Labour law and Social Europe

Selected writings of Brian Bercusson

Introduced by the ETUI Transnational Trade Union Rights Experts Group

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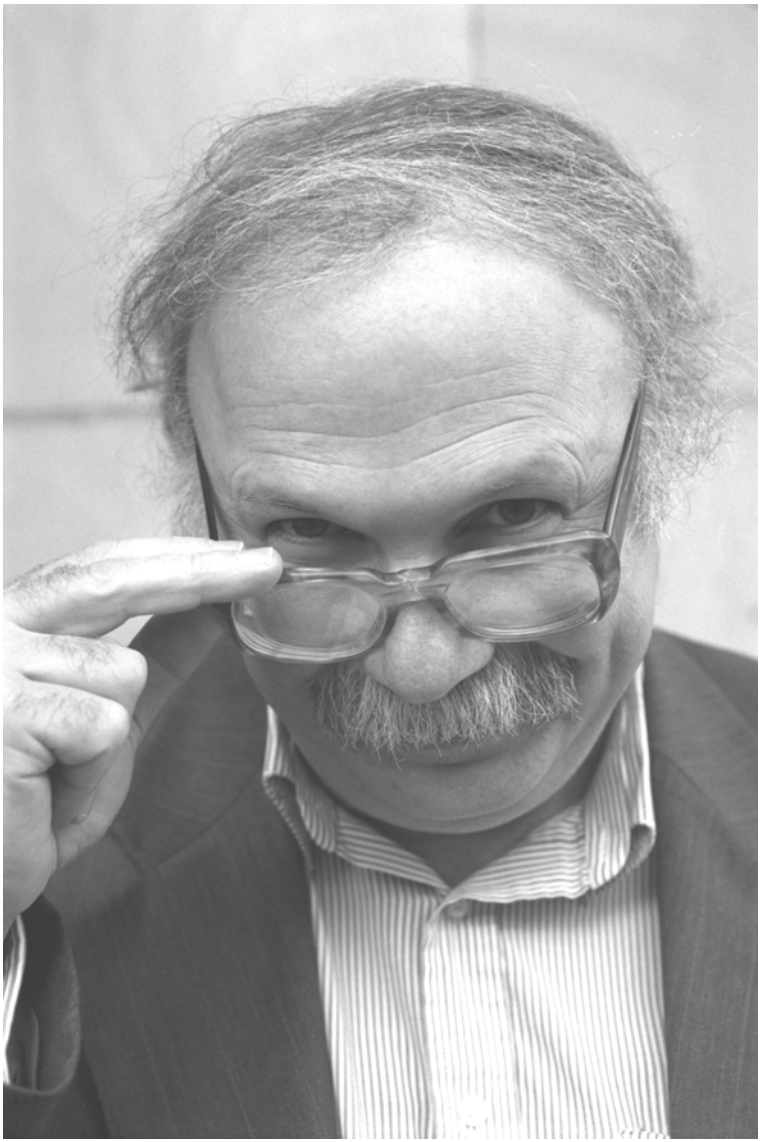
The Transnational Trade Union Rights Experts Group of the European Trade Union Institute is a network of leading European labour law experts: Brian Bercusson (†), Thomas Blanke, Niklas Bruun, Simon Deakin, Filip Dorssemont, Antoine T.J.M. Jacobs, Csilla Kollonay-Lehoczky, Yota Kravaritou (†), Klaus Lörcher, Bruno Veneziani and Christophe Vigneau from nine EU Member States. The principal aim of the Experts Group is to build bridges between the trade union movement in Europe and the academic world in the field of fundamental social rights, including transnational trade union rights. The Experts Group provides legal expertise on various labour law issues important to the European trade union movement, while investigating labour law developments. Anchored at the European Trade Union Institute, the Experts Group also works in close cooperation with the ETUC in providing legal analysis on labour law related issues.

Brian Bercusson enthusiastically initiated the creation of the Transnational Trade Union Rights Experts Group and coordinated it until 2008. The work of the Group has positively influenced EU institutional, constitutional and other legal debates for a better Social Europe, publishing a number of reports and books, among other things, the report *A Legal Framework for a European Industrial Relations System* (1999), a short version of *European labour law and the EU Charter of Fundamental Rights. Summary version* (2002), a critical legal analysis, published in eight languages, a comprehensive book *European labour law and the EU Charter of Fundamental Rights (2006)* and, more recently, the *Manifesto for a Social Constitution – Eight options for the European Union* (2007).

Labour law and Social Europe – Selected writings of Brian Bercusson compiles what we believe to be the most significant writings of Brian Bercusson, as a legacy for future generations of labour lawyers interested in shaping a better Social Europe. Each chapter is introduced by a member of the group who gives his or her views on how it can be understood in the context of Brian Bercusson's thinking more generally, while explaining the reasons for its selection.

Niklas Bruun, Klaus Lörcher and Isabelle Schömann (editors), Thomas Blanke, Simon Deakin, Filip Dorssemont, Antoine T.J.M. Jacobs, Csilla Kollonay-Lehoczky, Yota Kravaritou (†), Christophe Vigneau, Bruno Veneziani, with the participation of Catelene Passchier

Brian Bercusson 1948–2008



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European Trade Union Institute (ETUI)

Brussels, 2009

Print: ETUI Printshop, Brussels

D/2009/10.574/26
ISBN: 978-2-87452-160-7

The ETUI is financially supported by the European Community.
The European Community is not responsible for any use made of the information contained in this publication.

Table of contents

Preface

Brian Bercusson passed away suddenly but peacefully on 15 August 2008 in Tuscany. He was a leading European labour law academic and a true defender of European trade union and workers' rights. Brian Bercusson was a devoted and committed researcher for the European Trade Union Institute (ETUI) and the European Trade Union Confederation (ETUC), whose research and work focused on transnational labour regulation, in particular in the European Union, and its impact on domestic labour law. Following the debate on the Amsterdam Treaty reforms back in 1996, he wrote together with other leading European labour law experts, under the ETUI umbrella, *A Manifesto for Social Europe*. This work, published in 11 languages, triggered the establishment of the ETUI Transnational Trade Union Rights Experts Group, which Brian Bercusson continued to coordinate with boundless energy until his death. The fruits of the work of this group of eminent European labour law academics have influenced institutional and constitutional settings at European and national level, as well as other legal debates in a positive sense for a more and better Social Europe.

Reference might also be made to their report, *A Legal Framework for a European Industrial Relations System* (prepared for the IXth Statutory Congress of the ETUC in Helsinki, July 1999, and published in English, French and German); the book *European Labour Law and the EU Charter of Fundamental Rights* (2006, with summary versions in English, Dutch, French, German, Greek, Italian, Spanish and Swedish) and, more recently, the *Manifesto for a Social Constitution – 8 Options for the European Union* (2007, available in English, French and German).

Brian Bercusson's death is an enormous loss for the ETUI and the European trade union movement in general. He supported the ETUC with his wide-ranging expertise on manifold and very diverse questions related to European and international (labour) law. His advice in

matters such as the proposals for a temporary agency work Directive, the revision of the working time and the European Works Council Directives, as well as the recent ECJ judgments on *Laval, Viking and Rüffert*, were crucial in protecting workers' rights.

Brian Bercusson can be considered the founding father and mentor of the ETUC trade union legal experts network NETLEX, formally established in 1996, since when it has supported the ETUC in providing information and advice for its positions in various EU legal debates. He was also a strong supporter of the European social dialogue, which he famously described as 'bargaining in the shadow of the law'.

Despite the several setbacks that Europe – and, in particular, Social Europe – has witnessed over the years and even very recently, Brian Bercusson remained a strong believer in and fighter for a strong(er) Social Europe, based on primary and secondary sources of law, including a Charter of Fundamental Rights, and a slowly but steadily emerging European industrial relations system, including an effective European social dialogue. As a legacy for future generations but also as the expression of the trade union's heartfelt gratitude for his unstinting attachment to defending workers' rights, the ETUI Transnational Trade Union Rights Experts Group has gathered a selection of some of the most important writings of Brian Bercusson on Labour Law and Social Europe. Brian Bercusson, leading European labour law expert, true defender of European trade union and workers' rights, but above all a warm and charming personality, will be sorely missed.

John Monks
ETUC
General Secretary

Maria Jepsen
ETUI
Director of the Research Department

Brussels, 2009

Introduction
Optimism in action
Brian Bercusson and forty years of labour law

Brian Bercusson (born Montreal, Canada, 1948) was a UK-based labour lawyer who became one of the leading experts on European labour law. He arrived in the UK from Israel to study at the London School of Economics, before moving to Cambridge, where he completed his PhD under the guidance of Paul O'Higgins and Bob Hepple. In 1986, Brian Bercusson obtained a professorship at the European University Institute in Florence, and moved to Italy with his family, where he remained for the next eight years. In 1995, he returned to the UK, first to the University of Manchester, before being appointed Professor of European Labour Law at King's College London in 2000.

Brian Bercusson's early work dealt with the theme of collective industrial relations in Britain. His PhD was published in 1978 as a scholarly work on British 'fair wages resolutions'. His commentaries on the British Employment Protection Acts were very well known in Britain and much used by trade unionists in their negotiations to protect pay and working conditions.

In the course of the 1980s, Brian Bercusson increasingly engaged with European developments, becoming convinced that, in the new world of internalisation and globalisation, national labour law would no longer offer employees adequate protection. This shift in focus resulted in the publication of what is perhaps his best-known work, *European labour law* (Law in Context series) in 1996. He finalised the second edition of this book during the summer of 2008, shortly before his death, and it was published in 2009.

In the 1990s and 2000s, Brian Bercusson continued his research on European labour law, publishing a large number of articles, many of which have become essential reference points for those in the field.

Brian Bercusson was not only a sharp observer and commentator on European labour law, he was also an activist who sought to promote a Social Europe and achieve better protection for workers. He fostered this ambition through his advisory role on labour law issues at the European Trade Union Confederation, Thompsons law firm and the European Parliament.

He also collaborated with the European Trade Union Institute, the research institute with links to the ETUC, leading several working groups. In 1999, under the auspices of the ETUI, he set up an experts group on transnational trade union rights (TTUR).[1] This group worked actively under Brian Bercusson's leadership until his death in summer 2008. It was an extremely enriching experience for all participants, and Brian Bercusson's open and inclusive leadership was central in integrating this broad range of expertise and knowledge in a series of discussions and publications. This group took the decision during the autumn of 2008 to honour Brian Bercusson's memory by editing and publishing the selection of his best articles presented in this volume.

The decision to proceed with this publication was endorsed by the TTUR and the ETUI for several reasons.

First, Brian Bercusson had an unique insight into the fact that national labour law and EC labour law should not be regarded as two separate legal systems, and over the course of his career he sought to stress their interaction and symbiosis. He also argued for a socio-political approach which looked beyond the vertical interaction between member states and EC institutions to the roles of different actors, processes and outcomes within the framework of multilevel governance. These were vital contributions within the field of EU labour law and the publication of Brian Bercusson's work in a single, easily-accessible volume will

1. The group has been assisted by two researchers at ETUI: Stefan Clauwaert (1996–2002) and Isabelle Schömann (since 2002). The members of the group are professors Thomas Blanke – University of Oldenburg, Niklas Bruun – Helsinki University, Simon Deakin – University of Cambridge, Filip Dorssemont – Université Catholique de Louvain, Antoine T.J.M. Jacobs – University of Tilburg, Csilla Kollonay–Lehoczky – Central European University, Yota Kravaritou (†) – University of Thessaloniki , Klaus Lörcher – Legal Secretary at the European Union Civil Service Tribunal, Bruno Veneziani – University of Bari and Christophe Vigneau – Université de Paris I Panthéon Sorbonne. At an early stage, Pertti Koistinen, Ulrich Mückenberger and Alain Supiot participated in the 'Manifesto for a Social Europe' published in 1996.

provide a valuable resource for all those who have an interest in both the past and the future of the EU.

Second, publication of such a volume will allow the reader to follow, on the one hand, the development of Brian Bercusson's academic vision and, on the other hand, the consistency of his ideas and objectives in his writings, from his work on British labour in the 1970s to his last thoughts on how to overcome the crisis created by the *Laval* and *Viking* judgments.

Third, this compilation of Brian Bercusson's work provides an apparatus with which to encourage further reflection on the development of EU labour law from the 1980s until 2008, since he was an ongoing participant in the European scene, an 'optimist in action' who always tried to influence the development of EU labour law in his writings and continually made proposals and suggestions on how one might go further in promoting social objectives in this field of law.

In distinguishing between the three models of Europe presented by Miguel Maduro, Brian Bercusson clearly advocated a model in which harmonisation pursues European social values and is complemented by EU-level instruments of social justice. He rejected models of social policy based on market integration, relying on the social effects of the economic constitution and the model of social policy harmonisation to promote market integration by equalising competition conditions and preventing a 'race to the bottom'.

Brian Bercusson argued that the progress of European integration over the last half-century has produced a specific EU context for employment and industrial relations. This context includes: (i) supranational institutional structures, (ii) a legal framework of supremacy, (iii) trans-national economic integration and (iv) an emerging EU social dimension or even a constitutional framework concerned with employment and industrial relations.

These thoughts were expressed in his co-authored work *European industrial relations*.[2] Brian Bercusson determined the structure of this

2. See B. Bercusson and N. Bruun, *European industrial relations. Dictionary. Overview*, published by the European Foundation for the Improvement of Living and Working Conditions (2005).

Dictionary, dividing it into nine sections.[3] We have tried to follow this same structure in our classification of his articles, although with some adjustments. We grouped the institutional and legal framework together because often distinctions are hard to make; 'The enterprise' was renamed 'Participation at enterprise level' and 'Free movement of workers' was transformed into 'Economic freedom versus fundamental social rights'. Within health and safety, the publication focuses on working time and the last chapters cover the conceptualisation of European labour law and future challenges. We believe that these headings cover essential issues which Brian Bercusson explored in his research and we hope that this publication will highlight the distinctive and rich knowledge of European labour law which marked his work. Our sincere thanks go to Catherine Bercusson, his wife, for her tremendous and most appreciated support in this project.

The ETUI Transnational Trade Union Rights Experts Group:

Thomas Blanke, Niklas Bruun, Simon Deakin, Filip Dorssemont, Antoine T.J.M. Jacobs, Csilla Kollonay-Lehoczky, Yota Kravaritou (†), Klaus Lörcher, Bruno Veneziani, Christophe Vigneau, Isabelle Schömann, with the participation of Catelene Passchier.

3. 1. Institutional framework; 2. Legal framework; 3. Collective industrial relations; 4. Individual employment; 5. The enterprise; 6. Free movement of workers; 7. Anti-discrimination and equality in employment; 8. Health and safety; and 9. Towards an EU system of industrial relations.

Chapter I

Institutional and legal framework

Chapter I: Institutional and legal framework

Introduction by Niklas Bruun

Brian Bercusson wrote about the institutional and legal framework of labour law in general and EU labour law in particular throughout the major part of his career.

The specific features of labour law as a separate discipline, its relations to other legal disciplines and its role within different systems of industrial relations were issues that Brian Bercusson dealt with even in his early writings and he returned to them again and again.

In 1977, one of his first articles dealt with the question of the relationship between British economic law and labour law. Brian Bercusson argued for the autonomy of labour law with regard to criminal law and property law, under the expressive title: 'One hundred years of conspiracy and protection of property: time for a change'.[1] Brian Bercusson returned to the same topic in his last writings, but this time he argued for the autonomy of EU labour law in relation to the economic freedoms of the European Union, in particular the free movement of services and freedom of establishment, in his comments on the ECJ rulings in the *Viking* and *Laval* cases.

Brian Bercusson got involved with European labour law around the time President of the Commission Jacques Delors started the dialogue between the social partners at European level, the so-called 'Val Duchesse talks', while also launching the idea of a social dimension of the Internal Market project. Brian Bercusson attempted, in several articles, to elaborate what this social dimension should entail in institutional and legal terms and how such an institutional and legal framework could form the basis for a European labour law.

1. B. Bercusson (1977), 'One hundred years of conspiracy and protection of property: time for a change', *Modern Law Review* 40: pp. 268–92.

In the course of 20 years as a leading architect of EU labour law, Brian Bercusson dealt with the role of fundamental rights in EU law on several occasions. When the European Community's Charter of Fundamental Social Rights for Workers was adopted as a solemn declaration by eleven member states Brian Bercusson stressed the fundamental importance of the document, although he criticised its lack of legal force and consistency.[2] However, he also saw the important function of this document as part of a large programme for EU legislative measures in the field of labour and social law.

The Maastricht Treaty (1991) and the Amsterdam Treaty (1996) integrated important new institutional solutions into the EC Treaty. The Social Protocol and Agreement in the Maastricht Treaty created a two-speed Europe because the United Kingdom was content to let the other – at that time 11 – member states develop the social sphere without her. Brian Bercusson was the first to deal with this new institutional setting in a series of articles in which he explored the opportunities and mechanisms of social dialogue legislation.

Many labour lawyers thought that the practical significance of the Social Chapter in the Maastricht Treaty was marginal. Brian Bercusson outlined the potential of this mechanism in his articles and proved to be right in his belief that the social dialogue would be able to develop significant solutions 'in the shadow of the law'. He clearly saw that a dynamic and progressive Commission might create incentives for active participation in social dialogue, also on the side of the employers.[3]

Brian Bercusson was well aware of the importance of the European Court of Justice in developing European labour law. The challenging – by UAPME, the employers' organisation which represents the interests of European crafts, trades and SMEs at EU level – of the first results of social dialogue in the form of an agreement on parental leave, and the court decision that followed, was analysed by Brian Bercusson in an interesting and important article.[4]

2. B. Bercusson (1990), 'The European Community's Charter of Fundamental Social Rights for Workers'.
3. B. Bercusson (1992), 'Maastricht: a fundamental change in European labour law'.
4. B. Bercusson (1999), 'Democratic legitimacy and European labour law'.

Later on, in numerous articles, the institutional architecture of what Brian Bercusson had begun to call the European Social Model were published.[5] This article represents a theme present in several of his writings in the 2000s.

5. B. Bercusson (2004), 'The institutional architecture of the European social model'.

One hundred years of conspiracy and protection of property: Time for a change

Brian Bercusson (1977)*

The reaction to the decision of the Court of Appeal in *Hubbard* v. *Pitt*[1] could be neatly divided between lawyers and non-lawyers. Writing in the *Observer* on the weekend following the decision, Louis Blom-Cooper, Q.C., heaped praise on the outstanding liberalism of Lord Denning's judgment, which he prophesied "will go down in legal history as [his] finest hour in a remarkable judicial career."[2] In the *Sunday Times* of the same day, Peter Hain, while giving credit to Lord Denning's stand, addressed himself to the issue of substance:

"But what matters is that the picket *was* stopped. Lawyers may argue to their hearts content about the technicalities of the decision, but its *practical* effect will be to allow for the traditional and hard-fought rights of peaceable assembly and demonstration to be suppressed."[3]

It is remarkable that the acceptance by the Master of the Rolls of the legality of peaceful protest should be regarded as an extraordinary event. It remains the fact, however, that he was in a minority in the Court of Appeal. The decision of the court casts a shadow over all forms of picketing, industrial or other. The protection extended by section 17 of the Trade Union and Labour Relations Act 1974 is not substantive, but only procedural. It will not protect picketing in a trade dispute where the court finds on the evidence that there is any real prospect of succeeding in the claim for a permanent injunction at the trial and the balance of convenience lies in favour of granting the interlocutory relief,

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* 'One hundred years of conspiracy and protection of property: time for a change', Brian Bercusson (1977). This article was first published in *The Modern Law Review*, 40, 268–292 and is reprinted here with the kind permission of Wiley-Blackwell.

1. [1975] 3 All E.R. 1 (Stamp and Orr L.JJ., Lord Denning dissenting), dismissing an appeal from the decision of Forbes J. in the Q.B.D., [1975] I.C.R. 77.
2. The *Observer*, May 18, 1975, p. 10.
3. The *Sunday Times*, May 18, 1975, p. 17.

as long as the requirements of the section (notice to and hearing of the affected party) are adhered to.[4] The majority in the Court of Appeal accepted the plaintiffs' affidavits and photographs as being sufficient to show molestation, intimidation and defamation to a degree which warranted the issuance of an interim injunction, despite Lord Denning's protest that the behaviour was entirely peaceable and had been arranged with the full knowledge and agreement of the local police. Since molestation, intimidation and defamation are not protected by section 15 of the Trade Union and Labour Relations Act 1974, trade union pickets are as much at risk under the decision as anybody else. If the legality of picketing is to be measured in terms of psychological suffering and social harassment, to use the words of *The Times*' editorial on the day after the decision, then few pickets are safe.[5]

Hubbard v. *Pitt* was not directly concerned with picketing in trade disputes, but it is not without implications in that sphere. An examination of the law of industrial picketing may cast light on the judgments in the case. The following discussion treads an uneasy line between a technical legal analysis of the issues and the wider questions of ideology and perspective which govern the former. I shall argue that the perspective adopted by the law and lawyers in their treatment of picketing is premised on unstated assumptions about the distribution of power in industry and society. These assumptions are static in nature and reactionary in substance, and are ill-suited to a dynamic industrial relations system.

A singular attribute of the legal perspective is that it very rarely declares itself openly. Reactionary sentiments are only occasionally to be found in the dicta of a more than usually candid judge. That judicial decisions are informed by such a perspective is recognised by psychologists, suspected by trade unionists, but only rarely acknowledged by judges.[6] It is difficult to pin down the influence of this perspective with hard evidence.[7] Most of those who share the perspective will hardly acknowledge that it exists, or recognise that it constitutes a particular bias.

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4. See the new provisions of s. 17 added by the Employment Protection Act 1975, Sched. 16, Pt. HI, para. 6, and the note in (1976) 39 M.L.R. 169, 173. See also the comments by Professor K. W. Wedderburn in the note on *Camellia Tanker Ltd. S.A.* v. *International Transport Workers Federation* [1976] I.C.R. 274 in (1976) 39 M.L.R. 715, 718.

5. *The Times,* May 14, 1975, p. 17.

6. See the famous statement of Scrutton L.J. in [1923] C.L.J. 8. Contrary statements abound: Lord Wilberforce in (1969) 10 J.S.P.T.L. 254.

7. *E.g.* see the survey by P. O'Higgins and M. Partington in (1969) 32 M.L.R. 53.

In the field of labour law, the bias of the perspective is difficult to detect precisely because the judges have long since purported to accept trade union objectives as legitimate. The judiciary was only slowly weaned from an overtly class bias—and much suffering was caused during this period to the movement as a whole and individual trade unionists as well. But this purported acceptance of trade union legitimacy was one forced on the judges by the fact of trade union power in industrial and political life. The judges had to abandon direct condemnation of trade union objectives, though often with ill grace. Lord Wright commented in the case of *Crofter Hand Woven Harris Tweed* v. *Veitch* that the law "has for better or worse adopted the test of self-interest or selfishness as being capable of justifying the deliberate doing of lawful acts which inflict harm, so long as the means employed are not wrongful."[8] Since this forcible conversion, the legal perspective has transferred the attack from the objectives themselves to the means of achieving those objectives. Trade unionists seeking to achieve their supposedly legitimate ends have been brought up short time and again. Recent history is replete with illustrations of judges obstructing the trade union's objectives by invoking legal condemnation of the means used: inducements, direct or indirect, of contracts, whether of employment or otherwise, using unlawful means, such as breach of contract or threats to do so, or other interferences. Peaceful weapons of industrial warfare are condemned by judges who purport to accept the legitimacy of trade union objectives—thus denying them the means to achieve those objectives.

Unfortunately, most efforts to curb this judicial intervention have succumbed to the temptation to play by the rules at which the judges themselves are the masters. Ingenious formulae have been contrived to immunise trade union actions from the courts. With the added factor of a fickle legislature (primarily its upper chamber), these immunities have had only mixed success. The result has been that every trade union industrial action is overcast with a legal shadow. What labour lawyer can advise his trade union client with any certainty that common forms of industrial action will not be caught by some abstruse interpretation of old law or novel application of it, or even the creation of new law. The Union of Post Office Workers' action in support of South African trade unionists is the latest victim of this lottery. Only their industrial and political strength have saved workers from the gravest consequences of

8. [1942] A.C. 435.472.

this harassment. In the event of direct confrontation, the law has occasionally retreated. Other times, the resources of the State have enforced the judge's will.

In light of these observations, this article will examine picketing activity. The legal perspective is defined and its understanding of picketing is contrasted with that commonly held. The application of the legal perspective is then shown to be as described above—a concentration on the acts of pickets while purporting not to question the objectives of the picketing. Occasionally, this separation between means and ends is admitted to be meaningless. The consequences of the legal perspective are then described, and the case of *Hubbard* v. *Pitt* is used as an illustration in the field of civil liberties. An alternative perspective—a Marxist one—is then posed, which indicates, it is submitted, a way out of the liberal dilemma caused by judicial intervention. By looking closely at the objectives of pickets, more can be achieved than the passage of broad statements of principle declaring such activities lawful or by proposing ever more complex formulae immunising such activity from the judges. The law can move beyond formal into substantive recognition of workers' interests when engaging in industrial action. Such a move would solve many of the problems which plague not only the law of picketing, but other legal aspects of industrial conflict. Canadian experience in the field of picketing is presented as a source of ideas for the British context. It is too much to expect that the legal perspective will give way to the alternative described here, but the pragmatic pressures exerted by forces engaged in industrial struggle may require a re-examination of the legal position on picketing.

When workers go on strike at a factory, the consequence is usually to place economic pressure on their employer. The employer may seek to negate this by attempting to continue production or undertake other activities associated with operation of the plant. The strikers may station pickets at the entrances to the factory or elsewhere. The police are frequently present. The law of picketing purports to regulate the conflict between the objectives of the strikers on the one hand and of the employer on the other. It is essential in analysing the law and its role in this conflict to understand the concept of picketing integral to the law, and propagated by lawyers, judges and police.

A. Picketing from a legal perspective

1. Definition of the legal perspective

Legal commentators rarely affirm the perspective they adopt in their writings. It is an unfortunate consequence that they thereby appear to give their analysis an objective character. Frequently, however, and almost invariably in modern times their analysis, description and criticism are predicated on an acceptance of the conventional wisdom as to the inherent desirability, justice and continuity of a system of industrial relations based on collective bargaining, with its corollaries of management rights, union responsibilities and individual workers' freedoms. The preliminary acceptance and often conscious welcoming of a continuing division of industrial society into capital and labour contradicts the purportedly objective character of their discussion. It colours not only the substance of their analysis and the nature of the arguments brought to bear, but even the language in which they are expressed and the strength of their criticisms. The perspective adopted is one of constantly seeking to balance the opposing forces of capital and labour in a particular state of equilibrium. The state of equilibrium idealised by the legal perspective has traditionally been characterised by two fundamental concepts: the master-servant relationship of employment, and the ownership and control of the means of production by the employer. The idealisation of this state of equilibrium is bound to influence the analysis of strikes and picketing, which of their nature threaten to disturb the equilibrium. In this article I wish to indicate how the legal perspective reveals its bias in the law of picketing.

2. Picketing as commonly understood

The legal perspective on picketing will be more easily perceived if I begin by referring to some descriptions of the activity commonly understood as picketing. The Shorter Oxford English Dictionary defines the verb "to picket" as, *inter alia*, "the posting of men to intercept non-strikers on their way to work and prevail upon them to desist." The activity of picketing may embrace a wide range of activities. The pickets may limit themselves to merely observing scabs; they may attempt to communicate information to them as to the existence of a strike; they may go beyond this and attempt to persuade them not to aid the employer by working for him (or in the case of customers, doing

business with him)—using placards, speaking, shouting and persisting despite refusals to attend. They may go beyond persuasion to where their behaviour amounts to a threat—through their mere presence, by physical violence, social ostracism or economic boycott; or they may engage in actual assaults, destruction of property or the physical blocking of entrances and interference with traffic. Picketing activity may range from one extreme to the other on this spectrum.

These activities, if abstracted in isolation from the context in which they are undertaken, appear meaningless or senseless. It is only when placed in relation to the purposes they are intended to achieve that they can be understood as rational human behaviour. A Royal Commission on Trade Unions recognised this over 100 years ago:[9]

> It is alleged that instructions are given to the pickets to confine themselves to a mere representation of the case of the union promoting the strike, and to use argument and persuasion only, without resorting to violence, intimidation, or undue coercion. But although such instructions may be given, it is hardly in human nature that the pickets, who are interested parties, and who are suffering the privations incident to the strike, should always keep within the fair limits of representation and persuasion, when dealing with men whom they see about to undertake the work which they have refused, and who may thus render the strike abortive.

The purposes which render picketing a form of rational behaviour are first, to communicate information about the strike to the unaware; secondly, to persuade non-strikers to join the strike; and thirdly, to prevent, by moral pressure or physical obstruction, scabs from operating the plant. To arrive at an understanding of picketing, therefore, it is necessary not only to embrace the activity engaged in, but also the purposes which it sets out to achieve. To examine the former while ignoring the latter renders the actions of pickets senseless.

9. Eleventh and Final Report of the Royal Commission on Trade Unions, 1869, para. 69.

3. Picketing as legally understood

The courts have not failed to comprehend this vital link between activity and its purpose. A manifestation of this is the statement by Lindley L.J. in *Lyons* v. *Wilkins* in 1896:[10]

> Some strikes are perfectly effective by virtue of the mere strike, and other strikes are not effective unless the next step can be taken, and unless other people can be prevented from taking the place of the strikers. That is the pinch of the case in trade disputes; and until Parliament confers on trade unions the power of saying to other people, 'You shall not work for those who are desirous of employing you upon such terms as you and they may eventually agree upon,' trade unions exceed their power when they try to compel people not to work except on terms fixed by the unions. I need hardly say that up to the present moment no such power as that exists.

The courts were aware of the purposes of picketing but have declined to accord them any recognition in law. In considering the activity of pickets, no recognition was to be granted to the purposes sought to be achieved. They could certainly never cloak actions with legality by virtue of their legitimacy. On the contrary, any attempt "to compel people" in pursuance of these purposes was unlawful. On the question of what was or was not compulsion, the court withdrew from any consideration of the purposes of the compulsion. No consideration was given to whether compulsion in picketing was the same as compulsion in other circumstances. No attempt was made to distinguish picketing activity from any other form of activity by virtue of its context. This latter was ignored. The actions of pickets were to be assessed by the same criteria as the actions of strollers in the park. Picketing as legally understood was not distinguishable from any other form of activity: the criteria for assessing its legality were no different at common law. This equal application of the law to pickets was somewhat disingenuous, for in 1875 the Conspiracy and Protection of Property Act had been passed, section 7 of which was directed particularly at pickets.[11] The statute listed numerous acts perceived as constituting picketing activity. These included using violence or threats to persons or property; intimidating

10. [1896] 1 Ch. 811, 822–823; (No. 2) [1899] 1 Ch. 255 (C.A.).
11. 38 & 39 Viet., c. 86.

anyone by threats of violence or punishment to persons or property; persistently following anybody from place to place; hiding property or depriving anybody of it or hindering them in the use of it; following anybody with others in a disorderly manner on the highway; watching or besetting the place where anybody resides, works, carries on business or happens to be; and blocking or obstructing a highway. If any of these acts was done "with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing" it was an offence, if done "wrongfully and without legal authority." In *Lyons* v. *Wilkins*, Lindley L.J. was a member of the Court of Appeal which held peaceful picketing unlawful by virtue of it being a statutory "watching and besetting." The proviso to section 7 which permitted attending at or near a place in order merely to obtain or communicate information was inadequate to protect peaceful pickets: "You cannot make a strike effective without doing more than is lawful."[12]

4. The legal perspective applied

The legal perspective is distinguished in its application by the concentration on actions of pickets divorced from their context. It refuses to attach any significance to the purposes and functions of pickets. The consequences of this may be seen by analysing one approach to the 1875 statute which adopts this perspective and also reveals the bias inherent in it. In a classic analysis of the law of picketing in Canada,[13] an eminent Canadian labour lawyer, J. Finkelman, devotes a large portion of his article to establishing the difference between *Lyons* v. *Wilkins* and *Ward, Lock & Co. Ltd.* v. *Operative Printers' Assistants' Society*,[14] and the authority of the latter. His discussion revolves principally around the words "wrongfully and without legal authority" which precede the list of offences contained in section 7 of the 1875 statute. Finkelman asserts that: "The interpretation of the phrase 'wrongfully and without legal authority' lies at the basis of the whole section." (The controlling statute in Canada, The Criminal Code, s. 381, contains the substantially identical phrase "wrongfully and without lawful authority" followed by the list of offences in the 1875 Act.) The question to which he devotes all

12. [1896] 1 Ch. 811, 820; *per* Lindley L.J.
13. (1938) 2 *University of Toronto Law Journal* 67, 344.
14. (1906) 22 T.L.R. 327 (C.A.).

his attention is that of whether the acts enumerated in the section are, if committed, actionable *per se*, or whether the actions undertaken must be actionable apart from any consideration of the section. In other words, quoting Lord Sterndale in *Ward, Lock:* "if what is done is not actionable apart from the section it is not made so by reason of it."[15]

The Court of Appeal in *Lyons* v. *Wilkins* held that the words "wrongfully and without legal authority" had the following effect: "It is not necessary to shew the illegality of the overt acts complained of by other evidence than that which proves the acts themselves, if no justification or excuse for them is reasonably consistent with the facts proved."[16] To the contrary, the Court of Appeal held in *Ward, Lock* that: "The words in the first clause of the section 'wrongfully and without legal authority,' were introduced for the very purpose of limiting the remedy by criminal prosecution to cases so tortious as to give a civil remedy."[17] Finkelman concludes in favour of *Ward, Lock* after a lengthy analysis: "that 'peaceful picketing' for the purpose of informing 'those unaware of the fact that a strike is in progress' is legal, so long as it does not constitute a nuisance or other tortious or criminal act."[18] This view was not shared by the majority of the Court of Appeal in *Hubbard* v. *Pitt.* Orr L.J. saw *Lyons* v. *Wilkins* and *Ward, Lock* not as conflicting decisions, but as being on either side of a dividing line. The question in the instant case was whether the actions of the defendants fell on one or the other side of this dividing line, and this issue would come to be decided at the trial (p. 19 e–f).[19] Similarly, Stamp L.J. regarded the issue, again to be decided at the trial, as whether the defendants had committed the common law tort of nuisance as defined in *Lyons* v. *Wilkins* (p. 11 g–h). *Ward, Lock* was an exception involving trade unions (p. 14 h).

In his dissenting judgment in *Hubbard* v. *Pitt*, Lord Denning M.R. confirmed the analysis propounded by Finkelman. He specifically stated that the view expressed in *Lyons* v. *Wilkins* "has not stood the test of time" (p. 8 c):

> Later authority shows that there is no such tort as 'watching or besetting' a 'man's house' even though it is done with a view to

15. Quoted in Finkelman, *op. cit.* at p. 91.
16. Quoted *ibid.* at p. 87.
17. *Ibid.*
18. *Ibid.* at p. 102.
19. All page references are to the report in [1975] 3 All E.R. 1.

> 'compel' etc. Watching or besetting is only wrongful if it is combined with other conduct (e.g. obstruction or violence) such that the whole conduct amounts to a nuisance. It was so decided by this court seven years after *Lyons* v. *Wilkins*: the case was *Ward, Lock*...

Lord Denning went on to state that this correct view of the legality of picketing was not "decided on any immunity given to pickets in trade disputes. ... It was a decision as to the legality of picketing at common law. It covers picketing, not only in furtherance of a trade dispute, but also in furtherance of other disputes or other causes" (p. 9 a). He went on to express what I have above described as the legal perspective on picketing: "I see no valid reason for distinguishing between picketing in furtherance of a trade dispute and picketing in furtherance of other causes. Why should workers be allowed to picket and other people not?" (p. 9 h). Blom-Cooper neatly reversed the emphasis of Lord Denning's judgment: "In a dissenting opinion of outstanding liberalism Lord Denning declared the right to peaceful picketing, not just to those engaged in industrial disputes, but also to the consumer public. . . .[20] In fact, rather than raising the consumer public to the level of the worker, Lord Denning's judgment places them on the same plane; in effect lowering the worker to the unprotected status of the ordinary consumer.

It is unfortunate that Lord Denning did not take his liberal view to its logical conclusion, as did Finkleman in his article. Having defused, or so he thought, the 1875 Act, he nevertheless went on carefully to dissect the meaning to be attached to each of the subsections of section 7 which describe the acts which constitute picketing. *His conclusion is that, with a few minor exceptions, almost all acts likely to be committed in the course of picketing activity as commonly understood would constitute a civil or criminal wrong.* These range from crimes and torts involving violence (assault, etc.) to intimidation to trespass to nuisance. The result is that while his analysis of *Lyons* v. *Wilkins* and *Ward, Lock* (and that of Lord Denning) may have some theoretical value, in practice the status of picketing remains substantially the same. Pickets will be liable for most acts committed on the picket line, whether these fall simply within the 1875 Act *(Lyons* v. *Wilkins),* or by virtue of their constituting civil wrongs or crimes they thereby invoke that section

20. The *Observer*, May 18, 1975, p. 10.

(Ward, Lock). The realism lacking in the analysis of Finkelman and Lord Denning is to be found in Lindley L.J.'s dictum in *Lyons* v. *Wilkins* quoted above: "You cannot make a strike effective without doing more than is lawful."[21]

Recent experience appears to validate the logical consequences of Finkelman's (and by implication Lord Denning's) conclusion. It has been calculated that during the six weeks of the miners' strike in January and February 1972, 263 arrests were made for offences against the general law arising out of picketing.[22] These included assault upon and obstruction of the police, threatening, abusive and insulting behaviour, obstruction of the highway, possession of offensive weapons, assault occasioning actual bodily harm and criminal damage. Nobody was charged under section 7 of the 1875 Act which purports to regulate picketing. The Shrewsbury Two, Eric Tomlinson and Des Warren were convicted and sentenced to two and three years respectively not for any offence under the 1875 Act (which carries a maximum sentence of a £20 fine or three months' imprisonment) but for common law conspiracy, unlawful assembly and making an affray. A series of cases beginning in 1960 (*Piddington* v. *Bates, Tynan* v. *Balmer, Broome* v. *D.P.P., Kavanagh* v. *Hiscock*)[23] graphically portrays the limitations on picketing. The state of the law which emerges from these cases leaves in question whether any picketing is lawful. Time after time pickets engaged in peaceful activity have been arrested by police. The courts have upheld the rights of the police to act to prevent any criminal action, ranging from the most serious down to a breach of the peace, where they have a "reasonable apprehension" that one may be committed. Although the actions of the pickets arrested are undeniably lawful in themselves, the police may nevertheless halt and disperse them if they reasonably apprehend that any offence may be committed.[24]

This experience indicates that militant picketing which seeks to achieve its purposes is bound to be held unlawful. Yet nobody denies that a militant picket line is often the critical factor in the success of a strike.

21. [1896] 1 Ch. 811, 820.
22. See H.C. Deb. Vol. 831, (ser. 5), col. 223 (February 21, 1972) (Written Answers).
23. Respectively: [1960] 3 All E.R. 660; [1967] 1 Q.B. 91; [1974] A.C. 587; [1974] 2 All E.R. 177.
24. That this power conflicts with the European Convention on Human Rights and Fundamental Freedoms is shown by Paul O'Higgins, "The Right to Strike—Some International Reflections," in *Studies in Labour Law* (J. R. Carby-Hall ed., 1976), pp. 110, 116–117. See also the note on *Broome* v. *D.P.P.* in (1975) 91 L.Q.R. 173.

Can one advance examples where a non-militant picket line was a critical factor in the success of a strike? The question itself reveals its absurdity. If the strike once declared is unsuccessful in halting operations, by definition *the non-militant picket line has no function*, for the union has not persuaded or prevented workers from continuing the operation of the plant. If the strike once declared is successful in halting the operation of the plant, then again the non-militant picket line has no function, for there are no workers who need persuading. Substitute a militant picket line, however, and it becomes the critical factor in a strike which once declared does not succeed in halting operations. It alone may persuade or prevent scabs from continuing to operate the plant.

5. The bias of the legal perspective

How has the law reached this point of total opposition to militant picketing? How does the legal perspective, manifested in Finkelman's article and part of Lord Denning's judgment, justify this result? Finkelman does evince some awareness of how economic philosophy or industrial relations policy may affect the evolution of the law. At one point he protests the fact that: "the concept of nuisance which has crept into the picketing cases is alien to the common law, that is to say, persons are punished for committing nuisances in circumstances where no such punishment would be visited upon them were no economic factors involved."[25] He perceives how the law may severely hamper picketing by invoking a broader concept of nuisance embracing interference via the exclusion of scabs and the halting of production. Consequently, he castigates the judges who, as in *Lyons* v. *Wilkins*, adopt this approach: "In view of this state of affairs, there is much reason in labour's belief that special rules are often invented to hamper its activities."[26] It is revealing, therefore, that Finkelman does not himself hesitate to make the following statement:[27]

> Few of the cases of picketing fail to make some reference to nuisance, and all authorities agree that if watching and besetting constitutes a

25. Finkelman, *loc. cit.* at p. 98.
26. *Ibid.*
27. *Ibid.*

> nuisance it comes within the prohibition of the section. With this result we cannot quarrel; for, whatever may be the views of trade-union leaders, we believe that privileges should be extended to labour only where such privileges are indispensable to give employees a bargaining power equal in actual practice to that of the employers and we do not feel that it is wise to confer upon labour the privilege of committing a nuisance.

One may inquire whether this statement contains any less bias towards a particular form of industrial organisation and societal structure than that which Finkelman in the very next paragraph goes on to condemn as improperly distorting the concept of nuisance. There is revealed here the policy bias which underlies the legal perspective, despite its apparent preoccupation with analysis of specific acts of pickets divorced from their purposes. Finkelman condemns the introduction of policy considerations by the judges in their formulation of nuisance as it applies to pickets, but appears to be unconscious of his own. He considers the application of, for example, the "undistorted" concept of nuisance to pickets as being eminently fair. The same approach applies to the other civil and criminal actions analysed. It is unclear whether he considers the equal application of these doctrines to labour as being the extension of a privilege such as he advocates above to maintain equality of bargaining power, or whether this is simply an equal application of the law to labour as to all interests. The question remains whether this uniform application is any less of a policy-oriented approach than those he condemns. It is undeniable that these concepts of nuisance, intimidation, obstruction, trespass, etc., when applied in the picketing context, have the result of protecting and are premised on a particular set of industrial power relationships. The practical effects of their application are the maintenance of the ownership and control of the means of production by the employer by allowing him to continue operations without the only activity which might effectively disrupt them. It weights the scales, often decisively, in favour of the employer in a trade dispute. The legal perspective does not see in this, however, even an unequal application of the law, let alone partisan politics. The application of the concepts of nuisance, etc., is considered objective and value-free. A characteristic legal myopia prevents the discerning of policy considerations which are integral to the common law. Thus Lord Denning sees: "no valid reason for distinguishing between picketing in furtherance of a trade dispute and picketing in furtherance of other causes" (p. 9 h).

By focusing on particular forms of activity and disregarding the context of industrial relationships and power politics in which they appear, the law appears to be objective. This is clearly fallacious. Whether the sentiments expressed are reactionary, as in *Lyons* v. *Wilkins*, or liberal, as in Lord Denning's judgment, the legal perspective is founded on political conceptions of power relationships.[28]

6. Hubbard v. Pitt

The same bias was at work in *Hubbard* v. *Pitt* as was in *Lyons* v. *Wilkins*, though directed more at the field of civil liberties than that of trade disputes. Forbes J. at first instance expanded the concept of nuisance (misuse of the public highway) so as to enable him to hold peaceful demonstrators liable for unlawful interference with the plaintiffs. He ignored the context in which the defendants were acting—a heretofore publicly proclaimed and exercised freedom to peaceably protest—and applied to them the same criteria as to ordinary users of the highway, *i.e.* ordinary passage:

> As picketing is a use of the highway wholly unconnected with the purposes of dedication and is, in fact, designed to interfere with the rights of an adjoining owner to have unimpeded access from the highway, it is likely to be found to be an unreasonable user unless it is so fleeting and so insubstantial that it can be ignored under the *de minimis* rule.[29]

None of the judges in the Court of Appeal were prepared to proceed in this fashion. With regard to the extent of the right of the public to use the highway, Stamp L.J. stated: "I cannot regard the learned judge's conclusions of law as a satisfactory application of the law to the facts which he found" (p. 12 b). Orr L.J. was content to assume that certain

28. See, *e.g.* K. W. Wedderburn's "lesson which needs to be stated in relation to the traditional law of collective 'non-intervention' ... That traditional framework of British labour law really rested upon a middle-class acquiescence in the current balance of industrial power. That framework was already under severe attack before 1971 because middle-class opinion—and especially its upper segment of 9 per cent, which owns well over half the personal wealth in Great Britain—no longer acquiesced in the 1950s in the new muscles which trade unions had, but rarely efficiently flexed, in days of full employment." "Labour Law and Labour Relations in Britain," (1972) 10 *British Journal of Industrial Relations* 270, 275.

29. [1975] I.C.R. 77, 91 G.

criticisms of the judgment of Forbes J. "may turn out to be well founded" (p. 19 h). Lord Denning rejected the proposition outright, waving the banner of freedom of speech and assembly and stating that there had been no unlawful use of the highway. Forbes J.'s ruling was "of such significance that I do not think it should be allowed to stand" (p. 9 g).

The application of the legal perspective as described above is perfectly illustrated in Stamp L.J.'s judgment in the Court of Appeal: a concentration on the actions of pickets divorced from their context; a refusal to attach any significance to the purposes and functions of pickets. For example, in the final paragraphs of his judgment he addressed himself to the defendants' contention that the injunction precluded them "from carrying on activities which they were entitled to carry on and that it ought to be limited so as to allow the latter activities" (p. 18 a–b). To this the judge replied: "Nothing could be less satisfactory. If the plaintiffs are to be protected it is the *acts* of which they complain that must be restrained. The purpose for which they have been done in the past can only be determined at the trial" (p. 18 d).

The legal perspective itself is apparent in the majority's treatment of what they regarded as the major question of law—the balance of convenience test for whether an interim injunction should be issued. For this test entails the court's weighing social factors and balancing political interests. This was done openly in *Hubbard* v. *Pitt*. Forbes J. at first instance declared forthrightly the "enormous importance" of preventing "a man's trade" being "absolutely destroyed or ruined"; for "nothing can compensate the man for the utter loss of his business." Contrasted with this, the loss of impact in terms of public protest by banning pickets was "a small weight to be cast in the balance against the possibility of injury to the plaintiffs' business if the picket continues."[30] The majority in the Court of Appeal entirely agreed with this assessment.[31] Another interesting facet of perspective was revealed by the forthright way in which both judges in the majority accepted the relative financial status of the parties as affecting the balance of convenience. The plaintiffs' solid financial status was a

30. *Ibid*, at p. 93; quoted by Stamp L.J. in [1975] 3 All E.R. 1, 16 c.
31. *Ibid*. Stamp L.J. at p. 16 d; Orr L.J. at p. 20 e.

substantial factor in favour of granting their request for an injunction. On the contrary, as Stamp L.J. put it: "From what we have been told about their (the defendants) occupations they do not appear to be persons who could be expected to satisfy any substantial award of damages" (p. 15 d). On the balance of convenience test, the majority was convinced, in the words of Orr L.J., that justice required it "to impose an injunction which may for a limited time prevent the defendant from doing that which he would otherwise be at liberty to do" (p. 20 h). As Stamp L.J. observed: "the temporary interference with the right to free speech which might be affected if in the end it turned out that the derogatory material was true might be regarded as minimal when weighed against the damage wrongly done to the plaintiffs' business pending the trial ..." (p. 17 h).

In sum, the majority in the Court of Appeal was content to follow Forbes J. to the extent of holding that there was sufficient evidence of unlawful activity (defamation, molestation, intimidation) to support an interim injunction. This despite Lord Denning's point that "if an interlocutory injunction is granted, it will virtually decide the whole action in favour of the plaintiffs, because the defendants will be restrained until the trial (which may mean two years or more) from picketing the plaintiffs' premises, by which time the campaign will be over" (p. 10 d).[32] The reactionary sentiments which led the Court of Appeal in *Lyons* v. *Wilkins* to curtail the freedom to picket have their modern equivalent in the judgments of the majority in *Hubbard* v. *Pitt* which has curtailed the freedom peaceably to protest. In Stamp L.J.'s view, interference by the courts with freedom of speech was necessary if it prevented damage to the plaintiffs' business; the liberties to assemble, protest or communicate information must be constrained when they impinged on the rights of property.

Lord Denning's response to the plaintiffs' attempt to curtail the activities of the defendants was, as Blom-Cooper says, outstandingly liberal (p. 10 f–j):

> Here we have to consider the right to demonstrate and the right to protest on matters of public concern. These are rights which it is in the public interest that individuals should possess; and, indeed,

32. As of February, 1977, the action had not yet been heard. It seems unlikely to proceed further.

> that they should exercise without impediment so long as no wrongful act is done. It is often the only means by which grievances can be brought to the knowledge of those in authority—at any rate with such impact as to gain a remedy... Such is the right of assembly. So also is the right to meet together, to go in procession, to demonstrate and to protest on matters of public concern. As long as all is done peaceably and in good order without threats or incitement to violence or obstruction to traffic, it is not prohibited... I stress the need for peace and good order. Only too often violence may break out: and then it should be firmly handled and severely punished. But, so long as good order is maintained, the right to demonstrate must be preserved.

After what has been said above, the bias of the legal perspective should be evident here. Lord Denning recognises that picketing (and demonstrations, marches, meetings, etc) are among the few methods of mass communication available to ordinary people—workers, consumers and voters. These are the practically accessible, though extremely limited ways that the vast majority of citizens of modest means can make their voices heard, unlike individuals or corporate bodies of position and wealth, able to use either or both to propagate their views and interests. To restrict the right to take these few forms of mass action is to grant the effective monopoly of public communication to those privileged to own or control the mass media and those who can afford to purchase space and time from them. In effect, Lord Denning's caveats of "good order, without threats or incitement to violence or obstruction to traffic" are the equivalent of Finkelman's applying the common law concepts of nuisance, etc., to pickets. Finkelman's qualms about extending the privileges of labour beyond that necessary to achieve equality of bargaining power find their parallel in Lord Denning's strictures on the need to maintain good order at all costs. The result of Finkelman's qualms is that effective picketing is outlawed. What is the likely result of Lord Denning's strictures?

The contention is that if one leaves it to judges, lawyers and other subscribers to the legal perspective to define the limits of "good order," the result is a form of regulation which renders public protest entirely ineffectual. The vast majority of the legal profession have little or no experience in the forms of struggle they are to regulate. Who doubts but that as a class they are more familiar with the oper-

ation of business and commerce and the maintenance of public order than with trade union or consumer picket lines and protest demonstrations? All their experience is in the former field. Yet it is they who are to determine, through legal argument, legislative formulation and judicial decision, the parameters of these rights and freedoms. It should surprise nobody if the law will permit only polite and well-behaved gatherings of demonstrators carefully marshalled by police; quiet and unobtrusive pickets keeping out of everybody's way. The powers of the established order, whether corporations, bureaucrats, newspapers or others, the wielders of power by right of property and position, either totally unaccountable to the public or so remote as to make them effectively so, are not affected by such futile protests. Just as the liberal views of Finkelman imply the maintenance of certain power-relationships, so do those of Lord Denning. The freedom which they protect is one which allows the overwhelming power of property to be wielded with impunity.[33]

The law which proclaims this freedom is not a pure and abstract entity divorced from any contact with material interests. Every action undertaken by the machinery of the State in accordance with law will affect the interests and power of individuals, organisations and classes. If industrial law is characterised by the two fundamental concepts previously mentioned—the master-servant relationship of employment and the ownership and control of the means of production by the employers—then granting the State the monopoly of violence to enforce the law is tantamount to the enforcement by violence of those interests protected by the law. The law that declares militant picketing unlawful is no more than the declaration of forcible suppression of workers' interests for the benefit of employers. To state that a militant picket line is an instance of violence being employed by one interest—that of the workers—and not by the employers is to reveal the legal perspective which concentrates on individual actions

33. The views of that advocate of a Bill of Rights, Lord Justice Scarman, may be here noted. In the Report of his Inquiry into the Red Lion Square Disorders of June 15, 1974 (Cmnd. 5919, 1975), he referred to the decision of Forbes J. in *Hubbard* v. *Pitt* (para. 122). His opinion was that: "the principle of the law and the balance that it strikes between freedom, public order and the right of passage have not been shown by these disorders to be unsound: and I do not recommend any fundamental reform" (para. 124). Indeed, the advocate of a Bill of Rights went so far as to state that: "The real issue arising from the disorders is not whether our law recognises and protects the right to march and protest (it plainly does), but whether our law confers upon those whose duty it is to maintain public order sufficient powers without endangering the right of peaceful protest" (para. 115).

to the exclusion of the context in which these actions are undertaken. It excludes from consideration the interests which it is sought to promote or attack by these actions. To witness a confrontation on a picket line would serve to open the eyes of many lawyers. Violent clashes between police and pickets indicate not simply pickets employing violence to advance their interests but police employing violence to uphold the interests of the employer, who will often observe and occasionally aid in the violence being employed to defend his interests. The reality here is no more than a clash of opposing interests. The law of picketing simply comes down on the side of the employer. The myopic legal perspective reflects this by focusing exclusively on the violent acts of the pickets while ignoring the violence being employed on the employer's behalf. The choice of which violence the law and State will suppress is thus seen to be far from objective and value-free. Rather it is one which identifies legality with violent defence of the employer's interest and illegality with violent defence of workers' interests.

B. Picketing from a Marxist perspective

1. Definition of the Marxist perspective

Heretofore, I have concentrated on elaborating first a legal perspective characterised by two fundamental concepts (the master-servant relationship of employment and the ownership and control of the means of production by the employer), and secondly, the method by which this perspective is applied to picketing activity (by focusing on the individual actions of pickets divorced from their context and characterising them as illegitimate). The next step is to elaborate an alternative perspective to the legal one.

The alternative perspective to be outlined is a Marxist one. I shall not attempt to do more than state its principal propositions as they affect picketing. Briefly, this perspective, in common with some of those who propound the collective bargaining thesis, regards industrial society as being marked by a division into classes, the dominant of which are the proletariat (labour) and the bourgeoisie (capital). Unlike the proponents of certain forms of the collective bargaining ideology, however, the interests of these classes of workers-employees and capitalists-employers are regarded by Marxists as fundamentally

antagonistic. The ownership and control of the means of production are the prerogative of the capitalist class. The proletariat is in the position of selling its only commodity, labour power, to the capitalist for a price which is a wage. The wage paid by the capitalist to the worker is a certain portion of the value produced by the worker in the production process. The whole of the value of production resulting from the application of the workers' labour power to the means of production controlled by the capitalist is at the disposal of the employer-capitalist. The law reflects these relations of production and gives them their legal expression. As owner, the capitalist has exclusive rights of control and direction of the means of production which are his property. He decides what is to be produced and how it is to be distributed. As employer, the capitalist is also master of his workforce of employees. The employee is obliged to render faithful and honest service, use reasonable skill and care in his work and obey all reasonable and lawful orders and not commit any misconduct. This overwhelming preponderance of power in the hands of the capitalist class vis-à-vis the proletariat is thus enshrined in the law. It is enforced by the various apparatuses of the State—the police, judiciary and army—using whatever degree of force or violence is necessary to its maintenance.

The fundamental antagonism which Marxists perceive between the interests of the proletariat and the bourgeoisie is reflected in one way in the forum of industrial struggles between collective organisations of workers and employers. The history of these struggles includes an arduous battle against laws which first made such collective organisations of workers illegal, then continued to inhibit, penalise, harass and even suppress them. Only after frequently violent confrontations between employers invoking the law to maintain their interests and workers countering the violence of the State apparatus with their own has a degree of power been ceded to organised workers. The law has occasionally formally recognised these temporary accommodations in the unrelenting struggle. At times when workers' organisations have been defeated, these concessions have been withdrawn. The state of the power struggle in the industrially developed countries of Western Europe and North America is marked today by the institution of collective bargaining. In most of these countries, this institution only became of any significance a few decades ago and even today only a minority of the work-force is organised in trade unions. Its operation has been intermittent: frequent and lengthy interruptions have

occurred with the onset of various capitalist crises—wars and inflation —which have necessitated other methods of control. Marxists regard this current mechanism for the control of the class struggle as one stage in a continuing conflict, rather than a happy and permanent reconciliation of the interests of employers and workers. Its final resolution is to be the liberation of the working class from the subjection in which it is held by the power of the bourgeoisie.

2. The Marxist perspective applied to picketing

As mentioned above, picketing may be the logical corollary of a strike. The strike, if successful in shutting the plant down, removes any need for a picket line. Conversely, however, if the strike is incapable of stopping production, the picket line becomes vital as perhaps the major activity likely to make the strike successful. In the Marxist perspective the picket line is a weapon utilised by workers in their struggle against employers in the circumstances of a failed strike. Legal restraints on pickets serve, therefore, to deprive workers of a vital weapon in their struggle. To view pickets simply as persons engaged in intimidation, nuisance and violence is a dangerous illusion. It ignores the context of defence of jobs, security or even subsistence. To deny workers the right effectively to picket is to deny them the capacity to defend these minimal interests. The legal perspective, by restricting its vision, selects those values it will protect and those it will neglect, the interests it will defend and those it will combat. The Marxist perspective is based on a recognition of conflict of interests and class struggle and sees the picket line as a weapon on the side of the workers. The legal perspective attempts to establish an equilibrium based on the maintenance of capitalist interests as owners and employers and sees the picket line as disrupting this equilibrium and thus illegal.

C. Statutory intervention

1. The liberal dilemma

The problem posed by liberal law reformers is this: how to resolve the contradiction entailed in allowing picketing and public protest to be effective without at the same tune falling foul of the law. Writing in

the same year as Finkelman, the present Chief Justice of the Supreme Court of Canada, Bora Laskin, wrote:[34]

> The law relating to strikes and picketing is so uncertain in its application to any given situation that a trade union invites litigation every time it has to resort to such devices. This is one of many reasons why, assuming that collective bargaining is a desirable method of ensuring industrial peace, there should be some legislative guarantee of its effective operation.

The dilemma continues to torture the liberal conscience today. Writing in the *Observer* a few days after the decision of the Court of Appeal in *Hubbard* v. *Pitt*, Louis Blom-Cooper, Q.C., restated the problem again:[35]

> Unfortunately, the law is out of step with reasonable picketing practice and with the aspirations of the trade union movement. The issue, how best to avoid peaceful picketing spilling over into conflict leading to physical violence, has not yet been resolved.

The law of picketing in the United Kingdom today may be seen as a series of statutory statements of liberal good intentions intruding on the legal perspective manifested in judicial pronouncements. The classic statement is to be found in section 2 of the Trade Disputes Act 1906, which declared it lawful, in contemplation of furtherance of a trade dispute, to attend at or near a house or place "merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working."[36] The sentiments of this declaration of the freedom to picket were eclipsed by the reaction following the defeat of the General Strike in 1926 which led to the enactment of the Trade Disputes and Trade Unions Act 1927.[37] The position was restored by the Labour Government's repeal of this Act in 1946.[38] An employers' offensive again led

34. "The Legal Status of Trade Unions," in *Problems in Canadian Unity* (Violet Anderson, ed., 1938), pp. 98–99.

35. The *Observer*, May 18, 1975, p. 10. For similar statements, and a review of the law, see Richard Kidner, "Picketing in Perspective: (1) Picketing and the Criminal Law," [1975] Crim.L.R. 256.

36. Edw. 7, c. 47.

37. 17 & 18 Geo. 5, c. 22, s. 3.

38. Trade Disputes and Trade Unions Act 1946, 9 & 10 Geo. 6, c. 52, s. 1.

to the re-drafting of the statement in the Industrial Relations Act 1971, and again the position was restored for the most part by section 15 of the Trade Union and Labour Relations Act 1974.[39]

Some legal commentators, supporters of *Ward, Lock*, regard section 2 and its successors as adding nothing to the common law. The common law, they maintain, legalises picketing:

> it is virtually certain . . . that at common law peacefully obtaining or communicating information or peaceful persuasion not to work, etc. do not in themselves turn picketing into a tortious nuisance, provided nothing else is done of an unlawful nature.

"Reasonable interference with access to strike-bound premises" is legal.[40] Others more sceptical of the value of *Ward, Lock*, and observing the treatment of section 2 at the hands of the judges, regard the legal protection of picketing, whether common law or statutory, as having been reduced to "minimal proportions."[41] Even statutory provision that picketing for the purposes mentioned in section 2 is lawful will not protect pickets who seek to render a strike effective through what the judges regard as nuisance, intimidation or violence.

Lord Denning, in *Hubbard* v. *Pitt*, viewed the statutory law governing industrial picketing and the common law governing ordinary picketing as being "broadly speaking ... in line the one with the other." He subscribed to the liberal hope that the common law afforded adequate protection: "Picketing is lawful so long as it is done merely to obtain or communicate information, or peacefully to persuade; and is not such as to submit any other person to any kind of constraint or restriction of his personal freedom" (p. 9 h). The cases of the 1960s had indicated how easily the courts would anticipate that picketing was conducive to unlawful activity. The failure of liberal sentiments to

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39. Industrial Relations Act 1971, c. 72, s. 134; Trade Union and Labour Relations Act 1974, c. 52.

40. C. Grunfeld, *Modern Trade Union Law* (1966), p. 444. See also M. A. Hickling, *Citrine's Trade Union Law* (3rd ed., 1967), who suggests both that picketing confined to peaceful persuasion and argument is not and never has been criminal either at common law or under statute (p. 558), and also that many forms of picketing never entailed civil liability in either trespass or nuisance at common law (p. 561). *Lyons* v. *Wilkins* demonstrated "a confusion of thought" (p. 560).

41. K. W. Wedderburn, *The Worker and the Law* (2nd ed., 1971), p. 325.

affect the legal perspective was made clear in the decision of the majority in *Hubbard* v. *Pitt*.

The latest expression of liberal concern was contained in clause 99 of the Employment Protection Bill introduced in March 1975:[42]

> It is hereby declared that a person exercising a right conferred on him by section 15 of the 1974 (Trade Union and Labour Relations) Act (peaceful picketing) may, at the place where he is attending, seek by peaceful means, falling short of obstruction of the highway, to persuade any other person (whether in a vehicle or not) to stop for the purpose of peacefully obtaining or communicating information from or to that other person or peacefully persuading him to work or abstain from working.

The characterisation of section 15 of the 1974 Act as conferring a "right" to picket may add something to the moral force of the old law, but was unlikely to have any effect on the judges, whose freedom to enforce the old prohibitions on nuisance, etc. remains. If anything, the specific prohibition on obstruction of the highway reinforced the legal perspective, by making clear that the "right" to picket was subject to the pre-existing prohibitions.[43] The feeble nature of these attempts to resolve the liberal dilemma are a consequence in part of the failure to make explicit the underlying questions of ideology and perspective. I have attempted to raise some of these questions in this article. Some discussion of this kind has been going on in Canada over the past few years, however, and is worth investigating in some detail.

2. Old and new ideas from Canada

In 1968 the Report of the Canadian Task Force on Labour Relations took note of the amount of violence that had accompanied recent labour disputes (e.g. the *Oshawa Times* strike, the Inco strike and the Stelco strike in January, July and August 1966 respectively) as a

42. Bill 119 of March 25, 1975; presented by the Secretary of State for Employment, Mr. M. Foot.

43. The value of this proposed protection to pickets is perhaps indicated by the defeat of the clause in the Committee stage of the Bill. Several Labour M.P.s abstained from voting, declaring that it was "useless." See the debate in Standing Committee F on the Employment Protection Bill, 28th Sitting, July 17, 1975, at cols. 1485–1526.

disturbing aspect of current industrial relations.[44] They commented that:[45]

> If defiance of the law is not to lead to general disrespect for law and order . . . Laws must be kept under constant surveillance and brought up to date and clarified as changing circumstances dictate.

The Task Force seemed ready to reconsider the whole issue of picketing: "Respecting the (objects and consequences) of picketing, we recommend that its legitimacy be determined through the examination of legislative policy, and not through the common law of industrial torts or the judicial industrial relations gloss on the civil law of civil wrongs (delict)."[46] The need for a reappraisal had been brought out in a special study for the Task Force which had concluded:[47]

> The propensity to restrict (picketing) rests on a common law refusal to accept collective bargaining and the propriety of any pressure on an employer except by individual refusal of employment: hence, on a restriction of union rights to whatever extent is necessary to allow employers to carry on their operations as if collective bargaining did not exist. In the writer's opinion, that approach is completely out of keeping with current conditions and the temper of much of the labour force, and can only become more so if retained longer.

Despite this warning, the Task Force quietly succumbed to the temptation to view picketing through the traditional legal perspective, which they stated in the following form:[48]

> One of the fundamental civilising goals of the rule of law and the institutionalisation of its enforcement is to get disputes off the streets and into the courts, where they may be settled on the basis of evidence and substantive law instead of by roving force of arms.

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44. *Canadian Industrial Relations*, Report of the Task Force on Labour Relations, 1968, para. 425.
45. *Ibid*. para. 426.
46. *Ibid*. para. 623.
47. H. C. Pentland, "A Study of the Changing Social, Economic, and Political Background of the Canadian System of Industrial Relations," Draft Study No. 1 (a) for the Task Force on Labour Relations; Privy Council Office, 1968, at p. 403.
48. *Loc. cit.* para 636.

> The acceptance of picketing as part of the economic sanctions inherent in collective bargaining accommodates the return of industrial disputes to the streets....

The Task Force's resolution of the issue was to provide narrowly confined exceptions to a general rule outlawing any picketing activity which could effectively halt employer operations: "Generally, we do not think there is a case for giving to persons who choose to engage in acts of picketing any relief from general laws for the protection of the person and property, such as assault, battery, defamation, trespass, nuisance, and so on."[49] As regards the section in the Criminal Code of Canada which restates in almost identical form the provisions in section 7 of the English Conspiracy and Protection of Property Act 1875:[50]

> While it may be that the section could better be expressed in language more harmonious with modern industrial relations, we do not recommend its repeal. We are concerned here with the capacity of picketing as an act of free speech and of legitimate persuasion to erupt into extravagant or outrageous behaviour.

The Task Force did recognise that the direction of the common law was at cross purposes with the legislative policy of collective bargaining. It recommended accordingly a repeal of the common law of industrial torts and its replacement with a form of codification of the law. Unfortunately, its recommendations were premised on the unquestioned assumption that the employer was free to operate his plant and scabs were not to be hindered in working for him during a strike.[51] It thereby ignored the central function of picketing in the system of collective bargaining it was so anxious to uphold. As another of their special studies had pointed out: "If (the employer) can effectively operate virtually unfettered by legal constraints, the economic sanction of the strike may be virtually meaningless to the employees in question unless they exercise virtual control over the supply of labour services involved."[52] The obvious objection to this mere codification of the existing law had been made explicit in yet

49. *Ibid.* para. 630.
50. *Ibid.* para. 633.
51. *Ibid*, paras. 618–621.
52. Edith Lorentsen and Joel Ball, "The Development of the Public Policy on Labour Relations in Canada," Task Force on Labour Relations Project No. 8, at p. 558.

another special study commissioned by the Task Force: "... the only way that labour can effectively make its demands through picketing is by doing acts that are illegal now and would be illegal under the suggested codification. The effect of the codification would be to make that illegality clearer, and it would therefore be unacceptable to labour."[53]

Outbreaks of violence on picket lines have led to proposals and legislative developments in Canadian jurisdictions which have begun tentatively to recognise the interests of strikers in closing down a plant. No jurisdiction has yet taken the step of legalising militant picketing—in effect granting the worker the same right to defend his job as owners have to defend their property. Those jurisdictions which have spelled out a positive right to picket are still rooted in the conventional legal tradition.[54] Measures have been proposed and enacted, however, which have the effect of attaining the principal objective aimed at by militant picketing. A Task Force study did mention the suggestion of "one important labour spokesman [who] favoured the outlawing of all picketing provided that struck plants were padlocked."[55] An application of an idea similar to this is contained in a unique New Brunswick procedure referred to by H. D. Woods, the Chairman of the Task Force, in another context.[56] According to Woods, a problem arose in public employee labour relations laws when "designated" employees, who were prohibited from striking as being essential workers, had to cross the picket lines of their legally striking fellow-workers. Section 102 (3) *(a* & *b)* of the New Brunswick Public Service Labour Relations Act 1968 attempted to resolve the problem with the following formula:

> the employer shall not replace the striking employees or fill their positions with any other employee; and no employee shall picket, parade or in any manner demonstrate in or near any place of business of the employer.

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53. Innis Christie and Morley Gorsky, "Unfair Labour Practices," Task Force on Labour Relations, Study No. 10; Privy Council Office, Ottawa, 1968, at p. 79. Commentators in England have also suggested that codification might be a solution to the problems of picketing—see the note on the Trade Union and Labour Relations (Amendment) Act 1976 in (1976) 39 M.L.R. 698, 705.

54. For example, s. 85 and 1 (1) of the new Labour Code of British Columbia Act 1973.

55. Study No. 10, *supra*, note 53, at p. 78.

56. H. D. Woods, *Labour Policy in Canada*, (2nd ed., 1973), p. 317.

As Woods points out: "Thus, the employee's right to picket is traded off against the employer's right to replace striking employees. The employee is guaranteed that his job will not be transferred to strike-breakers, and the employer is protected from the potential disobedience of designated employees who might otherwise refuse to report for work if picket lines were established." The interests of labour in closing the plant down were clearly not predominant in the minds of the New Brunswick legislators. The First Annual Report of the Public Service Labour Relations Board commented on the unique procedure as having been designed simply to avoid "creating an odious situation, from the point of view of those directly concerned as well as the general public." Nevertheless, there is here legal recognition of the function of picketing. However indirectly, the law, in the words of Lindley L.J. in *Lyons* v. *Wilkins*: "confers on trade unions the power of saying to other people, 'You shall not work for those who are desirous of employing you upon such terms as you and they may eventually agree upon'." By going out on strike, workers may lawfully have the power to close a plant down.

Another step in the recognition of workers' interests in closing down a struck plant has come again from New Brunswick, though once more it is specific to a particular group of workers, this time in the construction industry. The New Brunswick Industrial Relations Act 1971 creates a procedure for the accreditation of employers' organisations as well as the certification of bargaining units of workers in the construction industry. The effects are similar—once an employers' organisation has been accredited, no employer a member of the accredited organisation and no trade union representing workers employed by such member may bargain independently of the accredited organisation, and any such independent agreement entered into affecting such employees is void (s. 51 (1)). The section of interest as regards picketing is section 51 (2) which is worth quoting in full:

> No trade union or council of trade unions that has bargaining rights for employees or employers represented by an accredited employers' organisation and no such employer, and no person acting on behalf of the employer, trade union or council of trade unions shall, so long as the accredited employers' organisation continues to be entitled to represent the employers in a unit of employers, enter into any agreement or understanding, oral or written, which provides for the supply of employees during a legal

> strike or lock-out, and any such agreement or understanding, if entered into, is void and no such trade union or council of trade unions or person shall supply such employees to the employer.

The intent of the section seems clear—a strike is to have the effect of closing down a construction site to the extent that none of the strikers may be replaced. No employer may enter into an agreement to replace strikers, and no union may agree to supply such employees. Questions remain as to whether any workers may be supplied to the employer during the strike, and whether workers may be individually hired as replacements, without an agreement to supply them. Despite this unfortunately ambiguous draftsmanship, a substantially identical section pertaining to the construction industry was enacted in the province of Prince Edward Island in 1973.[57]

In addition to these two limited embodiments of the rights of workers effectively to close down a struck plant, there are two other preliminary steps in this direction. The Manitoba Labour Relations Act 1972 enacted a new section (12 (1)) which allows an employee to refuse to perform work "which would directly facilitate the operation or business of another employer whose employees within Canada are lawfully on strike or locked out." In addition, section 13 (1) prohibits an employer from discharging or otherwise altering the employment status of an employee "who has refused to perform all or any of the duties or responsibilities of an employee who is participating in a legal strike or lockout."[58] The newly enacted Labour Code of British Columbia, assented to on November 7, 1973, prohibits employers from using, or authorising or permitting the use of professional strike breakers (s. 3 (2) (e)). A professional strike breaker is defined as "a person who is not a party involved in a dispute whose primary object, in the opinion of the Board, is to prevent, interfere with, or break up a lawful strike" (s. 1 (1)).

57. An Act to amend the Prince Edward Island Labour Act, assented to March 16, 1973, s. 5. Now s. 59 of the P.E.I. Labour Act (as amended).

58. The CCH Canadian Labour Law Reporter indicates that the last seven words quoted here were replaced by the phrase: "lawfully on strike or locked out" (1976, c. 45, s. 2). Both ss. 12 and 13 were proclaimed effective December 1, 1976, by proclamation gazetted October 9, 1976.

Conclusion

The question remains whether the law of picketing that has existed for the past 100 years will continue to apply. *Hubbard* v. *Pitt* is an indication that reliance on the courts to protect the civil liberties of even peaceful pickets, in trade disputes or otherwise, is dangerous. The legal perspective continues to dominate the exercise of judicial discretion as to what constitutes acceptable picketing activity, and this bodes ill for the interests of labour. Commenting on the judicial approach to picketing, another Canadian commentator noted: "The judge decides, in other words, how many pickets will cause the employer unreasonable discomfort or annoyance, 'unreasonable' that is, in the light of the *social value* which in the judge's opinion the law attaches to picketing. The whole purpose of the picketing is, of course, to cause the employer discomfort."[59] Similar evaluations are made by the courts in their determination of what constitutes intimidation, trespass, obstruction, wilful damage, etc., in picketing situations. While in theory the courts may evolve new conceptions of what acts constitute these offences, their progress is likely to be slow.[60]

The statutory approach is dominated by the liberal dilemma outlined above: the inability to resolve the perceived contradiction between effective picketing and "public order." The latest attempt at reconciliation in the Employment Protection Bill was unsatisfactory. I have referred to attempts in Canada to resolve the dilemma indirectly. These precedents should be considered by labour lawyers in the United Kingdom. The static nature of the legal perspective continues to regard the phenomenon as unchanging—violence in the advancement of their interests is to be forcibly suppressed when used by workers on the picket line. The Marxist perspective regards the law as changing to reflect developments in the class struggle. The law is founded not on unbending principles but on flexible interests (though these may frequently be framed in terms of principle). Consequently, it is reasonable to forecast that as the balance of

59. Innis Christie (1970) 8 *Alberta Law Review* 342, 352.

60. Confirmation of this may be found in the recent decision of the Supreme Court of Canada in *Harrison* v. *Carswell* [1976] Canada Supreme Court Reports (S.C.R.) 200. A trade union picket was charged under the Petty Trespasses Act of Manitoba. By a majority of 6–3, the Supreme Court held that picketing was a trespass under the Act. The minority opinion, written by Chief Justice Laskin, held the right to picket to outweigh the interest of the property owner or occupier in the particular circumstances of the case. See the note in 53 *Can. Bar Rev.* 819 (1975).

the conflicting interests of the ruling bourgeoisie and the working class alters and the class struggle develops, so the law which reflects these will change: "... new problems (of picketing) must be faced in terms of how best to balance competing demands in a complex society rather than in terms of outmoded legal conceptualising which never took into account more than some of the interests involved."[61] As put by the Ontario Federation of Labour in a recent submission to the Minister of that province:[62]

> The workers involved (in a strike), having served the company for many years, have built up an equity in their jobs. They should have a right to these jobs under all circumstances. When a legal strike takes place, others should not be allowed to replace them. Strikebreaking should be outlawed during a legal strike. Police should be prohibited from being used in any way to break strikes.

Some tentative hints of recognition of workers' interests in picketing and strikes may be discovered in a number of recent statutory provisions. The law providing for unemployment benefit has long stated that a worker is not required to accept a vacancy consequent upon a trade dispute.[63] The undesirability of blacklegging is indirectly recognised in section 49 of the Employment Protection Act 1975, which governs the exercise of the right to return to work of a woman absent due to pregnancy. The 1975 Act also changed the law of unfair dismissal as it affects strikers, so as to make it more difficult for an employer to dismiss them in circumstances where he has re-employed one or more of them.[64] Finally, regulations affecting the conduct of employment agencies and employment businesses came into operation on July 1, 1976. These imposed on contractors for the supply of workers the following requirement:[65]

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61. Christie, *supra,* note 59.

62. Ontario Federation of Labour, Submission to the Minister of Labour of the Province of Ontario, February 1974, para. 11.

63. National Insurance Act 1965, s. 22 (5) (a).

64. Sched. 16, Pt. Ill, para. 13. See the notes on these provisions in Bercusson, *The Employment Protection Act 1975* (1976). The influence of this change remains to be seen. The Employment Appeal Tribunal has not been kind to strikers: see *Thompson* v. *Eaton Ltd.* [1976] I.R.LJEt. 308; *Simmons* v. *Hoover Ltd.* [1976] I.R.L.R. 266; and *Cruikshank* v. *Hobbs*, *The Times*, January 12, 1977, p. 8.

