame,* [1990] ECR I-2433 and Case C-271/91, *Marshall v Southampton & South West Hampshire Area Health Authority,* [1993] ECR I-4367.

effect[10] and be available at all stages of the judicial process.[11]

Article 2(4) explicitly recognises that implementation of SPA directives may be entrusted to national social partners, but obliges the Member State to "take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive."[12] This method of implementation and the obligation on Member States is not restricted to SPA directives, but has been recognised with regard to EC Treaty directives in the case law of the Court of Justice, the Social Charter[13] and in certain directives.[14] Although Article 189 EC allows a Member State to choose the "form and methods" of implementation of directives, it does not provide expressly for implementation by collective agreement. However, the Court of Justice held in *Commission v Denmark*[15] that in some cases collective agreements could be considered as one of these available "methods".[16] Member States may leave implementation to the representatives of management and labour "in the first instance", but this "does not, however, discharge them from the obligation of ensuring... that all workers in the Community are afforded the full protection provided for in the directive." Such an obligation allows Member States to delegate implementation to national social partners while maintaining ultimate

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10 Case 14/83, *Von Colson*, op cit.

11 Case C-213/89, *Factortame*, op cit.

12 Article 2(4).

13 Preamble and Art 27.

14 Directive 91/533/EEC (conditions relating to an employment relationship) OJ 1991 L 288/32, 14 October 1991; Directive 75/129/EEC (collective redundancies) OJ 1975 L 48/29, 17 February 1975, as amended by Directive 92/56/EEC, OJ 1992 L 245/3, 24 June 1992; Directive 92/85/EEC (pregnant workers) OJ 1992 L 348/1, 19 October 1992. Exceptionally, Council Directive 93/104 EEC concerning certain aspects of the organisation of working time OJ L 1993 307/18, 23 November 1993 goes as far as to give priority to collective agreements over legislation in determining the EU standard concerning rest breaks during working hours. On this point see Bercusson, "The Collective Labour Law of the European Union," (1995) 1 European Law Journal, 157-179, at 163-4.

15 Case 143/83, [1985] ECR 427, at 434.

16 See Adinolfi, "The Implementation of Social Policy Directives through Collective Agreements", (1985) 25 CML Rev, 291-316 and Bercusson, "Social Policy at the Crossroads", op cit, at 168.

responsibility to "fill in the gaps" themselves.[17]

The obligation on Member States created by Article 189 is one of *result.*[18] Member States may tailor implementing measures to their own particular legal and social traditions[19] as long as the principles set out in the Directive are complied with. The Commission's Communication states that "the Member State concerned must provide for procedures to deal... with any shortcomings in the agreement implementing the directive".[20] In this respect acute problems arise due to the specific nature of collective agreements. First, any requirement to bargain on specific issues necessarily undermines the freedom of contract of the social partners and second, collective agreements are generally contracts legally binding only as between the contracting parties.[21] Where Member States have maintained that directives have been fully implemented by pointing to existing national collective agreements the Court has, therefore, been particularly concerned that agreements should fully guarantee both the substantive content of the directive[22] and that they should cover *all* workers, including non-union members.[23]

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17 There must be some form of State back-up in the case that requirements are not fulfilled. See Case 235/84, *Commission v Italy*, [1986] ECR 2291. A Member State must, for example, abide by Community deadlines where implementation occurs by collective agreement (Case 312/86, *Commission v French Republic*, [1989] ECR 6315).

18 In Case 248/83, *Commission v Germany,* [1985] ECR 1459, at 1489, the Court held that since the objective of the Directive in question had been achieved "no specific measure was required for its implementation." See also Case 29/84, *Commission v Germany,* [1985] ECR 1661.

19 The obligations of the Directive may, for example, become subsumed into pre-existing national legislation concerning a similar subject.

20 Communication, op cit, para 47.

21 Adinolfi, op cit, at 291.

22 Case 91/81, *Commission v Italy,* [1982] ECR 2133.

23 Case 143/83, *Commission v Denmark*, op cit; Case 235/84, *Commission v Italy*, op cit and Case 91/81, *Commission v Italy*, op cit.

At the heart of this concern is the effective judicial protection of the individual whose rights are affected by the substance of the directive's obligations.[24] The Court stated in *Commission v Germany*[25] that implementation of a directive affecting the rights of an individual must guarantee that their "legal position... is sufficiently precise and clear and the persons concerned are made fully aware of their rights and, where appropriate, afforded the possibility of relying on them before national courts."[26] It is not enough that Community obligations are fulfilled in practice:[27] the implementing measure must also be legally binding. Thus, in *Commission v Belgium*[28] the Court considered that a collective agreement which had been extended by Royal Decree was adequate implementation of the collective redundancies directive.[29]

This concern for the protection of the individual is also the impetus for the Article 2(4) obligation on Member States. The Communication explains that the purpose of this obligation is "to ensure that the workers concerned are in practice afforded their rights under the directive".[30] As argued above, in both the case that the SPA is part of the EC

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24 See Kahn-Freund, *Labour and the Law*, (Davies and Freedland, eds), 3rd edn, 1993, who notes, at 162, that "the contractual function of collective agreements is mainly for the benefit of management and its normative function is mainly for the benefit of labour".

25 Case 29/84, op cit, at 1673.

26 See also Case 143/83, *Commission v Denmark*, op cit.

27 The Court has declared the implementation of directives by administrative practices and circulars as inadequate as methods of implementation on the basis that they "can be changed as and when the authorities please and... are not publicised widely enough" (Case 102/79, *Commission v Kingdom of Belgium,* [1980] ECR 1473, at para 11). See also Case 116/86, *Commission v Italy,* [1988] ECR 1323; Case 236/85, *Commission v Netherlands,* [1987] ECR 3989; Case 239/85, *Commission v Belgium,* [1986] ECR 3645; Case 160/82, *Commission v Netherlands,* [1982] ECR 4637; Case C-13/90, *Commission v France,* [1991] ECR I-4327; Case C-339/87, *Commission v Netherlands,* [1990] ECR I-851; Case C-381/92, *Commission v Ireland,* [1984] ECR I-215 and Case C-131/88, *Commission v Germany,* [1991] ECR I-825. However, it is interesting to note that when the situation is reversed, where, for example, non-legally binding measures in the form of collective agreements contrary to the provisions of a directive exist, the Court has been anxious to rely on the "important *de facto* consequences for the employment relationships to which they refer" (Case 165/82, *Commission v United Kingdom and Northern Ireland,* [1983] ECR 3431, at 3447).

28 Case 215/83, [1985] ECR 1039.

29 Council Directive 75/129/EEC, OJ 1992 L 245/3, 17 February 1975.

30 Communication, op cit, para 47.

Treaty and if it is instead an intergovernmental agreement which "borrows" the principles enunciated in the Treaty, an individual may rely on the above case law as protection of their rights.

The European Works Council Directive was the first directive adopted on the basis of the SPA. The majority of Member States affected have proposed binding legislation as implementation of the directive.[31] However, implementation under the Article 2(4) method has been considered in Norway and Belgium.[32] In Norway an agreement on the directive was reached in November 1995 between the LO trade union confederation and the NHO employers organisation. Subject to formal ratification by the governing bodies of the two associations the agreement will come into force on 22 September 1996. In Belgium the social partners are considering draft legislation within the National Labour Council. If an agreement is reached it will be given the force of law by a Royal Decree.

Implementation of Community Level Agreements

Community level agreements may be implemented either "in accordance with the procedures and practices specific to management and labour and the Member States" or "by a Council decision on a proposal from the Commission."[33] The choice is left to the discretion of the social partners as part of the consultation process. The method chosen may depend on several factors, including the subject matter of the proposal.[34] It seems, for example, that agreements which contain specific rights for workers may be more suited to implementation by a Council decision which would give the agreement the force of Community law. However, broadly drafted agreements which to a greater extent lay down general policies may be better accommodated by a collective agreement which can reinterpreted at lower levels according to national law and practice.

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31 Draft legislation has already been proposed in Ireland, France, Belgium, Denmark, Germany, Sweden, Spain and the Netherlands.

32 "EWCs - The Countdown Continues", (1996) 265 EIRR, 23.

33 Art 4(2).

34 "Maastricht and Social Policy - Part Three", op cit, at 34.

Implementation by Council Decision

In matters covered by Article 2, the social partners may jointly request that the agreement be implemented by a Council decision. Implementation by this method does not seem to be restricted to agreements deriving from a Commission proposal. Any agreement which falls into the Article 2 subject matter may therefore be requested to be converted into a Council decision.[35]

Considerable discussion has centred on whether the Commission or Council can reformulate the agreement at this stage.[36] This confusion arises out of the discrepancy between the wording of the October 1991 Agreement[37] and Article 4(2). While the social partners text refers to "agreements *as they have been concluded*" (my emphasis), Article 4(2) remains unequivocal, suggesting that the possibility of Commission intervention remains open. Any amendments seem likely to damage relations with the social partners by infringing on their autonomy and converting their role into one of formation of proposals (ie more like lobbying), both of which are contrary to the Commission's task of "promoting the consultation of management and labour at Community level".[38] However, the Communication confirms that the Commission sees no opportunity for amendment.[39] The Council decision converting the Parental leave Agreement was limited to making binding the provisions of the agreement as concluded. In deference to this commitment, the text of the agreement did not form part of the decision, but was annexed to it.

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35 However, there is little chance of the conclusion of such agreements. See Chapter 3.

36 See Fitzpatrick, "Community Social Law After Maastricht", op cit, at 206; Whiteford, "Social Policy After Maastricht", op cit, at 209; Guery, "European Collective Bargaining and the Maastricht Treaty", (1992) International Labour Review, 581, at 591; "Maastricht and Social Policy - Part Three", op cit, at 36, Bercusson, "Social Policy at the Crossroads", op cit, 180 and Bercusson, *European Labour Law*, op cit, at 548.

37 Op cit.

38 Art 3(1).

39 Communication, op cit, para 38.

Despite there being a legal basis for the conclusion of Community-level agreements in Article 4(1), their legal status is left uncertain. Article 4(1) refers to "contractual relations, including agreements", suggesting that they are binding merely as contracts between the parties to the agreement.[40] The purpose of offering the option for implementation by Council decision seems to be to give general legal effect to an agreement[41] and to provide a mechanism for extending coverage to those workers who are not represented by the social partners, ie to create a European-level *erga omnes* procedure.[42]

The reference to the term "Council decision" has, however, created some ambiguity concerning the measures available for transposition of the agreement.[43] "Decision" has a technical meaning under Article 189 EC as a Community act which is "binding in its entirety on those to whom it is addressed". In addition decisions must "state the reasons on which they are based"[44] and "shall be notified to those to whom they are addressed".[45] A decision by this definition and addressed to the 14 Member States would give binding legal effect to the agreement and function in a manner comparable with the extension procedures operational in several Member States for ensuring that national collective

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40 Although, as Weiss, op cit, at 12 points out, if this is the case, it is unclear why the new provisions of Art 4(1) were considered necessary in view of the pre-existing basis for agreements in Art 118b EC, in reply one could add that if agreements were meant to be legally binding why provide for an alternative method of implementation in the form of a binding Council decision?

41 Padraig Flynn stated with respect to the Parental Leave Agreement that "the aim of the Commission proposal is to render the provisions of the agreement concluded between the social partners binding", as quoted in Agence Europe 6657, 1 February 1995, 7.

42 Barnard, *EC Employment Law*, op cit, at 75; Guery, op cit, at 591; Jensen, Madsen and Due, "A Role for a Pan-European Trade Union Movement? - Possibilities in European IR-Regulation", (1995) 26 IRJ, 4-18, at 10. This is the principle whereby collective agreements are enshrined in legislation, therefore becoming legally binding as regards all workers covered by the legislation, not only those who are members of the relevant contracting parties. See also "Debate on "Generally Binding" Agreements", (1995) 254 EIRR, 27-30.

43 Barnard, *EC Employment Law*, ibid, at 75 and Bercusson, *European Labour Law*, op cit, at 549.

44 Art 190 EC.

45 Art 191 EC.

agreements are binding *erga omnes*.[46] Although Article 189 EC does not describe decisions as directly applicable, as it does regulations, the case law of the Court of Justice has confirmed that they may be directly effective,[47] if the criteria for direct effect are satisfied.[48] Since EC Treaty decisions may give rise to these binding obligations they are usually expressed in unconditional and precise language. Such a measure seems unsuited to the general legislative function that implementation of an agreement would entail[49] and calls into question whether further implementation at national level would be required, as is the case for Directives. In implementing decisions at national level nor would it be open to Member States to entrust implementation to the social partners under Article 2(4) since it refers only to directives.

However, the Danish, Dutch and German translations of the SPA use terms approximating to "arriving at a decision"[50] which suggests that the decision may refer to the discretion enjoyed by the Council either in choosing an appropriate instrument[51] or not to implement the agreement at all. The Commission's Communication seems to reflect this interpretation, stating that the Commission shall "propose that the Council adopt *a decision on implementation*" (my emphasis).[52] This interpretation does not restrict implementation to a Council decision as defined by Article 189 EC.

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46 This is the principle whereby collective agreements are enshrined in legislation, therefore becoming legally binding as regards all workers covered by the legislation, not only those who are members of the relevant contracting parties. See Guery, op cit, at 591.

47 Case 9/70, *Grad v Finanzamt Traustein*, [1970] ECR 385.

48 Case 26/62, *Van Gend en Loos*, [1963] ECR 1.

49 Hepple, "European Social Dialogue - Alibi or Opportunity?", op cit, at 31; Davies, op cit, at 35; Hall, op cit and Bercusson, "Social Policy at the Crossroads", op cit, at 181. However, Hartley, *Foundations of European Community Law*, (3rd edn), Clarendon: Oxford, 1994, at 227 notes that in practice decisions of a legislative character have been adopted by the Community institutions.

50 Bercusson, "Social Policy at the Crossroads", ibid, at 183; *European Labour Law*, op cit, at 547 and ECOSOC Opinion, op cit, at point 5.3.3.

51 Bercusson, *European Labour Law*, ibid, at 549.

52 Communication, para 11.

The proposal arising from the agreement between the social partners on parental leave has confirmed that the Commission has favoured the latter interpretation, proposing the adoption of a directive, the measure most commonly used for European industrial relations legislation and well suited to a general legislative function. A directive is defined by Article 189 EC as a Community act which is "binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods". A directive is also therefore a suitable means of implementation of "framework agreements" which are "intended to be applied indirectly by means of provisions to be transposed into national law by the Member States or the social partners".[53] The explanatory memorandum accompanying the proposal on Parental Leave states that "the term "decision"...refers to one of the binding legislative instruments under Article 189..."[54] Implementation may occur by directives, regulations or decisions, but not by means of opinions or recommendations which have no binding force. The proposal goes on to state that "it is up to the Commission to propose to the Council the most appropriate of the three binding instruments under the said article".[55] It is unclear, though, why the Commission and not the social partners should make this choice.[56]

In the case of implementation by "Council decision", therefore, the degree of protection accorded to the individual will depend on the measure chosen to implement the agreement by the Council, which will in most cases, it is suggested, be a Directive. If so, the individual will be able to rely on the protection of a legally binding national implementing measure and the Member State will be required to provide adequate remedies in the case of any breach. Where the national measure is inadequate the individual has the possibility of reference to the precise terms of the Community level agreement, as implemented by the Directive, through the remedies of direct effect,

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53 Proposal for a Council Directive on Parental Leave, op cit, para 33.

54 Proposal for a Council Directive on Parental Leave, ibid, para 33.

55 Proposal for a Council Directive on Parental Leave, ibid, para 33.

56 The ECOSOC Opinion, op cit, at point 5.3.5 states that "the Committee is of the opinion that the social partners have to choose which binding legal instrument they prefer".

indirect effect and the possibility of state liability under *Francovich*. In addition the Commission may be willing to bring an action against the Member State for non-implementation under Article 169 EC.

Implementation may not, however, be a foregone conclusion. The Commission's Communication states that "by virtue of its role as guardian of the Treaties" the Commission may decide not to present the agreement as a proposal to the Council.[57] This decision follows consideration of the representative status of the contracting parties, their mandate, the legality of each clause in relation to Community law and the existence of provisions relating to the protection of small and medium sized undertakings, the conclusions of which take the form of an explanatory memorandum to any resulting proposal.[58] If it decides not to forward the proposal to the Council, the Commission will immediately inform the signatory parties of the reasons for its decision.[59] However, the basis for this discretion and assessment is questionable since nowhere in the SPA is it suggested that the Commission may refuse the social partners' request for implementation by Council decision.[60]

It is, on the other hand, open to the Council to decide not to implement the agreement by rejecting the Commission's proposal. The Council is to act by QMV except where the agreement contains one or more provisions relating to one of the areas referred to in Article 2(3), in which case it must act unanimously.[61] If rejected the Commission will withdraw its proposal and "examine, in the light of the work done, whether a legislative instrument in the area in question would be appropriate."[62] Where the Commission concludes that legislation is appropriate it may present a new proposal of its own. However, in view of the Commission's Article 3(1) commitment to promote the social

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57 Communication, op cit, para 39.

58 Communication, ibid, para 39.

59 Communication, ibid, para 41.

60 See ESOSOC Opinion, op cit, para 5.3.2 and Bercusson and Van Dijk, op cit, at 24.

61 Art 4(2), second paragraph.

62 Communication, op cit, para 42.

dialogue, it seems that it should be prepared to enter into negotiations with the contracting parties in order to introduce alterations into the agreement which may gain the relevant Council approval.

Implementation by the "Voluntary Route"

Article 4(2) states that agreements may also be implemented "in accordance with the procedures and practices specific to management and labour and the Member States" and has been dubbed by the Communication as the "voluntary route".[63] In contrast with implementation by a Council decision, which only applies to matters covered by Article 2, this second method seems to apply to any Community-level agreement, whether or not it falls within the legal bases of the Community Treaties.

The Declaration on Article 4(2)[64] attached to the SPA states that this method of implementation "will consist in developing, by collective bargaining according to the rules of each Member State, the content of the agreements." It therefore relies on the incorporation of agreements by existing national level collective bargaining structures. It is from this national structure that the substance of the European agreement will gain its legal status and on which individuals can enforce their rights.[65] The Communication states that "the terms of this agreement will bind their [the social partners'] members and will affect them only in accordance with the practices and procedures specific to them in their respective Member States."[66]

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63 Communication, ibid, para 37.

64 The legal status of the Declaration is questionable. Declarations on Community instruments have in the past been given no status before the European Court of Justice. Szyszczak, "Future Directions in European Social Policy Law", op cit, considers that it has "limited legal significance and is not justiciable", See Toth, "The Legal Status of Declarations Annexed to the Single European Act", (1986) 23 CML Rev, 803-812 and Schermers, "The Effect of the Date 31 December 1992", (1991) CML Rev, 275-289.

65 Guery, op cit, at 589.

66 Communication, para 37.

This procedure for implementation does not directly involve any action by the Community institutions. The Social Partners Proposals for implementation of the SPA state that, "in this case the Community institutions should refrain from intervening in the area covered by the agreement in question or its application."[67] This wording is not repeated in the Communication.[68] It is uncertain therefore whether the Community is able to take further action in the same area once implementation has occurred. Although no mention is made in the Communication of this possibility, it seems unlikely that future Community action would be ruled out. Presumably the Commission would be free to make further proposals, on which the social partners would be again consulted and given the opportunity to conclude an agreement.

This second method of implementation seems to presume that national level bargaining will take place. However, national industrial relations systems do not generally impose obligations to bargain on national level social partner organisations.[69] Neither the ETUC, CEEP or UNICE have mandates to bargain on behalf of their national members who, in turn, may not have mandates to bargain on behalf of their individual members.[70] The signatures of European social partner organisations therefore create "at most a moral obligation" for national bodies to implement European agreements.[71] Even considering that this moral obligation to bargain is respected, there is no guarantee that the national social partners negotiations will result in agreement. The Declaration refers to "*developing*... the content of the agreements..." rather than of mere *implementation*, implying that the national social partners may take an activist stance on the issues to be

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67 Proposals by the Social Partners for Implementation of the Agreement Annexed to the Protocol on Social Policy of the TEU, 29 October 1993, at para 10.2.

68 "Maastricht and Social Policy - Part Three", op cit, at 35.

69 Barnard, *EC Employment Law*, op cit, at 75 and Hepple, op cit, at 28.

70 Weiss, "Social Dialogue and Collective Bargaining in the Framework of Social Europe", in Spyropoulos and Fragniere, *Work and Social Policies in the New Europe*, European Centre for Work and Society, European Interuniversity Press, 1991, at 65 describes the social partner organisations as "a head without a body".

71 Guery, op cit, at 589.

discussed.[72] However it seems that the obligations laid down in the European-level agreement must serve as minimum requirements. In the case that agreement does result, differences between the 14 national industrial relations systems are such that collective agreements would have differing legal status and enforcement procedures, creating unequal rights across the Community.[73]

In addition, national collective agreements, prima facie, only bind their signatory parties, the members of trade unions and employers associations. There is a wide divergence in membership, in particular of trade unions as between Member States.[74] Although some Member States have national extension procedures whereby collective agreements can be given *erga omnes* effect,[75] they differ in scope and effectiveness and are insufficient to guarantee rights for anywhere near all workers.[76]

The wording of Article 4(2), which states that "agreements concluded at Community level *shall* be implemented in accordance with the procedures and practices specific to management and labour *and the Member States*", seems to suggest that some obligation on Member States to implement may persist. This wording may be significant in that it follows that of the first draft of the SPA by the Dutch Presidency and is one of the few departures from the precise terms of the October 1991 Agreement which stated that agreements "*may* be realised..."[77]

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72 Bercusson, *European Labour Law*, op cit, at 545 states that "developing" is not necessarily implicit in the implementation process, but goes beyond it.

73 In Italy and Germany, for example, the binding effect of the collective agreement differs as its obligatory and normative elements.

74 See Annex 5.

75 Belgium, Germany, France, Spain and the Netherlands. See also "Debate on Generally Binding Agreements" (1995) 254 EIRR, 27-30.

76 See Wedderburn, "Inderogability, Collective Agreements and Community Law", (1992) 21 ILJ, 245-264, at 258; Hepple, op cit, at 28-30 and Lyon-Caen and Mariucci, "The State, Legislative Intervention and Collective Bargaining: A Comparison of Three National Cases", (1985) 1 IJCLLIR, 87-107.

77 Bercusson, "Maastricht - A Fundamental Change in European Labour Law", op cit, at 187.

The precise terms of this obligation are not, however, clear and are not clarified by the Communication. Three interpretations can be suggested.[78] First, Member States may be obliged to *develop* particular formal procedures and practices to facilitate implementation. Member States may, for example, be forced to create *erga omnes* extension procedures where none exist. Second, the obligation may only extend to a requirement that Member States use machinery which is *already* in existence at national level, for example, in Member States where extension procedures are already available they must be used. Finally the obligation may be capable of a more negative interpretation. The requirement on Member States may merely extend to a principle of non-interference by national authorities with existing mechanisms or those set up by national social partners for the transposition of European agreements into national level agreements.

Any positive obligation seems to be denied[79] by the Declaration which states that "this arrangement implies no obligation on the Member States to apply the agreements directly or to work out rules for their transposition, nor any obligation to amend national legislation in force to facilitate their implementation". In contrast to the implementation of directives under Article 2(4) and as determined by the case law of the Court of Justice, the implementation of European-level agreements by what the Communication terms the "voluntary route"[80] seems to involve no obligation on the state to "guarantee the results imposed". Neither does there seem to be an obligation for States to amend legislation contrary to the terms of the agreement,[81] nor to provide adequate remedies for any breach. It should be borne in mind, however, that the strict requirements of Article 2(4) and the case law of the Court of Justice reflect the fact that where the implementation of

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78 See ECOSOC Opinion, op cit, point 5.1.2 and Bercusson, "Maastricht - A Fundamental Change in European Labour Law", ibid, at 187 for a discussion of this issue.

79 Hepple, op cit, at 28; Bercusson, "Maastricht - A Fundamental Change in European Labour Law", ibid, at 188 questions what is left of the obligation to implement in Art 4(2) if there is no obligation to apply agreements directly, or to transpose them or to facilitate their implementation?

80 Communication, op cit, para 37.

81 However, Bercusson, *European Labour Law*, op cit, at 545 notes that "the denial of obligations to take legislative action in support of implementation does not exclude the obligation to avoid legislation having a negative impact on the implementation of EC-level agreements".

directives is concerned Member States *may choose* to use collective agreements, but the primary method of implementation is assumed to be binding legislation. The same standards applied to Member States in the implementation of agreements by the "voluntary" method would require *erga omnes* extension procedures to be used in all cases and to be set up at national level where they did not previously exist.

The Declaration does not, however, rule out the third possible meaning of the obligation in Article 4(2). The denial of positive obligations to take action to facilitate implementation of collective agreements does not rule out a negative interpretation, that Member States may not construct barriers to such implementation.[82] Neither does the Declaration *prevent* Member States from facilitating the implementation of collective agreements. The system may therefore be reliant on the goodwill of Member States to ensure that their workers are sufficiently protected.[83]

The "voluntary route" has a particular impact on the possibilities for individual remedies in the case of non-implementation of an agreement. The probable contractual status of the European-level agreement means that it may be of little remedial use as the European social partner organisations may be the only parties able to sue where the contract has been breached.[84] Bearing in mind their lack of bargaining mandate, neither may the European social partners sue their national affiliated organisations on the basis of inadequate or non-implementation. Nor could an individual refer to the European agreement in the context of direct effect, indirect effect, a claim under *Francovich* or even persuade the Commission to bring an action for non-implementation under Article 169 EC, since the Member State has declined responsibility for implementation under the Declaration. With respect to the possibility that the Court of Justice may interpret

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82 Bercusson, "The Dynamic of European Labour Law After Maastricht", op cit, at 26.

83 Guery, "European Collective Bargaining", op cit, at 590.

84 Fitzpatrick, "Community Social Law After Maastricht", (1992) 21 ILJ, 199-213 at 205 points out the meaninglessness of such an exercise.

agreements under Article 177 EC there also seems to be doubt.[85] In the implementation of European level agreements by the "voluntary route" the SPA makes no distinction as between agreements falling within the substantive legal bases of Article 2 SPA and those containing provisions which do not. It seems inconceivable that the Court should be asked to interpret an agreement which may have no legal basis in European law.

Conclusion

We are left with the anomalous situation whereby, irrespective of the content of a social policy measure, both the possibility of agreement between the social partners and their choice of implementation method is instrumental in defining the protection afforded to the individual. Where no agreement can be reached and a directive is instead adopted, the individual has the protection of a legally binding national measure, whether in the shape of national legislation or "Member State guaranteed" national collective agreements under Article 2(4), as well as the possibility of being able to rely on the directive through direct effect, indirect effect and the possibility of a claim against the State for damages under *Francovich*. Where an agreement is reached and the "Council decision" method chosen by the social partners, the individual may rely on similar protection in the case of implementation at European level by a directive. However, as concerns implementation by the "procedures and practices" method, an individual may only refer to the national implementing collective agreement according to the rules of the Member State, but has no means of redress where this national agreement does not accord with the European agreement or where national affiliates to the European social partner organisations refuse to implement or cannot agree on the subject matter of the European agreement. As an example of deference to the principle of subsidiarity[86] such implementation is to be applauded. The Declaration does not oblige Member States to interfere with national industrial relations systems through the compulsory creation of *erga omnes* extension procedures.

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85 Barnard, *EC Employment Law*, op cit, at 76 notes that it is unlikely that the Court would have jurisdiction to interpret a measure which is not an act of a Community institution, but instead an autonomous act of the social partners.

86 Art 3b EC. See Chapter 8.

However, such a lacuna in the protection of individuals may not be altogether surprising or, indeed, harmful. The experience of the European Works Council Directive and the pre-Maastricht "Val Duchesse" social dialogue[87] has revealed the difficulties associated with gaining any form of agreement between the social partners. The Val Duchesse dialogue resulted in several "joint opinions" of no particular legal status, on the co-operative growth strategy for employment[88] and concerning training and motivation, and information and consultation.[89] Several other joint opinions have subsequently been reached. These opinions have largely been wide policy statements, rather than precise documents which could be translated into binding legal form. It is this type of agreement which is apt to be implemented by the "procedures and practices" method. Such agreements could play a valuable role in the co-ordination of national practice and policy in specific areas and prepare the groundwork for future binding Community action as well as improving the dialogue with and awareness of national organisations of Community issues, while leaving the implementation of agreements concerning the rights of individuals to binding "Council decisions".

The SPA therefore allows the social partners the potential to determine the *form* as well as the *substance*[90] of Community social action. The way this discretion will be exercised in practice is dependent on the personalities involved in the dialogue. Exactly who the social partners are will therefore be examined in the following chapter.

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87 See Chapter 2.

88 Joint Opinion of 6 November 1986.

89 Joint Opinion of 6 March 1987.

90 See Chapter 4.

Chapter 6

WHO ARE THE SOCIAL PARTNERS?

Introduction

Articles 3 and 4 refer to the consultation of and the dialogue between "management and labour". Similarly, Article 2(4) allows a Member State to entrust the implementation of directives to "management and labour". However, nowhere in the Social Policy Agreement or elsewhere in the EC Treaty is this concept of "management and labour" explained or defined. The Val Duchesse social dialogue involved only representatives of the ETUC, CEEP and UNICE. However, following the adoption of the Social Chapter, a number of other organisations requested that the Commission consider their direct participation in the SPA social dialogue.[1]

The Social Partners Study

With a view to the implementation of the SPA the Commission engaged in a study of European level trade unions and employers' associations early in 1993, the results of which were published on 24 August of that year.[2] Although the SPA gives no indication of the criteria to be used in order to determine the identity of "management and labour", the Commission seems to have focussed on the issue of representativeness.[3] This issue is inextricably bound up with the concept of democracy[4] and suggests that the Commission placed importance on the new SPA social dialogue as a democratic process, rather than, say, as a process of invited contributions by expert advisers who do not

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1 Communication, op cit, para 23.

2 Commission, Social Partners Study, Doc V/614/93/E, 24 August 1993.

3 See Social Partners Study, op cit, Annex 1, 1. The significance accorded to the principle of representativeness is also reflected by the title to Annex 3 of the Communication, "Main Findings of the Social Partners Study (Representativeness)".

4 The issue of "Democracy and the Social Dialogue" will be discussed in more detail in Chapter 7.

necessarily reflect the views of the majority. The concept of representativeness is not one which has been defined at European level. The Social Partners Study therefore posed the question as to how the concept has been defined by the laws of the Member States in order to assist the Commission in assessing how this condition might best be satisfied at European level.[5]

The study was based on reports submitted by independent experts from each Member State, including the UK, despite the opt-out. The reports ascertained the national level requirements of representativeness necessary for social partner organisations to take part in both national formal consultations and collective bargaining and identified the resulting participants. In addition the reports presented "individual fact sheets" containing quantitative and qualitative information with respect to the operation and national affiliations of 12 European level organisations.

In looking to the traditions of the Member States for the basis of the definition of representativeness at Community level the Commission followed Community practice with respect to the development of general principles of law.[6] However, this methodology may not be entirely suited to the case in point. The ECOSOC Opinion on the Communication states that "consultation and social dialogue at EC level should not be assumed to be the same as collective bargaining within Member States. The processes and outcomes may be different... It is important not simply to extrapolate from national experience to EC level".[7] While the outcome of a collective agreement at Member State level is in most cases a legally binding contract[8] between the parties in agreement, it may have rather more significance within the SPA social dialogue since its content may be

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5 Communication, op cit, para 23.

6 See, in particular Case 17/74, *Transocean Marine Paint Association v Commission*, [1974] ECR 1063 where the Advocate General engaged in a study of national practice. See also Cases C-46/93 and C-48/93, *Factortame No 3*, op cit.

7 ECOSOC Opinion, op cit, para 2.1.3.

8 Except in the UK.

implemented as law by a Council decision binding on the whole of the Community.[9] The criteria for representativeness may therefore need to be more stringent in this latter case. The laws of several Member States allow for similar national *erga omnes* extension procedures.[10] However, these were not singled out or focussed on within the Social Partners Study. In addition, the question of representativeness within national law has been defined over time within the particular national social and economic traditions. A survey which looks at the single issue of representativeness in isolation may not reflect these traditions.

The results of the Social Partners Study can be divided into 3 separate sections, each of which will be examined in turn.

Recognition for the purposes of Collective Bargaining

The first question asked to the national level experts looked at the systems for recognition of national social partners for the purposes of collective bargaining.[11] The basic mechanism was found to be mutual recognition, although several Member States require that additional formal or legal requirements be fulfilled. Before collective bargaining can begin in Ireland, for example, trade unions and employers associations are required to obtain a negotiating license and in Belgium the social partners need government recognition. Similarly the Portuguese system requires registration of both sides of industry by the Ministry of Labour and in Luxembourg trade unions need to be classed as representative at national level. In Greece, however, although no prior recognition is mandated, where one of the parties does not meet the quantitative criteria laid down by law the collective agreement can be declared null and void. Similarly the German system allows formal recognition to be sought in the State courts where the representativeness of a trade union is contested. In Spain, however, although no formal recognition is

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9 Art 4(2).