65. The Conduct of Employment Agencies and Employment Businesses Regulations 1976, S.I. 1976 No. 715, para. 9 (11). I am indebted to Dr. Brian Napier of Queen's College, Cambridge, for this reference.

> A contractor shall not supply workers to a hirer as direct replacements of employees who are in industrial dispute with that hirer to perform the same duties as those normally performed by those employees.

It is submitted that the time has come to abandon the legal perspective and its traditional application to picketing. The liberal approach to protection of workers: legalistic pirouettes attempting to circumvent the legal perspective by stipulating immunity in defined circumstances, is inadequate. The bias of the law should be directly confronted. A statute which in principle prohibited the employer from carrying on his operation in the circumstances of a trade dispute would resolve the problems of picketing to a large extent.

In the meanwhile, workers continue to struggle as best they can subject to the intimidation of the law. It is an open secret that the laws on picketing are flouted on numerous occasions. Police turn a blind eye to mass picketing. The power of workers in specific industrial conflicts may serve to overcome the legal bias in favour of the employers. Still, if the class struggle sharpens and confrontations increase in magnitude and ferocity, laws outlawing strike breaking may end up on the statute books, or judges may even be led to revise their interpretations of the common law.[66] As is the case with much in labour law, this is the consequence of the struggle of workers in industrial action.

66. For the latest straw in the wind, see the refusal of Mr. Justice Gibson to grant Grunwick Film Processing Ltd. an injunction restraining the strike committee of APEX and supporters from picketing and distributing allegedly defamatory leaflets. The judge was reported as stating that the issuance of such an injunction would "enjoin the strike committee and its supporters from saying of the firm things that they claimed were true and which they said could be justified in a court of law." See *The Times*, March 12, 1977, at p. 3."

The European Community's Charter of Fundamental Social Rights of Workers

Brian Bercusson (1990) * **

Introduction

On December 8–9, 1989, the Member States of the European Community gathered together in the European Council at Strasbourg, solemnly declared, with the sole dissent of the United Kingdom, a Charter of Fundamental Social Rights of Workers.[1] The development of the 1992 programme carried with it increasing concern about the social consequences of the creation of the single internal market. The social policy of the Community, as developed over its first 30 years, did not seem adequate to the task.[2] An attempt to overcome the stalemate preventing the Council approving many Commission proposals on social policy was made by the launching in 1985 of the Val Duchesse 'social dialogue' between the European level trade union and employers' organisations (ETUC and UNICE),[3] reinforced by the provision in Article 118B of the Treaty inserted by the Single European Act. But this effort did not satisfy the perceived need for the formulation and implementation of a comprehensive social dimension for the 1992 programme.

Building upon the Belgian Presidency (the Labour and Social Affairs Council of May 1987) and an Opinion of the Economic and Social

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** 'The European Community's Charter of Fundamental Social Rights of Workers', Brian Bercusson (1990). This article was first published in *The Modern Law Review*, 53, 624–642 and is reprinted here with the kind permission of Wiley-Blackwell.

1. Commission of the European Communities, *Charter of the Fundamental Social Rights of Workers* (Luxembourg: Office of Official Publications of the European Communities, 1990).
2. For a summary of the social policy of the Community during this period, see *Social Europe*, 1/87, pp. 51–62; 1/88, pp. 19–20.
3. For an outline of the development of the social dialogue in the Community, see Annex 10 to *The Social Dimension of the Internal Market*, Interim report of the interdepartmental working party of the Commission, *Social Europe*, Special Edition, Brussels, 1988.

Committee (the Beretta report of November 1987),[4] a working party of the Commission in 1988 proposed a body of minimum social provisions.[5] Thereafter, the development was very rapid: following an Opinion of the Economic and Social Committee in February 1989[6] and a Resolution on Fundamental Rights of the European Parliament in March 1989,[7] a first draft of a Community Charter of Fundamental Social Rights was published by the Commission in May 1989, a second draft was produced in October 1989 and the December summit approved the final Charter.[8] Shortly before that summit, the Commission had produced a communication concerning its Action Programme relating to the implementation of the Community Charter.[9]

The protagonists: Commission and Court

The precise nature of the political commitment of the eleven Member States who approved the Community Charter of Fundamental Social Rights of Workers will take concrete shape through the actions of two bodies.

First, the Commission will elaborate various Community instruments based upon the Charter. In this sense, the Charter is similar to the 1974 declaration of the Council in Paris which launched the second phase of social policy in the Community. Second, the Court of Justice will be called upon to adjudicate upon the meaning, and challenges to the validity, of the instruments proposed by the Commission and adopted by the Council — in some cases by qualified majority vote. The Charter itself may not be invoked as an independent legal foundation for the instruments, but it may be expected that the decisions of the Court will be influenced by the wording of the Charter.

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4. *Opinion of the Economic and Social Committee on the social aspects of the internal market (European social area),* Brussels, 19 November, 1987, CES(87) 1069.
5. See Report of the Interdepartmental Working Party, above, note 3.
6. *Opinion of the Economic and Social Committee on Basic Community Social Rights,* Brussels, 22 February, 1989; CES 270/89 F/OUP/CH/ht.
7. Resolution of 15 March, 1989, OJ No. C 96, 17 April, 1989, p. 61.
8. English versions of the first two Drafts of the Charter are available in *European Industrial Relations Review,* No. 186 (July 1989) p. 27, and No. 190 (November 1989) p. 26.
9. COM (89) 568 final, Brussels, 29 November 1989.

Can the Charter be perceived as an instrument promoting innovations in the social policy of the Community? The first Draft of the Preamble (paragraph 2) began by referring to 'the *implementation* of a social policy at Community level.' This was changed in the second Draft to the affirmation that 'the social aspects ... must be *developed*.' There remains a commitment in the final Draft: 'to ensure at appropriate levels the *development* of the social rights of workers.' But this clear incentive to innovation was balanced in the second and final Drafts by a stipulation that: 'the aim of the [present] Charter is to *consolidate* the progress made in the social field.' Furthermore, in the final Draft, a new clause was added: 'whereas the implementation of the Charter must not entail an extension of the Community's powers as defined by the Treaties.'

The formal distinction between implementation and development may simply disguise the substantive reality of development *through* implementation. The scope of the 'powers, as defined by the Treaties,' is open to interpretation. The Charter may be invoked, both by the Commission and the Court of Justice, as an indication of the scope of these powers. To that extent it may be an innovating force in the development of social policy in the shape of the fundamental rights it prescribes.

The Preamble also addresses the issue of the relation between Community social policy and the general objective of a European internal market in 1992. The first Draft's second paragraph referred to 'the implementation of a social policy at Community level, particularly in view of the impending completion of the internal market.' This was altered in the second and final Drafts to: 'the same importance must be attached to the social aspects as to the economic aspects and, whereas, therefore, they must be developed in a balanced manner.' The first Draft's formulation was, therefore, in terms of a social policy in general, with particular reference to the internal market, compared to the final insistence that Community action is limited to the social aspects of the internal market.

However, a reinforcement of the independence of social policy from the internal market emerged from the first Draft's provision in paragraph 12 that 'the implementation of the Single European Act must be accompanied ... by a development of the social rights of citizens.' This phrase is preceded in the second and final Drafts by the requirement that this implementation 'must take full account of the social dimension

of the Community' — *not* of the internal market only. This is a fundamental guideline for both Commission and Court in interpreting the Charter.

This article analyses the meaning of the Charter in order to identify the scope of the initiatives which might be taken by the Commission to implement the declaration of fundamental social rights. The analysis also elaborates the background against which decisions of the Court of Justice on these initiatives may be taken. Reasons of space preclude presentation of all aspects of the Charter.[10] But through detailed analysis of the Preamble and some of the Articles, the article will focus upon certain important elements of social policy manifest in the wording of the Charter, particularly in the light of changes which occurred in arriving at the final Draft approved in December 1989.

The Preamble

A number of points emerge from the Preamble which have general implications for the substantive content and implementation procedures of the rights contained in the Charter. Two substantive issues will be touched on: the position of the unemployed, and the Charter's distinction between citizens and workers. This will be followed by a brief discussion of the role of the social partners as envisaged in the Preamble.

Creating employment and combating unemployment

The first Draft of the Charter stated categorically in paragraph 4 that 'one of the priority objectives in the economic and social field is to *combat unemployment* and to this end the completion of the internal market presents major opportunities for growth and job creation.' The emphasis shifted in the second Draft: 'one of the priority objectives in

10. The sections of the Charter not dealt with in this Article include those on Social Protection (Article 10), Vocational Training (Article 15), Equal Treatment for Men and Women (Article 16), Information, Consultation and Participation for Workers (Articles 17–18), Protection of Children and Adolescents (Articles 20–23), Elderly Persons (Articles 24–25) and Disabled Persons (Article 26).

the economic and social field is to *promote employment and combat unemployment*.'

The final Draft begins with the assertion that 'completion of the internal market is the most effective means of creating employment and ensuring maximum well-being in the Community.' It then continues: 'employment development and creation must be given first priority in the completion of the internal market.' *Combating unemployment disappears as an objective.* Instead, the phrase 'ensuring maximum well-being' is inserted — but neither as an objective nor a priority; rather, it is asserted as another anticipated consequence of completion of the internal market.

One implication might be that measures taken to secure completion of the internal market should either (i) incorporate as a first priority the development and creation of employment; or, at least (ii) be accompanied by evidence as to their employment-creating consequences. The latter would require something in the nature of 'employment creation impact statements,' analogous to environmental impact statements.

There has been a lively debate, beginning with the Cecchini Report's[11] forecasts, over the likely employment consequences of completion of the internal market. Few are in doubt that in many industries there will be severe job losses. The final Draft of the Preamble of the Social Charter deletes the objective of combating unemployment, which will be a consequence of the completion of the internal market. Does this affect the *locus standi* of unemployed workers claiming rights, or the relevance of Charter rights to them, or the scope of those rights?

Citizens and workers

The title of the final Draft of the Charter specifies that it is for 'workers.' This was not so in the earlier drafts. Paragraph 6 of the first Draft stipulated that 'the completion of the internal market must *also* offer improvements in the social field for *citizens* of the European Community.' The second Draft deleted the word 'also,' but kept the reference to

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

'citizens' — thus reinforcing their status. However, the final Draft replaced the word 'citizens' with 'workers.' Similarly, a subsequent paragraph of the first and second Drafts promised 'development of the social rights *of citizens* of the European Community,' but the final Draft confines this to 'development of the social rights of *workers* of the European Community.'

The category 'workers of the European Community' is both narrower and wider than that of 'citizens.' 'Workers' may exclude persons *not* working, though they may be citizens. This could raise problems for persons who have never worked (e.g. school-leavers), who may work in the future (e.g. mothers), who are not currently working (unemployed), or who no longer work (retired). However, 'workers' may include persons who are *not* Member State citizens, but are working in the Community. Questions may arise as to whether workers who are not Community nationals must be lawfully resident.

Finally, do 'workers' include self-employed persons? A subsequent paragraph states that 'it is necessary ... to ensure ... the development of the social rights of *workers* of the European Community, *especially employed workers and self-employed persons*.' The first two Drafts, referred to 'the development of the social rights of *citizens* of the European Community, *especially workers and self-employed persons*.' Thus self-employed persons were a separate category of citizens from workers. The final Draft is ambiguous.

The role of the social partners: trade unions and employers

The recognition of the role of the social partners in the Charter was already evident in the informal Val Duchesse process, and formally acknowledged in the Single European Act's insertion of Article 118B of the Treaty. The Charter takes another step forward by proposing a role for the social partners in the elaboration and implementation of fundamental social rights.

In the Preamble, a new paragraph was inserted into the second Draft, and retained in the final Draft, to the effect that:

> the social consensus contributes to the strengthening of the competitiveness of undertakings, of the economy as a whole, and to the

> creation of employment; whereas in this respect it is an essential condition for ensuring sustained economic development.

If the social consensus is *essential* to development, Commission action or proposals for measures concerned with 'sustained economic development' *must* reflect the social consensus.

Moreover, the first two Drafts provided that 'the present Charter aims to [build on/ consolidate] the progress made in the social field, *in particular through Community action*.' The final Draft, however, changed this to read: '*through action by the Member States, the two sides of industry and the Community*.' The three actors are not ranked in any hierarchy, and it did not prove possible to prescribe even the outlines of how the role of the social partners could be performed. But a completely new paragraph was added to the final Draft of the Preamble:

> Whereas, in accordance with the conclusions of the Madrid European Council, the respective roles of Community rules, national legislation and collective agreements must be clearly established.

This provision precedes a paragraph which delineates responsibility for initiatives with regard to *implementation* of social rights. Invoking the principle of subsidiarity the first two Drafts allocated 'responsibility for the initiatives to be taken with regard to the implementation of these social rights [with] the member states or their constituent parts *or* with the European Community' — apparently giving equal weight to both. The final Draft seems to emphasise the role of the Member States by inserting, as regards the Community, the phrase 'within the limits of its powers.' On the other hand, it also substitutes '*and*' for the 'or,' implying less a division than a possible overlapping of competences; perhaps even that the Community can complement or duplicate Member State action.

The subsidiarity principle does not imply a role for other actors, such as the social partners. The first Draft of the Preamble specified further that '*implementation* requires the involvement of the two sides of industry' — implying that they must be involved. The second Draft reiterated this, but amended the paragraph to read that implementation 'requires, where appropriate, the active involvement of the two sides of industry at the various levels concerned.'

The insertion of 'where appropriate' emphasised that involvement of the social partners was not seen as always appropriate. The added word 'active,' however, gave a stronger emphasis to involvement where it was required. The reference to 'at the various levels concerned' could refer, on the one hand, to the various levels of collective bargaining, or, on the other, to the levels of Community, Member States (or their constituent parts) *or* the two sides of industry. Involvement might be required when measures of implementation (such as laws) were taken at any of those levels.

The final Draft changed all this by altering the position of the wording. 'Appropriate' now qualifies levels, not involvement. Instead, 'involvement' now becomes qualified by 'in many spheres.' In those spheres (unspecified), 'active involvement of the two sides of industry' is required. '[L]aws, collective agreements or existing practices' *are all* seen as potential instruments of implementation at the various appropriate levels: Member State and/or Community and/or the various levels of collective bargaining.

A fundamental question is whether *implementation* includes *further elaboration* of social rights. If so, the initiatives for further *elaboration* are to be undertaken, as implied in the preceding paragraph, in accordance with *rules* establishing the respective roles of the three specified actors: the Community, Member States and the two sides of industry.

This was the argument of a Report written for the Commission during the process of formulating the Charter: that collective bargaining, or the social dialogue, had a role to play in elaboration as well as enforcement of rights.[12] The questions discussed in the Report were: what relationships exist between these three sources: Community rules, national law and collective agreements; who is to establish the rules specifying their roles and competences; and how (through Commission initiatives; jurisprudence of the Court of Justice)? These issues are central to the debate over fundamental social rights in the Community today.

12. B. Bercusson, *Fundamental Social and Economic Rights in the European Community*, a report presented to a conference in Strasbourg on 'Human Rights and the European Community: Towards 1992 and Beyond,' 20–21 November, 1989 (mimeo). The first Draft of this report was presented to the Commission in June 1989; it was discussed by Commission officials at a hearing in Strasbourg in July 1989; the final Draft was submitted in September 1989. The report will be published in a forthcoming volume on human rights in Europe, edited by Antonio Cassese.

Conclusions

The Preamble makes clear that fundamental social rights are to become an integrated part of Community social policy. The first Draft provided that 'implementation of the Single European Act must be accompanied ... by a development of the social rights.' The second and final Drafts required this implementation of the Act to 'take full account of the social dimension of the Community, and ... it is necessary in this *context* to ensure ... the development of the social rights of workers.' In other words, social *rights* develop in the context of the larger social dimension of the Community, which includes rights, but also other Commission social policy initiatives, harmonisation of national laws, and freedoms as well as rights.

The remainder of this article elaborates some of the more interesting and innovative provisions of the Charter, with particular emphasis on those provisions which are the subject of initiatives proposed by the Commission in its Action Programme.

Freedom of movement: Articles 1–3

Special categories of workers: sub-contractors and public contracts

The first two Drafts of the Charter provided for guarantees of identical terms/equal treatment, in particular to those performing work on a *sub-contracting* basis in other Member States (Draft 1, Article 6; Draft 2, Article 6 (limited to 'non-temporary work')), and those employed on *public contracts* (Draft 1, Article 8; Draft 2, Article 5). These provisions laid special emphasis on certain categories of workers, deemed either especially vulnerable (sub-contracting), or previously often subject to special national regulations governing working conditions (public works).

The final Draft deleted all these provisions. As a result, the opportunity was lost to assert that these workers have special fundamental social rights deserving protection. This is an important defect since both these categories of workers (often inter-connected) are likely to grow if transnational firms of public works contractors develop.

The result may be that these firms are free to discriminate against non-national workers employed under sub-contracting arrangements or on

public works contracts in the host country — whether either category of national workers enjoys *special* protection beyond that of ordinary workers. Equal treatment with ordinary workers is guaranteed, but it remains unclear whether equality with the special protections enjoyed by these specific categories is guaranteed.

Despite the failure of the Charter to refer to sub-contracting or public contracts, the Commission's Action Programme makes proposals for concrete action. Regarding *sub-contractors,* the Commission (p. 23) proposes an:

> instrument on working conditions applicable to workers from another State performing work in the host country in the framework of the freedom to provide services, especially on behalf of a *sub-contracting* undertaking.

In the absence of a specific mandate in the Charter, the grounds for this initiative are stated in the Action Programme to be only incidentally those of avoiding prejudicial working conditions. Rather, the Commission justifies this instrument by referring to possible distortions of competition arising where workers employed by the sub-contractor are subject to working conditions regulated by the country where the sub-contractor has his registered office, which may be more disadvantageous than those of the country where the work is undertaken — thus prejudicing contractors from that country.

'[A]ppropriate Community instruments' (unspecified) are proposed in the Action Programme (p 24) which will ensure respect for two principles: (1) application of national legislation on public order; (2) respect for generally binding collective agreements.

The implications of both these principles are far-reaching. The concept of 'public order' is not uniform among Member States of the Community. A proposal to apply national public order standards to all sub-contractors, wherever their headquarters, would have a potential harmonising effect on public order standards in the Community — a much more ambitious objective having implications going far beyond regulations on sub-contractors.

The same can be said for requiring respect for generally binding collective agreements within a Member State. Equalising conditions

among bidders on the basis of collectively agreed standards would favour national contractors who already comply; allowing foreign contractors to avoid nationally binding agreements would discriminate against national bidders. Once again, however, the solution carries with it implications for European wide collectively agreed standards as employers with operations in more than one Member State are forced to confront the consequences of employing workforces on conditions which change from country to country — a situation already affecting some multinational enterprises.

Similarly, employers bidding for specific public works contracts will confront the proposal of the Commission regarding certain types of employment contracts: part-time employment and, in particular, fixed-term employment. In its proposals for action under the section of the Charter concerned with 'Employment and Remuneration' (Articles 4–6), the Commission recalls its proposals for two directives in 1982 and proposes to revise and adapt them to present a single proposal for a directive. This proposal (p. 16) would:

> lay down at Community level minimum requirements, concerning working conditions and social protection in particular, which would have to be complied with in contracts or employment relationships of this nature in all the countries of the Community.

The consequences of these principles are clearly spelled out in relation to public works contracts. The Commission acknowledges that 'similar problems arise,' and refers to its Communication on the regional and social aspects of public contracts.[13] It proposes (p 24), therefore, a Communication which:

> sets out to open the way for a series of practical proposals aimed, in particular, at arriving at a clearer definition of sub-contractors and at *standardised terms* for sub-contracting contracts.

The formulation of these 'standardised terms' appears, in principle, to involve respect for both public order and collectively agreed standards.[14] Specifically on public contracts, the Commission proposes an

13. COM (89) 400.

14. The latter in particular opens up many of the vistas described in preliminary fashion by my Report to the Commission on fundamental social and economic rights; above, note 12.

instrument on the introduction of a labour clause. Reference is made to Directive 89/440/EEC amending the Works Directive to introduce a 'transparency clause' whereby the contracting authority may provide tenderers with the necessary information concerning working conditions applicable to the work envisaged. Further (p. 24):

> On the basis of an analysis regarding the effective use by enterprises of the opening of public contracts and in the light of the current work in the domain of 'excluded' sectors, the Commission could formulate a proposal aiming at the introduction of a 'social clause' into public contracts.

Experience in a number of Member States demonstrates the close ties of such 'social clauses' with objectives of extending public order and collectively agreed standards. The use by public authorities of their contracting power to promote the application of labour law and the improvement of labour standards is a method of labour administration with a long history in Britain.[15] It received a setback at national level in 1983, when the Conservative government limited the use by government departments of their contracting power by rescinding the Fair Wages Resolution of 1946.

Despite this, during the 1980s, a number of local authorities, particularly in London (the Greater London Council and the Inner London Education Authority) began to use the technique of contract compliance. Admission to lists of approved contractors permitted to tender for public contracts was made subject to compliance with codes of practice. These codes included, for example, requirements of compliance with the legislation on race and sex discrimination, and included the requirement to provide information to enable the public authority to monitor compliance.

The Conservative government's hostility to this initiative was expressed in the Local Government Act 1988. This formally limited the power of local authorities to exercise their contracting functions through the technique of imposing requirements concerned with 'non-commercial' considerations, except in relation to racial equality.[16] A Commission

15. See B. Bercusson, *Fair Wages Resolutions* (London: Mansell, 1978).

16. The Secretary of State specifies the questions to be stipulated for potential contractors. Despite these limitations, surveys indicate that with respect to equal opportunities, some

proposal to implement social policy through the technique of contract compliance is one point of potential conflict with the present UK Conservative government.

Employment and remuneration: Articles 4–6

The formulation of Article 5 remained stable as regards its first line in all three Drafts: 'All employment shall be fairly remunerated.' But thereafter, the Article underwent substantial changes up to the final Draft.

Definition and coverage of the decent/equitable wage

The entitlement in both earlier Drafts was simply to a '*decent* wage.' The second Draft added to the first Draft's right to a decent wage: 'particularly at the level of the *basic* wage.' This refinement disappeared in the final Draft. But the final Draft substituted for the bare 'decent' wage entitlement of workers the standard of an '*equitable* wage ... *sufficient to enable them to have a decent standard of living.*' It is not clear whether the decent standard of living for the *worker* includes also the worker's family, as is explicit in the clause concerned with withholding wages in the same Article, which seems to postulate a lower standard: 'the *necessary means of subsistence* for himself and his family.' A differently formulated standard — an 'equitable reference wage' — is established for 'workers subject to terms of employment other than an open-ended full-time contract.'

The 'equitable reference wage' is not defined. It is not clear whether the word 'reference' implies a qualitative change from the guaranteed 'decent standard of living.' In the first Draft the equitable reference wage standard was assured only to workers *not* on contracts 'of unfixed duration'; workers covered were those on fixed term or temporary contracts. The second and final Drafts exclude 'open-ended full-time' contracts. The difference is that under the final Draft *part-timers* —

local authorities are continuing to use contract compliance as a technique for the administration of labour law. See 'Contract compliance still alive in local government,' Industrial Relations Services, *Employment Trends*, no. 462, 19 April, 1990, p. 2.

even those on open-ended/unfixed duration contracts — may benefit from the guarantee of an equitable reference wage.

It is not clear in any Draft whether the equitable reference wage standard is *additional* or *alternative* to the decent/equitable wage standard. If they are *alternatives*, then the guarantee of an equitable reference wage *excludes* assurance of a decent/equitable wage. In this case, a qualitative difference between the standards becomes significant. In such a case, for example, part-timers on open-ended/unfixed duration contracts under the first Draft would have been entitled also to a decent wage; but under the second and final Drafts, they are only entitled to an equitable reference wage.

Method of formulating and enforcing the wage standard: law, collective agreements, practices, arrangements

Draft 1 (Article 9) and Draft 2 (Article 8) provided for decent wages to be '*established*' and 'an equitable reference wage' to be '*laid down*' by '*law or by collective agreement at national, regional, interoccupational, sectoral or company level*' (Draft 1), or even, as added by Draft 2 '*in accordance with national practices*.' The final Draft does not clearly refer to a method of establishing or laying down a wage standard. Rather: '*in accordance with arrangements applying in each country*,' an 'equitable wage' is to '*be assured*'; and workers '*shall receive*' an equitable reference wage. The final Draft does not make clear where the standard to 'be assured' is to be found: in law, collective agreements at various levels, national practices, or any of these.

If, as earlier Drafts indicated, the wage standard may be formulated through collective bargaining at various levels, there arise problems of assessing whether and which *collective agreements* are sufficiently comprehensive in scope and coverage to provide an adequate standard. Even this is relatively easy compared with the problem of assessing the scope and coverage of '*national practices*.' In this context 'national' presumably refers to their quality as pertaining to one of the Member States, not their scope. Hence the formulation in the final Draft of arrangements 'applying in each country.' Otherwise wage setting practices which were not national in scope, but only regional, would not be eligible. On the other hand, it might be regarded as desirable to

adhere only to practices setting wages at the national level, as sub-national practices present problems of definition.

Whatever source is resorted to as setting the wage standard, the Article provides that the resulting equitable wage '*shall be assured*,' or, in the case of the equitable reference wage, shall be received. This emphasises enforcement of the standard, without specifying the method. It gives maximum flexibility to Member States to choose their preferred method of wage *setting* and to provide for *enforcement* of the standard set. The separation of the two activities implies that the same instrument or institution that fixes the wage may not be responsible for assuring it. Problems arise when the mechanism of enforcement is not the legal process, or when legal mechanisms are separate from industrial relations standard-setting machinery.

The Commission does not propose to confront these problems immediately. Instead, it takes the view (p. 14) that 'wage-setting is a matter for the Member States and the two sides of industry alone,' and (p. 15) that it is 'not the task of the Community to fix a decent reference wage [which] should be defined at the level of the Member States.' Nonetheless (p. 15), in light of the 'development of wage practices which no longer afford those concerned a decent standard of living ... the Commission does have a responsibility to assert its views ... by delivering ... an opinion.' An agenda for future action on this very complex issue is thus in the process of being settled.

Improvement of living and working conditions: Articles 7–9

Working time standards to be set by 'national practices' – including collective agreements

All three Drafts of the Charter provided for rights to 'a weekly rest period' and to 'annual paid leave.' The second Draft (Article 12), however, added a specific reference, as regards the right to a *weekly rest period*, to standards '*to be agreed jointly by the two sides of industry*.' The final Draft's Article 8 extended this reference to a specific standard to *both* the weekly rest period and annual paid leave. However, it replaced the earlier reference to a standard 'agreed jointly' with a standard which

'must be harmonised in accordance with *national practices* while the improvement is being maintained.'

In the Preamble, the reference to 'practices' specifies that 'implementation [of social rights] may take the form of laws, collective agreements or existing practices,' appearing to distinguish among these. However, other Articles of the final Draft seem to counter the implication that Article 8 *substitutes* 'practices' for jointly agreed standards.

Comparison may be made with the second Draft's provisions on remuneration (Article 8). This Article also made a distinction between standards to be set 'by law or by collective agreements at national, regional, inter-occupational, sectoral or company level or in accordance with national practices.' This was changed in the final Draft (Article 5) to read standards fixed 'in accordance with *arrangements* [cf. "national practices"] applying in each country' — so as to include all methods of standard setting.[17]

Despite the Preamble, the context of the final Draft's reference in Article 8 to 'practices' seems to *include* laws *and* collective agreements. On the other hand, unlike 'arrangements,' it seems to have a bias towards informality: less law than industrial relations. Perhaps, given the change from the second Draft's 'two sides of industry,' 'practices' are not limited to *industry* level agreements, but include practices at all levels. As in the second Draft's Article 8 on remuneration, *'national* practices' presumably refers to their quality as pertaining to one of the Member States, not their scope. The final Draft's provision in Article 21 for 'equitable remuneration' for young people also specifies the standard as that 'in accordance with national practice.'

Other Articles of the final Draft also refer to 'practice' in the sense of standards set through informal collective autonomous action. The section of the Charter on 'Freedom of Association' (Articles 11–14) emphasises this. Article 12 refers to rights to negotiate and conclude agreements under conditions laid down by 'national legislation and practice.' Article 13 encourages dispute settlement 'in accordance with national practice.' The section in 'Information, Consultation and Parti-

17. This reference to 'arrangements applying in each country' is also found in Articles 9 (right to have conditions of employment stipulated), 10 (right to social protection) and 24 (rights of elderly persons).

cipation' (Articles 17–18) advocates such developments 'taking account of the practices in force in the various Member States' (Article 17).

If 'national practices' include standards set by collective agreements, the Article's requirement that harmonisation take place while maintaining the improvement implies Community-wide coordination of such collectively bargained standards.

The Commission's proposals are in line with this interpretation of Article 8. The Action Programme refers to the Council's failure to adopt the Commission's 1983 draft recommendation on the reduction and reorganisation of working time. It reiterates that 'the adaptation, flexibility and organisation of working time ... play a not inconsiderable role in determining the situation of the labour market,' and emphasises its important role in competitiveness. The proposal, therefore, is for a Directive on the adaptation of working time. Significantly, the Commission notes (pp 18—19):

> Moreover, collective agreements on this matter are increasing in number in many industrial sectors throughout the Community.
>
> In order to avoid excessive differences in approach from one sector or country to another, the basic conditions which these agreements should comply with ought therefore to be clearly defined.
>
> The Commission considers moreover that as regards this diversity care should be taken to ensure that these practices do not have an adverse effect on the wellbeing and health of workers.
>
> For this reason, as regards the maximum duration of work, rest periods, holidays, night work, week-end work, systematic overtime, it is important that certain minimum requirements be laid down at Community level.
>
> For the Commission it would be a matter of proposing minimum reference rules without entering into details as regards their implementation.

A number of important issues arise from this proposal.

The legal basis of community action

The Action Programme's reference to the significance for competitiveness of flexibility of working time implies a need for harmonisation of standards regulating such flexibility across the Community to avoid distortions in the labour market which would affect competition between firms. This is to raise the well-known issue of 'social dumping,' where regulatory controls on working time in one country could be undermined by competition from countries where absence of such regulatory controls gives a competitive advantage to firms.

The legal basis of a proposal on working time may look to its effects on competition (the 'social dumping' argument), and invoke Article 100. This allows for directives, to be approved unanimously by the Council, for the approximation of provisions as directly affect the establishment of the common market.

Two alternatives to this exist. First, Article 100A, inserted by the Single European Act, allows for measures, to be approved by qualified majority in the Council, which have as their object the establishment and functioning of the internal market. It has been argued that this Article is 'of little significance in the employment field, for Article 100A(2) provides that it shall not apply, *inter alia*, to provisions relating to the rights and interests of employed persons.'[18] However, there is an argument to the contrary. Three possible interpretations can be offered of the restriction imposed by Article 100A(2):

(1) Any provision which touches, however indirectly and partially, the rights and interests of employees, is excluded from majority voting.

(2) A provision may relate to different degrees to a number of different constituencies. Only a provision, the predominant aim or effect of which relates to the rights and interests of employees, is excluded from majority voting.

(3) Only a provision which relates solely to the rights and interests of employees, and to nothing else, is excluded from majority voting.

18. D. Wyatt, 'Enforcing EEC Social Rights in the United Kingdom' (1989), 18 *Industrial Law Journal*, 197, 199.

To the extent that labour is a factor of production in the establishment of a unified market, most proposals affecting that market will relate to the rights and interests of employees in some way or other. Which of the interpretations of Article 100A(2) is adopted depends upon the vision of the Community held by its author.

An alternative to reliance on Article 100A as a legal basis results from the fact that diversity of regulatory practices regarding flexibility of working time is also deemed to pose a potential threat to the wellbeing and health of workers. This safety hazard allows for potential recourse to Article 118A, which authorises qualified majority voting in the Council in matters concerning the 'working environment, as regards the health and safety of workers.' The reference to minimum requirements is obligatory by the terms of Article 118A.

Collective agreements as a source of Community regulation of working time

The most daring aspect of the Commission's proposal is the focus on collective agreements as the source setting the standards to be harmonised. The Commission acknowledges the role of collective agreements in regulating flexibility of working time. It does not explicitly refer to the hotly contested issue in many Member States as to whether flexibility of working time *ought to be* subject to collectively agreed regulation. Nor is any comment made on the extent to which flexibility is *in practice* subjected to collectively agreed regulation. The existence of some collective agreements and the inevitable diversity in their approaches is sufficient to introduce the considerations of harmonisation and health and safety which justify the Commission defining 'the basic conditions which these agreements should comply with.' This approach is bound to come into conflict with governments opposed to collectively agreed regulation of working time flexibility, and will have a substantial impact in Member States and on industrial sectors where such regulation is relatively uncommon. The Commission further proposes 'minimum reference rules without entering into details as regards their implementation.' This implies that the proposed Directive would stipulate standards, but not implementation mechanisms.

This is likely to become another point of conflict between the Commission and the UK Conservative government. The conflict arises from a British

attempt at de-regulation recently highlighted by Simon Deakin.[19] The Factories Act 1961, the heir of legislation originating in the early 19th century, regulated the employment of women and young persons. It laid down fixed starting and finishing times, maximum periods of continuous working, maximum weekly and annual overtime, prohibitions on nightwork and Sunday working, and basic annual holiday entitlements. The provisions were always subject to wide *derogations* administered by the Factory Inspectorate, later the Health and Safety Executive. For example, a general exemption power was granted to the inspectorate under which any of the relevant hours restrictions could be lifted, including Sunday and nightwork. In return, inspectors were given the power to set *conditions for derogation* with the aim of protecting health and welfare.

The restrictions on women's working hours — including the nightwork prohibition — were repealed by the Sex Discrimination Act 1986. The Employment Act 1989, section 10, repealed all the remaining hours restrictions of the Factories Act 1961: those setting a maximum basic 48-hour week and 9-hour day for under 18s in factory employment, those limiting overtime work, establishing minimum holiday entitlements, fixing daily starting and finishing times and prohibiting Sunday work for those employees.

As Deakin comments: 'the effect of repealing the relevant provisions ... has *not* been to make nightwork possible where it was previously restricted, for the reason that *exemptions were always available and widely used;* rather, it has *removed the very power of the health and safety inspectorate to supervise nightwork*'[20] (my emphasis). The role of the administration in the area of working time regulation has been eliminated.

In the British context, the Commission could, therefore, replace the inspectorate's role by the process of collective bargaining, as is the case in a number of other Member States. In general, Article 8 has led to an Action Programme proposal on working time with potentially far-reaching implications for the relation of collective bargaining agreements

19. S. Deakin, 'Equality Under a Market Order: The Employment Act 1989' (1990), 19 *Industrial Law Journal* 1.
20. *Ibid*., at p 17.

to Community standards. These can be summarised under two headings following the Action Programme's own words:

> What are 'the basic conditions which these agreements should comply with'?
>
> How are the 'minimum reference rules' to be formulated?

The discussion of these issues is here confined to the topic of working time. But Article 7 postulates a right to improvement, through approximation, of living and working conditions in general, 'in particular the duration and organisation of working time and forms of employment other than open-ended contracts.' The issues addressed here, therefore, may become relevant when Commission proposals on topics other than working time are forthcoming.

Basic conditions with which collective agreements should comply

The aim of defining the basic conditions with which collective agreements should comply is 'to avoid excessive differences in approach from one sector or country to another.' The equal weight attached to sectoral differences contrasts with the frequent focus in the comparative literature on national differences in approach. The Community Directive could adopt the following approach.

'Basic conditions' could refer to a number of different features which characterise national practice of collective agreements on working time. Two features of industrial relations are said to be of primary importance: the relationship between statutory law (or action by the State) and collective bargaining (action by the social partners); and the degree and type of centralisation of industrial relations institutions, particularly collective bargaining and trade unions.[21]

The recent Commission *Comparative Study on Rules Governing Working Conditions in the Member States* reported that in most

21. T. Treu, 'Introduction' to Chapter II, 'New Trends in Working Time Arrangements,' in A. Gladstone (ed.), *Current Issues in Labour Relations: An International Perspective* (Berlin and New York: Walter de Gruyter, 1989), pp. 149–160, at pp. 155–156.

countries legislation had set a general standard of normal weekly working time.[22] Recently, however, measures had been introduced to allow for the possibility of regulating working hours other than on a weekly basis. The main instrument for this 'flexibilisation' was collective bargaining. The formulas included daily and weekly ceilings, normal, average working hours over a specified period and reductions in working time in return for flexibility. Following this flexibility model, nightwork was in some countries generally forbidden, but derogation was allowed, whereas in other countries it was generally allowed, unless explicitly forbidden. While there are problems in defining 'overtime working,' nine Member States (apart from Denmark, Italy and the UK) had laid down ceilings per day, week or year. The ceilings are often replaced through collective bargaining.

Flexibilisation through collective bargaining takes a variety of forms, some of which are described in the following extract from a recent study:

> a minimum core of protection, of substantive regulation ... may become smaller but it may also be different ... most legislations are not moving towards a short simple list of basic protective provisions, but may move to greater complexity in the regulation. For instance, flexibility has been realised by adding exceptions to the existing legislation, by establishing new complicated rules for calculating 'averages,' etc. The core is not one in the classic sense, but one of great diffusion and this may even be the case with collective bargaining.
>
> In discussing the core, different methodological possibilities come to mind. The first is the more classical one, a statutory legal core, reduced but more complex, with many exceptions; another is a derogatory possibility given either to the collective or to the individual parties. A further possibility might be that the law or (national) bargaining sets only a border limit (40-hour-week) over a certain period of time and leaves parties free to do what they like inside the boundaries ...
>
> The role, however, of public powers (as legislators and employer) remains important ... on the one hand 'controlled' deregulation; on

22. Synopsis, Commission Staff Working Paper, SEC (89) 1137, Brussels, 30 June, 1989.

the other, and more important, financial support of the most significant forms of work reorganisation.[23]

A Community Directive on working time flexibility could outline basic procedural conditions for the regulation of working time by collective agreements.

One approach is that proposed in the Report on *Fundamental Social and Economic Rights in the European Community*.[24] The Community would aim to develop, *less* an institutional model in any concrete form, which would inevitably conflict with the established framework of some national industrial relations systems. Rather, through comparative analysis, the Community Directive would stipulate a set of *qualities* or *characteristics* which can best guarantee the particular social and economic right in question. Comparative studies have been carried out under Commission auspices in areas covered by a number of specific rights which identify qualities which have proved themselves essential. Effective protection of these rights requires institutional forms and procedures, which nonetheless allow for the different industrial relations systems of Member States. The Community Directive would stipulate not that national institutions be replaced, but rather reformed, in whatever way suits the national environment, so that the requisite qualities specified in the Community instrument are reflected in those institutions. The consequence would be a substantive harmonisation of protection of the right in question, though each Member State might utilise different institutional machinery. The example cited in my Report was a study of the rights of workers to participate in the introduction of new technology.[25] The abundance of comparative work on flexibility in working time arrangements should enable the Commission to identify a set of qualities or characteristics which the legal and industrial relations institutions of Member States should reflect in order to achieve the goal of determining the basic conditions with which collective agreements should comply.

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23. R. Blanpain, 'General Report,' in R. Blanpain and E. Kohler (eds), *Legal and Contractual Limitations on Working-Time in the European Community Member States* (European Foundation for the Improvement of Living and Working Conditions, Office for Official Publications of the European Communities: Kluwer, 1988), at pp. 83–84.

24. Bercusson, note 12 above, at pp. 19–23.

25. Bercusson, *ibid.*, referring to the study entitled *The Control of Frontiers: Workers and New Technology: Disclosure and Use of Company Information* (Ruskin College Oxford: October 1984). The conclusions of the Final Report of this study are reproduced in *European Industrial Relations Review*, No. 134 (March 1984), p. 22.

Formulation of minimum reference rules

Article 8 refers to 'a weekly rest period' and 'annual paid leave.' The Commission's Action Programme refers to 'maximum duration of work, rest periods, holidays, night work, week-end work, systematic overtime.' The Action Programme's reference to holidays should include, therefore, 'annual paid leave.' A 'weekly rest period' is explicitly recognised in the reference to 'rest periods,' but also implies some restriction of the maximum duration of work, night work, weekend work and systematic overtime. A starting point for Community standards is the law of the Member States.

Constitutions of the Member States of the Community which provide that the maximum length of the working day shall be regulated by law are those of Italy (Art. 37), Portugal (Art. 60(ld)(2b) and Spain (Art. 40(2)).[26] A constitutional right to 'rest and leisure' is guaranteed by France 'to all' and particularly to the child, mother and aged worker (Preamble, para 3). In Luxembourg the law organises 'rest for workers' (Art. 11(5)). The Netherlands 'shall promote ... leisure activities' (Art. 22(3)). Portugal proclaims the right to rest and leisure (Art. 60(ld)), and the 'systematic development of a network of leisure and vacation centres in cooperation with social organisations' (Art. 60(2d)). Spain guarantees 'necessary rest ... and the promotion of suitable centres' (Art. 40(2)); and it 'shall facilitate adequate utilisation of leisure' (Art. 43) and a system of special services which shall take care of leisure (Art. 50).

As to timing and compensation, Italy's constitution makes provision for a paid annual holiday, and the worker cannot renounce the rest and paid holidays given (Art. 37). Portugal calls for a 'weekly rest' (Art. 60(ld)) and the worker is guaranteed 'paid periodic vacations' (Art. 60(ld)); also Spain (Art. 40(2)). Sundays and holidays recognised by the State are given special mention in the German Federal Republic as 'days of rest from work and of spiritual education' (Art. 139).

According to a recent Commission Study,[27] legislation provides for periods of weekly rest in all countries, save the UK. Public holidays are

26. The texts in English of the constitutional provisions cited below are taken from the valuable compilation and classification by D. Ziskind, 'Labor Provisions in the Constitutions of Europe,' [1984] 6 *Comparative Labor Law* (no. 4, Winter), pp. 311–414.

27. Above, note 22.

recognised by law in all Member States save Denmark and the UK. Paid annual leave is provided by legislation in all Member States save the UK.

The background of both domestic law and the practice of the social partners on working time indicates that, as regards formulation and definition of fundamental rights in this field at Community level, an instrument could determine minimum standards, but should also allow for alternatives, and hence flexibility, through collective bargaining. Certain minimum standards could be fixed at Community level, imposing limitations on working time. However, derogation from these standards would be permitted by a collective agreement. The minimum standard might indicate that such derogation could only be justified by economic, technical or social reasons, and that it must be reviewed regularly. This would enable the Community to exercise a degree of control, allowing for harmonisation of derogations through collective agreements.

Much of the current discussion on working time, even among trade unions, has shifted from reduction of working time to a focus on the aspects of deregulation, re-organisation and flexibility of working time. Article 8 indicates that the earlier emphasis on reduction is to be concretised in the form of rights to rest and leave. As it has been put, however, 'reduction of working time becomes the means of exchange for the flexibility demanded by employers.'[28] The effect of the Charter's provisions will likely reach far beyond mere limitations on working time, as these become enmeshed in complex collective bargaining agreements.

There are many agreements on labour flexibility at local and enterprise levels. For the purpose of standard setting in the Community, however, agreements at higher levels would probably be most relevant: those national in scope covering all industries, or industry-specific. The Action Programme speaks of agreements 'in many industrial sectors.' The Commission could aim in the Directive to specify either Community-

28. J. Bastien, 'Les syndicats européens face au temps de travail: le marché unique comme défi pour le reformulation de revendications syndicates,' [1989] *Sociologie du Travail*, no. 3, pp. 283–300, at p. 295: 'la réduction de temps de travail devient la monnaie d'échange de la flexibilite éxigée par les employeurs.'

wide all-industry standards, or Community-wide standards for specific sectors.

Most of the standards set by existing agreements are precisely quantitative. To prescribe such a quantitative standard in a Directive is to risk being superseded by rising standards in subsequent agreements, which will affect even a minimum standard. At least two solutions are possible. First, a formula to be prescribed by the Directive to link the standard to a specified set of factors. Second, the standard itself could be formulated in general terms. The latter might have been expected to be found in the Charter itself (as in other international instruments). In its absence, the Commission might propose one. This would allow a degree of flexibility over time. But the result is to delegate the power to interpret the standard to the body designated as responsible for adjudicating on complaints of non-compliance with Directives: the European Court of Justice.

Freedom of association: Articles 11–14

What is the 'right of association'?

The first Draft (Article 16) provided a right to *belong* to a '*trade union organisation*.' This became the second Draft's (Article 14) right to *join* 'any *professional* or *any association*.' Article 15 of the second Draft, however, did specify that this entails the right to '*belong* to a *union*.' A right to 'belong to' may be different from a right to 'join,' and this possible difference is important in the final Draft.

The final Draft, in Article 11 (first paragraph), provides a more generic '*right* [contrast the more familiar 'freedom'] *of association* in order to constitute *professional organisations or trade unions*.' The second paragraph of Article 11 specifies *a freedom* to *join* 'such organisations.' Two questions arise: first, does a right of '*association*' subsume *both* 'belong' and 'join,' or *only* 'belong'; second, does this right refer to organisations, or unions, or both?

There appears to be only one interpretation of this 'right of association' which does not lead to duplication. According to this interpretation, the right to associate in the first paragraph of Article 11 means a *right to belong* to both organisations and unions. To this is added by the second

paragraph *a freedom to join* 'such' organisations (including, perhaps, also unions).

The only alternative interpretations require some duplication. Thus, if the right to associate means the right to join, or to both belong to and to join organisations and unions, the second paragraph's freedom to join 'such organisations' leads to Article 11 guaranteeing both a right *and* a freedom to join.

Of course, duplication may be the lesser evil in this case, if the alternative is to reduce the right to join to a mere freedom. Formulation and implementation of other fundamental rights may depend on successful protection of rights of association (including both the right and freedom to join organisations and unions) guaranteed by Article 11. Moreover, the inclusion of a 'right to join' in Article 11's 'right of association' is supported by a phrase which did not appear in earlier drafts. The final Draft specifies that the right of association is *'in order to constitute* professional organisations or trade unions of their choice.' To *constitute* — to bring into being — is more like active joining than passive belonging.

Constitutive activities

There is considerable debate over whether and how far a fundamental 'freedom of association' protects the *activities* of the trade unions established by workers. The upgrading by Article 11 of this freedom into a 'right of association' could be interpreted in light of this debate. Thus, the additional phrase *'in order to constitute* professional organisations or trade unions of their choice' may enhance the substance of Article 11's 'right of association' by implying a right to engage in activities necessary to constitute such organisations. Examples would be meetings of workers (at the workplace, or during working time?) to discuss constituting trade unions; or strikes in pursuit of claims for union recognition pure and simple. A right of association could protect such activities aiming to constitute trade unions.

The additional phrase *'for the defence of their economic and social interests*' indicates the potential scope of such constituting activities (which would be additional to the activities specified in Articles 12–14). For example, a strike to obtain recognition for negotiations over a specific economic or social issue might be protected by a right of

association to constitute trade unions to defend those specific economic and social interests.

'Negative' freedom of association

The second paragraph of Article 11 links the 'freedom to join *or not to join* such organisations.' The earlier distinctions between right and freedom, and between joining and belonging to unions may be recalled. First, Article 11 provides only a *freedom* not to join, as contrasted with the *right* of association. Second, this is limited to a freedom not to *join*. There is no mention of a right or freedom not to *belong*. The specific implications of this could include that once a worker has joined, there is no right or freedom not to belong. Resignation, for example, could therefore be subjected to conditions. The protection of non-members from the practices of some unions (for example, the case of the British closed shop) which require compulsory union membership is seemingly accommodated by the provision in the second paragraph of Article 11 of a freedom *not to join*. However, the right of association may be read as placing collective *rights* of *existing* union members on a higher plane than individual freedoms of non-members not to join. Similarly, the protection of non-members from exclusionary practices of unions must confront the rights to belong of existing members — which may include rights to determine the membership. The two individual *freedoms* to join or not to join are each to be weighed against the collective *right* of association. A Community instrument which respected these balances of principle would require exceedingly delicate draughtsmanship. Perhaps erring on the side of caution, the Commission's Action Programme states (p. 29) that the 'responsibility for the implementation ... rests with the Member States in accordance with their national traditions and policies.'

Rights to negotiate and conclude collective agreements — Subject to conditions laid down by national legislation and practice, but not court decisions

In Article 12, the '*right* to negotiate and conclude collective agreements' is subjected to: '*the conditions laid down by national legislation and practice*.' One possible consequence of this could be to raise a presumption of interpretation *favouring* such rights where there is *ambiguity* in national legislation and practice. For example, as to

whether legislation restricts the content of collective agreements; or restrains negotiating tactics (refusal to reveal, or demand for disclosure of, specific types of information); or as to whether practice excludes a certain workers' organisation from being a party to an agreement.

A Community instrument could achieve this result by reiterating the supremacy of conditions laid down by national legislation and practice, but prescribing this presumption in favour of the rights in Article 12. This could then become one of the grounds for challenging a national court's interpretation in an action before the European Court of Justice.

This result is facilitated by the fact that the subordination of the rights to negotiate and conclude agreements is limited to conditions laid down by national legislation and practice — *but not to those laid down by other legal norms, in particular, jurisprudence.* In those jurisdictions where the courts have been an important source of rules governing collective bargaining, the implications of this omission are potentially enormous.[29] Jurisprudence prescribing conditions governing these rights cannot infringe the rights declared by the Charter. When court judgments become the authority for rules which contradict the Charter rights, they can be impugned.

Health protection and safety at the workplace: Article 19

In addition to certain 'measures' referred to in the preceding paragraphs, the third paragraph of Article 19 requires that '[t]he provisions regarding implementation of the internal market shall *help to ensure* such protection [of health and safety].' Earlier drafts only provided that such protection '*not be jeopardised*' by these provisions. The first Draft went on to instance the need for this negative injunction 'especially where public contracts are concerned' (Article 24). The second Draft moved from the purely negative injunction by using the case of public works to illustrate a positive provision: 'especially as regards the *awarding* of public works *contracts*.' The final Draft extends this approach into a general positive injunction, though the specific reference

29. See A. Jacobs, 'Collective Self-Regulation,' in B. A. Hepple (ed.), *The Making of Labour Law in Europe* (London: Mansell, 1986), p. 192, at pp. 237–240 ('Industrial Disputes and the Civil Law').

to public works contracts is dropped. *All* provisions appear to be covered — i.e. *all* instruments of policy implementing the internal market are engaged.

The public contracts example may be a pointer to the type of provisions affected by this paragraph of Article 19. Protection is to be ensured not by retroactive correction of negative effects of various provisions on health and safety, but by *positive* provision. Taking the cue from public works contracts, this could be done by express provisions imposing obligations regarding the health and safety of workers engaged in activities regulated by single market provisions.

Implementation of the Charter: Articles 27–30

Objectives of member state action: economic efficiency or social cohesion

According to the first two Drafts, the *objectives* of Member States' commitment to take action are: 'to guarantee the fundamental social rights contained in this Charter and full implementation of the social measures indispensable to the *efficient* operation of the internal market.'

In the final Draft, this objective was changed instead to: 'to guarantee the fundamental social rights in this Charter and to implement the social measures indispensable to the *smooth* operation of the internal market *as part of a strategy of economic and social cohesion*.'

The substitution of 'smooth' for 'efficient' operation of the internal market as an objective may imply an awareness of the need for cooperation among the actors involved, particularly the social partners. There is a relaxation of market imperatives. This is consistent with the insertion of the last phrase stressing parallel social and economic strategies of cohesion.

Instruments of member state action: legislative measures or collective agreements

The first two Drafts (first Draft, Article 32; second Draft, Article 30) provided that the *instruments* of Member State action were to be: 'either through *legislative measures* or by encouraging both sides of industry to conclude *collective agreements at national, regional, sectoral or company level.*'

In contrast, the final Draft (Article 27) provides: 'in accordance with the national practices, notably through *legislative measures* or *collective agreements*.' The lack of specification of which types of agreements should not preclude different levels of agreements. The deletion of the injunction 'encouraging' the conclusion of agreements is perhaps compensated by the emphatic 'notably,' which places legislation and collective agreements on the same level as legal measures.

Conclusion: Social dialogue and the Charter

A consistent theme of the analysis presented in this article has been the reference to social consensus and collective agreements as inspirations for and sources of fundamental social rights. Many of the Articles examined have explicitly referred to this theme either directly or indirectly.

The nature of the European Community system enables the method of formulation and definition of fundamental social rights to exploit the interaction of Community and national institutions in the development of such rights. To this international dimension, there is now added a crucial element by virtue of Article 118B introduced by the Single European Act — the promotion of the social dialogue. The social dialogue — collective bargaining between the social partners at European level and within Member States — offers a unique opportunity to be utilised as an instrument for developing the substantive content of, as well as applying fundamental social rights.

Principle and experience both support the use of social dialogue. The democratic principle favours the maximum involvement of employers and workers in the formulation of the rules governing their relationship. The flexibility, ingenuity and, above all, the consensual results of such a

process have been a key element in the success of the International Labour Organisation. The concept of social dialogue incorporates a principle critical in the European Community context. It stipulates a relationship between collective bargaining and law which assumes a multiplicity of forms within Member States and is extremely flexible in its application within the context of a Community policy on fundamental rights.

Social dialogue does not simply equate with collective bargaining. It implies a flexible relationship between social dialogue at all levels and Community and national institutions. For example, it could take the form of a dialogue between the social partners at European level leading to proposals in the form of Directives, and/or lead directly to collective bargaining and agreements within Member States. The relationship is contingent upon national traditions of social dialogue within Member States. Collective bargaining in the United Kingdom is not the same as that in France, Italy and Germany. Besides bilateral bargaining, the social dialogue may adopt the form of tripartite structures, assume roles for public authorities, and/or establish mechanisms for the representation of the unorganised.

The instrument at Community level — the Charter — provides the point of departure. The standards postulated in that instrument with varying degrees of precision imply a need for further definition in instruments to be proposed by the Commission. The Action Programme of the Commission contains proposals for Directives in many fields, some of which have been analysed in this article. In some of these fields, such as working time, the Directives are to interact with the social dialogue.

There is a case for integrating collective bargaining with the formulation and application of Community fundamental social rights in Britain. A variation on an observation by Michael Terry[30] could be formulated as follows: that the effective application of a rule is in inverse relation to the distance between the actors creating it and those upon whom it operates: the greater the distance, the less the effect; the less the distance, the greater the effect. One important instrument for reducing this distance is collective bargaining. A significant characteristic of

30. See M. Terry, 'The Inevitable Growth of Informality' (1977), 15 *British Journal of Industrial Relations*, 76.

collective bargaining has in Britain emerged at the end of the 1980s: 'decentralisation.'

Unlike the usual analysis of levels of bargaining used in continental systems, based on geography (national/regional/local) or industry/sector, in Britain collective bargaining is generally analysed in terms of two main levels: (i) multi-employer or national bargaining; (ii) single-employer or company bargaining (which can be further subdivided into multi-establishment or single-workplace bargaining). Working conditions may be the result of negotiations conducted at a number of different levels.

The pay of 60–70% of British workers is determined, either directly or indirectly, through collective bargaining. Although the decline of multi-employer, industry-wide agreements had already begun in the 1950s, a recent survey by the Confederation of British Industry found that during the period 1979–86 there was a 'marked diminution' in the influence of such agreements, matched by a pronounced growth in single-employer bargaining at company or establishment level. By 1986, 87% of employees in plants with collective bargaining had their basic rates of pay negotiated at establishment or company level. Multi-employer bargaining was still important in certain industries and with respect to certain conditions of work (25% of employees had their hours of work determined exclusively at the multi-employer level; 20% of employees had their holidays fixed exclusively at that level). However, other surveys confirmed the decline in the importance of multi-employer agreements.[31]

The application of labour law in general, and of fundamental social rights in particular, is affected significantly by this acceleration of the trend towards decentralisation of collective bargaining. The interaction of a strongly *localised, enterprise- and establishment-based* system of industrial relations with *national* or *international* legal norms raises serious difficulties. The British experience of mechanisms of application of labour law — courts and labour administration — does not hold out high hopes for the success of a coordinated and homogeneous application

31. See 'Developments in multi-employer bargaining,' Industrial Relations Services, *Employment Trends*, no. 440, May 23, 1989, p. 6; 'Decentralised bargaining in perspective,' Industrial Relations Services, *Employment Trends*, no. 451, November 7, 1989, p. 11.

of labour law on any but a formal level.[32] The substantive effects of labour law norms in practice will usually depend on the relative strengths of employers and workers in collective bargaining at local and workplace level.

The legal case for use of the social dialogue as a channel of legal implementation of social policy in the European Community has been established.[33] The social dimension of the internal market depends in part upon its creative use in Member States.

32. See B. Bercusson, 'Le rôle du juge, de l'administration et des partenaires sociaux dans l'application du droit du travail: la situation en Grande Bretagne,' [1990] *Travail et Emploi* (forthcoming).

33. A. Adinolfi, 'The implementation of social policy directives through collective agreements?' (1988), 25 *Common Market Law Review* 291.

Maastricht: A fundamental change in European labour law

Brian Bercusson (1992) * **

The Maastricht Treaty's Protocol on Social Policy provides a new framework for participation of labour and management in the formulation and application of labour law at national and Community levels. Following the Charter of Fundamental Social Rights of Workers, it marks a fundamental change of direction in European labour law

Developments in the European Community's legal policy on labour and industrial relations during the last few years have been remarkable. Two events are outstanding: the approval by eleven Member States of the Community Charter of Fundamental Social Rights of Workers at the Strasbourg summit of December 1989, and the conclusion of a Protocol to the Treaty on European Union and an Agreement on social policy at the Maastricht summit of December 1991. The United Kingdom was a party to neither the Community Charter nor the Agreement, but it accepted the Protocol.

The Maastricht accords still have to be ratified by national Parliaments, and the United Kingdom looks likely, in the medium term, to remain outside the social policy process. But the instruments are now arguably in place for a fundamental change in European labour law, both in its substance and in the procedures for its formulation and implementation. The United Kingdom's absence may even assist their future success. The question remains whether the actors involved are capable of putting them into effect.

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** 'Maastricht: a fundamental change in European labour law', Brian Bercusson (1990). This article was first published in the *Industrial Relations Journal*, 23 (3), 177-190 and is reprinted here with the kind permission of Wiley-Blackwell.

The substance of these instruments is the focus of this article. But the procedure of their formulation and adoption is important. The key documents proposing the changes were drafted by the Member State holding the Presidency of the Council of Ministers – the Netherlands. But their final form, and most of the substance of the provisions which eventually became the Agreement between the eleven Member States were the result of negotiations between the peak organisations of employers (UNICE and CEEP) and of workers (ETUC) at European level. These negotiations culminated in the accord dated 31 October 1991 between the ETUC and UNICE/CEEP on a new draft of Articles 118, 118A and 118B of the Treaty of Rome.[1] With few modifications, this accord was adopted by the eleven Member States as the basis for the future labour law of the European Community. It provides a striking example of the fundamental change in European labour law which is the subject of this article,

I begin by summarising the previous experience of European Community labour law, both in terms of its content and the legal techniques for its enforcement (I). Then the Community Charter and its aftermath will be briefly examined, and an argument made as to the emerging model of employment relations in Community labour law: a specific typology of regulated individual employment relationships and the role of collective bargaining within Member States in implementing fundamental social rights (II). Finally, the Maastricht Protocol and Accord will be analysed, in particular the inclusion of the social partners at Community level in the formulation of Community labour law and social policy (III).

I. Community social law and policy to 1989

Historical development

European Community labour law can be characterised in terms of its historical development by four different strategies, following each other in successive periods.[2] First, the strategy of the period of the European Coal and Steel Community, which included complex and expensive

1. Agence Europe, No. 5603, 6 November 1991, p. 12.

2. For a brief historical account, Hepple, B. A., 'European Labour Law. The European Communities', in R. Blanpain (ed.), *Comparative Labour Law and Industrial Relations in Industrialised Market Economies*, Vol. 1, Chapter XII, p. 293, Kluwer, 1990.

measures aimed at easing the re-structuring of the industry and consequent dislocation of its workers,[3] the Treaty of Rome, though containing provisions including Article 119 on equal pay for equal work, remained largely a dead letter as regards labour law policy for the first decade and a half of the Community's existence. It was only the revival of a commitment to social policy, following the Paris summit declaration of 1972, that led to the development of the second strategy of Community labour law during the 1970s: the harmonisation Directives in the area of collective labour relations and equality at work. This second stage came to an end with the beginning of the 1980s, largely the result of an effective veto on Community legislation in the social field by a British government adamantly opposed to the direction taken during the 1970s.

A third strategy, during the 1980s, was characterised by attempts to implement a labour law policy indirectly through the expanded use of Community financial aid instruments, particularly the social and regional funds.[4] In the latter half of the decade, a fourth strategy was attempted with the promotion of a social dialogue at European level.[5]

Content and enforcement

The balance sheet of Community law and policy in the field of labour law and industrial relations at the end of the 1980s was not encouraging. The main advances had been the harmonisation directives of the 1970s on the law relating to collective dismissals and protection of workers' rights in the event of transfer of undertakings or the employer's insolvency. Even more dynamic had been the Council Directives implementing the principle of equality between men and women as regards remuneration, treatment in employment, and social

3. Lyon-Caen, G. and A., *Droit Social International et Européen*, 7eme ed., Paris, 1991, pp. 152–154. For a study of British trade unions' attitudes to this initiative, see Teague, P., 'Trade unions and extra-national industrial policies: A case study of the response of the British NUM and ISTC to membership of the European Coal and Steel Community', (1989) 10 *Economic and Industrial Democracy* 211.

4. For a summary of the social policy of the Community during this period, see *Social Europe*, 1/87, pp. 51–62; and 1/88, pp. 19–20. For a detailed account of the Social Fund, *Social Europe*, 2/91.

5. For an outline of the development of the social dialogue in the Community, see Annex 10 to *The Social Dimension of the Internal Market*, Interim report of the interdepartmental working party of the Commission, *Social Europe*, Special Edition, Brussels, 1988.

security. These, together with renewed interest in Article 119 of the Treaty of Rome, guaranteeing equal pay for men and women, had given rise to a developed case law of the European Court of Justice.[6] Finally, there was an increasing amount of Community law on the health and safety of workers.[7]

The outcome for European labour law was increasingly rich. European Community labour law, embodied in directives on collective labour relations, sex equality and health and safety at work, had to be implemented in Member States. A variety of methods of ensuring that the labour law of the Member States reflected Community requirements emerged. One was through a Commission complaint to the Court under Article 169. A number of Member States introduced changes to their national law as a result of such complaints.[8]

A second method was through references by national courts to the European Court under Article 177, when a case before them raised a question of European law. Decisions by the European Court require the national courts to interpret national legislation in line with Community law.[9] The application of such a principle had radical implications, for example, regarding UK labour law on rights of workers in the event of transfers of undertakings.[10]

A third method resulted from other decisions of the Court, which attributed to Community instruments – the Treaty and some provisions of Directives – 'direct effect'. This meant these provisions could be invoked, even in the absence of national legislation, as a legal basis for a claim before a national tribunal.[11] Difficulties arose from the distinction

6. A useful collection of Treaty provisions, Directives and the case-law of the European Court of Justice which concerns them is Byre, A., *Leading Cases and Materials on the Social Policy of the EEC,* Deventer: Kluwer, 1989. It is interesting that of the 532 pages of text in this book, 297 (55%) are taken up with EC law and policy on sex equality. A detailed exposition of EC law in this area is to be found in *Social Europe*, 3/91.

7. *Social Europe,* 2/90.

8. This was the case with UK sex discrimination law following the Court's upholding the Commission's complaints in *Commission of the European Communities v. UK,* Case 61/81, [1982] *European Court Reports* (hereafter ECR) 2601; *Commission v. UK,* Case 165/82, [1984] *Industrial Cases Reports* (hereafter *ICR*) 192.

9. *Marleasing v. La Commercial International de Alimentation,* Case 106/89, [1990] *ECR* 4135; see Fitzpatrick, B. and Docksey, C., 'The duty of national courts to interpret provisions of national law in accordance with Community law', (1990) 20 *Industrial Law Journal* 113.

10. *Litster v. Forth Dry Dock & Engineering Co. Ltd.* [1989] *ICR* 341.

11. *Defrenne v. SABENA* (No. 2), case 43/75, [1976] *ECR)* 455; [1976] *ICR* 547.

the Court made between provisions with vertical direct effect – which could be invoked only against the State – and provisions with horizontal effect as well, which could be invoked also against private employers. Decisions by the Court seemed to allow for a wide definition of the State, which would enable individuals to rely on these provisions against a wide variety of employers in the public sector.[12]

A fourth method emerged very recently, when the Court was faced with a complaint by Italian workers that they had not been compensated for losses incurred when their employer went bankrupt. The 1977 Directive had required Member States to protect workers' rights in such circumstances.[13] The Court found that Italy had not implemented the Directive and went on to hold that compensation was owed by the State to those injured by its failure.[14] The implications of this decision are potentially enormous in light of the many alleged defects in Member States' implementation of Community labour law.[15]

II. The Community Charter and its aftermath

The Community Charter of Fundamental Social Rights of Workers was approved by eleven Member States in Strasbourg on 9 December 1989; the United Kingdom refused to adhere. Its legal quality is secondary to its political significance. It is effectively a direction to the Commission of the European Communities to develop initiatives for the implementation of the rights listed in the Charter, using the legal instruments available under the Treaty of Rome. Some of these allow for approval by a qualified majority of Member States, rendering the UK's opposition irrelevant. The Commission's Action Programme for the implementation of the Charter provides, *inter alia*, for a large number of directives to be proposed.[16]

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12. *Foster v. British Gas plc*, Case 188/89, [1989] ECR 3313; For a discussion see Bercusson, B. (1991) 11 *Legal Studies* 351–357.

13. Council Directive of October 20, 1980 on the Approximation of the Laws of the Member States relating to the protection of employees' in the event of the insolvency of their employer, O.J. 1980, L 283/23.

14. *Erancovich and Bonifaci v, Italian Republic*, Cases 6/90 and 9/90, decided 19 November 1991 (not yet reported).

15. In the case of the UK, see B. A. Hepple and A. Byre, 'EEC Labour Law in the United Kingdom – A New Approach', (1989) 18 *Industrial Law Journal* 129.

16. Bercusson, B., 'The European Community's Charter of Fundamental Social Rights of Workers', 53 (1990) *Modern Law Review* 624.

The directives proposed under the Action Programme have been subject to intensive debate as to which Articles of the Treaty should constitute their legal basis. This decision determines whether they require the unanimous approval of the Member States, or only that of a qualified majority. Despite the expected difficulties in obtaining the requisite approval in some cases, once approved, directives require to be implemented within national legal orders. Looking at developments since the Community Charter was approved, I believe two tendencies can be discerned.

First, adoption of two new directives, perceived in the general context of Community labour law, indicate[s] an emerging typology of individual employment relationships regulated by Community labour law.[17] Secondly, the Charter, and subsequent Commission proposals, indicate an expansion of the role of collective bargaining within Member States as a means of implementing fundamental social rights. This role later becomes generalised in the Maastricht Accord to all of Community labour law.

A. Regulated employment relationships in Community law

National labour law systems have as their foundation a legal concept of the individual employment relationship which normally adopts as the defining criterion the subordination of the worker to the employer.[18] The deviations from this model in the form of 'atypical' employment relationships have produced a vast literature in many countries.[19] A number of Community legal instruments appear to create a framework of regulation for certain categories of individual employment.

17. Council Directive of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship, OJ 1991 L206/19, Council Directive 91/533 of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ 1991 L 288/32.

18. Barbagelata, H., 'Categories of Workers and Labour Contracts', in R. Blanpain (ed.), *supra*, note 2, p. 37.

19. Examples include the papers presented in the volumes of the Actes du Colloque, 3–4 novembre 1988, *L'Evolution des Formes d'Emploi*, Paris: La Documentation Française, 1989; M. Pedrazzoli (ed.), *Lavoro subordinato e dintorni: comparazioni e prospettive*, Bologna: II Mulino, 1989; Rodgers, G. and J., (eds.), *Precarious jobs in labour market regulation: The growth of atypical employment in Western Europe*, Geneva: IILS, 1989.

This approach was highlighted in the aftermath of the Community Charter by the Commission proposal of three different Directives on 'certain employment relationships'.[20] Together with other proposals, and pre-existing Community labour law, there appears to be emerging a model which consists of four categories, still in the process of development.

1. Part-timers

The first category of workers subject to special Community regulation is part-time workers. In every Member State of the European Community the majority of part-time workers are female.[21] As a consequence, any treatment of part-time workers which is less favourable than that accorded to full-time workers constitutes indirect discrimination and is unlawful under Community law, unless it can be justified.[22] This has already had major consequences for part-time women workers. The European Court has upheld claims to equal treatment with respect to occupational pensions, sick benefits, wage adjustments and severance pay.[23]

2. Non-permanent workers

The second category of workers subject to special Community regulation is that of non-permanent workers. The recognition of this category derives from the approval by the Council of Ministers of only one of the three proposed directives on 'certain categories of employment relationships'. Two of the three proposals related to both part-timers and non-permanent workers.[24] The third applied only to non-permanent workers – and it was this proposal only which was approved.[25]

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20. COM(90) 228 final—SYN 280; Brussels, 21 August 1990. *Supra,* note 17.

21. See *A Social Portrait of Europe,* Statistical Office of the European Communities, (Eurostat), Luxembourg, 1991, p. 62, Table 5.6.

22. *Bilka Kaufhaus v. Weber von Harz,* Case 170/84, [1986] ECR 1607.

23. *Bilka Kaufhaus, ibid., Rinner-Kuhn v. FWW Spezial-Gebäudereinigung GmbH*, Case 171/88, [1989] *ECR* 2743, *Nimz v. Freie und Hansestadt Hamburg*, Case 184/89 [1991] *ECR 297*, *Kawalska v. Freie und Hansestadt Hamburg,* Case 33/89, [1990] ECR 2591. Proposal for a Council Directive on certain employment relationships with regard to working conditions; Proposal for a Council Directive on certain employment relationships with regard to distortions of competition.

24. Proposal for a Council Directive on certain employment relationships with regard to working conditions; Proposal for a Council Directive on certain employment relationships with regard to distortions of competition. COM(90) 228 final—SYN 280; Brussels, 21 August 1990.

25. *Supra*, note 17.

The implications of such a Directive are interesting, given the nature of the labour force within the European Community. Unlike part-timers, there is no general preponderance of women workers in the non-permanent work-force.[26] However, with respect to both part-timers and non-permanent workers, there is a clear north–south cleavage within the Community. The northern European Member States have a disproportionately high number of part-timers compared to the southern European Member States,[27] The opposite is true for non-permanent workers, who are concentrated more densely in the south.[28]

The implications of a specific category of employment regulated by Community labour law are that the costs of such regulation are borne by the employers of that category of employees, and appear as a form of competitive disadvantage vis-à-vis employers not subject to such regulation. Insofar as part-time employment is predominantly concentrated in northern Europe, employers in those countries have to bear a disproportionate cost of the equality law of the Community. Conversely, the enactment of Community regulations specifically aimed at non-permanent employment imposes costs disproportionately on southern European employers, where such employment is concentrated. The early adoption by the Council of such regulation has significance for the general debate over 'social dumping', given the generally lower labour costs of southern European employers.[29]

26. See *A Social Portrait of Europe*, Statistical Office of the European Communities, (Eurostat), Luxembourg, 1991, p. 64, Table 5.13.

27. In 1988, part-timers were over 30% of the working population in the Netherlands, and more than 20% in Denmark (23.7%) and the UK (21.9%), some 13.2% in Germany, but around 5% in Spain (5.4%), Italy, (5.6%), Greece (5.5%) and Portugal (6.5%) (8% in Ireland). *A Social Portrait of Europe*, Statistical Office of the European Communities, (Eurostat), Luxembourg, 1991, p. 62, Table 5.6. The Community average was 13.6%, more than 14 million part-time employees.

28. In 1988, employees with a temporary contract were 22.4% in Spain, 18.5% in Portugal and 17.6% in Greece, but fell from just over 11% in Germany and Denmark, to 8.7% in the Netherlands, 7.8% in France and 5.9% in the UK. See A *Social Portrait of Europe*, Statistical Office of the European Communities, (Eurostat), Luxembourg, 1991, p. 64, Table 5.13.

29. Comparative statistics on pay levels in various industrial groups and working time regulations are presented in the Explanatory Memorandum to the Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services, COM(91) 230 Final-SYN 346, Brussels, 1 August 1991, para. 11, Tables 1–4, pp. 5–8.

3. Employment without an easily identifiable employer

One of the new Directives approved following the Community Charter concerns an employer's obligation to provide information to workers.[30] The final text of the Directive incorporated a significant change as regards the categories of workers covered by its provisions. The first draft of the proposal referred simply to workers with a contract of employment. The final text refers instead to workers with 'a contract or other relationship of employment'. Though there is no definition of a 'relationship of employment', it clearly indicates workers who do not have the classical contract of employment, characterised by subordination.

Elaboration of the elements of a 'relationship of employment', defining the categories of workers who benefit from the rights prescribed in the directive, is one of the tasks facing Community labour law. The Directive requires that employers of such workers specify in writing a range of employment entitlements.[31] One of the possible consequences is that this obligatory written specification will facilitate such workers becoming entitled to many benefits from which it was previously customary to exclude them. The implications for Community regulatory protection of a whole range of workers currently excluded from much national labour law are potentially significant.

4. Employment covered by collectively agreed terms

The emergence in Community labour law of an increasing role for collective agreements as the instruments embodying European labour law standards is of primary and general importance. Its specific relevance here arises from another development following upon the Community Charter: a proposed Directive on the provision of services.[32] This proposes that workers imported into another Member State to undertake work on behalf of a contractor providing services may be subjected to '*erga omnes*' collective agreements applicable in that Member State.

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30. *Supra*, note 17.

31. Article 2: *inter alia*, place of work, title, grade, nature, category or brief description of the work, paid leave, remuneration, length of working day or week, and 'where appropriate, the collective agreements governing the employee's conditions of work'.

32. Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services, COM(91) 230 final—SYN 346, Brussels, 1 August 1991.

The significance of this proposal, which has part of its origins in a decision of the Court of Justice, is profound and emerges in the Explanatory Memorandum to the proposed directive.[33] The Commission considered the consequences of a requirement of observance of Member State collective agreements on the free movement of services. It was acknowledged that it would effectively disadvantage foreign competitors.

> The question is therefore one of finding a balance between two principles which find themselves in contradiction. On the one hand, free competition between firms, including at the level of subcontracting across borders, so that the full benefits of the Single Market can be realised, including by firms based in Member States whose main comparative advantage is a lower wage cost. On the other, Member States may decide to set and apply minimum pay levels applicable on their territory in order to ensure a minimum standard of living appropriate to the country concerned.[34]

As a matter of policy the Commission took the view that certain labour standards took priority over the competition imperative.

> The freedom to provide services is one of the fundamental principles of the Treaty and may be restricted only by provisions which are justified by the general good and imposed on all persons or undertakings operating in the Member States in which the service is to be provided.
>
> The principle of equality of treatment laid down in Article 60 of the Treaty of Rome does not mean that all national legislation applicable to nationals of a Member State and usually applied to the permanent activities of undertakings established therein may be similarly applied in its entirety to the temporary activities of undertakings which are established in other States.
>
> However, Community law does not preclude Member States from applying their legislation or collective labour agreements entered into by the social partners, relating to wages, working time and

33. *Rush Portuguesa Ida v. Office national d'immigration*, Case 113/89, [1990] ECR 1417.
34. *Supra*, note 32, Explanatory Memorandum, p. 4, para. 9.bis.

> other matters, to any person who is employed, even temporarily, within their territory, even though the employer is established in another State.[35]

This statement effectively declares that employment conditions of workers in general, where these derive from certain national instruments (legislation and *erga omnes* agreements) are to be protected by Community law. Its application in this directive is limited to workers engaged in providing services in other Member States. But it embodies a general policy which subjects the heretofore uninhibited ideology of unfettered competition in the single European market to a social and labour policy of profound importance.

B. Collective bargaining and implementation of Community labour law—before Maastricht

The implementation of Community labour law through collective bargaining has become potentially much more significant following the Treaty on European Union signed at Maastricht on 7 February 1992, but was already an important element in Community labour law before Maastricht. The issue arose first in the case law of the European Court following complaints by the Commission that certain Member States were not complying with the obligation under Article 189 to introduce the measures required to implement directives.[36] Article 189 provides for implementation within Member States by their 'choice of form and methods'. Directives in the area of labour law habitually referred in their concluding provisions to implementation through legislation, regulations or administrative provisions. They did not mention implementation through collective agreements. In its decisions the European Court held that a Member State can resort in the first instance to collective bargaining.[37] However, while upholding the principle that collective agreements may be used to implement Community labour law obligations, the Court emphasised that there must be adequate coverage by the agreements and that the substantive content of the agreements must coincide with the directives' requirements.