10 Belgium, Germany, France, Spain and the Netherlands.

11 Social Partners Study, Annex 3 reproduces the detailed answers of each national expert. A summary of the results is contained in Annex 1, 5.

required for agreements binding as between the contracting parties, trade unions which are deemed to be the "most representative" organisations have the right to negotiate collective agreements which can be extended *erga omnes*.

Where additional requirements are mandated these are both quantitative and qualitative and vary considerably. In Germany the financial and physical resources of the association and in France the experience and period of functioning of the organisation are relevant factors. Alternatively the social partners in Ireland must deposit 20,000-60,000 punts according to the size of the organisation. However, in virtually all cases some form of proof of representativeness is required, although the test is not always explicit. In the case of trade unions the number of members of the organisation in many cases plays a key role in recognition, whether as a general consideration, as in Germany, or by a set minimum membership figure, which ranges from 1,000 in Ireland to 50,000 in Belgium or by a proportionate figure, as in Luxembourg where trade unions need to prove that they represent more than 2% of organised workers. However other Member States, for example Belgium, also take into account the geographic, all-industry and inter-sectoral scope of organisations.

Employers associations are, as a rule, recognised using the same or similar criteria as for the trade unions, for example as in Belgium and Ireland. In several cases, however, such as Greece and Spain, the quantitative requirements attach to the number of workers employed by the affiliated companies rather than the number of company members of the organisation. Exceptionally, there are no rules for the recognition of employers associations in Luxembourg since each sector of the Luxembourg economy is represented by one single employers organisation.

Recognition for the Purposes of Formal Consultation

The Social Partners Study revealed[12] that most Member States have some kind of formal consultation body, usually taking the form of a council dealing with economic and social

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12 Social Partners Study, op cit, Annex 3 and Annex 1, 6.

issues, although Greece and Italy are exceptions, the former because no such body exists and the latter because it engages in informal consultations. In most cases the membership of these bodies is allocated by administrative decision based on traditional practice taking into account the size and influence of the largest umbrella organisations. Some Member State councils, such as Denmark, include sectoral as well as intersectoral organisations. However, in the majority of cases membership was accorded to associations which were in turn affiliated to either the ETUC or UNICE.

Examination of the Federations

The Commission initially examined 12 European federations, comprising 3 employees'[13] and 9 employers' organisations,[14] chosen due to their "clear vocation to represent the interests of their members as either employers or trade union organisations" or because such organisations had made specific requests to be included in the definition of "management and labour" for the purposes of the social dialogue.[15] However, the Commission was keen to point out that the inclusion or not of organisations within the study would not be determinant of their classification as a social partner.[16]

The results of the Commission's research is contained in Annex 2 of the Social Partners Study. For each organisation chosen the survey examined its quantitative membership, involvement in collective bargaining, consultative role, whether or not the organisation directly participates in annual meetings of the International Labour Organisation (ILO) and whether it is represented in existing EC consultative bodies. It therefore involved

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13 ETUC (European Trade Union Confederation), CEC (Confederation Europeenne des Cadres), CESI (Confederation Europeenne des Syndicats Independents).

14 UNICE (Union des Confederations de l'Industries des Employeurs d'Europe), CEEP (Centre Europeen des Entreprises a Participation Publique), UEAPME (Union Europeenne de l'Artisanaat et des Petites et Moyennes Entreprises), EUROPMI (Comite Europeen de la Petite et Moyenne Entreprise Independente), EMSU (Europaische Mittelstands-Union), AECM (Association Europeenne des Classes Moyennes), CEDI (Confederation Europeenne des Independents), EUROCOMMERCE (Retail, Wholesale and International Trade Representation to the EC) and ECWITA (European Community Wholesalers and International Traders Association).

15 Social Partners Study, op cit, Annex 1, 2.

16 Social Partners Study, ibid, Annex 2, 1.

consideration of quantitative and qualitative criteria as well as taking into account previous practice within the EC and internationally, an extension of the previous focus on representativeness.

Conclusions

The conclusions of the study are summarised in Annex 3 of the Communication.[17] With respect to recognition for the purposes of collective bargaining the conclusions refer to the wide diversity as between the Member States and go on to say that "it is difficult to identify a common denominator which could easily be transposed to the Community level, apart from the principle of mutual recognition..." However, with respect to the criteria for representativeness the Commission recognises the diversity in the specific terms of the requirements laid down, but concludes that national systems "make use (sometimes implicitly) of quantitative criteria of various types in about half of the Member States" and that "generally speaking, qualitative criteria appear to be at least as important". The Communication also concludes that most Member States have at least one formal body for consultation with the social partners at which most of the seats are occupied by the major national umbrella federations affiliated to UNICE and the ETUC, although in most cases a smaller number of seats are allocated to other organisations.

Considering the results of the study the Commission drew two main messages which it set out in the Communication:[18] "(a) the diversity of practice in the different Member States is such that there is no single model which could be replicated at European level, and (b) the different Member States' systems having all taken so many years to grow and develop, it is difficult to see how a European system can be created by administrative decision in the short term".

It is unclear what the above messages drawn from the research signify. Part (a) seems to suggest that the Commission was unable to base its criteria for the recognition of

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17 Communication, op cit, Annex 3, 3-4.

18 Communication, ibid, para 23.

European level social partners on any mutually agreed basis. However, it may equally mean that although no single model could be *replicated*, a number of common principles could be followed. Part (b) also causes some confusion since the following paragraph of the Communication does then go on to set out administrative criteria by which a European system is created.[19]

European Level Recognition for the Purposes of Formal Consultation

The Communication states that, in order to take part in the SPA social dialogue, organisations should:

1 "be cross-industry or relate to specific sectors or categories and be organised at European level"

2 "consist of organisations which are themselves an integral and recognised part of Member State social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States as far as possible"

3 "have adequate structures to ensure their effective participation in the consultation process"[20]

A list of the organisations the Commission deems currently comply with these criteria are set out in Annex 2 of the Communication.[21]

These requirements contribute little to the execution of the Commission's original objective to create a European level recognition process which involved an assessment of the representativeness of the European social partner organisations, suggesting that this notion was abandoned in light of the divergence in Member State systems brought to light by the Social Partners Study. Instead the procedure at European level remains parasitic on the wide ranging Member State requirements. The recognition test is, to a large

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19 Communication, ibid, para 24. See Bercusson, *European Labour Law*, ibid, at 558.

20 Communication, ibid, para 24.

21 For information the list is reproduced as Annex 6, below.

extent, directed towards the national member federations rather than the European level organisations themselves and is conducted according to the national law applicable to each of these member affiliations. This method follows Community practice with regard to the recognition of employees representatives as set out in the Directives on the Transfer of an Undertaking[22] and on Collective Redundancies,[23] which define workers representatives as those "provided for by the laws or practices of the Member States".[24] In addition, by not encroaching on national systems of recognition, the European criteria may also be said to respect the principle of subsidiarity.[25] The application of national mechanisms tailored towards the specific needs of *national* recognition may not , however, sufficiently take into account the additional law-making function of the European level social dialogue.

Despite this departure from its original objective, it remains unclear whether the results of the Social Partners Study have been completely abandoned as a basis for European level recognition. The criteria apply only "within the terms of Article 3 of the Agreement"[26] and therefore to the formal consultation process only. As at national level, the Communication does not set out minimum requirements, compliance with which would render any number of organisations eligible for participation, but formally recognises a defined group of actors. However, unlike national practice, the Communication considers that "it is not necessary... to create some form of consultation body or umbrella liaison committee"[27] for the purposes of formal consultation, although the Commission admits that this may need to be re-examined "in the light of experience as the process develops". Instead each organisation is invited to contribute its opinion on a individual basis, although the Commission has expressed a commitment to "promote

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22 Directive 77/187/EEC, OJ 1977 L 61/27, 14 February 1977.

23 Directive 75/129/EEC, OJ 1975 L 48/29, 17 February 1975.

24 Directive 77/187/EEC, ibid, Art 1(2)(c) and Directive 75/129/EEC, ibid, Art 1(1)(b).

25 See Art 3(b) EC and Chapter 8.

26 Communication, op cit, para 24.

27 Communication, ibid, para 27.

the development of new linking structures between all the social partners so as to help rationalise and improve the process."[28] Even so, the absence of such a committee may not be conducive to compromise or mutual understanding between the two sides of industry.

The criteria therefore set out no explicit minimum quantitative requirements for recognition, although some qualitative criteria are required. In particular, recognition demands organisation at European level. Aside from this, however, the other qualitative requirements are subject to major qualification, tend towards ambiguity and are expressed in wide language.

The Communication states that the criteria apply only "as a matter of general principle".[29] This may mean that the Commission is willing to recognise as social partners some organisations which are exceptions as they do not fulfill the requirements. Alternatively it may equally mean that the criteria set out general requirements, although the Commission is to apply more specific ones.

It is also unclear how the Commission proposes to assess whether national member organisations are "an integral... part of Member State social partner structures" or whether the European level organisations have "adequate structures" which can ensure their "effective participation" in the consultation process. In addition, it is unclear in what way the European organisations must be "representative of all Member States". Does this mean that they must contain national affiliations from each Member State or does it impose a more intrusive requirement that these national organisations must be "representative" of their Member State nationals?

As to ambiguities, point 2, for example, states that organisations should "consist of organisations...". The meaning of "organisations" becomes unclear on examination of those recognised in practice in Annex 2. Although most are made up of national

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28 Communication, ibid, para 26.

29 Communication, ibid, para 24.

federations of trade unions or employers' associations, there are some exceptions, such as the CEEP, which is instead made up of individual company members not organised at Member State level. In addition, the requirement that organisations must be "recognised"as "part of Member State social partner structures" needs clarification. The results of the Social Partners Study above show that different Member States employ differing procedures for recognition for the purposes of both collective bargaining and formal consultation. The limitation of the Commission criteria to Article 3 may suggest that the reference was intended to apply to recognition within national formal consultation structures. However, due to its internal organisation, the CEEP does not have member federations which participate in these structures. In addition Greece and Italy do not provide for formal consultation structures. Also ambiguous is the requirement that organisations must have "the capacity to negotiate agreements".[30] It is unclear whether this criterion is applicable to the national affiliations or to the European level organisations themselves. If the former then, irrespective of whether the requirement that organisations must be "recognised" at national level only applies to formal consultation structures, this criterion also seems to necessitate recognition for collective bargaining. If the latter, then the requirement seems to lack meaning. Any organisation at European level has the capacity to enter into an agreement due to their freedom to contract. However, many of the organisations recognised in Annex 2, including the 3 main organisations, the ETUC, UNICE and CEEP, lack any mandate to bargain on behalf of their member federations. The Commission has indicated that "only the organisations themselves are in a position to develop their own dialogue and negotiating structures"[31] suggesting an unwillingness to require any form of mandate.

This lack of precision in the language used allows for a great deal of discretion on the part of the Commission in its choice of organisations. It also calls into question how committed the Commission remain to the concept of representativeness as a requirement for recognition.[32] It is unclear how crucial the concept is in the Commission's assessment

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30 ECOSOC Opinion, op cit, point 2.1.12.

31 Communication, op cit, para 26.

32 Bercusson, *European Labour Law*, op cit, at 560.

of whether organisations are "adequate structures to ensure their effective participation in the consultation process".[33] Although specifically referred to in point 2 of the criteria, the Communication only requires that European level organisations are "representative *of all Member States*", not all workers and employers, and even then the notion is subject to the qualification "as far as possible". The accent on this principle in the Social Partners Study suggests that a much greater role for representativeness had originally been contemplated.

European Level Recognition for the Purposes of Negotiation

The above criteria apply "within the terms of Article 3 of the Agreement".[34] No requirements are set out for recognition for the purposes of negotiation under Article 4. It seems therefore that the Commission may have intended that negotiations on the conclusion of European level agreements be determined by mutual recognition, in conformity with the predominant practice at national level as recognised by the Social Partners Study. In support of this conclusion the Communication states that, for the purposes of negotiation, "the social partners concerned will be those who agree to negotiate with each other".[35] The Social Partners Study also refers to the parties' "autonomous right of choosing the organisations with which they deem it appropriate to enter into contractual relations".[36]

However, this division in personnel between the organisations consulted under Article 3 and those able to negotiate under Article 4 ignores the structure of the social dialogue process set out in the SPA. Article 4(1) states that "should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements". In Chapter 4 it was noted that agreements may be concluded as

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33 Communication, op cit, para 24.

34 Communication, ibid, para 24.

35 Communication, ibid, para 31.

36 Social Partners Study, op cit, Annex 1, 1.

a result of the initiative of the Commission through the consultation procedure in Article 3, or as a result of the initiative of the social partners themselves.

In the latter case of "own initiative" agreements there seems nothing within either the SPA or EC law to prevent any European level organisation exercising its freedom to conclude a contractual agreement with any other, irrespective of recognition under Annex 2 of the Communication. In the former case, however, the negotiation procedure is initiated under Article 3(4) on the occasion of the second consultation procedure. The Communication states that "the social partners consulted by the Commission on the content of a proposal... may... inform the Commission of their wish to initiate the process provided for in Article 4".[37] This seems to presume that only those organisations consulted, ie those recognised under Annex 2, have the right to engage in negotiations. The Communication further states that "the question of whether an agreement between the social partners representing certain occupational categories or sectors constitutes a sufficient basis for the Commission to suspend its legislative action will have to be examined on a case-by-case basis with regard to the nature and scope of the proposal and the potential impact of any agreement between the social partners concerned on the issue which the proposals seek to address".[38] Where issues concern all Community employers and workers the Commission seems, as a rule, to require at least the agreement between the general cross-industry organisations, ETUC, UNICE and CEEP.

Implementation of agreements may be "either in accordance with the procedures and practices specific to management and labour and the Member States or... by a Council decision on a proposal from the Commission".[39] Where the social partners choose to implement an agreement by the first method, again, their freedom to contract at European level does not seem to prevent implementation within their own organisations of an agreement concluded between any trade union or employers association, whether or not recognised in Annex 2. However, with regard to implementation by Council decision the

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37 Communication, op cit, para 29.

38 Communication, ibid, para 30.

39 Article 4(2). See Chapter 5.

Communication states that "the Commission will prepare proposals for decisions to the Council following consideration of the representative status of the contracting parties..." (etc).[40] It is unclear whether this representativeness test may apply to all European organisations who conclude agreements, irrespective of the Annex 2 list. However, it is more likely that the Commission was referring to a restriction based on representativeness of agreements even between recognised Annex 2 organisations. In any case, it is unlikely that non-recognised parties to any agreement would pass this representativeness test should it also be applicable to them.

Conclusion

The Social Partners Study was concerned to a large extent with the development of a Community level concept of representativeness. However, in view of the conclusions to that study, which revealed the diversity of arrangements operating within the Member States, it seems that this exercise may have been abandoned. The Commission's criteria for recognition rest almost exclusively on national structures to determine representativeness. This choice of organisations will be assessed from the point of view of the "democratic" credentials of the social dialogue process in the following chapter.

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40 Communication, op cit, para 39.

Chapter 7

THE SOCIAL DIALOGUE AND DEMOCRACY

Introduction

It is widely perceived that the EU legislative process suffers from a "democratic deficit".[1] In particular critics have exemplified the inadequacy of the role of the European Parliament within European level decision-making.[2] This problem was to some small extent addressed by the amendments made to the Treaty at Maastricht which provided for the "co-decision procedure".[3] However, it seems that in this case the hand which gives also takes away. The Maastricht Inter-governmental Conference also introduced the social dialogue procedure which operates to the almost complete exclusion of the Parliament with respect to social matters.

The social dialogue procedure itself may be characterised as a "corporatist" arrangement, with the social partners as functional interest organisations operating within the realm of essentially public obligations.[4] This chapter will assess this corporatist role against the background of the Community's desire to "further the democratic and efficient

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1 Neunreither, "The Democratic Deficit of the European Union: Towards Closer Cooperation Between the European Parliament and the National Parliaments", (1994) 29 Government and Opposition, 299-314; Neunreither, "The Syndrome of Democratic Deficit in the European Community", in Parry (ed), *Politics in An Independent World*, Elgar, 1994; Boyce, "The Democratic Deficit of the European Community", (1993) 46 Parliamentary Affairs, 458-477; Tiilikainen, "The Problem of Democracy in the European Union" in Rosas and Antola (eds), *A Citizens' Europe*, Sage, 1995; Williams, "Sovereignty and Accountability in the European Community", (1990) 3 Political Quarterly, 299-317; Raworth, "A Timid Step Forwards: Maastricht and the Democratization of the European Community" (1994) 19 EL Rev, 17-33; Piris, "After Maastricht, Are the Community Institutions More Efficacious, More Democratic and More Transparent?", (1994) 19 EL Rev 449-487.

2 See above note 1 and also Corbett, "Representing the People" in Duff, Pinder and Pryce, *Maastricht and Beyond: Building the European Union*, Routledge, 1994.

3 Art 189c EC.

4 Falkner, op cit; Lo Faro, op cit; Vobruba, "Social Policy on Tomorrow's Euro-Corporatist Stage" (1995) 5 JESP, 303-315 and Obradovic, "Accountability of Interest Groups in the Union Lawmaking Process", Paper presented to the W G Hart Legal Workshop, "Lawmaking in the European Union", 9-12 July 1996.

functioning"[5] of the Community institutions in light of the democratic deficit.

Corporatism

There is no absolute consensus on the precise definition of the term "corporatism".[6] As a political theory corporatism challenges the orthodox paradigm of pluralism, which can be characterised as an arrangement whereby a large number of groups representing different interests compete within the political market place for influence over government.[7] Corporatism recognises that a mutual dependance between organised functional interests and the public bureaucracy in the process of public decision-making is endemic to modern government.[8] The concept examines the *degree* of interdependence and institutionalisation in the relationship between these private and public organisations.[9] Despite the lack of authoritative definition many commentators[10] seem

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5 Treaty on European Union, Preamble. The Preamble also confirms the "attachment to the principles of liberty, democracy...", etc of the signatory parties.

6 Williamson, *Corporatism in Perspective*, 1989, at 7; Cawson, *Corporatism and Political Theory*, Blackwell, 1986, at 22; Panitch "Recent Theorisations of Corporatism: Reflections on a Growth Industry", (1980) British Journal of Sociology, 159-187 and Birkinshaw, Harden and Lewis, *Government by Moonlight*, Hyman, 1990, 1, at 25.

7 Schmitter defines pluralism as "a system of interest representation in which the constituent units are organized into an unspecific number of multiple, voluntary, competitive, non-hierarchically ordered and self-determined... categories which are not specifically licensed, recognized, subsidized, created or otherwise controlled in leadership selection or interest articulation by the state and which do not exercise a monopoly of representational activity within their respective categories," in Schmitter, "Still the Century of Corporatism?", (1974) 36 Review of Politics, 85-131, at 96, also published in Schmitter and Lehmbruch (eds), *Trends Towards Corporatist Intermediation*, London: Sage, 1979. See also Williamson, ibid, at 11 who characterizes pluralism as a "competitive market system of pressure group activity" while corporatism s seen as a "system of state licensed monopoly".

8 Lewis, "Corporatism and Accountability: The Democratic Dilemma", in Crouch and Dore (eds), *Corporatism and Accountability: Organised Interests in British Public Life*, Oxford: Clarendon Press, 1990, at 77 and Cawson, op cit, at 35.

9 Lewis, ibid, at 64 and Metcalfe and McQuillan, "Corporatism or Industrial Democracy?", (1979) 27 Political Studies, 266-282, at 268.

10 Williamson, op cit, at 4; Metcalfe and McQuillan, ibid, at 269 and Cawson, op cit, at 26.

to have used as a reference point the work of Schmitter,[11] who states that;

> *"Corporatism can be defined as a system of interest representation in which the constituent units are organised into a limited number of singular, compulsory, non-competitive, hierarchically ordered and functionally differentiated categories, recognised or licensed (if not created) by the State and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports".*

In its purist form, and as a concept in direct polarity with pluralism, several characteristics of a corporatist arrangement can be suggested. First, close, stable, regular[12] linkages must exist between the functional interest organisations and the state. Interest groups are attributed some form of public status[13] so that they may be seen as part of the "extended state".[14] The role of the state as the arena in which corporatist practice takes place is fundamental. Collective bargaining between the competing interests of management and labour may not properly be described as "corporatist" unless there is a significant state presence.[15] Second, a limitation on competition between interest groups must be observable through the granting of recognition to some privileged groups, creating a degree of representational monopoly by excluding others.[16] Third, corporatism

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11 Schmitter, op cit, at 13. This definition is also referred to in his subsequent reappraisal, Schmitter, "Modes of Interest Intermediation and Models of Societal Change in Western Europe", (1977) 10 Comparative Political Science, 7-38.

12 Birkinshaw et al, op cit, at 3.

13 Birkinshaw et al, ibid, at 28 and 35.

14 Lewis, op cit, at 64 and Birkinshaw et al, ibid, at 26.

15 Cawson, op cit, at 36.

16 Marsh, *Pressure* Politics, London: Junction, 1983, at 2; Lewis, op cit, at 65; Cawson, ibid, at 33-5; Williamson, op cit, at 11 and Birkinshaw et al, op cit, at 40-41.

must apply as a two-way exchange system.[17] The term "interest intermediation"[18] has been used to describe this relationship whereby, in return for privileged representational status, groups comply with certain government aims, creating for the state a "simplified external environment".[19]

The above represents a view of corporatism as an ideal form. However, the concept can be applied along scale which sees corporatism and pluralism as the two diametrically opposed "end points on a continuum".[20] Along this continuum arrangements can be seen as more or less corporatist.

The Social Dialogue as a Corporatist Arrangement

Pre-Maastricht the structure of interest representation within the Community could be described as "much more "pluralist" than corporatist",[21] with large numbers of pressure groups involved in lobbying.[22] However, within the SPA the Community institutions delegate to the social partners a more formalised role in the creation of European public policy and law. This signals a move along the continuum away from pluralism and

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17 Birkinshaw et al, ibid, at 29.

18 The relationship between the state and the interest group was described as "intermediation" in Schmitter, "Modes of Interest Intermediation and Models of Societal Change in Western Europe" in Schmitter and Lehmbruch (eds), *Trends Toward Corporatist Intermediation*, op cit.

19 Dunleavy, "Quasi-Governmental Sector Professionalism: Some Implications for Public Policy-Making in Britain", in Barker, *Quangos in Britain*, London: Macmillan, 1982, as cited in Lewis, op cit, at 65 and Birkinshaw et al, op cit, at 36.

20 Cawson, op cit, at 140. See also Martin "Pluralism and the New Corporatism", (1983) 31 Political Studies, 86-102, at 99 and Crouch "Pluralism and the New Corporatism: a Rejoinder", (1983) 31 Political Studies, 452-60. See also Birkinshaw et al, ibid, at 28 who rejects this model as unhelpful.

21 Streeck and Schmitter, "From National Corporatism to Transnational Pluralism: Organized Interests in the Single Market", (1991) 2 Politics and Society, 133-165.

22 See Harlow, "A Community of Interests? Making the Most of European Law", op cit; McLaughlin and Greenwood, "The Management of Interest Representation in the European Union", (1995) 33 JCMS, 145-156 and Greenwood and Ronit, "Interest Groups in the European Community: Newly Emerging Dynamics and Forms", (1994) 17 West European Politics, 31-52.

towards the introduction of European level corporatism.[23] The two-stage consultation procedure, the potential to conclude collective agreements which later may be converted in Community law through the Council decision method, and the role of the social partners in the implementation of agreements and binding legislation deriving from the social dialogue constitute a usurpation of public law functions by private organisations.[24]

The Community institutions, the "state" for these purposes, have delegated, in prescribed circumstances and with respect to pre-determined subject-matter,[25] the public function of law-making to the social partners, who consist of private organisations formed on the basis of functional representation.[26] The dialogue proceeds on the basis of a formalised, Treaty-based[27] and therefore stable structure as set out in the SPA and the Commission's Communication.[28] In addition the recognition of certain organisations for the purposes of the social dialogue creates a form of representative monopoly.[29]

The symbiotic nature of intermediation is often exemplified through the self-regulatory actions of corporatist interest organisations. The exercise of control or discipline of private organisations over their membership through securing the public law task of implementation represents "corporatism with a vengeance".[30] Cawson holds that the existence of some form of self-regulation is a crucial to distinguish corporatism from mere consultation as a feature of pluralism.[31] However, other commentators have observed that the regulatory function of the interest group in ensuring the compliance of

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23 Falkner, op cit, Vobruba, op cit and Obradovic, op cit.

24 Falkner, ibid, at 5 and Obradovic, ibid, at 6.

25 Art 2 SPA.

26 Obradovic, op cit, at 6.

27 Although see the discussion of whether the SPA forms part of the EC Treaty in Chapter 3.

28 Op cit.

29 Communication, op cit, Annex 2.

30 Lewis, op cit, at 74. See also Cawson, op cit, at 36-7 and Williamson, op cit, at 212.

31 Cawson, ibid, at 36-7.

its members can be seen as signifying an advanced form of corporatism,[32] rather than being a definitional precept.

To some extent the social dialogue envisages self-regulation through the voluntary "procedures and practices" method of implementation at European level[33] and by allowing a Member State to entrust the implementation of Directives to the social partners at national level.[34] However, it has already been observed[35] that, at present, the ambiguous status of European collective agreements together with a lack of mandate, insufficient union coverage and the disparity of remedies for breach of agreements available across the Community make this method of implementation unattractive in contrast with the Council decision method. However, even where the Article 4 SPA negotiation procedure is not invoked the consultation process involves elements of corporatism due to the guaranteed attention received by the opinions of the social partners and the importance attached to them.[36] The procedural support of the SPA may eventually create the impetus for reform within the social partner organisations and increase support in terms of membership within the Member States. The potential future use of the alternative of the procedures and practices method may allow the social dialogue to continue along the continuum and develop into a more advanced corporatist arrangement.[37]

Corporatism And Democracy

The social dialogue may be characterised as corporatist. This begs the question as to whether such a corporatist arrangement conforms with democratic principles.

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32 Williamson, op cit, at 212; Lewis, op cit, at 74.

33 Art 4(2) SPA.

34 Art 2(4) SPA.

35 See Chapter 4.

36 Falkner, op cit, at 5. See also Chapter 4 which refers to the importance attached to the opinions of the social partners with respect to the European Works Council Directive.

37 Falkner, ibid, at 6.

What is Democracy?

In literal terms democracy means rule by the *demos*, that is the people.[38] As a basis for the exercise of government in Western Europe it is uncontroversial. However, this wide concept can be interpreted in many different ways and the specific terms of its application are less easy to determine.[39] It is, however, possible to distinguish between direct and indirect democracies. Direct democracy can be characterised as popular self-government and is based on public participation.[40] This type of self-governance is impractical considering the scale and complexity of modern political systems and has given way to indirect democracy, which is based on the nomination of representatives who govern on behalf of the people. Direct participation is limited to the act of voting at regular intervals.[41]

Since it is impractical for citizens to rule directly, representative democracy is based on the premise that elected politicians serve as the people's representatives by articulating and attempting to secure their interests within the process of political decision making.[42] Differences in opinion exist over fundamental questions such as who is to represent the public interest, how to define that interest, and how to make representatives accountable.

Democracy and Corporatism

Corporatism has been presented above as an arrangement in which the state extends privileged status to certain functional interest groups by the assignment to them of tasks of a public nature. As far as these functional interest groups are concerned their members enjoy a greater input into the decision-making process than through traditional territorial

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38 Heywood, *Political Ideas and Concepts*, Macmillan, 1994, at 167.

39 Tiilikainen, op cit, at 19.

40 Heywood, op cit, at 168 and Boyce, op cit, at 461.

41 Heywood, ibid, at 168 and Boyce, ibid, at 461.

42 Heywood, ibid, at 177.

methods of representation. This latter form of representation can be criticised because it attempts to homogenize the views of the citizenry. Since this is an impossible task elected territorial representatives in practice act in the name of the people, but substitute their own wills for those they represent.[43] This problem may be less acute in the case of functional representation since it involves the representation of organised interests, where "the coincidence between the representative and the active and organised membership is very close".[44] However, even where functional representation is concerned the existence of representative, rather than direct, methods of participation mean that some degree of substitution is bound to exist.[45]

In contrast to pluralism, corporatism is based on the premise of according privileged status to a limited, specified inner circle of organisations. Corporatist organised interests are therefore able to exert greater influence over decision making since resources are not wasted on competition with other organisations[46] and guaranteed importance is attached to their opinions.

By definition, however, corporatism therefore excludes others and limits competition within the political marketplace.[47] The exclusive nature of corporatism has been criticised as threatening the democratic principle of equality since it creates a divide between "insiders" and "outsiders"[48] and denies access to influence over public policy to all "outsider", and therefore non-privileged, interests.[49] This includes not only non-privileged interest *groups*, but also those whose interests are not organised, whether due

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43 Hirst, *Representative Democracy and its Limits*, Blackwell: Polity, 1990, at 12 and Heywood, ibid, at 177-9.

44 Hirst, op cit, at 12.

45 Hirst, ibid, at 12.

46 Cawson, op cit, at 35.

47 Williamson, op cit, at 218; Lewis, op cit, at 82 and Birkinshaw et al, op cit, at 40-1.

48 The terminology is borrowed from Lewis, ibid, at 82.

49 Williamson, op cit, at 155 and Hirst, op cit, at 14.

to lack of organisational or financial resources.[50]

Corporatism endows public status and authority to private interest organisations which exercise this public power within the private sphere and therefore outside the supervision of Parliament. Within the areas in which corporatist arrangements operate one can expect an attendant diminution of parliamentary and electoral politics based on territorial representation.[51] Those falling outside privileged groups are therefore "doubly penalized": first by their exclusion from privilege and second by the devaluation of the influence of their elected representatives in Parliament.[52]

There is thus an opportunity for the excessive involvement of private interest groups[53] to the detriment of those who depend on their status as citizens for influence via parliamentary democratic procedures. This latter territorial representation is based on the aggregation of all interests within a particular constituency rather than on the functional interests of the few. The degree to which corporatism will in practice undermine democracy is therefore dependent upon the number and range of interests excluded.

Democracy and the Social Dialogue

It has already been noted in the previous chapter that, for the purposes of the social dialogue, the definition of "management and labour" includes only those organisations which fulfill the Commission's criteria[54] as set out in the Communication.[55] Since this method of functional representation is based on *organised* interests it excludes those workers and employers who are not members of trade unions or employers associations.

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50 Williamson, ibid, at 155.

51 Lewis, op cit, at 97, Williamson, ibid, at 10 and Cawson, op cit, at 145.

52 Williamson, ibid, at 155.

53 Obradovic, op cit, at 1.

54 Communication, op cit, Annex 2, as set out in Annex 6 below.

55 Communication, ibid, para 24.

The graph set out in Annex 5 below shows that organised workers can be said to make up a majority of the workforce in only 6 Member States: Belgium, Denmark, Ireland, Luxembourg, Sweden and Finland. Membership is particularly low in France and Spain where trade unions represent approximately 10% of workers and is in decline both throughout Europe and Worldwide.[56]

The organisations recognised by no means constitute all organised workers and employers groups within the Community. The CESI,[57] for example, a confederation of independent trade unions who represent between 5 and 7 million members,[58] has not been recognised by the Commission. The European Parliament has commented that the Commission's list is "unbalanced" and has called for better representation of all employers' and workers' organisations.[59]

The social partners only represent the views of those people currently in employment. There may be a positive case for the inclusion of the views and interests of other interested parties, inter alia, the unemployed,[60] as members of society wishing to join the workforce, the retired, as those with a long experience within employment, and consumers, as the purchasers of goods and services resulting out of the employment relationship.[61] Although the remit of the social dialogue is largely confined to issues

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56 Visser, "European Trade Unions: The Transition Years", in Hyman and Ferner, *New Frontiers in European Industrial Relations*, Blackwell, 1994 and Taylor, "Challenge Facing Endangered Species", Financial Times, 14 August 1995.

57 Confederation Europeenne des Syndicats Independents.

58 The CESI itself claims to represent 7m members, but the Social Partners Study recognizes a membership of only 5m. See "The New Social Partners: CESI", (1994) 247 EIRR, 19-20.

59 European Parliament, Resolution on the Application of the Agreement on Social Policy, A3-0269/94, OJ C 205/86, 25 July 1994, para 3.