35. *Ibid*., pp. 10–11, para. 14.
36. Adinolfi, A., 'The implementation of social policy directives through collective agreements?', (1988) 25 *Common Market Law Review* 291.
37. *Commission v. Denmark*, Case 143/83, [1985] 427.

Otherwise, there must be a back-up in the form of a State guarantee (usually legislation).[38] Finally, Member States cannot rely on too slow a process of implementation of Community obligations through collective bargaining.[39]

The Community Charter of 1989 marked a major advance in that eleven Member States approved not only a declaration of fundamental social rights of workers, but also explicitly indicated that the implementation of these rights was to go beyond the traditional method of legislative, regulatory or administrative measures. The Preamble stated:

> Whereas such implementation may take the form of laws, collective agreements or existing practices at the various appropriate levels and whereas it requires in many spheres the active involvement of the two sides of industry.

Further, Article 27:

> It is more particularly the responsibility of the Member States, in accordance with national practices, notably through legislative measures or collective agreements, to guarantee the fundamental social rights in this Charter ...[40]

One directive already approved after the Charter provides:

> Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive no later than 30 June 1993, or shall ensure by that date that the employers' and worker's representatives introduce the required provisions by way of agreement, the Member States being obliged to take the

38. *Commission v. Italy*, Case 235/84, [1986] ECR 2291. The Court reiterated this principle, despite the contrary opinion of the Advocate-General.

39. *Commission v. French Republic*, Case 312/86, [1989] ECR 6315.

40. The Text of the Charter, earlier drafts and the Commission's Action Programme are published in *Social Europe*, 1/90. For a detailed analysis of the implications of implementation of European Community social rights through collective bargaining, see the discussion in my Report to the European Commission submitted during the preparatory stages of the Charter, B. Bercusson, *Fundamental Social and Economic Rights in the European Community*, July and October 1989; published in *Human Rights in the European Community: Methods of Protection*, Nomos Verlag, Baden-Baden, 1991, pp. 195–291.

necessary steps at all times to guarantee the results imposed by this Directive.[41]

A number of other proposed directives aimed at implementing the Charter also explicitly recognise collective bargaining as one means of implementation.[42]

The implementation of Community labour law through collective bargaining has thus now attained recognition in both the case law of the Court and, following the Community Charter, in the legislative practice of the Commission and Council. A quantum leap in the role of collective bargaining was the result of the Maastricht negotiations on social policy in the Community.

III. The Maastricht Treaty

A. Europe of the 11 and Europe of the 12

The negotiations at Maastricht produced the Treaty on European Union signed by the Member States of the European Community on 7 February 1992. The Treaty includes a Protocol on Social Policy which forms part of the Treaty, and an Agreement, annexed to the Protocol, between eleven Member States, with the exception of the UK, also on Social Policy. The Protocol notes that eleven Member States 'wish to continue along the path laid down in the 1989 Social Charter [and] have adopted among themselves an Agreement to this end'; accordingly, all twelve Member States:

1. Agree to authorise those 11 Member States [excluding the UK] 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 abovementioned Agreement.

41. Council Directive 91/533 of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. OJ 1991 L 288/32), Article 9(1).

42. Proposal for a Council Directive on certain employment relationships with regard to distortions of competition, Article 6; COM(90) 228 final—SYN 280, Brussels, 13 August 1990. Proposal for a Council Directive concerning certain aspects of the organisation of working time, Article 14; COM(90) 317 final—SYN 295, Brussels, 20 September 1990.

> 2. 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 abovementioned Agreement...
>
> Acts adopted by the Council... shall not be applicable to the [UK].

The Agreement comprises a new formulation of some of the Articles on social policy of the Treaty of Rome. The question as to whether the Agreement and its consequences are regarded as part of Community law is a crucial issue, since the legal implications for the eleven Member States are very different if the Agreement constitutes only an inter-governmental treaty, and is governed by public international law, not European Community law.

The issue would have been resolved by the (perhaps expected) victory of the Labour Party in the British general election of April 1992, which presumably would have led to the UK becoming party to the Agreement. 'Its provisions would then have substituted for the provisions in the Treaty. As this did not happen, there continue in existence two parallel sets of provisions: one applicable to the 12 Member States in the Treaty, and one applicable to the 11 Member States in the Agreement.* The outcome in practice is that (subject to ratification of the Treaty by national parliaments) the Community institutions and the eleven Member States are to undertake the operation of the new provisions in the expectation that, sooner or later, the UK will accede to the results. The desirability of this outcome depends on whether the UK's contribution to Community social policy is regarded as positive or negative.

B. Scope of Community action and voting procedures

Two aspects of primary importance in the new provisions should be mentioned briefly. First, there has been a great expansion of the legal competences of the Community in the field of social policy (Article 1 of the Agreement, the re-drafted Article 117 of the Treaty of Rome):

* There will continue to be some academic debate about whether the Agreement itself, or acts adopted by the Council under the Agreement, form part of Community law. The view of the author is that they do form part of Community law, but there is not the space here to develop the arguments.

> 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 combating of exclusion.

Secondly, within this new sphere of Community social policy, the Council is authorised, by Article 2, paragraphs 1 and 2 (of the Agreement, the re-drafted Article 118 of the Treaty of Rome), to proceed by qualified majority voting[**] to 'adopt, by means of directives, minimum requirements for gradual implementation' in the following five '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 from the labour market...'

This is an expansion of the capacity of the Community to act in the social policy area even where one or more Member States are opposed. Article 2, paragraph 3, requires unanimity (among the 11, pending UK adhesion) in the following five 'areas:

– social security and social protection of workers;
– protection of workers where their employment 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.'

[**] The Protocol, Article 2, deems the new qualified majority in the Council, given the absence of the UK, to be 44 votes.

Paragraph 6 of Article 2, however, provides that:

> 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.

These provisions expand both the legal scope and the ability of the Community to develop social policy and labour law at European level. In the past, there have been many disputes over whether there was any legal basis for social policy measures, and, if so, whether the legal basis allowed for qualified majority voting or required unanimity in the Council. The new and more complex formulations of competence, and the apparent overlap between those fields allowing for qualified majority voting (Article 2(1)), those areas subjected to unanimity (Article 2(3)), and those excluded altogether (Article 2(6)) will doubtless give rise to much debate when measures are proposed by the Commission.†

C. Collective bargaining and implementation of Community labour law—after Maastricht

The ETUC/UNICE/CEEP accord of 31 October 1991, including a redrafted Article 118, was adopted, with very minor changes, by the eleven Member States in their Agreement comprising Annex IV of the Treaty concluded at Maastricht and is now Article 2(4) (re-drafted Article 118(4)) of the Accord attached to the Treaty on European Union. It reads:

> A Member State may entrust management and labour, at their joint request, with the implementation of directives...
>
> In that 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 measures by agreements, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive.

† A notorious example was the Commission's Social Charter Programme proposal on 'atypical workers', ultimately divided into three separate proposals, each with its own legal basis and voting procedure.

A number of observations may be made. As always, it is optional for the Member State to entrust implementation to the social partners. It is not clear whether the Member State may prevent or obstruct the social partners from implementing directives. States cannot impose the burden upon social partners; it must be at their joint request. This can create problems where there are multiple parties: divided union movements or multiple employer associations. It presumes a level of collective bargaining (national, regional, enterprise) appropriate for this type of implementation.

The result could range from peak organisations requesting block exemption for whole industries (or even multi-industry agreements), to enterprises and works councils requesting authority to implement the directive in their workplaces. One prospect is of a law flexibly authorising the social partners at specified levels to opt out of State regulation by substituting a collective agreement, provided this guarantees the results imposed by the directive.[43]

This is the end result of the long process described above: first individual Member States, then the European Court, then the eleven Member States in Article 27 of the Community Charter, then the Commission in its proposed directives and the Council and now the Maastricht Agreement—all have formally recognised the role of collective bargaining in the implementation of Community labour law.

D. The role of the European social dialogue in formulating Community labour law

At Community level, collective bargaining derives two major impulses—linked to each other—from the Maastricht Agreement. The first concerns the Commission's role in promoting the social dialogue at Community level. The second concerns the role of European level collective bargaining in the elaboration of Community labour law. These two impulses are closely related to a third: the Maastricht Treaty's definition of subsidiarity.

43. Such a provision is proposed in the Commission's proposal for a Council Directive concerning certain aspects of the organisation of working time, Article 12(3); COM(90) 317 final—SYN 295, Brussels, 20 September 1990.

1. Subsidiarity

The subsidiarity principle was the subject of explicit elaboration in the Union Treaty agreed at Maastricht, though this does not mean it has necessarily been clarified: (Article 3B)

> The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
>
> In the areas which do not fall within its exclusive jurisdiction, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar 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 issue has been made rather more complex by the injection of Community level action involving not EC institutions, but the social partners at Community level. The problem is that EC level action can now be undertaken by the social partners as well as by the Commission. Similarly action at national level can include that by the social partners as well as by Member States.

The question is: how does the principle of subsidiarity apply in the resulting complex of interactions? Formerly it could be said to apply to Community action v. Member State action. But is the same standard applicable as between:

– EC level action by the social partners v. Member State action; or

– EC Commission action v. action by the social partners within the Member State; or

– EC level action by the social partners v. action by the social partners within the Member State?

Are any or all of these subject to the same principle of subsidiarity? Or are they subject to a principle of subsidiarity formulated differently?

Finally, there is the question of whether Commission action or action by the social partners at EC level is preferable; similarly, at Member State level, whether action by the State or the social partners is preferable. Neither of these choices seems directly governed by the subsidiarity principle, but the choice between them is subject to the same logic as the subsidiarity principle.

2. Promotion of social dialogue

The first reinforcement of social partner action at EC level emerged from the ETUC/UNICE/CEEP accord. This proposed to replace the existing Article 118B:

> The Commission shall endeavour to develop the dialogue between management and labour at European level ...

Instead, the new Article 118B proposed by the social partners at EC level was approved at the Maastricht Summit and is now Article 3(1) of the Agreement appended to the Union Treaty:

> 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 ...

This seems to reinforce the obligation of the Commission regarding the social dialogue at EC level beyond the former 'endeavour to develop'. But it also, I suggest, implicitly reflects on the subsidiarity principle. The most 'relevant measure' which the Commission can take 'to facilitate their dialogue' is to devolve to them the task of formulating the implementing agreements on Community labour law.

3. Participation of the social partners in the formulation of EC labour law

a. Consultation or 'bargaining in the shadow of the law'

The second impulse to action by the social partners at EC level surfaced in the Dutch Presidency's first draft. This provided, first, formal

recognition for what was already the practice at EC level. The proposed new Article 118A provided:

> Before submitting proposals in the social policy field, the Commission shall consult management and labour on the advisability of Community action.

More significant was the proposal which was not in the Dutch Presidency's first draft. The second draft, however, adopted an amended text of Article 118A agreed by the ETUC/UNICE/CEEP, the substance (and virtually the identical text) of which became Article 3, paragraphs 2–4 of the Agreement:

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.

4. 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.

A major ambiguity arises as to the timing of the initiation of the special procedure referred to in paragraph 4 of Article 3—the social dialogue and possible agreements at Community level. Article 3(4) states that the procedure may be initiated by the social partners 'on the occasion of such consultation'. The question is: *which* consultation of the two envisaged by Article 3—before, and/or after the Commission produces its envisaged proposal?

Each possibility has implications for the bargaining tactics of the social partners at Community level. In both cases there occurs a familiar situation of 'bargaining in the shadow of the law'. If the procedure may be initiated at the stage of consultations when only 'the possible direction of Community action' is being considered, but *before* the

Commission presents its envisaged proposal, the parties have to assess whether the result of their bargaining will be more advantageous than the unknown content of the Community action. Experience from many countries demonstrates that there will be pressures on the social partners to negotiate and agree to avoid an imposed standard which pre-empts their autonomy, and which may be also a less desirable result.

This incentive is lost if the procedure may be initiated only at the stage of consultations *after* the Commission presents its envisaged proposal. The parties may be more or less content with the proposal. They may still judge that the result of further bargaining would be more advantageous than the known content of the proposed Community action, taking into account the possible amendment of the Commission proposal as it goes through the Community institutions. The side *less* satisfied with the envisaged proposal will have an incentive to negotiate and agree to a different standard. The side *more* contented may still see advantages in a different agreed standard. Again, experience in many countries demonstrates that the social partners are often able and willing to negotiate derogations from specified standards which allow for flexibility and offer advantages to both sides.

Indeed, the negotiation of the accord which led to the insertion of these provisions into the Maastricht Treaty Protocol can be invoked as a concrete example of the process in action. The combination of expansion of competences and extension of qualified majority voting proposed in the Dutch Presidency's first draft was sufficient to induce UNICE to agree to a procedure allowing for pre-emption of what threatened to be Community regulatory standards in a wide range of social policy areas.

b. The special procedure

The procedure referred to in the Agreement, Article 3(4) (the re-drafted Article 118A(4)), is the subject of Article 4 (the re-drafted Article 118B):

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 provisions relating to one of the areas referred to in Article 2(3), in which case it shall act unanimously.

The procedure outlined here has aspects which are clearly voluntary. First, it cannot be initiated without the consent of both the social partners (Article 3(4) (Article 118A(4)). Secondly, Article 4(1) (the redrafted Article 118B(1)) makes it clear that neither party is obliged to agree. Thirdly, the Commission seems free to produce proposals even when the social partners initiate the procedure, or during it. Finally, extension of the procedure beyond the 9-month period proposed is subject not only to the joint decision of the social partners, but also to the decision of the Commission.

The obligatory pre-emption, if any, by the social partners of Community labour law does not take effect at the point of initiation or for the duration of the procedure. It is as regards the successful outcome of the procedure—agreements—that the potentially obligatory nature of the procedure emerges. There are two methods of implementing the agreement reached.

i. National practices and procedures

The first is 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 ...' (Article 4(2)). It seems from this formulation that some degree of obligation is imposed on Member States by the word 'shall'. The question is: if such implementation is obligatory, how does such an obligation operate? At least three possibilities exist.

One possibility is that the Member States are obliged to develop procedures and practices (which may be peculiar to themselves) to implement the agreements reached at Community level. This would seem to require some formal machinery of articulation of national standards with those laid down in the agreements. The experience of implementation of Community instruments, such as Directives,

provides a basis for assessing whether Member States have complied with this obligation.

A second possibility is that the Member States are not obliged to develop new procedures and practices to implement the agreements. But where there exists machinery of articulation of national standards with those laid down in the agreements, this is to be used.

A third possibility is that, given the nature of the authors of the standards (Community level organisations of employers and workers), the procedures and practices peculiar to each Member State may consist of mechanisms of articulation of Community agreements with collective bargaining in the Member State concerned. Member States are not obliged to create such mechanisms, but national law may not interfere with such mechanisms which already exist, or which may be created by the social partners within the Member State to deal with the new development at Community level.

It is not clear whether, and, if so, how far any of the three possibilities allows for Member State discretion regarding the content of the Community level agreements. Do 'practices and procedures specific to each Member State' imply that the content may be adapted to such exigencies? Does it depend on the nature of the agreement: following the pattern of Community directives, the agreement may specify either objectives to be achieved in various ways, or more clear and precise obligations which limit the scope for deviation. The existence of clear and precise obligations even raises the question whether such provisions could have direct effect—at least in vertical form—as regards Member States.

A potentially paradoxical aspect of these possibilities is that none of them entail the direct involvement of Community institutions. In particular, in contrast to the limitations imposed by restricted competences and voting procedures on organs of the Community, agreements reached are not subject to any explicit restriction either as to content or to majority or unanimous voting. The problems could take at least two forms. First, agreements reached outside Community competence—does the obligation to implement apply? Secondly, agreements reached within Community competence, but which are opposed by sufficient Member States to block approval had they been presented to the Council under either majority or unanimous voting requirements.

ii. Council decision

A second method is envisaged to implement Community level agreements at Member State level: 'Agreements concluded at Community level shall be implemented ... in matters covered by Article 2, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission' (Article 2(4)). Unlike the first method, this makes implementation of agreements conditional on a Commission proposal. Moreover, such a proposal of the Commission is made explicitly subject to conditions as to competences and voting procedures.

c. Obligatory implementation of EC agreements?

The obligatory implementation of agreements reached through the social dialogue at Community level was declared ('shall be implemented') in the first Draft presented by the Dutch Presidency. The ETUC/UNICE accord of 31 October 1991 (paragraph 1) repeated the Dutch first draft proposal regarding the voluntary nature of the dialogue which may lead to agreements. However, unlike the Dutch first draft, the second paragraph of the proposed Article 118B stated that: 'Agreements concluded at the Community level *may* be implemented ...'.[44]

From the English version, it seems the Dutch Presidency's proposed obligation to implement agreements becomes *voluntary*. The second Dutch draft which followed the ETUC/UNICE accord raised problems because of the differences between the English and French versions. The *English* version *reinstated* the wording rendering implementation *obligatory* via national procedures and practices. The *French* version, however, *did not change* the wording relating to the obligatory or voluntary nature. The outcome is not helpful in understanding this key point.

The situation has not been helped by a further change which occurred in the French version between the agreement in Maastricht in December and the signing of the Treaty in February. The English version remained the same: a high level of obligation: (Article 118B(2)): 'Agreements concluded at Community level shall be implemented ...'. The French version changed one key word: instead of the December version: 'La mise en oeuvre des accords conclus au niveau commu-

44. The French version is not so clearly permissive: 'La mise en oeuvre des accords conclus au niveau communautaire *interviendra* ...'.

nautaire *interviendra* ...', there appears in the Union Treaty Accord: (Article 4(2)): "La mise en oeuvre des accords conclus au niveau communautaire *intervient* ...'. This change of verb tense appears, if anything, to reinforce the obligatory nature of the implementation.

The second Dutch draft made one further key change: it deleted the provision agreed by the ETUC/UNICE/CEEP that the Commission proposal and Council decision must adopt the agreements reached by the social partners '... as they have been concluded'. This opens the way for the Commission possibly to change the content of the agreements. It is contested whether this is so. After all, the wording still is: 'Agreements ... shall be implemented ... on a proposal from the Commission'. The final agreement in Maastricht in December did not change the wording on this point. The ambiguity remains a crucial one: how much are the Member States and the Commission entitled to vary the agreements reached at EC level?

The key issue remains the degree of obligation regarding implementation of EC level agreements. The uncertainty is highlighted by a Declaration attached to the Maastricht Treaty Accord:

> The Conference declares that the first of the arrangements for application of the agreements between management and labour Community-wide—referred to in Article 118B(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.

This Declaration raises a series of difficulties. What is the legal effect of a declaration to an Agreement attached to a Treaty? Such declarations on Community legal instruments are not granted any status before the Court of Justice. If the Agreement's redrafted Articles of the Rome Treaty are subsequently incorporated into the Treaty, what will happen to this Declaration?

How, if at all, does it change and/or reduce the obligation of the Member States regarding implementation? The obligation is *transformed* from implementation to *developing* the content of the agreement by domestic

bargaining. This is not necessarily implicit in the implementation process; indeed, it goes beyond it.[45] Finally, if there is no obligation to apply agreements directly, or to transpose them, or even to facilitate implementation, what is left of the obligation to implement?

Conclusion

Three outcomes of the Maastricht summit are of outstanding importance for the future of Community labour law:

1. The implementation of Community labour law through collective bargaining within Member States is explicitly recognised.

2. A role for the social partners at EC level in formulating Community labour law is introduced. The procedure is that of 'bargaining in the shadow of the law'. The social dialogue is delicately timed to take place during the Commission's procedure of consulting the social partners about social policy proposals. This raises complex issues of subsidiarity.

3. If the social partners at EC level reach agreements, it appears that Member States are obliged to implement these agreements within their national legal orders; it is not clear how this is to be accomplished.

The future of European labour law lies with the instruments agreed by the Member States at Maastricht: directives and EC level collective agreements, to be implemented within Member States, and enforced, *inter alia*, using the techniques developed to enforce Community law.

45. My report to the European Commission on *Fundamental Social and Economic Rights in the European Community*, *supra*, note 40, included, *inter alia*, such a proposal.

Democratic legitimacy and European labour law

Brian Bercusson (1999) *

Abstract

Following the Treaty of Amsterdam of June 1997, and the UK's opt-in to the Social Policy Agreement, the role of the social dialogue in the making of EC labour law is formally enshrined in the EC Treaty. In Case T-l35/96, *UEAPME*, a challenge to the Parental Leave Directive, the Court of First Instance (CFI) asserted that agreements reached through the social dialogue, which are incorporated into directives, may be challenged on grounds of their democratic legitimacy. The CFI also required the Council and Commission to determine whether the EU social partners, the parties to the Parental Leave Agreement, achieved 'sufficient collective representativity', while the Court itself undertook its own review. The article contrasts the CFF's EU constitutional law model of democratic legitimacy of the social dialogue with an industrial relations model rooted in national labour law systems and argues for a 'European labour law' which combines the two models. It questions whether the courts are the best place for questions of democratic legitimacy, representativity and autonomy to be decided. On the other hand, the article explores the potential of the *UEAPME* decision to legitimate developments in the EU social dialogue and outlines how the CFF's identification of the European Parliament as the source of democratic legitimacy can be exploited in the current conjuncture.

1. Introduction

The Maastricht Treaty on European Union transformed EC labour law by formally 'constitutionalising' the social dialogue in the Protocol and

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* 'Democratic legitimacy and European labour law', Brian Bercusson (1999). This article was first published in the *Industrial Law Journal*, 28 (2), 153-170 and is reprinted here with the kind permission of the Industrial Law Society.

Agreement on Social Policy.[1] Following the Treaty of Amsterdam of June 1997, and the UK's opt-in to the Social Policy Agreement, the role of the social dialogue in the making of EC labour law is formally enshrined in the EC Treaty.[2] In a decision almost exactly one year after the Amsterdam summit, the Court of First Instance of the EC (CFI) delivered a judgment which highlights the constitutional nature of the integration of social dialogue into the EC Treaty.[3]

In *UEAPME*, an organisation representing artisans and small and medium undertakings (SMUs) challenged the Parental Leave Directive, which was the first product of the Protocol and Agreement on Social Policy.[4] UEAPME brought an action under Article 173 (Article 230) of the EC Treaty for annulment of the Directive. The use of Article 173 to determine the standing of UEAPME to seek annulment highlights the constitutional profile of the social dialogue, and explains, in part, the approach of the CFI. The *UEAPME* decision concerns a choice between competing legal conceptualisations of the EU social dialogue. Put simply, *EC* labour law can be defined, described and developed in concepts derived from the constitutional law of the EC, or in concepts drawn from labour law traditions of the Member States. The CFI used constitutional law concepts which challenge fundamental premises of the legislative procedure through social dialogue established by the Social Policy Agreement. This article contrasts the CFF's EU constitutional law model of democratic legitimacy of the social dialogue with the industrial relations model rooted in national labour law systems and argues for a '*European* labour law' which combines the two models.[5]

The route followed by the CFI needs to be carefully plotted. In sum, there were three essential elements: the *legitimacy* of social dialogue

1. B. Bercusson, *European Labour Law* (London: Butterworths, 1996), Chapter 34: 'The Constitutional Basis for Autonomous Development of European Labour Law', pp. 523–37 (hereinafter cited as *European Labour Law)*.

2. Articles 117–22 of the EC Treaty are renumbered Articles 136–45. The old numbering will be used in this Article with the new numbering in brackets.

3. Case T-135/96, *Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME) v Council of the European Union* [1998] IRLR 602 (hereinafter referred to as *UEAPME)*.

4. Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L145/4 of 19.6.96.

5. For the conceptualisation of 'European' labour law, see *European Labour Law*, Chapter 1, pp. 5–26.

agreements, the *representativity* of the *parties* to them, and the *control* by EU institutions of the social dialogue *process*.

2. The CFI's challenges to the social policy agreement

A. Challenging social dialogue agreements: democratic legitimacy

The key question, which enabled the CFI to launch itself into fundamental legal questions concerning the EU social dialogue, was the apparently narrow technical obstacle of the standing of the applicant, UEAPME, under Article 173 (230):[6]

> ... it is necessary to determine whether, notwithstanding the legislative character of Directive 96/34, the applicant may be regarded as directly and individually concerned by it.

The CFI chose to develop the question of locus standi under Article 173 as raising issues of constitutional importance:[7]

> In view of the particular features of the procedure which led to the adoption of Directive 96/34 on the basis of Article 4(2) of the Agreement [Art. 139(2) EC], it is also necessary to determine whether any right of the applicant has been infringed as the result of any failure on the part of either the Council or the Commission to fulfil their obligations under that procedure ...

The CFI contrasted the two possible outcomes under the Social Policy Agreement. The first outcome follows from the normal legislative process and the CFI declared:

> the democratic legitimacy of measures adopted by the Council pursuant to Article 2 of the Agreement [Art. 137 EC] derives from the European Parliament's participation in that first procedure.

6. *UEAPME*, paragraph 68.
7. *UEAPME*, paragraph 83.

The second outcome results from the social dialogue; the directive which emerges from the Council embodies the agreement reached by labour and management. Of this, the CFI said:[8]

> In contrast, the second procedure, referred to in Articles 3(4) and 4 of the Agreement (Articles 138(4) and 139 EC), does not provide for the participation of the European Parliament. However, the principle of democracy on which the Union is founded requires – in the absence of the participation of the European Parliament in the legislative process – that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council acting on a qualified majority, on a proposal from the Commission, with a legislative foundation at Community level. In order to make sure that that requirement is complied with, the Commission and the Council are under a duty to verify that the signatories to the agreement are truly representative.

B. Challenging the social partners: representativity

The most important part of the CFI's decision for the social partners concerns the *parties* to any social dialogue agreement. For an agreement to be democratically legitimate, the CFI stipulates that it must be ascertained:[9]

> whether, having regard to the content of the agreement in question, the signatories, taken together, are sufficiently representative.

Applications under Article 173 (230) are challenges to a legal measure by a specific party. The nature of the measure challenged and the characteristics of the challenger, conditions to success under Article 173, shaped the CFI's vision of the social dialogue.

8. *UEAPME*, paragraph 89.
9. *UEAPME*, paragraph 90.

(i) Representativity in relation to the specific agreement

The challenge was to a specific directive incorporating a social dialogue framework agreement on Parental Leave. The CFI insisted that the representativity of the parties is to be measured 'in relation to the content of the agreement',[10] or 'with respect to the substantive scope of the framework agreement'.[11] It looked, for example, at who exactly were the workers covered by the agreement.[12] The implication for the social partners is that, for the future, agreements may be democratically legitimate when signed by organisations which are *only* representative as regards the narrow scope of the agreement concerned. This offers the social partners an opportunity, in that agreements negotiated at EU level need not be all-encompassing. On the other hand, it presents them with a challenge in that, taken individually, organisations signing these agreements may be far from representative in general.

(ii) 'Sufficient collective representativity'[13]

This is the key phrase repeatedly used by the CFI to describe the parties to a democratically legitimate agreement. The CFI had to determine whether UEAPME qualified as an applicant under Article 173 as 'directly and individually concerned' by the directive. The CFI interpreted those words of Article 173 in the context of social dialogue agreements as follows:[14]

> ... representatives of management and labour ... which were not parties to the agreement, and whose particular representation – again in relation to the content of the agreement – is necessary in order to raise the collective representativity of the signatories to the required level, have the right to prevent the Commission and the Council from implementing the agreement at Community

10. *UEAPME*, paragraph 90.
11. *UEAPME*, paragraph 91.
12. *UEAPME*, paragraph 94.
13. The official language of the case was French. This phrase first appears in paragraph 90 (and thereafter is repeated in the same formulation) as 'partenaires sociaux signataires ... ont une representativité cumulée suffisante'. This is translated relatively accurately into English as 'signatories, *taken together*, are sufficiently representative'. In subsequent paragraphs, however, the phrase is formulated as 'sufficient *collective* representativity' (paragraph 94). This translation of 'cumulée' as 'collective' is questionable in failing to highlight a key dimension. Representativity is *cumulative* in that the signatories (on either side) may, taken separately, *not* be representative, but *taken together* may achieve the requisite degree of representativity. A better translation of this key concept, it is suggested, would be 'sufficient cumulative representativity'.
14. *UEAPME*, paragraph 90.

> level by means of a legislative instrument ... they must be regarded as directly and individually concerned by that measure.

The implication for the social partners is that, even after the difficult process of social dialogue has resulted in an agreement, EC law allows non-signatories to challenge the validity of directives implementing social dialogue agreements.

The 'right to prevent the Commission and the Council from implementing the agreement at Community level by means of a legislative instrument' offers the social partners an opportunity. Agreements negotiated at EU level by labour and management who do not have sufficient collective representativity may be challenged by legitimate representatives of labour and management. It presents a danger, however, in that organisations excluded from the social dialogue negotiations may seek to undermine these agreements. The specific formula adopted by the CFI to legitimise EU-level agreements explicitly encapsulates two elements of central importance.

'*Sufficient*'. The requisite degree of representativity is not absolute. It must merely be sufficient. This relaxation of the standard may be in recognition of the extremely varied level of trade union representation in different Member States. As with the definition of subsidiarity in Article 3B, inserted by the Treaty on European Union (Art. 5 EC), however, it is not clear when the requisite degree has been 'sufficiently' achieved.[15] An EU level agreement may stand or fall on whether or not the parties to it have sufficient representativity to confer the democratic legitimacy demanded by the CFI on the agreement. The relativity of the element of 'sufficiency' was evident in the CFI's finding that, even having regard to the Social Policy Agreement's emphasis on SMUs in Article 2(2) (Art. 138(2) EC), UEAPME could not argue that:[16]

> its level of representativity is so great that its non-participation in the conclusion of an agreement between general cross-industry organisations automatically means that the requirement of sufficient collective representativity was not satisfied.

15. See the discussion in the context of subsidiarity in *European Labour Law*, pp. 532–34.
16. *UEAPME*, paragraph 104.

'*Collective*'. One problem confronted by social partner organisations which may seek a role in EU-level dialogue is that they may be exclusively national, or their transnational character, in contrast to the EU social partners ETUC, UNICE and CEEP, may be uneven: concentrated in or confined to only a number of Member States. Taken individually, such organisations could not aspire to 'sufficient collective representativity' at the EU level, if the EU social dialogue was confined to organisations which in themselves had European scope. One implication of the CFI's use of the word 'collective ('cumulée'), however, is that a number of social partner organisations could sign an agreement which, cumulatively, achieved the requisite degree of representativity. This appears to conflict with the Commission's understanding of 'representativeness', one of the criteria of which is and remains that the organisations 'be organised at European level'.[17]

(iii) Representativity: criteria

While emphasising the importance of representativity, the CFI was less than clear on the question of criteria. The CFI referred to the criteria set out by the Commission in its Communication of 1993. Representativeness meant European scope (cross-industry or sectoral), comprising recognised bargaining organisations in Member States, and adequate to the task at EU level. But the CFI did not express a clear opinion about them.[18] Reflecting the Commission's choice of criteria, the CFI seemed to look for evidence of representativity in parties 'having regard to their cross-industry character and the general nature of their mandate'.[19] Thus, as regards UNICE: 'that body represented undertakings of all sizes in the private sector, which qualified it to represent the SMUs'.[20]

The CFI acknowledged that the criterion of numbers represented may be taken into consideration; however, 'the number of SMUs represented respectively by the applicant [UEAPME] and UNICE ... cannot be

17. See the Commission Communication on 14 December 1993, COM(93) 600 final, paragraph 24, re-affirmed in the Communication of 10 May 1998, COM(98) 322, section 1.2, page 5. See also the discussion of 'representativeness' in *European Labour Law*, Chapter 36, pp. 558–62.

18. *UEAPME*, paragraph 72. The CFI emphasised the duty of the Commission and the Council to examine the representativity of the social partners parties to any agreement (paragraphs 85 ff). The CFI reviewed their examination and referred to tables and studies which 'show at the very least that both institutions kept themselves informed as to the representativity of the management and labour concerned in the present case' (paragraph 92).

19. *UEAPME*, paragraph 96.

20. *UEAPME*, paragraph 98.

regarded as decisive in relation to the content of that agreement'.[21] The statistics produced by the parties, and quoted by the CFI, demonstrated a degree of uncertainty likely to undermine any reliance on numbers.[22] The CFI seemed rather to be satisfied if the *interests* of the category of SMUs were taken into account. The CFI emphasised 'the argument that UNICE does have a general mandate – to defend the interests of undertakings of whatever kind – by contrast with the more specific mandate of other cross-industry organisations, such as the applicant'.[23] It cited the text of the agreement, 'which makes it clear that the SMUs were not left out of the negotiations leading to its conclusion'.[24]

A concept of an organisation's 'representativity' based on its claim to represent interests, rather than actual numbers of members, poses problems. Even more so, if the evidence for representation of those interests is based on the text of agreements concluded. The question of interest representation in the constitutional context of the EU raises issues going far beyond the summary considerations in the CFI's judgment.[25] The question of whether general constitutional considerations are appropriate for a process of social dialogue that has its roots in the labour law systems of the Member States is discussed in the final section of this article.

21. *UEAPME*, paragraph 102.

22. *UEAPME*, paragraph 103 cited three sets of figures for the number of SMUs represented by UEAPME, ranging from 4,835,568 to 6,600,000. The CFI itself said that the evidence showed that 'a third ... perhaps as many as two-thirds ... of those SMUs are also affiliated to one of the organisations represented by UNICE'.

23. *UEAPME*, paragraph 99.

24. *UEAPME*, paragraph 105.

25. It is worth comparing the CFI's analysis of 'representativity' at EU level with the approach of the European Court of Justice to representation at national level. The latter is criticised by Paul Davies, writing about the decisions in Cases C-382/92 and C-383/92, *Commission v UK* [1994] ECR 1-2435: '...the Court should have either been bolder or have left well alone. It should either develop a comprehensive set of criteria for judging the effectiveness of Member States' systems of representation ... or it should eschew *ad hoc* intervention'. The CFI's decision may be assessed in terms of the consequences described by Davies, applied at EU level: '... a situation where partial but effective consultation via trade union representatives is replaced by comprehensive but rather ineffective consultation with *ad hoc* elected representatives'. P.L. Davies, 'The European Court of Justice, National Courts, and the Member States', in Davies et al. (eds), *European Community Labour Law* (Oxford: Clarendon Press, 1996), p. 95 at 123 and 136. See the discussion of Cases C-382/92 and C-383/92 in B. Bercusson, (1996) 33 *Common Market Law Review* 589–610.

C. Challenging the social dialogue: autonomy

The Social Policy Agreement established a delicate equilibrium between autonomy of the EU social partners and the role of the Commission, an equilibrium I have characterised as 'bargaining in the shadow of the law'.[26] The autonomy of the social partners was confirmed by the CFI in rejecting UEAPME's claim to participate in the negotiations leading to the Parental Leave Agreement. The CFI strongly asserted the voluntary nature of the social dialogue under the Maastricht Agreement:[27]

> ... it is the representatives of management and labour concerned, and not the Commission, which have charge of the negotiation stage properly so-called.

However, the CFI took the view that this autonomy *ceases* when the parties wish their agreement to be transformed into an EC legal measure by a decision of the Council and turn to the Commission 'which thereupon resumes control of the procedure and determines whether it is appropriate to submit a proposal to that effect to the Council'.[28]

It would appear from this that the social partners retain their autonomy throughout the social dialogue process. However, as indicated above, the shadow of the Commission weighs on the process insofar as the prospect of the Commission's proposing legislation will influence the negotiations. The CFI has lengthened this shadow by reinforcing the Commission's power to assess the representativity of the parties to the agreement:[29]

> ... on regaining the right to take part in the conduct of the procedure, the Commission must, in particular, examine the representativity of the signatories to the agreement in question.

Although apparently *post*-agreement, this examination in effect reaches back to the conduct of negotiations, since the social partners' exclusion of other parties from the negotiations may lead the Commission and

26. *European Labour Law*, Chapter 35, pp. 538–52.
27. *UEAPME*, paragraphs 78–79.
28. *UEAPME*, paragraph 84.
29. *UEAPME*, paragraph 55.

Council to reject their agreement as insufficiently representative. The Commission can effectively force the participation of certain parties required for the 'sufficient collective representativity' needed to achieve democratic legitimacy. If these are excluded, the agreement may be successfully challenged by the excluded party.

The impact on the autonomy of the social partners of the CFI's decision is evident in its aftermath. The indications were that UEAPME would appeal from the decision of the CFI to the European Court of Justice. It appears that the appeal was dropped. Instead, a 'Proposal for a Cooperation Agreement between UNICE and UEAPME', dated 12 November 1998 outlines 'the modalities of cooperation between UNICE and UEAPME in social dialogue meetings, including negotiations' (Clause 1.2). This includes provisions whereby 'UNICE undertakes to consult UEAPME prior to taking public positions on behalf of the employers group in social dialogue and negotiating meetings' (Clause 3.1) and 'UEAPME representatives fully participate in preparatory meetings of the employers group and in plenary meetings with ETUC' (Clause 3.2).

The shadow of the Commission was further lengthened by the CFI seeming to approve the view expressed in the Commission's Communication that it would consider:[30]

> ... the representative status of the contracting parties, their mandate and the 'legality' of each clause in the collective agreement in relation to Community law, and the provisions regarding small and medium-sized undertakings set out in Article 2(2).

This opens up new avenues for the Commission to exert influence on the social dialogue process, as the parties negotiate under this scrutiny.

For example, the internal constitutional structure of the EU social partners is the outcome of delicate political adjustment. In the case of the ETUC, decisions to approve agreements may be taken by majority vote. If a particular agreement was approved by such a majority, but the largest national trade union confederation voted against the agreement, would the Commission entertain a complaint by that confederation on the grounds, for example, that the negotiators had exceeded their

30. *UEAPME*, paragraph 86, quoting paragraph 39 of the Commission's Communication of 1993.

mandate? In the case of UNICE, negotiations are undertaken only when there is a unanimous consensus among the member employer federations. Would the Commission allow an agreement to proceed to Council which UNICE purported to negotiate despite the opposition of one Member State employer confederation?

The examples multiply and the potential for Commission influence expands if the *substance* of agreements comes under scrutiny in light of Community *law*, itself not always predictable.

To justify its view as to the role of the Commission following the conclusion of an agreement under the social dialogue, the CFI asserted:[31]

> The Commission must act in conformity with the principles governing its action in the social policy field, more particularly expressed in Article 3(1) of the Agreement, which states that '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'.

Article 3(1) (Article 138(1) EC) is indeed in the Social Policy Agreement. But this well known provision has its origins in the Single European Act 1986,[32] long before the Social Policy Agreement was ever dreamed of. It was clearly and unambiguously voluntarist in nature, and was implemented through Commission support, mainly financial, for the social partners' dialogue. What is extraordinary is that the CFI sees phrases such as 'promoting the consultation' and 'to facilitate their dialogue' as justifying the conclusion which follows:[33]

> As the applicant and the Commission have rightly pointed out, on regaining the right to take part in the conduct of the procedure, the Commission must, in particular, examine the representativity of the signatories to the agreement in question ...

31. *UEAPME*, paragraph 84.

32. The Single European Act 1986, Article 22, inserted a new Article 118B into the Treaty of Rome: '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'.

33. *UEAPME*, paragraphs 85 and 87.

> The Council, for its part, is *required* to verify whether the Commission has fulfilled its obligations under the Agreement, because, if that is not the case, the Council runs the risk of ratifying a procedural irregularity capable of vitiating the measure ultimately adopted by it. (My emphasis.)

The CFI interprets Article 3(1) (Article 138(1)) as if it were a crucial procedural step engaging the EU institutions in *obligations* connected with the social dialogue, a step so essential that it can vitiate the social dialogue process as a whole. It is difficult to see how Article 3(1), the substance of which was enacted in a context much earlier to and wholly outside the subsequent obligatory consultation and still voluntary social dialogue procedure leading to directives, can be so interpreted. Provisions stipulating promotion and facilitation do not create obligations.[34]

In support of its conclusion that the Commission was under such obligations, the CFI cited the Commission's Communication of 1993 and quoted from paragraph 39 of that Communication.[35] The Communication, of course, does not constitute any legal authority for the Commission to assume the powers it asserts. This assumption of power was contested in the Opinion of the Economic and Social Committee on the Commission's Communication.[36] ECOSOC took the view that it is up to the social partners to decide whether their collective agreement should be put to the Council. The Commission has no discretion; if there is a joint request by the signatory parties, the Commission must propose it. Of course, the *Council* may reject the proposal. But the right to reject it is *not* given to the Commission. There is nothing in the Agreement which hints that the Commission can assess the agreement in terms of the criteria listed in the Communication: representativeness and mandate.[37] These go to the heart of the autonomy of the social partners.

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34. If Article 3(1) (Article 138(1)) was to be read as imposing such obligations on the Commission and Council, this might raise the question of their duty to take measures to override any obstruction of the social partners to development of the social dialogue (a duty to bargain?), and to implementation of agreements reached (erga omnes extension of agreements?). But there is not space here to explore these possibilities.

35. *UEAPME*, paragraph 86.

36. Opinion 94/C 397/17, OJ C397/40 of 31.12.94.

37. Contrast the Commission's rejection of the Council's power to amend any agreement reached through the social dialogue. Communication of 1993, paragraph 38.

The autonomy of the social dialogue process is further compromised if the shadow of Commission scrutiny is enhanced further by the CFI's addition of the Council and, indeed, the Court's scrutiny. The constitutional sensitivity of such additional supervision was evident in the view expressed by the Legal Service of the Council shortly after the CFI's decision.[38]

The Legal Service was concerned by the Court's rejection of the Council's argument that the Court not substitute its own assessment of the representativity of the social partners for that of the Council, having regard to the complexity of that assessment.[39] Considering the question of an appeal, the Legal Service noted that the Court had denied to the Council the degree of discretion normally recognised by the Court, particularly in the area of social policy which involves complex considerations. The Legal Service asserted that the degree of control retained by the Court was excessive and its reasoning was damaging to the institutional prerogatives of the Council.[40]

This concern of the Council faced with the Court overriding its discretion is but a reflection of the concerns of the social partners faced with not one, but three levels of scrutiny: Commission, Council and Court. Such scrutiny might, and then only might, be justifiable if the process in question is indisputably of a legislative nature, raising issues of constitutional accountability. It is questionable at least whether it is compatible with the autonomy of the social dialogue, which is arguably among the fundamental rights of labour and management recognised in the constitutional traditions of the Member States and embodied in ILO Conventions 87 and 98.[41] Any such infringement of autonomy may be the source of future litigation.

38. Note d'Information du Service Juridique: Affaire T-135/96, UEAPME contre Conseil, Brussels, 7 July 1998. Document 10218/98.

39. Ibid., paragraphs 6, 7,10, 21 and 26.

40. Ibid., paragraph 25. The Legal Service of the Council quoted the CFI's statement of 'the fundamental democratic principle that the people must share in the exercise of power through a representative assembly' (*UEAPME*, paragraph 88). It added: 'the CFI states that the democratic legitimacy of the acts adopted by the Council by virtue of Article 2 of the Agreement results from the intervention of the European Parliament', but did not comment on whether this reflected on the power of the Council to confer democratic legitimacy.

41. B. Bercusson, *Trade Union Rights in the 15 Member States of the European Union*, Research Study for the Committee on Social Affairs and Employment, European Parliament, 1997; Luxembourg: Office of Official Publications of the EC.

3. Conclusions

The *UEAPME* case involves a choice of conceptual frameworks to define the legal nature of the EU social dialogue. In the CFI's view, the EU social dialogue is equated with the EU legislative process; as such, it must attain the equivalent degree of democratic legitimacy. The constitutional implications of this vision are fundamental: it involves a role for the EU institutions in scrutinising the social partners (representativity), their dialogue (autonomy) and their agreements (legitimacy).

This perspective is historically linked to the origins of the EU social dialogue, which was developed as a consequence of the failure of the legislative process in developing EC labour law.[42] The Social Policy Agreement was conceived under the pressure of the constitutional development of a social dimension in the Treaty on European Union. The dynamic of the EU social dialogue, as constructed in the Social Policy Agreement, links social dialogue with the EU legislative process: 'bargaining in the shadow of the law'.

It is quite a different matter, however, to extrapolate from this historical evolution and functional dependence in the development of EC labour law to the assumption of political and legal equivalence of social dialogue and legislative processes, an assumption that the same or similar principles of political legitimacy and legal institutional accountability should apply.[43]

This is to ignore the qualitative difference between the legislative machinery of the EU institutions making EC labour law and the EU social dialogue law-making machinery. The latter has its conceptual roots *not* exclusively in the political legal traditions of constitutional arrangements, but *also*, indeed mainly, in those of industrial relations. Specifically, the EU social dialogue is perceived as akin to another level,

42. *European Labour Law*, Chapter 6, 'The Strategy of European Social Dialogue', pp. 72–78.

43. Cf. D. Obradovic, 'Accountability of Interest Groups in the Union Lawmaking Process', Chapter 18 in P. Craig and C. Harlow (eds), *Lawmaking in the European Union* (Kluwer, 1998), p. 354, who concludes, at 384: 'The overlap between the spheres of responsibilities of the EU institutions and the social partners is so great that it is practically impossible to determine exactly where their respective responsibilities begin and end. As a result, the concept of accountability under the [Social Policy] Agreement is blurred ... the quest for accountability of the social partners must be conceived, in many respects, as part of the quest for greater overall political accountability in the European Union'.

transnational, of collective bargaining super-imposed on national systems. This was the image reflected in the first path to implementation of agreements laid out in Article 4(2) of the Social Policy Agreement (Article 139(2)): articulation with national systems.[44]

In the *UEAPME* decision, the CFI opted for the EU constitutional law paradigm of democratic legitimacy, institutional scrutiny and judicial review. I submit that this errs in looking exclusively to EC law for inspiration in developing a conceptual paradigm for the Social Policy Agreement. European labour law[45] cannot afford to abandon national labour law systems, traditionally rooted also in an industrial relations model.

However, the *UEAPME* decision can be adapted to accommodate more traditional labour law concepts and has the potential to legitimise developments in the EU social dialogue. Some of these developments are outlined in the next section.

The *UEAPME* decision also serves to highlight the contribution of the constitutional paradigm to an EU social dialogue modelled on an industrial relations system. The final section outlines how the CFI's identification of Parliament as the source of democratic legitimacy can be exploited in the current conjuncture of European labour law.

A. The potential of the CFI's constitutional paradigm for EU social dialogue

The implications of the concept of 'sufficient collective representativity' for the future development of the EU social dialogue are considerable.

44. In a parallel enquiry into the legitimacy of the social dialogue process, Sandra Fredman similarly outlines two models: 'the first relying on an industrial relations model, the second on a model of participatory democracy'. The industrial relations model is said to be plausible, but to have characteristics which make it fundamentally different from collective bargaining: the outcome is more powerful in having legislative consequences; and the sanctions available to the parties are weaker than in collective bargaining. Of the participatory democracy model, it is said that it 'makes more sense than a collective bargaining model of the strong influence of social dialogue on legislation'. But it too is 'far from unproblematic'. She highlights a problem of the participatory democracy model in 'the extent to which such corporatism appears to side-step other important democratic institutions, particularly Parliament'. 'Social Law in the European Union: The Impact of the Lawmaking Process', in Craig and Harlow, op. cit., p. 386 at 408–11.

45. *European Labour Law*, p. 25.

The EU social dialogue has had its most public successes to date at the inter-sectoral, or cross-industry level. But there has been considerable discussion of the potential for developing social dialogue at *other* levels, involving *other* social partners. The *UEAPME* decision opens the way for such developments by recognising as democratically legitimate agreements with a defined and specific scope between social partners who satisfy the conditions of 'sufficient collective representativity'. A number of such developments may be highlighted.

(i) Sectoral social dialogue

Firstly, the sectoral level has been suggested as a candidate for EU social dialogue,[46] now greatly reinforced by the latest Commission Communication on the social dialogue.[47] Annex II to that Communication included a draft Commission decision[48] setting up sectoral dialogue committees promoting the dialogue between the social partners at European level. A number of such committees are in the process of being established.

(ii) An example: the public sector

Secondly, the CFI specifically singled out the CEEP as an essential social partner in the context of the Agreement on Parental Leave:[49]

> So far as concerns CEEP ... that cross-industry organisation represents at Community level all undertakings in the public sector, regardless of their size ...

If this be so,[50] it opens up the prospect of social dialogue between the CEEP and EU-level organisations representing labour in the public sector, for example, the European Public Services Union (EPSU), to reach social dialogue agreements deemed to be between social partners of 'sufficient collective representativity', and capable of being incorporated in directives as democratically legitimate.

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46. *European Labour Law*, Chapter 6, pp. 78–94.
47. 'Adapting and promoting the Social Dialogue at Community level', COM(98) 322, of 20 May 1998.
48. Now Commission Decision C (1998) 2334, OJ L225/27 of 12.08.1998.
49. *UEAPME*, paragraph 100.
50. The accuracy of the facts asserted by the CFI as regards CEEP may be questioned. For example, the CFI referred to UEAPME's assertion of 'the fact that CEEP represents solely the interests of undertakings governed by public law' *(UEAPME*, paragraph 97). But most Member State employers of civil servants (ministries and government departments) are not represented by CEEP. Yet the Parental Leave Directive may apply to them.

(iii) Employment policy agreements

Thirdly, the role of the social partners in the specific area of employment policy has been explicitly recognised. Following the Amsterdam Summit's agreement in June 1997 to include a new 'Employment' chapter, a special 'Jobs Summit' was convened under the Luxembourg Presidency in November 1997 which led to the adoption of the first 'Employment Policy Guidelines' for 1998 on 15 December 1997. These provided for the adoption of a common structure for National Action Plans, agreed at the end of January 1998, and the Member States agreed to submit their Plans by mid-April.

In the Commission Communication for the Cardiff summit of 15–16 June 1998, which evaluated the National Employment Plans drawn up by the Member States, it was stated, under the rubric of 'Encourage the Social Partners to reinforce, implement and evaluate the impact of their contributions':[51]

> The Social Partners, at national and European levels, have a great responsibility, as called for in the Guidelines, and should intensify their efforts to contribute to the modernisation of the contractual and institutional framework for reconciling flexibility and security, establishment of systems for life-long learning, and the promotion of new forms of work organisation and employment patterns such as job rotation systems.

The *UEAPME* decision would allow for the recognition of agreements limited in scope to the specific areas of Employment Policy delineated in this statement, provided the social partners negotiating them were organisations of labour and management of 'sufficient collective representativity' in the specific area affected by the agreement.

(iv) Transnational collective agreements

The creation of a common currency in 11 Member States, allowing for transparent wage comparisons, has increased the pressure towards coordination of bargaining agendas of the social partners in different Member States: 'Pay settlements in Belgium and the Netherlands already take account of developments in Germany'.[52] An initiative

51. See *Agence Europe*, Documents No. 2090/2091, of 10 June 1998, p. 9.

52. 'Towards a euro wage?', IRS, *Pay and Benefits Bulletin*, No. 457 (October 1998), p. 5. On the prospects for European collective agreements on pay in multinational enterprises, see 'Pan-

aimed at developing a wage bargaining strategy was the objective of a meeting in the Dutch town of Doorn on 4–5 September 1998. Trade union negotiators including the affiliates in Belgium, the Netherlands, Germany and Luxembourg of the International Federation of Chemical, Energy, Mine and General Workers' Unions agreed:[53]

> The participating trade unions aim to achieve collective bargaining settlements that correspond to the sum total of the evolution of prices and the increase in labour productivity ... The trade unions of the four countries intend to examine how they can back up their demands beyond national frontiers when necessary ... By attuning their wage policies, the participating organisations aim principally to prevent a bidding down of collectively bargained incomes between the participating countries, as sought by the employers. The trade unions see this neighbourly initiative as a step towards European cooperation on collective bargaining.

The participants expressed the hope that unions in other Member States would join their initiative, particularly in the countries using the euro. A coordinating working group of experts was established to meet regularly to exchange information and experience. The Doorn declaration also called for 'employment creation agreements at the sectoral and enterprise levels, including redistribution of work and shorter working hours'. Collective agreements among social partners in a group of Member States could also satisfy the requirement of 'sufficient collective representativity' if the geographical scope of the agreement was clearly circumscribed.

B. 'European' labour law

The CFI in *UEAPME* highlighted the dual processes of *creating* EC labour law: the legislative process, involving the European Parliament, and the social dialogue process of the EU social partners. But the latter

Europe pay deals predicted', *Financial Times* (30 June 1998), p. 3. This reported that 'Just over half of European multinationals believe economic and monetary union will lead to pan-European pay agreements and levels...'.

53. The text is on the World Wide Web at the site of the International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM) <http://www.icem.org>.

process is also of a dual nature, reflected in the alternative procedures of *implementing* social dialogue agreements prescribed in Article 4(2) of the Social Policy Agreement (Article 139(2)): through Council decision or 'in accordance with the procedures and practices specific to management and labour and the Member States'. This dual process of implementation signals emphatically the industrial relations origins of the EU social dialogue.[54]

The CFI did not attend to this alternative conceptual structure, in contrast to the arguments presented to it. Thus, the Council highlighted that:[55]

> The first procedure, being of a classically legislative nature, leads to the adoption of a Council measure on the basis of Article 2 of the Agreement [Art. 137 EC] ... The second procedure ... is essentially a contractual process conducted by and at the behest of parties representing economic and social interests ...[56]

UEAPME also emphasised:[57]

> the specific nature of Directive 96/34 ... Its sole purpose is to place Member States under an obligation to implement a framework agreement concluded by three general cross-industry organisations.

UEAPME's argument highlights the unique amalgam in Article 4(2) of the Social Policy Agreement (Article 139(2) EC) of the *EC* legislative processes and the *Member State* labour law traditions of extension 'erga omnes' of collective agreements reached between private organisations:[58]

> First, the cross-industry organisations which negotiated the framework agreement chose to make it effective erga omnes, although they could have confined themselves to negotiating a

54. The Social Policy Agreement itself was, of course, based on an agreement of 31 October 1991 between the EU social partners and incorporated into the Treaty on European Union agreed at Maastricht in December 1991.
55. *UEAPME*, paragraph 36.
56. In *UEAPME*, paragraph 35, the Council states bluntly: '... the document which emerges is an agreement between private persons...'.
57. *UEAPME*, paragraph 44.
58. *UEAPME*, paragraph 45.

> simple agreement producing effects inter partes. Second, the Commission chose to submit to the Council a proposal for a Directive to make the framework agreement binding erga omnes whereas, under Article 4(2) of the Agreement, it could have opted for another of the legislative instruments provided for in Article 189 of the Treaty or – as the German Government maintains in its statement of position on the procedural issues raised by the Agreement – it could have proposed adoption merely of a decision sui generis.

The extension 'erga omnes' of collective agreements is a conceptual bridge between the pure industrial relations paradigm of articulation ('the procedures and practices specific to management and labour and the Member States') and the pure constitutional law paradigm of negotiated legislation ('at the joint request of the signatory parties, by a Council decision on a proposal from the Commission').

The first and second mechanisms of Article 4(2) (Art. 139(2) EC) should be seen as functionally equivalent: the first uses industrial relations mechanisms of articulating the EU social dialogue with national collective bargaining systems to achieve erga omnes effects, and the second uses constitutional mechanisms of EU legislation to require Member States to implement the Directive-Agreement. Both are essentially extension mechanisms for EU level social dialogue agreements: that is their function. The genius of 'European' labour law was creatively to develop a synthesis of the different conceptual apparatuses of industrial relations and constitutional law appropriate to achieve this function in the evolving dialogue of the social partners in the emerging EU polity.

The CFI in *UEAPME* asserted that the EU social partners could achieve a degree of 'sufficient collective representativity' which would confer on them the requisite *democratic legitimacy* to make an agreement forming the substance of a valid EC directive. The requirement of 'sufficient collective representativity' of the social partners was deemed necessary since the directive was not subject to scrutiny by the European Parliament, the indisputably democratically legitimate body. But there were strings attached. The CFI warned that the condition of 'sufficient collective representativity' required the Council and Commission, when deciding to submit or approve the proposal for a directive based on the agreement, to adjudicate, on the basis of specified criteria, whether the

EU social partners achieved 'sufficient collective representativity'. Further, the Court itself was to undertake its own assessment of 'sufficient collective representativity', based on its own criteria.

This poses a potential threat to the autonomy of the social partners, both from the EU institutions (Commission, Council, Court) carrying out this scrutiny, and from the criteria they may choose to apply in their assessment. It might, therefore, be a preferable option for the social partners to seek to achieve the necessary degree of democratic legitimacy from the EU institution which the Court has described without reserve as possessing that quality: the European Parliament.

The indications are that the European Parliament is willing to accept a process of social dialogue which respects the autonomy of the social partners. The Committee on Employment and Social Affairs of the European Parliament tabled an Own-Initiative Report on Transnational Trade Union Rights on 20 March 1998.[59] This proposed to carefully distinguish the process of 'establishing trade union rights at European level' (paragraph 5), in which 'trade union organisations should be involved', from the social dialogue process 'to draw up proposals for negotiating rules and principles' (paragraph 6), in which 'management and labour' are engaged.

The Parliament thus recognised that negotiating rules and principles for the European social dialogue were to be established by the social partners. A social partners–EU institutional agreement would establish a framework of negotiating rules and principles for the EU social dialogue and provide the requisite democratic legitimacy required by the European Court. Such an agreement could provide the basis for the formulation of a legal measure which establishes a legal framework of negotiating rules and principles for the EU social dialogue.

59. PE 223.118/Fin, Rapporteur: Mrs Ria Oomen-Ruijten. This Report originally aimed to convey to the Inter-Governmental Conference the views of Parliament on amendments to the EC Treaty. A first draft of this Report, dated 14 January 1997, was discussed by the Committee in February 1997 (PE 220.024). This first draft Report proposed a series of amendments to the Treaty, including extending EU competence to cover fundamental trade union rights, and making it an EU objective to achieve them. Specifically, this draft Report proposed the inclusion of rights of association at EC level, and for this to be implemented through social dialogue (proposed Amendment 3, to Article 2, paragraph 4 of the Social Policy Agreement). This draft of February 1997 proposing Treaty amendments was overtaken by the Treaty of Amsterdam of June 1997.

The decision of the CFI in *UEAPME* is a stunning reminder of how courts can shape the emerging European labour law. If the EU social dialogue plays a role in the future EC labour law, the issues of democratic legitimacy, representativity and autonomy cannot be avoided. The question is whether the courts are the best place for these issues to be decided.

The institutional architecture of the European social model

Brian Bercusson (2004) *

The theme of the institutional architecture of the European social model brings together a number of issues of central importance to the fifteen Member States of the European Union (EU)[1] and the three associated states of the European Economic Area,[2] of immediate concern to the acceding countries of the EU,[3] and potential future candidate countries,[4] but also of potential interest to the rest of the world. The central importance to Europe arises because of the current constitutional moment of institutional changes and enlargement of the EU. The interest for the rest of the world arises because of the clear contrast the American experience presents when compared with the European social model, and in particular, its institutional architecture. Its importance arises precisely because, while there may be no or little military competition in a uni-polar world dominated by the USA, the economic[5] and political stature of the EU makes the European economic and social model the subject of considerable attention elsewhere.[6] I am not suggesting that the institutional architecture of the European social model can or should be exported, but certain of its features provide a basis for reflection, if not emulation in other parts of the world.

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* 'The institutional architecture of the European social model', Brian Bercusson (2004). This article was first published in T. Tridimas and P. Nebbia (eds.) *European Union law for the twenty-first century. Volume 2: Rethinking the new legal order*, Oxford: Hart Publishing, 311–331 and is reprinted here with the kind permission of the publisher.

1. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.
2. Iceland, Liechtenstein and Norway.
3. Ten countries will become Member States in May 2004: Cyprus, the Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Slovakia, Slovenia and Malta.
4. Accession of Romania and Bulgaria, and possibly Turkey, is planned for the end of the decade. By 2010, the EU could contain up to 28 Member States, leaving aside the former Yugoslav Republics and Albania.
5. The largest single unit in the world economy, the EU in 1997 had a nominal GNP of about $6 trillion, compared with $5 trillion for the US and $3 trillion for Japan and a population approaching that of the USA and Japan combined.
6. For example, the Japanese interest in the European social model. See the 3-page headlined dossier in *Le Monde Economie* of 28 May 2002, entitled '*Le japon en crise s'intéresse au modèle social européen*'.

This chapter begins with some reflections on the current constitutional moment in the EU and its implications for the European social model (I), explores certain structural features of the European social model, in contrast with American experience (II), and proposes an outline of the principal features of the emerging institutional architecture of the European social model (III).

The constitutional context of the European social model

The EU social model and fundamental rights of employment and industrial relations

The Commission's 1994 White Paper on Social Policy described a 'European Social Model' in terms of values which 'include democracy and individual rights, free collective bargaining, the market economy, equality of opportunity for all and social welfare and solidarity'.[7] The model is based on the conviction that economic and social progress are inseparable: 'Competitiveness and solidarity have both been taken into account in building a successful Europe for the future'.

The European social model has a number of dimensions. For example, in a Communication on 'Employment and social policies: A framework for investing in quality', the Commission contrasts the 'European social model' of public social spending with the 'US model' which relies on private expenditure, highlighting that 40 per cent of the US population lacks access to primary health care, even though per capita expenditure as a proportion of GDP is higher in the US than in Europe.[8] The Commission goes on to emphasise that it is not only the existence of jobs but the characteristics of employment which are important to the European social model.

A 'Convention on the Future of Europe', comprising representatives of the European Parliament, the parliaments of the Member States of the EU, of the Member State governments and the European Commission, as well as with the participation of representatives of the accession countries and others, was formally inaugurated on 28 February 2002.[9]

7. COM (94) 333, para 3.
8. COM (2001) 313.
9. Documentation relating to the Convention may be accessed through the EU's website, at: http://europa.int

The perceived failures of the IGC preceding the European Council meeting at Nice in December 2000 contrasted with the perceived success of the body (self-denominated the 'Convention') established by the Cologne Council of June 1999 with the mandate to produce an EU Charter of Fundamental Rights for consideration by the European Council at Nice. That EU Charter was duly produced, and unanimously approved as a political declaration at Nice in December 2000.

The EU social model of employment and industrial relations is exemplified by the EU Charter of Fundamental Rights. On the one hand, the Charter breaks new ground by including in a single list of fundamental rights not only traditional civil and political rights, but also a long list of social and economic rights. Of particular interest to employment and industrial relations are provisions on protection of personal data (Article 8), freedom of association (Article 12), freedom to choose an occupation and right to engage in work (Article 15), non-discrimination (Article 21), equality between men and women (Article 23), workers' right to information and consultation within the undertaking (Article 27), right of collective bargaining and collective action (Article 28), protection in the event of unjustified dismissal (Article 30), fair and just working conditions (Article 31), prohibition of child labour and protection of young people at work (Article 32) and reconciliation of family and professional life (Article 33).[10]

On the other hand, although the EU Charter was approved by the European Council, it was limited to a political declaration. It was not given a formal legal status. However, the inclusion of social and economic rights in the EU Charter takes on greater significance due to the proposal of the Convention on the Future of Europe to incorporate the EU Charter as Part II of the Constitutional Treaty of the European Union. In particular, its current actual legal effects, and the potential future effects of attributing to it a formal legal status will have consequences in a constitutional context; specifically, its implications for the concept of EU citizenship.

Article 8 of the Maastricht Treaty on European Union, as amended by the Amsterdam Treaty, now in Article 17 of the EC Treaty, created a new status

10. B. Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights* (Brussels: European Trade Union Institute, 2002) (summary version, 102 p., available in Dutch, French, German, Greek, Italian, Spanish and Swedish).

of EU citizenship.[11] As currently stated in the EC Treaty, the rights of EU citizens are meagre by contrast with citizenship of Member States. Does citizenship have meaning in EU law going beyond nationality of a Member State, a substantive content separate from nationality? The issue has been explored by Norbert Reich, who puts forward two respects in which EU citizenship could go beyond nationality.[12] First, the EU confers rights on Member State nationals under EC law which go beyond what nationals obtain under Member State law. With reference to a European social model, much depends on whether these extra rights may be characterised as 'citizenship' rights, in particular, when they go beyond the traditional civil and political content to embrace a wider set of 'social' rights.

Secondly, the EU confers rights on individuals irrespective of Member State nationality. Individuals possess specifically EU rights when they are EU residents, workers, consumers and so on. National citizenship is not the criterion for entitlement to 'EU citizenship' rights of a worker to equal pay (Article 141), to rights as a consumer to information, education and organisation (Article 153(1)), to a resident's rights to petition the European Parliament (Article 194), of any person's right of access to EU documents (Article 255), or to protection of personal data (Article 286). Taken together, EU citizenship thereby includes (social) rights wider than rights attached to Member State nationality, the EU grants these rights not only to Member State citizens, but also to third country nationals; and, therefore, EU 'citizenship' means something different from Member State nationality.

In his discussion of the concept of EU citizenship, Reich addresses an issue which has aroused considerable debate: the difficulties the EU encounters in attributing 'citizenship' to individuals which contrasts with traditional 'nationality' based concepts of citizenship. In brief, the problem stems from the lack of perception of the EU as a nation, in the alleged absence of a commonality of history, polity, language or law.

Joseph Weiler has argued that a nationality based concept of citizenship contradicts the supranational essence of the EU: the *telos* of European inte-

11. '1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship. 2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby'.

12. N. Reich, 'Union citizenship – Metaphor or source of rights?' (2001) *European Law Journal*, 4–23.

gration as an ever closer union of 'peoples', not the creating of one 'people' (*demos*). This entails a de-coupling of nationality and citizenship.[13] For Reich, national citizenship becomes a residual category, a matter of historical contingency. A preferable understanding of EU citizenship would look to residence as a central criterion for EU citizenship rights.

As with much else, the question of 'what' can best, or only be answered by asking why and how. Why is there a search for 'EU citizenship'? Weiler suggests the reasons for the striving to create a concept of EU citizenship lie in the exhaustion of the original EU project: peace and prosperity produce the paradox of success. An anxiety related to manifestations of modernity similar to the *fin-de-siècle* atmosphere conducive to the rise of fascism as the early twentieth century response, currently aggravated by the post-modern attack on truth, reality and coherence, leads to a search for meaning. The nation provides the comfort of belonging, a shield against existential aloneness. To this is contrasted the banal offer of bread and circuses by the EU as a market culture, as if the EU is a brand, an image, a product of which the individual is a consumer, not a citizen.

Weiler argues for de-coupling nationality and citizenship, but then re-coupling them so that the State becomes merely an instrument, the organisational framework for the nation. The EU is to control state excesses but preserve nations: the essence of the supranational vision. By separating nation and state, differences expressed in other than state forms, national cultures, will be protected, not national states. This allows for maintaining the European *telos* without looking for a European *demos*, the de-coupling of nationality and citizenship allows for co-citizenship of individuals who do not share the same nationality. Or, another way of putting it, multiple *demoi*: Member State nationals and EU citizens. He hints at an EU specificity rooted in mutual social responsibility embodied in the welfare state and human rights. There is a complex commitment to diversity, coupled with acceptance that a larger (European) *demos* has the right to make decisions binding all, but conditional on a commitment to maintaining diversity. In a phrase, substantive values of multicultural diversity, a welfare state and human rights are coupled with decisional procedures in a European political framework.

13. JHH Weiler, 'To be a European citizen; Eros and civilization', in *The Constitution, of Europe* (Cambridge: CUP, 1999), pp. 324–57.

Reich also hints at developments which could legitimise EU institutions through a political and social concept of citizenship, contingent on evolution of the EU. The question posed by Reich is that, if not 'nationality' based, how would one characterise EU citizenship: as 'economic' (*bourgeois*), participatory (*citoyen*), or some other? What would it mean for EU citizenship to change from the 'market citizen' (*bourgeois*) to citizenship without an exclusively economic role?

The concept of 'European social citizenship' was the basis of a project organised by a group of academics from a number of Member States who in 1996, and again in 2000, put forward a Manifesto which aimed to construct EU citizenship on the basis of the concept of 'social citizenship'.[14] As developed by T.H. Marshall, the levels of citizenship rights begin with civil rights (legal equality), political rights (to participate in the exercise of national sovereignty) and evolve towards social rights (manifested in welfare state solidarity). The Manifesto of 1996 elaborated a concept of European 'social' citizenship as the defining *telos* of the European project, and the meaning of EU citizenship.

Citizenship is not just about voting a few times a year, worshipping if you happen to believe, marrying and founding a family if you so choose. A central aspect of EU social citizenship is about that very large part of almost everybody's life: working. The inclusion in the EU Charter of Social and Economic Rights related to working life confirmed that these are to be considered fundamental to the EU social model, what it means to be an EU citizen.

The EU model of employment and industrial relations

The EU model of employment and industrial relations is determined by the organisational forms of workers and employers at EU and national levels; specifically, their interactions in a variety of ways and at different levels, often characterised as 'social partnership'. Perhaps the most

14. B. Bercusson et al., *A Manifesto for Social Europe* (Brussels: European Trade Union Institute, 1996); U. Mueckenberger (ed.), *Manifesto Social Europe* (Brussels: ETUI, 2001). See also B Bercusson et al., 'A Manifesto for Social Europe' (1997) 3 *European Law Journal*, pp. 189–205. Comments by A. Lo Faro, 'The Social Manifesto: Demystifying the Spectre Haunting Europe', and A Larsson, 'A Comment on the "Manifesto for Social Europe"' (1997) 3 *European Law Journal*, 300–303, 304–307.

familiar is collective bargaining between an employer and a union at sectoral level in most countries, though also company or enterprise level. But in the EU, this is only one of three institutional forms of interaction. The other two are processes at national level (macro-level) and at the workplace (micro-level). It is the existence of all three levels and their inter-relationship which define the specific character of the European model of employment and industrial relations.

The EU 'social partnership' model

At EU level, the creation of a European social dialogue beginning in 1985 has led to agreements translated into legally binding directives on parental leave, part-time workers and fixed-term work.[15] The 'social partners' are also involved in institutional frameworks engaging both EU institutions and the Member States, including the 'macroeconomic dialogue' where the peak organisations meet at regular intervals with the Member States, the Commission and the European Central Bank. These macro-level arrangements are a reflection of practices in most Member States, in a variety of forms of tripartite or bipartite 'Economic and Social Councils' dealing with a variety of social and economic matters of concern to the members of the social partner organisations. The UK stands out as having few such institutional arrangements. In this, as in other features, it shares the absence of a tradition of bipartite or tripartite dialogue at national level with the USA.

Collective bargaining is the familiar process by which organisations of workers and employers settle the central issues of pay, hours of work and other elements of the terms on which work is to be performed. This has not yet developed at EU level. However, while as yet absent from the EU level, there is emerging an important trend towards EU level coordination of collective bargaining in the Member States.

It is in the Member States where collective bargaining is evident as the most important process regulating working life, and much besides. On

15. Council Dir 96/34/EC of 3 June 1996 on the Framework Agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 145/4 of 19.6.96; Council Dir 97/81/EC of 15 Dec 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ L 14/9 of 20.1.98; Council Dir 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L175/43 of 10.7.1999.

the key issue of pay determination, the most important, dominant level of bargaining is at the intersectoral level in three countries (Belgium, Finland and Ireland) and at the sectoral level in eight others (Austria, Germany, Greece, Italy, the Netherlands, Portugal, Spain and Sweden). The degree of centralisation of collective bargaining in most Member States is, therefore, in striking contrast to the USA, where, like the UK, the individual company level is predominant. Even the clear predominance of centralised bargaining on pay does not adequately convey the importance of collective bargaining. An even more powerful indicator of its role is its coverage: the proportion of workers whose pay is determined by collective agreements. Centralisation, intersectoral and sectoral, means that collective agreements will cover all employers in the sector or the country, even where workers are not members of trade unions and employers are not members of employers' organisations and not parties to the collective agreement, as the following table illustrates:

Table 3 **Collective bargaining coverage, Europe, Japan and USA**

Country	Coverage
Austria	98%
France	90%–95%
Belgium	90%+
Sweden	90%+
Finland	90%
Italy	90%
Netherlands	88%
Portugal	87%
Denmark	83%
Spain	81%
Average of 13 EU Member States	80%
Germany	c. 67%
Luxembourg	58%
Average of 9 candidate countries	c. 40%
UK	36%
Japan	21%
USA	15%

Sources: Figures for EV Member States and candidate countries – referring to various years from 1999–2002, and in some cases estimates – are in most cases as calculated by EIRO for TN03011O2S and TN0207104F; figure for Japan (2001) is from JIL; figure for USA (2001) from BLS. (cf: http://www.eiro.eurofound.eu.int/2002/12/feature/TN0212101F.html)

Macro-level consultation and dialogue influences major issues of social and economic policy, and collective bargaining determines pay and other terms and conditions of employment. But the day-to-day working life of most people in the office, shop or factory is subject to a myriad of

decisions concerning, for example, working practices (performance), conduct at work (disciplinary matters), health and safety, and many others. Rather than these decisions being taken unilaterally by management, there has developed in the Member States of the EU a mandatory system of participation by workers in such decisions through representative structures of 'works councils', 'enterprise committees', trade union bodies and similar forms. These exist in almost all Member States (13: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden). Only in Ireland and the UK is such a general and permanent system lacking, as is the case, again, also in the USA.

The EU has now taken a decisive step towards establishing the practice of information and consultation of employee representatives as part of the European social model. On 18 February 2002, the Council of Ministers adopted Directive 2002/14 establishing a general framework for improving information and consultation rights of employees in the European Community.[16] The objective was 'to make the essential changes to the existing legal framework ... appropriate for the new European context'.[17]

Contrasting the presence and role of trade unions and workers' representative organisations in the USA with European experience illustrates the singularity of the European model of employment and industrial relations. Its manifestation, in all its diversity, at both EU and Member State levels, in the form of macro-level national dialogue, collective bargaining at intersectoral and sectoral levels, and collective participation in decision-making at the workplace is the most salient quality distinguishing the European model of employment and industrial relations.

16. Council Dir No 2002/14 establishing a framework for informing and consulting employees in the European Community, OJ 2002, L80/29.

17. Proposal for a Council Dir establishing a general framework for informing and consulting employees in the European Community, COM/98/612, 11 November 1998; Preamble, Recitals 15–16. See now the Preamble to the final directive, particularly Recital 17: '... the object is to establish a framework for employee information and consultation appropriate for the new European context described above [in Recitals 6–16]...'.

The role of collective organisations of workers and of employers

Critical to the success of this specific EU model of employment and industrial relations is collective organisation in the form of collective organisations of workers and employers, the central actors in a 'social partnership' model. This defining feature of the European model may be more easily perceived by comparing it with the American model. The comparison of models can be illustrated by starting with trade union density, for substantial trade union membership is a pre-condition for the emergence of social partnership.

Trade union density, union membership as a proportion of the working population in the EU Member States, is extremely variable. However, despite the general downward trend of recent years, there is a pattern: a group of four countries with a high union membership density (ranging from 69.2 per cent in Belgium up through the Nordic countries to 87.5 per cent in Denmark). A second, larger group of countries has a medium union density hovering around the 29–40 per cent level, and including the three big economies of Italy (35.4%), Germany (29.7%) and the UK (29%). In between these are two small countries; Luxembourg with 50 per cent and Ireland with 44.5 per cent. Finally, two big countries with low levels of union density: Spain with 13.5 per cent and France, the lowest with only 9.1 per cent union density. The combination of size and density means that though the unweighted average union density of the 15 countries is 43.5 per cent, the largest countries have considerably lower density so that the weighted EU average is only 30.4 per cent. The median figure was Italy at 35.4 per cent. In contrast, trade union density in the USA in 2000 was 13.5 per cent, lower than any EU country except France.

Union membership and density, though fundamental, is only part of the picture and, from the institutional point of view, arguably the less important part. The trade union membership figures have to be translated into institutional or organisational forms, trade unions, and the importance of these organisational forms depends on their regulatory functions, which in turn depend on their relations with employers, their organisations and the State, and the outcomes of these relationships in terms of regulatory instruments, such as collective agreements.

As regards *trade unions*, there is a marked contrast between the unity of organisation at EU level and the diversity at national level. The strongly marked features of centralisation and sectoral organisation at EU level are reflected in different combinations at national level: more or less centralisation and more or less sectoral organisation. The similarity (centralised, few, industrial) may be noted between the EU level structures (the European Trade Union Confederation, ETUC) and those in Austria and Germany, on the one hand, and those of Ireland and the UK (centralised, many, mixed) with the USA on the other. Most continental EU Member States have multiple centres organised on sectoral lines.