60 Obradovic, op cit, at 9.

61 Lady Seear, Member of the House of Lords and of the Supervisory Council of the European Centre for Work and Society, has expressed this view that employers and workers organisations should no be the only organisations to be involved in the creation of a European Social area, as noted in Spyropoulos and Fragniere, *Work and Social Policies in the New Europe*, European Inter-University Press, 1991, at 89-90. The point is also made in "European Commission's Green paper on European Social Policy: The United Kingdom Response", Department of Employment, April 1994.

concerning the employment relationship and working conditions[62] and the involvement of workers and employers groups may lead to primary attention being focussed on these issues to the detriment of wider "citizen topics",[63] some of the issues already proposed under the social dialogue concern moral issues, which perhaps call for the input of the whole of European society. The proposals on part-time and temporary workers and parental leave, for example, concern the issue of the role of women at work and within the family.[64]

The Commission's list of recognised social partner organisations does, however, only apply "within the terms of Article 3 of the Agreement".[65] No requirements are set out for recognition for the purposes of negotiating an agreement under Article 4. The Communication notes that, for these purposes, "the social partners will be those who agree to negotiate with each other".[66] The Social Partners Study[67] also refers to the parties' "autonomous right of choosing the organisations with which they deem it appropriate to enter into contractual relations".[68] In practice the individual social partner organisations have imposed their own restrictions on recognition with only the ETUC, UNICE and the CEEP being involved in negotiations, which further decreases the number of workers represented within the social dialogue.[69] The graph in Annex 8 below

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62 Article 2 SPA.

63 Vobruba, op cit, at 312 and Obradovic, op cit, at 9. Both note that the Commission has recognized the problem that the Community has a tendency to reduce citizens to employees. See also Commission's Green Paper, European Social Policy: Options For the Union, COM (93) 551 final, 17 November 1993, which asks "How can we stimulate a kind of consolidated statement of citizens' rights within the Union, which would make more explicit existing rights and seek to shift the existing "labour market orientation" to a more general people-oriented approach on the basis of values common to Member States?"

64 Consultation in these cases should perhaps have involved womens groups and the Equal Opportunities Commission to a greater extent.

65 Communication, op cit, para 24.

66 Communication, ibid, para 31.

67 Op cit.

68 Social Partners Study, op cit, Annex 1, at 1.

69 Council Resolution on Certain Aspects for a European Union Social Policy: A Contribution to Economic and Social Convergence in the Union, op cit, para 21.

illustrates the proportion of members of the ETUC in comparison with all workers in each of the Member States. Only in Belgium, Denmark and Ireland do members of the ETUC make up a majority.

At present and agreement has been concluded in only one case,[70] on the subject of parental leave. Consultations were brought to a halt by 3 of the 28 recognised social partner organisations, the general cross-industry organisations who originally took part in the Val Duchesse social dialogue, the ETUC, CEEP and UNICE. The social partners have recently agreed to begin negotiations on atypical workers in September 1996,[71] again involving only these organisations. The "substantial body of experience behind the social dialogue" established between these 3 organisations was expressly recognised in the Communication.[72] However, even before negotiations on parental leave had begun this exclusivity was criticised by other organisations, including UEAPME, CEC[73] and CESI, who had expressed a willingness to participate in the talks.[74] The Secretary General of UEAPME told the press that "the validity of Maastricht social dialogue is being called into question if it is limited to the present parties".[75]

The main objection to the monopoly created by UNICE, ETUC and CEEP was set out in a letter to the President of the Commission, Jacques Santer, in which the President of the CEC stated that the negotiations excluded "interprofessional organisations representing certain categories of workers... who are, however, recognised as a category of specific importance in the social dialogue"[76] as a necessary result of their inclusion as recognised

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70 Negotiations in the Article 4 sense were not initiated on the subject of the European Works Council directive as no consensus could be agreed on the agenda. See above, Chapter 4.

71 Agence Europe 6763, 4 July 1996, 15.

72 Communication, op cit, para 25.

73 "CEC Protests at Exclusion", (1995) 260 EIRR, 3.

74 The Secretary General of CESI had indicated its willingness in a letter sent to the Commission. See Agence Europe 6558, 8 September 1995.

75 Agence Europe 6496, 8 June 1995, 14.

76 Agence Europe 6540, 10 August 1995, 2.

social partners in Annex 2 of the Communication. The Secretary General of UEAPME has also pointed out that the Commission has set itself up as Secretariat for Val-Duchesse-type social dialogue and it consequently "contributes considerable financial support to this exclusivity".[77] In particular, the claims to participation of UEAPME, which represents craft, small and medium sized enterprises (SMEs), are strong since both the SPA[78] and the Communication[79] explicitly refer to the protection that should be accorded to small and medium-sized undertakings in any agreements or legislation based on the social dialogue.[80] The President of the French Republic, Jacques Chirac expressed surprise at UEAPME's situation at a press conference after the Cannes Summit and has now lent his support to their full participation.[81]

The monopoly created by ETUC, UNICE and CEEP threatens not only to cast doubts over the legitimacy of the social dialogue, but has also provoked the "outsider" organisations to threaten non-recognition and non-compliance with any agreements reached. The Secretary General of UEAPME has issued the statement that "the craft enterprises and SMEs represented by UEAPME will reject such agreements if they are not involved in the negotiations."[82] Similarly EUROCOMMERCE has urged the Council of Ministers not to apply the accord to commerce employers unless EUROCOMMERCE

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77 Agence Europe 6496, 8 June 1995, 14.

78 Art 2(2) SPA.

79 Communication, op cit, para 39.

80 In a letter to the President of the Commission, Jacques Santer, the Secretary General of UAEPME referred to the fact that the Social Protocol "clearly speaks of the respect to be given to the situation of SMEs" and went on to conclude that "negotiation without their representative organisations runs counter to the spirit of the Maastricht Treaty" (Agence Europe 6530, 27 July 1995, 14). With respect to content of the Parental Leave deal UEAPME have stated that the fact that employees benefit from protection against redundancy during parental leave is not acceptable to SMEs and that regulations of exemptions should be provided for cases where the economic interests of the employer are put at risk by maintaining the work contract during and after parental leave. In UEAPME's opinion "problems could have been resolved had UEAPME been able to take part in negotiations".

81 "UEAPME Closer to Full EU Acceptance?", (1995) 259 EIRR, 3 and Agence Europe 6516, 6 July 1995, 16.

82 Agence Europe 6496, 8 June 1995, 14.

agrees.[83] In addition, the conclusions of the EMC General Assembly in Luxembourg revealed that its member organisations do not consider themselves bound by the results of negotiations in the context of the social dialogue in which they have not taken part. As a result the EMC has indicated that its "national organisations will conduct action to refuse the results of negotiations in which they did not participate, insisting on the fact that the existence of problems specific to management is eclipsed".[84] Most significantly, in a letter to the Jacques Santer and Padraig Flynn, UEAPME has indicated that in the absence of a solution "a legal conflict between the European Commission and UEAPME seems inevitable".[85]

The European Parliament has added its voice to the criticism of this arrangement. It states that the Commission should "give a hearing to all social partners" and promote dialogue between all the organisations meeting the criteria and has specifically referred to the case of organisations representing SMEs.[86] In addition it has called for the Commission to set up an information desk for non-representative European organisations.[87]

The Role of the European Parliament within the Social Dialogue

Within the Community the territorial interests of citizens are represented by the members of the European Parliament. Direct elections have taken place since 1979.[88] All nationals of Member States have the right to vote as well as citizens of the Union residing in

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83 "Outside" Organisations Dispute Partners' Parental Leave Deal", (1996) 264 EIRR, 4 and Agence Europe 6603, 11 November 1995, 12.

84 Agence Europe 6624, 11-12 December 1995, 15.

85 Agence Europe 6628, 16 December 1995, 14.

86 European Parliament, Resolution on the Application of the Agreement on Social Policy, ibid, paras 1 and 4.

87 Resolution on the Social Policy Agreement, op cit, at para 10.

88 Council Decision 76/787, OJ 1978 L 278/1, 22 November 1978.

Member States of which they are not nationals.[89]

The role of the Parliament within the European legislative process is notoriously weak.[90] It is rather the Council of Ministers which has the ultimate power of decision-making. The Council is an unelected[91] body consisting of national government representatives. Widespread criticism of the insufficient role of the Parliament has led to the introduction of the co-operation[92] and co-decision[93] procedures as introduced by the Single European Act and the Maastricht Treaty, respectively.

Within the areas of social policy addressed by the SPA the Parliament is now largely redundant[94] with consultation between the social partners as functional interest organisations occurring in place of consultation with the territorial representatives. However, the Commission has indicated in its Communication that it intends to make sure that the Parliament is "fully informed at all stages of any consultation or negotiation procedure involving the social partners".[95] The Parliament will not be required or even approached to give an opinion and although it may do so of its own initiative there is no duty on the social partners to take this opinion into consideration.

Where an agreement is reached as part of the Article 4 negotiation process the Commission is not legally required to consult the Parliament on requests made to it by

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89 Art 8b(2) EC.

90 See note 1 above.

91 However, note the view of Craig and de Burca, *EC Law - Text Cases and Materials*, Clarendon: Oxford, 1995, at 119 who state that "the Council's democratic credentials are indirect: the Council representatives are... political appointees, but they are not directly elected at European level". See also Boyce, op cit, at 470.

92 Art 189c EC. See Lodge, "The European Parliament - From 'Assembly' to Co-Legislature: Changing the Institutional Dynamics", in Lodge (ed), *The European Community and the Challenge of the Future*, 1989, at 58.

93 Art 189b EC. See Boyron, "Maastricht and the Co-decision Procedure" (1996) 45 ICLQ, 293-318.

94 Obradovic, op cit, at 6.

95 Communication, op cit, para 35.

the social partners concerning the implementation of an agreement by the Council decision method.[96] However the Commission intends to "inform Parliament and to send it the text of the agreement, together with its proposal for a decision and the explanatory memorandum, so that Parliament may, should it consider it advisable, deliver its opinion to the Commission and to the Council".[97] Should the Parliament decide to issue such an opinion it would do so at the end of the legislative process. Since the Commission has stated that it will propose to the Council the adoption of a decision on the "agreement as concluded"[98] there seems little room for discussion on the content of the proposed measure. The opinion could influence the adoption of the proposal only in its assessment of the legality of the agreement.[99]

Where no agreement is reached the Commission may consider the possibility of proposing legislation.[100] Before the adoption of directives under the SPA the Council must consult the Parliament concerning matters based on Article 2(3) and do so in accordance with the co-operation procedure[101] for matters falling under Article 2(1).[102] Such consultation is likely, however, to be overshadowed to a large extent by the views of the social partners which may be taken into account by the Commission in drafting any subsequent proposals even in the event that no agreement is reached.[103]

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96 Communication, ibid, para 40.

97 Communication, ibid, para 40.

98 Communication, ibid, para 38.

99 The Council may decide not to implement the agreement on this basis. See Communication, ibid, at para 42 and Chapter 5 above.

100 Communication, ibid, para 34.

101 Art 189c EC.

102 Art 2(2) SPA.

103 See Chapter 4.

The Parliament has indicated its dissatisfaction with this role of "onlooker".[104] In response it has urged the Commission and the Council to enter into a serious dialogue with it and to consider the conclusion of an interinstitutional agreement with a view to giving it "an active role in the adoption of the decision implementing such agreements".[105] In particular, Parliament has requested a right of initiative so that it may request the Commission to initiate the legislative procedure where an agreement by management and labour is rejected.[106] However, the Parliament seems to have mixed feelings about the social dialogue.[107] Its requests for involvement do not challenge the right of the social partners to determine the content of agreements. Moreover, it has stated that the social dialogue constitutes "an essential condition for the achievement of the social dimension"[108] and that their extensive consultation rights provide the Community with "an opportunity to shape the European welfare scene in a way which is close to current practice and the citizen".[109] Despite the fact that the role given to the social partners under this process is far greater than that accorded to the Parliament under the EC Treaty and that it reduces the Parliament's own powers within the field of social policy, the Parliament do not seem to go so far as to claim that the social dialogue increases the Community's democratic deficit. [110]

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104 European Parliament, Report on the Commission proposal for a Council directive on the framework agreement concluded by UNICE, CEEP and ETUC on parental leave, A4-0064/96, 29 February 1996, at 8.

105 European Parliament, Resolution on the Commission proposal for a Council directive on the framework agreement concluded by UNICE, CEEP and ETUC on parental leave, A4-0064/96, OJ 1996 C 96/284, 1 April 1996, at para C.

106 European Parliament, Resolution on the New Social Dimension of the Treaty on European Union, A3-0091/94, OJ C 77/30, 14 March 1994, Resolution on parental leave, ibid, para 2 and Report on parental leave, op cit, at 10.

107 Obradovic, op cit, at 7.

108 European Parliament, Resolution on the Application of the Agreement on Social Policy, op cit, at para A.

109 European Parliament, Resolution on the Social Policy Agreement, op cit, at para H.

110 Obradovic, op cit, at 7.

Conclusion

The social dialogue is a corporatist arrangement whereby interest groups, in this case the social partners, carry out public law tasks through their role of creating and implementing European level legislation. Corporatist theory indicates that such arrangements may not be consistent with democracy. Within the social dialogue procedure the Commission has recognised 28 organisations representing a host of interests, both sectoral and cross-industry. However, in practice the negotiation of agreements is the concern of only the 3 main general cross-industry organisations, UNICE, the CEEP and the ETUC. As a result the social dialogue process can be seen as essentially undemocratic.

However, corporatism may be seen as a threat to democracy only where it undermines a pre-existing efficient form of popular representation.[111] Its critics have based their objections on a comparison with national parliamentary legislation. The Community suffers from an acute democratic deficit, in particular with few powers being given to the territorial representatives of the European citizenry within the European Parliament. Comparatively, therefore the social dialogue seems like a step forward in the recognition of interests and the participation of citizens within the legislative process.[112]

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111 Hirst, op cit, at 7.

112 Vobruba, op cit, at note 11.

Chapter 8

SUBSIDIARITY AND THE SOCIAL DIALOGUE

Introduction

The principle of subsidiarity and the new social dialogue competences of the European level social partners were simultaneously formally introduced into the Community legal order by the Treaty on European Union. Subsidiarity can be defined as a mechanism which seeks to provide guidance concerning the functional allocation of legislative and administrative competences between different levels of organisation. The origins of the principle lie in Roman Catholic social philosophy and it is generally traced to the 1931 Papal Encyclical of Pope Pius XI, Quadregisimo Anno, which states that "it is an injustice , a grave evil and a disturbance of the right order, for a larger and higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies".

Within the Community the concept of subsidiarity is not new. It has been debated since the early 1970s[1] and has since arguably implicitly influenced Community policy-making. Its central importance is now confirmed as a guiding principle for the achievement of the objectives of the Union by Article B TEU. The application of the principle within the Community is set out in Article A TEU which encourages decision-making "as closely as possible to the citizen" and Article 3b EC[2] which states that:

> *"The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.*

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1 Cass, "The Word That Saves Maastricht? The Principle of Subsidiarity and the Division of Powers Within the European Community", (1992) 29 CML Rev, 1107-1136.

2 Introduced by the TEU.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty".

The Commission's Communication on the application of the SPA[3] states that the role of the social partners within the social dialogue process recognises "a dual form of subsidiarity within the social field: on the one hand, subsidiarity regarding regulation at national and Community level; on the other, subsidiarity as regards the choice, at Community level, between the legislative approach and the agreement-based approach". This chapter will consider the impact of the application of subsidiarity on the social dialogue and the extent to which the role of the social partners recognises the principle. However, before such an assessment can be made it is necessary to provide an explanation as to the meaning of subsidiarity. Subsidiarity has been defined in numerous ways and its varying implications for the Community detailed by a multitude of commentators.[4] The intention of the following section is not to provide a conclusive interpretation, since this is a matter for the Court of Justice, but to provide some general conclusions as to the consequences of the application of subsidiarity.

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3 Op cit, para 6c.

4 Eg Toth "A Legal Analysis of Subsidiarity", Steiner "Subsidiarity Under the Maastricht Treaty" and Emiliou "Subsidiarity: Panacea or Fig Leaf?", all in O'Keeffe and Twomey, *Legal Issues of the Maastricht Treaty*, Wiley, 1995; Duff, "Towards a Definition of Subsidiarity", in Duff (ed), *Subsidiarity Within the European Community*, Federal Trust, 1993; Peterson, "Subsidiarity: A Definition to Suit Any Vision?", (1994) 147 Parliamentary Affairs Journal, 116-132; Constantinesco, "Who's Afraid of Subsidiarity?", (1991) 11 Yearbook of European Law, 33-55; Editorial, "The Subsidiarity Principle", (1990) 27 CML Rev, 181-184; Toth, "The Principle of Subsidiarity in the Maastricht Treaty", (1992) 29 CML Rev, 1079-1105; Emiliou, "Subsidiarity: An Effective Barrier Against 'the Enterprises of Ambition'?", (1992) 17 EL Rev, 383-407 and Cass, op cit.