As regards *employers' organisations*, at EU level, employers' organisations reflect one of the dimensions which marks trade union organisation: they are highly centralised in the UNICE (*Union des Confédérations de l'Industrie et des Employeurs d'Europe*), which engages with the European Trade Union Confederation in social dialogue and negotiations at EU level. However, the second dimension, sectoral organisation, is lacking on the employers' side. While there are many organisations representing business at EU level, they do not engage with their equivalent organisations, the European industry federations affiliated to the ETUC. The European Commission has sought to promote such engagement by establishing sectoral social dialogue committees.[18]

Once again, it is striking how the EU level interaction of employers' and trade union organisations at intersectoral level and, though to a lesser extent, at sectoral level, reflects a pattern at the national level evident in most Member States. The exception again is the UK at intersectoral level and the UK, Ireland and Luxembourg at the sectoral level. These latter Member States are more similar to the American formula of little or no bargaining with trade unions at national–intersectoral or sectoral levels, but focus on the company or enterprise level.

18. As reported in the Commission's Communication, 'The European social dialogue, a force for innovation and change' (COM (2002) 341 final, Brussels, 16 June 2002), 27 sectoral social dialogue committees have been set up at the joint request of the social partners in the sectors concerned. Annex 2 of the Communication contains a list.

In sum, in understanding the EU employment and industrial relations model, it is impossible to ignore the predominance of certain actors and levels in most Member States. Organisations of employers and trade unions, at intersectoral and sectoral levels, play a major role. This role can be further traced through the interaction of these actors at different levels and the institutional forms of this interaction. Their presence reveals the extent to which these organisations influence social life in general, and working life in particular. These institutional forms determine the EU model of employment and industrial relations.

The emerging institutional architecture of the European social model

The current constitutional moment offers the prospect of developing an institutional design for a European social model reflecting these elements of macro-level national dialogue, collective bargaining at intersectoral and sectoral levels, and collective participation in decision-making at the workplace. Some of the elements are in place, others are missing or compromised, and the whole requires a degree of co-ordination.

Fundamental rights: in place

The political initiative for an EU Charter of Fundamental Rights aimed to balance the social policy vacuum in the agenda of the IGC which preceded the European Council of Nice in December 2000. The debate over fundamental social rights brought two legal perspectives into conflict. On one side were those who wanted to exclude social rights entirely, or minimise their content, or marginalise them into a separate 'programmatic' section, or make them purely declaratory, or subject them to special 'horizontal' conditions to prevent the EU acquiring any further social competences. On the other side were those who wanted to include social rights, maximise their content, grant them the same status as civil and political rights, make them justiciable or otherwise enforceable, and not limit them by reference to existing EU competences.

As indicated earlier, the outcome gave something to each side. Though only a political declaration, the Charter broke new ground by incorporating social and economic rights, including collective labour rights. It remains to be seen whether and how declaring social and

economic rights will affect the EU's economic policy, in particular, the EU's strategy on employment, and whether the enshrining of fundamental rights of association, information and consultation, and collective bargaining and action will influence the institutional operation of the EU where the social partners have major roles to play in the spheres of social policy and employment policy (the open method of co-ordination).[19]

The outstanding questions are two-fold. First, in the short term, what are the legal prospects of the political declaration by the European Council of an EU Charter of Fundamental Rights? Secondly, in the longer term, what are the legal effects of an EU Charter which is given formal legal status by being incorporated into the Constitutional Treaty?

Trade union rights will most likely become part of EU law as a result of the EU Charter. As EU law, they will affect Member States' laws on trade unions. The meaning of the rights contained in the EU Charter will probably be contested when, in a Member State, a complaint is made that trade union rights guaranteed by the EU Charter are being violated. An appeal to the national courts to respect the EU Charter should allow for the issue to be referred to the European Court of Justice.

The European Court will be faced with the need to elucidate the content of the rights provided for in the EU Charter. In this situation, there would probably be submissions from all or a majority of Member States confirming that certain trade union rights form part of their national law and practice. The European Court will have to decide how to respond to these submissions. Should it interpret the EU Charter's

19. Art. 12: Freedom of assembly and of association: 1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests ... Art. 27: Workers' right to information and consultation within the undertaking: Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices. Art. 28: Right of collective bargaining and action: Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

provisions as including trade union rights recognised in all or a majority of Member States?

The European Court could take different approaches to identifying this common tradition. At least four alternative approaches may be envisaged:

a. a narrow formulation of trade union rights, which might accommodate all or a majority of Member States where such a narrowly defined scope of fundamental trade union rights is acceptable;
b. conversely, a wider range of trade union rights, though these would include a lesser number, albeit still a majority of Member States which accept that those rights are within the scope of fundamental trade union rights;
c. alternatively, rather than adopt a single interpretation of trade union rights, the European Court could allow them to be applied differently in the different Member States, by leaving their detailed content to be interpreted and applied by national courts;[20]
d. finally, the Court could confine trade union rights to claims raising issues of a transnational nature which were not covered by national laws.

It is proposed that the Court's approach should be to adopt a formulation which includes fundamental trade union rights recognised in all, or a majority of Member States. On the one hand, this approach has the disadvantage that it might require a minority of certain Member States to recognise certain trade union rights which their political and industrial traditions have not confirmed. However, it is suggested that such a minority of Member States should be able to accommodate such rights. On the other hand, it is suggested that the Court risks much more if it denies the fundamental character of certain trade union rights recognised by all or a majority of Member States.[21]

20. For an example in the case of the right to strike, see Art. 2 of Council Reg (EC) No. 2679/98 of 7 Dec 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States. OJ L337/8 of 12.12.98 (the 'Monti' Regulation').

21. Compare the judgment of the Court with the Opinion of AG Jacobs in a case referred to the ECJ by the Netherlands courts (Case C-67/96, *Albany International BV v Stichting Bedrijfspensionenfonds Textielindustrie,* Joined Cases C-115/97, C-116/97 and C-117/97, *Brentjens' Handelsonderneming B V v Stichting Bedrijfspensionenfonds voor de Handel in Bouwmaterialen* and *Case C-219/97, BV Maatschappij Drijvende Bokken v Stichting Pensionenfonds voor de Vervoer- en Havenbedrijven,* [1999] ECR 1-5751.

The challenge is to *establish* clearly *justiciable trade union rights*: e.g. trade union freedom of association, information and consultation, collective bargaining and collective action. The social and economic rights in the EU Charter go beyond trade unions and include fundamental individual rights in employment. The tasks of an implementation strategy are threefold. First, with respect to *justiciable* rights, to develop effective implementation, looking to effective sanctions, preventing regressions, removing qualifications, thresholds, exclusions, modifications. Secondly, *moving more social and economic rights towards justiciability*; formulating them as positive and enforceable rights; including effective sanctions. Thirdly, with respect to *programmatic* rights, implementation through effective monitoring of government policy and actions, with possible judicial review of consistency and powers of nullification.

Macroeconomic dialogue and collective bargaining: the need for co-ordination

There are two well-known frameworks for collective bargaining at EU level: the EU social dialogue and EU level co-ordination of collective bargaining.

The EU social dialogue

The EC Treaty contains the legal framework for the EU social dialogue in the Social Chapter: Articles 138–139. The social dialogue legislative process begins with the obligatory consultation of the social partners by the Commission in two stages: first, when the social policy is first being developed and, secondly, at the stage of an actual proposal. There follows the possibility of the EU social partners undertaking a social dialogue. This EU social dialogue may produce an agreement. This agreement may be proposed by the Commission to the Council for a decision, usually transforming the framework agreement into a directive.

At EU inter-sectoral level, the results so far include:

- three framework agreements have been concluded and transformed into EC directives: on parental leave (1996), part-time work (1997) and fixed-term work (1999);
- following negotiations over some eight months, the EU social partners concluded a framework agreement on the regulation of telework on 23 May 2002, formally signed on 16 July 2002.

The agreement is to be implemented by the members of the signatory parties 'in accordance with the national procedures and practices specific to management and labour' (Article 139(2) EC);

- two negotiations have failed to produce an agreement: that on European works councils led to the 1994 directive;[22] that on agency work has recently ended; a draft directive is still under consideration;[23]
- on one issue, UNICE refused to negotiate: information and consultation at national level. Political agreement on a proposed directive was reached at the Social Affairs Council of June 2001 and the directive was adopted in February 2002.[24]

Problems with the EU social dialogue include, first, that employers will only negotiate if there is a credible prospect that failure to reach agreement will result in Community legislation ('bargaining in the shadow of the law'). However, the political conditions are not present for the Commission and Member States to embrace a legislative agenda. Secondly, employers are reluctant to negotiate agreements which are transformed into the generally binding form of EC directives. They want a more flexible result of the social dialogue process. This presents risks in terms of the effective implementation of such 'non-binding' agreements.

Co-ordinated collective bargaining

Coordination of European collective bargaining is the consequence of a political rationale resulting from European Monetary Union and aims to counter downwards pressure on wage costs. It parallels the co-ordinated national bargaining which has been practiced in some Member States where centralised national bargaining has been replaced by more decentralised systems of bargaining, but there is still a role for

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

23. Following the failure of attempts to achieve regulation of temporary agency work through the European social dialogue, the Commission introduced a Proposal for a Dir of the European Parliament and the Council on working conditions for temporary workers (COM(2002) 149 final, Brussels, 20 March 2002). However, despite a drastic revision of the text of the proposed directive in November 2002, the last attempt in June 2003 in the Council of Ministers to achieve a consensus allowing for the proposed directive to progress though the legislative procedure failed.

24. Council Directive No. 2002/14 establishing a framework for informing and consulting employees in the European Community. OJ 2002, L80/29.

the national level. The process is sometimes called centrally co-ordinated decentralisation, or organised decentralisation. The coordination of European collective bargaining reflects this Member State experience by attempting at EU level to coordinate national and sub-national levels of collective bargaining.

At its 9th Congress in Helsinki in June–July 1999, the ETUC set up a 'committee for the coordination of collective bargaining' to develop strategies. The committee formulated a guideline on the coordination of collective bargaining, endorsed at an ETUC Executive Committee meeting on 14–15 December 2000. The guideline's three main objectives are:

- to allow trade unions at European level to provide a general indication of wage bargaining developments in response to the European Commission's broad economic policy guidelines and the European Central Bank (ECB) guidelines, and generally to influence the macroeconomic dialogue at European level;
- to avoid situations which may lead to social and wage 'dumping' and wage divergence in Europe; and
- to coordinate wage claims in Europe, and especially in those countries which are part of the euro single currency area, and to encourage an 'upward convergence' of living standards in Europe.

The guideline contains a formula for pay claims:

- nominal wage increases should at least exceed inflation, while maximising the proportion of productivity allocated to the rise in gross wages in order to secure a better balance between profits and wages; and
- any remaining part of productivity should be used to fund other aspects in collective agreements, such as 'qualitative aspects of work where these are quantifiable and calculable in terms of cost'.

As part of the implementation procedures of this guideline, the ETUC Executive Committee proposed to review wage developments each year and progress on qualitative aspects of work every two years through a common analysis of the situation in the EU Member States and Member States of the European Economic Area (EEA). The annual report at the end of 2002 shows that wage increases were consistently

below the level indicated by the guideline's formula, though closer to it than in previous years.

Another example on the sectoral level is the co-ordination rule of the European Metalworkers' Federation (EMF), proposed by the EMF's 3rd Collective Bargaining Conference in 1998 and confirmed by the EMF Executive Committee and EMF Congress in 1999. The rule states: 'that the main reference point for the EMF affiliates must be to maintain purchasing power and achieve a balanced participation in productivity increases.'

A number of significant developments are worth emphasising.[25] Most interesting is the conclusion that wage increases in 2000 were in line with the European Central Bank's (ECB) definition of price stability, with implications for the ECB's policy on interest rates. This opens up the prospect of a dialogue with the institutions responsible for EU macroeconomic policy, including the ECB, promoting an agenda of job creation and growth. The EMF's role is particularly important in the European context since the metalworking sector often sets the pattern for collective bargaining in Member States.

The problem is that, so far, this is a wholly unilateral initiative. There is no evidence of an employer response to engage with such an exercise in wage, or any other form of coordination. As with the social dialogue, the question is how to stimulate an employer response with a view to developing an operational EU industrial relations system of coordinated bargaining.

Adapting institutional frameworks: the European Employment Strategy and the EU social dialogue

The EU is a new supranational political formation. Its social model will include features which are unique to it. It is part of the task of building an EU social model to creatively exploit some of the unusual, even unique features of the EU system.

Employment and labour market policy are a major concern of the EU, the Member States and the social partners at EU and national levels.

25. *Report on the European Coordination Rule* to the 4th EMF Collective Bargaining Conference, Oslo, 20–21 June 2001.

The development of the European Employment Strategy (EES) is currently one of the most dynamic areas of EU policy in the economic and social field.

Despite its close relation to social policy, when the EES was incorporated into the EC Treaty by the Treaty of Amsterdam, it was placed in a separate Employment Title (Articles 125–130) quite removed from the Social Chapter (Articles 136 ff.).[26]

The Employment Title embodies the 'open method of co-ordination', implementing the EES in Article 128 EC:

- The Council and Commission formulate an annual joint report, put to the European Council.
- The European Council adopts conclusions and the Council, after consulting other EU institutions, acting by a qualified majority on a proposal from the Commission, draws up Guidelines which the Member States 'shall take into account in their employment policies'.
- Each Member State is to make an annual report on 'the principal measures taken to implement its employment policy in the light of the guidelines for employment' (the National Action Plan: NAP).
- The NAPs go to the Council and Commission which prepare a joint report to the European Council of that year on implementation of the guidelines. The Council, acting by a qualified majority on a recommendation from the Commission, may make (non-binding) recommendations to Member States concerning their employment policies.

However, the 'open method of co-ordination' suffers from a serious problem. The social dialogue and the social partners feature regularly in the political rhetoric of the EU institutions and the Member States when promoting the EES. An active role of the social partners is accepted as an essential political condition for its success. However, the social dialogue is not institutionally integrated or even mentioned in the Employment Title of the EC Treaty. The social partners are only marginally situated in the institutional structure of the EES.

26. The draft Constitutional Treaty, however, places them one following the other.

In sum, social policy and employment policy in the EU are presently managed through separate institutional frameworks: the social dialogue and the EES. Can they be combined in a framework for their mutual reinforcement?

The EU social dialogue, both inter-sectoral or sectoral, could make a major contribution to the EES. The EU intersectoral framework agreements on part-time and fixed-term work, and sectoral agreements on working time in the sectors excluded from the Working Time Directive, demonstrate the potential of the social partners to regulate the labour market consistently with the Community's employment policy objectives.[27]

The 'open method of co-ordination' of the EES offers an institutional framework that could reinforce EU social dialogue. It avoids Member States' reluctance to adopt legislative solutions, and substitutes Guidelines. But these are mandatory. They must be adopted every year. It removes employers' resistance to negotiating agreements which lead to binding directives and substitutes framework agreements which may be implemented in the form of Guidelines.

27. Council Dir 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ L307/18 of 13.12.93) adopted in 1993 excluded most transport sectors ('air, rail, road, sea, inland waterway and lake transport'). The intention was never that this should be a permanent exclusion, but that these sectors should reach social dialogue agreements at EU level adopting working time arrangements tailored to their exigencies. For example, this was accomplished by an agreement in the maritime sector on 30 September 1998, given legal effect by Directive 1999/63/EC concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) (OJ 1999, L/167/33), and for the civil aviation sector by an agreement in March 2000, given legal effect by Dir 2000/79/EC concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (FTF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA) (OJ 2000, L302/57), In the rail sector, an agreement to apply the directive was reached also on 30 September 1998. However, its translation into a directive was delayed because the EU social partners in the rail sector were unwilling to proceed unless and until a similar arrangement was made in the road transport sector. They feared competition, should lower (or no) standards in road transport give that sector an unfair competitive advantage. However, the EU social dialogue in the road transport sector remained deadlocked, mainly over the issue of whether it should cover self-employed drivers. The deadlock was broken in the road transport sector only in February 2002 and took the form of Dir 2002/15/EC of 11 March 2002 (OJ 2002, L80 of 23 March 2002).

An institutional design could integrate the best features of the EU social dialogue and of the open method of coordination:

1. Mandatory annual Guidelines take the form of framework agreements which emerge from an EU-level social dialogue between EU social partners. These framework agreements/ Guidelines are supported by affiliated social partners. They draw on the experience of national employment pacts, and/or reflect proposals by the Commission.
2. Affiliated social partners at Member State level produce mandatory annual National Action Plans to implement the EU framework agreements/Guidelines.
3. The Commission and Council review and report on implementation of the framework agreements/Guidelines. Where necessary, they issue recommendations where implementation is inadequate. If recommendations are ignored, the Commission and Council take measures in the form of specific decisions or general directives.

Adding coordination of collective bargaining: towards 'cooperative corporatism'

The development of a co-ordinated collective bargaining system at EU level faces the same problem as the EU social dialogue: employers are not engaged. In the case of the EU social dialogue, it was proposed that the EES might be used to stimulate an employer response. It aimed to focus the institutional pressures on to employers of the Commission and Council formulating annual Guidelines and Recommendations and national administrations formulating annual National Action Plans.

Similarly, the trade unions' development of a co-ordinated bargaining policy at EU level could become of interest to EU institutions and Member States. There is growing awareness of the advantages of tripartite 'employment pacts' at national level, bolstered by various institutional constellations involving the social partners. On the one hand, there is a thesis of 'competitive corporatism'. This argues that such corporatist national pacts are concerned with seeking a national competitive advantage. On the other hand, coordinated collective bargaining at EU level raises the prospect that a form of regulatory co-operation at EU level, 'co-operative corporatism', could emerge.

The objective would be for the protagonists of coordinated collective bargaining to achieve a response from institutions responsible for macro-

economic policy: Member State governments and the European Central Bank. This is a form of reinforced macroeconomic dialogue. If the ECB, Member State governments and trade unions at EU level could agree on a coordinated wage policy, this would remove a major threat of inflation and promote monetary stability. In return, trade unions could demand commitments on a range of policies involving employment and related social policy areas.

The institutional price demanded by trade unions would require governments to pressure employers – at Member State and EU level – to enter into social dialogue. However, the institutional response of governments and the ECB could, by itself, act as a pressure on employers to engage, so as not to be left out of the policy exchanges between EU trade unions and national and EU public authorities. This is exactly the kind of pressure which has been lacking to stimulate the social dialogue.

The social dialogue dynamic of 'bargaining in the shadow of the law' becomes more sophisticated; not just law, but a combination of coordinated bargaining and macroeconomic dialogue. Even the employment policy of EES becomes a means of pressuring employers to come to the bargaining table.

The proposal is for an EU social model combining coordinated collective bargaining and elements of the EES and the EU social dialogue: exchanges of employment policy and social policy with wages policy. The architecture of the European social model is a form of regulatory co-operation at EU level. 'Co-operative corporatism' builds on coordinated collective bargaining and the institutional machinery of the EES and the EU social dialogue.

There is some evidence that this architecture may not be confined to the drawing board. In accordance with a Council Decision of 6 March 2003, the Tripartite Social Summit for Growth and Employment was established (Article 1), bringing together the Council Presidency and the two subsequent Presidencies, the Commission and representatives of the social partners (Article 3) at least once a year (Article 4(1)) with the task 'to ensure ... that there is continuous concertation between the Council, the Commission and the social partners in order to enable the social partners to contribute, on the basis of their social dialogue, to the various components of the integrated economic and social strategy

launched at the Lisbon European Council in March 2000 and supplemented by the Gothenburg European Council in June 2001' (Article 2).[28]

This Council Decision was in line with the Contribution by the social partners to the Laeken European Council of 7 December 2001. That contribution stated that the ETUC, UNICE and CEEP 'believe it necessary to reaffirm ... the distinction between bipartite social dialogue and tripartite concertation [and] the need better to articulate tripartite concertation around the different aspects of the Lisbon strategy' (Section 1). Accordingly, in Section 4 of their contribution, the European social partners proposed to articulate concertation on the Lisbon strategy in a single forum. This tripartite concertation committee for growth and employment 'would examine the Community's overall economic and social strategy ahead of the spring European Council'.[29]

The micro-level: industrial democracy and social citizenship compromised?

A Council meeting of Ministers of Agriculture (including fisheries) held in Brussels on 18 February 2002 finally adopted the long-awaited directive establishing a general framework for improving information and consultation rights of employees in the European Community. A fishy result in more than one sense.

28. Initially proposed in the Commission's Communication, 'The European social dialogue, a force for innovation and change' (COM (2002) 341 final, Brussels, 26 June 2002). In Section 2.1 on 'Organising tripartite concertation', the Commission's Communication stated that 'Fruit of the political desire closely to associate the social partners in the advances made in European integration, concertation is firmly rooted in Community practice' (p. 12). It stated that the proposed new Tripartite Social Summit for Growth and Employment 'will provide for an informal discussion on the social partners' contribution to the Lisbon strategy'. It added, however, that 'Economic and monetary matters are dealt with in the context of the macroeconomic dialogue which should be pursued in accordance with its own procedures. The macroeconomic dialogue is thus not affected by this decision' (p. 13).

29. The first formal tripartite social summit for growth and employment took place on 20 March 2003, co-chaired by the Greek Prime Minister, then current President of the EU Council of Ministers, and the President of the European Commission and attended by high-level representatives of the social partners, the Social Affairs Commissioner and the Ministers of Labour from Greece and those of the Member States holding the next two Presidencies (Italy and Ireland).

Since the original proposal of the Commission in November 1998, the United Kingdom government had been actively blocking adoption of the directive in the Council. When the blocking minority of Member States finally collapsed under pressure from the Swedish Presidency of the Council in June 2001, the UK government persisted in its objective of weakening the directive's stated purpose in Article 1(1): 'to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community'.

The Commission, almost all the other Member States where there is already a statutory right to employee representation in all companies above a certain work-force size, and the European Parliament actively promote the role of employee representatives in general and trade unions in particular. The UK New Labour government's resistance to the bitter end is recognised in the highly unusual joint declaration of the European Parliament, the Council and the Commission attached to the Minutes of the Council which adopted the directive on 18 February 2002. This declaration recalled the judgments of the European Court of Justice of 8 June 1994 with regard to employee representation.[30] Those judgments had condemned the then UK Conservative government for its failure to provide for information and consultation of employee representatives in the cases of collective dismissals or transfers of undertakings, as required by EC directives of 1975 and 1977.

The final tortured text of the framework directive approved in February 2002 on information and consultation at national level reflects the UK government's unrelenting campaign of resistance. It is a minefield of ambiguities.[31]

Conclusion

The EU Charter of Fundamental Rights is an important milestone in the development of Social Europe. It can be of value in developing the social dimension by putting pressure on EU institutions to promote a

30. *Commission of the European Communities v United Kingdom*, Cases C-382/92 and C-383/92, [1994] ECR 2435, 2479.

31. B. Bercusson, 'The European social model comes to Britain' (2002) 31 *Industrial Law Journal* (September) 209–44.

European social model. The EU Charter can be used to support a concept of European social citizenship which overcomes the division between classical human rights and social and economic rights. The distinctive role of trade unions in the European social model is manifest at all levels of economy and society, from the level of macroeconomic policy-making down to the lived experience of the workplace.

The task of designing the institutional architecture of the European social model presents an enormous opportunity in the constitutional moment which will culminate in 2004. It has potential implications reaching beyond the EU Member States: to the accession countries of central and eastern Europe and the Mediterranean, and others queuing up, to those benefiting from the world's largest source of foreign aid, and to the trading partners of the world's largest trade bloc.

Chapter II

Collective industrial relations

Chapter II: Collective industrial relations

Introduction by Antoine T.J.M. Jacobs

Brian Bercusson took the first steps in his academic career writing about collective industrial relations, which in those days meant: British industrial relations. In 1976, he wrote an article on 'The new fair wages policy '[1] and in 1978 he completed his PhD on 'Fair wages resolutions'.[2] The topic in this instance was a very interesting legal instrument designed to underpin the binding force of collective agreements by requiring that government institutions apply the current level of wages and labour conditions when contracting services from private contractors (public procurement). Who would have thought that the European Court of Justice, on which Brian Bercusson pinned so much hope later in his career, would deal such a devastating blow to this instrument in the Rüffert case, only a few months before his death.[3]

Brian Bercusson also turned his attention to other aspects of British collective industrial relations, such as the freedom to strike and picketing.[4] All this occurred during a period of great upheaval in British society. After the trade unions had suffered a major setback under the Conservatives (Edward Heath, 1970–74) with the adoption of the Industrial Relations Act 1971, a new Labour government (Wilson/ Callaghan, 1974–79) had somewhat restored the standing of the workers' movement with a set of more labour-friendly Acts, which were the object of some benign, but critical comments from Brian Bercusson.[5] However, in 1979, the Conservatives returned to power and Brian

1. B. Bercusson, 'The new fair wages policy', *Industrial Law Journal*, 1976/5, pp. 129–47.
2. B. Bercusson, *Fair wages resolutions*, Vol. 2, Studies in Labour and Social Law, London: Mansell, 1978, 538 p.
3. C-346/06, ECJ, 3 April 2008.
4. B. Bercusson, 'One hundred years of conspiracy and protection of property: time for a change', *Modern Law Review* 40, 1977, pp. 268–92; B. Bercusson, 'Picketing, secondary picketing and secondary action', *Industrial Law Journal* 9, 1980, pp. 215–32.
5. B. Bercusson, *The Employment Protection Act 1975*, London: Sweet and Maxwell, 1976; B. Bercusson, *The Employment Protection (Consolidation) Act 1978*, London: Sweet and Maxwell, 1979.

Bercusson was faced with a host of new laws that the Thatcher government, in successive years, marshalled against the labour movement – much to his distaste, as can clearly be seen in several of his publications in those years.[6]

Because the British labour law of the day could no longer serve as a source of inspiration, Brian Bercusson turned increasingly to the study of comparative labour law. Stimulated by his appointment as labour law professor at the European University Institute in Florence, he published comparative studies on wage determination,[7] and on trade union democracy and political systems.[8]

In the course of the 1980s and 1990s, Brian Bercusson became convinced that in the 'new world' of internationalisation and globalisation, national labour law would no longer be able to offer employees adequate protection. Certainly in Europe, where the Single Market was due to be completed in 1992, comprehensive European labour law would become indispensable. Brian Bercusson analysed the potential of the European Community's Charter of the Fundamental Social Rights of Workers with regard to creating such an extensive stratum of European labour law.[9] He did the same for the Treaty of Maastricht,[10] in the course of which he coined an eloquent phrase to describe the interaction between the European Commission and the 'social dialogue': 'Bargaining in the shadow of the law'

Two years later, he published another article on this subject, in which he went more deeply into the dynamics unleashed by the social policy provisions of the Maastricht Treaty.

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6. B. Bercusson and C. Drake, *The Employment Acts 1974–1980*, London: Sweet & Maxwell, 1981; B. Bercusson, 'A new framework for labour law', *Journal of Law and Society*, pp. 277–86; B. Bercusson, 'Labour law', in P. Archer and M. Martin (eds), *More law reform now*, Chichester: Barry Rose, pp. 147–82.

7. B. Bercusson, 'Wage determination: instrumentalist and neo-corporatist approaches' (mimeo), paper delivered at a conference entitled 'Law and economic policy: alternatives to de-legalisation', Florence: EUI, 1985.

8. B. Bercusson, 'Trade union democracy and political systems', *Bulletin of Comparative Labour Relations* 17, 1988, pp. 133–43.

9. B. Bercusson, 'The European Community's Charter of the Fundamental Social Rights of Workers', *The Modern Law Review*, 1990, pp. 624–42.

10. B. Bercusson, 'Maastricht: a fundamental change in European labour law', *Industrial Relations Journal*, 1992.

'The dynamics of European labour law after Maastricht'
Industrial Law Journal 23 (1), 1994, pp. 1–31

In this optimistic mood, Brian Bercusson even reflected on the possibility of concluding sectoral agreements at EC level.[11]

Fourteen years later, Brian Bercusson had become less optimistic about the potential of the remarkable dynamic force which is 'bargaining in the shadow of the law.' He took the view (see the third publication under this Theme)[12] that the willingness of the social partners (notably, the employers) to engage in agreements is, in the first place, dependent on the political balance of power in the EU institutions. If the Commission launches initiatives, Member States mobilise in the Council and the Parliament is supportive, the social partners are confronted with the likelihood of regulation. A logical calculus of self-interest points to incentives to self-regulate via social dialogue. However, this dynamic is fragile, as it depends on the political balance of power in the EU institutions. For instance, if the European Commission does not push for social policy initiatives, if there are blocking minorities of Member States in the EC Council of Ministers or if the European Parliament is not supportive, then the likelihood of legislative measures recedes. In these circumstances, employers in particular are unlikely to look to alternative forms of regulation voluntarily, unless they can be offered incentives.

During the 1990s, Brian Bercusson followed the developments of European labour law after Maastricht with great interest, describing and commenting on it extensively in his major book, *European labour law*, published in 1996.[13]

Late in the 1990s, the Conservatives fell from power, but the new Labour government showed few signs of striking a new deal on industrial relations. At the same time, the European Court of Justice, in the Albany and UEAPME cases, issued wise judgments which seemed to

11. B. Bercusson, 'European labour law and sectoral bargaining', *Industrial Relations Journal*, 1993, pp. 257–72.

12. B. Bercusson, 'Implementing and monitoring of cross-border agreements: the potential role of cross-border collective industrial action', in P. Papadakis (ed.), *Cross-border social dialogue and agreements: an emerging global industrial relations framework*, Geneva: International Institute for Labour Studies, 2008, pp. 131–37.

13. B. Bercusson, *European labour law*, London: Butterworth, 1996.

respect national systems of industrial relations, while promoting the emergence of a European system of collective bargaining.

At the request of the European Parliament, Brian Bercusson researched the state of trade union rights in the EU Member States.[14] He thereby shaped the contours of Fundamental Trade Union Rights[15] and tried to imagine a model of Transnational Trade Union Rights.[16] He strongly supported calls for a 'Social Europe' and became enthusiastic about the working of the so-called Convention which was to prepare a Charter of Fundamental Rights. Much to Bercusson's delight, the Convention decided to include various trade union rights in this Charter, which was ultimately adopted by the European Council in Nice in 2000. The Charter was a 'soft law' document and Brian Bercusson was well aware of that. However, in several treatises he expended much energy on advocating binding effects for this Charter and promoting an extensive interpretation of the trade union rights laid down in it.

'The EU Charter of Fundamental Rights 2000 and trade union rights'

in E. Gabaglio and R. Hoffmann (eds),
European Trade Union Yearbook, 2001, pp. 55–80

Brian Bercusson elaborated on this theme in a number of other publications.[17] He explored the potential contribution of the Charter to building a system of industrial relations at EU level, in particular, by introducing fundamental trade union rights into the legal order of the European Union.

14. B. Bercusson, *Trade union rights in the EU Member States*, Luxemburg: European Parliament, 1997.

15. B. Bercusson, 'Fundamental trade union rights', in U. Mückenberger (ed.), *A Manifesto for Social Europe*, Brussels: ETUI, 2000.

16. P. Herzfeld Olsson, B. Bercusson and N. Bruun (eds), 'Transnational trade union rights in the EU', Workshop summary, Stockholm: National Institute for Working Life, 1998; B. Bercusson, 'Transnational trade union rights', in H. Collins, P. Davies and R. Rideout (eds), *Legal regulation of employment relations*, The Hague: Kluwer Law International, 2001, pp. 410–16.

17. B. Bercusson, 'The role of the EU Charter of Fundamental Rights in building a system of industrial relations at EU level', in *Transfer*, 2003, pp. 209–28; B. Bercusson, 'The EU Charter and trade union rights', in B. Bercusson (ed.), *European labour law and the EU Charter of Fundamental Rights*, Baden-Baden: Nomos, 2006, pp. 85–107.

As the fragility of the dynamic of bargaining in the shadow of the law became more manifest, Brian Bercusson took an increasing interest in a second force that might be conducive to the creation of European labour law by the European social partners: collective international action. He engaged in the debate that the right to such action should be deduced from the fundamental right to take collective action, as laid down in the Charter.

His energy was quickly put to the test when the *Viking* and *Laval* cases were brought before the Court, which opposed the freedom to provide services recognised under the EC Treaty to the freedom to take collective action. As the outcome of these cases, from the outset, seemed to jeopardise the national industrial relations systems of some Member States and the rights of workers to take industrial action on an international scale, Brian Bercusson mobilised all his intellectual powers to defend transnational workers' rights.[18] He recognised that the EU lacks the competence to legislate on the issue of collective action (Art. 137, EC Treaty), but he emphasised that, nevertheless, the fundamental right to collective action was recognised in various primary documents, such as the Nice Charter of Fundamental Rights and has also been endorsed in secondary EC legislation (such as the Monti Regulation[19]) and in various places in cases of the European Court of Justice. He argued that the freedom of enterprises to move from country to country within the single European market has shifted the balance of economic power towards the employers. This is particularly evident in the overwhelming economic power of multinational enterprises, the magnitude of transnational capital movements, the social dumping effects of global trade, delocalisation, unemployment and deskilling. National laws have not yet adapted to trade union responses in the form of collective action, which impact on the transnational economy.[20]

18. B. Bercusson, 'Collective action and economic freedoms: assessment of the opinions of the Advocates General in Laval and Viking and six alternative solutions', ETUI-REHS, 2007; B. Bercusson, 'The trade union movement and the European Union: judgment day', *European Law Journal* 13, 2007, pp. 279–308.

19. Council Regulation (EC) No. 2679/98 of 7 December 1998, OJ L 337/8 of 12.12.1998, Art. 2.

20. B. Bercusson, 'Restoring a balance of economic power in Europe', Foreword to P. Dossemont, T. Jaspers and A. van Hoeck (eds), *Cross-border collective actions in Europe: A legal challenge. A study of the legal aspects of transnational collective action from a labour law and private international law perspective*, Antwerp: Intersentia, 2007, p. 8.

It appears from Brian Bercusson's last great publication in this field that he was satisfied that the European Court of Justice in its judgments had recognised that the right to take collective action is a fundamental right which forms an integral part of the general principles of Community law. At the same time, Brian Bercusson put his finger on the various qualifications that the Court has asserted with regard to this right, which undoubtedly would have incited him to raise his voice again, had it not been silenced forever.

The dynamic of European labour law after Maastricht

Brian Bercusson (1994) *

The analysis in this article of the implications of the Maastricht Treaty on European Union for the social law and policy of the European Community seeks to go beyond a static interpretation of the texts and addresses the dynamics of the Protocol and Agreement on Social Policy – how they may work in practice. This involves, first, an analysis of the legal nature of these instruments. The consequences of their legal status will powerfully influence the way in which the actors involved – Community institutions, Member States and the social partners – plan their strategies. The legal status of the instruments will also have a determining effect on a second issue to be analysed: the scope of potential social policy proposals emanating from the Commission.

It is the interaction between Commission proposals and the social dialogue which constitutes the defining quality of the emergent process of social policy formation in the European Community: what I have called 'bargaining in the shadow of the law'.[1] The social dialogue takes place on many levels. Agreements at Community level, and the process of their articulation with Member State labour laws may encompass many different actors. This multiplicity of actors poses a complex problem of choice of levels for social policy formation and implementation. It can be summed up in the word 'subsidiarity'. This article seeks to provide some clarification of this principle as it may be applied in the area of Community social law and policy.

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* 'The dynamic of European labour law after Maastricht', Brian Bercusson (1994). This article was first published in the *Industrial Law Journal*, 23 (1), 1-31 and is reprinted here with the kind permission of the Industrial Law Society.

1. B. Bercusson, 'Maastricht: a fundamental change in European labour law' (1992) 23 *Industrial Relations Journal* 177.

1. The legal nature of the Protocol and the Agreement on Social Policy

The Treaty on European Union signed by the Member States of the European Community on 7 February 1992 includes a Protocol on Social Policy and an Agreement, annexed to the Protocol, between eleven Member States, with the exception of the UK, also on Social Policy. The Protocol notes that eleven Member States 'wish to continue along the path laid down in the 1989 Social Charter [and] have adopted among themselves an Agreement to this end'; accordingly, all twelve Member States:

1. Agree to authorise those 11 Member States [excluding the UK] 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 abovementioned Agreement.

2. 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 abovementioned Agreement ...

   Acts adopted by the Council ... shall not be applicable to the [UK].

The Protocol on Social Policy forms an integral part of the EC Treaty.[2] The Agreement is stated in the Protocol to be annexed to the Protocol. The presumption is that both Protocol and Agreement are, therefore, part of Community law. Similarly, any measures adopted using the institutions, procedures and mechanisms of the Treaty will have effects in Community law as far as the 11 Member States are concerned. Yet a number of arguments against the Agreement being part of EC law have been elaborated by Eliane Vogel-Polsky.[3]

2. Article 239: 'The Protocols annexed to this Treaty by common accord of the Member States shall form an integral part thereof.'

3. E. Vogel-Polsky, 'Evaluation of the social provisions of the Treaty on European Union agreed by the European Summit at Maastricht on 9 and 10 December 1991', Committee on Social Affairs, Employment and the Working Environment of the European Parliament, 7 February 1992, DOC EC/CM/202155, PE 155.405.1.

A. Diplomatic practice or EC law?

A first argument characterized the Agreement as the result of a diplomatic conference of the Member States within the framework of the European Council. The results of such meetings are not Community law. Against this, it may be argued that, unlike such diplomatic practice, the Agreement on Social Policy is annexed to a Protocol which is part of the Maastricht Treaty, itself the product of the intergovernmental conference and undeniably EC law.

B. The Protocols on EMU and on Social Policy

A second argument compared Protocol No. 14 on Social Policy with Protocol No. 11 on Economic and Monetary Policy, which states that the voting rights of the UK in the Council shall be suspended (Article 7), but allows the UK later to choose to join the economic and monetary union (Article 10). Protocol No. 14 on Social Policy authorizes 11 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 abovementioned Agreement' (emphasis added). As it is relevant only to 11 Member States, it is said not to be Community law.

The claim is that the 11 Member States have made an international agreement regarding exclusively themselves. However, such an argument renders the Protocol meaningless. The UK's consent is not necessary for the 11 Member States to assume mutual obligations to which the UK is not a party. The Protocol only makes sense if EC law is engaged and the UK has to give its consent to such obligations.

Without such consent, the agreement would fall foul of the European Court's Opinion 1/76 of 26 April 1977, which condemned international agreements engaging only some Member States in a field of EC competence as 'a change in the internal constitution of the Community ... not compatible with the requirements of unity and solidarity'.[4] If it was merely an international agreement between the 11 Member States,

4. *Re Draft Agreement establishing a European laying-up fund for inland waterway vessels* (1977) *ECR* 741, para 12 at p. 758.

under it the Commission might propose measures to be adopted by the 11 which would modify, by international agreement, existing EC law – a result contrary to the Commission's duty as 'guardian of the Treaties' for which the UK could even complain to the Court as a violation of the other Member States' Treaty obligations.

As EC law, the acts adopted by the EC institutions under the Protocol could come before the European Court under Article 177 without the problem canvassed in Opinion 1/91 of 14 December 1991 as to the incompatibility between interpretation of an international treaty and the EC Treaty in the context of the Community legal order.[5] The contrast may be made with Protocol 35 of the EEA Treaty, from which it appears that 'without recognising the principles of direct effect and primacy ... the Contracting Parties undertake merely to introduce into their respective legal orders a statutory provision to the effect that EEA rules are to prevail over contrary legislative provisions'.[6]

Further, it may be argued that both Protocols 11 and 14 have the consequence that the UK simply is excluded from one aspect of the European Union. Both Protocols have the same legal status. Both envisage the use by 11 Member States of institutions, procedures and mechanisms of the Community. In both cases, it would seem that the intention of the Member States was that the UK could rejoin economic and monetary union or the social policy of the other Member States. The problem is that in the case of the former, this was explicit; not so in the case of the latter.

C. To opt in or not to opt in; and if so, how?

Protocol 11 dealing with economic and monetary union provides in Article 1, para 2 that:

> Unless the United Kingdom notifies the Council that it intends to move to the third stage [of economic and monetary union] it shall be under no obligation to do so.

5. *Re the Draft Treaty on a European Economic Area* (1991) 1 *CMLR* 245.
6. *Ibid.*, para 27, p. 269.

However, Article 10 allows that the UK:

> may change its notification at any time after the beginning of [the third] stage.

In other words, the procedure under Protocol 11 is that the UK is excluded unless it 'opts in' in one of two ways: either notification of UK intention to move to the third stage, for otherwise there is no obligation (Article 1); or change of its original notification, entailing obligations (Article 10). Protocol 14 on social policy simply provides in Article 2, para 1, that:

> 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 abovementioned Agreement.

Protocol 14 contains no explicit mechanism for 'opting in' by way of notification. Paragraph 2 merely goes on to outline the voting procedures in the absence of the UK, and paragraph 3 provides that the:

> 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.

At bottom, the issue is whether the Maastricht Treaty provisions on economic and monetary union were intended to allow eventual opting in by the UK, but those on social policy were intended *permanently* to exclude the UK. I would submit that the latter cannot be seriously contended.

Hence, the Protocol should be read not as an exclusion of the UK forever from the social policy of the EC. Rather, as with economic and monetary union, UK participation is subject to a special procedure for opting-in. The question remains: what procedure? Three alternative strategies would enable the UK to join the new social policy.

(i) Treaty amendment/revision

Opting-in could be achieved by an amendment to Protocol 14, in other words, to the Treaty. This amendment could take two forms:

(a) the deletion of the entire Protocol and Agreement *and* the substitution of the existing EC Treaty provisions with the new formulation of Articles 118 *et seq.* now in the Agreement;

(b) changing the text of the first line of the preamble to the Protocol from '11' to '12' Member States, and including the UK in the following list; also in para 1 of the Protocol and similarly in the Agreement; and deleting para 2 of the Protocol entirely.

(ii) Interpretation of the Protocol

Rather than amend the Protocol, the question can be posed as one of interpretation of the Protocol. Can it be read to allow for the UK to opt in or not? I submit that the Protocol can be read as implying that when the UK *does* take part in the deliberations of and the adoption by the Council of Commission proposals (assuming also adhesion to the Agreement – see (iii) below), the acts adopted shall be applicable to the UK.

(iii) Adhesion to the Agreement

The Protocol applies so long as the UK does not adhere to the Agreement. This is the precondition for participation in decision-making by the Council. All 12 Member States authorize recourse to EC machinery to give effect to the Agreement. The preamble to the Protocol notes that only 11 Member States have adopted the Agreement. It follows that the UK is excluded and is not bound. *What is necessary is that the UK adhere to the Agreement, not to the Protocol.* This does not require amendment of the Protocol at all. Following adhesion, it is obvious that all 12 Member States authorize use of EC machinery to give effect to the Agreement through procedures involving also the participation of the UK.

In conclusion: as between (i) amendment of the Protocol, (ii) interpretation of the Protocol [and] (iii) adhesion to the Agreement, the latter two strategies obviously involve much lighter procedures. The other Member States clearly wished the UK to join the new social policy initiatives. Under any of the three procedures, the UK retains the right to refuse to take part until it wishes to join.

These alternative strategies throw some light on the debates over the legal consequences of the itinerary of the Maastricht Bill in the UK Parliament.

The European Communities (Amendment) Act 1993, which received the Royal Assent on 20 July 1993, includes two provisions which, combined, have already produced a legal challenge and could in the future have unforeseen consequences. Section 1(1) of the 1993 Act excludes the Protocol on Social Policy from the instruments which are given legal effect in domestic law by the European Communities Act 1972, Section 2(1). Section 1(2) approves the Treaty on European Union for the purpose of Section 6 of the European Parliamentary Elections Act 1978.

The challenge, in *R v Secretary of State for Foreign and Commonwealth Affairs, ex pane Lord Rees-Mogg*, argued that Section 1(2):[7]

> does not approve the Protocols, and in particular does not approve the Protocol on Social Policy, which is specifically excluded from the operation of Section 1(1) of the Act.

The Court rejected the argument, distinguishing between the purposes of Section 1(1) and Section 1(2). Lloyd LJ stated:

> What could have been the point of incorporating all the Protocols in English domestic law, save only Protocol 14 [on Social Policy], unless it was intended by Parliament that the Protocols should be approved for ratification.

This highlights the horns of the dilemma. All Protocols are ratified, but one of them, on Social Policy, is excluded from having domestic legal effects. Three interpretations are possible of the resulting situation.

First, this is an apparently clumsy and illogical double negative. The Protocol itself provides that the acts adopted by the Council shall not be applicable to the United Kingdom. The 1993 Act declares in effect that any non-applicable acts adopted shall have no effect in domestic law.

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7. Queen's Bench Division, 30 July 1993 (Lloyd, Mann LJJ, Auld J), reported in the *Independent*, 3 August 1993; and in the *New Law Journal*, 6 August 1993, p. 1153: Lexis transcript CO/2040/93.

Logically, it is tempting to argue that this implies that applicable acts shall have effect in domestic law.[8]

Secondly, also clumsy, the Protocol on Social Policy is ratified, but the door is left open to the UK opting in by a declaration of adhesion to the Agreement and participation in the procedures. However, an amendment to Section 1(1) of the 1993 Act deleting the exclusion of the Protocol would then still be necessary.

Thirdly, as in the first legal challenge, there is a question of the relationship of the social policy opt-out to ratification. All Member States ratifying the Treaty approved the opt-out in the Protocol. For the UK to further deny legal effect in domestic law to the Protocol is unnecessary and inconsistent with ratification. The issue may come before both the UK courts and the European Court. In a challenge to the 1993 Act's exclusion of the Social Policy Protocol from having domestic legal effect, the UK courts might hold that this does not affect ratification and uphold the deletion of the Social Policy Protocol from the EC Treaties having legal effect. The issue could still come before the European Court under an Article 177 reference.

The European Court might hold that the 1993 Act does not affect ratification. All the other Member States ratified the Treaty including the Protocol and thereby granted it the requisite legal effect in domestic law. The problem then is that the Protocol is denied legal effect in UK law by the 1993 Act.

There are at least two options available to the Court, more or less dramatic, and both annoying to the UK Government. Less dramatically, the Court might hold that the UK ratified the Protocol and Agreement on Social Policy, but simply avoids its effects by not participating as provided for in the Protocol. When it does choose to participate, it will be required to amend the 1993 Act so as to include the Protocol and Agreement among those instruments having legal effects in domestic law.

The more dramatic would have the Court holding that the UK cannot single out the Protocol and deny it legal effect despite its ratification.

8. The exclusion might perhaps make sense if there were other potential instruments which might otherwise be applicable under the Protocol – such as EC-level agreements.

The provision in the 1993 Act is inconsistent with ratification. The UK must recognize the new social competences of the EC.[9] The Protocol still allows for the UK to opt out by not participating in the procedures for the adoption of acts of the Council under those new competences.[10]

By such a decision of the Court, the formal division of the Community into two on social policy issues is avoided. Sooner or later, a UK government is bound to adhere to the social policy of the rest of the Community. The Court will simply anticipate the inevitable. The choice of which option it chooses will determine whether a legislative amendment to the 1993 Act is necessary in order for the UK to opt-in.[11]

D. Intergovernmental Agreement or EC Law?

A third argument advanced by Vogel-Polsky qualifies the Agreement as an intergovernmental agreement between 11 Member States and as such having effect in public international law, not Community law. Against this it may be argued that the 11 Member States appear to have intended the Protocol and Agreement to create Community law. Hence, the Agreement's effect in public international law would be to create the identical effects to those of Community law, using the institutions, procedures and mechanisms of the Community. This would include also the possibility of the European Court assuming jurisdiction over measures resulting from the Protocol (including the Agreement itself, proposed by the Commission and affirmed by the 11 Member States in the form of an EC measure!), since these, in terms of the Protocol, could be qualified as acts of the institutions of the Community under Article 177.[12] It seems absurd to create this 'shadow' EC law to avoid the conclusion that it is EC law.[13]

9. More fancifully, the Court might hold that the exclusion of any legal effects for the Protocol is a double negative, implying that the UK recognizes the Protocol and adheres to the Agreement on Social Policy.

10. This leaves open the question of the effect of EC-level agreements adopted under the Agreement on Social Policy.

11. It also may have implications for the effect of EC-level agreements.

12. The European Court, in considering its position on the Fund Tribunal provided for in the draft Agreement on the European laying-up fund for inland waterway vessels (Opinion 1/76, above, note 4), 'hoped that there is only the smallest possibility of conflicts of interpretations giving rise to conflicts of jurisdiction' between it and the Fund Tribunal. Nonetheless the Court felt 'obliged to express certain reservations' (p. 761, para 21). These risks, and therefore

To classify the Agreement as not part of Community law would be to render the Protocol effectively meaningless (by requiring, for example, subsequent repeated ratification by each of the 11 Member States of all measures adopted under it) and to contradict the express intention of the Member States. The argument that it is not EC law is based on the view that, *a priori,* there is absent an adequate legal basis for such an Agreement, and this frustrates the political will of the Member States. More accurate is the view that the legal power to create the Agreement as part of Community law exists.[14] In a choice between two interpretations, one of which gives rise to practical absurdity, the other should be preferred. This is particularly so where the authors of the document being interpreted strenuously support this other interpretation.

The issue of legal status is of fundamental importance. Its consequences will be apparent in the enforcement of the Agreement and measures (Directives, decisions, Community level agreements between management and labour) which result from it. Briefly, four methods are available to ensure that the labour law of the Member States reflects Community law: first, a Commission complaint to the Court under Article 169; secondly, references by national courts to the European Court under Article 177 and the requirement that national courts interpret national legislation in line with Community law;[15] thirdly, the possibility of

reservations, would be less in the case of the Court interpreting the EC Treaty and the same Court interpreting the Agreement on Social Policy.
On the other hand, in Opinion 1/91 (above, note 5), the differences between international law and EC law were such that the Court held 'that homogeneity of the rules of law throughout the EEA is not secured by the fact that the provisions of Community law and those of the corresponding provisions of the (EEA) agreement are identical in their content or wording' (p. 269, para 22); *a fortiori* in the case of the EC Treaty social provisions and those of the Maastricht Agreement on Social Policy. There would remain the problem of the effect of the Agreement and measures adopted under it in national courts in dualist systems, unless national legislation on EC law would be interpreted also to include this 'shadow EC law'.

13. I owe this point to an intervention by Prof. Marie-Ange Moreau, in a session to which both Prof. Vogel-Polsky and myself contributed, at the 'conclave' organized by the *Association Française de Droit du Travail* at Saverne, 11–12 September 1992.

14. An analogy would be with the adoption of the Social Action Programme of 1974. As put by a former Commissioner for Social Affairs: it 'reflected a political judgment of what was thought to be both desirable and possible, rather than a juridical judgment of what were thought to be the social policy implications of the Rome Treaty'. M. Shanks, *European Social Policy Today and Tomorrow*, 1977, p. 13. The results of that Programme are unquestionably part of EC law.

15. *Marleasing v La Commercial International de Alimentation,* case 106/89, (1990) *ECR* 4135; B. Fitzpatrick and C. Docksey, 'The duty of national courts to interpret provisions of national law in accordance with Community law' (1990) 20 *ILJ* 113.

'direct effect';[16] and, finally, potential claims for compensation against Member States in the event of losses suffered due to non-implementation of EC law by those Member States.'[17]

The question is whether some or all measures (Directives, decisions, Community level agreements) which result from the Agreement can utilize these methods of enforcement. In the case of Community level agreements, this would possibly put the Court in the position of interpreting and enforcing such agreements.[18] Other consequences emerge as a result of the new competences attributed to the Community by the Agreement.

2. The scope of Community competences and majority voting procedures

Article 1 of the Agreement, the re-drafted Article 117 of the Treaty of Rome, has greatly expanded the legal competences of the Community in the field of social policy:

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 combating of exclusion.

Within this new sphere of Community social policy, the Council is authorized, by Article 2, paras 1 and 2 (of the Agreement, the re-drafted Article 118 of the Treaty of Rome), to proceed by qualified majority voting to 'adopt, by means of directives, minimum requirements for gradual implementation' in the following five 'fields:[19]

16. *Defrenne v SABENA (No. 1)*, case 43/75, (1974) *ECR* 455.

17. *Francovich and Bonfaci v Italian Republic*, cases 6/90 and 9/90, (1992) *ECR* 5357.

18. Cases in which the European Court has had to come to terms with collective agreements within Member States include: *Commission of the EC v Italian Republic*, case 91/81, (1982) *ECR* 2133, *Commission of the EC v Denmark*, case 143/83, (1985) *ECR 421, Commission of the EC v Italian Republic*, case 235/84, (1986) *ECR* 2291 (possibility of implementation of Directives through collective agreements); *Commission of the EC v UK*, case 165/82, (1983) *ECR* 3431 *(de facto* effects of non-legally enforceable agreements); *Commission of the EC v French Republic*, case 312/86, (1988) *ECR* 6315 (discriminatory effect of agreements and tempo of reform).

19. The Protocol, Article 2, deems the new qualified majority in the Council, given the absence of the UK, to be 44 votes.

- 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 from the labour market ...'.

This is an expansion of the capacity of the Community to act in the social policy area even where one or more Member States are opposed. Article 2, para 3 requires unanimity (among the 11, pending UK adhesion)[20] in the following five 'areas:

- social security and social protection of workers;
- protection of workers where their employment is terminated;
- representation and collective defence of the interests of workers and employers, including co-determination, subject to para 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'.

Paragraph 6 of Article 2, however, provides that:

> 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.[21]

These provisions expand both the legal scope and the ability of the Community to develop social policy and labour law at European level. In the past, there have been many disputes over whether there was any legal basis for social policy measures, and, if so, whether the legal basis allowed for qualified majority voting or required unanimity in the

20. As to the possibility of the UK 'opting-in', see section I.C above.

21. This exclusion contradicts the expressed intention in the Protocol that 11 Member States 'wish to continue along the path laid down in the 1989 Social Charter; that they have adopted among themselves an Agreement to this end ...'. The Social Charter contained explicit guarantees related to pay (Article 5), the right of association (Article 11) and the right to strike (Article 13). The implication must be that the exclusions in this paragraph are to be interpreted narrowly. In contrast, there is doubt as to whether para 6 operates similarly to limit the scope of 'agreements concluded at Community level' under Article 4 of the Agreement; see below section 5.B.iii.a. and note 29.

Council. The new and more complex formulations of competence, and the apparent overlap between those fields allowing for qualified majority voting (Article 2(1)), those areas subjected to unanimity (Article 2(3)), and those excluded altogether (Article 2(6)) will doubtless give rise to much debate when measures are proposed by the Commission.[22]

What is the relation of the new competences in the Agreement to the old competences in Articles 117–118B of the Treaty?[23] The Protocol and Agreement aim, in the words of the latter's preamble: 'to implement the 1989 Social Charter on the basis of the *acquis communautaire*'. I have elsewhere commented on the ambiguity of the 1989 Social Charter's objectives as regards consolidation vs development of social rights. In particular, it was noted that in the final draft of the Charter's Preamble a new clause was added: 'whereas the implementation of the Charter must not entail an extension of the Community's powers as defined by the Treaties'.[24] The Protocol and Agreement comprise a major extension of the Community's powers in the social field as regards the 11 Member States party to the Agreement. This implies the proposal of measures going beyond (hence 'without prejudice to') the present *acquis communautaire*, based on the powers in the EC Treaty to which that *acquis* was restricted, and henceforth engaging the new legal powers.[25]

Manfred Weiss has stated that the Agreement 'imposes an obligation upon the eleven signatory Member States to consider themselves bound by the Protocol, instead of Articles 117–121 of the Treaty'.[26] In my view,

22. A notorious example was the Commission's Social Charter Action Programme proposal on 'atypical workers', ultimately divided into three separate proposals, each with its own legal basis and voting procedure.

23. The recital to the Protocol stipulates: 'that this Protocol and the said Agreement are without prejudice to the provisions of this Treaty, particularly those relating to social policy which constitute an integral part of the *acquis communautaire*'. 'This Treaty' refers to the Treaty on European Union, which makes only one change to the relevant parts of the EC Treaty (Articles 117–121): Article G(33) replacing the first subparagraph of Article 118a(2).

24. B. Bercusson, 'The European Community's Charter of Fundamental Social Rights of Workers', (1990) 53 *MLR* 624 at 625.

25. As put in the Maastricht Treaty's Article B on the objectives of the Union: 'to maintain in full the *acquis communautaire* and build on it ...'. Article C again refers to 'respecting and building upon the *acquis communautaire*'. Fitzpatrick notes the potential problem of reconciling existing Directives with amendments to them approved under the Agreement. 'Community Social Law after Maastricht', (1992) 21 *ILJ* 199, at p. 204. The recent amendment of the Collective Dismissals Directive, the first such change to a Community labour law, is not a violation of the *acquis communautaire*.

26. M. Weiss, 'The significance of Maastricht for EC social policy', (1992) *International Journal of Comparative Labour Law and Industrial Relations* (Spring) 3 at p. 6.

this can mean two things. First, that if the 11 Member States wish to adopt a social policy, they are now *obliged* to pursue the new Agreement *whenever* the old framework fails (either on grounds of alleged lack of competence or voting requirements (UK veto)). Secondly, if they wish to adopt a social policy, they are *precluded* from approving proposals narrowly conceived within the old framework, but *must* pursue the new competences. If these are consistent with the old framework, the UK may participate. If not, the Agreement of the 11 applies.

Like the Community Charter of 1989, the Agreement should be regarded not only as a legal, but also as a political document.[27] It not only defines the new scope of Community social policy, *more important*, it directs the Commission to produce proposals to implement the new competences.

It is not only a legal question of what the competences of the 11 v 12 Member States are in social policy. In practice, the crucial issue is the *Commission's* role. Social policy proposals can be conceived in either the old or the new framework of competences. The question is whether the Commission is *able* to continue in the old pattern or is *obliged* to operate a new social policy within the framework of the new competences.

At least three options exist. The Commission could, first, use the Agreement to promote previous proposals which failed to achieve requisite majority/unanimity. Secondly, it could re-draft old proposals to fit in with the new parameters between majority/unanimity. For example, an old proposal vetoed by the UK, or confronted by a majority vote including the UK, could be redrafted to achieve requisite unanimity or a sufficient majority of the 11 Member States under the Agreement. Thirdly, it could draft new proposals in light of the new competences of the Agreement.

In my view, the key is the *scope* of proposals (their approval is secondary as the UK may or may not vote depending on the scope). Are they to be *formulated* in light of the Agreement or the old framework of competences? Is it satisfactory for the Agreement to constitute only the fall-back competences when the old framework fails because of the UK

27. B. Bercusson, op. cit., note 24.

veto? A more positive vision would be for the Commission to work from the new conception of social policy. In this *political* rather than legal sense, it is not so much that the Agreement obliges the Member States, as that it obliges the *Commission* to operate within a new framework.

The position of the Commission probably depends, in part, on the status of the Agreement in EC law. If it is *not* EC law, the answer is simplest: the new competences are outside the Treaty. If it *is* EC law, the alternatives seem to be:

(a) They *replace* the Treaty provisions – but, presumably, only so far as the 11 Member States are concerned.

(b) They are *additional* to the Treaty – but, again, only so far as the 11 Member States are concerned. This has the disadvantage that it involves overlaps between new and old competences; also, perhaps, contradictions, in addition to those already inherent within Article 2, between paras 2 (majority) and 3 (unanimity).

(c) They *both* replace *and* are additional. For the 11, the Agreement *replaces* the old Treaty provisions as the basis for social policy. But where there are *overlaps*, they are (for the 11) *additional* to the old Treaty provisions. As far as the overlapping area is concerned, proposals may be made involving the UK. These proposals fit under *both* rubrics: the old Treaty provisions and the Agreement. Voting can take place with a number of consequences:
   (i) unanimity – all 12 are bound;
   (ii) qualified majority – if available under the old provisions, it will bind all 12;
   (iii) if qualified majority is not available under the 12, then it may be upheld on unanimity or qualified majority voting among the 11.

This has the procedural consequence that *two* legal bases (the old Treaty provisions and the Agreement) will be invoked when voting on the same proposal. The ultimate legal basis will depend on the result of the voting.

A determining role may be played by the social partners. Under the Maastricht Agreement, they have the right to be consulted and, if they wish, to request that agreement be sought on the issue by way of social

dialogue (Articles 3(4) and 4). These rights only operate in the case of social policy proposals under the new competences. Since the Commission has the duty to promote social dialogue (Article 3(1)), there is an implication that the new competences – allowing for social dialogue – should be used. Indeed, the question arises whether the social partners could challenge proposals under the old legal basis (the EC Treaty provisions) as excluding them unnecessarily.[28]

The substantive content of the policy, under whatever framework of competences, is to be achieved. But at which level is the requisite action to be taken to achieve the policy? This is to be determined in accordance with the principle of subsidiarity.

3. Subsidiarity

The subsidiarity principle was the subject of explicit elaboration in the Union Treaty agreed at Maastricht, though this does not mean it has necessarily been clarified: (Article 3B)

> The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
>
> In the areas which do not fall within its exclusive jurisdiction, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar 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 principle of subsidiarity only applies when the Community and Member States *both* have competence. The question is which of the two (Community or Member States) is to exercise the competence. As defined in Article 3B of the Treaty on European Union, there are *two*

28. Could the UK similarly complain if the new competences were used, thereby excluding it? I would submit that the answer is no: the UK always has the possibility of 'opting-in'.

conditions for Community action: first, *insufficient* achievement by Member States of the objectives of the proposed action; *and*, secondly, *better* achievement by the Community by reason of the scale or effects of the proposed action.

The issue is to be posed in *relative* terms: which level is *better* (as in '... cannot be sufficiently achieved by the Member States and can ... be better achieved by the Community'). The Community could argue Member State insufficiency, and the Member States could argue that the Community is no better (or worse). This raises the difficult question of which *criteria and standards* to adopt to assess sufficiency. The allocation of competences depends on a reliable assessment of relative sufficiency. The terms of the assessment are critical; in particular, what is the role of economic or other criteria and standards?

The debate over subsidiarity is likely to be influenced by the European Economic Community logic of economic rather than political (let alone social) union. Exclusivity/competences is the language of legal/political union. Efficiency (sufficiently achieved) and scale and effects are the language of economic union. The ambiguity is apparent in the (slippery) terms in which the debate has been conducted: (political-social) objections to centralization are dressed up in (economic) terminology of efficiency. But schools of economics include political and social considerations to varying extents. The neo-classical school of economics which underlies the old conception of the European Economic Community is unlikely to be sustainable in the context of the Treaty on European Union.

On the other hand, efficiency may have to be weighed against fundamental constitutional principles of Member States which include other values. For example, in the specific context of the application of the principle of subsidiarity to the question of whether the social partners at the EC or at Member State level should take action, or whether it should be the Community or the Member States themselves, the principle of the autonomy of the social partners, at Community level as well as at Member State level, should be brought into the equation. 'Efficiency' might dictate EC or Member State action, but longstanding hegemony of the social partners, at one or other levels of bargaining,

over certain policy areas may dictate leaving it to management and labour to settle the substance of EC social policy in that area.[29]

Subsidiarity being a relative test as between levels, if, for example, the social partners are unable to adopt measures as a result of the intransigence of one side, this will be a sign that the competence may be exercised at a different level. Similarly, if the Community is unable to adopt measures due to majority or unanimous voting requirements, competence should be exercised by the social partners at the 'better' level.

There is a further point. I believe the subsidiarity principle has been misconceived as implying an allocation of powers to *either* a higher or lower level. The test of relative sufficiency indicates that it is not a question of exclusive allocation. Instead, deciding which level is *better* implies that *both* have something to contribute. Though one may be better *overall*, the other may be more advantageous *in some respects*. The solution might be to use the subsidiarity principle to delineate the respective advantages of *each* level and promote *cooperation* between them, rather than assign exclusive jurisdiction to one or the other. *Within* the relevant field of competence, different levels can coordinate their action. This is a familiar problem in labour law and industrial relations: the relative roles of legislation and collective bargaining in regulating different policy areas.

This ties up with the problem of criteria and standards for efficiency. The allocation of competences, particularly if cooperation/interdependence rather than exclusivity is the objective, depends on a reliable assessment of relative sufficiency, a concept which should be expanded beyond its narrow economic confines. More than ever it becomes clear that a court of law is ill-equipped to deal with the issue.

The problem of subsidiarity becomes, therefore, one of practical application. What are the procedures and institutional structures appropriate for resolving conflicts over which level or levels take action?

29. A practical illustration of this principle may underlie the exclusion of competence on the right of association and the right to strike in Article 2(6) of the Agreement. However, there is an argument (see below) as to the social partners retaining competence on this issue to make 'agreements ... at EC level (which) shall be implemented' (Article 4(2)). Article 2(3) of the Agreement still grants some competence for the EC institutions on matters of 'representation and collective defence of the interests of workers and employers'.

What may be required is a body which could adjudicate, mediate, arbitrate, report or whatever in an effort to unfreeze any stalemate, and, more importantly, give guidance aimed at coordination of cooperative action at different levels. Labour law and industrial relations dispute resolution machinery in Member States provides a reservoir of experience.

The Agreement invites the exploitation of this experience precisely because it makes explicit the use of collective bargaining – at EC level and within Member States – in the formulation and implementation of Community social law.

4. Collective bargaining and implementation of Community labour law – after Maastricht

The first Dutch Presidency draft proposed a new Article 118 which provided in para 4:[30]

> A Member State may entrust management and labour with the implementation of all or part of the measures which it has laid down in order to implement the directives adopted in accordance with paragraphs 2 and 3.

It did not seem clear that the social partners were to be entrusted with implementation of directives *directly*. Rather, the *Member State* lays down measures to implement directives, and it is the implementation of *these* measures which may be entrusted to labour and management. I would argue that this first draft was *not* an accurate rendering of the jurisprudence of the European Court.[31]

In *Commission of the European Communities v the Kingdom of Denmark,* the Danish government's position was explicitly that collective agreements were its choice of form and method for implementation of the obligations of Council Directive 75/117 on equal pay.[32] It was argued that the Danish legislation was but a secondary guarantee of the

30. *Europe Documents* No. 1734, 3 October 1991.

31. An interpretation of the draft as limiting the capacity of the social partners to implement directly EC directives might have been challenged as an infringement of the *acquis communautaire.*

32. Case 143/83, (1985) *ECR* 427.

equality principle in the event that this principle was not guaranteed by collective agreements. An agreement of 1971 made such provision and covered most employment relations in Denmark.[33] The Court held: 'that Member States may leave the implementation of the principle of equal pay in the first instance to representatives of management and labour'.[34] The Court re-affirmed this principle in a second case involving Italy, *Commission of the European Communities v the Italian Republic*, when implementation of Directive 77/187 was at issue.[35]

In light of this jurisprudence, and the Charter and subsequent directives (proposed and approved)[36] it appeared that the proposed new Article 118(4) provided for *State measures* to *delegate* to the social partners the task of implementation, *not* of directives, but of State measures implementing directives. In my view, however, the jurisprudence authorizes the social partners directly and independently of State measures to implement directives through collective agreements. The State measures necessary only regard backup provision where agreements are inadequate.

That this is so may be evidenced from the provision which replaced the Dutch Presidency's first draft. The sequence of events is important. This first draft was rejected by the Member States as a basis for negotiations at the Maastricht Summit. In the interval between this and the second draft, presented by the Dutch presidency on 8 November,[37] the ETUC, UNICE and CEEP[38] produced their Accord of 31 October 1991, including a redrafted Article 118(4):

> On a joint request by the social partners, a Member State may entrust them with the implementation of the directives prepared on the basis of paragraphs 2 and 3.

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33. *Ibid*., p. 434, para 7.
34. *Ibid*., pp. 434–435, para 8.
35. Case 235/84, (1986) *ECR* 2291.
36. Community Charter, Article 27; Proposal for a Council Directive on certain employment relationships with regard to distortions of competition, Article 6; COM(90) 228 final – SYN 289, Brussels, 13 August 1990; Proposal for a Council Directive concerning certain aspects of the organization of working time, Article 14; COM(90) 317 final – SYN 295, 20 September 1990; Council Directive 91/533 of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, Article 9(1). OJ 1991 L288/32.
37. *Europe Documents* No. 1746/1747, 20 November 1991.
38. The European Trade Union Confederation, the *Union des confédérations de l'industrie et des employeurs d'Europe* and the *Centre européen de l'entreprise publique.*

In this case, it shall ensure that, by the date of entry into force of a directive at the latest, the social partners have set up the necessary provisions by agreement, the Member State concerned being required to take any necessary provisions enabling it to guarantee the results imposed by the directive.

The substance of this provision became the text of the second Draft of the Dutch presidency, which was rejected by the UK. It was adopted by the 11 Member States in their Agreement comprising Annex IV of the Treaty concluded at Maastricht and is now Article 2(4) (proposed revision of Article 118(4)) of the Agreement attached to the Treaty on European Union. It reads:

> 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 that 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 measures by agreements, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive.

There is no mention of *State* measures; *direct* implementation of directives by management and labour is the issue.

It should be noted that the ETUC/UNICE/CEEP Accord specified that 'the social partners' were to be entrusted with the implementation of directives. It is not clear whether 'management and labour' signifies a wider choice of representatives of employers and workers, and also of levels of representation, than would be the case if 'social partners' had been the term used. This becomes particularly important since Member States cannot impose the burden upon social partners; it must be at their joint request. This can create problems where there are multiple parties: divided union movements or multiple employer associations.

Delegation of implementation to management and labour presumes a level of collective bargaining (national, regional, enterprise) appropriate for this type of implementation. The result could range from peak organizations requesting block exemption for whole industries (or even

multi-industry agreements), to enterprises and works councils requesting authority to implement the directive in their workplaces. The Member State is not obliged to allow this. But one prospect is of legislation flexibly allowing the social partners (but query: (i) what are appropriate levels; (ii) who are the eligible social partners) to opt out of State regulation by substituting a collective agreement, providing this guarantees the results imposed by the directive.[39]

This is the end result of the long process whereby first individual Member States, then the European Court, then the eleven Member States in Article 27 of the Community Charter, then the Commission in proposed, and the Council in approved directives and now the Maastricht Agreement – all have formally recognized the role of collective bargaining in the implementation of Community labour law.

5. Participation of the social partners in the formulation of EC labour law

A. Consultation

The Dutch Presidency's first draft provided formal recognition of what was already the practice at EC level. The proposed new Article 118A provided:

> Before submitting proposals in the social policy field, the Commission shall consult management and labour on the advisability of Community action.

This, I suggest, also reflects on the subsidiarity principle, requiring consideration not only of the advisability of the *substance* of Community action, but also of the appropriate *level* of implementation.

39. Such a provision is proposed in the Commission's initial proposal for a Council Directive concerning certain aspects of the organization of working time, Article 12(3); COM(90) 317 final – SYN 295, Brussels, 20 September 1990; text in *EIRR* No. 202, November 1990, p. 27. It was retained in the second draft of the proposal (text in *EIRR* No. 210, July 1991, p. 27). The final text agreed in the common position adopted by the Council on 2 June 1993 is more complex, reflecting differences among the Member States; see *Agence Europe*, No. 5991, 2 June 1993, pp. 7–8.

More significant was the proposal which was not in the Dutch Presidency's first draft, but the second draft, which adopted an amended text of Article 118A agreed by the ETUC/UNICE/CEEP. The substance (and virtually the identical wording) of the text formulated by the social partners became Article 3, paras 2–4 of the Agreement. The final text of the Agreement is as follows:

> 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.
>
> 4. 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.

One change appears in the Agreement from the text produced by the social partners. This was introduced by the Dutch Presidency and requires Commission consent to a prolongation beyond 9 months of the independent procedure of the social partners.

However, it should be noted that a second change emerged in the Dutch Presidency's second draft, which does *not* appear in the text of the Union Treaty signed in Maastricht on 7 February 1992. The Treaty, following the wording in the social partners' Accord, provides that the second consultation of the Commission with the social partners is to be 'on the *content* of the envisaged proposal'. However, the Dutch Presidency's second draft *and*, astonishingly, the Agreement made at Maastricht on 9–10 December 1991, both provided for this second consultation to be 'on the envisaged proposal'.

Comparison of the texts casts some light on their meaning. Consultations limited to 'the content of the envisaged proposal' might be interpreted as excluding, for example, issues to do with the appropriate legal basis,

or even implementation procedures as opposed to 'substantive' content. Consultations 'on the envisaged proposal' might have been limited to whether a proposal should be made, and not its substantive content. The original wording of the social partners requiring consultation 'on the content of the envisaged proposal' was restored in the final Treaty. However, it is unlikely that this change will affect the practice of the Commission's consultation procedure.

B. Negotiation

The procedure referred to in Article 3(4) of the Agreement (the re-drafted Article 118A(4)), is the subject of Article 4 (the re-drafted Article 118B):

> 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 provisions relating to one of the areas referred to in Article 2(3), in which case it shall act unanimously.

(i) The process of social dialogue at EC level: 'bargaining in the shadow of the law'

Since 1985, the Commission has stressed that negotiations between employers' and workers' organizations at Community level were a cornerstone of the European social area which goes hand in hand with the creation of the single European market.[40] These negotiations have come to be known as the 'European social dialogue'.

40. It was thus stated by Jacques Delors in presenting the Commission's programme to Parliament in January 1985. Commission of the EC, *Joint Opinions*, European Social Dialogue Documentary Series, 'Introduction', p. 19.

Collective bargaining/social dialogue *within* Member States is regarded as reflecting a balance of power between labour and capital, exercised traditionally through the weapons of industrial conflict. The Maastricht Agreement does not address even the possibility of industrial conflict at European level. Indeed, Article 2(6) seems explicitly to withhold regulatory competences which would be most relevant.

The logic to this auto-exclusion is, perhaps, that the current state of Community level social dialogue is qualitatively different in that the normal means of pressure – strikes – are not (yet) operational at Community level. The present prospect of the Community social dialogue implies rather a tripartite process – involving the social partners and the Commission/Community as a dynamic factor. This is the scenario I have elsewhere described as 'bargaining in the shadow of the law'.[41]

This prospect arises out of a major ambiguity as to the timing of the initiation of the process of social dialogue during the Commission's consultations. Article 3(4) simply states that the process may be initiated by the social partners 'on the occasion of such consultation'. The question is: *which* consultation of the two envisaged by Article 3 – before, and/or after the Commission produces its envisaged proposal?

Each possibility has implications for the bargaining tactics of the social partners at Community level. In both cases there occurs a familiar situation of 'bargaining in the shadow of the law'. If the procedure may be initiated at the stage of consultations when only 'the possible direction of Community action' is being considered, but *before* the Commission presents its envisaged proposal, the parties have to assess whether the result of their bargaining will be more advantageous than the unknown content of the Community action. There will be pressures on the social partners to negotiate and agree to avoid an imposed standard which pre-empts their autonomy, and which may be also a less desirable result.

This incentive is lost if the procedure may be initiated only at the stage of consultations *after* the Commission presents its envisaged proposal. The parties may be more or less content with the proposal. They may

41. *Op. cit.*, note 1, from which the next three paragraphs and footnote 42 are taken.

still judge that the result of further bargaining would be more advantageous than the known content of the proposed Community action, taking into account the possible amendment of the Commission proposal as it goes through the Community institutions. The side *less* satisfied with the envisaged proposal will have an incentive to negotiate and agree to a different standard. The side *more* contented may still see advantages in a different agreed standard. The social partners are often able and willing to negotiate derogations from specified standards which allow for flexibility and offer advantages to both sides.[42]

The possibility is not excluded that the procedure may be initiated at *either* occasion of consultation – before and/or after the proposal. This would allow for negotiations aimed at pre-empting a proposal; or, if these do not take place, or fail, negotiations allowing for agreed derogations and flexibility.

The tactics involved may be illustrated by a hypothetical case: the Commission, in accordance with Article 3(2) of the Agreement (Article 118A(2)), consults the social partners on the possible direction of Community action regarding a specific aspect of working conditions. The assumption of the case (which I believe reflects the position to date) is that such action is desired by the ETUC – which is willing to negotiate an agreement – and less so by UNICE (though here, as elsewhere, the agglomeration of national interests in each of the social partners at Community level is assumed to be capable of generating a single view).

UNICE may judge that the Commission proposal is likely to set a standard too high and/or too rigid. In this case it will have an incentive to pre-empt this result by agreeing to initiate the procedure under Article 3(4) (Article 118A(4)). Alternatively, UNICE may judge that the Commission proposal is likely to set a standard tolerably low and/or flexible. There will be less incentive to agree to initiate the procedure at this stage. But UNICE might still prefer to avoid any risk by initiating the procedure and trying to avoid the Commission proposing a standard.

42. Indeed, the negotiation of the Accord which led to the insertion of these provisions into the Maastricht Protocol Agreement can be invoked as a concrete example of the process in action. The combination of expansion of competences and extension of qualified majority voting proposed in the Dutch Presidency's first draft was sufficient to induce UNICE/CEEP to agree to a procedure allowing for pre-emption of what threatened to be Community regulatory standards in a wide range of social policy areas.

If UNICE waits until the Commission produces its envisaged proposal, two scenarios emerge. First, the proposal is too high and/or too rigid. In this case UNICE will have an incentive to avoid this result by agreeing to initiate the procedure under Article 3(4) (Article 118A(4)). However, it does so from a weakened position, since the Commission proposal becomes a probable minimum standard. In the second scenario, the proposal is tolerably low and/or flexible. There will be less incentive for UNICE to agree to initiate the procedure, but negotiations may still be desirable to increase flexibility or allow for derogations.

Given what I believe to be the current positions of the social partners at Community level, the prospects of and incentives for negotiation and agreement are greater the *higher* the social policy standard espoused by the Commission.

The argument is that it is for the Commission to give a clear signal that the factor breaking any deadlock in bargaining will not be the classic weapons of class struggle as evident in national contexts, but the stimulus of Commission activity in the form of proposals for social legislation. This imposes a heavy burden of responsibility on the Commission. But this has been so ever since it launched the European social dialogue through the Val Duchesse initiative in 1985. The Commission's initiative was crucial to the achievement of the Accord reached by the social partners on 31 October 1991 and incorporated into the Maastricht Agreement. It is by further such initiatives that the European social dialogue will continue to develop.

(ii) 'Agreements concluded at Community level'

The obligatory pre-emption, if any,[43] by the social partners of Community labour law does not take effect at the point of initiation or for the duration of the procedure. It is as regards the successful outcome of the procedure – 'agreements concluded at Community level' – that the potentially obligatory nature of the procedure emerges.

43. It is not clear whether the Commission is precluded from pursuing its original social policy proposal even when informed by management and labour of their wish to initiate the process under Article 4 which may culminate in an agreement. The 9-month duration (which may be extended) does not explicitly preclude a parallel process of social policy formulation by the Commission. It might even be that such a '[two]-track' process would impart a certain dynamism to both Commission and social partners.

The debate over the potential of European social dialogue which has taken place since the first meetings between the social partners at Val Duchesse in 1985 has posited four types of 'European agreement':

(a) an inter-confederal/inter-sectoral agreement between the social partners organized at European level (ETUC/UNICE/CEEP);

(b) a European industry/sectoral/branch agreement between social partners organized on an industry/sectoral/branch level;

(c) an agreement with a multinational enterprise having affiliates in more than one Member State;

(d) an agreement covering more than one Member State.

To define the phrase 'agreements concluded at Community level' in Article 4(2) in restrictive terms of geography or of actors seems counter-productive. For example, if the UK does not adhere to the Agreement, 'Community level' agreements may well engage the organizations of British employers and trade unions members of the ETUC and UNICE, but not the Member State in which these agreements are to be applied.

If the phrase 'agreements concluded at Community level' were taken to require that agreements must engage all and only Member State organizations of workers and employers, this could eliminate all the four types of agreements mentioned above as possibly emerging from the European social dialogue. The first two because the social partners at European level are not organized so as to include exclusively organizations of workers and employers of Community Member States. Non-Member State organizations are included, and some organizations within Member States are not included. The last two because the enterprises and regions concerned do not include all Member States.

The 'Community' dimension of 'agreements concluded at Community level' is considerably diluted by the potentially paradoxical fact that, in contrast to the limitations imposed, by restricted competences and voting procedures on organs of the Community, such agreements are not subject to any explicit restriction either as to content or to majority

or unanimous voting. Nor do the procedures of reaching agreements entail the direct involvement of Community institutions.[44] The European social dialogue is not formally dependent on Community law, whatever benefits it may derive from use of the Community legal framework.[45]

The conclusion proposed is that the phrase 'agreements concluded at Community level' can be understood in terms of the European social dialogue as carried on since 1985. Therefore, at the least, agreements emerging from the European social dialogue should be deemed to fall within the meaning of the phrase. But, in addition, other agreements with a European Community element (geographical, actors) may also be eligible for inclusion within the framework of Article 4(2).

(iii) Implementation of 'agreements concluded at Community level'

Once an agreement has been concluded at Community level, there are two methods of implementing the agreement reached.[46]

(a) National practices and procedures

The first is 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 ...' (Article 4(2)). It should be noted that the reference to management and labour is supplemented by '*and* the Member States'. It seems from this formulation that some degree of obligation is imposed directly on Member States by the word 'shall'. One question is: if such implementation is obligatory, how does such an obligation operate?

One possibility is that the Member States are obliged to develop formal machinery of articulation of national standards with those laid down in the agreements or to use existing machinery of articulation. Alternatively, given the nature of the authors of the standards (Community level organizations of employers and workers), the procedures and practices

44. At a time when assertions are frequent as to the democratic deficit of measures adopted by Community institutions, this raises important questions of the legitimacy of such agreements. As to the democratic legitimacy of neo-corporatist outcomes, see P.C. Schmitter, *Democratic Theory and Neo-Corporatist Practice*, EUI Working Paper No. 74, 1983.

45. It may be argued that the Accord, reached by ETUC/UNICE/CEEP and later incorporated more or less completely into the Maastricht Agreement could have survived the failure of the Member States to ratify the Treaty on European Union. However, the utility of the Accord after such a failure would have been much less of a practical prospect.

46. The following paragraphs develop the views initially canvassed in an earlier article, *op. cit.*, note 1.

specific to each Member State may consist of mechanisms of articulation of Community agreements with collective bargaining in the Member State concerned. Member States are not obliged to create such mechanisms, but national law may not interfere with such mechanisms which already exist, or which may be created by the social partners within the Member State to deal with the new development at Community level. This possibility of a process of articulation of 'agreements concluded at Community level' with 'procedures and practices specific to management and labour' does not detract from the significance of the following words: '*and* the Member States ...'. This may be a reflection of the jurisprudence of the European Court of Justice concerned with implementation of Community instruments through collective bargaining, now encapsulated in Article 2(4) of the Agreement.

The extent of Member State obligations is the subject of a Declaration, on Article 4(2), attached to the Maastricht Treaty Agreement. It states that this method of implementing EC-level agreements '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'. The fragile legal quality of such Declarations may be emphasized.[47] Further, 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. This is an unusual twist to the doctrine of 'inderogability' to be found in some Member States. That doctrine precludes individual employment contracts derogating from collective agreements, or, exceptionally, authorizes collective agreements to derogate from legislative standards. Here, the doctrine would be invoked to preclude Member State legislation inhibiting articulation of agreements within Member States with EC-level agreements.[48]

Implementation is particularly affected by the possibility that agreements may be reached without the direct involvement of Community institutions, and are not subject to any explicit restriction either as to content or to majority or unanimous voting. One question is whether there is an obligation to implement agreements reached outside

47. See the comments in B. Bercusson, *op. cit.*, note 1, at pp. 187–88.

48. For a discussion of the doctrine, see Lord Wedderburn, 'Inderogabitity, Collective Agreements and Community Law', (1992) 24 *IU* 245.

Community competence. The answer requires clarification of the meaning of Community competence.

For example, what is the position of agreements reached which are opposed by sufficient Member States to block approval had they been presented to the Council under either majority or unanimous voting requirements. It may be argued that voting requirements do not affect the agreement, as it has been reached in another forum authorized by the 11 Member States. If so, the Member States have authorized agreements outside the formal scope of Community competence in the sense that the agreement is at odds with the procedural requirements requiring unanimity or a specific majority for the exercise of the competence in question,

A double set of Community competences emerges: first, the new competences envisaged by the Agreement applicable to the measures adopted by Community institutions; but also, second, a different set of competences allotted to the social partners, and carrying with it the obligation to implement 'agreements concluded at Community level'. These latter would thus fall within the scope of Community law, with all the enforcement implications canvassed above.

This proposition is argued on the basis of the Agreement's adoption of extraordinary new procedures for the development of Community law, restricting the direct participation of Community institutions, and, in particular, rendering inapplicable the consequent restrictive voting requirements closely tied to specific areas of competence. This new approach to formulating Community labour law may imply that the detailed limits on competences carefully attached to the old institutions and procedures are not necessarily to be carried over to the new institutions and procedures.

For example, Article 2(2) of the Agreement provides that the Council may adopt directives by qualified majority vote as regards the fields specified in Article 2(1), but must act unanimously as regards the areas specified in Article 2(3). But, as per Article 2(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. (emphasis added)

The question is whether this exclusion of competences as regards the procedures in *Article 2* applies to the radically different procedures laid down in *Articles 3 and 4*. If not, by implication, under *Article* 3, the Commission *may* make a proposal in a social policy field specified in Article 2(6) which, under Article 3(4), is then taken up by management and labour, with the possible result of an agreement on the subject at Community level (Article 4(1)) which 'shall be implemented' in one of the ways specified in Article 4(2). This difference in potential competences may be understood because of the particular delicacy of the matters listed in Article 2(6) touching, as they do, upon the area of the autonomy of the social partners (right of association, the rights to strike or impose lock-outs) and the most central of collective bargaining subjects (pay).

If it is possible to justify and understand this difference between Community competences for procedures involving the Commission, Council and Parliament on the one hand, and competences for procedures involving the Commission, management and labour on the other, then it may be that the competences listed generally in Article 2 are *not* to limit the potential of the social dialogue procedure prescribed in Articles 3 and 4.

To summarize: the starting point is Article 1, which specifies the social policy objectives, and hence competences, of the Community and the Member States in very general terms. Article 2 then lays down certain procedures for achieving such objectives by the usual procedure of Council directives – specifying some of the competences for qualified majority voting, unanimity for others, and excluding still others.

Article 3(2) simply provides for Commission proposals 'in the social policy field' which may be taken up by management and labour in the new procedure of social dialogue. These proposals may go beyond those specified in Article 2, though still within the Community competences specified in Article 1.

Member State obligations to implement agreements at Community level within those competences flow from Article 4(2).[49] Finally, it is

49. Also, Article 5 of the Treaty: 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community'.

interesting to note that Article 4(2) provides for the second method of implementing agreements concluded at Community level – by a Council decision on a proposal from the Commission *'in matters covered by Article 2*' with a further paragraph specifying the voting requirements. This reinforces the argument that the range of competences in social policy reserved to the social partners is distinct from that of the Community institutions.

(b) Council decision

A second method is envisaged to implement Community level agreements at Member State level. The second paragraph of a revised Article 118B proposed in the first Draft of the Dutch Presidency provided:

> In matters falling within Article 118, where management and labour so desire, the Commission may submit proposals to transpose the agreements referred to in paragraph 1 into Community legislation. The Council shall act under the conditions laid down in Article 118.

Unlike paragraph 1, this makes implementation of agreements conditional on a Commission proposal. Moreover, unlike the obligation under the first paragraph to implement agreements, such a proposal of the Commission is made explicitly subject to the conditions of Article 118 as to competences and voting procedures.

The Commission's proposals are 'to transpose the agreements'. This seems expressly to limit the discretion of the Commission to change the content of the agreements reached. However, the nature of the Community legal instrument proposed is left to the Commission's discretion and the Council's action.

The ETUC/UNICE/CEEP accord altered this provision to implementation of: (proposed revision of Article 118B(2))

> Agreements concluded at Community level ... in matters covered by Article 118 (Article 2), at the joint request of the signatory parties, by a Council decision on a proposal from the Commission concerning the agreements as they have been concluded.

As with the Dutch Presidency's proposal, this makes implementation of agreements conditional on a Commission proposal. Again, such a proposal of the Commission is subject to conditions as to competences and voting

procedures. Finally, while the word 'transpose' is deleted, its substance is retained by the requirement that agreements be implemented 'as they have been concluded'.

The final version adopted as Article 4(2) of the Agreement annexed to the Protocol on Social Policy incorporated the text agreed by the social partners with the exception of the provision agreed by the ETUC/UNICE/CEEP that the Commission proposal and Council decision must adopt the agreements reached by the social partners '... as they have been concluded'. This seems to open the way for the Commission possibly to change the content of the agreements. It is contested whether this is so. After all, the wording still is: 'Agreements ... shall be implemented ... on a proposal from the Commission'. The ambiguity remains a crucial one: how much are the Member States and the Commission entitled to vary the agreements reached at EC level?

Another critical issue is the nature of the instrument to be used to implement the agreement. The first draft of the Dutch Presidency left it to the discretion of the Commission and Council to determine the appropriate instrument. The ETUC/UNICE/CEEP accord and the final Agreement refer to a 'proposal from the Commission' and 'a Council decision'.

A Council Decision is one of the specific instruments of Community legislation listed in Article 189. It is not clear whether the reference in Article 4(2) is to such an instrument, or rather reflects the Dutch Presidency's preference for the Commission and Council to have a choice of instruments. One indication, perhaps, is that the Agreement in its Danish version uses the term for 'arriving at a decision' *(ved en afgorelse)*, not the technical term to 'take decisions' *(ved besltninger)* used in Article 189.[50]

A possible choice of instruments to be decided upon by the Commission and Council is a much more flexible approach. It also avoids some of

50. I am grateful to Mr Tore Hakonsson, a researcher at the European University Institute, for providing this translation. The same point is made with reference to the German version by the European Trade Union Institute's Working Paper prepared for a conference in Luxembourg, 1–2 June 1992, *The European Dimensions of Collective Bargaining after Maastricht*, Working Documents, Brussels, 1992, at p. 104, para 19. The French and Italian versions, like the English, use the ambiguous term: Article 189: '*prennent des décisions*'; '*prendono decisioni*'; Agreement Article 4(2): '*une décision*'; '*una decisione*'.

the technical problems of utilizing a Decision which, under Articles 189–192, 'shall be binding in its entirety upon those to whom it is addressed', 'shall state the reasons on which they are based and shall refer to the proposals or opinions which were required to be obtained pursuant to this Treaty' and 'shall be notified to those to whom they are addressed and shall take effect upon notification'. Further, on the terms of Article 2(4) (revised Article 118(4)) of the Agreement, implementation may be entrusted to management and labour only of *directives*. Use of other instruments might preclude such articulation.

On the other hand, leaving it to Commission discretion and Council action to determine the instrument of implementation does leave open the possibility of their choosing non-legally binding instruments. This might be inconsistent with the intention of the social partners that their agreements should have legal effect. It would also contribute to an unequal application of agreements across Member States in some of which these agreements are or are not legally enforceable. Whatever the technical problems, a Decision would, given a sufficiently broad definition of a class of addressees, resolve some of the problems of general application and enforcement of agreements.

A further change occurred in the wording in the December agreement. As proposed by the Dutch Presidency, the Council decision was to be taken 'under the conditions laid down in Article 118'. The Maastricht Agreement changed this: (Article 4(2), para 2)

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

Article 2(1) listed certain fields, proposals in which were, by virtue of Article 2(2), subject to majority voting. The agreements might: (a) cover only such areas; (b) cover areas neither within majority nor unanimous voting procedures i.e. not within the competence of EC institutions;[51] (c) cover only areas within the unanimous voting procedure; (d) cover areas which fell partly within more than one of the above ('one or more provisions ...' (mixed agreements)). Cases (a) and (c) seem clear. Case (b) is problematic as to whether a Council decision can be taken at all.

51. Though within that of the social partners, see discussion above.

Case (d) seems, under the final version of the Maastricht Agreement to subject 'mixed agreements' to unanimity.[52]

6. Conclusion

This article has explored three issues which arise from the attempt to understand the problems of interpretation and implementation of the Maastricht Agreement.

1. The legal nature of the Agreement and its consequences. The conclusion was that the Agreement is probably part of Community law, as are the likely outcomes of the Agreement (directives, decisions, EC-level collective agreements). The methods of enforcing Community law should be available for these instruments as well.

2. The scope of the new competences and majority voting. The conclusion was that the new competences probably replaced the Treaty of Rome for the 11 Member States, and that the Commission would play a key role depending on whether it accepted that it was now obliged to produce proposals based on these new competences.

3. Social dialogue and the role of subsidiarity. The conclusion was that social dialogue at EC level was characterized by its tripartite nature, and that the Commission could play a key role. The role of different levels in developing social policy was likely to be influenced by the principle of subsidiarity – understood as a measure of the relative sufficiency of actions by the Community or the social partners. The decision as to relative sufficiency is a highly political one, and requires the development of appropriate procedures and institutional structures.

52. A similar argument arose concerning the interpretation of Article 100A(2) of the Treaty of Rome (as amended by the Single European Act 1986). This subjects to unanimity proposals relating to the rights and interests of employed persons. It was argued that if the proposal related solely to such rights and interests, it was subject to unanimity. If it related only marginally to such rights and interests, it was eligible for majority voting, even though it also related to them. The problems arose when the proposal related to such rights and interests, but also to other matters. B. Bercusson, *op. cit.*, note 24 at pp. 633–34.

The European social dialogue thus emerges as a critical feature of Community social law and policy.[53] It is important to appreciate the novel features of this process and avoid the temptation to chart the future path of European social dialogue following national models, either in detail or even in some of their basic principles. These are the product of much reflection and experience which must be respected. But at the same time their application in a transnational context is quite new, and hence requires new thinking.

For example, the fundamental principle of the autonomy of the social partners is granted almost, if not literally, constitutional status in the legal orders of Member States. This is reflected in the Maastricht Agreement's respect for the requirement that the social partners' consent be obtained before their agreements can be transmuted into Community instruments. But once so transmuted, the need arises for enforcement of these instruments, a process which national experience has shown to present dangers to the autonomy of the social partners which challenge even the most experienced labour tribunals. Community institutions will have to respond to these challenges.

Again, the legitimacy of the agreements adopted will raise questions of the legitimacy of the social partners who through them develop fundamental social and economic rights. Decline in membership and proliferation of organizational forms seem to be among the dominant characteristics of Western European labour at the present.[54] The implications for the role of the social partners in the European social dialogue are not hard to perceive. They can be summarized by asking two questions: (a) what bodies or organizations claiming representativeness are to benefit from the rights granted by the Maastricht Agreement; and (b) what legal obligations and liabilities are to be imposed upon them?

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53. My Report for the Commission of October 1989 on *Fundamental Social and Economic Rights in the European Community* proposed that collective bargaining/the social dialogue in Member States and transnationally should be the primary instrument for developing and implementing fundamental social and economic rights in the EC. A. Cassese et al., *Human Rights in the European Community: Methods of Protection*, Baden-Baden: Nomos Verlag, 1991, p. 185 at pp. 287–289.

54. B. Bercusson, 'Europäisches und nationales Arbeitsrecht – Die gegenwartige Situation' (1991) 5 *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* 1, at pp. 20–29.

Traditionally, labour law has been much concerned with the external relations of the actors involved in industrial relations, specifically with their relations to each other through collective bargaining. Increasingly, however, labour law has been forced to grapple with the issue of internal constitutional structures, particularly of the new and changing actors emerging. It is worth recalling the prediction of Simitis that the 'third generation' of labour law would be concerned with this issue.[55]

These questions become of the first importance if the process creating Community social policy and law by-passes existing institutions, such as the European Parliament and the Economic and Social Committee, and is based instead upon trade union and employer confederations organized at Community level. All the more so if the legal consequences of their activities extend beyond the existing membership of trade unions and employers' associations.[56]

55. S. Simitis, 'Juridification of Labor Relations', in G. Teubner (ed.), *Juridification of Social Spheres*, Berlin and New York: De Gruyter, 1987, 113 at pp. 142–43.

56. For an attempt to explore these possibilities, see B. Bercusson, 'European labour law and sectoral bargaining', (1993) 24 *Industrial Relations Journal* (December) 257.

The EU Charter of Fundamental Rights 2000 and trade union rights

Brian Bercusson (2002) *

1. Origins and context of the EU Charter**

A working group entitled the 'Convention', comprising representatives of three groups: the member state governments (15), the European Parliament (16), national parliaments (30) and the Commission (1), was appointed by the Cologne European Council of June 1999 to formulate an EU Charter of Fundamental Rights and Freedoms, to be presented to the European Council in Nice in December 2000 (European Council 1999: 44–45 and Annex IV). On the basis of this draft document, it was intended that the European Parliament, Commission and Council would proclaim a European Charter of Fundamental Rights. It was left to the Nice European Council to decide whether and, if so, how the Charter should be integrated into the Treaties.

The EU Charter of Fundamental Rights was formally adopted as a political declaration by the member states of the European Union meeting under the French presidency in the European Council at Nice in December 2000. It is important to analyse the political, economic, institutional and legal context in which the EU Charter emerged.[1]

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* 'The EU Charter of Fundamental Rights 2000 and trade union rights', Brian Bercusson (2002). This article was first published in E. Gabaglio and R. Hoffmann (eds.), *European trade union yearbook 2001*, Brussels: ETUI, 55–80.

** This paper derives much of its inspiration from the work of the Research Group on Transnational Trade Union Rights, and the steady and constructive support of Reiner Hoffmann, the Director of the ETUI. The members of the group should claim any of its merits, but are not responsible for any of its deficiencies. I am grateful to Thomas Blanke, Niklas Bruun, Stefan Clauwaert, Patrick Humblet, Antoine Jacobs, Csilla Kollonay-Lechoczky, Yota Kravaritou, Ulrich Mückenberger, Antonio Ojeda-Aviles, Bruno Veneziani and Christophe Vigneau.

1. The following draws on the introduction to Mückenberger(2001).

1.1. Political context

The political context was one in which an Intergovernmental Conference (IGC) was charged with preparing an agenda for the Nice European Council of December 2000. The priorities of the IGC, endlessly debated in the member states, included enlargement (the procedures for application and admission of new member states), institutional reform (to reform voting in the Council, the number and distribution of members of the Commission, the case load of the European Court and the composition of the European Parliament) and common security and defence policy (the management of military and non-military crises).

What was striking about the work of the IGC was the absence of a social agenda or priorities. Arguably, the failure to incorporate a social policy dimension into the IGC agenda endangered the enlargement of the EU, undermined institutional reforms and threatened the security of Europe. The initiative to formulate an EU Charter of Fundamental Rights, therefore, was one part of the political response to an awareness that the IGC agenda, and the member states, had failed to address social policy issues.

1.2. Economic context

The economic context of the EU Charter can be appreciated by recalling the Presidency Conclusions of the Lisbon European Council of 23–24 March 2000, which began with the heading: 'Employment, Economic Reform and Social Cohesion'. The Council laid down an 'overall strategy' which aimed at 'modernising the European social model, investing in people and combating social exclusion' (paragraph 5). In particular: (paragraph 6)

'This strategy is designed to enable the Union to regain the conditions for full employment and to strengthen regional cohesion in the European Union. The European Council needs to set a goal for full employment in Europe in an emerging new society which is more adapted to the personal choices of women and men...

The Swedish Presidency hosted the first European Council in spring 2001, the task of which was to define relevant mandates on employment

policy and to seek to formulate a consensus on the objectives of the EES with respect to economic policy at national and Community levels. In the words of the conclusions of the Lisbon summit, 'to ensure more coherent strategic direction and effective monitoring of progress.' (European Council 2000)

One question is whether and how the fundamental rights embodied in the EU Charter could affect the future economic and social policy agenda of the EU in general, and, in light of the emphasis on employment policy, the substantive content of the European employment strategy (EES) in particular.

1.3. Institutional context

The institutional context of the EU Charter includes the institutional structure specific to the EES: the 'open method of co-ordination (sometimes called the 'Luxembourg process'), which is encapsulated in Article 128 of the Employment Title of EC Treaty: annual Guidelines, national action plans, review, report and recommendations. Specifically, the social partners are called upon to play a major role in the 'Luxembourg process' of the EES: 'The social partners need to be more closely involved in drawing up, implementing and following up the appropriate guidelines' (European Council 2000: para. 28). This was reinforced at the Feira Council, which invited the social partners 'to play a more prominent role in implementing and monitoring the Guidelines which depend on them' (European Commission 2000: Explanatory memo. 3).

One critical issue is how the institutional mechanism of the Luxembourg process, and, specifically, the role of the social partners, is to be co-ordinated with the institutional mechanism of labour regulation through the social dialogue in Articles 138–139 of the EC Treaty (the 'social chapter'). The EU social dialogue and the EES aim to produce basic labour standards and reduce unemployment, policies overlapping with welfare state provision. The fundamental rights of the social partners guaranteed by the new EU Charter approved at Nice will influence the institutions and actors involved, the processes of social dialogue and employment policy co-ordination and the legal and policy measures which result.

1.4. Legal context

Finally, the EU Charter emerged in a specific legal context which highlighted sharp divisions of opinion regarding its legal status and its political and legal consequences[2]. The specific concern was whether social and economic rights, as contrasted with civil and political rights, should be included, and, if so, should be justiciable, or considered 'only' programmatic rights.

As regards civil and political rights, there was little dispute as to their justiciability. It was recognised that such rights had long been included in justiciable form in the European Convention on Human Rights (ECHR) of the Council of Europe. However, there were debates over whether their inclusion in an EU Charter should have a content and meaning different from, and enforcement machinery separate or independent from that of the Council of Europe institutions in Strasbourg.

As regards social and economic rights, one division in the Convention was between those who favoured including them, and those who wished to exclude them altogether. The latter considered that such rights were not part of the existing *acquis communautaire*, or fell outside the competences of the EU. Their objective was to ensure that the EU Charter should not in any way become an instrument for the future expansion of EU competences in the social sphere.

Those who wished to include social and economic rights were further divided among those who separated some rights as 'subjective' or 'justiciable' (e.g. protection of children and adolescents, dignity at work, protection against dismissal, vocational training, maternity protection and parental leave) from other rights which were 'programmatic' (e.g. health protection, social protection, elderly persons, disabled persons, migrant workers, housing). The strategy would be for such programmatic rights to be placed in a separate chapter and introduced by a clause declaring that the EU recognised as a political objective to create proper conditions for the implementation of that category of rights. Some social rights would be incorporated into the first section of the Charter, alongside justiciable civil and

2. For a detailed account of these debates in the Convention, see Clauwaert (2001).

political rights. But there would be a separate, more extensive list of social rights which are not guaranteed by the EU itself (though they may be by some member states).

Another tactic in this debate was the argument for inclusion of a 'horizontal' clause in the EU Charter which would make it clear that no extension of EU competences was to be allowed through the Charter's provisions. This could be made either generally applicable to the whole of the Charter, or specifically aimed at the clauses on social and economic rights.

1.5. The outcome of Nice (December 2000)

The political initiative for an EU Charter of Fundamental Rights aimed to balance the social policy vacuum in the agenda of the IGC. The debate over fundamental social rights brought two legal perspectives into conflict. On one side were those who wanted to exclude social rights entirely, or minimise their content, or marginalise them into a separate 'programmatic' section, or make them purely declaratory, or subject them to special 'horizontal' conditions to prevent the EU acquiring any further social competences. On the other side were those who wanted to include social rights, maximise their content, grant them the same status as civil and political rights, make them justiciable or otherwise enforceable, and not limit them by reference to existing EU competences.

The choice facing the European Council of Nice was a difficult one. On the one hand, to reject the Charter would be regarded as a setback for 'Social Europe', confirmation of the primacy of the EU's economic profile in general and of deregulated markets in particular. It would send a negative message about social rights to candidate States in the context of enlargement. On the other hand, some member states were unequivocal in their refusal to accept a legally binding Charter, let alone incorporating it into the Treaty.

The outcome gave something to each side. On the one hand, the Charter breaks new ground by including in a single list of fundamental rights not only traditional civil and political rights, but also a long list of social and economic rights. It remains to be seen whether and how declaring social and economic rights will affect the EU's economic policy, in particular,

the EU's strategy on employment, and whether the enshrining of fundamental rights of association, information and consultation, and collective bargaining and action will influence the institutional operation of the EU where the social partners have major roles to play in the spheres of social policy and the open method of co-ordination (the Luxembourg process implementing the EES). On the other hand, although the EU Charter was approved by the European Council, it was limited to a political declaration. It was not given a formal legal status.

The outstanding questions are two-fold. First, in the short term, what are the legal prospects of the political declaration by the European Council of an EU Charter of Fundamental Rights? Secondly, in the longer term, what are the legal effects of an EU Charter which is give formal legal status by being incorporated into the Treaties?

2. Legal prospects and legal effects of the EU Charter

2.1. Legal prospects of the political declaration of the EU Charter

The EU Charter is presently proclaimed as a political declaration. It is not part of Community 'hard' law. The European Community Charter of the Fundamental Rights of Workers of 1989 was also only granted declaratory status. But it had three effects which may also emerge for the EU Charter.

Reference in the Treaties

The 1989 Charter is referred to in the Preamble to the Treaty on European Union (TEU):

> '[Member states] confirming their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 19 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers'.

It is also referred to in Article 136 of the EC Treaty:

> 'The Community and the member states, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 19 October 1961 and the 1989 Community Charter of the Fundamental Social Rights of Workers'.

On the one hand, it would seem anomalous if the new EU Charter, unanimously proclaimed by all the member states as enshrining fundamental rights, was not accorded the same status and was treated differently from the 1989 Charter. On the other hand, if it is inserted alongside the references to the other Charters, difficulties could arise where there appear to be conflicts between them. In particular, there might be resistance if the EU Charter was regarded as regressive in relation to the Charters of 1961 and 1989, at least so far as social rights are concerned.

Alternatively, or in addition, there could be moves to amend the Treaties to insert a reference to the new EU Charter, for example, alongside, or instead of the express reference to the European Convention on Human Rights (ECHR) in Article 6(2) of the TEU, which reads:

> 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950...'

Action Programme

Following the declaration of the Community Charter in 1989, the Commission produced a Social Action Programme with legislative proposals based on the Charter. These proposals (covering, e.g. European works councils, working time, burden of proof in sex discrimination, etc.) referred to their inspiration by relevant provisions on fundamental social rights in the 1989 Charter. The Commission might come under similar pressure to make proposals implementing social rights guaranteed by the new EU Charter.

This is particularly so where it is clear that the EU has the competence to take action in that area of policy. It would be anomalous if some fundamental social rights in the EU Charter (e.g. Article 31(2): working time) were already implemented through directives, while other equally fundamental social rights (e.g. Article 14: 'Right to education', including vocational and continuing training; Article 27: 'Workers' right to information and consultation within the undertaking' (a proposal only recently approved by the Council), Article 30: 'Protection in the event of unjustified dismissal') were proclaimed, but there was no EU legislation supporting that fundamental right, despite clear competence in the Treaty to enact directives in this area (e.g. Article 137(1): 'the information

and consultation of workers'; Article 137(3): 'protection of workers where their employment contract is terminated').

Litigation

As a form of 'soft' law, the EU Charter could be used by the European Court of Justice as an interpretative guide in litigation concerned with social rights. Such litigation could take the form of legal action by way of preliminary references (Article 234, ex 177) challenging member states' implementation of Union law when such national legislation arguably violates fundamental social rights in the Charter. The interpretation of EC directives, or national implementing legislation, could be influenced by the social rights guaranteed in the EU Charter.

An early and encouraging indication arrived barely eight weeks after the EU Charter was approved in Nice in a case in which the broadcasting union, BECTU challenged the UK Government's implementation of the Working Time Directive.[3] The UK Government made entitlement to paid annual leave subject to a qualification period of 13 weeks' employment. There is no such qualification in the Directive and, as EC law has supremacy over national law, the UK, as a member state, is obliged to respect the rights guaranteed by EC law. BECTU complained because many of the union's members on short-term contracts were being deprived of their right to paid annual leave under EC law by the UK Government's legislation.

On 8 February 2001 Advocate General Tizzano delivered his advisory Opinion upholding BECTU's complaint, as did the European Court in a decision of 26 June 2001. What is particularly important about the Advocate General's Opinion is that he looks at the right to paid annual leave 'in the wider context of fundamental social rights' (paragraph 22). A worker's right to a period of paid annual leave is to be given the same fundamental status as other human rights and guaranteed absolute protection. Tizzano then pointed out that 'Even more significant, it seems to me, is the fact that that right is now solemnly upheld in the Charter of Fundamental Rights of the European Union, published on 7 December 2000 by the European Parliament, the Council and the

3. *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v. Secretary of State for Trade and Industry*, Case C-173/99, Opinion of the Advocate-General, 8 February 2001; ECJ decision, 26 June 2001. The following is derived from a comment on the case in *Thompsons Labour and European Law Review*. London, April 2001.

Commission after approval by the Heads of State and Government of the member states' (paragraph 26). He freely admits that 'formally, [the EU Charter] is not in itself binding' (paragraph 27). However, he states unequivocally: (paragraph 28)

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

This is the worst nightmare of those who fought against the inclusion of fundamental social rights, including trade union rights, in the EU Charter. The trade union rights in the EU Charter are 'a substantive point of reference', and not only for the Community institutions, but also for member states (for example, as in *BECTU*, where a member state is responsible for transposing an EC directive including the fundamental social right to paid annual leave), and even for private persons, human and corporate.

The potential of the trade union rights in the EU Charter will be apparent when they are compared with member state laws which restrict or inhibit the rights of workers and their representatives to information and consultation, to join trade unions and have their unions recognised for the purposes of collective bargaining, and to take strike action. What if an employer refuses to enter into collective agreements, or dismisses strikers exercising their fundamental right to take strike action, or closes down the undertaking without advance information and consultation? Will EU law become available to challenge violations of what are declared in the EU Charter to be the fundamental human rights of trade unionists?

Of course, the EU Charter can be used only where the issue is governed by EU law (as in *BECTU*, where paid annual leave was regulated by the Working Time Directive). There are EU laws on information and consultation, where the EU Charter may become very relevant, but other areas, such as strikes and collective bargaining, may not be covered by

any EU law or only peripherally so. Nonetheless, as EU law continuously expands, the actions of member states and private individuals and corporations may come to be challenged where they fail to respect what are now recognised as the fundamental human rights of workers and their representatives. Direct actions against the member states by the Commission, or by individuals under the *Francovich* principle, may also become possible.[4]

2.2. Legal effects of the EU Charter if incorporated into the EC Treaty

The EU Charter would become legally binding if it was incorporated into the Treaty. The legal consequences of such incorporation could be significant.

Direct effect

As with equal pay for men and women (Article 141, ex 119 EC), the Court could attribute binding direct effect to provisions of the Charter which were considered sufficiently clear, precise and unconditional. This effect would apply both vertically (against member states and their 'emanations'), and horizontally (against private persons or bodies). Examples might include:

Article 8(2): 'Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified'.

Article 30: 'Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices'.

Article 29(2): 'Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave'.

Provisions of the Charter which are not considered to satisfy the conditions for direct effect may be invoked to challenge EU law, including Commission proposals for legislation, or member state laws which are said to violate

4. *Francovich and Bonfaci v. Italy*, Cases C-6/90 and C-9/90, [1991] ECR I-5357.

the fundamental rights guaranteed. Such challenges could be mounted in national courts and referred to the Luxembourg Court under Article 234 (ex 177). Examples might include:

— National legislation transposing the Parental Leave Directive which included derogations denying rights guaranteed by the EU Charter, Article 33: 'the right ... to parental leave following the birth or adoption of a child'; a recent example would have been the exclusion of parents with children under 5 years of age at the date of transposition;

— EU competition law invoked to challenge collective agreements protected by the Charter, Article 28: 'the right to negotiate and conclude collective agreements'.

Indirect effect

The doctrine of 'indirect effect' established by the European Court of Justice with respect to directives requires national courts to interpret national laws consistently with EC law. It would apply with even greater force to the rights guaranteed in a Charter incorporated into the Treaty than in the case of a Charter with merely declaratory status.

State liability

The violation by the EU or a member state of a fundamental right guaranteed by the Charter in the Treaty would very likely constitute a breach of EU law giving rise to liability under the *Francovich* principle.

Expansion of competences

The EU Charter states in Article 51(2): 'This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties'. However, the competences of the Community and the Union are frequently a subject of litigation between those seeking to extend, or to limit them.[5]

5. Might the recent decision of the Court denying EC competence to prohibit most tobacco advertising have been influenced by a Treaty including the EU Charter's commitment in Article 35: 'A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities'? See *Germany v. European Parliament and Council* (Tobacco Advertising Directive), Case C-376/98, judgment of 5 October 2000.

Where there is doubt whether a measure adopted by the Community or the Union falls within their respective competences, the European Court will be more likely to uphold the measure where it can be linked with a Charter provision, rather than to interpret the Treaty to restrict the powers of the Community to protect the fundamental rights guaranteed by the Charter. In this way the powers and tasks of the Community and Union provided for in the Treaties are implicitly expanded where these are necessary in order to safeguard the EU Charter rights, all the more so if the Community action in question aims explicitly to implement a fundamental right guaranteed by the EU Charter.

Action Programme

Finally, social rights guaranteed by the Treaty would put pressure on the Commission to make proposals for their implementation. The threat of the European Court invoking the doctrine of 'direct effect' in the absence of such implementing measures would be an incentive to Community legislative action.

3. Fundamental trade union rights in the EU Charter and the European Court of Justice

It is clear that the European Court of Justice will play a major role in determining both what are the fundamental rights of trade unions in the EU legal order, and how they are to be given effect.[6] How can the Court be expected to accomplish these tasks?

3.1. The Court's fundamental rights jurisprudence

How will the European Court of Justice go about identifying certain trade union rights as fundamental rights? This can best be understood in light of the Court's past record of assertion of the protection of fundamental rights in the EU's legal order. Two of the earliest seminal decisions illustrate the Court's approach.

6. For further analysis of the charter's provisions on fundamental social and trade union rights, see Clauwaert (2001) and Bercusson (2001).

In *Stauder*, the Court referred to 'the fundamental human rights enshrined in the general principles of Community law and protected by the Court'. Advocate-General Roemer referred to 'general legal principles of Community law in force', which were to be 'guided by reference to the fundamental principles of national law'. They were 'an unwritten constituent part of Community law'[7]. In the decision in *Internationale Handelsgesellschaft*, the Court held that the validity of an EC measure cannot be affected by a claim that it is counter to fundamental rights or principles of national law. However, on the question of whether there were analogous fundamental rights in EC law, the Court stated:[8]

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

The explicit endorsement of fundamental rights in the EU legal order, backed by this reference to the common constitutional traditions of the member states, is now reinforced by Article 6(2) of the Treaty on European Union:

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

Both the jurisprudence and the Treaties now point to the need to identify within member states the common traditions regarding fundamental trade union rights. In other words, the future interpretations of the fundamental trade union rights in the EU Charter will look to the legal and constitutional practices protecting these rights in the laws of the member states.

Confirmation of this was forthcoming in the most recent case in which the EU Charter has been cited, this time by the Court of First Instance (CFI). In a decision of 30 January 2002 in *max.mobil Telekommunikation*

7. *Stauder v. City of Ulm*, [1969] ECR 419; ECJ, paragraph 7; A-G., p. 428.
8. *Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle für Getreide und Futtermittel*, Case 11/70, [1970] ECR 1125, paragraph 4.

Service GmbH v. Commission, the CFI twice referred to provisions of the EU Charter, first Article 41(1) (Right to good administration), and then Article 47 (Right to an effective remedy and to a fair trial) in the following terms: [9]

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

Even as a mere political declaration, the EU Charter appears to be accepted by the European Courts as reflecting fundamental rights common to the traditions of the member states and an integral part of the EU legal order.

3.2. A preliminary point regarding minimum standards

The European Court's formulation of fundamental trade union rights need not necessarily seek the lowest common denominator or minimum standard. An indication of this is the Court's interpretation of what was then a new Article 118A (now in Article 137 EC) inserted into the Treaty of Rome by the Single European Act of 1986. Article 118A aimed at 'encouraging improvements, especially in the working environment, as regards the health and safety of workers', and specified that:

> '2. In order to help achieve the objective laid down in the first paragraph, the Council... shall 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'.

On the basis of then Article 118A, the Ministers of Social and Labour Affairs at a meeting on 1 June 1993, approved a Commission proposal for a Council Directive concerning certain aspects of the organisation of working time. The UK, however, abstained and announced its intention

9. Case T-54/99, paragraphs 48 and 57.

to challenge the legal basis of the proposed Directive in the European Court. Nonetheless, the Directive was adopted by the Council at a meeting on 23 November 1993 and has become the law of the EU.[10] The UK government took the view that the working time proposal should have been adopted on a legal basis which required unanimous voting, and lodged an appeal with the European Court of Justice to challenge the legal basis selected.

Among other grounds for dismissing the UK's challenge, the Court rejected the UK government's argument that the provision allowed only for 'minimum requirements' in the sense of constituting a minimum benchmark. The Court declared that the provision:[11]

'does not limit Community action to the lowest common denominator, or even to the lowest level of protection established by the various member states, but means that member states are free to provide a level of protection more stringent than that resulting from Community law, high as it may be'.

There is reason to expect, or at least hope, therefore, that the Court would similarly not interpret the fundamental trade union rights in the EU Charter as reflecting 'the lowest common denominator, or even to the lowest level of protection established by the various member states'.

3.3. An approach to formulating trade union rights in the EU: 'common traditions'

Fundamental trade union rights in the European Union are not identical in all the member states. The historical, legal and industrial relations traditions of the fifteen member states have produced differences in national laws which highlight the problem of producing a set of uniform trade union rights derived from a single EU Charter.

For example, what is included in the scope of 'freedom of association'? There is no exact legal equivalence in the meaning of 'freedom of

10. Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time; OJ L307/18 of 13.12.93. *Europe* No. 6113, 24 November 1993, p. 10.

11. *UK v. Council*, Case C-84/94, [1996] *ECR* I-5755, paragraph 56.

association' in British or Irish law, *liberté syndicale* in French or Belgian law, *Koalitions-freiheit* in German or Austrian law, or *libertà sindacale* in Italian law. In Sweden, freedom of association includes the right to take advantage of union membership and to work for the organisation; in the Netherlands, the right to participation through works councils (an institutional issue) is not included in freedom of association (self-organisation), which is tied to trade unions;[12] in Germany, it took twenty-five years of doctrinal debate before the right of association guaranteed in the constitution was generally held to imply the right to strike.

This ambivalence is reflected in the EU Charter itself. The right to freedom of association is provided in Article 12 of the EU Charter, 'Freedom of assembly and of association'. But the Charter also includes other rights: to collective bargaining and to collective action (Article 28). However, in some member states, these are assumed to be part of a right to 'freedom of association'. The uncertainty was evident in the evolution of Article 12. The references to freedom of association of trade unions were initially included in a group of articles all concerned with the collective rights of labour. However, at a late stage, the trade union rights of association were isolated into Article 12 and included in a different Chapter, entitled 'Freedoms'. Subsequent attempts to unite trade union rights of association with the other collective rights of labour failed, and, in the final draft, Article 12 was kept separate from the other collective rights, which were placed in the Chapter entitled 'Solidarity'.

Despite national differences, it is possible to analyse trade union rights in the member states and provide a comprehensive list of such rights. The extent to which member states' laws include some, many, or even all of the rights on this list will differ. Often, member states will acknowledge the same fundamental trade union rights, though they may, in defining the scope of such rights, not always include the same elements.

One approach to identifying the rights which the European Court of Justice might be prepared to recognise as protected by the EU Charter could be to identify those fundamental trade union rights which are protected in all, or a majority of member states. These rights form the beginnings of an effort to construct a common tradition of protection of trade union rights.

12. This distinction does not make sense in countries without works councils.

3.4. Which trade union rights are recognised in member states?

Drawing on a recent Research Study on trade union rights in the member states of the EU carried out for the European Parliament, some attempt can be made to identify a common core of fundamental trade union rights which is shared by all, or a majority of the member states (Bercusson 1998).

The Research Study found that there is a unanimous consensus in the EU in favour of five trade union rights:

— rights of association/to join trade unions,[13]
— not to join trade unions,[14]
— to autonomous organisation,[15]
— to trade union activity (including in works councils)[16] and
— to a legal status for collective agreements.[17]

For three of these trade union rights, all or all but one of the member states have legislation in place.[18] For the other two rights, a majority have legislation in place.[19]

Beyond this common core, there is a substantial majority (10-11 member states) in favour of trade union rights already in legislative form regarding:

— legal definition (11),[20]

13. All the member states have legislation on the right of association/to join trade unions.
14. All but one (Sweden) of the member states have legislation on the right not to join a trade union. Sweden has collective practice.
15. There are 8 member states that have legislation concerning trade unions as regards autonomous organisation (Austria, France, Greece, Ireland, Luxembourg, Portugal, Spain, the United Kingdom). The other member states achieve this result through collective practice (Belgium, Denmark, Finland, Germany, Italy, the Netherlands, Sweden).
16. All but one (Denmark) of the member states has legislation on the right to trade union activity (including works councils legislation). Denmark has collective practice.
17. There are 13 member states which have legislation as regards legal status for collective agreements. The other member states (Denmark, Italy) achieve this result through collective practice.
18. Right of association/to join trade unions; right not to join trade unions; right to trade union activity (including in works councils).
19. Right to autonomous organisation; right to a legal status for collective agreements.
20. Austria, Belgium, France, Germany, Greece, Ireland, Luxembourg, Portugal, Spain, Sweden, the United Kingdom. However, the other Member states do not appear to have produced legal definitions.

— information and consultation (including works councils) (10),[21] and
— extension of agreements (11).[22]

There is also a substantial majority (11 member states) in favour of trade union rights, in either legislative form (L) or through collective practice (CP), regarding:

— financial autonomy (11)[23] and
— elections/decision-making autonomy (11).[24]

There is a substantial majority (11 member states) against the closed shop, in either legislative form (10)[25] or through collective practice.[26] But collective practice is ambivalent in Belgium, Denmark and Sweden, and the Netherlands appears to authorise it in certain cases.

Finally, there is a clear majority (9 member states) in favour of trade union rights in legislative form regarding the right to strike[27] and to legal personality.[28] Regarding two other trade union rights: the legal rights to recognition as trade unions, and to collective bargaining of trade unions are not clearly established, either in legislation or collective practice. This is, perhaps, due to the overlap with legal requirements for the establishment of workers' representative bodies (works councils) in dual channel systems.

21. Austria, Belgium, France, Germany, Greece, Luxembourg, the Netherlands, Portugal, Spain, Sweden. Denmark and Finland have collective practice.
22. Austria, Belgium, Finland, France, Germany, Greece, Ireland, Luxembourg, the Netherlands, Portugal, Spain. However, the other member states do not appear to have formalised collective practice or preclude this possibility (Italy).
23. CP: Belgium, Denmark, Finland, Germany, Sweden;
L: Austria, France, Greece, Italy, Luxembourg, and Portugal. In other member states, there are some externally determined rules on finances (Ireland, Spain, the UK).
24. CP: Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Sweden; L: Austria, Portugal, Spain. In other member states, there are some external constraints (Greece, the UK).
25. Austria, France, Germany, Greece, Ireland, Italy, Luxemburg, Portugal, Spain, the United Kingdom.
26. Finland.
27. Finland, France, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden. Belgium has collective practice. However, the law or collective practice in the other member states is either ambiguous or negative.
28. Austria, Denmark, Finland, France, Greece, Luxembourg, the Netherlands, Portugal, Spain. But the other member states appear to either resist this or are ambivalent.

3.5. How should the European Court interpret the trade union rights in the EU Charter?

Trade union rights will most likely become part of EU law as a result of the EU Charter. As EU law, they will affect member states' laws on trade unions. The meaning of the rights contained in the EU Charter issue will probably be contested when, in a member state, a complaint is made that trade union rights guaranteed by the EU Charter are being violated. An appeal to the national courts to respect the EU Charter should allow for the issue to be referred to the European Court of Justice.

The European Court will be faced with the need to elucidate the content of the rights provided for in the EU Charter, including freedom of association. In this situation, there would probably be submissions from all or a majority of member states confirming that certain trade union rights form part of their national law and practice. The European Court will have to decide how to respond to these submissions. Should it interpret the EU Charter's provisions as including trade union rights recognised in all or a majority of member states?

The European Court could take different approaches to identifying this common tradition. At least four alternative approaches may be envisaged:

— A narrow formulation of trade union rights, which might accommodate all or a majority of member states where such a narrowly defined scope of fundamental trade union rights is acceptable.

— Conversely, a wider range of trade union rights, though these would include a lesser number, albeit still a majority of member states which accept that those rights are within the scope of fundamental trade union rights.

— Alternatively, rather than adopt a single interpretation of trade union rights, the European Court could allow them to be applied differently in the different member states, by leaving their detailed content to be interpreted and applied by national courts.

— Finally, the Court could confine the trade union right to claims raising issues of a transnational nature, which were not covered by national laws.

It is proposed that the Court's approach should be to adopt a formulation which includes fundamental trade union rights recognised in all, or a majority of member states. On the one hand, this approach has the disadvantage that it might require a minority of certain member states to recognise certain trade union rights which their political and industrial traditions have not confirmed. However, it is suggested that such a minority of member states should be able to accommodate such rights. On the other hand, it is suggested that the Court risks much more if it denies the fundamental character of certain trade union rights recognised by all or a majority of member states

3.6. An illustration: Article 12 and trade union membership and recognition

It was suggested that the Court will be faced with challenges to national laws which are alleged to conflict with the guarantees in the EU Charter. In such cases, national laws on trade union rights may be a useful source of inspiration for the Court. An illustration is provided by Article 12(1) of the Charter:

Freedom of assembly and of association
'Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests'.

Using Article 12 to override restrictive member state laws
May Article 12(1) be interpreted as guaranteeing rights which go beyond what is provided in some national laws? Article 12(1) raises questions of how much interference is allowed in internal affairs of unions, whether it includes the right to recognition of a trade union, including allowing trade union officials access to union members at the workplace, and the right to take part in union activities. For example, in Finland, legislation of 1970 requires the employer to provide meeting space and facilities for and protection of union representatives. Does this potentially expand the scope of Article 12? In Ireland, legislation of 1990 provides for a right to strike and picket to protest against anti-union action. Is this included in Article 12?

In the United Kingdom, trade union rights are a relatively modern innovation. The national tradition provides mainly for trade union immunities. Article 12 could have unpredictable consequences. For example, are employers who induce workers to abandon trade union membership or collective agreements violating Article 12 rights? Is the mandatory requirement of a majority in a ballot over trade union recognition an acceptable condition? Does it deny representational rights of association to union members where only a minority votes for recognition? Are stringent controls over the internal organisation of trade unions (e.g. elections, discipline, etc.) violations of Article 12?

In Germany, the constitution grants freedom of assembly in Article 9(1) only for Germans/citizens. Article 12 seems to extend the right beyond this category. On the other hand, the freedom to form coalitions 'to safeguard and improve working and economic conditions' (Article 9(3)) is said to be a general human right. It seems that Article 9(3) of the German constitution might not apply to employers, as it is seen as part of collective labour law. To this extent, Article 12 expands the scope of the right. It seems that the German constitutional right in labour law provided some immunity to trade unions against competition law (restraint of trade). Does Article 12 also extend this protection to employers?

In Italy, the Constitution, Article 17, provides for freedom of assembly, but includes possible restrictions in terms of prior notice, and allows for bans on grounds of security or public safety. Such qualifications are absent in Article 12. The Italian constitution in Article 18 speaks of freedom for all types of 'associations', and in Article 39: 'The organisation of trade unions shall be unrestricted'. Some argue that organisation is wider, allowing for a plurality of different forms of workers' representation, inside and outside the enterprise. It is not clear whether Article 12 of the EU Charter allows for such a plurality. If it did, would this be a right going beyond national law in a direction which is positive (less restriction on types of trade union organisation) or negative (dispersion of collective power)?

Using member state laws to expand the scope of Article 12

The interaction between the EU Charter and national laws on trade union rights is not uni-directional. The EU Charter may be interpreted as overriding more restrictive national laws on trade union rights. Equally, however, in interpreting the language of the EU Charter, the

Court will be sensitive to where national laws have protected trade union rights going beyond what the EU Charter appears to provide.

Many national laws regard freedom of association as a collective right of the trade union, which implies associated rights to protection of the organisation from the State and employers, autonomy of its organisation, freedom to engage in activities (collective bargaining, strikes), protection of its officials, etc. The Article 12 right seems to be more limited as an individual right of 'everyone'. There does not appear to be recognition that the organisation, the collectivity, has rights. In contrast, Article 28 speaks of workers' organisations having rights. It may be that this is the only source from which rights of association, autonomy, etc. may be derived

For example, in the UK, the new statutory trade union recognition procedure does provide for a mandatory procedure for collective bargaining if the trade union wins a majority in a ballot. There is also a new individual right to representation by a companion, including a trade union official, in disciplinary and grievance proceedings.

In Germany, the scope of the German constitution's right 'to safeguard and improve working and economic conditions' (Article 9(3)) may be wider than 'protection of his or her interests' in Article 12 of the EU Charter. There are different interpretations of the phrase in the German constitution, as to whether it covers objectives such as structural changes in the economy going beyond traditional collective agreements or co-determination. The phrase in Article 12 is also quite vague, but does not seem to be narrower than the German formulation; and 'interests' could be wider.

In Italy, Article 39 of the constitution implies rights not only to join, but also not to join. It also includes trade union activities and freedom from State intervention in internal affairs of the union. Law 200/1970, Article 14, provides an explicit protection of trade union freedom at the workplace, for private employees, and there are some specific laws for public employees. There are also rules prohibiting anti-union discrimination. Article 17 prohibits employers' interference with trade unions, following principles in ILO Convention No. 98. Other laws define the status of union representatives, and of the most representative organisations (Article 19 of the 1970 law), in order for unions to acquire

privileges, such as appointing representatives to public organs. They also gain rights to promote union activity at plant level.

In Greece, the right to peaceable assembly is not limited to 'protection of his or her interests'. In general, the constitution seems to have more detailed provisions: Article 12 on employers and employees' freedom of association; Article 22 on collective agreements; Article 23 on the right of association specific to trade unions, including the State's obligation to safeguard trade unions and exercise of associated rights. It implies also positive rights to organisational independence, to call strikes and conclude agreements. Legislation also protects the establishment, operation and activities of unions, and hence also workers' representatives.

In France, Paragraph 6 of the Preamble of the 1947 Constitution has a double scope: individual rights to join or not join a trade union, and the prohibition of anti-union discrimination. It also includes some rights of trade unions against employers and the State.

Carefully selected cases could enable trade unions to encourage the European Court of Justice to adopt a more expansive interpretation of the trade union rights guaranteed by the EU Charter.

4. Conclusions

On balance, it is suggested that the EU Charter is a positive contribution to the promotion of trade union rights in the EU for a number of reasons.

It is an *independent source of rights*. The EU Charter has a substantive content going beyond, and is not limited to national practice in individual member states. As illustrated above, in Case 173/99, *BECTU*, the Advocate General's Opinion of 8 February 2001 invoked the EU Charter in condemning the UK's limited implementation of rights to paid annual leave, a fundamental right under the Charter.

National provisions which reflect Charter rights may achieve *higher legal ranking* in the national system; perhaps even constitutional status. At a minimum, there can be no regression from national provisions reflecting Charter rights. National laws providing rights which go beyond the Charter are useful in promoting an expansive interpretation of the Charter.

While it is necessary to specify more clearly the relation of the EU Charter to international sources, it may go *beyond* these. For example, where the EU Charter provisions do not include the limitations stipulated in the European Convention on Human Rights, the EU Charter may afford greater or more extensive protection.

The 1989 Community Charter of Fundamental Social Rights was not regarded seriously because of the established prejudice against recognition of social and economic rights, seen as different from classical civil and political rights. In the EU Charter, *social and economic rights* are recognised as having the same status as civil and political rights. The consequence is that fundamental rights, declared by the European Court to be protected as part of the EU legal order, will have a greater chance to include social and economic rights.

The inclusion of many social rights in a single Charter means it is not possible to interpret one single Article in isolation without considering others. This can be used to *expand* many rights which may be limited in isolation. For example, the scope of Article 27, 'information and consultation' can be expanded when linked to Article 31, 'fair and just working conditions', which in turn implies respect for dignity, protected by Article 1, 'human dignity'.

The Charter is an important milestone in the development of Social Europe. It can be of value in developing the social dimension by putting *pressure on EU institutions* to promote a European social model. The EU Charter can be used to support a concept of European social citizenship which overcomes the division between classical human rights and social and economic rights.

This positive assessment should not overlook the potential risks. The EU Charter might be exploited by employers and others to further a very different agenda. The very wide scope of the EU Charter offers the possibility to re-open many fundamental principles established in national systems: e.g. forms of worker representation, justifications for dismissal, penalties for discrimination, scope of information and consultation. For example, the right to conclude collective agreements could be used to impose obligations on unions; e.g. a peace obligation, or a duty to negotiate 'in good faith'. Or there is a risk of undermining national protection; e.g. dismissal might be held to be justifiable on some grounds not allowed in member state laws.

Nonetheless, the history of EC law is that of the emergence of a new legal order. This new legal order developed new concepts of implementation and enforcement of EC law. When directives stipulated policy results, but left to member states the choice of form and method (Article 249 EC), the European Court of Justice developed doctrines testing the adequacy of member state implementation, looking especially to effectiveness (*effet utile*), for example, of sanctions and remedies.

The social and economic rights in the EU Charter go beyond trade unions to include others of a more programmatic nature. Implementation of the Charter aims to build a bridge between *programmatic* (social and economic rights) and *justiciable* (civil and political) rights. Justiciable rights equate to effective and enforceable rights. The challenge is to *establish* clearly *justiciable trade union rights*: e.g. trade union freedom of association, information and consultation, collective bargaining and collective action, and, further, to *develop* implementation of *programmatic* social and economic rights: e.g. health, education, etc.

The tasks of an implementation strategy are three-fold. First, with respect to *justiciable* rights, to develop effective implementation, looking to effective sanctions, preventing regressions, removing qualifications, thresholds, exclusions and modifications. Secondly, *moving more social and economic rights towards justiciability*; formulating them as positive and enforceable rights; including effective sanctions. Thirdly, with respect to *programmatic* rights, implementation through effective monitoring of government policy and actions, with possible judicial review of consistency and powers of nullification.

It is important that the EU Charter acquires the character of a *dynamic* instrument, that member states have to actively accommodate any new fundamental social rights: a form of dynamic subsidiarity (Bercusson *et al.* 1996, chapter 4). There are lessons to be learned from other international experience in implementing fundamental social rights, including the procedures of the ILO's Freedom of Association Committee, and the supervision and the collective complaints procedure of the European Social Charter.

Still other methods of monitoring social and economic rights are on the EU agenda: a role for the social partners in monitoring EU Charter rights at the appropriate levels; the monitoring of member states action in the social and employment policy field through the 'open method of

co-ordination' embodied in the Employment Title of the EC Treaty; monitoring compliance through regulation of contracts allocated in the sphere of public procurement, and others.

The EU Charter opens a new chapter in the legal enforcement of trade union rights, both at transnational and national levels. All efforts should be made to secure and reinforce these rights as the Convention prepares for the Intergovernmental Conference in 2004.

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Chapter III

The employment relationship

Chapter III: The employment relationship

Introduction by Bruno Veneziani

Brian Bercusson was a true European labour lawyer, in a number of ways. One example is the method he used to analyse one of the many topics to which he devoted his attention, namely the employment relationship.

In the introduction to his comprehensive analysis of the employment protection legislation enacted during a crucial period in the history of British labour law – from 1974 to 1980 – he accurately and critically considered the evolution of labour law to be a series of employment protection acts (B. Bercusson, *The Employment Protection Act 1975*, London: Sweet and Maxwell, 1976; B. Bercusson, *The Employment Protection (Consolidation) Act 1978*, London: Sweet and Maxwell, 1979; B. Bercusson and C. Drake, *The Employment Acts 1974–1980*, London: Sweet and Maxwell, 1981).

The changes in British politics strongly conditioned collective and individual labour relations through a succession of political coalitions. Conservative governments (1970–74) and Labour governments (1974–1979) ended the traditional abstention of the law from industrial relations by intervening in both collective and individual labour relations.

During the same period, a similar path was followed by the European Community, which enacted a set of labour law directives dealing with individual employment relationships: Council Directive 1975/117 on the principle of equal pay for men and women; Directive 1976 /207 on equal treatment for men and women with regard to access to employment, vocational training and promotion of working conditions; Directive 79/7 on equal treatment in matters of social security; Directive 1975/129 on collective dismissals; Directive 1977/187 on approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses; and Directive 1980/987 on employer insolvency.

The UK's accession to the EC in 1973 coincided with the beginning of this period of legislative activity in the Community and the impact of European legislation on British labour law was profound: for example, the provisions of Part IV of the Employment Protection Act 1975 are derived from Council Directive 75/129 on collective redundancy. Overall, European laws of that period were based on the understanding that the concept of an employment relationship is distinct from a relationship founded on an employment contract (European Labour Law, p. 426).

Brian Bercusson was well aware of this theoretical distinction and its consequences in terms of enforceable labour rights.

As a comparative labour law jurist his analysis underlines the different approaches to the employment relationship in civil law and common law systems. However, the methodology he adopted in his commentary on English labour law is a mixture of the civil law and common law approaches. In fact, he says that, as in other areas of law, the structure of the subject is dominated by particular legal concepts and institutions: contracts, statutes and common law. But these legal categories are not sufficient to explain the complexities of the subject matter; they represent a rather 'conventional' structure of labour law, which requires a more modern approach.

Brian Bercusson's main theoretical assumption was that the basic subject matter is twofold: the notion of 'labour' has a double meaning, encompassing both 'work' and 'workers'.

The main concern of labour lawyers, therefore, is not concepts and categories but rather particular problems (within the framework of work and workers) and the law's treatment of them.

In commenting on the Employment Protection Consolidation Act 1978 – which collects together most of the legislation on individual employment from 1963 to 1975 – he criticised the lack of a coherent pattern, due to the fact that different governments enacted the legislation (Conservatives: Contracts of Employment Act 1963 – Labour: Redundancy Payments Act 1965; Conservatives: Industrial Relations Act 1971; Labour: Employment Protection Act 1975; Conservatives: Employment Act 1980).

This criticism led Brian Bercusson to recommend that labour lawyers concern themselves with all sources which affect the employment relationship: that is, not only statutory provisions and tribunal and court decisions, but also workers' rights and employers' duties, collective customs and work practices.

Given the limited number of pages in the volume of collected writings, only Chapter 2 (40 pages) of B. Bercusson and C.D. Drake's *The Employment Acts 1974–1980* (1981) can be selected. It refers mainly to UK legislation but it constitutes an illuminating approach for all comparative lawyers. The article which deals with the employment relationship is entitled 'The contract of employment and contracting out. The UK Patent Act 1977', EIPR, August 1980. It focuses on ways in which the normal effects of the Patent Act 1977 – the allocation of ownership of and compensation for employees' inventions between the employee and the employer – can be modified by changing the contract of employment; in other words, how far the statutory framework can be circumvented, sometimes to the detriment of employees' rights. The article is deeply concerned with the content of employee performance, the contractual obligations of the parties, the notion of the 'normal duties' of employees and the modification or variation of originally agreed terms and conditions.

The whole article is focused on the internal dynamism of contractual obligations, underlining that contractual duties are not necessarily confined to those specifically laid down in writing. Furthermore, it is related to a specific issue with regard to contracts of employment and, compared with the previous one, seems mainly confined to an English perspective.

Brian Bercusson's status as a 'European' labour lawyer is also validated by the comparative analysis contained in the paper presented at the international symposium in Helsinki on 26–28 November 1984, entitled 'New technology – A new labour law?'

The paper deals with the role of the state, unions and employers in five European countries (France, Federal Republic of Germany, Italy, Sweden and the UK), showing how very different workers' rights may emerge from different national balances of power between the state, the market and the labour movement, especially in a socio-political context

in which the post-War settlement has been broken and a new industrial relations system has emerged.

The analysis assumes that, given the crisis of the post-War welfare state, the task for labour lawyers in many countries is the coordination of labour law proposals in a wider perspective by means of general programmes of action and the reconstruction of social relations through the fight against unemployment. This writing does not deal specifically with the employment relationship, but with the general need for the state to intervene in the labour market to guarantee more active rights protection in the labour market for the unemployed.

Another aspect of Brian Bercusson's European credentials was his continuous and profound attention to Community law, as witnessed by the volume: C. Vigneau, K. Ahlberg, B. Bercusson and N. Bruun (eds), *Fixed-term work in the EU. A European agreement against discrimination and abuse*, National Institute for Working Life, Boktryck, Helsingborg, 1999.

The book is the first comprehensive contribution to the debate on the national implementation of Directive 1999/70/EC and was the result of a research project involving the Swedish National Institute for Working Life and the three Swedish trade union confederations, LO, TCO and Saco. The detailed legal analysis of the Agreement on fixed-term contracts and the Directive implementing the agreement is developed by B. Bercusson and N. Bruun. Brian Bercusson's specific contributions cannot be identified. Brian Bercusson's book *European labour law* also contains a number of writings on legal concepts and new forms of work, as well as on the notion of the worker as citizen: (i) 'Legal, political and industrial relations strategies regarding new forms of employment', in *L'evolution des formes d'emploi*, Actes du colloque de la revue *Travail et emploi*, 3–4 November 1988. (ii) 'Fundamental social and economic rights in the European Community', in A. Cassese et al. (eds), *Human rights in the European Community: Methods of protection*, Baden-Baden: Nomos, 1991, pp. 195–294.

Employment protection

Brian Bercusson (1981) *

I. The role of employment protection legislation

In writing an introduction to the Employment Protection Acts, the problem of what role this legislation plays in labour law generally cannot be avoided. To understand the role of labour legislation, and the Employment Protection Acts in particular, it is necessary to step back and try to see how the subject of 'labour law' has been organised.

The conventional structure of labour law

As in other areas of law, the structure of the subject is dominated by concepts and institutions. There are a number of central legal institutions and concepts which operate in labour law and which can easily be taken as the poles around which the subject is organised. 'Contract' (e.g. the contract of employment, or the contract of membership of a union) is one. 'Statute' (defining individual and collective rights and liabilities) is another. 'Common law' (implying terms, or establishing economic torts as a basis for liability for industrial action) is a third. To these have been added some non-legal institutions and concepts, borrowed from industrial relations in the main: collective bargaining, trade unions, etc.

The dangers of a conventional structure

The advantage of constructing the subject from such building blocks is that they are so flexible. They lend themselves to the description of a

* 'Employment protection', Brian Bercusson (1981). This article was first published in C.D. Drake and B. Bercusson *The employment acts 1974-1980 with commentary*, London: Sweet & Maxwell, 4–42 and is reprinted here with the kind permission of the publisher.

number of phenomena which can be called functions or problems. But the approach suffers from the danger that the organising concepts and institutions themselves tend to become central, and *not* the functions and problems. Indeed, the latter become relatively confused and confusing as, increasingly, each function and problem involves the inter-relation of contract, common law, statute, collective arrangements, etc. So if the conceptual approach is primary, then the problems come to be perceived (even defined) in terms of the organising categories, and the real problems are disguised, or may even disappear from view, or never be addressed. Some examples of this may help:

Implied Terms: New developments in this area have arisen mainly through the law of constructive dismissal; yet it is retained as part of contract law.

Equal pay: Is this best treated as a separate statutory category? Or as a contractual matter concerned with pay? Or as a form of discrimination?

Written statement of particulars: Is this most closely related to contract? Or to a statutory right to information? Or to incorporation of documents (e.g. collective agreements, works rules)?

Trade union activities: Is the freedom to participate a function of contractual provisions? Or a statutory right? Or a judicial balancing of the two?

The closed shop: Is this a matter of statutory protection of freedom of association? Or a sub-category of unfair dismissal? A matter of collective bargaining arrangements? Or of internal contractual relations between unions and their members?

Some examples of problems which do not fall neatly within conceptual categories, and consequently receive little or inadequate treatment, are the following:

Contract and dismissal: When does a breach of contract by the employer (e.g. a change in terms of employment) rejected by the employee, nonetheless allow the employer to dismiss him 'fairly'? This is a crucial practical problem, but is dealt with as a sub-category of unfair dismissal, if at all.

The concept of discrimination: Unequal treatment at work is of central importance. The workplace reeks of inequality – in pay, status, conditions, type of work, etc. Yet only certain types of non-work-related discrimination (sex, race, etc.), are dealt with. Not other kinds (age, class origin, etc.), let alone work-related discrimination. The whole area is confined to statutory interventions, but the problem is much larger (as the problems over job evaluation indicate).

Now obviously labour law can and has been described using these categories as the framework. Thus contract, or the employment relationship, can be used as the core, with collective bargaining and statute law as adjuncts. Or collective bargaining could be taken as the central concept, showing how contract was influenced or controlled by it, and again leaving statute as an adjunct. But always, it seems, the concept or institution is primary. The question is: can this approach be improved upon? Is there another way of approaching the subject of labour law using a framework other than that dictated by legal concepts or industrial relations institutions?

An alternative approach

One approach is to ask: what is the basic subject matter with which labour law is concerned? For example, is it the employment relationship? Or, as this implies a bilateral relationship of employer–employee, with concomitants of subordination, conflict, etc., is this to adopt an *a priori* category which is historically limited and also excludes, for example, worker co-operatives, while creating difficulty with the civil service and leading to wholesale exclusion of the self-employed?

What about collective bargaining as the starting point? Or is this not even more constrained by a particular historical epoch? After all, it has not been with us for all that long; it does not affect some 20% of the workforce; and it looks like being under threat by some form of direct regulation (e.g. an incomes policy). Again, for there to be collective bargaining, two sides and thus conflict is presumed (albeit limited by an assumed consensus for ultimate accommodation).

So what is the basic subject matter? It will be suggested here that it is twofold: on the one hand, *work*, and on the other, the *worker*. These

are what labour law is about. One might add also the employer, the trade union – but one can imagine a labour law without either of these. One *must* have work and workers for labour law. It is, one might say, inherent in the double meaning of 'labour' itself.

If one identifies the subject matter of labour law as work and the worker, it is then necessary to construct a framework around this subject matter. If one starts with concepts and institutions, one has fairly well established paths: e.g. the content of a contract, its formation/ termination, statutory interpretation, remedies for breach, collective bargaining and collective agreements, etc. The alternative approach suggests certain self-explanatory categories as a minimal framework. But it also allows for a great deal of flexibility in filling in these categories. This flexibility enables one to deal with those problems and difficulties which are seen as most salient to labour law. This can be illustrated by highlighting some aspects of that part of labour law which is concerned with *work*. Remember: the object is to re-think the topography of labour law. The focal points should be not legal concepts or industrial relations institutions, but (around the framework of work and workers) *problems* and the law's treatment of them.

Briefly, the part of labour law concerned with work might begin with a consideration of *access to work*. This would include a scrutiny of the decision to engage: discretion and its control. Questions to be answered might include: What is the nature of the decision? Who makes it? What kind of scrutiny of that decision operates? What criteria or standards are applied to judge it (if any)? A second area would be to examine the *work obligation*. Defining the nature and quality of this obligation presents numerous problems, as do changes in work obligations, whether these be unilateral changes by the employer, or bilateral structured changes through, for example, new technology agreements negotiated with unions. The quantity of the work obligation brings in problems of hours of work, and patterns of work-time, as well as issues of redundancy and work-sharing. A third area of concern would be *incidents of work*. Pay and benefits immediately come to mind, and the different systems of determining pay and benefits might be considered, together with the ability of law to accommodate various systems. An equally important incident of work is discipline. Here might be examined the problems of determining the rules of discipline and the scope of disciplinary rules and procedures. Questions of mutuality in discipline may be raised: what sanctions exist where management

violates the custom and practice of the workplace? The central concept of discrimination in the workplace, mentioned above, would fall to be considered here. A fourth heading of *temporary absence from work* would bring together such apparently diverse topics as sickness and injury (security of employment as well as security of earnings), maternity (the relation of production and reproduction, childcare and work), holidays and time off work. Certain parallels emerge when these matters are treated together. Finally, a category of *termination of work* would cover issues of voluntary and involuntary employee termination, employer termination and post-termination problems.

Some advantages of the new approach

This rather novel framework can add something to the conventional modes of approach to labour law, for example:

(i) Legal and industrial relations concepts are organised around the subject matter – not *vice versa*. What should emerge is a clearer view of the subject matter undistorted by concepts. The questions asked focus on the subject matter which is the concern of labour law, and the adequacy of legal concepts is measured accordingly.

(ii) This approach brings into the subject certain areas which fall outside the contract of employment and collective bargaining, yet are, it may be suggested important concerns of labour law: the self-employed and professionals.

(iii) The approach avoids certain concepts and analogies, the explanatory power of which may be limited and even misleading. Examples include: the concept of a 'floor of rights'; the debate over whether the law is abstentionist or interventionist (or lately, seeks to integrate labour and capital); the division of the subject into law (primarily contract, plus common law and statute) and industrial relations (collective bargaining), with dispute resolution somewhere in the middle; the idea of law as of secondary importance in labour relations, whereas one suspects it is no more and no less important than in oilier fields: not that labour lawyers are too modest, rather that others may make larger claims!

The role of employment protection legislation

Returning now to the initial problem posed of the role of employment protection legislation, it may be seen that the alternative approach, which seeks to avoid traditional legal categories, shows that legislation in a new light. For example, the statutory protection against unfair dismissal ought not to be treated as an autonomous category. It is not simply a self-contained body of statutory provisions relating to termination of the employment relationship. While certainly important with regard to termination of work, its effects should be appreciated in other areas of work regulation, e.g.:

- quality control of work, *i.e.* dismissal for incapability;
- discipline, through the Code of Practice which relates to the reasonableness of an employer's behaviour;
- implied terms of the contract of employment: duties of trust and confidence, protection from arbitrary or outrageous behaviour, harassment (through constructive dismissal);
- changing work obligations: the limits of the employer's power to make such changes in the 'interests of the business'.

Similarly, other 'employment protection' categories should be perceived as having wider ramifications. Thus, redundancy is not a closed-off category, but is concerned with flexibility and mobility of workers, trial changes in work practices and organisation and in particular the introduction of new technology. As a part of the wider category of the quantity of the work obligation, it is closely related to other aspects of the legal regulation of the quantity of work: hours of work (overtime, work-sharing), lay-offs (guarantee payments) and the general question of control of output. Or take maternity protection: if this is seen less as an exclusive prerogative of female employees, and more as part of a general category of temporary absence from work, some of the more embarrassing decisions of tribunals might be avoided (see for example the majority and minority opinions in *Turley* v. *Allders Department Stores Ltd* [1980] I.R.L.R. 4 (EAT)).

This is not a matter of theoretical concern to academics only. It should be generally appreciated that statutory employment protection can be perceived as more than an excrescence upon the common law or a minimal standard underpinning collective industrial practice. Until there is an adequate integration of legislation into the theory of labour

law, there can be only abortive attempts at change through Parliament. Such attempts will be frustrated by courts, tribunals and lawyers whose understanding of the subject is formed by theories in which legislation is subsidiary to common law or industrial relations practice. This is not a plea for more legislative intervention. It is a plea for a better understanding of what labour law is about, and what role statute can play in its development.

II. Introductory notes to employment protection law

The notes which follow provide a necessarily brief introduction to the self-contained categories of legal protection provided by the various sections of the Employment Protection Acts. There are of course deficiencies in such treatment limited to the self-declared categories of the statutes. To compensate in part for these deficiencies considerable reference to industrial practice, primarily in the form of collective agreements, is made in these notes.

To protect themselves while *in* employment, most workers, through their autonomous collective organisations, have succeeded in negotiating collective agreements on wages, hours and conditions of work. But on matters concerned with *termination of or absence from* employment – the bulk of employment protection law – there are only the beginnings of collective industrial practice in this form (though there has been rapid growth in the areas of redundancy and lay-offs and time off agreements). It would be hazardous to attempt to forecast whether collective bargaining will come to dominate this area as it has the substantive terms of employment. Some control over the terms of work was only achieved after many decades, and the past 15 years in particular have witnessed a ceaseless effort by employers to regain this control. Any similar power over security of employment will not be ceded any more willingly. The law on termination of employment may be seen more as intervention to maintain managerial control than protection of workers' employment security.

So on the whole, the rights of workers and duties of employers, and the role and relevance of legal provisions, are often determined more by the collective custom and practice of British industry than by developments in common law or statutory interpretation by courts and tribunals. These latter developments are examined in the detailed annotations to

the sections of the Employment Protection Acts in Part II of this book. The notes which follow, however, provide a brief introduction to the collective custom and practice of British industry.

Written particulars of employment

Forms of compliance. Recent research (see [1977] 6 *I.L.J.* 133) indicated that, of the employers surveyed, many did comply with the requirement in section 1 of the 1978 Act to provide written particulars of terms of employment, at least to some extent. A BIM survey of 1980 on company practice relating to the written employment contracts of managers and specialist staff found that 96% of the companies surveyed provided written contracts for some or all of those staff. There remains the large number who do not comply: the problem of workers' ignorance of their own terms of employment remains unsolved by the law. But of those employers who *do* comply, the *forms* of compliance are many: there is a myriad of documents purporting to comply, ranging from letters of appointment, offers of employment on specified terms, documents intended to be written statements of particulars and others intended to be written contracts – *both* of which might be headed: 'Contracts of Employment Act 1972,' and follow the pattern of terms laid down by the legislation; and numerous other documents, complete and incomplete as to employment terms, headed by various titles: Contract, Statement of Particulars, Terms of Employment, Conditions of Work, etc., sometimes requiring signature of either or both parties and sometimes not.