Subsidiarity within the European Union

While Community objectives and areas for potential action are laid down in general terms within the Treaty, subsidiarity, as defined by Article 3b offers day to day guidance on the appropriate level for the exercise of action in the individual case.[5] Although often linked to federalism,[6] subsidiarity does not call for a consititution dictating a static entrenchment of reponsibilities.[7] The principle is a dynamic one, which allows Community action to be expanded or restricted according to the requirements of the particular circumstances of the case.

Article 3b provides a procedure for answering two questions: (1) should the Community act, and (2) what should be the intensity or nature of the Community's action?[8]

1 Should The Community Act?

The first paragraph of Article 3b restates the principle of conferred powers, that in order to achieve its objectives, the Community may only act within the powers conferred upon it by the Treaty. The second paragraph goes on to exclude the application of subsidiarity from areas of concurrent competence.

Article 3b continues that "the Community shall take action... only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community". The test is essentially one of comparative allocative efficiency and

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5 Steiner, ibid, at 59.

6 Eg Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States", (1994) 94 Columbia Law Review, 331- 455.

7 Van Kersbergen and Verbeek, "The Politics of Subsidiarity in the European Union", (1994) 32 JCMLS, 215-236, at 225.

8 Conclusions of the Presidency, European Council in Edinburgh, 12 December 1992, Annex 1, 13 and Commission Communication to the Council and Parliament outlining its proposals for the application of the Subsidiarity principle, Bull of the EC 10-92, point 2.2.1.

comprises two parts. First, the objectives of the proposed action must be unable to be "sufficiently achieved" at Member State level. Second, they must therefore be able to be "better achieved" by Community action. Proof of both these parts must be substantiated by qualitative or, wherever possible, quantitative criteria.[9] In order to fulfill the "better achievement" test the "scale or effects" of the problem must justify Community level action. The Conclusions of the European Council in Edinburgh have confirmed that Community action must produce "clear benefits"[10] by reason of the scale or effects of the problem as compared with Member State action. The reference to "scale" indicates that the problem must involve a cross-boundary dimension, although "effects" is a much more elusive term, with a potentially wide ambit.[11] The Commission's Communication on the principle of Subsidiarity[12] states that the test includes asking what Community action adds to Member State action, which is the most efficient and cost efficient and what would be the cost of non-action. At the end of the day, however, "better" is a subjective comparator which reduces the test of subsidiarity to a large extent to one of political choice[13] rather than of objective social, economic, technical or legal proof.[14]

The outcome of the test clearly depends upon the goals the Community sets for itself.[15] The above two criteria are not difficult to fulfill where Community action seeks to create a level playing field in order to correct distortions within the internal market.[16] Social and employment law is less directly a cross-boundary issue, but action may be justified in

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9 Conclusions of the Edinburgh Council, ibid, at 19.

10 Conclusions of the Edinburgh Council, ibid, at 19.

11 Neuwahl, "A Europe Close to the Citizen? The 'Trinity Concepts' of Subsidiarity, Transparency and Democracy", in Rosas and Antola (eds), *A Citizens Europe*, Sage, 1995, at 55.

12 Commission Communication on the Principle of Subsidiarity, op cit.

13 Berman, op cit, at 335.

14 Scott, Peterson and Millar, "Subsidiarity: A Europe of the Regions v The British Constitution?", (1994) 32 JCMS, 47-67, at 57.

15 Hartley, "Constitutional and Institutional Aspects of the Maastricht Agreement", (1992) 42 ICLQ, 213-237, at 217.

16 Steiner, op cit, 61 and Van Kersbergen, op cit, at 228.

many cases on the basis of the problems associated with social dumping.[17]

The burden of proof lies in all cases with the Community. It is presumed that action at the level of the Member State is "better" unless and until the Commission proposes action at Community level. Despite subsidiarity's dynamic quality, this presumption may allow the principle to develop into a weapon that Member States can use in order to protect their own national interests.[18] Subsidiarity has, for example, been dubbed by the British as the principle of minimum interference[19] and championed by John Major as an indicator of less future Community interference.

2 The Intensity or Nature of the Community's Action?

The third paragraph of Article 3b states that "any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty" and is a restatement of the principle of proportionality as determined by the case law of the Court of Justice.[20] The case of *Denkavit*[21] defined the principle in similar terms: "By virtue of the principle of proportionality... measures adopted by Community institutions must not exceed what is appropriate and necessary to attain the objective pursued". The Court has developed the principle to mean that Community measures must reasonably reflect the objective to be achieved, that the costs of adopting the measure do not outweigh its benefits and that the measure chosen must represent the least burdensome choice of the variety of options

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17 Spicker, "The Principle of Subsidiarity and the Social Policy of the European Community", (1991) 1 JESP, 3-14, at 8, Van Kersbergen, op cit, at 231.

18 Van Kersbergen, op cit, at 227; Coppel, "Edinburgh Subsidiarity", (1993) 44 NILQ, 179-187, at 180. In Delors, "The Principle of Subsidiarity: Contribution to the Debate", in *Subsidiarity: The Challenge of Change*, Proceedings of the Colloquium organised by the European Institute of Public Administration, March 21-22 1991, 13 Delors states that subsidiarity is sometimes used as an "alibi" and as " a fig leaf... to conceal an unwillingness to honour the commitments which have already been endorsed" within the EC Treaty.

19 Toth, "The Principle of Subsidiarity in the Maastricht Treaty", op cit, at 1105.

20 Commission Communication on the Principle of Subsidiarity, op cit.

21 Case 15/83, [1984] ECR 2171, at 2175. See also Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125.

available.[22]

The proportionality test seeks to restrict the scope and method of regulation once the question of whether the Community should act has been determined. Community measures should therefore aim towards being framework in nature, outlining minimum standards and leaving as much scope as possible for national decision-making. Directives are therefore to be preferred to regulations or decisions, and where appropriate non-binding measures such as recommendations should be used.[23]

Subsidiarity and the Social Dialogue

The obligations outlined in Article 3b apply with reference to "Community action". The question of compliance with subsidiarity must form part of the initial consultations on an initiative.[24] The Commission must take the principle into account when drawing up a proposal and justify the relevance of the initiative with regard to subsidiarity in an explanatory memorandum.[25] The Council's negotiations on the substance of a proposal must also include an examination of the issue.[26]

Curiously, considering the primacy of the principle within the Community legal order, the Commission's Communication on the SPA does not expressly oblige the social partners to take subsidiarity into account during the social dialogue procedure. The documents beginning the first consultation stage under Article 3(2) SPA have, however, in practice required the social partners to consider the questions of the necessity of

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22 Bermann, op cit, at 389.

23 Conclusions of the Edinburgh Council, op cit, at 20, Commission Communication on Subsidiarity, op cit.

24 Conclusions of the Edinburgh Council, ibid, at 22.

25 European Parliament, Interinstitutional agreement on procedures for implementing the principle of subsidiarity, Doc PE 176.643, 17 November 1993 and Conclusions of the Edinburgh Council, ibid, at 22.

26 Conclusions of the Edinburgh Council, ibid, at 23 and Commission Communication on Subsidiarity, op cit.

Community action and whether action should take the form of legislation, recommendations, collective agreements or anything else,[27] although again without express reference to subsidiarity. With regard to agreements which are later implemented by Council decision and which therefore become part of Community law there is no doubt that their form and content must comply with subsidiarity. The same may not be true of agreements which are implemented by the "procedures and practices" method. If an agreement merely retains the status of a private contract[28] between the social partners, the Article 3b obligation may not apply since the contract may not fall into the category of "*Community* action". However, the problems associated with enforcement of agreements implemented by this latter method and the negative attitude of UNICE towards "own initiative" agreements means that it is likely for the present that all agreements will be converted into a Council decision.

The operation of the social dialogue and the potential for the conclusion of Community level agreements is therefore dependent on the proposal of legislation by the Commission. The presumption in favour of the Member State as the "better" level inherent in Article 3b militates against centralised Community action. Despite the malleable quality of the "better achievement" test the Community institutions will be forced to consider the principle of subsidiarity carefully since review of compliance is subject to control by the Court of Justice.[29] In addition, politically the application of the principle may cause the Commission to exercise some degree of caution in the proposal of a large quantity of measures.[30] Although not specifically referring to subsidiarity, the Commission's Social Action Programme for 1995-97[31] includes few new legislative proposals and therefore few opportunities for the social dialogue.

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27 See for example EIRR 262, Nov ember 1995, 3 regarding the first consultation document on Atypical Work and Agence Europe 516, 6 July 95, 15 regarding the Burden of Proof in Cases of Sex Discrimination.

28 See Chapter 5.

29 Conclusions of the Edinburgh Council, op cit, at 16.

30 Emiliou, "Subsidiarity; Panacea or Fig Leaf?", op cit, at 77.

31 COM (95) 134, 12 April 1995.

Where subsidiarity does allow for regulation at Community level the proportionality principle of Article 3b favours flexible, non-binding, framework action. The Commission's Communication on subsidiarity specifically encourages agreements by the social partners as an alternative to legislation. The presumption of Article 4(2) SPA that the agreement will stand alone, unless implementation by Council decision is requested by the social partners further illustrates the importance attached to non-binding action.

The Commission's Communication on the SPA points to the choice between the legislative approach and the agreement-based approach[32] as recognition of subsidiarity. In practice where an agreement is concluded it is likely to form the basis of a Directive through implementation by Council decision rather than to stand alone. The uncertain legal status of agreements at Community level, the variety in status of agreements at national level and the differences in membership of trade unions across the Union make this option untenable as far as the enforcement of rights deriving from the agreements are concerned. The lack of real choice between the two approach favours the creation of legislation and pays a superficial respect to the proportionality principle of Article 3b.

A Wider Definition of Subsidiarity

Article 3b provides a mechanism to determine the exercise of power along a vertical scale, aiming at decisions being taken "as closely as possible to the citizen"[33] by restricting Community level action with the burden of justification. However, this formulation of subsidiarity operates only as between action at Community level and Member State level and offers no guidance as to how to determine power sharing along a horizontal axis.

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32 Communication, op cit, para 6c.

33 Art A TEU.

The European Parliament has distinguished between *vertical* and *horizontal* subsidiarity,[34] the vertical concept referring to the allocation of competences between different levels of authority (eg European or national level) and the horizontal to allocation at the same level.[35] In the context of the social dialogue a horizontal application of subsidiarity could provide guidance as to the choice between action by the Community institutions and the European level social partners at Community level and between the national public authorities and the national social partners at Member State level.

While recognising that Article 3b refers only to vertical subsidiarity the Opinion of ECOSOC on the Commission's Communication[36] suggests that the SPA may reveal possible indications of the application of horizontal subsidiarity and several examples are cited.[37] First, within the Declaration on Article 4(2) SPA the Member States expressly delegate to collective bargaining the development of the content of EC level agreements and acknowledge no obligation to undertake legislation. Second, Article 2(4) SPA allows the implementation of Directives at Member State level to be entrusted to management and labour, subject to a guarantee by the Member State of the results imposed. Third, Article 2(6) excludes the areas of "pay, the right of association, the right to strike or the right to impose lock-outs" from the legislative remit of the Council. Instead the social partners are to exercise competence on these issues, since their capacity to conclude agreements under Article 4 SPA is not so restricted. Last, the principle of autonomy of the social partners may influence the division of responsibilities between the social partners and the authorities. ECOSOC suggests that this recognition of horizontal subsidiarity at European level follows its increased recognition at Member State level,[38] notably through the case law of the Court of Justice which has determined that directives

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34 European Parliament, Giscard d'Estaing (Rapporteur), Interim Report Drawn up on Behalf of the Committee on Institutional Affairs on the Principle of Subsidiarity, Doc A3-163/90.

35 See Bercusson, *European Labour Law*, op cit, at 56.

36 ECOSOC Opinion, op cit.

37 ECOSOC Opinion, ibid, at point 1.3.6.

38 ECOSOC Opinion, ibid, at point 1.3.7.

may be implemented by national collective agreements in the first instance, although the Member State must guarantee the results imposed.[39]

If the examples cited above are indeed cases of horizontal subsidiarity, it seems that the concept favours devolving responsibility to the social partners rather than action by the governmental institutions of the Community or the Member State. In this respect one could add that a Council decision implementing a Community level agreement is limited to making binding the provisions of the agreement as concluded, with no scope for amendments[40] and that implementation by this method may not occur except at the joint request of the signatory parties.[41]

If one assumes therefore that horizontal subsidiarity is functioning at Community level[42] and that the autonomy given to the social partners is its end product, the question then arises as to the criteria for application of the principle.[43] The criteria set out in Article 3b refer only to vertical subsidiarity and are incapable of informing a horizontal allocation of competences. It is submitted that some light can be shed on this question by examining the values that underpin the concept of subsidiarity.

The strictly legal formulation of Article 3b ignores the socio-political and moral values which form the essence of the origins of subsidiarity in the Catholic social doctrine referred to in the introduction to this chapter. This doctrine defines subsidiarity not only by reference to efficiency, but also recognises that the concept has a moral aspect which encourages the autonomy of social organisations within a plural society.[44] State intervention is only justified when it is necessitated by the failure of these organisations.

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39 Case 143/83, *Commission v Kingdom of Denmark,* [1985] ECR 427. See also Chapter 5.

40 Communication, op cit at para 41.

41 Art 4(2) SPA.

42 As Bercusson does in *European Labour* Law, op cit, at 558.

43 Bercusson, *European Labour Law*, ibid, at 533 and 558.

44 Cass, op cit, at 1111; Van Kersbergen, op cit, at 222 and Emiliou, "Subsidiarity: An Effective Barrier Against "the Enterprises of Ambition"?", op cit, at 387.

The State has an obligation to intervene by taking appropriate measures to increase the capacity of such organisations to act autonomously.[45] Bermann[46] has identified the virtues of this autonomous local governance in the following ways. Recognition of the autonomy of social organisations allows for the increased participation of individuals in rule-making. Subsidiarity also promotes political liberty by encouraging the diffusion of authority between different levels of governance and flexibility by enabling the law to be more responsive to the community it serves. In addition the principle also respects the internal divisions of the state and allows them to preserve their own diverse social and cultural identities. Essentially the merits of subsidiarity lie in the fact that it advances a participatory democracy by devolving power from the state.[47]

This wider definition of subsidiarity may be implicit in the Article A TEU notion that decision-making should occur "as closely as possible to the citizen".[48] The social dialogue procedure complies to a large extent with this conception by devolving responsibility from the Commission to non-State social partner organisations who represent the workers and employers for whom they regulate.[49] The Commission's Communication on Subsidiarity favours agreements in this respect since they "are based... on a partnership with bodies which are closer to the individual than the Community institutions". Furthermore the Commission has justified the need for action on parental leave on the basis that "the social partners... have agreed that it is necessary"[50] rather than on any criteria of efficiency or scale and effects and the type of action, a Council directive, on the basis that the social dialogue allowed the "social partners and not the Community to fix its content".[51]

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45 Constantinesco, op cit, at 34.

46 Bermann, op cit, at 340.

47 Delors, "The Principle of Subsidiarity: Contribution to the Debate", op cit at 7-8 and 16-18.

48 Neuwahl, op cit, at 41.

49 See Degimbe, "The Social Dimension of the Internal Market and Subsidiarity" in *Subsidiarity: The Challenge of Change*, op cit.

50 Draft Directive on Parental Leave, op cit, Explanatory Memorandum, para 36.

51 Ibid.

Conclusion

The social dialogue recognises the Commission's concept of dual subsidiarity in practice only to the extent that one is prepared to accept a wider definition of subsidiarity to encompass a horizontal dimension. As regards subsidiarity between regulation at national and Community level the Article 3b comparative allocative efficiency test expresses a preference for decision making at the level of the Member State, implying a marginal role for Community social dialogue which is to a large degree dependent on the Commission's legislative initiatives. Subsidiarity as regards the choice at Community level between the legislative and the agreement based approach sits uneasily in practice within the proportionality requirements of Article 3b.

However, there are increasing indications that the Community has been influenced by a horizontal application of subsidiarity. This approach seems to favour input by the social partners into the Community legislative process, irrespective of the eventual form that regulation takes, to the extent that the dialogue advances a participatory democracy. In the light of the conclusions established in Chapter 7 regarding the corporatist nature of the social dialogue, however, it may be argued that in practice this dialogue cannot be said to be democratic and therefore can neither be said to comply with this wider horizontal definition of subsidiarity.