Legalistic analysis of forms of compliance. Given the extremely varied forms of response by employers to the legislation, the lawyer's approach is as follows: he attempts to classify the various documents into one of the categories: contract/statement of particulars. Then, as a matter of discretion – if contract, parol evidence may be allowed to amplify (though not contradict) it, and doctrines of mistake, misrepresentation, intention to create legal relations, etc; may be relevant. If a statement of particulars, evidence is allowed to amplify or contradict it, and doctrines of, e.g. estoppel may apply. Either way, written documents are in this way given some primary role, and employees are usually at a disadvantage in this respect. The documents are invariably drawn up by the employer – the employee only 'consents.' As Sir Otto Kahn-Freund said: 'This is the reality of things, in the language of the law that reality is concealed. There the unilateral rule- and decision-making power of

management is presented as based on a 'contract,' on the free will of the employer and the employee' (*Labour and the Law* (1977), p. 12). Employers with superior bargaining power and access to professional expertise on personnel management and legal advice naturally exploit these resources in drafting statements – geographical mobility or job flexibility clauses in employment documents are usually a good illustration of this.

Realistic analysis of forms of compliance. An alternative approach would seek to redress this imbalance: any evidence as to terms of employment would be allowed, including, without any special significance, any written documents, whatever their nature. The key-stone of this approach would be collective custom and practice. There is, of course, the problem of class-bias in judges' perceptions of such custom and practice. E.g. *Burroughs Machines Ltd.* v. *P. Timmoney* [1977] I.R.L.R. 404, where a document entitled 'Particulars of Terms of Employment pursuant to s. 4 of the Contracts of Employment Act 1963 (as amended)' referred to a collective agreement providing for a 'guaranteed week,' save in the event of industrial action involving 'federated' employers. The employer in question subsequently left the federation, and the occasion arose where a claim for guaranteed pay was made in circumstances of industrial action involving the employer himself – by then no longer a 'federated' employer. The Court of Session in Scotland held that there was no written contract; the collective agreement's provisions could not be incorporated 'word for word' into the contract of employment; and that 'common sense' dictated that the 'guaranteed week' provision be conditioned by provision in favour of the employer in the event of industrial action on his premises. So although the employee was *not* engaged in the industrial action, and the employer *was* a party to it, it was 'common sense' to the judge that the employee should bear the financial consequences.

Despite this hazard to workers, the realistic analysis probably is better suited to employees' circumstances. At the least, it avoids the practical problems for workers of forced signing of documents and maintaining adequate records over long periods, such written records being conclusive. It also avoids having to rely on the legal vagaries of doctrines of estoppel, misrepresentation, mistake, intent to create legal relations, incorporation of collective agreements (see Note to s. 2 (3)), etc. The dangers of employers' manipulating custom and practice at work can be met by the weapon of trade union organisation and action. This is more

reliable than the legal weapons of estoppel, etc. in the tribunals and courts, used there to avoid the consequences of an otherwise binding and adverse written document. The requirement of the written statement of particulars would be retained to fulfil its original purpose – written information for employees – but no more.

Reference to documents. It is thought to be common for an employer to discharge his obligation by referring employees to documents – as where the employment is covered by a collective agreement fixing the particulars listed in s. 1. But a survey of employers in light industry in North-East London showed that this is not always the case (1977) 6 I.L.J. 133). 80 per cent, of the employers interviewed complied with the law in some form, and of these, 78 per cent claimed to have provided *full* particulars *without* reference to secondary documents. Those who did not provide full particulars but rather referred to secondary documents tended to have a predominantly white-collar workforce. So the common expectation that employers would avoid the burden, and employees miss the benefits of a direct supply of information was not borne out by this research. It showed that manual workers were found to be less likely to be fobbed off with a reference elsewhere. But where this did occur, the anticipated results followed: the survey disclosed a high level of ignorance among employees of such secondary documents – collective agreements, works rules, etc. – even when clear reference was made to them. Again, manual workers seemed *more* aware of these secondary sources than white-collar workers.

Accessibility. *Ignorance* would seem to contradict the logic of the law's requirements that the document be reasonably accessible to the employee or that he have reasonable opportunities of reading it in the course of his employment. But experience triumphs over logic, or over law anyway. Display on a notice board might satisfy the needs of an employee for information, but the above mentioned survey found that in some cases there were very few or only one copy available for a large number of employees spread over a number of sites. This would not seem to satisfy the requirement as to 'reasonable' accessibility. As to the scope of 'reasonable opportunities of reading the document, the time off provisions of s. 28 of the 1978 Act might help trade union members.

Seasonal employment and long-serving employees. Provision is made in s. 2(4) of the 1978 Act for seasonal employers, who are exempted from the requirement to issue particulars to employees who may have

been away for up to six months. Yet employees away from work may need reminding. And in particular, long-serving workers may lose their documents/statements of particulars. A right to require periodic reissuings of written statements would alleviate much of the difficulty.

Part-timers. The exclusion by s. 3 (1) of the 1978 Act of employees working less than 16 hours a week from the right to a written statement of terms of employment is particularly unfortunate since in many cases they do not in practice receive many of the benefits available to full-time workers. Surveys indicate that they are often on lower basic rates, do not benefit from overtime, are excluded from sick pay and do not get the same holiday entitlements. Thus, in one survey covering 4.4 million women employees, 72% of the establishments offered pension benefits going beyond the State scheme, but in only 14% were part-time workers eligible. And though 70% gave sick pay above the State level, in only 33% were part-time workers eligible (Dept. of Employment *Gazette*, November 1980, p. 1142). Since practice does vary so greatly in the treatment of part-timers, their need for information is as great as that of full-time employees.

Discrimination against women workers. It should be noted that compared with about 3,500,000 part-time women workers (over a third of all U.K. women workers), fewer than 700,000 men do part-time jobs. So less favourable treatment of women part-timers with regard to non-contractual benefits might very well fall within the definition of indirect discrimination in s. 1 (1) *(b)* of the Sex Discrimination Act 1975. Employment legislation itself thus indirectly discriminates against women workers – see the general exclusions effected by Sched. 13 to the 1978 Act paras. 3–7. Furthermore, the decision of the E.A.T. in *Dugdale* v. *Kraft Foods Ltd* [1977] I.C.R. 48 indicates that unequal treatment on the grounds of hours worked is not by itself a sufficiently material difference to justify a lower rate of pay under the Equal Pay Act 1970, s. 1 (4). Another case is currently pending before the European Court as to whether the equal pay principle contained in Article 119 of the Treaty of Rome requires part-time workers to be paid the same time-rate as full-timers: *Jenkins v. Kingsgate (Clothing Productions) Ltd* [1980] I.R.L.R. 6 (EAT).

Changes in particulars of employment. The research referred to above [1977] 6 I.L.J. 133) showed, perhaps surprisingly, that a high proportion of employers complied with the requirement of s. 4 of the 1978 Act and

provided written statements of changes in terms of employment to their employees.

Employee must consent to change. The notification required here is of an agreed change. The common law rule is that an employer cannot change terms of employment without the consent of the employee. So merely informing the employee by a written statement is not conclusive of the existence *of an agreed* change in the terms. Unfortunately, the legal bias against workers often transforms the *knowledge* of a powerless worker into binding consent. This, despite the fact that many strikes arise precisely out of a change by management in the conditions of work which has not been and is not agreed to by the workers. One wonders what, if any, role is played by the written statement in the struggle for control over work regulation.

Status quo clauses. In practice, the potential conflict can be defused by a negotiated status quo clause, though this may only defer the problem. E.g. a national procedure agreement between British Leyland Truck and Bus Division and four unions (TASS, APEX, ACTSS and ASTMS) representing white-collar staff, finalised on September 6, 1977, provides that where there is any disagreement over *changes in working practices,* etc., the status quo will apply until agreement is achieved. A new agreement, effective from May 31, 1978, between the EEF and TASS contains the following clause: 'Except by agreement between the parties, *general alterations* in salaries and alterations in working conditions which are the subject of agreements officially entered into or which are recognised by the employers and employees concerned, shall not be given effect to until the appropriate procedure provided in this agreement has been exhausted.'

In the absence of such express status quo clauses, workers may be able to utilise the 1972 Code of Practice, para. 52 of which provides: 'Major changes in working conditions should not be made by management without prior discussion with employees or their representatives.' Again, the new Code of Practice on Disciplinary Practice and Procedures provides that new rules are to be introduced 'only after reasonable notice' (para. 20).

Contractual mobility and flexibility clauses. A change in the *terms*, covered by this section, does not *necessarily* result from actual changes in, e.g. the nature of the work done or the place where it is to be done –

as many workers have found to their dismay. No written notification is required in that case. So, e.g. Barclays Bank have a clause relating to geographical mobility in their General Rule Book: 'Every member of the staff must be willing to serve at any office of the Bank as may be required and will serve the bank faithfully, diligently and to the best of his or her ability.' There is a flexibility agreement between Govan Shipbuilders Ltd. and a joint negotiating committee representing certain white-collar staff of October 1977 which provides: 'All members of Secretarial Service Centres will perform any secretarial duties allocated to them by either the Controller of Secretarial Services or other supervisor whether or not they normally carry out this duty.' Such provisions are often linked with productivity bonus payments. So an agreement made in the NJIC for the gas industry for 41,000 manual workers, effective 20.1.80, contains a 'General Obligations Payment' designed to recognise the need for operatives to work flexibly and to be familiar with skills other than their own. And a new job evaluation scheme for British Transport Dockers provides as part of the deal that staff must, at the request of local management and subject to suitability, be prepared to perform other jobs in the same grade to cover temporary problems like sickness or absence. (For other examples, see *IRRR* 235, November 1980).

One statement may be all. The provision in s. 4 (3) of the 1978 Act can transform the employer's obligation to keep the employee informed with up-to-date notice of the state of his contractual rights and obligations into a potentially one-off exercise. An employer can in his initial statement refer to the document (collective agreement) as the source of the terms and go on to indicate that all future changes would be entered there. That would end all the direct communication required by the law on this score.

The research referred to above found that in practice barely any of the employers surveyed (light industry in North-East London) took this one-off step. Most of them provided written statements of the changes, usually 'full particulars.' But *Burroughs Machines Ltd.* v. *Timmoney* [1977] I.R.L.R, 404 illustrates the other mode of compliance. The employee had a contract which referred to the engineering industry agreement and stated that 'the company undertakes to ensure that all alterations will be duly recorded within one month of any change.' When he disaffiliated from the E.E.F., the employer notified the unions and the appropriate amendments were made in the relevant documents. The Court of Session held that none of the alterations

affected the terms relating to the guaranteed week claimed by the employee, and that the act of the company in resigning from the federation 'had and could have had no effect whatever upon the contract of employment between the company and the (employee).' One can only conclude that the original reference to the engineering agreement, which allowed exemptions from payment to 'federated' employers was at least misleading, for non-federated employers were apparently also exempted, as the employee lost his claim.

Remedies. The remedy for failure to supply written particulars (subsidiary. 1 and 4 (1)) is even more unsatisfactory than the usual individual complaint mechanism provided, and in practice it is little used. In the first quarter of 1978, applications to industrial tribunals totalled 9,689 in England and Wales and 1,291 in Scotland. Only 1 per cent arose out of rights (including rights to a minimum period of notice) set out in the Contracts of Employment Act 1972 – which is replaced by these provisions. Wedderburn in 1971 calculated that only 53 of 7,689 cases heard by tribunals in 1968 came under this heading.

The reasons for this inadequacy are not hard to find. The authors of the research into the workings of these provisions referred to above have commented: 'It is perhaps ironical that in an age of widespread collective bargaining, if an employer of, say, 5,000 employees fails to provide written statements, the only recourse the work-force has is by way of individual complaint to a tribunal. It is not open to a trade union or a group of employees to bring a group action, and although there is, of course, the possibility of a 'test case,' contacts with local trade union officials suggest that a successfully brought 'test case' does not always produce a response on the part of the employer towards the rest of the work-force. Sometimes many cases have to be brought' (6 I.L.J. 133, at 138–9 (1977)). So workers do well to rely, as with other legal rights, not on their legal remedies, but on their own industrial strength to secure the employer's compliance.

The contents of the written statement. The legal requirement on employers to provide written particulars of terms of employment needs amplification with regard to certain of those particulars:

Remuneration. Pay and benefits are probably the most obvious incidents of work. Details of the more common types of remuneration and fringe benefits are presented in the Notes to s. 1 (3) of the 1978 Act.

But the range of benefits is steadily expanding, A 1980 survey of fringe benefits for office staff, based on 382 organisations employing over 100,000 office staff catalogued holiday entitlement, maternity benefits, pensions, insurance cover, sick pay, private medical insurance, flexible working hours, canteens and luncheon vouchers, season ticket loans, share options and profit sharing, house purchase schemes, relocation and housing assistance, reimbursement of the costs of further education courses, discount buying and social facilities. The average cost of non-wage benefits as a proportion of payroll was estimated at 20% of total payroll costs *(IRRR-PBB* 27, November 1980). The benefit to the employee can be substantial. One estimate stated that in 1980 a standard rate taxpayer would need a gross pay increase of £1,196 to compensate for the loss of a Chevette 1250cc company car – or even more if the company also paid for private usage. And see the package agreed at BDA-Hotpoint, a subsidiary of GEC, which included a summer play school for employees' children, wedding gifts on the marriage of employees or their children, scholarships for further education of employees' children, dental facilities on site, in addition to medical facilities, CAB advisers on site once a week, free legal advice from a local solicitor, and a subsidised BUPA scheme (see details in *IRRR* 218, February 1980). Perhaps, in defining what the employee gets from work, there should be included other non-monetary benefits: career prospects, creativity outlets, travel opportunities, freedom from supervision, etc. Job evaluation techniques could be put to work here.

Taxation and index-linking. The impact on these various kinds of remuneration of changes in taxation is obviously great. The recent controversy over the taxation of company cars and the well known complexity involved in taxation of different forms of free or subsidised travel for employees are illustrations of this.

Attempts to meet the fluctuations of the economy by index-linking remuneration (not to mention pensions) are not uncommon. Various types of provisions are to be found in collective agreements: reopener clauses, stating that under certain circumstances pay negotiations will be reopened before the agreement is due to expire; direct indexation, by which pay is adjusted as the RPI rises; and threshold clauses providing for further increases when the RPI reaches a certain level (threshold).

Basic hours and overtime. According to the 1980 New Earnings Survey, in April 1980 the average weekly hours worked was, for full-

time adult manual men, 45.4 hours, and for manual women, 39.6 hours. These figures include respectively 5.7 hours overtime for men and 1.1 hours overtime for women. So, excluding overtime, all men worked 38.9 hours a week compared with 37 hours by women. There are, of course, differences between manual and non-manual workers. Basic hours, excluding overtime, of non-manual men were 37.1, and 36.7 of non-manual women. Non-manual workers worked less than a third of the overtime worked by manual workers, men and women.

While most workers were, therefore, on a basic working week below 40 hours, the overtime component served to put them over that total – and its economic significance is shown by the fact that overtime earnings made up 14.1 per cent of the total earnings of manual men (and in some groups of workers, e.g. baking, over 25 per cent of earnings come from overtime; in others, e.g. municipal busmen, over 20 per cent,), though only 2.9 per cent of the earnings of non-manual men. Overtime varies, particularly for women, depending on the state of the economy. In the year up to April 1980, overtime hours worked by manual men fell by 0.6 hours to 5.7, but women's hours remained the same. Obviously the current industrial depression is taking its toll of overtime as well as jobs.

In July 1978, the TUC began its campaign for shortening the work week by issuing a circular calling on member unions to give priority to reductions in hours, A data bank was set up to collect and exchange information on shorter hours agreements and unions were circulated with reports or developments. During 1979 a relatively small number of national agreements are known to have included provisions for reductions in normal hours. The national agreement for engineering workers, reached after industrial action during the summer of 1979, is the largest of these and gives a 39-hour week from November 1981 for more than two million workers. Other agreements, affecting some 300,000 workers, provide for reduced hours effective from various dates in 1980. Most of these reductions are for one hour a week for manual workers, usually to 39 hours. (See Department of Employment *Gazette,* May 1980, p. 519; for details of 25 agreements, see *IRRR* 217, February 1980.)

These figures give some substance to the legal problems often discussed of whether overtime is obligatory. A study in 1978 of 192 organisations employing more than 500,000 people showed nearly a quarter of the

organisations requiring compulsory overtime from some of their employees; 75 per cent of these required more than four hours a week, and 25 per cent, eight hours a week or more.

Shift-work. Details must be provided of any working patterns, e.g. shift-working. The hazards of shift-working are notorious – not only for disruption of family and social life, but for damage to health due to disturbance of biological rhythms, fatigue, stress and neurological disorders and accidents. Despite this, the practice is common. Comparisons between the 1968 and 1979 UK New Earnings Survey figures indicate that the proportion of employees in manufacturing industries who receive shift payments increased from approximately 25% to 26% since 1968. But a different survey in 1978 concluded that the proportion of manual workers employed on shift patterns of some type had risen to 34.5% (*IRRR* 230, August 1980). A recent review of collective agreements in the chemicals industry showed that all but 17 of the 91 agreements, covering 80,000 manual workers, made provision for shift work. The most common pattern was three-shift continuous working; next most common was double day working *(IRRR-PBB* 19, July 1980).

Patterns of working hours. Other patterns, where they exist, need also to be spelled out in the written statement. For example, *flexible working hours*, an arrangement whereby employees may begin and end work at times of their choice provided they are all present at certain core-times and that within a settlement period of a week or month they work the total number of hours agreed. The spread of such arrangements has been remarkable. Thus, in the non-industrial Civil Service there were no such arrangements before 1972. By the beginning of 1980, 200,000 workers (40% of the total) were covered by flexible working hours, and the Civil Service negotiating body, the National Whitley Council, has urged their extension to all non-industrial staff.

The *compressed working work* is a work pattern in which the full complement of normal weekly hours are worked in fewer than five full days. It is most commonly found in practice among shift workers in the engineering industry. The EEF estimated in early 1980 that out of 220,000 workers in federated firms on night work, about 160,000 were on the system of four long nights and a short Friday night, and a further 35,000 worked four long nights only Monday to Thursday. The tendency to reductions in the working week to below 40 hours may lead

to further attention being paid to cutting the number of working days among normal day workers.

Staggered working hours are sometimes adopted to alleviate traffic congestion problems (see, for example, the allowances paid to such workers in the cement industry of 7p. for each hour worked).

Finally, *job-sharing* is the practice whereby two people jointly fill one full-time post. The English clearing banks have systematically adopted this practice since the early 1960s when there was an acute shortage of clerical and secretarial staff in central London and it was sought to attract married women returners by splitting full time jobs into alternate week jobs. Various methods may be found: alternate weeks, alternate days, split weeks and even split days.

Holidays and holiday pay. The *Social Action Programme* drawn up by the EEC Commission in October 1973 contained, among other things, a Recommendation to Member States to adopt the principle of four calendar weeks as the minimum paid holiday entitlement by December 31, 1978. There is, in the U.K., as yet no general right to holidays. Manual workers' entitlements to paid holidays expanded greatly during the 1960s (in 1960, 97% of manual workers were estimated to be entitled to only two weeks holiday – by 1970 over half were entitled to three weeks or more). In the 1970s these entitlements continued to rise until 1976. The increase was then halted up to the summer of 1979 probably due to the effects of successive incomes policies. During 1979, national agreements or wages orders covering an estimated 2.75 million workers provided for increases in holiday entitlements, many of these bringing the entitlements up to four weeks. The National Engineering Agreement covering some 2 million workers established a four year agreement: its effect was to provide two additional days for the 1979/1980 year, followed by a staged increase of a further day each year until a basic entitlement of 25 days is reached in 1982/83. The increase was agreed on the condition that additional days are to be taken on days nominated by management so arrangements can be made for Christmas/New Year shutdowns. Still, many workers are relatively badly off, e.g. the Clothing Industry Wages Council, covering 350,000 workers, stipulates only 18 days.

Holiday pay is the largest fringe benefit in terms of levels and also as a proportion of wages and salaries. In 1968, it formed 7% of pay and 8.8%

in 1973. Holiday pay entitlement is specifically to be singled out for attention in the statement of particulars (see also rights during the period of notice: Sched. 3; para. 2 (1) *(c)* to the 1978 Act). Accrued holiday entitlement needs be the subject of contractual provision. Most white-collar staff receive their normal weekly earnings when they are on holiday, but not manual workers, though there is a trend from paying basic rates only towards paying average earnings. Thus in the engineering industry until April 1978 holiday pay was calculated on the national minimum time rate plus a third. Now it is paid on the basis of normal average 40-hour earnings with the national agreement laying down the principles by which the appropriate figure can be arrived at for time workers, PBR workers and shift workers.

Sickness and sick pay. Terms and conditions (but note the change from 'provisions' to 'provision for sick pay' in s. 1 (3) *(d)* (ii)) under this heading should cover two principal aspects: sickness benefit schemes, and continuation of employment in the event of prolonged ill-health. In practice, only the first tends to be the subject of coverage in statements of particulars and even written contracts.

Despite the isolated decision in *Orman v. Saville Sportswear Ltd*, [1960] 1 W.L.R. 1055, the judges have proved incapable of implying a general common law duty on employers to stand by their employees in ill-health – the duty of fidelity impliedly owed by employees not being reciprocal in this instance. On the contrary, the common law regards the contract of employment as a commercial matter: if labour is defective, then payment is not required. Payment is for work done and hang the inhumanity. So workers in ill-health must rely on what they have succeeded in negotiating for themselves in their contracts.

The hardship is enormous in scale: during 1976, certificated sickness accounted for the loss of some 350 million working days, costing the taxpayer over £312 million in social security benefits *(cf.* six million working days lost through industrial disputes). Yet the variation in workers' protection is equally enormous. A Department of Health and Social Security survey of occupational sick pay schemes in 1974 found marked differences between the schemes for non-manual and manual employees, *e.g.* 25 per cent, of full-time men and 21 per cent, of full-time women receive between 13 and 26 weeks' sick pay. But there are considerable variations according to type of work. While 27 per cent of non-manual men receive 52 weeks' sick pay or over, 25 per cent of

manual men receive only four weeks or less. Again, take-up of benefits is another matter. Ministry of Pensions and Ministry of Labour surveys in 1964 showed that in 1961 only about a fifth of the male workers incapacitated by sickness actually received employers' sick pay, though just over 50 per cent, were covered by some provision. Then there is the variation between regions: sick pay schemes most frequently are found in the South East and are least common in the West Midlands and Wales.

Sickness benefit provisions to be included in the written statement are of various types, most commonly a direct payment by employer to employee during the period of absence. The employee's entitlement is to be paid for a specified number of days or weeks or months during a year, or some longer period. Alternative methods used by some employers are assurance schemes – benefits being paid by the insurance company, or Friendly Society schemes – with both employer and employee making contributions.

Between 1972 and 1978 it is estimated that the number of employees covered by medical insurance schemes paid for by their employers doubled from just over 220,000 to more than half a million. 1979 saw the sharpest increase yet, to more than 700,000 employees. Moreover, this figure excludes all those who gain coverage as result of the electrical contracting national scheme since this only took effect from January 1, 1980.

A shocking finding of the above-mentioned DHSS survey of 1974 was that in a substantial minority of cases, both the duration and amount of sick pay is at the employer's discretion. This finding was confirmed in a recent survey of 30 top British organisations: the 20 largest private sector employers and the 10 largest nationalised industries (see Industrial Relations Review and Report, No. 152 (May 1977)). Management was found in many cases to have complete discretion in the payment of benefits – sometimes to the extent of expressly stating the scheme not to be contractual at all; *e.g.* the Bass Charrington staff scheme, and the W.D. and H.O. Wills scheme (part of the Imperial Group). It should be considered whether the inclusion of such schemes in a written statement of terms might have implications which undermine their purportedly non-contractual nature. For details of the matters concerning sickness benefit schemes which should be covered in the written statement, see the notes to s. 1 (3) of the 1978 Act.

Finally, it should be noted that the Queen's Speech of November 20, 1980 indicates the Government's intention to proceed with the proposals contained in the Green Paper (*Income During Initial Sickness: A New Strategy*) published on April 2, 1980. The proposals are to transfer the responsibility for making payments to employees off work through ill health from the State on to the employer. The proposals as published would require employers to pay sick pay of £30 a week for up to eight weeks' sickness absence in any tax year. The total amount of flat-rate sickness benefit which is paid to people in the first eight weeks of incapacity is currently of the order of £375 million a year. If, in place of this, sick pay had to be provided subject to a minimum of £30 a week, employers' wage bills would rise by about £415 million. For a critique of the proposals, see T.M. Partington, [1980] *I.L.J.* 193.

Pensions and pension schemes. Social welfare payments, mainly pensions, are the second most important category of fringe benefit in industry (after holiday pay), comprising 4.2 per cent of pay in 1968 and 4.8 per cent, in 1973. A 1960 Glasgow University survey showed that about 66 per cent of companies operated pension schemes and 50 per cent gave long-service payments. A 1968 Department of Employment survey reported that in manufacturing, 72 per cent of employers made payments into pension funds for employees. Occupational pension schemes cover about 11 million employees, and eight million of these will get at least half final salary on retirement. But these schemes have grievous faults – they are very uneven in their incidence, many workers are not covered, especially lower-paid workers and women in particular (see 5 I.J.L. 54 (1976)). They have little redistributive effect on wealth in this country. Hence the growth of State pension schemes – see the proviso to s. 1 (3) and also s. 1 (4) (d) of the 1978 Act.

Union involvement is growing in this area and a recent guide issued by the NUJ sets out the issues which may be the subject of interest:

– the establishment of pensions as a negotiable issue;
– joint administration of company pension schemes by management and employees;
– equalisation of the retirement age for men and women;
– long-term sickness and disability benefit;
– indexing of pensions to rises in the cost of living.

The NUJ booklet contains a number of examples from company pension schemes to illustrate these points (see *IRRR* 227, July 1980). Trade union officials may be involved in pensions at least to the extent of advising members and warning employers of the cost of lost pension rights which must be compensated for in the event of an unfair dismissal (see the paper published by the Government Actuary's Office, with assistance from tribunal chairmen, which sets out a suggested method of assessing pension loss for this purpose (reproduced in full in *IRRR-LIB* 153, January 1980).

Title of the job. The need to analyse the generality or specificity of the phrase 'title of the job' springs from the considerable practical consequences which will flow from one or the other approach. The ramifications are clear: a *general* approach would benefit employers by allowing them to define job titles broadly, thus gaining flexibility, shifting the employee from one type or place of work to another as the need arises. Taken to its extreme, job 'titles' are here reduced to grades of a job evaluation scheme. This disregards the workers' duties, skills, the 'nature of the work and the capacity ... in which he is employed' and reduces him to a point on a numbered scale. This cannot be allowed to go unchallenged. The consequences for workers might be to undermine traditional craft skills by dilution, to threaten bargaining strength by allowing for flexibility and confining wage claims to regradings of a finite amount determined by the employer's scheme, and to endanger jobs by letting interchangeability enable several 'jobs' to be carried out by one worker.

So conversely, a *precise* approach to 'job title' benefits workers by making clear what the nature, capacity and place of employment is, and ensuring that the employer cannot add on duties, increase responsibilities, or transfer him without his consent to this variation of the contract, *i.e.* it renders negotiable what would otherwise be a unilateral power of the employer. The interpretation of 'title of the job' is therefore of the first importance. A precise approach will ensure that every employee has a statement describing an identifiable job of his own. This may, effectively, become a title to, and not only of his job.

Disciplinary and Grievance Procedures. As s. 1 (4) *(a)* of the 1978 Act makes it mandatory to have disciplinary rules written down, so s. 1 (4) *(b)* (i) obliges employers to provide an appeals procedure on disciplinary matters. These may be fused with grievance procedures,

which are also made mandatory by s. 1 (4) *(b)* (ii) (but see the Code of Practice, para. 16).

An example of such a fused procedure is that between the TGWU and the Hotel Bristol, Piccadilly, part of the Trafalgar House Group, covering all weekly paid staff. Disciplinary arrangements provide for verbal and written warnings, investigation and hearing. But at any stage an employee can appeal against disciplinary action through the grievance procedure, a five-stage procedure with time limits on all stages. It leads ultimately to ACAS conciliation if no agreement is reached, and provides that no industrial action will be taken until the procedure is exhausted. This last point raises two inter-related issues: first, the effect of this no-strike clause on the contracts of employment – see T.U.L.R.A., s. 18 (4). Secondly, whether the existence of such a clause implies a contractual right, should the procedure be exhausted without agreement, of the workers to take industrial action. At least it might preclude the employer from invoking any discipline should employees take industrial action at the conclusion of the procedure.

Health and safety rules and procedures. It is not at all clear why these rules were not required to be included in the written statement (s. 1 (5) of the 1978 Act). The GMWU pointed out in its comments on the absence of health and safety matters from the Code of Practice: 'In our experience, a substantial number of disciplinary matters arise in connection with health and safety.' One need only consider disputes arising when workers consider some machine or substance dangerous and the employer refuses to do anything to eliminate the risk on grounds of cost or lost production. Agreed rules and procedures would be just as useful here as in other matters. It is not clear that the employer's duties to provide information under the Health and Safety at Work etc. Act 1974, s. 2 (2) *(c)* and (3), will cover this gap.

Guarantee Payments

Origins and significance. With the enactment of the provisions on guarantee payments in the Employment Protection Act 1975 (now ss. 12–18 of the 1978 Act), Britain finally recognised the principle of the guaranteed week already accepted by the other members of the EEC. At the time of passage, it was estimated that this might be the most expensive provision in the 1975 Act – one estimate put the cost at £80 m.

(see the Report of Standing Committee F on the Employment Protection Bill, 11th Sitting, June 17, 1975, at col. 551). To allow employers to prepare for this expense, the Government did not bring the provisions into effect until February 1, 1977.

In fact, as was pointed out in the Department of Employment *Gazette* (June 1978, p. 660), it might have been predicted that these provisions would have little impact. For the information collected on short-time working and temporary lay-offs during 1974–77 showed both to have been very rare. The three-day week in the 1974 power crisis was the only widespread instance. Otherwise, the practice had been concentrated in particular industries such as textiles.

On the other hand, the growth of short-time working and lay-offs consequent on the current economic depression would seem to render these provisions on guarantee payments rather more significant. The number of hours lost through short-time working in June and July 1979 (336,000 and 601,000 respectively) had risen one year later, in June and July 1980 to 2,755,000 and 2,937,000 respectively. The number of hours lost in July as a result of short-time working was the highest since May 1975: 4.7% of workers in manufacturing industries were on short-time work – the highest percentage since the three-day week in 1974. By October 1980 this had risen to a total of 467,000 workers, 10.4% of the total employed in manufacturing being on short-time working. On average, each lost 15.4 hours or about 38% of the standard working week. Most lost a few hours a week, but some are laid off for up to a week at a time. Nonetheless, it would seem that it is not the guarantee payment provisions which have been resorted to in these circumstances so much as a different mechanism: the Temporary Short Time Working Compensation Scheme.

Temporary Short Time Working Compensation Scheme. The TSTWCS came into operation in April 1979. It enables an employer to share work between employees by putting them on short time working. Employees put on short time must be paid at least 75% of their normal pay for each day without work and employers are reimbursed this proportion plus related N.I. contributions and holiday pay credits over a maximum period of six months. During its first year of operation, 1,591 applications were approved under the scheme, encompassing 92,919 jobs threatened with redundancy and involving 229,148 workers who were expected to work short time in an effort to avoid these

redundancies. (Department of Employment *Gazette,* May 1980). It was stated in reply to a Parliamentary question that the number of applications to join the scheme had increased very considerably in the four months up to November 1980. For example, in August 1980, 627 applications were approved and in that month alone £9.8 million was used to finance 716,630 workless days. 145,100 workers were put on short time in an attempt to prevent 77,680 redundancies. Engineering and textiles were the industries using the scheme most extensively. In the first five months of the financial year 1980/81 the Government spent £40.2 million with every sign of claims increasing. The Government has announced that the scheme will be continued for another year. The period of support has been extended from six to nine months, but new applicants to the scheme will receive only 50% of normal earnings instead of 75% as originally provided.

It can be seen that as far as employees are concerned, short time working on almost full pay is a good alternative to losing their job. So in general trade unions have supported applications and, on some occasions, have pressed employers into applying. The irrelevance of the legal provisions on guarantee payments is obvious. By claiming a subsidy through the scheme, the employer introducing short time working obviates the need to make guarantee payments. And the workforce will usually be financially better off under the scheme than if receiving guaranteed pay even at the maximum level of payments permitted (see Notes to s. 15 of the 1978 Act). The inter-relation of unemployment benefit with guarantee payments and the subsidies under the scheme create new skeins of problems for benefit officers to unravel. (For some guidance, see *IRRR* 233, October 1980, at p. 6).

Collective agreements and the law. The law on guarantee payments illustrates again the yawning chasm which divides workers who have to rely on the law for their rights from those who rely on themselves. It is estimated by the Department of Employment that there exist guaranteed pay arrangements at national level covering 12 million workers in various industries. For brief details of such arrangements for a guaranteed weekly wage, where these are known to differ from those provided by the 1978 Act, and for a minimum earnings guarantee, see *Time Rates of Wages and Hours of Work*, HMSO, 1980. Yet very few claims appear to have been made for the legal entitlement. In the *Industrial Relations Law Reports* up to December 1980, almost four years after its introduction, only 12 cases concerning guarantee

payments are reported – 11 in the industrial tribunals and one in the EAT. Of these, only one was reported successful – a Mr. Robinson was awarded £6 *(Robinson* v. *Claxton & Garland (Teesside) Ltd.* [1977] I.R.L.R. 159). Even if one multiplied by 1,000 the number of unreported claims and by 10,000 the amount of guarantee pay awarded so far, the results of the legal process would remain insignificant beside that achieved by workers' autonomous action. Lawyers should adjust their attention accordingly to the entitlements under collective agreements, rather than under the provisions of the legislation. The law *is* important, but only as the backdrop against which the collective struggle is waged. With regard to guarantee payments, the legislative requirements assume their importance: (a) by virtue of their being adopted instead of pre-existing collectively agreed standards; (b) as the floor from which negotiations are conducted to achieve improvements; or (c) as a standard against which other arrangements are measured for the purposes of exemption under s. 18 of the 1978 Act.

Qualifying for guarantee payments: flexibility. Section 13 (2) of the 1978 Act, and the note to it, deal with the requirement that an employee claiming guarantee payment undertake suitable alternative work unless it is reasonable for him to refuse it. Industrial practice illuminates the issues presented by the subsection. Thus all but one of the first 16 agreements exempted under s. 18 provide for some degree of mandatory flexibility in order to qualify for guarantee payment. The degree of flexibility, however, covers a wide range – and the legal requirement in this subsection presumably falls somewhere on this spectrum. Thus in some cases workers must be willing to perform '*suitable* alternative work' (Order No. 1 – Civil Engineering); or '*reasonable* alternative work' (Order Nos. 5 and 9 – Footwear and Leather Manufacture). But in both the latter two cases union officers must be consulted in case of difficulty in interpreting what is reasonable alternative work.

In Order No. 4 (Wire and Wire Rope Manufacturing), if 'reasonable alternative work' is undertaken, payment is to be at the *higher* of the two rates (the original or the alternative job). In some agreements there is an *occupational* qualification: the employee must be willing to perform work 'in any other suitable demolition or dismantling industry occupation' (Order No. 2); or in 'any other suitable building industry occupation' (Order No. 3). Both these also require movement to 'any other job, site or shop where work is available,' and similar geographical

mobility is required in the agreement negotiated by the unions with the Refractory Users' Federation (Order No. 12). Some degree of occupational mobility is entailed in the clause in the Steeplejack and Lightning Conductor Engineering Industry (Order No. 6): employees must perform work 'in any other suitable occupation,' but not as much as in the Papermaking and Boardmaking Industry (Order No. 7), which allows for alternative work 'in any department or in connection with any process within the establishment.' Another group of agreements in similar industries (No. 10, Fibreboard Packing Cases; No. 13, Multiwall Sack Manufacturers; and No. 15, Carton Manufacturing) all require employees to 'perform such work as is required, either in his own or an alternative job.' Interestingly, a voluntary, non-exempt agreement, covering 12,500 workers in the Glass Container Industry makes it a condition of the guarantee that the employee 'perform in the normal way any services, whether within or temporarily outside his usual occupation which in the circumstances he could reasonably be required to perform.'

Exempt agreements negotiated with subsidiaries of General Mills Inc. (U.S.A.) explicitly provide for employees to 'work flexibly so as to maintain a balanced work force. When this results in an employee being required to accept work at a lower grade *(e.g.* machine minder to work as a packer) the higher rate of pay will be maintained for up to six weeks' (Smith's Food Group and the TGWU, Order No. 8) and in the agreement Order No. 14 (Tudor Food Products and GMWU), the flexibility clause explicitly provides for acceptance of a change of shift, as well as a lower grade of work – again at higher basic rates preserved for up to six weeks. A final interesting contrast is provided by two exempted agreements negotiated by the same company with two unions, one general and one craft union. In both cases the company, Henry Wiggin & Co, Ltd., does not expressly require employees to accept suitable alternative work. But in the case of the agreement negotiated with the GMWU (Order No. 11), where the lack of work arises out of 'the refusal of *another* employee to perform any work he is temporarily assigned to do,' the employee may lose part or all of his entitlement under the agreement. This last provision is, however, *absent* in the agreement negotiated with the EETPTU (Order No. 16); *i.e.*, there is no obligation to accept alternative work in order to qualify.

Industrial tribunals' interpretation. Some industrial tribunals exhibit the law's managerial outlook and insensitivity to workers' interests in

interpreting s. 13 (2) of the 1978 Act. Thus in *Purdy v. Willowbrook International Ltd.* [1977] I.R.L.R. 388, the union representative's contention that the alternative work was unsuitable because it was outside the employee's normal trade was rejected. The industrial tribunal held there were 'no good grounds for declining the offer.' He had done the work previously, had the necessary skill and the Act envisaged work being suitable 'even though it is work which the employee is not under his contract employed to do' – a matter the industrial tribunal failed to notice is not necessarily the same as the union representative's contention.

The legal perspective is well illustrated by the industrial tribunals' interpretation of subs. (2) *(b).* In *Meadows v. Faithful Overalls Ltd* [1977] I.R.L.R. 330, the worker concerned arrived at 7.50 a.m. on a cold February morning to find the factory temperature below the permitted minimum. While management rushed about trying to get oil supplies, for the heating fuel had run out, the women workers waited in the canteen with hot tea. This had happened on a number of previous occasions of heating failure, and during the waiting time for the temperature to rise the women were paid only their basic rate, though they were on piece-work. After one and a half hours, about 9.30 a.m. the women started to go home. They were asked to wait until 9.45 a.m. when the fuel was supposed to arrive. It did not. When it did eventually arrive after 10 a.m., they had gone home. The industrial tribunal's approach was simply to evaluate the reasonableness of *management's belief that* in fact the oil would shortly arrive. Without regard to the workers' position – two hours in the cold, loss of piece rates – it was held that management's belief was reasonable, the requirement that the workers should stay was *therefore* [*sic*] reasonable, and the claim was dismissed. Perhaps the E.A.T. should take a more objective view and not be satisfied to base the legal rights of workers entirely on management's beliefs.

Trade dispute disqualification. It was pointed out in the note to s. 13 (1) of the 1978 Act that the statute's exclusion of employees in the circumstances of a trade dispute 'involving any employee of his employer or of an associated employer' was wider than that for social security benefits. It may also be pointed out, however, that it is narrower than a number of collectively agreed provisions for suspension of negotiated guarantee payments in the circumstances of a trade dispute. In those cases, s. 140 (1) of the 1978 Act operates to

render the wider exclusion void, but this is subject to s. 140 (2) (a) – agreements specifically exempted under s. 18. And here we find a rather alarming development: of the first 16 exempted agreements, 14 have provisions for trade dispute suspension which are as wide or *wider* than that of s. 13 (1). *E.g.* Guarantee Payment (Exemption) Orders Nos. 10 and 13 of 1977 and 15 of 1978 all provide that the benefit will not be payable 'where there is no work due to industrial action within the plant *or outside the plant but within the industry by any group of workers covered by this Agreement or in membership of Unions signatory to this Agreement*.' Orders 10 and 15 were between the GMWU and SOGAT and, respectively, the Fibreboard Packing Case Employers' Association and the British Carton Association. Order 13 involved the TGWU as well as the other two unions and on the employers' side, the Multiwall Sack Manufacturers Employers' Association. Again, the Agreements contained in Orders 1, 2, 3 and 12 of 1977 allow the employer to suspend payment where he cannot provide work due to collective action 'taken by *any* employee employed under the Agreement' – the agreements negotiated by organisations in the civil engineering, demolition, building and refractory users' industries respectively. So, if there are several subcontractors working, *e.g.* on a building site and one goes on strike, the other subcontractors may escape liability for any guarantee payment even though they are not associated employers.

Other agreements contain even wider exclusion clauses. It seems clear that employers see in guaranteed pay agreements ways of putting pressure on employees (and unions) to avoid industrial action. This is obviously the case in the non-exempt agreement negotiated by Leyland with 11 unions representing 102,000 hourly paid employees in 34 plants which provided earnings security in return for production continuity. Coming into force in November 1977 were provisions for a full shift guarantee and improved lay-off and job security provisions – but subject to the loss of these benefits for individuals involved in unconstitutional industrial action during any one quarter. In 1979 the company added that the lay-off guarantee would not apply when the lay-off had been caused by any form of collective industrial action which restricted normal working. It will be remembered that similar 'penalty clauses' were the subject of a strike at Ford's in 1969.

Unions negotiating exempted agreements must feel that the benefits obtained compensate for the wider suspension clauses. But it should be

noted, first, that two of the exempted agreements do contain *narrower* trade dispute suspension clauses: both were negotiated in 1977 by the National Union of the Footwear, Leather and Allied Trades with respectively the British Footwear Manufacturers' Federation (Order No. 5) and the Cut Sole Associates – British Leather Federation (Order No. 9). The suspension only operates: 'in the event of any employees in a department or a factory taking part in a strike', and applies only 'to all employees in *the* factory'.

Secondly, it should be noted that many non-exempted agreements also provide benefits in circumstances which would be barred by this subsection; e.g. an agreement in the Drug and Fine Chemicals Industry has *no provision* for *immediate* suspension in the event of a strike. This can only occur *after* specified notice has been given *and* the workers' representatives are consulted.

Guarantee payments under collective agreements. Most of the exempted agreements which replace the statutory provisions provide for payment at the basic rate of pay (e.g. Nos. 7, 11, 16), though some make express provision for the inclusion of a shift differential where applicable (Nos. 8, 14) and others go on to expressly exclude bonus, overtime and plus payments from the calculation (Nos. 10, 13, 15). Two agreements negotiated in the Footwear and Leather Industries, however, provide for a guarantee only of 75 per cent of the employee's average earnings – and farther detailed consideration of the calculation of earnings for piece workers is provided in the agreements (Nos. 5, 9). On the other hand, the agreement negotiated between the Refractory Users Federation and the GMWU, TGWU and UCATT guaranteed weekly earnings as follows: (a) Standard Hourly Rate, (b) Joint Board Supplement, and (c) Guaranteed Minimum Bonus (No. 12). And the non-exempt agreement covering 12,500 workers in the Glass Container industry, effective from May 1, 1976, provided for the payment of the hourly job rate, but also for there to be added to this for the purposes of calculation 'one-fortieth of any flat supplementary payment approved by the N.J.I.C., but which has not been consolidated into rates.' Even better is the agreement in the Drug and Fine Chemicals Industry, which provides for normal earnings to be guaranteed which 'includes basic rate, job rate, bonus, shift differential and weekend premiums. Bonus payments which fluctuate shall be averaged over an appropriate period.' In contrast, *e.g.* a settlement agreed in the NJC for the building brick and allied industries covering 18,000 operatives and other grades,

effective 7.11.79, provides a payment of £10 for each workless day if the employee is placed on short-time.

Exempted agreements contrasted with statutory provisions. Nothing is said about whether the exempted agreement under s. 18 of the 1978 Act must contain terms not less favourable than the statutory provisions (*cf.* s. 65 (2) *(d)*). S. 140 (2) *(a)* would allow for such agreements to exclude or limit the operation of these provisions. In practice, as indicated by Mr. Albert Booth, then Minister of State for Employment, when the Employment Protection Bill 1975 was going through Committee, any relative disadvantages compared to the statutory scheme would be expected to be balanced by advantages over that scheme in other respects. For example, the statutory provisions only deny benefit if the employee has worked less than four weeks, has already had five days' benefit in the three-month period, has unreasonably refused suitable alternative employment, or where the lay-off was caused by a trade dispute described in s. 13 (1). Of the first 16 agreements exempted, most do not go beyond these provisions. But, *e.g.* Nos. 5 and 9 covering the Footwear and Cut Sole Industries suspend the guarantee payment, *inter alia,* 'in the event of a breakdown of machinery, fire, flood, or stoppage of fuel or power supply.' In Nos. 10, 13 and 15, in the Fibreboard Packing Case, Multiwall Sack and Carton Manufacturing Industries, there is a clause of the exempt agreement which provides, 'where circumstances arise outside the control of management and employees of such a nature as to make payment under this Agreement impracticable then benefit will not be payable.' The unions presumably felt, and the Secretary of State agreed, that these suspension clauses were compensated for by other provisions of the Agreement. But since there is nothing which prevents employees covered by non-exempt collective agreements from choosing whichever of their rights, statutory or contractual, will benefit them more, there would not seem to be much incentive for a union to be a party to an application to obtain an exemption.

Redundancy Payments

Policy of the legislation. The theory and policy behind the legislation has been subjected to a great deal of analysis and criticism. Thus, in the first edition of the major work on *The Law of Redundancy* (1971), C. Grunfeld speaks of the 'predominant purpose' and 'primary aim' as

being to mitigate or reduce the resistance of workers to industrial reorganisation and the redeployment of labour. He says the 'paramount policy of the Act' is to enable British management to achieve what he calls the 'principal end' of facilitating labour mobility. While others, *e.g.* K. W. Wedderburn (*The Worker and the Law* (1971)) regard the rationale of the Act as still shrouded in mystery, he is clear that redundancy reflects a management idea – *i.e.* 'superfluity' of workers. And the law's identification with management's interests is comprehensively analysed in R.H. Fryer's lengthy critique in *Redundancy and Paternalist Capitalism* (1973), App. II.

Myths of the Redundancy Payments Act. An extract from Fryer's excellent critique is to be found in (1973) 2 I.L.J. 1, where he considers what are said to be the six myths of the 1965 Act: 'namely, that the legislation provides an element of employment security; that it gives some sort of job "property rights" to workers; that by regulating redundancy, it restricts managerial discretion; that it compensates workers for their loss of job; that redundancy payments act as a disincentive to find alternative work; and that, irrespective of other advantages or disadvantages, it at least affords minimum cover to all who lose their job because of redundancy.'

In contrast to these myths, Fryer argues that the legislation has become a positive inducement to insecurity of work by encouraging some trade union officers and workers to abandon protective attitudes to job security. As to a regulatory effect on management, the result of the Act has been to tend to take redundancy out of both conflict and the area of collective action and control by workers. The argument as to 'property rights' in the job is shown not to be an appropriate analogy (and see Grunfeld, who says that: 'To say that a person's work should be regarded as being as good as property rights is to imply that it is no better'). As to the Act's compensating workers made redundant, any assessment must adopt criteria for adequacy; and given the minimal nature of the vast majority of compensatory payments, it must be said that the Act is little short of a deliberate deception. Figures produced by Fryer add to this picture by showing how, on the most optimistic assessment, only one-third of those dismissed in 1971 by reason of redundancy received *statutory* payments. In fact, it may have been 25 per cent or less. Of those who did get payments, the low levels (averaging £292 in 1971, though by reason of inflation this had risen to an average of

£524 in 1975 and £619 in 1977) could hardly support a view that they had a disincentive effect on workers seeking employment.

Management power and economic policy. Whatever the intended policy of the 1965 Act, there seems to be considerable evidence that its economic policy has failed. A study entitled *Effects of the Redundancy Payments Act* by S.R. Parker *et al.* (Office of Population Censuses and Surveys (O.P.C.S.), HMSO 1971) concluded that most redundancies were the consequence of economic causes, not the mobility which would lead to the desired organisational and technological changes. Another study, *The Impact of Employment Protection Laws,* by W. W. Daniel and E. Stilgoe (1978) found similarly that in a survey of about 300 employers, over 60 per cent of redundancies were due to deficient demand for the employer's product. The result was that older marginal workers got sacked and, as a recent analysis put it: 'for many older workers the mobility the Redundancy Payments Act facilitated was mobility out of the active labour force' (*Department of Employment Gazette,* September 1978, p. 1033). Of course, this effect has different significance for different groups. Thus recently a company devised a scheme providing insurance cover for management executives made redundant. For an annual premium, the policyholder gets a steady income during redundancy while looking for another job. Ordinary workers need rely on unemployment benefit.

Fryer brings out fully how the Act reinforced the primacy of business considerations and the secondary nature of the question of employment security. The protection of management's power has, therefore, been the guiding light of the courts in interpreting the Act. This was most recently reiterated by Lord Denning in *Lesney Products & Co. Ltd. v. Nolan* [1977] LR.L.R. 77 (C.A.): 'it is important that nothing should be done to impair the ability of employers to reorganise their work force and their times and conditions of work so as to improve efficiency. They may re-organise it so as to reduce overtime and thus to save themselves money, but that does not give the man a right to redundancy payment.' The main effect of the Redundancy Payments Act was to make it easier for employers to sack workers as redundant. So in the O.P.C.S. study referred to above, 63 per cent of managers who thought that the Act made the discharge of employees easier referred to the easing of conscience. Judges seem to be rather less conscience-stricken.

Collective agreements. Despite the encouragement of government departments (the Ministry of Labour published extensive surveys of redundancy information, advice and practice in 1961 and 1963), in 1968 OPCS found that only a quarter of establishments with 500 or more employees had a formal written agreement with trade unions over redundancy. A further quarter had a more informal understanding. But K.W. Wedderburn (1971) cites a BIM survey which found that many companies had 'policies' (usually last-in-first-out), and that one-half had schemes or agreements whereby payments exceeded the amounts payable under the Act – though half paid nothing to workers who left after 'warning' and before formal notice. And while 58% of trade union officers surveyed felt that the 1965 Act had made no difference to employers' willingness to sign redundancy agreements, three-quarters thought that the Act had helped management to get workers to accept manpower changes. Indeed, this may explain the practice of employers, many of whom voluntarily pay one and a half times or twice what is required by the Act.

The next step in redundancy promotion was the provisions of what is now s. 59 *(b)* of the 1978 Act introduced first by the Industrial Relations Act 1971, s. 24 (5) *(b)* (see Note to s. 59). This was accompanied by a Code of Practice, paras. 44–46 of which laid down certain points of guidance beginning with: 'Responsibility for deciding the size of the work force rests with management. But before taking the final decision to make any substantial reduction, management should consult employees or their representatives, unless exceptional circumstances make this impossible.' These suggestions have been given statutory backing by the Employment Protection Act 1975, s. 99, which makes consultation mandatory when redundancies are proposed. But although some employers will have established procedures, most trade unions are unwilling to enter into agreements, preferring to emphasise and insist on job security rather than redundancy for their members. It may be noted that it was not until 1972, over six years after the Redundancy Payments Act 1965, that the public employment services were re-organised by government. In 1977, however, Daniel and Stilgoe found that half of all establishments having 50–5,000 employees had a formal agreement with trade unions over redundancy, and a further quarter had a less formal understanding. There appears, therefore, to have been a very substantial increase in the extent of redundancy agreements over the ten year period between 1968–1977 (Daniel and Stilgoe, pp. 21–23).

The State and redundancy law. The role of the Ministry of Labour, later Department of Employment, in promoting redundancy while failing to deal with the consequential unemployment is not the only way the State has taken an active role prejudicial to workers' interests. Many of the disputes that have arisen before industrial tribunals have arrived due to the active intervention of the Department anxious to prevent a redundancy payment being made. The Department's responsibility for the Redundancy Fund has led it countless times to intervene, contrary to the wishes of both employer and employee, and prevent any redundancy payment. Intervention to ensure that payment is made is not deemed to be an activity worthy of the Department's resources. See, *e.g. North-East Coast Shiprepairers Ltd, v. Secretary of State for Employment* [1978] I.R.L.R. 149 (E.A.T.).

Negotiated improvements to redundancy provision. The details of the statutory benefits granted to redundant employees are described in the Notes to ss. 81 ff of the 1978 Act. They have been improved upon in various respects, of which only one or two illustrations may be presented. So, despite the statute's requirement of *two years employment* to be eligible for a redundancy payment, collective agreements may allow for redundancy payments for shorter term employees, *e.g.* that between NUBE and Lloyd's and Scottish Finance allows for *ex gratia* payments of one week's pay if they have less than one year's service; two weeks if one to two years' service. The agreement between the Gas Conversion Association and the GMWU (effective February 1, 1976) covers workers with less than the two years' service required for the statutory payment, and provides for additional supplements up to a maximum of £315. A recent agreement, effective March 2, 1980, between British Tissues and the GMWU contains special arrangements for those with less than two years' service, part-timers, employees aged over 60 (women) or 65 (men) and those with over 20 years' service – the ceiling on service under the statutory redundancy provisions. On the question of *offers of alternative employment* to redundant employees, redundancy agreements may define in some detail where alternative work is considered suitable. One example is that introduced at National Carriers Ltd. (NCL), effective May 2, 1977:

Factors which may be taken into account in determining what constitutes an offer of suitable alternative work in relation to the employee concerned are the skills of the employee, the nature of his previous work, earnings

in his new job compared with his previous earnings and, where the new job is in a different place the difficulties which the transfer might cause.

In determining whether the alternative employment offered is suitable in relation to the employee concerned, he should have regard to the skill, knowledge and experience of the grade in which the employee was previously employed, but consideration should also be given to the practicability of training the employee for work in other grades. The age of the employee will also be taken into account as will the hours of work compared with those in the employee's present post. Where it is evident that an employee's promotional prospects will be affected by the proposed offer, this will be regarded as a good reason for the employee to decline the alternative job offered to him.

The comparative level of remuneration attached to the new post offered for a normal week's work (*i.e.* excluding overtime and Sunday duty) will be a relevant factor. If the earnings attached to the alternative post offered, calculated in accordance with the provisions of the Redundancy Payments Act are materially below those of the employee's present post, an employee may, with good reason, decline the offer.

The alternative work offered should be within reasonable distance of the employee's place of residence, having regard to the availability of transport and hours of work.

For the purpose of determining what constitutes an offer of suitable alternative work:

(a) the post must be one which would not involve an increase in the employee's present daily travelling time by an average of more than half an hour in each direction by train or public road transport provided that the total daily travelling time between the employee's home and his new place of work does not average more than an hour and a quarter in each direction.

(b) in cases where an employee already incurs travelling time in excess of an average of an hour and a quarter in each direction, a reasonable offer would be one which would not involve him in any travelling in excess of that already incurred; and

(c) special consideration will be given to cases falling under (b) above where it can be shown that, whilst additional travelling to that already incurred is not involved, difficulties in travelling will be experienced, *e.g.* an employee working in an urban area with a direct train service who is transferred to a rural area with indirect transport services.

Travelling time for this purpose will include:

– waiting time en route arising from making train or bus connections,

– waiting time for first train or bus service following completion of turn of duty.

Other collective agreements will provide special protection for employees taking up alternative work, *e.g.* retention of previous basic rates, or subsidised travel.

Other agreements provide more leeway for an employee made redundant to be given *longer notice* or opportunity to leave earlier and still claim a redundancy payment. Thus, a recent agreement between Shaw Savill and Albion (part of the Furness Withy Group) and ASTMS provides that an employee should be given about three months', and not less than two months' notice before the date on which the work requirement ceases (the 'redundancy date'). Employees are entitled to a period of protected employment dating from the redundancy date calculated on the basis of age – but the employee may terminate his employment at any time after the redundancy date on giving one week's notice in writing.

Another agreement, reached on September 16, 1976, between the London Co-operative Society and USDAW and the TGWU provides that management will agree to workers leaving their jobs early without loss of any redundancy pay, but excluding payment for unexpired notice, subject to satisfying the employer that they have starting dates for other employment. NUBE reached an agreement, ratified on December 6, 1977, with Lloyd's and Scottish Finance that allowed that the employee might request early release in writing and if the company did not object, then the right to redundancy was not affected.

Other agreements expand upon the provision in s. 31 of the 1978 Act which allows *time off to an employee made redundant to look for work*. For example, an agreement of September 16, 1976, between the London Co-operative Society and USDAW and the TGWU provides, in the event of redundancy, for employees to be entitled to reasonable time off *with pay* (*cf.* the limitations in the statutory entitlement (s. 31 (*a*)) to seek alternative employment, attend interviews and make arrangements for training for future employment. More explicit terms are to be found in an agreement of late 1978 between the shipping Firm of Shaw Savill and Allison (part of the Furness Withy Group) and ASTMS. The agreement provides that notwithstanding the giving of formal notices of termination, employees will be entitled to a period of 'protected employment' dating from the redundancy date. The length of the period will vary with the age of the redundant employee – from a minimum of three-quarters of a month at ages 20–23, up to 15 months at ages 51–55. Individuals on protected employment remain on the pay-roll on normal terms and conditions of employment, though they will not necessarily be required to attend for work. They remain employed until alternative jobs are found, or the maximum period has elapsed. During this period the company will seek to redeploy individuals into, or train them for, other jobs with the company or elsewhere in the Group. In the absence of internal vacancies, the company will assist in the finding of jobs elsewhere. Such provisions as these show up the meanness of the legal protection for workers threatened with the scrap-heap. And see also a recent survey which listed 15 agreements providing *continuing payments* by companies to unemployed ex-employees (*IRRR* 221, April 1980).

Finally, collective agreements will often improve the basis upon which redundancy payments are calculated (see Sched. 4 to the 1978 Act). This may be simply by multiplying the statutory figure, as, for example, in a 1980 agreement between USDAW and Woolworth for 40,000 retail stores' staff. The company agreed to increase redundancy payments from the statutory level to 1 ¾ times the statutory entitlement.

Redundancy Fund transactions. With all its defects, the law does provide in the aggregate a substantial amount of cash to many employees. In some cases redundancy money is more of a lump sum than they have seen in their lives. This money is paid by the employer who is entitled to claim a rebate from a Redundancy Fund (ss. 103 ff. of the 1978 Act) which is maintained by contributions paid by employers

as part of their N.I. contribution. Thus, for example, Redundancy Fund transactions for the period January 1 to March 31, 1980, concerned 85,274 employees, including one government employee. They received payments totalling £76,750,000. Employers liable to make payments contributed £41,815,000 net of rebate, and the cost to the fund in rebates to employers and direct payments was £34,933,000.

Unfair redundancy compensation. The notes to s. 59 of the 1978 Act discuss the circumstances where a dismissal for redundancy may give rise to an entitlement to unfair dismissal compensation by reason of unfair selection or breach by the employer of a customary arrangement or agreed procedure. The role of collective agreements regulating redundancy is thus given official recognition. An example of an agreed selection procedure for redundancy is that between NUBE and Lloyd's and Scottish Finance (ratified December 6, 1977). The following priorities were established: (i) voluntary redundancy, which allows the company discretion to reject a volunteer; (ii) part-time staff, with those of least service leaving first; (iii) all staff aged 60 (male) and 55 (female) and over to be given the option of voluntary early retirement without actuarial deduction of pension; (iv) staff with least service in the particular area in which redundancy is being declared; (v) notwithstanding the above, consideration will be given, subject to an appeal being made, to members of staff with individual problems including disability and particular family circumstances; (vi) if staff have to accept alternative employment of a lower grade due to a redundancy exercise, salaries will not be reduced. If the salary is in excess of the maximum salary for the new job, increases or increments will not be paid as long as the salary is outwith the salary band of the new job; (vii) there may be occasions where the company must declare redundancy of a particular job classification where, therefore, the selection criteria listed (i)–(iv) cannot logically apply. There is a joint negotiating committee which acts as an appeals committee to hear objections to any redundancy selections.

Maternity

Law and maternity. The provisions on maternity benefits (ss. 33–48 of the 1978 Act), the right not to be dismissed on grounds of pregnancy (s. 60), and the protection against the employer's failure to permit the woman to return to work after confinement (s. 56), were part of the

attempt in the Employment Protection Act 1975 to remedy a striking gap in the labour laws of the UK, all the more visible when contrasted with the laws of other members of the EEC; its failure to protect women in employment during pregnancy and after confinement. An ILO Convention on this matter has existed since 1919 and was further revised in 1952. It has not yet been acceded to by the United Kingdom. In the Standing Committee on the Employment Protection Bill 1975 the Government accepted that the proposed provisions did not equal the standards of the ILO Convention. It failed to provide all the benefits required, such as leave before and after birth and guaranteed payments during this period, protection against dismissal and reinstatement, nursing break provisions for returning mothers, the possible extension of maternity leave because of problems, and lighter work during pregnancy and afterwards special safeguards for health. Under the Health and Safety at Work, etc. Act 1974, however, employers do have a duty to take all reasonable steps to ensure the health and safety of pregnant employees, and this may involve certain alterations in the employee's duties where these entail exposure to pressure, heat or require, *e.g.* lifting heavy weights. As far as the Employment Protection Act is concerned, however, the Government admitted that the proposals laid down only a minimum standard.

Women at work: jobs and pay. The number of women employed in the United Kingdom rose from 8,891,000 in June 1973 (39.2 per cent of the total employees in employment) to an estimated 9,281,000 (41 per cent of the total) in June 1977. Many of these women workers do not differ in their work patterns from male workers, as was summarised in a recent Department of Employment Manpower Paper: 'more women are now married, they marry younger and live longer; child-bearing is normally compressed into a short period relatively early in life. Many women now have the opportunity ... of working continuously for 20 or 30 years.' A recent study by W.W. Daniel noted a marked change in the number of mothers entering the labour market shortly after childbirth. Data from 1971 suggested that 9% of recent mothers became economically active. Daniel's survey of 1979 showed this had risen to 24% (Department of Employment *Gazette*, May 1980, p. 468).

The Equal Opportunities Commission has recently pointed out that data show that 4 out of 5 of the people earning the lowest 10% of incomes are women. In 1976, 43.2% of women working full-time earned less than £40 a week; only 5.2% of men were in the same position. The

EOC points out that poverty and the low level of women's incomes are the result of large numbers of women in low paid sectors of industry. A recent report from the Low Pay Unit states that 71.4% of working women are employed in the distributive trades and service industries; and that 'women also tend to fall within the lowest grades of jobs in an industry'. The EOC also points to discrimination against women in social security; and most pertinent to the employment protection provisions on maternity, highlights the lack of social facilities to back up women in the dual role of breadwinner and wife and mother. The Commission urged employers to take a new look at ways of minimising the disruption of women's careers caused by childbirth and childcare. But the results of such urging have been meagre. Published reports indicate that, at most, employers try to avoid unlawful discrimination, but positive steps, *e.g.* the provision of day-care facilities, were rare.

The impact of maternity provisions on women at work. Maternity provisions, however, might be one area where companies are tempted to take an initiative. The motivation is hardly philanthropic. More that they are relatively inexpensive: the take-up rate is low. The research by Daniel indicates why. First, it was calculated that, each year, 3.6% of women in employment stop working to have a baby. So an employer with 100 female employees can generally expect 3 or 4 to stop working each year for childbirth. But, secondly, only about one half of women who worked during pregnancy satisfied the qualifications for legal maternity benefits (*e.g.* two years' service, working 16 hours a week or more). So the employer need worry, on average, only about 1–2 employees. But, thirdly, only 10% of all women who worked during pregnancy actually returned to work. And another survey seemed to confirm this by finding that although 15% of the women who took maternity leave returned to work, this amounted to only 0.3% of the women covered in the survey *(IRRR* 217, February 1980). The provisions for maternity pay have had somewhat greater effect. The number of women who had received maternity pay (and in respect of whom rebate had been paid to the employer) was as follows in the period since the provisions came into effect in April 1977: April 1977–March 1978: 67,366; April 1978–March 1979: 107,953; April 1979–September 1979: 55,139 (Department of Employment *Gazette,* January 1980, p. 38). But see now the DHSS Consultative Document 'A Fresh Look at Maternity Benefits' (November 1980).

Women on tribunals. The future of maternity benefits will depend in practice on the extent to which trade unions, particularly those with many or even a majority of women members, fight for provisions to be made in collective agreements safeguarding them. As to the statutory provisions, their influence is subject to the deficiencies of enforcement by complaint through industrial tribunals. Apart from the inherent difficulties of women using this process, the industrial tribunals themselves are male-dominated bodies. The proportion of women on the lay panels from which members are appointed is about 20 per cent, whereas women are about 40 per cent of the working population. For an illustration of the effect of this see the Note to s. 48. On the case of *Edgell v. Lloyd's Register of Shipping* [1977] I.T.L.R. 463, where the woman asked for her post back again, and the employer gave her another post of the same grade but with different duties and responsibilities. This was due to an administrative reorganisation which had been carried out in her absence. To this case the industrial tribunal responded as follows:

> This is one of the elements of course which the learned draftsmen of the Act did not think about. They appear to think that businesses remain static and their organisation remains the same over an indefinite period. Of course any company or any employer is allowed to carry out such re-organisations and change their administration to suit the requirements of their business. *It is not our duty as a tribunal to question the right of management to manage.* All we are here to do is to be quite certain that an employer when carrying out those changes acts justly and fairly to the employee. (para, 10)

To the woman's arguments that her rights were based on the definition of' 'job' – including 'nature of the work' and 'capacity' – the industrial tribunal replied: 'This is not an exercise in theology or semantics.' Her claim was dismissed.

If industrial tribunals are going to allow managements the power to change the job offered under the aegis of an unchallengeable 'management prerogative' – the outlook for returning mothers is grim. (Contrast *McFadden v. Greater Glasgow Passenger Transport Executive* [1977] I.R.L.R. 327, where the industrial tribunal rejected the employer's argument that giving the returning mother a supernumerary post instead of her old established clerical position was permitted. Many of the old terms were applicable but certain others (status, her own desk,

security of employment) were not. Cut-backs in her employer's expenditure were not a justification.)

Additional maternity benefits in collective agreements. The statutory rights to maternity pay and maternity leave granted by s. 33 of the 1978 Act are supplemented in practice by collective agreements or various trade unions' bargaining proposals. The supplementary provisions which employees may benefit from in addition to these may either be (1) of the same kind, only more beneficial; or (2) add benefits of various new kinds. A few examples will illustrate the relative poverty of entitlement allowed for in the statute.

A number of trade unions have drawn up model maternity agreements to be guides for their negotiators. These stipulate various benefits for pregnant women workers going far beyond the statute's maternity provisions, *e.g.* the right to visit her doctor and clinic for pre-natal checkups without loss of pay (TASS, ASTMS, APEX, GMWU); changes in working arrangements may be negotiated to alleviate difficulties caused by pregnancy, *e.g.* different starting and finishing times to ease travel, a shorter working week with normal average earnings to be maintained (TASS, GMWU). ASTMS makes special provision for temporary job moves without loss of pay where health is at risk. To provide for after-birth child-care difficulties, TASS and the GMWU encourage the following: at least temporary part-time work for a period; alteration of hours if previously hours worked were unsocial; 10 days' paid concessionary leave per annum during the first five years of the child's life where the health or the care of the child requires it. TASS goes on to allow for these child-care provisions to 'apply to male employees with paternal responsibilities,' Paternity leave is also an aim: TASS, ASTMS and GMWU asking for 10 days' paid leave (APEX – six days), and TASS and GMWU go on to ask for another five days where the mother's medical condition warrants it – such leave not to count against either holiday or sick pay entitlement.

These model aspirations have already been effected in a number of agreements, *e.g.* ASTMS have agreed with Longman Publishing that during the first four weeks of return, the employee can work a three-day week and secure full weekly pay; and the same union agreed with Containerlink for redeployment provisions to apply if the old job adversely affects the domestic circumstances of returners. The Phillips Industries Group Policy provides for attempts to be made to alleviate

any difficulties associated with the later stages of pregnancy, *e.g.* by reducing overtime, lifting or travel, and greater flexibility of hours where this helps. Paternity leave is also spreading: various agreements provide for leave from up to five days (British Institute of Management and APEX; Wilson & Whitworth Publishing and NUJ; G.L.C. (Staff); Independent Broadcasting Authority and Association of Broadcasting and Allied Staff (the BBC only gives two days)), 10 days (Galleon Roadchef and GMWU, Norfolk Capital Hotels and TGWU, GMWU) or even up to 15 days (Penguin Books and ASTMS). For further illustrations, see the agreements collected in *IRRR* 218, February 1980, at pp. 8–11.

The contract of employment during maternity absence. The problem is whether a woman taking maternity leave is treated as having her employment terminated, though it is to be renewed on her return to work; or alternatively, whether the contract of employment is treated as 'suspended' – though the woman is still on the employer's books as an employee and the contract comes to life again when she returns. The above-mentioned *IRRR* survey of 261 organisations from the public and private sectors, covering over one million workers, found that 88% of respondents to the question on the status of the contract of employment during maternity leave said that they treated the contract as *suspended* until the woman returns to work – as if she had been on extended unpaid leave. Only 12% terminated the contract and re-issued the contract if the woman returned.

The law provides that whether or not the contract continues to subsist, the period of absence counts for the purposes of certain *statutory* rights (*e.g.* redundancy) as a period of employment – Sched. 13, para. 10 to the 1978 Act. A number of collective agreements and trade union model guides aim to secure contractual benefits during the period of absence. The model agreements produced by TASS, the GMWU and ASTMS all expressly provide that during the period of maternity leave the employee's contract is to continue unbroken, and the period of leave is to count towards calculating seniority, sickness and holiday entitlement. TASS and the GMWU even propose that the employees should have the option to commute all or part of their holiday entitlement accrued during the period of maternity leave. ASTMS specifies that maternity leave should not affect pension eligibility and benefits, and APEX proposes that there should be no loss of pension, seniority, status or promotion rights and benefits.

Various collective agreements have implemented such trade union aspirations. The United Biscuits Agreement with USDAW provides that during the period of absence service shall be regarded as continuous for the purposes of pension, sickness benefit, annual holiday entitlement and holiday pay accrual. The GMWU's agreement with Galleon Roadchef provides for annual increments, sick pay and holiday entitlements to accrue during the period of leave. At Co-operative Laundries the agreement provides for the period of absence to be deemed to be contributory service for the purposes of membership of the pension scheme. In the public sector, the GLC (Staff) Agreement allows for the leave period to count for incremental purposes, and the IBA (Staff) allow for accrual of holidays, sick leave, pension rights and salary progression. The NJC for Water Service Staffs Agreement provides that absences of up to 12 months because of maternity would not break continuity, but not more than six months of such absence would count for reckonable service. The BBC will allow annual leave to remain unaltered only if maternity leave is under 18 weeks. Many companies, for reasons of administrative convenience (*e.g.* membership of employee in the pension fund) allow for the contract to continue, albeit suspended, in cases where employees are eligible to return to work. The contract is not regarded as terminated until (*e.g.* in W.D. & H.O. Wills), the 29th week after confinement if the employee has not returned. The Boots Company provides that if the employee does not exercise her right to return, she is considered to have left on the last day of work before the absence.

Finally, some agreements do not allow for the simpler options, where the contract is not terminated, of allowing benefits either to accumulate or not. Rather they have detailed provisions on the effect of absence on various benefits, particularly sick pay. The TASS and GMWU model agreements simply provide that *illness* related to pregnancy should be treated as normal sickness absence.

The APEX model agreement advises that maternity/paternity leave should not be reckonable against sick pay or holiday entitlement. As ASTMS points out in making the same point, otherwise a woman having a baby is likely to use up all her sick leave entitlement for the whole year, and if she gets the flu afterwards, she would be unable to claim sick pay. The Post Office makes maternity leave an integral part of its sick pay scheme: illness and maternity leave count together towards a maximum six months' annual entitlement. Metal Box have a similar scheme and the NJC Agreement for Gas Staffs and Senior Officers

provides for the period of absence for maternity leave to rank against any period of sick pay entitlement under the Staff Sick Pay Scheme. Other employers treat maternity illness under the sick pay scheme only up to the beginning of official maternity leave (usually the 11th week before confinement) – the NHS, Heinz, Cadbury Schweppes Moreton Factory.

Complying with statutory requirements. The Employment Act 1980 introduced new requirements, *e.g.* relating to written notices, in addition to existing requirements, *e.g.* the two year period of employment. These requirements can be and have been ameliorated by collective bargaining.

Two years' qualification period. Many collective agreements, both agreed and proposed by trade unions, provide for much shorter periods of qualification, *e.g.* TASS' Model Maternity Agreement specifies that eligibility depends on 12 months' continuous employment; ASTMS suggests a one-year qualifying period, but expressly states this should not preclude an initial demand that there should be no qualifying period. The GMWU Maternity Proposals are to apply in full to women who have completed 12 months' continuous service – but in the case of women with less than 12 months, it is proposed that negotiations should still provide for suitable arrangements if the women wish to return to work. APEX's Model Agreement for negotiators applies to all women employees, irrespective of service. When one reviews actual agreements concluded, many in the public sector only require one year's service qualification (British Gas, Local Government, NHS, Post Office) while in the private sector the periods vary: *e.g.* Heinz (Harlesden Factory) and TGWU and other trade unions – one year; Penguin Books and ASTMS – one year; London and Manchester Assurance and ASTMS – two years; Longman Publishing and ASTMS – 21 months; and Wilson & Whitworth Publishing and NUJ – 10 months. Sometimes the longer the period of service, the greater the benefits with regard to paid leave – *e.g.* Galleon Roadchef and GMWU.

Another issue is up to what point in time is the qualifying period to be calculated? The Act specifies two years up to the beginning of the *11th week before* the expected week of confinement. But, for example, the TASS and ASTMS model agreements specify a 12-month period up to the expected date of *confinement.* The NJC for Local Government Scheme requires 12 months continuous service at the *date of application* for maternity leave – as does the agreement in the NHS General Whitley Council. And the NJC for Water Service Staffs

agreement covers female employees with at least 12 months' continuous service *at the date of commencement* of the maternity leave.

Notice requirements. The problems of whether the woman has given written notice may be avoided, at least so far as the employer is concerned, by a personnel policy which provides for interviews with pregnant employees or requires them to fill out forms giving their intentions. Trade unions should ensure that women members are properly advised and represented in the circumstances. One possible method of avoiding the dangers of this notice requirement is for employers to give the employee the option of stating that she is not sure whether she intends to return to work, in which case the company indicates that they will be prepared to keep her job open provided she confirms her intention by a certain date after her confinement. Given the pressures of the months immediately following the birth of a child, one would expect perhaps a minimum three to four months would be the period required before the mother might set up a routine which would enable her to formulate her future employment plans. *Cf.* s. 33 (3A) and (3B) of the 1978 Act.

A number of company procedures should operate to avoid difficulties for the employee unwittingly leaving too early. The Boots Company provides for an interview as soon as the employee's pregnancy is known, and in the interview the employee is advised of her rights and made aware of the significance of leaving before the 11th week. A similar procedure operates at Cadbury Schweppes Moreton factory, which employs about 2,000 women, Phillips Industries Group Policy requires the employee to notify her superior as soon as pregnancy is confirmed, and again an interview follows.

Maternity pay in collective agreements. Collective agreements are usually more generous in the quantity of maternity pay to which employees are entitled. In the public sector, paid maternity leave may be for an extended period of almost full pay, followed by a further period on half pay, *e.g.* the local government NJC Scheme provides for the first four weeks at full and a further 14 weeks at half pay; similar provisions apply at British Gas, the GLC, NHS and the University Clerical and Administrative Staff. In the private sector, ASTMS has an agreement with Penguin Books for 16 weeks leave at full pay and eight weeks at half pay, and with London & Manchester Assurance, for 24 weeks at 90 per cent, of weekly pay. The GMWU with Galleon Roadchef provides for the period of fully paid maternity leave to rise from two weeks after one year's service,

to 20 weeks after seven years' service. Payment is, however, often subject to conditions. (For further agreements, see *IRRR* 218, February 1980).

Conditions to payment in collective agreements. Unlike the statutory entitlement, payment of negotiated maternity pay above a certain level of payments is often conditional upon the employee returning to work – particularly in the public sector. So part of the payments to staff at British Gas, the GLC, in local government, the NHS and the Post Office is withheld until three months after the employee returns to work. This seems to be less common in the private sector – *e.g.* the Galleon Roadchef and GMWU agreement provides for payment whether or not the employee returns. But others do provide for *repayment* of part if the employee does not return for a specified period, *e.g.* Penguin Books and ASTMS: employees who return for less than five months must repay maternity pay proportionately.

The experience reported by one company in this regard is instructive. As mentioned above, women employed at London & Manchester Assurance were entitled to greatly enhanced maternity pay (24 weeks), if they said they intended to return to work. In practice this caused problems since the women were obviously tempted to say they intended to return in order to qualify for the increased pay. This, even though they might be uncertain as to their intentions or even intend not to return. To resolve this, the company changed its policy by providing the additional 18 weeks' maternity pay whether or not a woman states she intends to return. In this way the company hopes to get 'an honest and unbiased decision from each woman' (*IRRR* 217, February 1980).