Chapter 9

CONCLUSION

The Current Role of the Social Dialogue

Since ratification of the Maastricht Treaty the social dialogue procedure of the SPA has been initiated on several occasions. The social partners have been requested to consider the possible direction and the content of Community action on the subjects of European Works Councils, parental leave, the burden of proof in the case of sex discrimination, part-time and temporary workers, national level information and consultation and most recently sexual harassment and the flexibility of working time and safety. So far the procedure has been completed on only two occasions. The first led to the creation of the Directive on European Works Councils and the second to the conclusion of an agreement between the social partners on parental leave and leave for family reasons which has subsequently been converted into a directive. The adoption of European level regulation in these areas is a significant step forward for European social policy since successive proposals on both of these issues have previously failed to be adopted due to the requirement of unanimity under EC Treaty legal bases. In addition it seems likely that some form of regulation will be adopted in the near future concerning many of the other areas thus far referred to the social partners.

Despite these results the social dialogue can by no means be said to have been a complete success. The problems besetting the development of the social dialogue outlined in Chapter 2 still dominate the new SPA procedure. In particular, both social partners have not yet fully recognised their common responsibility in the building of a European social area.[1] The presence of the employers association, UNICE, within the social dialogue may be more strategic than positive. In addition neither party to the dialogue has indicated a willingness to engage in negotiations on the conclusion of an agreement of their own

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[1] Teague, "Between Convergence and Divergence: Possibilities for a European Community System of Labour Market Integration", (1993) 132 International Labour Review, 391-406, at 397.

initiative.

Although it is the social partners who are best placed to gauge the needs of industry, the social dialogue therefore remains responsive to Commission proposals, ie the social dialogue can be said to be *reactive* rather than *proactive*. The impact of the application of vertical subsidiarity as set out in the first part of Article 3b EC militates against large-scale action in the social field at European level, with a presumption in favour of national competence, therefore potentially offering a diminishing number of legislative proposals and therefore opportunities for utilising the social dialogue.

Despite the continuing resistance of the UK Conservative government to the adoption of binding social regulation at European level, the Commission has, nevertheless, proved that it will make use of the alternative mechanism of the SPA when necessary. However, the SPA has been used as a measure of "last resort" with measures first being proposed under the EC Treaty in spite of the UK's previous rejection of proposals for European level social regulation *as a matter of principle*, rather than on the basis of substantive content or wording. Such is the desire to include all 15 Member States in any measure adopted that the Commission has been prepared to dilute proposals in order to attract the UK's vote.

With a detailed proposal already in existence, effective consultation and bargaining between the social partners has been hindered. "Bargaining in the shadow of the law" has ensured that negotiations have taken the form of strategic trade offs based on the wording of previous proposals. The agreement on parental leave represents the end product of these trade offs rather than any true consensus between the social partners as to how the issue of the reconciliation of work and family life should be dealt with at European level. Any agreement reached is likely to afford relatively low levels of protection to workers within the Community, reflecting the terms of the EC Treaty proposal diluted for the benefit of the UK, rather than previous proposals which present a higher level of protection.

Where an agreement is reached within the negotiation process, it is unlikely to remain as such. The implementation of agreements by the "procedures and practices specific to management and labour and the Member States" is impracticable considering the unknown legal status of a European collective agreement, the diversity in legal status of national collective agreements across the Member States, the insufficient proportion of the European workforce represented by the European level social partners and the lack of mandate accorded to them to bargain on behalf of their national member federations. In addition the Declaration on Article 4(2) ensures that Member States have no "gap filling" role to play by guaranteeing the results imposed by an agreement both in terms of content and coverage. Implementation by this method would prove at most patchy and would be impossible to police. There seem few cases where the ETUC would not insist that the agreement be converted into a legally binding measure, in most cases a directive, by a Council decision.

The conversion of agreements into directives seems to have an unhappy relationship with the last section of the Article 3b subsidiarity test concerning proportionality, which prefers non-binding regulation. There are, however, indications that a horizontal definition of subsidiarity is being applied at Community level. This interpretation is wider than that set out in Article 3b EC and based upon the origins of subsidiarity as a Catholic social doctrine. This wider interpretation may justify the conversion of agreements on the basis of the democratic participation of the social partners in the new legislative process.

On closer inspection, however, the social dialogue does not seem to conform even to this horizontal interpretation of subsidiarity. First, "bargaining in the shadow of the law" and specifically in the shadow of previous EC Treaty proposals marginalises the effective input of the social partners in the creation of regulation. Second, the social dialogue procedure itself can be characterised as a corporatist arrangement which may not conform with the principles of democracy.

At present the practical importance of the role of the social dialogue therefore appears not to lie in its capacity to involve the social partners in the decision-making process so as to make the issues proposed or the content of regulation more responsive to the needs of the two sides of industry. Instead it has been used primarily as a mechanism to secure the adoption of legislation previously proposed for the 15, but blocked within the Council of Ministers due to the requirement of unanimity under Article 100 EC. The social dialogue fulfills a dual role in this respect. First, an agreement between the social partners or, even where an agreement is not concluded, any indication that both sides of industry recognise the need for regulation in a particular area and are ready to enter into negotiations, defeats any argument within the discussions of the Council of Ministers that proposed social legislation will have an excessive effect on competitiveness. Although it is the UK government who have been credited with this argument, there are indications that the certainty of UK objections may have masked the underlying, unstated fears of other Member States. Second, the consultation and consensus of the social partners appears to go some way towards legitimisation of regulation which affects only 14 out of the 15 Member States.

The Future of Social Dialogue

With only two examples of the end product of the social dialogue, the procedure is still in its infancy. The question arises as to whether the inadequacies outlined above are mere "teething" problems or whether they will prove to be longer lasting threats to the efficient functioning of the social dialogue.

The situation of the SPA outside the main body of the EC Treaty was intended to be a temporary arrangement until such time as a future UK government would allow an amendment to Articles 117-119 EC. UK opinion polls have indicated that there is a real chance that the Labour Party under Tony Blair may come into office at the next election.[2] The Labour Party has pledged that, in this event, it would be willing to agree to the SPA. Such a Treaty amendment would considerably reduce the problems with efficient

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2 An election must take place before May 1997.

consultation and negotiation associated with the pre-proposal of action under the EC Treaty and the dilution of proposals in order to attract the UK Conservative government's vote.

The reactive nature of the dialogue may be less susceptible to political change. The interests of employers associations in the development of European social regulation are essentially negative and it seems unlikely that they would agree to negotiate on own initiative agreements without the pressure of a Commission proposal. Even in the absence of the UK Conservative government the Commission is unlikely to propose the adoption of large-scale social action. The principle of subsidiarity is now firmly entrenched in the EC Treaty as a guiding principle for the development of Community law. In addition "New Labour" have indicated that they will not accept greatly increased involvement in the social field at European level and have assured the business community that they will sanction nothing which would impair UK competitiveness.[3]

The corporatist tendencies of the social dialogue seem set to continue with the 3 main social partner organisations again excluding all other recognised associations within the discussions on part-time and temporary workers. However, when UEAPME's challenge[4] to the legitimacy of these exclusionary negotiations reaches the Court of Justice, it is submitted that such negotiations will be protected to a large extent by the application of the principle of the autonomy of the social partners. However, the 3 main organisations may be forced to take more account of the views of organisations representing SMEs on the basis of Article 2(2) and the accompanying Declaration.

Any possible implementation of agreements by the procedures and practices method seems increasingly impossible in the face of a continuing decline in the membership of

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3 Kampfner, "Labour Shift on Social Chapter", Financial Times, 5 August 1996; Taylor, "Unions Learn to Love Europe", Financial Times, August 27 1996 and Peston, "Blair Woos Business on Social Chapter" Financial Times, 16 July 1996.

4 Case T-135/96, *UEAPME v Council*, not yet heard.

trade unions across many Member States.[5] Neither does there seem to be the political will to take steps towards the harmonisation of European collective labour law systems. Article 2(6), for example, prevents regulation on the subject of the right of association.

The SPA has created the potential for the autonomous development of a collective labour regulation[6] by the social partners. Article 4 provides the capacity to support a European social area regulated by a balance between binding legislation and collective agreements. The degree of divergence between national industrial relations systems is a major factor operating against this development.[7] However, as economic integration increases European level "trajectories" in industrial relations issues seem to be emerging.[8] High and persistent unemployment, for example, is a problem affecting all Member States.[9] In addition Europe-wide trends towards labour market flexibility, the growth of workplace bargaining and Human Resource Management[10] can be detected. The need for the protection of the worker in the face of increasing European management structures[11] has already been recognised at Community level with the adoption of the European Works Council Directive.

The European level social partners seem unwilling to rise to this challenge and it seems that their role under the social dialogue will for the time being be confined to assisting in the creation of European social legislation.

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5 See Annex 7, Visser, "European Trade Unions: The Transition Years" in Hyman and Ferner (eds), *New Frontiers in European Industrial Relations*, Blackwell, 1994 and Hyman, "European Unions: Towards 2000", (1991) 5 Work, Employment and Society, 621-639, at 621.

6 Bercusson, *European Labour Law*, op cit, at 505.

7 Roberts, "Industrial Relations and the European Community", op cit, at 8.

8 Teague, "Between Convergence and Divergence", op cit, at 398.

9 See Annex 2.

10 Teague and Grahl, *Industrial Relations and European Integration*, London: Lawrence and Wishart, 1992, Ch 7.

11 Marginson and Sisson, "The Structure of Transnational Capital in Europe: The Emerging Euro-Company and its Implications for Industrial Relations", in Hyman and Ferner (eds), *New Frontiers in European Industrial Relations*, Blackwell, 1994.

ANNEXES

ANNEX 1

THE PROTOCOL AND AGREEMENT ON SOCIAL POLICY

PROTOCOL ON SOCIAL POLICY

THE HIGH CONTRACTING PARTIES,

NOTING that eleven Member States, that is to say the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic, wish to continue along the path laid down in the 1989 Social Charter; that they have adopted among themselves an Agreement to this end; that this Agreement is annexed to the Protocol; that this Protocol and the said Agreement are without prejudice to the provisions of this Treaty, particularly those which relate to social policy which constitute an integral part of the "acquis communautaire":

1 Agree to authorise those eleven Member States to have recourse to the institutions, procedures and mechanisms of the Treaty for the purposes of taking among themselves and applying as far as they are concerned the acts and decisions required for giving effect to the above-mentioned Agreement.

2 The United Kingdom of Great Britain and Northern Ireland shall not take part in the deliberations and the adoption by the Council of Commission proposals made on the basis of this Protocol and the above-mentioned Agreement.

By way of derogation from Article 148(2) of the Treaty, acts of the Council which are made pursuant to this Protocol and which must be adopted by a qualified majority shall be deemed to be so adopted if they have received at least 52 votes in favour. The unanimity of the members of the Council, with the exception of the United Kingdom of Great Britain and Northern Ireland, shall be necessary for acts of the Council which must be adopted unanimously and for those amending the Commission proposal.

Acts adopted by the Council and any financial consequences other than administrative costs entailed for the institutions shall not be applicable to the United Kingdom of Great Britain and Northern Ireland.

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

The undersigned eleven HIGH CONTRACTING PARTIES, that is to say the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Portuguese Republic (hereinafter referred to as "the Member States"),

WISHING to implement the 1989 Social Charter on the basis of the "acquis communautaire",

CONSIDERING the Protocol on social policy,

HAVE AGREED as follows:

Article 1

The Community and the Member States shall have as their objectives the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combatting of exclusion. To this end the Community and the Member States shall implement measures which take account of the diverse forms of national practice, in particular in the filed of contractual relations, and the need to maintain the competitiveness of the Community economy.

Article 2

1 With a view to achieving the objectives of Article 1, the Community shall support and complement the activities of the Member States in the following fields:

- improvement in particular of the working environment to protect workers' health and safety;
- working conditions;
- the information and consultation of workers;
- equality between men and women with regard to labour market opportunities and treatment at work;
- the integration of persons excluded form the labour market, without prejudice to Article 127 of the Treaty establishing the European Community (hereinafter referred to as "the Treaty".

2 To this end, the Council may adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the

creation and development of small and medium-sized undertakings.

The Council shall act in accordance with the procedure referred to in Article 189c of the Treaty after consulting the Economic and Social Committee.

3 However, the Council shall act unanimously on a proposal from the Commission, after consulting the European Parliament and the Economic and Social Committee, in the following areas:

- social security and social protection of workers;
- protection of workers where their employment contract is terminated;
- representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 6;
- conditions of employment for third-country nationals legally residing in Community territory;
- financial contributions for promotion of employment and job-creation, without prejudice to the provisions relating to the Social Fund.

4 A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraphs 2 and 3.

In this case, it shall ensure that, no later than the date on which a directive must be transposed in accordance with Article 189, management and labour have introduced the necessary measure enabling it at any time to be in a position to guarantee the results imposed by that Directive.

5 The provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent preventative measures compatible with the Treaty.

6 The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

Article 3

1 The Commission shall have the task of promoting the consultation of management and labour at Community level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.

2 To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action.

3 If, after such consultation, the Commission considers Community action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation.

On the occasion of such consultation, management and labour may inform the Commission of their wish to initiate the process provided for in Article 4. The duration of the procedure shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it.

Article 4

1 Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.

2 Agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 2, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

The Council shall act by qualified majority, except where the agreement in question contains one or more of the provisions relating to one of the areas referred to in Article 2(3), in which case it shall act unanimously.

Article 5

With a view to achieving the objectives of Article 1 and without prejudice to the other provisions of the Treaty, the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this Agreement.

Article 6

1 Each Member State shall ensure that the principle of equal pay for male and female workers for equal work is applied.

2 For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

3 This Article shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers.

Article 7

The Commission shall draw up a report each year on progress in achieving the objectives of Article 1, including the demographic situation in the Community. It shall forward the report to the European Parliament, the Council and the Economic and Social Committee.

The European Parliament may invite the Commission to draw up reports on particular problems concerning the social situation.

DECLARATIONS

1 Declaration on Article 2(2)

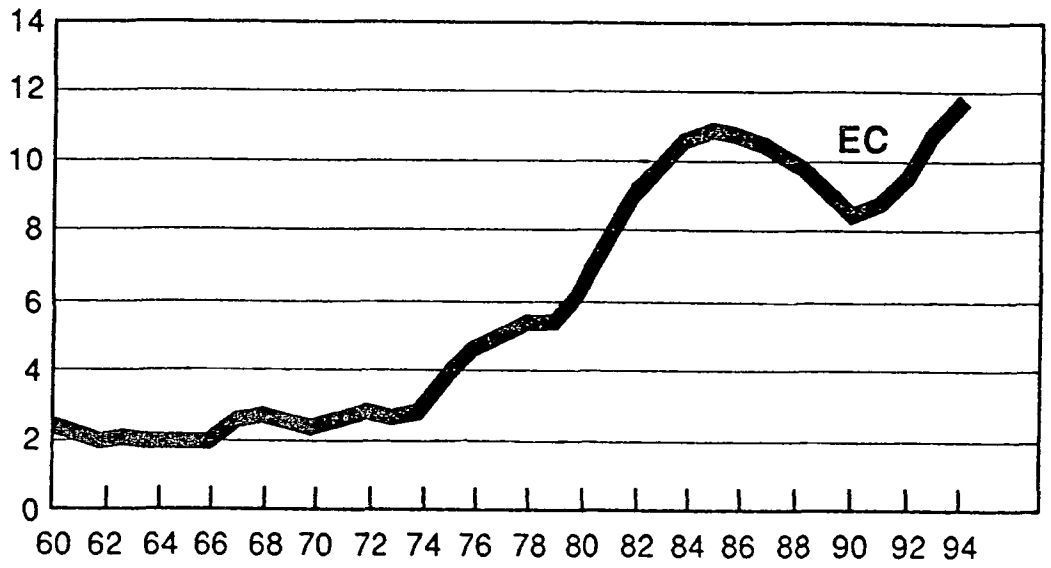
The eleven High Contracting Parties note that in the discussions on Article 2(2) of the Agreement it was agreed that the Community does not intend, in laying down minimum requirements for the protection of the safety and health of employees, to discriminate in a manner unjustified by the circumstances against employees in small and medium-sized undertakings.