The right to return to work and childcare. The right to return to work only lasts for 29 weeks after the week of confinement (subject to s. 47 exceptions). One must be very sceptical of the value of this right. It amounts to a right to return to work whilst encumbered by a child less than eight months old. This is next to no right at all given the current lack of child-care facilities. To make it a reality there would have to be something in the law to require, or at least encourage, the provision of such facilities which would make a return to work possible. As it is, there is nothing to make employers provide facilities which would enable women to reclaim their jobs, and nothing is said about publicly provided schemes which would make the legal right effective. Local authority and private nursery facilities for child-care are almost non-existent, particularly those which cater for babies under two years. At

the beginning of 1980 there were only 540 day nurseries caring for 0.7% of under-fives in the UK. Some trade unions are committed to attempting to provide some measure of aid to mothers trying to cope with the double burden of childcare and work – see the provisions in the model collective agreements cited above. For details of the efforts of some employers, see *IRRR* 218, February 1980, pp. 6–7. But as it stands, the legal right is largely a rhetorical exercise.

Unfair Dismissal

Philosophical concept: justice. The concept of 'fairness' in dismissal can be discussed at an abstract philosophical level. Thus, D.A.S. Jackson (*Unfair Dismissal,* 1975) refers to the elaboration of the concept by John Rawls in his theory of justice, and concludes: 'The concept of "unfair dismissal" thus delves deeper into basic morality, and is therefore operationally more exacting and fundamentally apt, than any other.'

Political concept: ideology. In contrast, Richard Hyman emphasises how motions of 'fairness' are used as ideological tools to achieve certain ends (*Social Values and Industrial Relations,* 1975). To perceive dismissal in terms of fairness or unfairness has certain consequences in the practice of industrial relations. As Hyman points out: 'One of the most popular concepts in the everyday vocabulary of industry is "fairness", a notion which may at times inspire criticism of practices or relationships which are perceived as inequitable and sustain workers in struggles for redress. Yet in its conventional usage the language of fairness tends on the contrary to contain conflict and reinforce capitalist relations of control ... a concept with potentially radical implications is normally conservative in its application' (*Industrial Relations – A Marxist Introduction,* 1975, p. 146).

Lawyers, employers and workers who adopt the conventional notion of 'fairness' can and do subscribe to the existing structure of power at the workplace with only marginal criticisms. In so far as the content of the notion of 'unfair dismissal' does not challenge the existing structure of authoritarian control and inequality of reward in industry, it is a major ideological resource of those who benefit under the present system – the managers of industry, the minority who own and control it, the ruling class. For if workers and others are given the option of a law of

dismissal which does not undermine the system, then resort to *other* means of avoiding dismissal, *e.g.* strikes which may challenge the system, is less likely to happen.

The law and managerialism. The law of unfair dismissal contains a contradiction, therefore, of on the one hand preserving the fundamental structure of managerial control over the work process, while on the other hand appearing sufficiently attractive as an avenue of redress for workers who are dismissed. The key is to note that the law accepts the *reality* of power at the workplace, while having the *appearance* of controlling or regulating that power. There is no space here to examine this aspect of the law, but one analysis of the provisions has pointed to the 'essentially managerial perspective' of the law (B. Weekes *et al.*, *Industrial Relations and the Limits of Law*, 1974, p. 28).

The reasons permitting dismissal include conduct, capability or redundancy. But where a fair reason for dismissal includes a refusal to co-operate with the employer in accepting a change in job content, hours of work, status, title or grade, place of work, refusal to obey an order, or for certain kinds of relationships with other employees or customers; where capability is determined by expectations of management; and redundancy is a question of the commercial judgment of the employer – then legal fairness is simply a function of managerial needs, not those of workers. A worker can be 'fairly' dismissed in law if he is incapable of producing profit, if he misconducts himself in the furtherance of his employer's business, or if the employer no longer needs him and he is thus 'redundant.' The law's approach was summed up by Phillips J. in *Cook v. Thomas Linnell & Sons Ltd.* [1977] I.R.L.R. 132 (E.A.T.): 'It is important that the operation of the legislation in relation to unfair dismissal should not impede employers unreasonably in the efficient management of their business, which must be in the interests of all. Certainly, employees must not be sacrificed to this need; and employers must act reasonably when removing from a particular post an employee whom they consider to be unsatisfactory.' But what about the workers?

Unfair dismissal and management. A recent study of the effects of employment protection laws in manufacturing industry (plants employing 500–5,000 people) by W.W. Daniel and E. Stilgoe (*The Impact of Employment Protection Laws,* P.S.I. No. 577, June 1978) concluded that the unfair dismissal requirements of legislation had had

the most widespread impact on employers. Primarily, this had taken the form of formalising or reforming disciplinary and dismissals procedures. The extent of this finding needs to be appreciated: the fact that unfair dismissal had the *most effect* reflects in the main the very *low* impact of other parts of employment legislation. The interviews carried out by the authors of the study showed that only 17 per cent of managements had said the legislation had a good deal of effect, while 41 per cent said that it had only a little effect, and fully 42 per cent said it had no effect at all. So while 58 per cent said it had some effect, most of this impact was very limited.

Unfair dismissal and trade unions. This study also revealed that the impact of legislation varied most between workplaces characterised by different proportions of trade union members. Thus, in workplaces where the trade union had recognition but less than 80 per cent membership, 21 per cent of management evaluated the legislation as having a good deal of effect, though, again, 25 per cent said it had no effect in workplaces with between 80–99 per cent trade union membership, 23 per cent of management thought it had a good deal of effect, but again 44 per cent thought it had none. And where trade union membership was 100 per cent, only 15 per cent of managements thought it had a good deal of effect; fully 54 per cent said it had none. The authors of the study suggest that in the very highly organised plants, procedures were likely to have pre-dated the legislation, so that its introduction had less impact.

Unfair dismissal and workers. The appearance of the law of unfair dismissal as regulating the employers' power is reinforced by the full bureaucratic panoply of claims, tribunal hearings and remedial orders. This appearance is given widespread publicity, but deserves closer examination. There is room here only for a few bare statistical bones.

An analysis published in the Department of Employment *Gazette* (September 1979, p. 866) shows that about 38,000 unfair dismissal *applications* were registered in each of 1977 and 1978. Of cases which proceeded to disposal in 1978 (34,180), just over one-third (34.6 per cent) went to a tribunal hearing. Just under two-thirds (65.4 per cent) were conciliated. Of the 65.4 per cent which were *conciliated*, the following were the outcomes: 30.3 per cent were withdrawn for various reasons; 35.1 per cent were settled by conciliation; 33 per cent received compensation (of those, 28 per cent got less than £100, 48 per cent less than £150; just under

three-quarters (73.6%) got less than £300; 1.5 per cent got £3,000 or more); *1.3 per cent, got either reinstatement or re-engagement.*

Of the 34.6 per cent which went to *tribunals,* just over two-thirds were dismissed (25 per cent); *9.6 per cent of claims of unfair dismissal were eventually upheld by industrial tribunals.* Of the 9.6 per cent upheld, 8.5 per cent (the vast majority) received compensation (of those, just over half got less than £400, three-quarters got less than £750; 2.5 per cent got more than £3,000); *0.3 per cent got reinstatement or re-engagement.* (The figures for 1977 are virtually identical, save that compensation is lower in light of inflation – see Department of Employment *Gazette,* May 1978, p. 555).

Conclusion. In sum: of those 34,180 workers who, being dismissed, claimed a legal remedy and had their case disposed of by the legal machinery, *more than half got nothing* (30.3 per cent withdrawn from conciliation; 25 per cent dismissed by the tribunal). Of the rest, the vast majority got compensation of less, often considerably less, than £500 (85.3 per cent at conciliation; 61.5 per cent at the tribunal) – about five weeks' pay at the average wage. And 1.6 per cent (572 workers) got their jobs back of the 34,180 who lost them.

So workers' assessment of the law of unfair dismissal as it actually works goes something like this: About a 50:50 chance of success overall, a 1 in 10 chance of success if you get to an industrial tribunal; most likely a few weeks' wages if you do get something; a 1 in 50 or less chance of getting your job back. Workers who have any other option are well advised to stay clear of the legal machinery in trying to combat unfair dismissal. Lawyers may advise their clients accordingly. Employers have little to fear.

Characteristics of applicants: industry. The Department of Employment *Gazette* of November 1977, p. 1214, gives details of the characteristics of the employees who made an application claiming the right under this section during 1976. Three industrial groups – distribution trades (16.6%), miscellaneous services (16%) and construction (13.9%) made up nearly half of all applications. Densely unionised industries such as coal mining and quarrying, ship-building and marine engineering, vehicles and gas, electricity and water, accounted for 0.1%, 0.6%, 0.7%, 1.3% and 0.5% respectively.

Size of employer. As in previous years, there was a disproportionate number of claims from small firms: about one-fifth of all applications came from employees working in undertakings employing less than 20 employees (note new s. 64A of the 1978 Act, introduced by the Employment Act 1980, s. 8). Just under half (48.7%) came from employees in firms employing less than 100 employees (though more than three-quarters of the total workforce is employed by concerns with more than 100 employees). Still, firms with 1,000 employees or more accounted for 15.6% of the applications.

Age, length of service, sex, earnings. With regard to the age of applicants, over a third were under 30 and 57.9% were under 40. A large proportion of applicants had a relatively short period of employment when the claimed unfair dismissal: 23.5% had been employed between six months and one year (up to March 1975 the period of qualification for protection was one year – TULRA, Sched. 1, para. 10 – as it is now following an alteration from six months in July 1979. It was confirmed that during the period October 1, 1979 to the end of April 1980, 26 per cent fewer complaints of unfair dismissal were registered than during the corresponding period in 1978/79); another 23.5% had been employed between one and two years (up to September 1974 the qualification period had been two years – Industrial Relations Act 1971, s. 28 *(a)*). Altogether, 73.4% had been employed for less than five years. Still that leaves over a quarter of employees with long service relying on the law to protect them from alleged unfair dismissal. Women, who make up some 40% of the workforce, made up 25.1% of all applications in 1976. It is a reflection of women's weak economic position that over half of them earned less than £30 per week, and fully 83% less than £40 per week. Even with male applicants, just over a third earned £40 per week or less. The majority of applicants, in other words, came from the relatively low-paid.

The politics of 'fairness': I. Not altogether surprisingly, the law in s. 57 (1) of the 1978 Act provides a catch-all category available to employers who cannot fit their reasons for dismissal into any of the others designated as fair: 'some other substantial reason.' And here we see something truly remarkable. Tribunals and judges have transformed this provision into an employers' charter. Through this catch-all phrase has flowed all the unchallenged political theory known as the unitary view of industrial relations, the conventional ruling class wisdom as regards business efficiency, economic necessity and interests of the organisation. It seems that this innocuous phrase contains, according to

the judges, all these factors – each of them may make a dismissal fair (which would otherwise be unfair as it did not fall into the other specified categories). Where the interests of the employer require a dismissal, he may invoke one of these to cloak his interests in 'fairness' under the law. And this is all the judges' doing. And even more remarkable to lawyers is that the judges have trampled underfoot the sanctity of contract. It seems that employers who *unilaterally* change terms of the contract as to wages, hours, conditions of work, etc. – a clear breach of contract where not accepted by the employee – are supported by the judges. It seems that this subsection gives employers an implied right to break contracts when it is in their interests to do so. If employees who resist are sacked, they have no remedy. (For a recent illustration of this approach, see *Hollister* v. *National Farmers' Union* [1979] I.R.L.R. 238 (C.A.) – 'a sound business reason.') There is something even more startling to all but the most cynical labour lawyers familiar with judicial fulminations about statutes enabling trade unions to deprive individual workers of their freedom to bargain (see, *e.g.* Browne-Wilkinson L.J. in *Powley v. ACAS* [1977] I.R.L.R. 190 (D.C.), Lord Denning M.R. in the Court of Appeal and Lord Salmon in the House of Lords in *ACAS v. Grunwick Processing Laboratories Ltd,* [1978] I.R.L.R. 38). For the judges have held that, of all things, the very fact that the unilateral change had been agreed with a trade union (of which the employee was not even a member) was one of the circumstances which supported the employer's claim that he had some other substantial reason justifying dismissal *(Ellis v. Brighton Co-operative Society* [1976] I.R.L.R. 419 (E.A.T.)). Surely the defenders of individual liberty in the higher courts will not let that pass.

In all this there has been little in the way of defending the employee's interest – or even his contractual rights. Rarely in recent times has the power of judicial law-making been so flagrantly exploited to favour employers' interests.

Other substantial reasons. Apart from contractual changes in the employer's interests, other grounds for holding dismissals fair under the cover of 'some other substantial reason' exist. They tend to parallel the above description, *e.g.* where the employer's major customer threatens to withdraw unless the employee is sacked, dismissal can be fair (*Scott Packing & Warehousing Co. Ltd. v. Paterson* [1978] I.R.L.R. 166 (E.A.T.); where the employer's insurance company does not accept the employee – dismissal can be fair *(Moody v. Telefusion Ltd.* [1978]

I.R.L.R. 311 (E.A.T.)); and where the employee refused to join the union in a closed shop establishment, and further refused even to pay an amount to a charity – dismissal can be fair *(Rawlings v. Lionweld Ltd.* [1978] I.R.L.R. 481). But *cf.* the case of expiry of a fixed term contract – this has been held possibly to amount to some other substantial reason – but the judges have stressed the need to balance with the employer's interest the interest of the employee in security of employment *(Terry v. East Sussex County Council* [1976] I.R.L.R 332 (E.A.T.); *Cohen v. London Borough of Barking* [1976] I.R.L.R. 416 (E.A.T.). It is preferable that judges attempt to balance employers' and employees' interests than that they should decide on the basis of the needs of the 'business' – as if the employee's needs were thereby considered.

The politics of 'fairness' II. The Employment Protection Act 1975 made a significant and decisive change in the way the law was henceforth to treat the relationship of strike activity to the employee's rights *vis-à-vis* the employer. The old statutory provisions reflected the common law view that a strike was a breach of contract: if the employee was dismissed for strike activity 'the dismissal shall not be regarded as unfair' (TULRA, Sched. 1, para. 8 (2)). The only limitation on the employer's traditional right to dismiss strikers (unless based on the contract of employment) was where the employee could show that he was being discriminated against by reason of his trade union membership or activities ('an inadmissible reason').

Despite the conventional view that strike activity is illegitimate and dangerous, if not actually treason – a view frequently reflected in the common law's treatment of such activity – it has increasingly dawned on the public consciousness that such a view could be construed as representing only a bourgeois perspective prejudiced towards middle-class interests. The view has been challenged by the assertion that strike activity could also be regarded as a form of workers' self-defence, and a legitimate form of promotion of working-class interests – not just Luddism and greed. The result of this challenge to the conventional wisdom may be seen in these provisions.

No longer is strike activity to be regarded without more as justifying dismissal. While, unfortunately, the law persists in denying the striker protection unless he can show some form of discrimination between himself and others (s. 62 (2) *(a)* and *(b)* of the 1978 Act equivalent to old para. 8 (2) *(b)* and *(c)* of TULRA, once he has shown this, it is up to

the employer to prove that his dismissal was fair, *i.e.* it is no longer assumed that dismissal for strike activity is fair unless it was motivated by anti-union bias. While the latter would obviously render the dismissal unfair under the new provisions as well, the law now envisages general justification for strike activity which precludes the employer from automatically dismissing the striking employee. So, *e.g.* if the employer attempts to show misconduct in striking as a 'fair' reason, the tribunal will have to decide if in the circumstances the action of the employer was legitimate, whether it was reasonable in the circumstances for the employer to dismiss the striker and if he did so in a reasonable manner. The tribunal is no longer to be governed simply by the traditional legal perspective on strike activity. Other considerations and interests in defence of such activity must now be taken into account. It will be up to the complainant and those representing him to ensure that these are put forward adequately.

Further changes. The next step may be to erode the blanket immunity given to employers who dismiss all their employees for taking part in industrial action. Now that it is recognised that selective dismissal may be unfair, it is possible to consider that wholesale dismissal may be just as unfair.

Judges are fond of declaring how necessary the power fairly to dismiss is: *e.g.* Phillips J. in *Thompson v. Eaton Ltd.* [1976] I.R.L.R. 308 (E.A.T.) – 'otherwise, an employer must always submit to the demands of strikers, go out of business or pay compensation for unfair dismissal'. This position was considered by Phillips J. to be a kind of legal neutrality *(Gallagher v. Wragg* [1977] I.C.R. 174 (E.A.T.)).

But it would not seem to be beyond the stretch of judicial imagination to conceive of cases where it would appear unjust to allow the employer to dismiss strikers 'fairly': strikes to protest against racial discrimination; strikes against flagrant breaches of health and safety regulations. An attempt along these lines is to be found in a Bill introduced by Mr. I. Mikardo, MP (Second Reading on January 21, 1978) which would have allowed employees to bring an unfair dismissal claim if they were dismissed while striking in support of an ACAS recommendation for recognition (now repealed) which had not been complied with by the employer.

Remedies for unfair dismissal. The Employment Protection Act 1975 replaced the previous law on remedies available to employees who had

been unfairly dismissed (TULRA, Sched. 1, para. 17 (2) and (3)). The remedies available under the old law, particularly those of reinstatement and re-engagement, were found to be hopelessly inadequate. This was not a result of any intrinsic defects, but solely because the industrial tribunals simply did not apply them. Thus, in 1974, 13.4 per cent of all complainants were completely successful in their claims for unfair dismissal, yet in only 0.6 per cent of those cases did the tribunals recommend reinstatement or re-engagement, *i.e.* six out of every 1,000 succeeded in being reinstated or re-engaged, whereas nearly 140 in every 1,000 succeeded in an unfair dismissal case. In 1974, four times as many reinstatements (12 *v.* 3) and re-engagements (232 *v.* 56) resulted from conciliation efforts as from the tribunals. (These figures are found in the Report of Standing Committee F on the Employment Protection Bill, 21st Sitting, July 3, 1975, at cols. 1098–1100). These abysmal figures led to the extraordinary new provisions now found in ss. 68–70 of the 1978 Act. The old remedies of reinstatement and re-engagement are not fundamentally changed – the obligations on the employer remain substantially similar. But the *tribunals* are put under what is hoped will be an inescapable obligation to apply these remedies.

The figures given in the Notes above do not bear out any claim that much of a change has occurred. Without going into detail, the law changed on June 1, 1976, when the new provisions on remedies came into effect. The figures, if anything, show a change for the worse:

Outcome of cases: conciliated and heard by tribunals

Year		Cases conciliated			Tribunal cases		
		No.	%	% of all cases	No.	%	% of all cases
1975	Reinstatement	234		1.0	62		0.3
	Re-engagement	262		1.2	115		0.5
	Total	496		2.2	177		0.8
1976	Reinstatement	382	1.7	1.1	102	0.8	0.3
	Re-engagement	203	0.9	0.6	78	0.6	0.2
	Total	585	2.6	1.7	180	1.4	0.5
1977	Reinstatement	427		1.3	178		0.5
	Re-engagement	290		0.9	109		0.3
	Total:	717		2.2	287		0.8
1978	Reinstatement	288	1.3	0.8	70	0.6	0.2
	Re-engagement	178	0.8	0.5	36	0.3	0.1
	Total:	466	2.1	1.3	106	0.9	0.3

Source: Department of Employment *Gazette,* April 1976, October 1977, May 1978, September 1979.

The significance of the industrial tribunal making an order for reinstatement or re-engagement is twofold. It is the only chance the employee unfairly dismissed has of getting his job back. And in times, as at present, of high unemployment, this need hardly be over-emphasised. Secondly, if the employer fails to comply with an order to reinstate or re-engage the employee unfairly dismissed, then the compensation payable by the employer is increased over and above what would normally be awarded (s. 71).

Given the relative rarity of orders for reinstatement or re-engagement, the alternative remedy of compensation is available. Detailed figures on settlements in conciliation and tribunal awards may be obtained from charts in the Department of Employment *Gazette* of April 1976, October 1977, May 1978 and September 1979. In percentage terms, increases appear to have been substantial. But in absolute terms, the worker ends up with the equivalent of only several weeks' wages to tide him over till he can find his next job (there has been no maximum monetary award since the change in the basis of unfair dismissal compensation on June 1, 1976: there have been 70 cases up to the end of 1978 since the inception of the right to claim unfair dismissal in which the applicant received a monetary award of over £5,000).

The following figures for the median awards given by industrial tribunals can be found in the *Department of Employment Gazette* of December 1977:

First quarter 1975	£200
Second quarter 1975	171
First quarter 1976	195
Second quarter 1976	210
First quarter 1977	350
Second quarter 1977	355

The figures for 1977 comprise awards consisting of both a basic and compensatory element. The median award in 1978 was £375.

In sum: the hopes for legal protection of workers who cannot defend themselves must remain with the legal remedy of reinstatement or re-engagement. Employers will have little to fear from that of compensation.

The limits of law: interim relief for victimisation. The reason for the introduction of this remedy in the Employment Protection Act 1975 may be deduced from statistics given at the Committee Stage of that Act's passage through Parliament. These indicated that, although less than 20 per cent of all strikes due to dismissal between 1966–73 concerned workers' representatives being dismissed, their share of man-days lost through strikes increased from 17 per cent at the beginning to over 40 per cent at the end of that period. Additionally, while only 60 per cent of dismissal strikes concerned only one employee dismissed, 90 per cent of dismissal strikes concerning employee representatives concerned one employee. (Standing Committee F on the Employment Protection Bill, 30th Sitting, July 22, 1975, at col. 1632). The obvious conclusion was that the dismissal of single shop stewards leads to most damaging strikes. To combat the problem, not of anti-trade union discrimination by employers, but of the loss of production due to industrial action caused by this discrimination, there was proposed the palliative of providing the employee in those circumstances with legal continuity of employment pending determination of his complaint by an industrial tribunal.

While lawyers may be impressed by the radical nature of this legal remedy, trade unionists are unlikely to be. Decades of harsh experience have engrained in workers the lesson that protection of themselves and particularly of their organisation at work depends not on the law or the fiat of some legal tribunal, but on their own strength *vis-à-vis* their employer. The proof of this was plain for all to see – contrast the disproportionate number of strikes over such dismissals with the number of complaints to industrial tribunals in such cases: only 27 in the six months between the end of September 1974 and the end of March 1975. Resort to tribunals is made only when the organisation of workers is so weak or the employer so strong that self-reliance would be fatal. The inducement here proffered – an order of legal continuation of the contract of employment after a specially hastened hearing (still estimated to take place only two to three weeks after the dismissal) – is not one which any shop steward worth his salt is going to wait for unless he has to. Any reduction in strike activity in such dismissal cases will be due more to union weakness and general economic factors than the availability of the new legal remedy. During the four years since the remedy came into force (June 1, 1976), only four cases were reported in the Industrial Relations Law Reports – of which three were unsuccessful.

Protection for Trade Unionists

Law and control of the workplace. Crude forms of anti-trade union activity are indulged in only by less sophisticated employers. Section 23 of the 1978 Act was clearly intended to combat the more subtle methods of preventing or deterring the spread of trade unionism. The employer does not rely only on his superior position *vis-à-vis* the employee in an employment relationship governed by the ostensibly egalitarian individual contract. His position as owner and controller of the means of production – the power of property at the point of production and often outside it – enables him to take many actions *outside* that employment relationship which will prevent or deter trade unionism. But the law here prohibits only actions which will affect the employee's trade unionism *in the context* of the individual employment relationship, not in the broader arena of anti-union activity.

This narrower power of the employer in the context of the individual employment relationship to take action (short of dismissal) to prevent or deter trade unionism derives from two areas of the relationship which he controls by law: the first is his control over the workers' time (thus, *e.g.* in the Agreement between the Unions and Vauxhall Motors Ltd., dated June 1974, the chapter on Works Standards is called: 'We Sell Our Time'); and the second, his control over the place of work, by virtue of property ownership.

The question is to what extent, if at all, the protection afforded by this section to employees taking part in trade union activities will alter legal perceptions of control of the workplace. For example, some judges and tribunals have insisted on a close connection between the union member's action and the official union machinery. They claim that trade *unionists*' activity is not necessarily trade *union* activity, and if the workers concerned are just 'troublemakers' they will not be protected. Definitions of 'trouble-makers' are, of course, extremely subjective. Workers should try, therefore, to associate themselves with the union as closely as possible in any activity. The irony here – and in labour law generally – is that in those cases they rarely need to rely on the law.

All too often the judicial view seems to have been that unions are mere encumbrances on the employer's legal rights, to be tolerated but restricted. Decisions which allow employees to be 'fairly' dismissed when, for example, they contacted their union and a factory inspector

over an asbestos dust hazard *(Dixon v. West Ella Developments Ltd.* [1978] I.R.L.R. 151 (E.A.T.)), or complained about the 'Shops and Offices Act' poster not being properly displayed *(Gardner v. Peeks Retail Ltd.* [1975] I.R.L.R. 244), are bad enough. But worse is the attitude that comes out in judgments like that of Kilner Brown J. in *City of Birmingham District Council v. Beyer* [1977] I.R.L.R. 211 (E.A.T.): a blacklisted trade unionist resorted to a false name to get a job, and was then sacked when recognised. The judge denied him any remedy for unfair dismissal and went on to tell him that 'he had only himself to blame', advising him that 'what he ought to do was to swallow his pride and apologise and ask the (employer) to give him another chance'. Finally, he was told that he had not been 'sufficiently humble'. The response of trade unionists can be imagined.

The inadequacy of the remedy of compensation needs no emphasis. An employer may continue to victimise trade unionists at will – he will simply have to pay for it in the traditional manner. The fact that an employer may 'buy' himself out of a trade union is not lost on workers. The consequence is that, whenever possible, workers will rely on their own industrial strength to protect themselves from such anti-trade union discrimination. The cases which reach industrial tribunals will be those where this self-reliance is inadequate to deal with a powerful and intransigent employer.

Time-off. The provisions in ss. 27–28 of the 1978 Act on time off for trade union duties and trade union activities show the weaknesses of both law and collective bargaining practice.

With regard to time off for union members to take part in union activities, the ACAS Code's guidance (paras. 21–22) on the scope of trade union activities is eloquent testimony to the bunkered vision of industrial relations pluralism. One was perhaps surprised at the limited view expressed by the Donovan Commission of the interests of trade union members (p. 309). This was criticised by the General Council in its Annual Report to the TUC in 1968 (p. 409) which reminded those who needed reminding of the 'wider social purposes' of trade unions. Industrial relations pluralism and its perspective, which confines trade union aspirations to only marginal changes in the existing institutions and objectives of industry and society, has been subject to trenchant criticism by Alan Fox and Richard Hyman since then. But it seems that ACAS is oblivious to this critique.

One is shocked by the extreme narrowness of the examples of trade union activities put forward in the Code: attendance at executive committee meetings or annual conferences (only senior members of trade unions would qualify for these rare absences from work), voting in union elections and maybe occasional workplace meetings where this would not adversely affect production or services. Reference to the objects of the TGWU as stated in its Rule Book is sufficient to reveal how pathetically inadequate the Code is in providing guidance to the potential activities of trade union members.

In stark contrast, with regard to time off for union officials to carry out their duties, the ACAS Code modestly gives pride of place to collective bargaining (para. 10). This is a characteristic of British auxiliary legislation in labour relations, and will doubtless help overcome the problem of statutory provision for widely differing circumstances in industry. It also has other less happy consequences, however, and these were succinctly stated by the authors of a study of the facilities for female shop-stewards in the NHS and Local Authorities (R.H. Fryer *et al.* (1978) 16 B.J.I.R. 160–174): '... the provisions of the Employment Protection Act, rather than making common provision, will in fact result in unequal availability of facilities to different groups of shop-stewards. In so far as local bargaining determines the level of facilities, the results of bargaining will reflect the strength and weaknesses of union organisation. Any systematic strengths or weaknesses of groups of workers or occupations will therefore tend to be reproduced in the level of facilities enjoyed by those workers' (p. 162). Inequality is the price of flexibility. The Code ratifies the status quo: as is the case in much of labour law, the law protects what the workers have already got for themselves.

Examples of union negotiated agreements. It was remarked in the B.J.I.R. article just quoted that in local government and the Health Service, the suggestions laid down by the Code of Practice for training have been normal practice for some time. The local authorities manual workers' National Agreement gives stewards the right to 'all reasonable facilities for exercising their functions.' They are allowed time off to carry out their duties with management permission 'and then only to conduct such business as is urgent and relevant to the depot, site, job or workshop.' The National Engineering Disputes Procedure, el. 12, provides that 'shop stewards shall be afforded reasonable facilities to deal with matters appropriate to be dealt with by them. In all other

respects they shall conform to the same working conditions as their fellow employees, and shall act in accordance with the terms of this or any other relevant agreement, national, local or domestic.'

More specific provision is possible for regular duties: *e.g.* Lesney Products allows paid time off for two-hour meetings for shop-stewards once a month, and for senior stewards twice a month. Where there is some difficulty in distinguishing union duties from internal union activities which management may argue are not covered, there can be a 'block time' approach. The Post Office grants partly paid leave of up to 45 days per year for union officials to do work 'which contains elements of both union business and of industrial relations'. Otherwise, as in the time-off agreement concluded by the Co-operative Employers Association National Wages Board and the Joint Trade Union Committee for Retail Co-operative Employment effective from January 1, 1978, the agreement may simply allow for paid time off for both types of duties – whether 'concerned with industrial relations between his employing society and its employees' or 'duties *outside* the confines of the employing society' – with further specification of the outside duties covered.

Chapter IV

Workers‘ participation

Chapter IV: Workers' participation

Introduction by Thomas Blanke

Brian Bercusson's concerns with regard to labour law can be summarised in terms of the following questions, among others: What are the driving forces behind the development of labour law? What is the engine, who determines the direction of this development? And – especially from the British point of view – what is the impact on British labour law? Will the British system benefit from the emerging EU labour law or not?

With regard to the problem of workers' participation at plant level, we must first note the considerable differences between the EU member states. Perhaps the core of these differences is whether a country has a single- or a dual-tier system of industrial relations. Expectations with regard to EU law in this respect have changed significantly over the last 40 years. The principal stages were: The 'golden age' of social rights in the late 1970s; the crisis under the Thatcher and Major governments in Great Britain; the creation of a legal framework for atypical labour relations and the first institutions of collective labour law under EU law during the 1990s; the reform of the EU Treaty, with its remarkable and far-reaching social rights; the creation of more and more institutions of collective labour law under EU law; and, finally, the crisis of collective autonomy and social rights in EU law.

The first and, at that time, very strong initiatives to create a system of 'workers' participation' at enterprise level, as well as at the level of the establishment, in the European Community date back to the 1970s. During that period – the so-called 'golden years of European labour law' – three directives were adopted which were intended to protect workers against the functioning of the Common Market. The first two were: the Directive on collective redundancies, 75/12/EEC (codified as Dir. 98/59/EC), adopted on 20 July 1975, and the Directive on the transfer of undertakings, 177/7187/EC (now codified as Dir. 1/23/EC), adopted on 14 February 1977, to promote the harmonisation of the relevant national laws ensuring the safeguarding of the rights of employees and requiring transferors and

transferees to inform and consult employees' representatives in good time. Both Directives, for the first time, provide for the obligatory information and consultation of workers' representatives. The transfer of undertakings Directive also lays down a provisional mandate for workers' representatives. The third relevant directive is the Directive on the insolvency of employers, 80/987/EC of 20 October 1980, as well as the famous draft of the 'Vredeling' Directive of 1980, which was the first attempt to create participation rules at enterprise level within the EC.

As already mentioned, Brian Bercusson was, in these years, mainly interested in themes of collective industrial relations. This also applies to Brian Bercusson's interest in workers' participation, in respect of which he analyses the influence of workers' representatives at workplace level on the contract of employment. The main instrument was the conclusion of collective agreements, as Brian Bercusson demonstrated, of which there are many.

'Workers' representatives and working practices in the workplace',
in W.E. Butler et al. (eds), *Comparative labour law*, 1987,
Aldershot: Gower, pp. 140–48.

After having been appointed to a Chair at the European University Institute in Florence in the mid-1980s, Brian Bercusson was influenced by Gunter Teubner's 'civil' concept of law and regulation. In this context, he published an interesting study on the relationship between the legal form of group enterprises and the regulation of labour relations.[1] He saw very clearly that a merely legal analysis, which does not refer to the concrete situation, is not sufficient.

This argument is also central in another study written during these years: In his study, 'Workers, corporate enterprise and the law', he provided an overview of a number of central doctrines of company law and their impact on workers' positions and came to the conclusion that: 'In practice, ... workers' influence over capital comes not from company law, but from the power of autonomous workers' organisations.'[2] This

1. B. Bercusson (1990) 'The significance of the legal form of the group enterprise in the United Kingdom', in D. Sugarman and G. Teubner (eds), *Regulating corporate groups in Europe*, Baden-Baden: Nomos, pp. 267–84.

2. B. Bercusson (1986) 'Workers, corporate enterprise and the law', in R. Lewis (ed.), *Labour law in Britain*, Oxford: Blackwell, pp. 134–55, p. 137.

result is based on a careful analysis of the role the employees play within a company: 'In company law, the employee is an outsider – a contract worker – in contrast to the shareholder who is an insider-member ... In short, company law regards as an outsider someone who may have worked a lifetime for a company and is an integral part of its activities, while it regards as an insider with the rights and powers of a member someone who has perhaps picked up a few shares without any other involvement. Hence the arguments for reform.'[3]

The 1990s and the beginning of the new Millennium seemed, once more, to be 'golden years' for the development of socially-oriented EU labour law. There was the introduction of European works councils and the extension of EU directive 94/45/EC to the UK (as Dir. 97/74/EC) within the context of the Amsterdam Treaty of 1997. There was also the signing of the Charter of Fundamental Rights of the European Union in December 2000 at the Nice summit. Finally, there was the coming into force of the general framework directive for informing and consulting employees in the European Community (Dir. 2002/14/EC of 11 March 2002) and of workers' participation rules within companies, such as the SE (Council Reg. 2157/2001 of 8.10. 2001, Dir. 2001/86/EC) and the European Cooperative Society or SCE (Council Reg. 1435/2003 of 22.7.2003, Dir. 2003/72/EC).

In this period, Brian Bercusson developed a very positive view of EU labour law and its impact on Great Britain. In a series of studies he analysed – within the so-called Manifesto Group – the 'European social model', based on European citizenship, which also entails a certain social status.[4] He studied labour relations in the European member states and the USA;[5] elucidated the European Works Councils directive 94/45/EC; and examined the experiences with European Works Councils, including the directive's potential with regard to actual Court decisions.[6] A special article was dedicated to the framework directive for

3. Ibid., p. 139.

4. B. Bercusson, S. Deakin, P. Koistinen, Y. Kravaritou, U. Mückenberger, A. Supiot and B. Veneziani, *A Manifesto for Social Europe*, Brussels: European Trade Union Institute, 1996); U. Mückenberger (ed.), *Manifesto Social Europe*, Brussels: ETUI, 2001.

5. B. Bercusson et al. (eds) (1998) *Need to be heard at work? Recognition laws – Lessons from abroad*, London: Institute of Employment Rights.

6. B. Bercusson (1999) 'Labour and multinational capital: the potential of European Works Councils', in P. Humblet and L. Lenaerts (eds), *Arbeid en Kapitaal (on)verzoenbaar?*, Tegenspraak-Cahier No. 19, Gent: Mys & Breesch, pp. 103–20.

informing and consulting employees in the European Community (Dir. 2002/14/EC of 11 March 2002). He argued that EU law was shaping an economic model incorporating mandatory information and consultation of employees and their representatives as it developed the concept of the Single European market. This economic model is embedded in what has been called the 'European social model'. Following his interpretation, the implementation of the Directive has to be respected in 9 steps – this article well illustrates Brian Bercusson's ability to argue in legal contexts: he had an outstanding capacity to draw distinctions and to explain himself clearly.

'The European social model comes to Britain',
Industrial Law Journal, 2002, 31 (3), pp. 209–44.

Nowadays, the dominant impression is that, after the EU expansion of May 2004 directed towards the East and the South, the development of the social dimension of EU labour law again confronts a crisis. The European Social Model must contend, not only with internal difficulties due to the differences between the 'old' and the 'new' member states, but also with the global economic crisis. It is therefore doubtful whether the distinction between single- and dual-tier systems regarding industrial relations in the EU member states is still valid.[7]

Always sensitive to future developments, Brian Bercusson started up, within the framework of the European Trade Union Institute, a second – after the Expert Group on Transnational Trade Union Rights – group of academics (composed mainly of economists) which focussed on corporate governance and the possibility of integrating and extending workers' participation. The group – called 'Paths to Progress' – prepared a number of papers, edited by Brian Bercusson. Brian Bercusson started with a working paper outlining perspectives and questions for further investigation,[8] then provided a comprehensive overview of the results of

7. See E. Rose, 'Workplace representation in Europe – are there any single channel systems left?' In: E. Rose and H.H. Voogsgeerd (eds), *Recent trends in workers' involvement*, Groningen 2009 (forthcoming).

8. B. Bercusson (2006) 'Results of the "Paths to progress" working group', in B. Bercusson (ed.), *Paths to progress. Mapping innovation on information, consultation and participation for employee involvement in corporate governance*, Brussels: Social Development Agency, pp. 11–18.

the working group,[9] followed by publication of the results of the research project. Brian Bercusson's paper described his current ideas on the *ordre communautaire social* and the need for its further development with regard to the new fiscal dimensions of globalisation. The starting point – in his view – should be a revision of the Acquired Rights Directive in the event of a transfer of capital. This should be followed by the extension of the *ordre communautaire social* to other financial operations. The governing principles of this *ordre* are: (i) transparency (information and consultation) – he argues that Art. 27 of the Charter of Fundamental Rights is central to the *ordre communautaire social* – and (ii) that no transfer should put at risk the workers affected (continuity of terms and conditions of employment). Brian Bercusson said that this would be a kind of 'participation *Tobin* Tax' – but without actually being a tax.

'Regulation of the financial sector to promote worker representation and participation in the corporate governance of multinational enterprises', in: B. Bercusson (ed.) (2006), *Paths to progress. Mapping innovation on information, consultation and participation for employee involvement in corporate governance*, Brussels: Social Development Agency, pp. 22–37.

9. See B. Bercusson (ed.) (2006) *Paths to progress. Mapping innovation on information, consultation and participation for employee involvement in corporate governance*, Brussels: Social Development Agency.

Worker representatives and working practices at the workplace

Brian Bercusson (1987) *

The problem of introducing changes in working practices at the workplace is of immense practical importance. No single legal concept or category in British law deals with the problem of changes at work. The law is to be found in doctrines concerning variations in the contract of employment, statutory rules on dismissal for refusal to accept change, and redundancy claims. Little account is taken by the law of the role of worker representatives in negotiating changes at work and the resulting collective agreements. Yet rules and procedures governing change have frequently been agreed by worker representatives with management. This paper will examine the extent to which traditional legal doctrines take account of the role of worker representatives in changing working practices, and provide illustrations of collectively agreed rules and procedures for such changes.

Worker representatives and the contract of employment

The primary source of the employee's legal rights and obligations under British law is the contract of employment between the individual employee and his employer. Whatever the reality of employer dominance or collective bargaining, one must refer to this individual agreement in defining the legal position of the employee with regard to basic employment matters: wages, hours, holidays, and in particular, what it is that the employee is required to do – the job description. The contract of employment, so central to employment law, comes into being when employer and employee respectively offer and accept employment. In the present state of the labour market in Great Britain,

* 'Worker representatives and working practices at the workplace', Brian Bercusson (1987). This article was first published in W.E. Butler, B.A. Hepple and A.C. Neal (eds.) *Comparative labour law: Anglo-Soviet perspectives*, Aldershot: Gower, pp. 140-148 and is reprinted here with the kind permission of Ashgate Publishing.

it is exceptional for worker representatives to be actively involved in the formulation of the terms of employment at the moment of hiring. In these circumstances, it is not unusual for the employer to demand, and for the often desperate job-seeker to be unable to resist, terms requiring flexibility on the part of the employee with respect to the work to be performed, and even the place in which it may be necessary to perform the work: job flexibility and geographical mobility. Once such terms are part of the contract of employment, the legal basis exists for the employer's power unilaterally to implement changes in working practices, even where these are detrimental to the employee's interests.

Worker representatives can influence the contract of employment – and thereby curtail the employer's power to insist on the inclusion of terms allowing for unilateral change – in two ways. First, although not present and active at the hiring stage, representatives of the workers already employed by the employer may have negotiated collective agreements covering the workforce which restrict the employer's power to introduce changes in working practices. The job to be filled by the newly hired employee may have been the subject of collective bargaining that stipulated the terms of employment, including the degree of flexibility and mobility required. The new employee, even if not a trade union member, will thus benefit from the protection negotiated by the workplace representatives.

It may be, however, that no formal collective agreement has been negotiated on the subject of changes at the workplace. The individual contract of employment may, therefore, contain flexibility and mobility clauses on the insistence of the employer, or may even be silent on these matters. In either event, worker representatives may be active in resisting attempts by employers to implement changes in working practices, whether or not the employer can point to contractual provisions authorising him to do so. Employers may seek to break this resistance, using weapons such as dismissal or even, occasionally, court orders (injunctions) to prevent the organising of industrial action. However, the negotiating skills of worker representatives and their ability to organise industrial action may induce the employer to withdraw, or even refrain from introducing changes. Where this situation persists over a period of time, it may be possible to argue that a 'custom and practice' has developed, precluding the employer from unilaterally introducing changes in working practices, and that the terms of the individual contracts of employment have been modified to

reflect such custom and practice. In this second way, therefore, worker representatives can influence the law on changes at work through the contract of employment.

It should be noted that these processes of collective bargaining and of collective custom and practice operate not only to *resist* employer-initiated changes in working practices, but also to *promote* changes desired by the workers. Demands may be made by worker representatives for changes in working practices, which, if agreed, will be incorporated into individual contracts, and similarly worker-initiated changes may become part of the custom and practice of the workplace.

Worker representatives and legislation

The judges have been unable to develop independently common law rules which recognise the role of worker representatives in negotiating changes in working practices. For example, in *Glitz* v *Watford Electric Co. Ltd*.,[1] the judge was not willing to imply a term into the employee's contract of employment requiring consultation with the trade union representative before she could be required to change her job from being a typist to working on a duplicating machine. However, judges have been prepared to accept and develop rules recognising the role of worker representatives where statutory provisions are relied upon by workers when employers attempt unilaterally to implement change. The relevant statutes apply where employees are dismissed for refusing to accept changes, redundancy situations and transfers of undertakings.

A. *Unfair Dismissal:* Workers dismissed for refusing to accept changes in working practices implemented by employers in breach of their contracts of employment have claimed that the dismissal is not justified by any of the 'fair' reasons listed in s.57(2) of the Employment Protection (Consolidation) Act 1978 (capability, conduct, redundancy, etc.). However, the Court of Appeal in *Hollister* v *National Farmers' Union*[2] held that such refusal to accept change was 'some other substantial reason of a kind such as to justify the dismissal' (s.57(l) of the 1978 Act). Where such changes were part of a reorganisation to

1. [1979] I.R.L.R. 89 (EAT).
2. [1979] I.R.L.R. 238.

improve 'efficiency', Lord Denning said dismissal of non-cooperative employees was fair as 'there was some sound, good business reason for the reorganisation'.

Even where the employer has a 'fair' reason for dismissal, however, the dismissal may be unfair if the employer has acted 'unreasonably in treating it as a sufficient reason for dismissing the employee' (s.57(3) of the 1978 Act). In claims for unfair dismissal, the law provides that the Industrial Relations Code of Practice 1971 'shall be taken into account in industrial tribunal proceedings' (Employment Protection Act 1975, Sched. 17, para. 4(l)). Para. 52 of the 1971 Code provides:

> Communication and consultation are particularly important in times of change. The achievement of change is a joint concern of management and employees and should be carried out in a way which pays regard both to the efficiency of the undertaking and to the interests of employees. Major changes in working arrangements should not be made by management without prior discussion with employees or their representatives.

Para. 65 of the 1971 Code provides:

> Consultation means jointly examining and discussing problems of concern to both management and employees. It involves seeking mutually acceptable solutions through a genuine exchange of views and information.

The Code of Practice therefore envisages a role for worker representatives in negotiating changes in working practices. The judges, however, have differed in their willingness to make consultation or negotiation a precondition of the employer's power to dismiss employees who reject changes. In the *Hollister* case, Lord Denning asserted that, 'It does not say anything about consultation or negotiation in the statute' (as opposed to the Code of Practice, which he did quote). He refused to accept that failure to consult would make a dismissal unfair. In contrast, the Employment Appeal Tribunal in *Ladbroke Courage Holidays Ltd.* v *Asten*[3] upheld a tribunal decision that such a dismissal

3. [1981] I.R.L.R. 59.

was unfair where 'consultation should have taken place and that consultation was likely to have been fruitful'.

Worker representatives have no right to complain to a court or tribunal where they have not been consulted over changes as provided in the 1971 Code of Practice. The status of the Code's provisions depends upon the extent to which tribunals will take them into account in unfair dismissal proceedings. The variable attitudes of tribunals have resulted in the law being a very weak support for worker representatives where employers undertake major reorganisations.

B. *Redundancy Situations:* Where changes in working practices lead to a redundancy situation – loss of jobs or reduction in personnel – a number of statutory provisions reflect a recognition of the role of worker representatives.

(i) Consultation of worker representatives

As in the case of unfair dismissal proceedings, the employer may use redundancy as a fair reason for dismissing an employee. However, s.57(3) of the 1978 Act still requires him to act reasonably. In the case of *Williams* v *Compair Maxam Ltd*.,[4] the Employment Appeal Tribunal stated that:

> there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles: ...
>
> 2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

4. [1982] I.R.L.R. 83.

Whether failure to consult worker representatives will render a dismissal unfair depends on the variable views of different tribunals. It is at best only an indirect legal recognition of the role of worker representatives and an uncertain pressure on employers to engage in consultations and negotiations over change.

A more direct recognition of the role of worker representatives in cases where changes in working practice lead to redundancies is in s.99 of the Employment Protection Act 1975:

> An employer proposing to dismiss as redundant an employee of a description in respect of which an independent trade union is recognised by him shall consult representatives of that trade union about the dismissal...

The origins of the provision lie in the European Economic Community's Council Directive 75/129 of 17 February 1975, to which the United Kingdom was obliged to give effect. Many questions raised by this law have been addressed in subsequent decisions on complaints by trade union representatives of non-compliance by employers with the statutory requirements: which trade union representatives ought to be consulted; what is the content and nature of the consultation required; at what stage in the decision-making process ought the trade union representatives to be involved; what are 'special circumstances which make it not reasonably practicable for the employer to comply with any of the requirements' (s.99(8)); and what is the remedy for a union representative whose right to be consulted has been violated by the employer?

(ii) Negotiated redundancy procedures

Dismissal of a worker in a redundancy situation can be fair, but s.59 of the 1978 Act provides that where:

> "it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by him and who have not been dismissed by the employer, and ...

> (b) that he was selected for dismissal in contravention of a customary arrangement or agreed procedure relating to redundancy and there were no special reasons justifying a departure from that arrangement or procedure in his case, then ... the dismissal shall be regarded as unfair."

The law recognises here the role of worker representatives in negotiating agreed procedures or making arrangements in the event of a redundancy situation affecting workers they represent. These are indirectly supported by requiring adherence to them on pain of a finding of unfair dismissal if any worker is selected in contravention of such arrangement or procedure. For example, in the case of *Tilgate Pallets Ltd.* v *Barras*[5] there was a customary arrangement or agreed procedure providing for selection on the basis of last-in-first-out in the event of redundancy. Nonetheless, the employers drew up lists based on their desire to retain what they considered to be a viable workforce, and argued that they had had contacts with the workers' representative which led them to believe that the agreed procedure would not apply. The Employment Appeal Tribunal upheld the finding of unfair dismissal:

> It seems to us that where an agreed procedure or customary arrangement has been reached and there has been no alteration to it agreed by both sides that customary arrangement will continue: the mere fact that one party believes that some alteration has taken place is not enough.

Collective agreements in redundancy situations often include provisions which are not restricted to selection procedures. They may require the employer to take measures to avoid redundancy, detailed consultation procedures, provision for redundancy payments and time off to look for work for those made redundant. The role of worker representatives is not confined to assisting in the selection of workers to be dismissed. But the view has been expressed that only contravention of agreed selection procedures would allow a claim for unfair dismissal to succeed under s. 59 *(McDowell* v *Eastern BRS Ltd*.[6]).

5. [1983] I.R.L.R. 231.
6. [1981] I.R.L.R. 482 (EAT).

C. *Transfer of Undertakings:* In the event of transfers of undertakings, businesses, and parts of businesses, there are special provisions which recognise the role of worker representatives involved in the changes affecting employees. The Transfer of Undertakings (Protection of Employment) Regulations 1981 (No. 1794) impose obligations on employees in the circumstances of such transfers. With respect to 'any employee of the transferor or the transferee (whether or not employed in the undertaking or the part of the undertaking to be transferred) who may be affected by the transfer or may be affected by measures taken in connection with it', the employer is required to provide information to worker representatives of *inter alia* 'the legal, economic and social implications of the transfer for the affected employees' (reg. 10(l) and (2)). The employer must provide this information 'long enough before a relevant transfer to enable consultations to take place between the employer of any affected employees of a description in respect of which an independent trade union is recognised by him and that union's representatives' (reg. 10(2)). This obligation to provide information is supplemented by an obligation to 'enter into consultations with the representatives of that union' where the employer envisages that he will 'in connection with the transfer, be taking measures in relation to any such employees' (reg. 10(5)). As in the case of the statutory requirements on consultation over proposed redundancies, these provisions are derived from an EEC Council Directive (No.77/187 of 14 February 1977). Both sets of provisions apply where a redundancy situation arises from the transfer of the undertaking. But the obligations of consultation and/or information may apply where changes ensue even without dismissals.

The significance of this last distinction between dismissals resulting from a redundancy situation and those resulting from changes at work is highlighted by the provision in reg. 8. This declares a dismissal to be 'fair' where 'an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer is the reason or principal reason for dismissing an employee' (reg. 8(2)). In *Berriman v Delabole Vate Ltd.*,[7] the Employment Appeal Tribunal held that the concept of 'economic, technical or organisational reason' was limited by the following words – 'entailing changes in the workforce' – so that dismissal following a

7. [1984] I.R.L.R. 394.

refusal of the employee to accept a change in pay was not within reg. 8(2). A change in the workforce is a change in the personnel employed, and not simply a change in the terms and conditions of their employment. To this extent, there has been a dramatic reversal of the judicial policy laid down initially by the Court of Appeal in *Hollister*, which held both changes in the workforce *and* changes in terms of employment to be fair reasons for dismissal. In the case of transfers of undertakings, only changes in the workforce will enable the employer to invoke reg. 8(2). The justification put forward by the EAT in *Berriman* would seem to apply with equal force to changes in terms *not* connected with transfers of undertakings: otherwise, 'the consequence would be that employers were indeed entitled, when taking over another business, to require a reduction in the pay of the employees taken over without thereby infringing the provisions of the employment legislation' (para. 18, *per* Mr. Justice Nolan). It may be time for the courts to reconsider the policy they adopted in *Hollister*.

Worker representatives and collective agreements

Apart from statutory provisions, there exist collective agreements whereby employers undertake obligations with regard to worker representatives in connection with proposed changes in working practices. There is no comprehensive survey of such agreements that would enable us to know what proportion of the workforce benefits from such agreements. But a review of a number of them indicates that the following matters tend to be covered.

A first group of provisions is concerned with anticipating the changes. Thus, a requirement will be stipulated that advance notice and information should be provided to worker representatives. For example, an agreement between the clerical workers' union (APEX) and the General Accident Fire and Life Assurance Corporation Ltd. provides that:

> 1. The corporation will advise APEX of outline proposals to commence research on projects or feasibility studies which could include the consideration of new technologies.
>
> 2. The corporation will provide in writing to APEX details or specific proposals for the introduction, extension or changing of applications involving new technologies which could affect working arrangements, skill requirements, job numbers, job levels or working conditions.

The agreement may provide for specific joint machinery to be set up involving worker representatives in discussion, consultation or negotiation. For example, an agreement between the major white-collar private sector employees' union (ASTMS) and the Scottish Provident Institution provides for the setting up of a joint committee to investigate and report on new technology or new techniques when proposed, and to cover the following points:

(i) the type of equipment or system and its siting;
(ii) the skills needed to operate or service or work with it;
(iii) manpower requirements;
(iv) any likely changes in job regradings;
(v) the expected introduction date of the new system and plan of expected progress during the time leading up to that date;
(vi) training and retraining requirements;
(vii) health and safety requirements.

A second group of provisions is concerned with the problems following the introduction of changes, once these have been agreed in principle. These take the form of *status quo* clauses which allow worker representatives to object to specific changes and prevent their implementation until agreement is reached between the employer and the representatives. Provisions may also be made expressly for trial periods, training and re-training and the operational conditions. For example, an agreement between APEX and the International Harvester Co. of Great Britain Ltd. provides that, 'Any complaints re. working conditions should be raised by the employees concerned with their immediate supervisor and with the involvement of grade representatives and department manager, if necessary.' A third group of provisions deals with problems likely to arise once changes have been introduced. Provision is made for monitoring the effects of the changes, particularly with respect to information on productivity and manpower levels. For example, an agreement between APEX and the Humber Graving Dock and Engineering Co. provides that:

> The management agrees to provide sufficient information to the union to enable it to: monitor developments, changes in workflow, changes in working methods and the effects on jobs, assess the effect of any further proposed introduction of computer based systems, analyse health and safety effects and general working environment.

A fourth group of provisions is concerned with job and income security. There are a large number of agreements concerned with redundancies, redeployment and the consequences for incomes of the workers affected. But the agreements also deal with problems of changing job descriptions and satisfaction. For example, an agreement between APEX and Plessey Telecommunications provides:

> Staff operating the new system will not be given additional tasks which are not covered by the agreed systems without prior consultation with the trade union.
>
> It is not the intention of the system to de-skill or fragment jobs, nor to introduce greater routine since these are not only harmful to job satisfaction, but may also be a self-defeating approach to improved productivity and the aims of the system.

The role of worker representatives in negotiating over changes in working practices is recognised by the practice of trade unions issuing 'model' agreements or guidelines for negotiators involved in such problems. For example, the Trades Union Congress has issued a 'New Technology Agreement Issues Checklist', which urges negotiators to follow certain guidelines, including:

> Longer holidays, sabbaticals and early retirement on improved pensions can all be pursued in bargaining about new technology and attempting to reduce working time. The reduction or elimination of systematic overtime should be a bargaining priority.
>
> Where new technology produces an increase in shift-working this should be accompanied by a reduction in hours worked. The flexibility associated with micro-electronic technology can be used to change shift patterns to bring about a greater intensity of capital utilisation and shorter working hours.

Negotiators are involved not only in bargaining over reductions in working time, but also over pay increases following productivity gains.

The existence of many such collective agreements and the active role played by workers' representatives in practice when changes are introduced at the workplace disguises fundamental legal problems. These problems are, first, that these collective agreements are, almost

without exception, not legally enforceable as between the employers and workers' representatives who negotiate them. The Trade Union and Labour Relations Act 1974 creates, in s.18, a presumption that collective agreements are not legally binding unless there is express provision to the contrary. Virtually no collective agreement contains such expression of intent to be legally bound. Hence the obligations and rights contained in them cannot be legally enforceable. The second legal problem arises from the possibility that, although the agreements might not be legally enforceable as between the collective parties (workers' representatives and employers), it might be possible to enforce them as a result of their incorporation into the individual contracts of employment of the workers represented. These individual contracts are undoubtedly legally binding as between employer and employee, and are very likely to reflect the results of the collective agreements negotiated by worker representatives on such matters as pay, hours, holidays, job descriptions and so on. There seems no reason in principle why these individual contracts should not incorporate the protections allowed for by collective agreements on changes in working practices. These protections would include the right of individual employees to have any problems affecting them dealt with by the appropriate negotiating machinery – *i.e.* the role of the trade union representative would be legally safeguarded by an individual legal right of the employee represented by the union, as negotiated by that union in a collective agreement.

The difficulties surrounding such legal recognition of the worker representatives' role lie in the problem of acknowledging an individual right to collective representation; and more concretely, in the often loose draftsmanship of collective agreements, which renders the language to be incorporated unfamiliar to judges used to the precision of commercial draftsmanship. Neither of these problems, however, is insurmountable.

The European Social Model comes to Britain

Brian Bercusson (2002) *

Abstract

The EC framework directive on information and consultation will have to be implemented for undertakings in the UK employing at least 150 employees or establishments employing at least 100 employees by 23 March 2005. Unlike most other Member States, the UK does not have a mandatory regime of workplace representation. EU law is shaping an economic model incorporating mandatory information and consultation of employees and their representatives. The interpretation and application of the new directive by the Commission and the European Court will be shaped by their understanding of this 'European social model', while a Convention on the Future of Europe is deliberating on what it means to be a citizen of the European Union. The directive's object and principles are analysed. The directive requires a nine-stage process: (1) transmission of information/data, (2) acquaintance with and examination of data, (3) conduct of an adequate study, (4) preparation for consultation, (5) formulation of an opinion, (6) meeting, (7) employer's reasoned response to opinion, (8) 'exchange of views and establishment of dialogue', 'discussion', 'with a view to reaching an agreement on decisions', and (9) 'the employer and the employees' representatives shall work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests both of the undertaking or establishment and of the employees'. The implications for the structure of employee representation and the potential scope for Member States to determine the practical arrangements for exercising the right to information and consultation, and, in particular, the position when Member States entrust to management and labour the task of defining practical arrangements are explored. The role of the

* 'The European social model comes to Britain', Brian Bercusson (2002). This article was first published in the *Industrial Law Journal*, 31 (3), 209–244 and is reprinted here with the kind permission of the Industrial Law Society.

Blair government in weakening the directive, and its consequences, are described. The conclusion considers the scope for a form of 'British industrial relations exceptionalism' in the European Union.

1. Introduction

The EC framework directive on information and consultation has put the subject of works councils on the British labour law agenda.[1] Previous EC law interventions have led commentators to canvass the possibilities of dual channel representation systems, integration with or substitution for the existing system, dominated by the absence or presence of trade unions.[2] The timetable for implementation of the directive should concentrate the mind in considering the options available. Due to the tactics of the Blair government, the transposition dates for the UK were staggered, with the final date for full implementation deferred possibly until as late as 23 March 2008.[3] Nonetheless, transposition of the directive will be necessary for undertakings employing at least 150 employees by the deadline of 23 March 2005.[4]

2. The EU context

For the UK, the question of what the EC directive demands by way of mandatory workplace representation is of particular importance because, unlike most other Member States, the UK does not have a mandatory regime of workplace representation. One particular concern of this article is to address the meaning of the directive in the specific

1. Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community. OJ L 80/29 of 23.3.2002.

2. *Commission of the European Communities v United Kingdom*, Cases C-382/92 and C-383/92, [1994] ECR 2435, 2479. P. Davies, 'A Challenge to Single Channel' (1994) 23 ILJ 272–85. B. Bercusson, Note on Cases C-382/92 and C-383/92, (1996) 33 *Common Market Law Review* 589–610. M. Hall, 'Beyond Recognition? Employee Representation and EU Law' (1996) 25 ILJ 15–27. B. Bercusson, 'A European Agenda?', in K. Ewing (ed.), *Employment Rights at Work: Reviewing the Employment Relations Act 1999* (Institute of Employment Rights, 2001) 159 at 172–85.

3. Depending on the interpretation of Article 10; for example, the phrase 'no general, permanent and statutory system of information and consultation of employees, nor a general, permanent and statutory system of employee representation at the workplace'. Similarly, there is some uncertainty in the definition of 'undertaking' which may determine the threshold. See below for further discussion.

4. For most EU Member States, the lower thresholds specified in Article 3(1) apply (undertakings: 50 employees; establishments: 20 employees) as of 23 March 2005.

context of European integration,[5] and specifically in the present economic and political conjuncture where a Convention on the Future of Europe has been established and is deliberating on, *inter alia*, what it means to be a citizen of the European Union.

In describing the precursors of the new framework directive, the Collective Dismissals and Acquired Rights Directives,[6] I argued that '[t]hese Directives might have been the beginning of a sustained development towards a role for labour in the enterprise'.[7] Indeed, they were followed by a number of initiatives seeking to require information and consultation in discrete areas affecting labour in the enterprise.[8] Eventually, the desire for a social dimension to accompany the 1992 Single Market Programme led to the adoption of the Protocol and Agreement on Social Policy of the Maastricht Treaty on European Union (TEU). The European Works Councils Directive[9] emerged from this specific political conjuncture when it combined with the catalytic effect of events (the Hoover affair)[10] which precipitated a political

5. 'The labour law of the UK, and of other Member States ... is European ... as reflecting the cumulative experience of national labour laws, filtered through the prism of EC institutions and refined in the crucible of the developing European polity'. B. Bercusson, *European Labour Law* (London: Butterworths, 1996), p. 6. Hereinafter cited as Bercusson (1996).

6. Council Directive 75/129 of 17.2.75 on the approximation of the laws of the Member States relating to collective dismissals, OJ L 48/29, as amended by Directive 92/56 of 24.6.92, OJ L 245/92. Now consolidated in Council Directive 98/59/EC of 20.7.98, OJ L 225/16. Council Directive 77/187 of 14.2.77 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJL 61/26, as amended by Directive 98/50/EC of 29.6.98, OJ L 201/88 of 17.7.98, Now consolidated in Council Directive 2001/23/EC of 12 March 2001, OJ L 82/16. Hereinafter, these directives will be referred to respectively as CRD and ARD.

7. Bercusson (1996), p. 220.

8. *Ibid*. at 220–21: 'The following years saw a number of initiatives by the Commission which attempted to expand their scope: two drafts of a Directive on procedures for informing and consulting employees in large national and multinational firms in 1980 and 1983 (the so-called 'Vredling' Directive, named after the then Commissioner for Social Affairs); a revised draft Fifth Directive on company structure and administration in 1983; and a revised draft Regulation and Directive on the Statute for a European Company, in 1979 (amending earlier drafts of 1970 and 1975). However, all these initiatives came to naught. The requirement of unanimity in the Council of Ministers congealed any movement they might have represented. Progress was only made in the sphere of health and safety at work, where a number of Directives were adopted regarding information and consultation over hazards at work (lead and ionic compounds in 1982, asbestos in 1983, noise in 1986), culminating in the Framework Directive in 1989' (footnotes omitted).

9. Council Directive 94/45/EC of 22.9.94 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. OJ L 254/64 of 30.9.94. Hereinafter referred to as the EWC Directive.

10. 'The Hoover Affair and Social Dumping' (March 1993) 230 *European Industrial Relations Review* 14–20.

initiative. As I argued then, that directive 'manifests a general strategy towards labour in the enterprise which has long-term consequences'. Moreover:[11]

> These Directives, then, should be seen not as individual and isolated cases of special situations or circumstances where EU policy was exceptionally supportive of labour in the enterprise. Rather, they are part of a general evolution of policy in the EU towards labour in the enterprise. The specific individual measures embodying this policy have been shaped by the contingent difficulties of social policy formation at particular conjunctures in the development of the EU. But they should be seen in this general context ... Directives apparently covering only narrowly defined situations involving labour in the enterprise (collective dismissals, transfers of undertakings, transnational enterprises) raise general and momentous issues of workers' representation, the role of collective agreements, adequacy of sanctions ... and, ultimately, managerial prerogative.

The adoption of the new framework directive is similarly characterised by a particular political conjuncture of equal significance to that which led to the TEU, and similarly combined with catalytic events, in particular, those surrounding the closure of the Renault plant at Vilvoorde in Belgium,[12] which precipitated the initiative which led to the directive.

The present political conjuncture has two dimensions which shape the meaning and significance of the new framework directive. The first has to do with the competences and objectives of the EU; the second, the current constitutional process with the Convention at its heart.

11. Bercusson (1996), p. 221.

12. The Repercussions of the Vilvoorde Closure' (February 1998) 289 *European Industrial Relations Review* 22–25. But also closures at Michelin in France: 'Michelin Agrees EWC ... and Announces Job Losses' (November/December 1999) 24 *European Works Councils Bulletin* 4; and, again, Marks & Spencer in France and BMW in the UK; see 'Repercussions of the Marks & Spencer Closures' (June 2001) 329 *European Industrial Relations Review* 15–18. Cf. M. Whittall, 'The BMW European Works Council: A Cause for European Industrial Relations Optimism?' (2000) 6 *European Journal of Industrial Relations* 61–83.

A. EU competences and the European Social and Economic Model

An EC competence is necessary for there to be a legal basis of an EC measure establishing a general framework for informing and consulting employees. Insofar as creation of a common market with fair competition implied harmonisation of labour costs, and this was deemed politically desirable by the Member States, and furthermore was also feasible in terms of voting in the Council, some measures were adopted on the basis of Article 100 (now Article 94) of the EC Treaty of 1957.

As the competences of the EC in the social field were extended by the Single European Act 1986, again, subject to political desirability and voting feasibility, more issues engaging worker representation were the subject of EC legal measures during the late 1980s and early 1990s, particularly in the field of health and safety, including working time.[13] The European social dialogue constitutionalised in the TEU raised specifically transnational issues of worker representation in Europe, including in multinational enterprises with the EWC Directive.[14] These developments may be understood in terms of the changing nature of European economic and political integration. The foundations of the post-1945 settlements in the EU Member States included the overlapping elements of basic labour standards, full employment and a welfare state. The regulation of labour markets in the context of these settlements was undertaken by political authorities and the social partners, organisations of employers and trade unions, to varying degrees in different Member States. The transnational political and economic integration of Europe is unlikely to deviate wildly from these foundations. EU law is shaping an economic model incorporating mandatory information and consultation of employees and their representatives as it develops its particular concept of the single European market. This economic model is embedded in what has been called the 'European social model', which includes information and

13. Council Directive 89/391/EEC of 12.6.89 on the introduction of measures to encourage improvements in the safety and health of workers at work. OJ L 183/1. Council Directive 93/104/ EC of 23.11.93 concerning certain aspects of the organisation of working time. OJ L 307/18.

14. Bercusson (1996), Chapters 18–19, pp. 248–301. 'Labour and Multinational Capital: The Potential of European Works Councils', in P. Humblett and L. Lenaerts (eds), *Arbeid en Kapitaal: (on) verzoenbaar?*, Tegenspraak-Cahier 19 (Ghent, 1999), pp. 103–20. 'Democratic Legitimacy and European Labour Law' (1999) 28 ILJ 153–70.

consultation of employees in undertakings. The meaning of the new directive, its enforcement by the Commission and interpretation by the European Court of Justice will be shaped by their understanding of the EU's social model.

B. The Constitutional Convention and EU citizenship

(i) The Convention

A Convention including representatives of the European Parliament, the parliaments of the Member States of the EU, of the Member State governments and the European Commission was formally inaugurated on 28 February 2002.[15] It follows the perceived success of the body established by the Cologne Council of June 1999 with the mandate to produce an EU Charter of Fundamental Rights. That EU Charter was duly produced, and unanimously approved as a political declaration at Nice in December 2000. The EU Charter breaks new ground by including in a single list of fundamental rights not only traditional civil and political rights, but also a long list of social and economic rights. However, although the EU Charter was approved by the European Council, it was limited to a political declaration and was not given a formal legal status.[16] But the inclusion of social and economic rights in the EU Charter will have particular consequences for the Convention considering issues including the concept of EU citizenship.

15. Documentation relating to the Convention may be accessed through the EU's website at: http://europa.int.

16. That issue, among others, was remitted for consideration by the Convention, and final decision by the European Council in 2004. In the meanwhile, as many anticipated, the EU Charter has taken on a life of its own. By the end of 2001 the Charter had been referred to on eleven occasions by Advocates General of the European Court: Opinions of AG Alber (Case C-340/99, 1.2.2001); AG Tizzano (Case C-173/99, 8.2.2001); AG Jacobs (Case C-270/99, 22.3.2001; Case C-377/98,14.6.2001); AG Geelhoed (Case C-413/99, 5.7.2001; Case C-313/99, 12.7.2001; Case C-224/98, 21.2.2001); AG Leger (Case C-353/99 P, 10.7.2001, Case C-309/99, 10.7.2001); AG Stix-Hackl (Case C-131/00, 12.7.2001; Case C-60/00, 13.9.2001; Case C-459/99, 13.9.2001; Case C-49/00, 31.5.2001; Case C-210/00, 27.11.2001; Case C-224/00, 6.12.2001); AG Mischo (Joined Cases C-20/00 and C-64/00,20.9.2001; Joined Cases C-122 and C-125/99, 22.2.2001); AG Colomer (Case C-208/00, 4.12.2001). It has also been cited by the Court of First Instance in a decision of 30 January 2002: Case T-54/99, *max.mobil Telekommunikation Service GmbH* v *Commission*. I am grateful to Professor Piet Eeckhout of King's College, London for some of these references. Even as a mere political declaration, the EU Charter appears to be accepted by the European Courts as reflecting fundamental rights common to the traditions of the Member States and an integral part of the EU legal order.

(ii) 'EU citizenship'

As currently stated in Article 17 of the EC Treaty, the rights of EU citizens are meagre[17] in contrast with citizenship of Member States. In examining the issue of whether citizenship has meaning in EU law going beyond nationality of a Member State, Norbert Reich puts forward two respects in which EU citizenship could go beyond nationality.[18] Firstly, the EU confers rights on Member State nationals under EC law which go beyond what nationals obtain under Member State law. I suggest that the emerging European social model means certain rights may be characterised as 'citizenship' rights when they go beyond the traditional civil and political content to embrace a wider set of 'social' rights. Secondly, the EU confers rights on individuals irrespective of Member State nationality. Individuals possess specifically EU rights when they are EU residents, workers, consumers and so on. For example, national citizenship is not the criterion for entitlement to 'EU citizenship' rights of a worker to equal pay (Article 141). Taken together, it is suggested that EU citizenship not only includes (social) rights wider than rights attached to Member State nationality, but that the EU grants these rights not only to Member State citizens, but also to third country nationals; and, therefore, EU 'citizenship' means something different from Member State nationality.

Joseph Weiler has argued that a nationality based concept of citizenship contradicts the supranational essence of the EU: the *telos* of European integration as an ever closer union of 'peoples', not the creating of one 'people' (*demos*). This entails a de-coupling of nationality and citizenship.[19] He hints at an EU specificity rooted in mutual social responsibility embodied in the welfare state and human rights. There is a complex commitment to diversity, coupled with acceptance that a larger (European) *demos* has the right to make decisions binding all, but conditional on a commitment to maintaining diversity. In a phrase, substantive values of multicultural diversity, a welfare state and human rights are coupled with decisional procedures in a European political framework.

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17. Free movement (Article 18), the right to vote and stand as a candidate in municipal elections and for the European Parliament (Article 19), to diplomatic and consular protection (Article 20) and to petition and protection by the Ombudsman of the European Parliament (Article 21).

18. N. Reich, 'Union Citizenship: Metaphor or Source of Rights?' (2001) 7 *European Law Journal* 4–23.

19. J.H.H. Weiler, 'To Be A European Citizen: Eros and Civilization', in *The Constitution of Europe* (CUP, 1999), Chapter 10, pp. 324–57.

The concept of 'European social citizenship' was the basis of a project organised by a group of academics from a number of Member States who in 1996, and again in 2000, put forward a Manifesto which aimed to construct EU citizenship on the basis of the concept of 'social citizenship'.[20] The Manifesto of 1996 elaborated a concept of European 'social' citizenship as the defining *telos* of the European project, and the meaning of EU citizenship.

A central aspect of EU social citizenship is about that very large part of almost everybody's life: working. The inclusion in the EU Charter of social and economic rights related to working life confirmed that these are to be considered fundamental to the EU social model, what it means to be an EU citizen. A, if not the defining feature of the European social model is engagement of organisations of workers and employers.[21] The new framework directive is an integral element of the institutional architecture of the European social model and is to be interpreted in this constitutional context.

C. The institutional framework of European social citizenship

Organisations of employers and trade unions play a major role in most Member States.[22] Their institutional forms and interactions at various levels reflect the European social model of working life, a central component of social citizenship. The day to day working life of most people in the office, shop or factory is subject to a myriad of decisions concerning, for example, working practices (performance), conduct at

20. B. Bercusson, S. Deakin, P. Koistinen, Y. Kravaritou, U. Mückenberger, A. Supiot and B. Veneziani, *A Manifesto for Social Europe* (Brussels: European Trade Union Institute, 1996); U. Mückenberger (ed.), *Manifesto Social Europe* (Brussels: ETUI, 2001). See also B. Bercusson et al., 'A Manifesto for Social Europe' (1997) 3 *European Law Journal* 189–205. Comments by A. Lo Faro, 'The Social Manifesto: Demystifying the Spectre Haunting Europe', and A. Larsson, 'A Comment on the "Manifesto for Social Europe"' (1997) 3 *European Law Journal* 300–3, 304–7.

21. B. Bercusson, 'Fundamental Social and Economic Rights in the European Community', in A. Cassese et al. (eds), *Human Rights in the European Community: Methods of Protection* (Baden-Baden: Nomos Verlag, 1991), pp. 195–294. 'EU Citizenship and Fundamental Social Rights: Community Law—European Law—National Law', in P. Rodière (ed.), *European Union Citizenship in the Context of Labour and Social Law* (Academy of European Law, Trier, Bundesanzeiger, Köln, 1997), pp. 9–18.

22. For a useful survey, see the European Foundation for the Improvement of Living and Working Conditions, Dublin; European Industrial Relations Observatory (EIRO) online; comparative overview of 'Industrial relations in the EU, Japan and USA, 2000'.

work (disciplinary matters), health and safety, and many others. Rather than these decisions being taken unilaterally by management, there has developed in the Member States of the EU a mandatory system of participation by workers in such decisions through representative structures of 'works councils', 'enterprise committees', trade union bodies and similar forms. These exist in almost all Member States (Austria, Belgium, Denmark, Finland. France, Germany, Greece. Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden).[23]

The representative structures established by legislation or by generally applicable collective agreements in these countries provide for bodies to receive information and be engaged in consultation, or even co-determination, on a range of matters relating to the company's economic position having implications for the workforce, as well as on decisions affecting the day to day working life of employees. Only in Ireland and the UK is such a general and permanent system lacking. EC law has now taken a decisive step towards establishing the practice of information and consultation of employee representatives as part of the European social model.

3. The Directive

The decision by the French car manufacturer Renault in February 1997 to close its factory at Vilvoorde in Belgium, announced without warning to the 3,000 workers employed, triggered a political storm which revived long-standing demands for EU legislation. Despite the strong encouragement of the European Commission, the European organisation of employers (UNICE) twice explicitly refused to enter negotiations (social dialogue) with the European Trade Union Confederation (ETUC) with a view to reaching a framework agreement. Consequently, on 11 November 1998, the European Commission published a Proposal for a Council Directive establishing a general framework for informing and consulting employees in the European Community.[24] The initial draft proposals signalled the fundamental change in EU social policy: the

23. See 'Information and Consultation of Workers Across Europe', Parts 1–3 in *European Industrial Relations Review* (November 2001) 334 at 13–21; (December 2001) 335 at 13–18, (January 2002) 336 at 30–36.

24. Proposal for a Council Directive establishing a general framework for informing and consulting employees in the European Community, COM/98/612, 11.11.98 (hereinafter, 'the initial draft proposals').

objective was not harmonisation of national law, but 'to make the essential changes to the existing legal framework ... appropriate for the new European context'.[25]

Given the space available, this article can examine only some aspects of the directive: definition of its object and principles (Article 1); what the directive requires, substantively and procedurally, by way of information and consultation of employees' representatives (Articles 2 and 4), including the issue of the structure of employee representation; the requirement that Member States determine the practical arrangements for exercising the right to information and consultation, and, in particular, the position when Member States entrust to management and labour the task of defining practical arrangements (Article 5). In considering its implications for the UK, the role of the Blair government in weakening the directive, and its consequences, are described. The conclusion considers whether there could emerge a form of 'British industrial relations exceptionalism' in the European Union.[26]

A. Article 1: Object and principles

One significant feature of Article 1 is that its principles constrain all practical arrangements for information and consultation, whether determined by Member States (Article 4(1)) or agreed between management and labour (Article 5). Some of the consequences may be highlighted.

(i) A Community minimum standard

Article 1(1) provides that the Directive sets out 'minimum' requirements. In interpreting this phrase in the context of the Working Time Directive, the European Court of Justice emphasised that it did not imply the lowest common denominator among the standards prevailing in Member States, but rather specified a Community minimum standard to be complied with by all Member States.[27]

25. Ibid., Preamble, Recitals 15–16. See now the Preamble to the final directive, particularly Recital 17: '... the object is to establish a framework for employee information and consultation appropriate for the new European context described above [in Recitals 6–16]...'.

26. Cf. The French cultural exception.

27. *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, Case C-84/94 [1996] ECR 1-5755.