2 Declaration on Article 4(2)

The eleven High Contracting Parties declare that the first of the arrangements for application of the agreements between management and labour Community-wide - referred to in Article 4(2) - will consist in developing, by collective bargaining according to the rules of each Member State, the content of the agreements, and that consequently this arrangement implies no obligation on the Member States to apply the agreements directly or to work out rules for their transposition, nor any obligation to amend national legislation in force to facilitate their implementation.

ANNEX 2

UNEMPLOYMENT IN THE EUROPEAN COMMUNITY
(Percentage of the Civilian Labour Force)



Source: "Employment Policy in the European Commuunity: Lessons From the USA", Hanson, Institute of Directors Research Paper, 1995

ANNEX 3

AGREEMENT OF 31 OCTOBER 1991

(Brussels, 31 October 1991)

...

Article 118

...

4. A Member State may entrust management and labour at their joint request with the implementation of the directives adopted in accordance with paragraphs 2 and 3.

In that event, it shall see to it that (no later than the date of entry into force of a directive) management and labour have established the requisite measures by agreement between themselves, but the Member State concerned shall take such action as is needed to enable it at all times to secure the results to be achieved by virtue of the directive.

Article 118a

1. The Commission's task is to promote the consultation of the social partners at Community level and take any measure to usefully facilitate their dialogue, ensuring a balanced support of the parties.

2. For this purpose, before presenting its proposals in the field of social policy, the Commission will consult the social partners on the possible guidelines for a Community action.

3. If, after consultation, the Commission considers that a Community action is desirable, it will consult with the social partners regarding the content of the envisaged proposal. The social partners transmit to the Commission an opinion or, if appropriate, a recommendation.

4. In the course of this consultation the social partners may inform the Commission of their desire to engage the process provided for in Article 118b(1) and (2). This procedure may not exceed nine months' duration, unless an extension is jointly agreed by the social partners concerned.

Article 118b

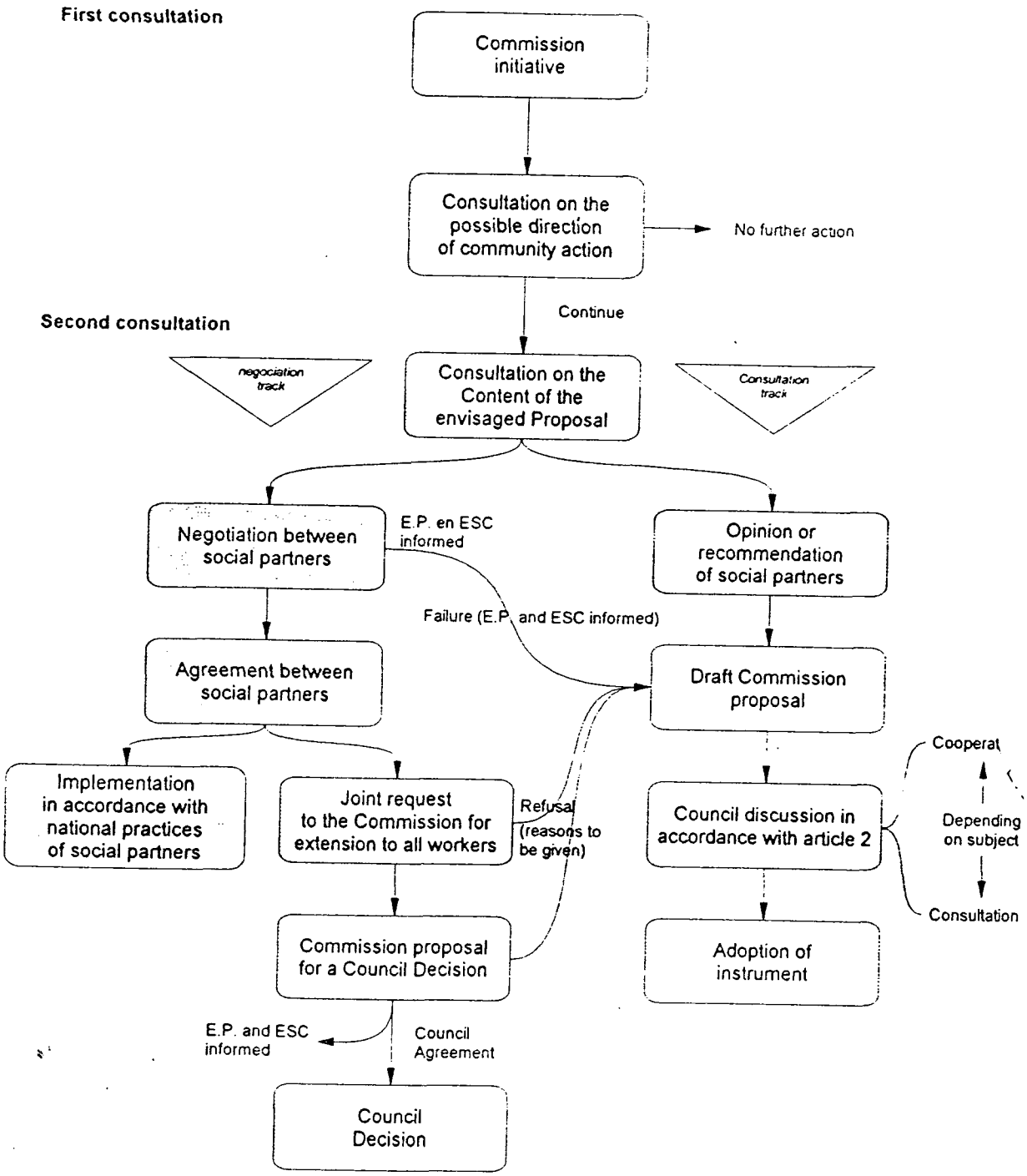
1. The dialogue between social partners at Community level can lead, if the latter so desire, to relations based on agreements.

2. Those agreements concluded at Community level may be realised either according to the procedures and practices appropriate to the social partners and to the Member

States or in matters covered by Article 118, at the joint request of the signatories, on the basis of a decision of the Council on a proposal from the Commission, with regard to the agreements as they have been concluded. This decision will follow the voting procedures of Article 118.

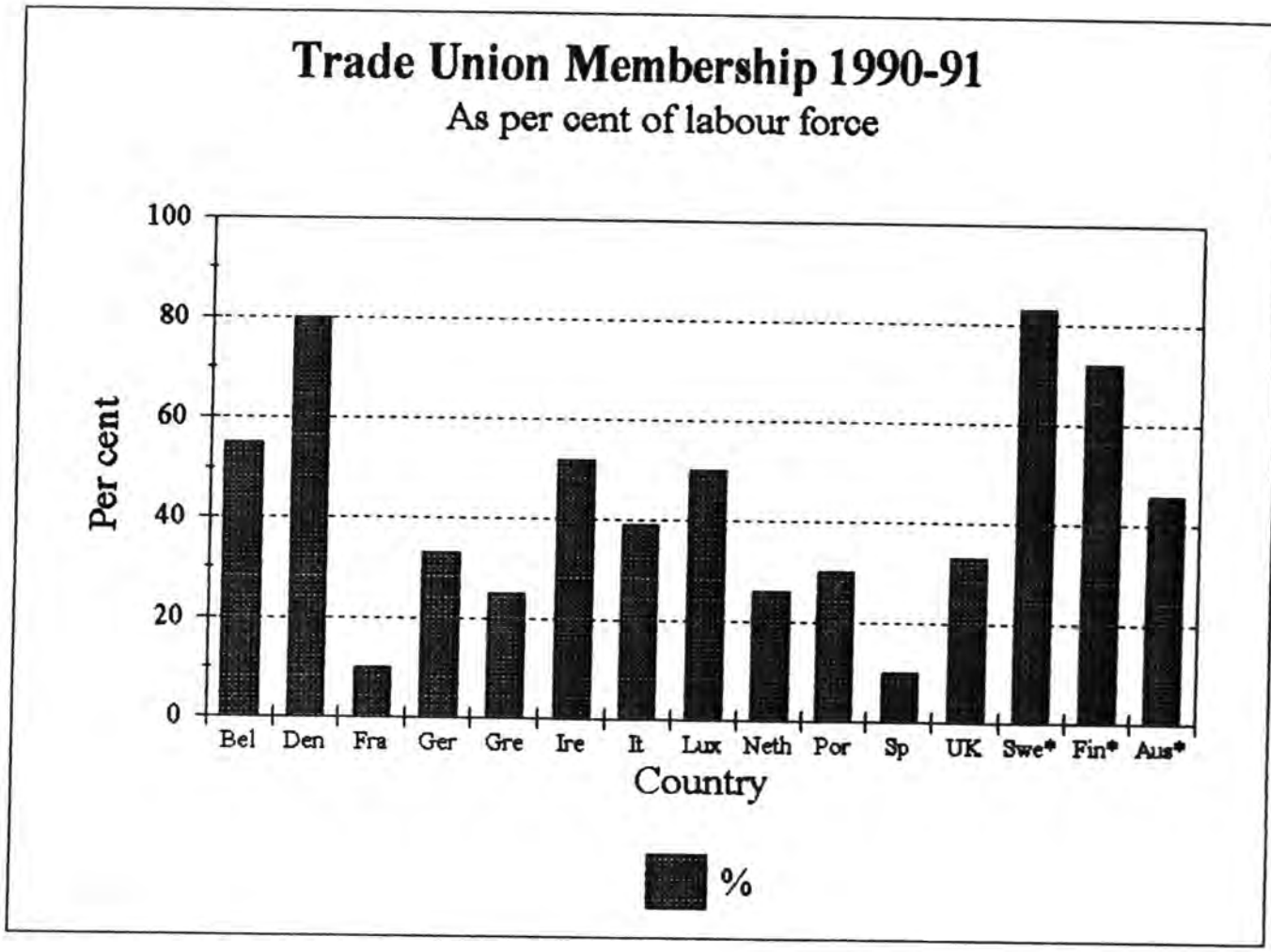
ANNEX 4

OPERATIONAL CHART SHOWING THE IMPLEMENTATION OF THE AGREEMENT ON SOCIAL POLICY



Source: Commission, Communication Concerning the Application of the Agreement on Social Policy, COM(93) 600 final, 14 December 1993, Annex 4

ANNEX 5



Source: Lecher, *Trade Unions in the European Union*, London: Lawrence & Wishart, 1994, 91

*Jensen, Madsen & Due, "A Role for a Pan-European Trade Union Movement? - Possibilities in European IR-Regulation", (1995) 26 IRJ, 4-18, at 9, figures for 1990

ANNEX 6

SOCIAL PARTNERS' ORGANISATIONS CURRENTLY COMPLYING WITH THE CRITERIA SET OUT IN THE COMMISSION'S COMMUNICATION, PARA 24

1 General Cross-Industry Organisations

UNICE - Union of Industrial and Employers' Confederations of Europe
CEEP - European Centre of Enterprises with Public Participation
ETUC - European Trade Union Confederation

2 Cross-Industry Organisations Representing Certain Categories of Workers or Undertakings

UEAPME - European Association of Craft, Small and Medium-Sized Enterprises
CEC - Confederation Europeenne des Cadres
Eurocadres

3 Specific Organisations

EUROCHAMBRES

4 Sectoral Organisations With No Cross-Industry Affiliation

Eurocommerce
COPA/COGECA
AECI - Association of European Co-operative Insurers
BIPAR - International Association of Insurance and Reinsurance Intermediaries
CEA - European Insurance Committee
Banking Federation of the European Community
GCECEE - Savings Banks Group of the European Community
Association of Cooperative Banks of the EC
ETA - European Timber Association
HOTREC - Confederation of the National Hotel and Restaurant Associations in the European Community
European Construction Industry Federation
ERA - European Regional Airlines Association
ICAA - International Civil Airports Association
Association des Transports Aeriens a la Demande
AECI - Association of European Community Airlines
AEA - Association of European Airlines

Organisation Europeenne des Bateliers
International Union for Inland Navigation
European Community Shipowners Association
Community of European Railways
International Road Transport Union

Source: COM(93) 600 final, Communication Concerning the Application of the Agreement on Social Policy, Brussels, 14 December 1993, Annex 2.

ANNEX 7

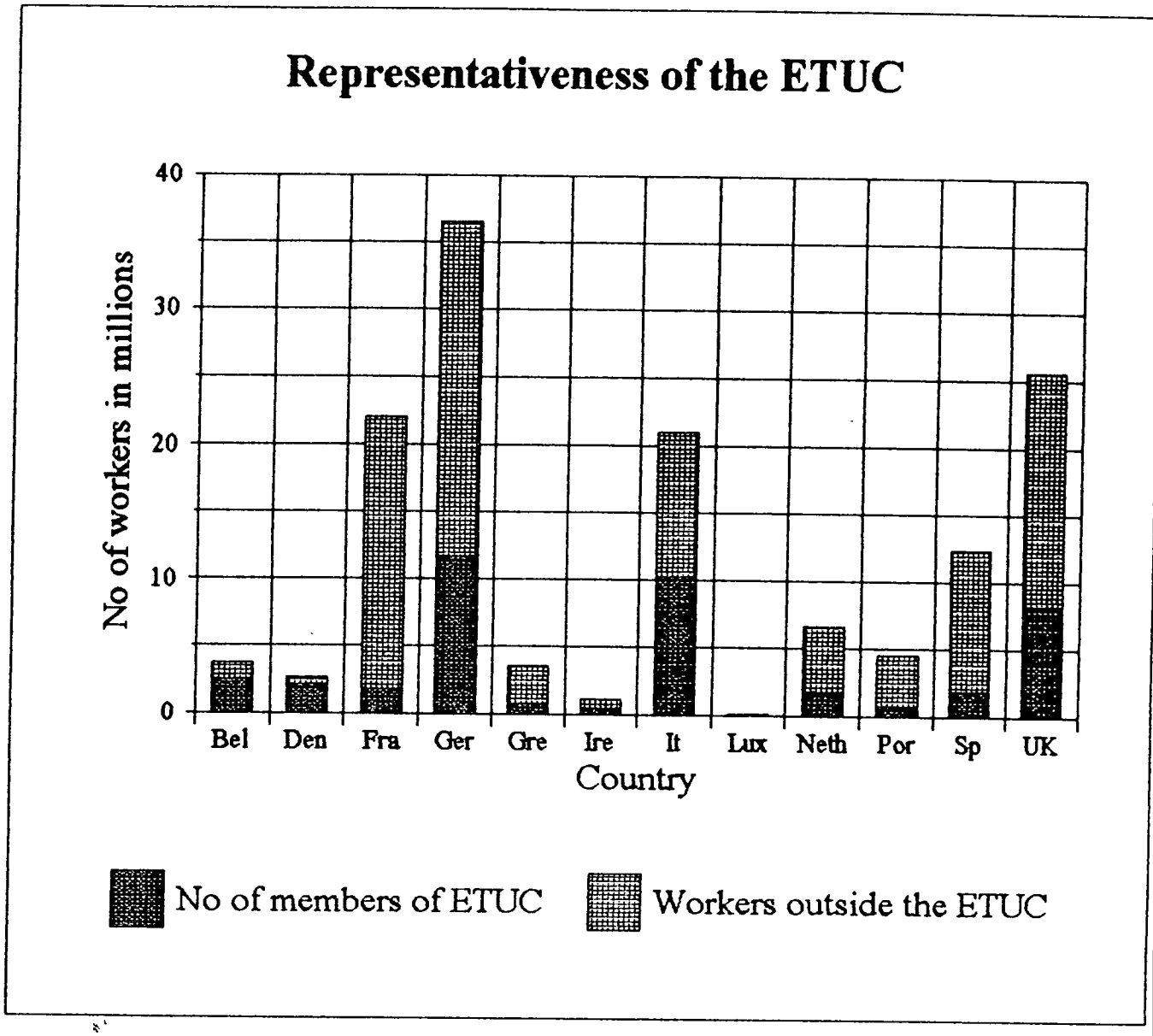
DECLINE IN TRADE UNION MEMBERSHIP 1960-1991

(Union Density Rates in Per Cent)

	Aus	Bel	Den	Fin	Fra	Ger	Ire	It	Neth	Nor	Swe	UK
1960-67	58	44	60	37	20	34	47	29	38	53	66	40
1968-73	55	47	61	54	22	33	52	37	37	51	698	44
1974-79	52	56	71	67	21	37	55	49	37	53	76	50
1980-85	53	57	77	70	15	36	51	46	31	56	82	48
1986-91	47	56	75	71	10	34	44	38	25	57	84	41

Source: Visser, "European Trade Unions: The Transition Years", in Hyman & Ferner (eds), *New Frontiers in European Industrial Relations*, Blackwell, 1994

ANNEX 8



Source: Social Partners Study, Commission of the EC, Doc V/6141/93, Annex II
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