(ii) A parallel right in the EU Charter

Article 1(1) refers to 'the right to information and consultation of employees'. If interpreted in light of the same right declared in Article 27 of the EU Charter of Fundamental Rights,[28] it could impact on national legislation transposing the directive. In the second case before the European Court in which the EU Charter was mentioned, it was used by the Advocate General to justify striking down a provision in UK legislation limiting the scope of a right to paid annual leave in the Working Time Directive, deemed to be a fundamental right under the EU Charter.[29]

(iii) The principle of 'effectiveness' ('*effet utile*')

Article 1(2) mandates that the 'practical arrangements for information and consultation', must be such 'as to ensure their effectiveness'. There is no distinction between practical arrangements made 'in accordance with national law' by Member States by way of implementation under Article 4, or those made 'in accordance with ... industrial relations practices' by management and labour by way of derogation under Article 5. All practical arrangements made are subject to the EC criterion of 'effectiveness', one with particular resonance in EC law.

(iv) The obligation to 'work in a spirit of co-operation': a peace obligation/status quo clause?

Article 1(3) provides:[30]

> When defining or implementing practical arrangements for information and consultation, the employer and the employees' representatives shall work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests both of the undertaking or establishment and of the employees.

By virtue of covering *both* 'defining *or* implementing practical arrangements for information and consultation', the obligation to 'work in a spirit of cooperation' applies not only in the definition of practical arrangements, but during their application. Similarly, where the

28. 'Workers' right to information and consultation within the undertaking. Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.'

29. *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v Secretary of State for Trade and Industry*, Case C-173/99, [2001] ECR 1-4881.

30. Article 1(3) may be compared with similar provisions in the EWC Directive: Articles 6(1) and 9.

practical arrangements are determined by the Member States under Article 4 '[i]n accordance with the principles set out in Article 1', this obligation applies to both employer and employees' representatives when implementing those practical arrangements. As such, the principle is of general application to any and all practical arrangements for information and consultation.[31]

The obligation applies to both 'the employer and the employees' representatives', and its potential application in the UK may be illustrated by looking to its possible enforcement. Breach by employees' representatives of the obligation to 'work in a spirit of co-operation' could damage an employer. Two examples will suffice: (i) if there are financial consequences as the process of information and consultation is delayed, or the results are unsatisfactory as a result of the alleged failure to cooperate: could this lead to a claim for compensation; (ii) if failure led to a strike, either official (authorised by the representatives) or unofficial, what could be the appropriate, adequate, effective, proportionate and dissuasive measures and sanctions required by Article 8? A court might hold that industrial action violated the spirit of cooperation required during the information and consultation process. The obligation could develop into something parallel to a 'peace obligation' (a no-strike clause) in a collective agreement.[32]

On the other hand, an obligation to 'work in a spirit of cooperation' with employees' representatives could impact on management decision-making processes. By way of illustration, Article 7(3) of the Commission's initial draft proposals required Member States to provide for a special sanction on employers for serious breaches of the obligations to inform and consult with respect to certain decisions. The sanction was that a decision by the employer in certain circumstances:[33]

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31. Its specific significance in relation to the negotiation by 'management and labour' *defining* these practical arrangements (Article 5) will be explored below. Here we are concerned with the more general application of the principle to the *implementation* of practical arrangements, whether negotiated by management and labour or determined by Member States.

32. One possible indication that this was not intended might have been implicit in Article 7(3) of the Commission's initial draft proposals, which imposed a special sanction on *employers* for serious breaches of the obligations to inform and consult. Arguably, therefore, this particular sanction could *not* be applied to employees' representatives who violate this obligation. However, Article 7(3) was subsequently deleted from the final draft of the directive.

33. In particular, this provision reinforced the sanctions available for breaches of the Collective Dismissals and Acquired Rights Directives. It would have required the amendment of the national legislation implementing these directives.

> shall have no legal effect on the employment contracts or employment relationships of the employees affected. The non-production of legal effects will continue until such time as the employer has fulfilled his obligations ...

This appears to be similar to a '*status quo*' clause in a collective agreement, which precludes unilateral action by the employer to change working conditions. A court might hold that employer unilateral action violates the obligation to 'work in a spirit of co-operation' during the information and consultation process. A *status quo* clause would arguably be an 'adequate' sanction which is 'effective, proportionate and dissuasive' (Article 8(2)).

Another example: the spirit of cooperation means the employer and the employees' representatives 'taking into account the interests both of the undertaking or establishment and of the employees' during the entire process of information and consultation. This may come as a shock to systems less acculturated to cooperative processes of decision-making at the workplace.

B. Information

'Information' is defined in spare terms in Article 2(f) by reference to process ('transmission'), nature ('data') and purpose ('to acquaint ... and to examine'). However, later provisions supplement both the substantive content of the information to be disclosed and the process by which it is to be disclosed.

(i) Nature of the information; data[34]

The peculiarity of the formulation in terms of 'data' raises questions as to the quality of the information to be provided. Among other problems, will (raw) data in the form of original documentation be transmitted? May the data be 'worked' by the employer for the purposes of improved comprehension (or the contrary)? Or is the employer obliged to

34. In the English language definition in Article 2(f): 'transmission ... of data in order to enable [them] to acquaint themselves with the subject matter and to examine *it*', whether 'it' refers to 'the subject matter' or 'data' depends on whether 'data' is/are regarded as singular or plural. The French language version, referring to 'données' and then 'sujet traité et de l'examiner' confirms that the reference is to the subject matter.

transform the raw data into a form which renders it comprehensible and useful? Information can be denied by the provision of too much data as well as too little, by selective data, by data provided out of context ... Much depends on the employer's 'spirit of cooperation' and, even more, on the practical arrangements for information prescribed in Article 4.

(ii) Scope of the information: a closed list?

The Commission's initial draft proposals specified 'all relevant facts on the subjects set down in Article 4(1)', a definition in very general terms. However, like the ARD, but unlike the CRD or the EWC Directive, the initial draft Article 4(1) specified a closed list of items of information.[35] Article 4(2) of the final directive also appears to provide only a closed list. Although drafted so as to allow for generously wide interpretation,[36] it states 'Information and consultation shall cover' what follows, but not more.[37]

(iii) Scope of information vs. scope of consultation

Article 4(2) appears to make an unexpected division between matters on which information is to be disclosed (subparagraph (a)) and those on which *both* information and consultation are to take place (subparagraphs (b) and (c)). This seems to contradict the opening line of Article 4(2), which states that 'Information and consultation shall cover'.[38]

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35. In contrast, the CRD refers to 'all relevant information and in any event ... [a list of items to be provided in writing]'; the EWC Directive (Annex, para 2) states that the EWC's right to be informed and consulted 'shall relate in particular to ... [a list of matters]'.

36. Compare the list in the Annex to the EWC Directive (the subsidiary requirements), paras 2 and 3.

37. There may be a loophole in Article 4(3), which states that 'Information shall be given ... with such content as ... appropriate ... for consultation', without referring back to the closed list in Article 4(2).

38. The question is whether the matters specified in subparagraph (a) also include consultation by virtue of the rubric. In any event, it will be very difficult to distinguish matters in subparagraph (a) which do not also impact on 'employment' issues listed in subparagraph (b), or are not also 'likely to lead to substantial changes' envisaged in subparagraph (c). Nonetheless, these differences could have implications if the different procedures set out for information and consultation in Article 4(3) and 4(4), as well as the different definitions in Article 2(f) and (g), are deemed to cover different matters. Greater certainty could be achieved by clarity in implementing legislation, avoiding future litigation over whether there should have been 'consultation' in addition to 'information' relating to issues in subparagraph (a).

(iv) Procedure: effectiveness

Article 2(1)(d) of the Commission's initial draft proposals defined 'information' for the first time in EC law, going beyond the usual requirement merely to provide information 'in good time'.[39] Much of this was ousted in the final directive's definition (Article 2(f)); however, some of the substance was transferred to Article 4(3), which prescribes the practical arrangements for information which are to be determined by the Member States:

> Information shall be given at such time, in such fashion and with such content as are appropriate to enable, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation.

Moreover, Article 4(1) stipulates that these practical arrangements must accord with the principles set out in Article 1, which includes the general injunction that the practical arrangements 'be defined and implemented in such a way as to ensure their effectiveness'.

(v) Timing

Article 4(l)(a) and 4(l)(b) of the Commission's initial draft proposals imposed an obligation on the employer to inform and consult on 'reasonably foreseeable developments'. This appears to differ from the European Court of Justice, which had earlier rejected an argument that an employer was liable for not informing and consulting employees' representatives when he ought reasonably to have foreseen collective dismissals.[40] In the final directive, however, the reference to 'reasonably foreseeable developments' was deleted. Article 4(2)(a) and (b) refer instead to 'probable development', though Article 4(2)(c) refers to 'decisions *likely* to lead to changes'.[41]

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39. It specified 'that the timing, means of communication and content of the information are such as to ensure its effectiveness, particularly in enabling the employees' representatives to examine the information thoroughly and, where appropriate, prepare consultations'.

40. *Dansk Metalarbejderforbund and Specialarbejderforbundet i Danmark v H. Nielsen & Son, Maskinfabrik A/S*, Case 284/83 [1985] ECR 553, para 15.

41. The French language version's '*susceptibles*' is particularly conducive to a foreseeability requirement. The use of the same word in Article 4(3) is translated in the English language version as 'to enable'.

(vi) 'Fashion'

The odd phrase 'in such fashion' (French: '*d'un façon*') refers to how the information is to be presented, its quantity and quality. To achieve the purpose of the exercise, it must not smother employees' representatives in paper, and it must serve to enable them to study and prepare.[42]

(vii) Purpose

The essential criterion for assessment of each aspect of the practical arrangements for information is whether they achieve the purpose stipulated: 'to enable, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation'.[43] There is, at least, a double task at the 'information' stage. First, to 'conduct an adequate study'; hence, the need for proper timing, 'fashion' and content of the information.[44] Then 'prepare for consultation', which is prior to the actual consultation itself.[45] All this contrasts with, if not contradicts, the narrow definition of 'information' in Article 2(f), where information is merely transmitted so as to enable the employees' representatives 'to acquaint themselves with the subject matter and to examine it'.[46]

(viii) Confidentiality of information

Article 6(1) is mandatory on the subject of confidentiality,[47] but specifies two conditions for confidentiality of information: (i) it must be

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42. See above, the discussion of the reference to 'data' in the definition of 'information' in Article 2(f); and, below, of the description of 'consultation' in Article 4(4)(a).

43. One implication is that study and preparation for consultation are particular, but not the exclusive purposes of information being disclosed. These other purposes may not be related to consultation, as implied by Article 4(2)(a) requiring information to cover matters without reference to consultation ('recent and probable development of the undertaking's or the establishment's activities and economic situation'). Other purposes might include, in the aftermath of the Maxwell scandal and, more recently, the Enron affair, for example, decisions regarding investment of employee pension funds in the company's shares. A different implication might be that information is to be disclosed not only to employees' representatives, but to employees directly.

44. The phrase implies that conducting a study is preparatory to consultation.

45. The final words of Article 4(3) are open to an interpretation allowing that timing, form and content of the information may not *necessarily* have to accommodate preparation for consultation. On the other hand, the timing may have to allow for other purposes besides, *in particular*, study and preparation, which are not the exclusive purposes (see below). Normally, however, 'at such time, in such fashion and with such content' will be interpreted so as, at least, to enable adequate study and preparation for consultation.

46. This may be a problem of the translation of 'acquaint', which carries an English cultural usage both of the unbearable weight of knowing, and of the expectation that the recipient of information should acquire the requisite knowledge.

47. 'Member States *shall* provide that ...'.

expressly provided in confidence; and (ii) the confidentiality requirement must be justified by the 'legitimate interest of the undertaking or establishment'. Article 6(2) similarly requires Member States to stipulate what may be excluded from disclosure. This may seem slightly positive as implying that, unless there is such an exclusion, employers cannot refuse to supply information on grounds that it is harmful or prejudicial – though they can designate it as confidential. However, it is very negative in allowing Member States to exclude information and consultation in such cases, even where confidentiality could be guaranteed. It will be necessary to critically assess the 'objective criteria' which allegedly exempt an employer in these circumstances.

However Member States define the 'legitimate interest of the undertaking' which justifies confidentiality under Article 6(1), it is not the same as Article 6(2)'s: 'information ... that, according to objective criteria ... would seriously harm the functioning of the undertaking or establishment or would be prejudicial to it', which may be wholly excluded from disclosure. It is not clear why, for some information to be banned, it must 'seriously' harm functioning, but for other information it suffices to be merely 'prejudicial' in order not to be disclosed. Article 6(3) makes mandatory provision for review.

In sum, the hierarchy of secrecy is as follows: information is to be disclosed (Article 4(2)). But (i) some of this information may be provided in confidence where this is in the legitimate interest of the undertaking or establishment, though some of this confidential information may be passed on to others, but, again, in confidence (Article 6(1)); however, (ii) other information ('in specific cases and within ... conditions and limits') may not be disclosed at all, if it is (a) seriously harmful, or (b) prejudicial to the undertaking or establishment (Article 6(2)). Finally, review procedures may scrutinise cases where information has been provided in confidence or not disclosed at all (Article 6(3)).

C. Consultation

The definition in Article 2(g) adopts the language of the EWC Directive: 'establishment of dialogue' (Article 2(l)(f)). However, whereas the EWC Directive refers to dialogue with 'central management or any more

appropriate level of management', Article 2(g) refers to a dialogue with 'the employer'.

(i) Consultation 'with a view to reaching an agreement', or not...

Although the CRD and ARD did not define 'consultation', both directives specify the obligation to 'consult ... with a view to reaching an agreement'.[48] Similarly, this phrase does not appear in the definition of 'consultation' in Article 2(g) of the final directive. Rather, it is found in Article 4, which requires Member States to 'determine the practical arrangements for exercising the right to information and consultation at the appropriate level in accordance with this Article', and specifically in Article 4(4)(e) which prescribes that such practical arrangements include that 'Consultation shall take place ... with a view to reaching an agreement on decisions within the scope of the employer's powers referred to in paragraph 2(c)'.

At first glance, it might appear that the reference to paragraph 2(c) in Article 4(4)(e) limits the scope of the consultation required 'with a view to reaching an agreement' to 'decisions likely to lead to substantial changes in work organisation or in contractual relations,[49] including those covered by the Community provisions referred to in Article 9(1) [ARD and CRD]'. Arguably, however, this is not the case. The scope referred to is that of the employer's *powers* to make substantial changes in work organisation or in contractual relations, including collective dismissals and transfers of the undertaking or parts of it. These powers of the employer will affect almost any matter of concern to the workforce. For example, they may, and indeed are likely to be exercised with respect to matters falling also within paragraph 2(b) of Article 4 (employment). So long as the decision in question is within the scope of the employer's powers referred to in paragraph 2(c), it must be made in consultation with a view to reaching an agreement with employees' representatives.

It is a less than happy formulation of the requirement to consult with a view to reaching agreement that it should appear to be correlated only

48. ARD, Article 7(2); CRD, Article 2(1).

49. The French and German language versions differ significantly from the English. 'Contractual relations' is rendered respectively as '*controls de travail*' and '*Arbeitsverträge*'. This appears to substantially reduce the scope of (i) information and consultation required by Article 4(2)(c), and (ii) the requirement of consultation 'with a view to reaching an agreement' in Article 4(4)(e). The scope of the employer's powers in the latter case might be interpreted as confined to his or her own employees.

with Article 4(2)(c). The inference might be drawn that consultation is required for the other matters specified in Article 4(2), but not consultation 'with a view to reaching an agreement'. There would thus appear to be two types of consultation: dialogue with a view to reaching an agreement on some matters, not so on other matters. Ambiguity persists on the precise scope and nature of each type of consultation. On the other hand, it seems clear that the scope of the obligation to consult with a view to reaching an agreement extends to all matters within the scope of management's decision-making power as regards changes in work organisation and contractual relations.

(ii) Practical arrangements for consultation

In Article 2(l)(e) of the Commission's initial proposals, there was a definition of 'consultation' as meaning 'the organisation of a dialogue and exchange of views between the employer and the employees' representatives'. It went on to provide a further detailed definition.[50] After a number of subsequent drafts, the substance of this earlier definition is now to be found in Article 4 of the final directive, which prescribes that 'Member States shall determine the practical arrangements for exercising the right to information and consultation'. Article 4(4) provides:

Consultation shall take place:

(a) while ensuring that the timing, method and content thereof are appropriate;
(b) at the relevant level of management and representation, depending on the subject under discussion;

50. The words in brackets in the following quotation in this footnote indicate significant changes from Article 2(l)(e) of the initial draft proposals; the words in brackets do not appear in Article 4(4) of the final directive: '"consultation" means the organisation of a dialogue and exchange of views between the employer and the employees' representatives on the subjects set out in Article 4(1)(b) and (c):
- ensuring that the timing, method and content are such that this step is [effective];
- at the (appropriate] level of management and representation, depending on the subject under discussion:
- on the basis of the [relevant] information to be supplied by the employer and the opinion which the employees' representatives are entitled to formulate;
- including the employees' representatives' right to meet with the employer and obtain a response, and the reasons for that response, to any opinion they may formulate;
- including, in the case of decisions within the scope of the employer's management powers, an attempt to seek [prior] agreement on the decisions referred to in Article 4(1)(c).'

One crucial change is the deletion of the reference in the final indent to seeking 'prior' agreement, a point dealt with below.

(c) on the basis of information supplied by the employer in accordance with Article 2(f) and of the opinion which the employees' representatives are entitled to formulate;
(d) in such a way as to enable employees' representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate;
(e) with a view to reaching an agreement on decisions within the scope of the employer's powers referred to in paragraph 2(c).

This is the definitive description of the process of participation by employees' representatives in management decision-making, which is established by this directive as a cornerstone of the European social model.

(iii) The 'relevant level'

Article 4(1) enjoins the Member States to determine that consultation takes place 'at the appropriate level in accordance with this Article', and Article 4(4)(b) specifies that '[c]onsultation shall take place: ... at the relevant level of management and representation'. The directive mentions some explicit criteria for determining 'relevance', but these leave much room for dispute. Firstly, Article 4(4)(b) itself specifies the relevant level as 'depending on the subject under discussion'. Secondly, consultation is 'with a view to reaching an agreement on decisions within the scope of the employer's powers referred to in paragraph 2(c)' (Article 4(4)(e)).

A decision limited by the employer's powers implies that the relevant level is that of that employer with the power to make the decision. But this begs the question of whether what is at issue is the formal decision-maker (e.g. the employer 'in contractual relations' with the employees concerned) or the 'real' decision-maker (e.g. the employer whose 'decisions are likely to lead to substantial changes in work organisation'). If consultation is intended to influence decisions, it must be with the employer who makes the decision at the relevant level, whether the contractual employer or, for example, the employer in the form of a parent company.[51]

51. This was the purpose of the 1992 amendments to the CRD which provided for the information and consultation obligations to 'apply irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer', and rejected any 'defence on the part of the employer on the

A significant indication that a liberal interpretation of 'relevant level' is intended is the reference in the directive not to the relevant 'employer', but to 'the relevant level of management'. The EWC Directive provides a clear example of a requirement being imposed on a 'central management' to inform and consult representatives of employees, many if not most of whom are not in contractual relations with the central management, but are likely to be affected by the decisions of that central management.

As to the 'relevant level of ... representation' of the workforce, although phrased in the singular, there is no reason to confine the obligations to one level of employees' representatives. The impact of the decision may be felt at many levels, and practical arrangements should require information and consultation at these relevant levels.[52] In any event, the relevant level of 'representation' does at least presuppose representation. This puts to rest any doubts about whether the directive allows for consultation of individual employees.[53] Collective representation is

ground that the necessary information has not been provided to the employer by the undertaking which took the decision leading to collective redundancies'. CRD, Article 2(4). See similarly, ARD, Article 7(4). Article 4(4)(e) explicitly refers to consultation 'on decisions within the scope of the employer's powers referred to in paragraph 2(c)', which in turn includes 'those covered by the [CRD and ARD]'. Similar provisions to those in the CRD and ARD are not to be found in this directive. However, it would be anomalous were they not considered applicable also in this directive, but rather confined to the specific situations of collective dismissals and transfers of undertakings.

52. An excellent study undertaken by researchers at Ruskin College emphasised that coordination among levels of representatives was crucial to successful engagement of employees' representatives in decision-making in the enterprise. See the study undertaken by Ruskin College, Oxford, for the Commission. Final Report presented to the Directorate General for Internal Market and Industrial Affairs and the Directorate General for Employment, Social Affairs and Education of the European Commission, *The Control of Frontiers: Workers and New Technology: Disclosure and Use of Company Information* (Ruskin College. Oxford, October 1984). See also Appendix to Final Report: Summaries of Case Studies. The conclusions of the Final Report are reproduced in (1984) 134 *European Industrial Relations Review* 22.

53. The Preamble provides evidence of the conflicts (also pervasive in the disputes over the EWC Directive) due to attempts to resuscitate information and consultation of individual employees as an alternative to collective representation. Cf. Recital 15: This Directive is without prejudice to national systems regarding the exercise of this right in practice where those entitled to exercise it are required to indicate their wishes collectively'. This appears to say that (i) it only applies to those entitled to exercise it (e.g. national thresholds/exclusions may apply); (ii) but only where they are required to indicate wishes; that is to say, it must be mandatory that they express wishes to, for example, establish a works council; so if only voluntary, the directive applies to those below national thresholds; (iii) it must be a collective expression; that is to say, it is not enough for individuals to indicate wishes, for example, against, not to adopt, information and consultation. Cf. Recital 16: 'This Directive is without prejudice to those systems which provide for the direct involvement of employees, as long as they are always free to exercise the right to be informed and consulted through their

presumed: the next two subparagraphs (c) and (d) refer to 'employees' representatives'.

(iv) 'Appropriate' and effective consultation

The quality of the consultation required is to be measured against a criterion of what is 'appropriate'. Although this was substituted for the word 'effective' in the initial draft proposals, it does not imply any loss of effectiveness.[54] What is important is that 'appropriateness' and 'effectiveness' are the overriding criteria for assessment of the practical arrangements determined by Member States. EC law provides parameters for Member State action.

(v) Content

The content of consultation appears formally to be different from that of information. Although the rubric to Article 4(2) provides that 'Information and consultation shall cover ...', the following subparagraph (a) refers only to 'information', whereas subparagraphs (b) and (c) specify 'information and consultation' on the matters listed. In practice, the overlap between the contents in the three subparagraphs will make it very difficult for an employer to refuse consultation on the ground that a particular matter falls exclusively within subparagraph (a) and is inappropriate for consultation.

(vi) Timing

As regards timing, previous directives required the consultation to be 'in good time',[55] if not 'as soon as possible'.[56] What is 'appropriate' timing may vary according to circumstances: the nature of the decision and its impact, the organisation of employees' representation, etc.[57] A crucial ambiguity remains: whether or not the process of information

representatives.' This emphasises (i) 'always', so periods barring reapplication for information and consultation are not allowed; (ii) 'free': employer or legislative constraints (e.g. insistence on ballot majorities) are questionable.

54. The practical arrangements are to be 'in accordance with the principles set out in Article 1', paragraph 2 of which prescribes that they 'shall be defined and implemented ... in such a way as to ensure their effectiveness'.

55. CRD, Article 2; ARD, Article 7.

56. EWC, Annex, paragraph 3: 'This information and consultation meeting shall take place as soon as possible ...'

57. The Ruskin College study emphasised the importance of early access to the decision-making process and a predetermined decision-making procedure (as well as coordination of the structures of employees' representation). Op. cit.

and consultation is to take place *prior* to a decision being made by the employer (see below).

(vii) Method

The 'method' of consultation, in light of Article 4(4)(d) and (e), obviously includes, for example, meetings, feedback, and advice from experts.[58] The reference in Article 4(4)(d) to 'meet the employer' is not limited to one meeting.[59] Article 4(4)(c) provides for 'the opinion which the employees' representatives are entitled to formulate' on the basis of the information supplied by the employer,[60] and Article 4(4)(d) fleshes out the element of 'establishment of dialogue' in the definition of 'consultation' in Article 2(g) by specifying the employer's 'response, and the reasons for that response'. This 'reasoned response' is not an explanation for management's decision; this has not yet been taken. Rather, it is the employer's response to the opinion of the employees' representatives on the employer's proposals. If that opinion puts forward options, the employer needs to respond to them and justify any rejection of these options.

The method of consultation envisages a pro-active approach by employees' representatives; not only to react to the employer's proposals, but to formulate their own. Article 4(3) qualifies their activity in terms of conducting an adequate study in preparation for consultation. The ensuing 'opinion' is not the end of the process, but only its beginning; it

58. Article 6(1) refers to 'experts who assist them'. A similar provision with respect to the Special Negotiating Body in Article 5(4) of the EWC Directive is accompanied by the qualification that '[Member States] may in particular limit the funding to cover one expert only'. See also the subsidiary requirements in the EWC Directive, Annex, para 7. There is no such limiting provision here. This highlights the question of payment of both the employees' representatives carrying out their functions, and of these experts. Both are arguably covered by Article 7 of the directive, which requires Member States to 'ensure ... guarantees to enable [employees' representatives] to perform properly the duties which have been assigned to them'.

59. Again, unlike the subsidiary requirements in the EWC Directive, Annex, para 2, which specify 'once a year', but also envisage further meetings (para 3) 'Where there are exceptional circumstances [which] shall take place as soon as possible ...'.

60. This provision for an 'opinion' is similar to that provided for when the select committee or the European Works Council established according to the Annex to the EWC Directive holds a special meeting in the light of 'exceptional circumstances affecting the employees' interests to a considerable extent'. EWC Directive, Annex, para 3; 'This information and consultation meeting shall take place as soon as possible on the basis of a report drawn up ... , on which an opinion may be delivered at the end of the meeting or within a reasonable time.' Perhaps significantly, unlike the EWC Directive, this provision is not here followed immediately by the injunction: 'This meeting shall not affect the prerogatives of the central management.' Another parallel exists in the social dialogue procedure envisioned by the EC Treaty: an opinion may be forwarded to the Commission by management and labour when they are consulted on the content of proposals in the social policy field (Article 138(3)).

requires a reasoned response by the employer, which is only another element in the process of consultation 'with a view to reaching an agreement'.

(viii) Summary

To summarise: the practical arrangements which Member States are required to determine for information and consultation in accordance with Articles 2 and 4 incorporate the following process comprising nine sequential stages:

1. transmission of information/data (Article 2(f))
2. acquaintance with and examination of data (Article 2(f))
3. conduct of an adequate study (Article 4(3))
4. preparation for consultation (Article 4(3))
5. formulation of an opinion (Article 4(4)(c))
6. meeting (Article 4(4)(d))
7. employer's reasoned response to opinion (Article 4(4)(d))
8. 'exchange of views and establishment of dialogue, (Article 2(g)), 'discussion' (Article 4(4)(b)) 'with a view to reaching an agreement on decisions' (Article 4(4) (e))
9. 'the employer and the employees' representatives shall work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests both of the undertaking or establishment and of the employees' (Article 1(3)).[61]

The practical arrangements to be determined by the UK government for exercising the right to information and consultation must reflect this process.

(ix) Labour law and industrial relations culture

All this goes beyond exhortation and becomes a legally structured process. But, of course, this cannot by itself create the necessary industrial relations culture in which works councils in other Member States have developed active participation by employees' representatives in management decision-making. An example is the works council representing 2,000 employees at Berlin's biggest department store, the

61. The implementation of the practical arrangements for information and consultation must respect this principle, set out in Article 1(3). For its further implications, see below.

Kaufhaus des Westens (KaDeWe). Apart from the works council's social role as regards employees' welfare:[62]

> ... the council's influence extends into operational areas. The workers' council has to be consulted on new hirings and dismissals and checks carefully that employees are put into the appropriate pay groups. It worries about training and qualifications – and whether the air conditioning is working, the canteen food tastes satisfactory and sales assistants have soft rather than hard floors on which to stand by day. By law, KaDeWe's management is obliged to free four staff to work full-time for the council and has to provide resources for their work ... The entire operation has a rhythm. On Tuesdays and Fridays the personnel sub-committee meets at 9.30 am to approve or reject appointments. Once a week the workers' council meets the personnel department to discuss the latest issue confronting the workforce (both sides describe the relationship as 'businesslike'). And four times a year the shop is closed on a Tuesday morning and the entire staff gathers for a workers' assembly ... [KaDeWe's] personnel director has no objections in principle to the workers' council system ... [although t]he system can slow decision-making. 'It is annoying when, having had an idea, you have to wait for the workers' council to be consulted before you can implement it'.

The 64,000 euro question is: can this industrial relations culture be transplanted to the UK by way of an EC directive?

D. Implementation by Member States vs. derogation by social partners[63]

Apart from the usual prostrations before the subsidiarity principle,[64] the evolution of the directive was subject to two familiar pressures.

62. R. Atkins, 'Inspecting the Workers' Council', *Financial Times*, 12.1.2001, p. 16. And compare the 'culture shock' experienced by the BMW Longbridge shop stewards when they encountered the activities and resources of the BMW works council in Germany, described in M. Whittall, 'The BMW European Works Council: A Cause for European Industrial Relations Optimism?' (2000) 6 *European Journal of Industrial Relations* 61–83.

63. The terminology of 'social partners' derives from the French and German language versions of the directive, which translate the English 'management and labour' in Article 5 as, respectively, '*partenaires sociaux*' and '*Sozialpartnern*'.

64. See the Preamble, Recital 17.

Firstly, the desire of Member States, particularly where there were already established systems of worker representation and processes of information and consultation, for some discretion in their implementation of the directive through legislation. Secondly, the desire of the social partners for flexibility in adapting the directive by derogation through collective agreements. The effect of these familiar pressures was distorted, however, as a consequence of the absence in two Member States, the United Kingdom and Ireland, to use the terminology adopted in Article 10, of a 'general, permanent and statutory system of information and consultation of employees, nor a general, permanent and statutory system of employee representation at the workplace'.

The UK government was determined to exploit these familiar pressures to maximise Member State discretion and, in particular, to instrumentalise social partner flexibility to alleviate domestic political pressure from employers unfamiliar with and anxious about the imposition of these new systems. The majority of Member States, with such systems already in place, and, in particular, the European Parliament, were highly suspicious, and rightly so, that the UK would seek to exploit any such Member State discretion and social partner flexibility to minimise, if not evade the obligations prescribed by the directive.[65] The resulting directive reflects these tensions in provisions that are more or less ambivalent.[66] Each of these processes, of implementation by Member States (Article 4) and derogation by social partners (Article 5), requires scrutiny, in particular, as regards the substantive and procedural limitations on them. Not least of these are the principles in Article 1 of the directive.

(i) Implementation: Member States determine practical arrangements

Article 4(1) is phrased in mandatory language: 'the Member States *shall* determine the practical arrangements for exercising the right to information and consultation'. These practical arrangements concern only the *exercise* of the right; the right itself is not subject to derogation

65. See the Preamble, Recital 16.

66. For an attempt by the European Parliament to prescribe trade unions as the employees' representatives, and the declaration attached to the decision of the Council adopting the directive, recalling the European Court's judgment in *Commission of the European Communities v United Kingdom*, Cases C-382/92 and C-383/92, [1994] ECR 2435, 2479, which illustrates the continuing scepticism about the UK's commitment to the directive, see below.

by the Member State. Moreover, this determination is subject to at least two substantive provisions.

Firstly, it must be 'in accordance with the principles set out in Article 1'. In a clear reference to Article 4, Article 1(2) refers to practical arrangements 'defined and implemented in accordance with national law ... in individual Member States ...'. However, although the scope of this discretion appears to go beyond implementation so as to allow Member States to *define* practical arrangements for information and consultation, such discretion to *define* arrangements is constrained by the mandatory provisions in the remaining three paragraphs of Article 4 ('Information and consultation shall cover ... Information shall be given ... Consultation shall take place ...'). But the boundary between 'implementation' and 'definition' may tempt Member States to reformulate the rights provided.[67]

Secondly, the practical arrangements mandated by Article 4(1) are 'without prejudice to any provisions and/or practices in force more favourable to employees'. This should disqualify attempts to replace existing arrangements whereby, for example, trade unions are informed and consulted. Problems likely to arise include whether a particular practice is 'in force', or 'at the appropriate level', or (e.g. in the case of a non-trade union consultative body) is 'more favourable to employees'.

(ii) A key issue: structures of employee representation[68]

Promotion of collective workers' representation is a fundamental element in EC labour law. In general terms, EC law leaves it to the national laws of the EU Member States to define who the representatives of workers are to be.[69] Yet such a conclusion does not

67. Hence the particular importance of the wording of the substantive requirement in Article 1(3) that: 'When *defining* ... practical arrangements for information and consultation, the employer and the employees' representatives shall work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests both of the undertaking or establishment and of the employees.'

68. The following four paragraphs are derived from B. Bercusson, 'A European Agenda?', in K. Ewing (ed.), *Employment Rights at Work: Reviewing the Employment Relations Act 1999* (IER, 2001) 159 at 172–85.

69. For example, the CRD provides in Article l(b) that 'workers' representatives means the workers' representatives provided for by the laws and practices of the Member States'. Similarly, the ARD provides in Article 2(l)(d) that '"representatives of employees" and related expressions shall mean the representatives of the employees provided for by the laws or practices of the Member States'.

stand easily with the decision of the European Court of Justice in *Commission of the European Communities v United Kingdom*.[70] There the Court required the United Kingdom to create a system of workers' representation where none existed. Designation of workers' representatives was made mandatory by the Court due to the consequences for the rights of workers under the CRD and ARD:[71]

> which require Member States to take all measures necessary to ensure that workers are informed, consulted and in a position to intervene through their representatives in the event of collective redundancies [or the transfer of an undertaking].

In order to effectively perform the tasks of information and consultation specified in the directives, employees' representatives must possess the experience, independence and resources required to protect the interests of the workers they represent. Member State laws or practices must ensure that the national law on employees' representation achieves the objective of the EC directives.

Transposing EC directives into United Kingdom legislation has led to a proliferation of employee representation structures for different purposes. From a tradition of single channel employee representation, British labour law, moving in the opposite direction from the American 'trade union representational monopoly', has skipped over continental dual channel systems into multichannel employee representation systems. Different representation systems are linked to different functions. The new directive will require the establishment of new organs of worker representation. It raises the question of the criteria for determining who are the workers' representatives who can establish and participate in these bodies,[72] and whether British industrial relations

70. Cases C-382/92 and C-383/92 [1994] ECR 2435, 2479.

71. Case C-383/92, para 23; Case C-382/92, para 26.

72. For example, the European Works Councils Directive was implemented in the United Kingdom through the Transnational Information and Consultation of Employees Regulations 1999, which came into force on 15 January 2000. I have argued that these Regulations raise a number of difficulties of reconciling the concept of workers' representation in the Directive with that in the Regulations. See B. Bercusson, 'A European Agenda?', in K. Ewing (ed.), *Employment Rights at Work: Reviewing the Employment Relations Act 1999* (IER, 2001) 159 at 172–85.

is best served by further multiplying the channels of employee representation with different functions.[73]

The tendency of recent UK governments has been to promote a model of collective workers' representation based on the formal legitimacy of ballots. This contrasts with a European model based on established workers' representatives with the competence, experience and independence to act effectively. There is potential for future collision of the UK model with a European agenda of fundamental rights on worker representation in the EU Charter and rights of information and consultation in the new directive.

(iii) Derogation: negotiating different voluntary arrangements

Article 5 of the directive authorises Member States to entrust management and labour (the social partners) to make voluntary agreements, including different arrangements, 'while respecting the principles set out in Article 1'. Apart from the requirement of 'effectiveness', Article 1 imposes procedural, as well as other substantive constraints specific to those negotiated agreements.

(iv) Level of agreement

The level at which there may be negotiated 'provisions which are different from those referred to in Article 4' is left to the choice of Member States. In most Member States, the relevant provisions are established in national legislation or in national intersectoral agreements.[74] Article 5 appears to allow for the maximum flexibility in terms of the level of negotiation of different provisions, subject to the level being 'appropriate'.

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73. Sarah Veale, Senior Employment Rights Officer at the TUC, has noted that decisions of the European Court could be adapted so that 'where a union is recognised for collective bargaining then it will have exclusive rights to be informed and consulted; if it is recognised for general consultation purposes then it too would have exclusive rights to be informed and consulted ... ; if neither of these agreements applied then a union could seek an agreement to give effect to the Directive ... ; if no agreement could be reached then information and consultation would take place in line with a statutory scheme under which workers would elect representatives'. Presentation to a conference on 'Information and Consultation: New Rights at Work', organised by the Labour Research Department, 13 April 2002.

74. Hence, perhaps, the reference to 'management and labour' (the social partners), in contrast to 'employer and employees' representatives'. The German language version of Article 5, however, uses the term '*Vereinbarungen*', which refers to works councils' agreements. The French '*accords*' has a similar connotation.

It may be that a UK government would look to agreements at undertaking or even establishment level, allowed by Article 5. This means that the 'management and labour' authors of the agreement will be the employer and the employees' representatives. If so, there is a specific condition to be applied as a consequence of Article 5's reference to 'respecting the principles set out in Article 1'. The 'social partners' entrusted with 'defining freely and at any time through negotiated agreement the practical arrangements' must 'work in a spirit of cooperation'.[75]

In stipulating this condition, the Member States presumably aimed at ensuring that the balance of forces, in particular at undertaking or establishment level, does not unduly influence the negotiations and any resulting agreement, which may include provisions different from those referred to in Article 4.[76]

(v) Consequences of failure to 'work in a spirit of cooperation'

Failure to comply with the obligation to work in a spirit of cooperation in the particular case of negotiations undertaken in the context of Article 5 could lead to the resulting agreement being deemed invalid as not satisfying the requirement of Article 5, as not 'respecting the principles set out in Article 1', in which case the fall-back provisions of Article 4 will apply.

Alternatively, on a complaint, an adjudicator could establish provisions for the practical arrangements for information and consultation at undertaking or establishment level. There is a parallel with the 'procedure agreement' which may be imposed by the Central Arbitration Committee under the Employment Relations Act 1999, with the obvious differences between an order specifying, in the one case, 'the method by

75. Article 1(3): 'When defining ... practical arrangements for information and consultation, the employer and the employees' representatives shall work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests both of the undertaking or establishment and of the employees.' See above for more detailed analysis of this provision.

76. This would be a particular concern in the absence, again invoking the phrase in Article 10, of a 'general, permanent and statutory system of information and consultation of employees, nor a general, permanent and statutory system of employee representation at the workplace'. Hence, *ad hoc* arrangements for employee representation adopted in order to allow for 'workforce agreements' under the Working Time Regulations 1998, or for the purposes of information and consultation under provisions in the Regulations implementing the CRD and ARD (The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999) may not suffice to satisfy the requirements of the new framework Directive.

which [the parties] are to conduct collective bargaining',[77] and, in the other case, 'the practical arrangements for information and consultation'.[78] Such a remedy would be consistent with the EC law principle requiring that sanctions for breaches of domestic law be available to remedy violations of equivalent EC laws.

(vi) Member States and social partner agreements

A final point concerns the relation between practical arrangements for information and consultation determined by the Member States and, where Member States choose to allow them, those negotiated in agreements between management and labour. Article 4 refers to the Member States determining practical arrangements 'without prejudice to any provisions and/or practices in force more favourable to employees'. This seems to mean that social partner agreements are to take precedence over Member State provisions where they are in force and are more favourable to employees.[79] Both, however, are subject to respect for the principles set out in Article 1 of the directive. The extent of permissible derogations from the provisions of the directive by agreements between management and labour remains one of the most sensitive issues.[80]

4. The Blair government's role: weakening the directive

Although the proposed directive could be approved by a qualified majority vote, only on 18 February 2002 did the Council of Ministers of Agriculture (including fisheries) finally adopt the directive. A fishy result in more than one sense.

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77. Employment Relations Act 1999, Schedule 1, para 31(3); Trade Union Recognition Method of Collective Bargaining Order.

78. Though there may be a question whether such a process would conflict with Article 5's injunction that the social partners be entrusted 'with defining freely'; however, this 'defining' must be done 'while respecting the principles set out in Article 1', including the duty to 'work in a spirit of cooperation'.

79. Cf. Article 4 of the Working Time Directive, which provides as regards daily rest breaks: 'the details of which, including duration and the terms on which it is granted, shall be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation'.

80. Questions have been raised regarding the adequacy of voluntary EWC agreements negotiated under Article 13 (and, in time, under Article 6) of the EWC Directive. There is likely to be similar critical assessment of agreements negotiated under Article 5 of this directive.

A. The usual suspect

Since the original proposal of the Commission in November 1998, the Blair government had persisted in its objective of weakening the directive.[81] The consequences were particularly important as regards two of the most innovative aspects of the Commission's initial draft proposals: the need for information and consultation *prior* to a decision being made; and the need for *sanctions* when management violates the requirement of information and consultation. These were potentially serious defects in the Council draft finally agreed on 11 June 2001.

B. Consultation prior to decision-making?

Article 1(1) states that the purpose of the directive is 'to establish a general framework [for] information and consultation of employees'. This statement, however, does not make it clear whether the information and consultation process is obligatory *before*, or only *after* the employer makes the decision. However, in 'decisions likely to lead to substantial changes in work organisation or in contractual relations', the Commission's initial draft proposals did make it clear that the mandatory information and consultation must include 'an attempt to seek *prior* agreement on the decisions'.[82]

81. To take but one example, the French Presidency of the Council of Ministers beginning July 2000 made the proposal one of their priorities. Due to the efforts of the UK in the Social Affairs Council of 27–28 November 2000, the proposal was again blocked. 'France in retreat on EU social affairs plans', *Financial Times*, 29.11.2000, p. 11. By then, the Blair government's trench warfare had been successful in gutting much of what was innovative in the proposal. The draft approved by COREPER which came before the Social Affairs Council on 27–28 November indicates in the footnotes to each provision those Member States which have reservations, partial or fundamental. The United Kingdom registers far more reservations than any other Member State, and, indeed, the vast majority of reservations. Transmission d'un text du groupe des Questions sociales du 13.11.2000 au Comité des Représentants permanents, no. prop. C'ion 13099/98 SOC 428-COM (1998) 612 final; Objet: Propositions de directive du Parlement européen et du Conseil établissant un cadre général relatif a l'information et la consultation des travailleurs dans la Communauté européenne. Accord politique. Council Document 13038/00, SOC 410. CODEC 843 Brussels, 14.11.2000.

82. Article 2(l)(e), 5th indent. This may have been in response to the litigation which followed the announcement of the closure of the Renault plant at Vilvoorde on 27 February 1997, where this issue emerged as a crucial point of difference. The French Court of First Instance appeared to require the procedure before the decision was made. The Appeal Tribunal said this was not necessary, but that the employer must allow for the possibility that the procedure could modify the decision. *Comité de Group Européen Renault (CGE) v Société Renault*, Nanterre Court of First Instance, Summary Jurisdiction, Injunction order delivered in Chambers, 4.4.97. *Société Renault v CGE Renault and the European Metalworkers*'

A further indication of the Commission's position was in Article 7(3)(a) of the initial draft proposals, which defined a case of 'serious' breach as meaning 'the total absence of information and/or consultation of the employees' representatives *prior* to a decision being taken'. But it was not clear whether the seriousness related to the total failure, or its timing (after the decision). Arguably, it was the former, which would mean that any lesser failure to inform or consult *prior* to the decision would qualify at least as a breach, if not a serious breach. The issue of timing was the subject of critical battles leading to amendments of the draft proposals.

Unfortunately, both the revised Commission draft of 23 May 2001[83] and the Council's approved draft of 11 June 2001[84] deleted the word 'prior', specifying only that 'consultation shall take place ... with a view to reaching an agreement on decisions'.[85] This might appear to indicate a shift towards the view that information and consultation only concerns decisions *already* taken, rather than employee representatives being engaged *prior* to management making a decision.

However, the Preambles to all three drafts justified the directive on the grounds that 'serious decisions affecting workers' were taken 'without adequate procedures having been implemented *beforehand* to inform and consult them'.[86] Similarly, all three Preambles justified Community action on the grounds that 'existing legal frameworks for employee information and consultation at Community and national level tend to adopt an excessively *a posteriori* approach to the process of change ...'. This seems to indicate an intention that information and consultation procedures should *precede* decision-making.

The negotiations in the Conciliation Committee were to determine the outcome. The outcome was less than happy. Attempts were made by the European Parliament to insert such provisions in amendments

Federation (EMF), Versailles Court of Appeal, 7.5.97. Reported in *Droit Social*, May 1997, pp. 504–8; and see the observations by A. Lyon-Caen at p. 509 and the article by M.A. Moreau at pp. 493–503.

83. Article 4(4) 5th indent.

84. Article 3(3b), 4th indent.

85. See now Article 4(4)(e).

86. The Commission draft of 1998, para 8; the revised draft of 23 May 2001, para 6 (which replaced the word 'implemented' with 'put in place'); and the Council's approved draft of 11 June 2001, para 8.

presented on second reading on 10 October 2001, stipulating, for example, that information be 'before the decision is taken' (Amendment 4) and consultation be 'during the planning stage in order to ensure the effectiveness of the procedure and make it possible to exert influence' (Amendment 5). Neither of these amendments were included in the final text.

The final directive remains ambivalent. The Preamble does contain a number of indications that the directive's requirement of information and consultation is to be interpreted to preclude 'serious decisions affecting employees from being taken and made public without adequate procedures having been implemented *beforehand* to inform and consult them' (Recital 6), and criticises existing legal frameworks as tending 'to adopt an excessively *a posteriori* approach to the process of change' (Recital 13). The Preamble provides an interpretative framework for the directive. The ambiguity caused by the absence of the word 'prior' may be interpreted to promote the objectives of the directive: that information and consultation take place before the decision is made, avoiding an *a posteriori* approach to decision-making. This is a central question: are employees' representatives to be informed and consulted prior to decisions being made, or only to react to decisions already made. The resolution of this issue in EU law could have fundamental consequences in the UK and Europe. There is every reason to hope that the European Court, in an appropriate case, would uphold an interpretation of the directive consistent with this clear indication in the Preamble.

C. Sanctions for 'serious' failure to inform and consult

All versions of the draft directive required that 'adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced ... [and] adequate penalties to be applicable in the event of infringement of this Directive by the employer ... These penalties must be effective, proportionate and dissuasive'.

Nonetheless, experience, such as that of the Renault case, had shown that Member States often failed to provide adequate remedies where employers violate their obligations to inform and consult. This led the Commission, in its initial draft of 1998, to propose special sanctions for '*serious breach*' by the employer (Article 7(3)). 'Serious breaches' are

defined as 'the total absence of information and/or consultation of the employees' representatives *prior* to a decision being taken ...'. In these cases of 'serious breach', the decision by the employer 'shall have no legal effect on the employment contracts or employment relationships of the employees affected. The non-production of legal effects will continue until such time as the employer has fulfilled his obligations ...'.

None of this survived the onslaught on the Commission's proposal led by, among others, the UK government. The Council's approved draft of 11 June 2001 proposed to delete the whole of this provision for a special sanction for serious breach. It is significant that the Commission refused at that stage to back down. Again, the European Parliament followed up with amendments proposed in a report by its Employment and Social Affairs Committee on second reading on 10 October 2001: an Amendment 12 imposing stringent sanctions and suspension of employer decisions in cases of serious breach. However, at a plenary session on 23 October 2001, while this amendment achieved a majority of those voting, it failed to reach the required absolute majority of 313 of the 625 MEPs.

As a result, the Parliament's representatives in the Conciliation Committee, supported by the Commission, agreed to a compromise whereby the Preamble of the final text of the directive includes the following Recital 28: 'Administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations based on this Directive.'

It is still open to the European Court to condemn a Member State, as it did the UK in Cases C-382/92 and C-383/92 of 8 June 1994, for failing to provide adequate penalties in cases of violation of the information and consultation requirements. But the blocking of the Commission and European Parliament's attempts to provide an adequate remedy to employees who suffer as a result of being unlawfully denied access to information and consultation on matters vital to their future is a bitter disappointment.

5. British industrial relations exceptionalism?

The final tortured text of the framework directive reflects the Blair government's unrelenting campaign of resistance. It is a minefield of ambiguities. Three of particular interest to the UK will be highlighted briefly here.

A. The Directive's requirements and different negotiated arrangements

The prospect is offered by Article 5 of management and labour negotiating 'provisions which are different' from those laid down by the directive. The EWC Directive allowed for autonomous negotiation of European works councils. But such agreements could only be negotiated by the special negotiating body, which crucially was subject to specific representation and voting requirements. In the case of this directive, the European Parliament attempted in Amendment 3 on second reading to specify that the 'social partners' eligible to negotiate different agreements on behalf of employees were 'the competent representative organisation of the trade unions, the employee representatives of the undertaking, as provided by law'. Though supported by the Commission, this proposal failed.

Again, in the event of failure to reach agreement on an EWC, that directive prescribed a set of minimum standards (the 'subsidiary requirements') as necessary to avoid ineffective and sub-standard arrangements being negotiated. None of this is provided for in the present Directive. Instead, the autonomous agreements may explicitly differ from the detailed requirements laid down in Article 4, and are subject only to the principles set out in Article 1. This leaves any 'different' provisions wide open to challenge, a result nobody wants.

B. The Directive's requirements and national law and practices

Article 1(2) surfaced first in the Commission's amended proposal of May 2001. It provided that 'Information and consultation procedures shall be established and implemented so as to ensure their effectiveness'. The Council's draft of June 2001 substituted: 'The practical arrangements for information and consultation shall be defined and implemented in

accordance with national law and industrial relations practices in individual Member States in such a way as to ensure their effectiveness.'

The directive's 'general framework setting out the minimum requirements for the right to information and consultation' cannot be altered by national law. Article 2(b)–(e) allows for national law and practice to define 'establishment', 'employer', 'employee' and 'employees' representatives'. But not 'information' and 'consultation'. These substantive elements of the general framework of the right to information and consultation may not be defined by national law and practices; only the practical arrangements to assure their effectiveness.

The problem will be that some Member States may be tempted to stray on to this forbidden ground. It will be up to litigants to bring them before the courts when national definitions of 'practical arrangements' trespass on the requirements of the 'general framework'. In such cases, the criterion for resolving disputes between the assertions of national law and practices and the claims of the EU general framework is 'effectiveness'. If the practical arrangements ensure effectiveness of the right to information and consultation, they will be upheld. They have no other claim to legitimacy. Least of all if the practical arrangements adopted by national law and practices undermine effectiveness. This is an open invitation to litigation over whether transposition legislation provides effective arrangements for information and consultation.

C. Thresholds and transposition

The directive applies to all undertakings employing at least 50 employees or establishments employing at least 20 employees.[87] It allowed Member States three years for transposition of the directive into national law.

Not content, the UK government extracted concessions both increasing the threshold of application and extending the period of transposition of the directive. Too modest to allow itself to be named, the UK government benefiting from this concession is identified by a wonderful

87. Article 3. This is calculated to cover under 3% of all companies in the EU, though about 50% of all employees in the EU.

formula in Article 10. This allows for such limitations in 'a Member State in which there is no general, permanent and statutory system of information and consultation of employees, nor a general, permanent and statutory system of employee representation at the workplace allowing employees to be represented for that purpose'. The dubious distinction of a general denial of employees' rights is likely to be claimed only by the UK and Ireland. But even their claims may be challenged, as arguably there exists a permanent statutory system of health and safety representatives, raising the question of what is meant by 'general'. Arguably, 'general' refers to all workplaces, not to all issues. The other Member States cannot escape responsibility for such a formulation, but the UK government can claim whatever credit is to be gained.

If the UK succeeds in exploiting this provision, it will have managed to increase the threshold for application of the Directive to undertakings employing 150 or establishments employing 100 employees for a period of a further two years beyond the three year normal transposition period. This threshold will decrease to 100 employees in undertakings and 50 employees in establishments for a further year before it reaches the normal threshold.[88] Many British workers may have to wait until

88. If the UK opts for 'undertakings', the definition of 'undertaking' in Article 2(a) becomes critical: 'a public or private undertaking carrying out an economic activity, whether or not operating for gain, which is located within the territory of the Member States'. Unlike 'establishment', it is not 'defined in accordance with national law and practice'. It is an EC law concept. Comparisons with the ARD come to mind. The definition in Article 2(a) appears less restrictive even than that adopted by the European Court of Justice under the ARD, reflected in the 1998 amendments to the ARD (now Article l(l)(b)): 'an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'. An undertaking for the purposes of the new directive need not be one with a specific retained identity, an organised grouping of resources; for example, it need not be organised on one site; nor need it be perhaps organised under the umbrella of a single legal entity. An undertaking could comprise a number of linked establishments, linked in a cohesive economic activity by contracts or ongoing business relationships; for example, suppliers/contractors in cases of outsourcing. This could mean that the threshold of 50 employees might be exceeded for the out-sourcing enterprise which itself employs less than 50 persons but, together with the suppliers/contractors, exceeds the threshold. It could thereby include many small suppliers/subcontractors with less than 50 employees who are in regular (permanent) business relationships with a contracting enterprise which exceeds 50 employees even without them. By opting for 'undertaking' rather than 'establishment', in order to limit the scope of application of the directive, the UK government might create greater uncertainty. In particular, the transposition date may apply earlier than expected under Article 10. If some undertakings believe they are not covered until 23 March 2007 because they employ less than 150 employees (Article 10(a)), they may find themselves exposed when linked establishments are deemed to count as part of the undertaking as

2008 for the rights guaranteed to other EU citizens three years earlier. But delay as it may, the UK will eventually be obliged to set up such a general, permanent and statutory system of employee representation for the purposes of information and consultation.

6. Conclusion

Further developments are likely in coming years; not least, the prospect that the Intergovernmental Conference scheduled for 2004 will incorporate into the EC Treaty the EU Charter of Fundamental Rights, which includes, among others, Article 27:

Workers' right to information and consultation within the undertaking. Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

A careful strategy of litigation can identify cases which may evoke an interpretation from the European Court of Justice more sympathetic, as in earlier such cases, to the objectives of the EU directive than to the domestic policies of the UK Government.

The Commission, almost all the other Member States where there is already a statutory right to employee representation in all companies above a certain workforce size, and the European Parliament actively promote the role of employees' representatives in general and trade unions in particular. Their attitude to the Blair government's resistance to the Directive to the bitter end is recognised in the highly unusual joint declaration of the European Parliament, the Council and the Commission attached to the Minutes of the Council which adopted the directive on 18 February 2002. This declaration recalled the judgments of the European Court of Justice of 8 June 1994 with regard to employee

defined in Article 2(a), and together they exceed the 150 minimum threshold. Similarly, believing themselves to fall below the threshold under Article 10(b), undertakings with less than 100 employees for the year after 23 March 2007 may find themselves caught by links with others bringing them above the 100 employee threshold.

representation.[89] Those judgments had condemned the then UK Conservative government for its failure to provide for information and consultation of employees' representatives in the cases of collective dismissals or transfers of undertakings, as required by EC directives of 1975 and 1977.

Almost eight years later, on 18 February 2002, the UK was peremptorily reminded by the EC institutions that the new Directive's obligation to inform and consult employees' representatives applied to the Blair government as well. At the end of the day, the UK cannot escape the European social model of mandatory employee representation and mandatory information and consultation of employees' representatives.[90]

89. *Commission of the European Communities v United Kingdom*, Cases C-382/92 and C-383/92 [1994] ECR 2435, 2479.

90. If the Blair government will not listen to Europe, perhaps it will take to heart the Japanese interest in the European social model. See the three page headlined dossier in *Le Monde Economie*, 28.5.2002, entitled '*Le Japon en crise s'intéresse au modèle social européen*.'

Regulation of the financial sector to promote worker representation and participation in the corporate governance of multinational enterprises

Brian Bercusson (2006) *

Introduction

1. The 'Paths to progress' project is concerned with worker representation and participation. One path to progress is through corporate governance. This paper aims to explore mechanisms whereby operations in the financial sector can engage worker representation and participation in the corporate governance of multinational enterprises (MNEs).

2. The approach draws on concepts in the law and practice of the EU's labour law governing employment and industrial relations: the *acquis communautaire social.*

MNEs and capital mobility

3. The background paper prepared for the London meeting of the project group on 9 February 2005[1] sketched the realities of the dominating economic power of multinational enterprises and the central role of capital mobility in the global economy.

4. As elaborated in that background paper, it is widely accepted that *multinational enterprises* play a central role in globalisation and global competition. Hence the importance of European Works Councils

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* 'Regulation of the financial sector to promote worker representation and participation in the corporate governance of multinational enterprises', Brian Bercusson (2006) (full text). This article was first published in B. Bercusson et al. (eds.) *Paths to progress. Mapping innovation on information, consultation and participation for employee involvement in corporate governance,* Brussels: Social Development Agency, 22-37 and is reprinted here with the kind permission of the publisher.

1. B. Bercusson, *Participation and its place in the representation jigsaw*, 22 September 2004 (22 pp.).

(EWCs), as one mechanism aiming to fill in the 'participation gap' in the regulatory and political control of MNEs.

5. A second primary focus in the literature on economic globalisation is on *global financial integration*. Transnational financial integration is a factor in economic globalisation going far beyond the specific role of MNEs. The Report of the ILO's World Commission on the Social Dimension of Globalisation stated:[2]

> *"... it is widely accepted that the key characteristics of globalisation have been the liberalisation of international trade, the expansion of FDI, and the emergence of massive cross-border financial flows. This resulted in increased competition in global markets. It is also widely acknowledged that this has come about through the combined effect of two underlying factors: policy decisions to reduce national barriers to international economic transactions and the impact of new technology, especially in the sphere of information and communications. These developments created the enabling conditions for the onset of globalisation".*

6. The role of regional integration in the process of economic globalisation is a well-known theme: 'The basic issue is the relationship between forces of globalisation and forces of regionalisation. Regionalism is one possible approach to "a new multilateralism"', and 'Europe represents the most advanced regional arrangement the world has seen'.[3]

7. In the context of the *European Union*, the law on free movement of capital developed in parallel with the international trends described above.[4] The *acquis communautaire social* has not kept pace with developments in the free movement of capital.

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2. *A fair globalisation: creating opportunities for all*, Report of the ILO World Commission on the Social Dimension of Globalisation, 2004, paragraph 132.

3. Bjorn Hettne, 'Global market versus the new regionalism', in David Held and Anthony McGrew (eds), *The global transformations reader* (2nd ed), Polity Press, Cambridge, 2000, pp. 359–369, at pp. 359, 362.

4. Leo Flynn, 'Coming of age: the free movement of capital case law', (2002) 39 *Common Market Law Review* 773–805.

Corporate structure/governance issues

8. A transformation in corporate structure and governance has accompanied globalisation. This has been analysed using different theoretical frameworks, including theories of the firm as a network of contracts or as an hierarchical organisation. These frameworks see the firm as a mechanism for risk allocation and resource distribution.

9. Marie-Laure Morin identifies three different levels of organisation of the 'firm', identified as (i) the firm as producer (the establishment), (ii) the firm as an economic and social organisation (the enterprise), and (iii) the firm as an allocator of resources (a financial group).[5]

   She concludes :[6]

   > *To sum up, labour law began by focusing on employment relationships at the establishment level in order to regulate the conditions of tangible labour and extend protection to workers' physical bodies. It then sought to protect employment and to organize collective relations between the economic boundaries of the enterprise – the economic entity then being the main locus of decision-making. Nowadays, it is painstakingly endeavouring to extend its reach to the group, as the embodiment of the dominant level, so as to ensure that workers' interests can be taken into account at that level too.*

10. The 'Paths to Progress' project is concerned with this latest task. This paper places the focus on the financial dimension of the enterprise, the

5. Marie-Laure Morin, 'Labour law and new forms of corporate organisation', (2005) 144 *International Labour Review* (No. 1) 5–30, at p. 7: 'In today's labour law, it is common practice to distinguish the establishment, the undertaking and the group of undertakings. In actual fact, these distinctions refer to the different levels of corporate organisation with which labour law has, historically, been successively concerned in order to focus on the centre of effective power and thus ensure the protection of employees. Yet, while seeking to ensure workers' protection, labour law also contributes to organizing the production of goods and services. While spelling out the rules that govern the individual contract of employment ... labour law is also concerned with the organisation – endowed with a centre of power and governed by labour relations – of which the employee is a part by virtue of the contract of employment'.

6. Ibid., p. 11.

third dimension of the firm as a financial group, as allocator of resources, in particular, the MNE.[7]

The framework: 'ordre communautaire social'

Free movement transforms the balance of economic power in the European Union

11. The freedom of enterprises to move throughout the single European market has shifted the balance of economic power towards employers. This is manifest in the overwhelming economic power of multinational enterprises, the magnitude of global capital mobility, the social dumping impact of global trade, delocalisation, unemployment, de-skilling...

12. The changing balance of economic power threatens European integration. There are ominous signs of strain: rejection of the draft Constitutional Treaty, the contested draft Services Directive, resistance to further enlargement for fear of migration of labour from new Member States...

13. Trade unions are not opposed to EU economic integration. But labour is not a commodity. Globalisation means that capital mobility frequently has an impact beyond national borders. Under the pressure of EU law, national laws adapted to the free movement principle of the EU single market. National laws have not yet adapted to the impact of capital mobility on labour in the transnational economy.

14. The law of the common market has transformed national rules governing the free movement of capital. But the EC Treaty provisions on free movement are not absolute. Free movement is limited by public policy considerations, both in the Treaty and as developed by the European Court of Justice through its case law.

7. Morin's approach looks to two paths. First, to identify the employer in order to determine the allocation of risk and responsibility in these new complex structures. Secondly, to promote (a) information transparency, (b) consultation and collective bargaining at different levels over different matters, and (c) corporate social responsibility mechanisms.

The European social model requires EU law to adapt to the new balance of economic power

15. EU law needs to adapt the rules of free movement of capital to reflect the *acquis communautaire social*, to redress the imbalance of economic power created by the EU law on free movement of capital. The interpretation of the Treaty's provisions on free movement should be based on '*ordre communautaire social*': principles which reflect the general *acquis communautaire* of social policy of the EU and, in particular, the regulation of employment and industrial relations in the Treaty and relevant secondary legislation.

16. Interpretation of the economic freedoms of movement should be consistent with the evolution of the EU from a purely economic Community establishing a common market to a European Union with a social policy aimed at protecting workers employed in the common market who are also citizens of the Union: '*ordre communautaire social*'.[8] Economic provisions of the Treaty have come to be re-interpreted in light of changes in the scope of activities of the EU.[9] The European Court's decision in *Albany* is an illustration of where the Court acknowledged that the EU Treaty provisions on competition policy must

8. For example, the European Court of Justice recognised the implications of this transformation in the nature of the EU in a decision of 10 February 2000 (Case C-50/96, *Deutsche Telekom AG v. Schroder* [2000] BCR 1-743). The case concerned the exclusion of part-time workers from supplementary occupational pension schemes. As formulated by the national court posing the question for the ECJ, the claim for a retrospective application of the principle of equal pay would risk distortion of competition and have a detrimental economic impact on employers. Nonetheless the Court concluded: (para. 57) (italics added) '...it must be concluded that the *economic aim* pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, *is secondary to the social aim* pursued by the same provision, which constitutes the expression of a *fundamental human right*'.

9. For example, the Commission must now take employment into account due to Article 127(2) EC inserted by the Treaty of Amsterdam, which requires that: 'The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Community policies and activities'. By way of analogy to labour policy, a survey suggests that: 'The most recent decisions in the field of environmental agreements come close to making environmental policy a 'core' factor in competition cases. I have suggested that this is so because the Commission is transforming the definition of economic efficiency to include the concept of sustainable development. Another possible argument in support of the approach in these cases is that the duty imposed by Article 6 EC to integrate environmental protection in the Community policies and activities referred to in Article 3 EC means that environmental protection is normatively superior to the core values of EC competition law, and may thereby act as a 'trump' to justify even anticompetitive environmental agreements if these are necessary to safeguard the environment'. Giorgio Monti, 'Article 81 EC and Public Policy', (2002) 39 *Common Market Law Review* 1057 at p. 1078.

be conditioned by later Treaty provisions on social policy; specifically, collective action in the form of social dialogue.[10]

'Ordre communautaire social'

17. From the beginning of the European Community, improvement of living and working conditions was stipulated as a social policy objective.[11] Protection of labour standards is not an obstacle to free movement, it is a *condition* of free movement. The interpretative framework for the Treaty provisions on free movement is based on five points of the *acquis communautaire* which comprise what may be called the *ordre communautaire social*.[12] In brief, the law on free movement in the EU

10. *Albany International BV v. Stichting Bedrijfspensionenfonds Textielindustrie,* Case C-67/96; with Joined cases C-115/97, C-116/97 and C-117/97; [1999] ECR 1-5751. It was commented: 'The vital point, however, is that ... the Court in *Albany International* did not deny that the rules restricted competition. But it placed its investigation into the scope of Article 81(1) in a wider context. The Treaty competition rules are porous: the very scope of Article 81(1) is influenced by policy objectives located elsewhere in the framework of EC law and policy. It is worth recalling that both Articles 28 and 49 on the free movement of goods and services respectively offer similar insight into the way in which the Court interprets EC trade law in a manner that seeks to avoid trampling other regulatory objectives underfoot'. Stephen Weatherill, *Cases and Materials on EU Law*, 6th ed., 2003, Oxford University Press, p. 526.

11. Title III of the original Treaty of Rome, 'Social Policy', contained only two Chapters with only 12 Articles. In the first Chapter on Social Provisions, the first of the six Articles comprising the Chapter, Article 117, stated: (italics added) 'Member States agree upon the need to *promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained.* They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action'. Now Article 136 EC, para 1: 'The Community and the Member Stales, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 19 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion' .

12. These may be defined as: (i) a universal premise of international labour law based on the Constitution of the ILO to which all Member States belong: 'labour is not a commodity'; (the Philadelphia Conference of 1944 adopted a Declaration defining the aims of the International Labour Organisation subsequently incorporated into the ILO Constitution which affirmed: 'labour is not a commodity'. The Preamble to the Community Charter of the Fundamental Social Rights of Workers of 1989 states: 'Whereas inspiration should be drawn from the Conventions of the International Labour Organisation...'); (ii) the activities of the Community shall include 'a policy in the social sphere' (Article 3(l)(j) EC) and the Community and the Member States 'shall have as their objectives improved living and working conditions' (Article 136 EC); (iii) respect for fundamental rights of workers reflected in the Community Charter of the Fundamental Social Rights of Workers

must be interpreted in the light of *ordre communautaire social:* labour is not a commodity like others (goods, capital), pursuing the objective of improved working conditions, respecting the fundamental rights of workers as human beings, acknowledging the central role of social dialogue and social partnership at EU and national levels, and adhering to the strict principle of equal treatment without regard to nationality.

18. The guiding interpretative principle of EU law on free movement is shaped by the *ordre communautaire social.* The EU law on transnational free movement of capital is to be interpreted in this light.

19. In this context, even more fundamental than the balance of economic power in the common market is the constitutional human rights dimension. The EU Charter of Fundamental Rights adopted at Nice in December 2000, later incorporated into Part II of the draft Constitutional Treaty, includes Article 27, 'Workers' right to information and consultation within the undertaking':

    Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

20. This is central to the European social model. Member States are to ensure that national laws respect this light to information and consultation.[13] However, their success in the face of transnational capital mobility is questionable.

1989, the European Social Charter signed at Turin on 19 October 1961 (both cited in Article 136 EC), and the EU Charter of Fundamental Rights solemnly proclaimed by the European Parliament, the European Council and the Commission at Nice on 7 December 2000 (OJ 2000 C 354/1); (iv) the distinctive characteristic of the European social model which attributes a central role to social dialogue at EU and national levels in the form of social partnership; (see the 'Overview' (pp. 2–50) to the *European Industrial Relations Dictionary*, published by the European Foundation for the Improvement of Living and Working Conditions, Luxembourg: Office for Official Publications Office of the European Communities, 2005, especially pp. 4–11); (v) the common market principle of equal treatment of all workers without discrimination based on nationality.

13. Reflected in a number of directives, including Council Directive 75/129 of February 17, 1975 on the approximation of the laws of the Member States relating to collective dismissals, OJ L 48/29, as amended by Directive 92/56 of 24 June 1992, OJ L 245/92; consolidated in Council Directive 98/59/ EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225/16; Council Directive 77/187 of February 14, 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 61/26, as amended by Directive 98/50/EC of 29 June 1998, OJ L

21. The exercise of free movement of capital is shaped by the context of *ordre communautaire social*, which may have a restrictive effect. The question is how is EU law to regulate the potential conflict between representation and participation of workers in decision-making within the undertaking, on the one hand, and free movement of capital on the other.

22. There is now a substantial body of EU law (ranging from directives to European Employment Guidelines) and policy (including e.g. soft law on restructuring) regulating decision-making by enterprises which affects workers. These impose both substantive obligations and procedural constraints (e.g. information and consultation). Taken together, these comprise the *acquis communautaire social.*

23. In an era of economic globalisation, unfettered capital mobility and consequent massive flows of capital across borders has perhaps the greatest impact on workers. Yet, up to now, it is perhaps the least amenable to protection through the *acquis communautaire social.* The imbalance of economic power consequent on global capital mobility makes collective industrial action much less able to redress the balance. One solution is through a qualitative improvement in the *acquis communautaire social.*[14]

Building on the acquis communautaire social

24. One mechanism close to the issues of representation and participation of workers and trade unions in the corporate governance of MNEs when these enterprises are affected by operations in the financial sector is the Transfers of Undertakings Directive 77/187 of 1977 (ARD).[15]

201/88; consolidated in Directive 2001/23 of 12 March 2001, OJ 1782/16; Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. OJ L 254/64 of 30.9.94; Council Directive 97/74/EC of 15 December 1997 extending to the United Kingdom Directive 94/45/EC, OJ L 10/22 of 16.1.98; Council Directive No. 2002/14 establishing a framework for informing and consulting employees in the European Community. OJ 2002, L80/29.

14. Though, as will be explained later, in its absence, collective industrial action should not be limited by EU law.

15. Also called the Acquired Rights Directive, and hereafter referred to as the ARD. Council Directive 77/187 of February 14, 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings,

25. The ARD incorporates two central principles of the *acquis communautaire social:*

(i) protection of individual employees (no transfer of the risk resulting from change in the ownership of the undertaking through continuity of obligations regarding terms of employment[16] and some protection against dismissal[17]); and

(ii) a role for collective labour representatives in the hierarchy of decision-making (transparency through information and consultation[18]).

26. The ARD was initially adopted to deal with the problems of enterprise restructuring following the oil and energy crises of the 1970s.[19] However, much restructuring is now driven by mergers and acquisitions following the transformation of capital markets and the invention of new mechanisms of corporate finance and credit instruments allowing for financing of take-overs. This close link of restructuring with financial operations raises the question of whether the ARD's regulation of restructuring could be adapted to this new financial dimension.

businesses or parts of businesses, OJ L 61/26, as amended by Directive 98/50/EC of 29 June 1998, OJ L 201/88; consolidated in Directive 2001/23 of 12 March 2001, OJ L/82/16.

16. Article 3(1): 'The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee'.

17. Article 4(1): 'The transfer of an undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce'.

18. Article 7(1): 'The transferor and the transferee shall be required to inform the representatives of their respective employees affected by a transfer of the following: the date or proposed date of the transfers, the reasons for the transfer, the legal, economic and social implications of the transfer for the employees, any measures envisaged in relation to the employees. The transferor must give such information to the representatives of his employees in good time before the transfer is carried out. The transferee must give such information to the representatives of his employees in good time, and in any event before his employees are directly affected by the transfer as regards their conditions of work and employment'. Article 7(2): 'Where the transferor or the transferee envisages measures in relation to his employees, he shall consult the representatives of his employees in good time on such measures with a view to reaching agreement'. On the interpretation of such provision, and in particular, the timing (the process to be completed before any decision is made) and the nature of the obligation to consult (equating to negotiation), see now *Irmtraub Junk c. Wolfgang Kuhnel als Insolvenzverwalter über das Vermögen der Firma AWO,* Case C-188/03, ECJ decision, 27 January 2005.

19. B. Bercusson, *European Labour Law* (1996), Chapter 18, pp. 234–247.

27. This dynamic of adaptation of the ARD is not new. The ARD has undergone major transformations as it has come to operate in new contexts. The classic example was the application of the ARD to privatisation. Those promoting the ARD in 1977 never anticipated its application to privatisation of public enterprises and the contracting out of public services. However, the European Court did not hesitate to characterise these latter processes as involving the transfer of workers employed in the public sector to private sector employers, and hence covered by the ARD and the employment protection principles it embodied.[20]

28. Similarly, the ARD was applied to the management fashion of the 1990s of 'outsourcing', again pressured to some extent by capital market demands for higher returns. Particularly interesting was the long-running controversy over the definition of the 'undertaking'. The issue was whether an 'undertaking was primarily to be identified by its assets (capital) or its activities (labour). The European Court has resisted continued attempts to promote a definition of the undertaking exclusively in terms of its capital assets.[21]

29. Apart from the ARD, there are additional elements of the *acquis communautaire social* relevant to our concerns. The Collective Dismissals Directive 75/129, adopted in 1975, was amended in 1992 specifically to try to deal with the problem of decision-making in transnational enterprises.[22] The transnational dimension was reinforced

20. *Dr. Sophie Redmond Stickling* v. *Bartol*, Case C-29/91, [1992] ECR 1-3189. *Commission of the European Communities v. United Kingdom*, Case C-382/92, [1994] ECR 2435. Privatisation gave rise to the transformation of stock exchanges which had to go international to raise the huge amounts of capital involved: 'During the 1980s, privatisation of state-owned assets, including such companies as British Steel and British Telecommunications, required access to investors in markets outside of the home jurisdiction, essentially due to the massive amounts of securities required to be offered and sold. With the success of multi-jurisdictional offerings in such circumstances, financial institutions and their legal advisors realised the possibilities for truly 'global offerings' by private companies, as well as the future of privatisation throughout the world'. D.W. Arner, *Globalisation of Financial Markets: An International Passport for Securities Offerings?*, The London Institute of International Banking, Finance and Development Law, Essays in International Financial and Economic Law, London, 2002, p. 13.

21. See Joined Cases C-232-233/04, *Nurten Guney-Gorres and Gul Demir v. Securicor Aviation (Germany] Ltd and Kotter Aviation Security GmbH & Co, KG*, ECJ decision, 15 December 2005.

22. The amendment proposed and eventually approved was modest: 'The obligations laid down ... shall apply irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer. In considering alleged breaches of the information, consultation and notification requirements laid down by this Directive, account shall not be taken of any defence on the part of the employer on the

by the adoption of the EWCs Directive 94/45 in 1994, which vastly extended the scope of the obligation to inform and consult employee representatives beyond the critical situations of collective dismissals and restructuring. The expanded scope of information and consultation was then extended to enterprises at national level by the framework Directive 2002/14. It is also now present in the EU legislation governing the European Company *(Societas Europeae*).[23]

Applying the *acquis* to operations in the financial sector

30. Given its history of flexible adaptation to a variety of different contexts, can the ARD engage worker representation and participation in the operations of the financial sector as they affect the corporate governance of multinational enterprises?

31. Article l(l)(a) of the ARD provides:

> "*This Directive shall apply to any transfer of an undertaking, business or part of an undertaking or business to another employer as a result of a legal transfer or merger*".

32. The gaping loophole revealed, which has long been recognised, is that the ARD covers only transfers from one employer *to another employer*.[24] It is generally accepted that the Directive, which applies only where there is a transfer to another employer, fails to achieve its objective when the undertaking is transferred through a share purchase. The employees are under contract with the company. The transfer of shares in the company does not legally alter their employment status with that company. So although there is *effectively* a change of ownership – in that the company is now owned by another person – the transaction falls outside the scope of the Directive. In other words, where an undertaking is an incorporated company and the company's

ground that the necessary information has not been provided to the employer by the undertaking which took the decision leading to collective redundancies'.

23. Council Directive 2001/86/EC supplementing the statute for a European Company [Council Regulation (EC) No. 2157/2001, OJ L294/1, 10 November 2001] with regard to the involvement of employees, OJ L294/22, 10 November 2001.

24. This can be seen as a relic of the fetish of the individual employment contract between employer and employee in labour law.

shares are sold, there is no transfer of the undertaking *to another employer* as the employer remains the company.[25]

33. The question is whether this provision requiring a transfer formally to engage *another employer* is necessary, and, in the circumstances of the role of financial capital in restructuring operations, has become not only irrelevant, but a positive obstacle to the operation of the *acquis social communautaire.*

34. The essence of the transfers intended to be covered by the Directive is less the legal *quality* of the transaction, the fact of a *formal* transfer to *another legally separate employer,* than that a change affecting employees has occurred as regards: (Article l(l)(b))

> *"an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary".*

35. In practice, the scope of the Directive has been interpreted by the European Court to cover situations falling outside the formal scope of a transfer of an undertaking directly between one employer and another. A transfer may be deemed to have occurred where more than one transaction may be involved; or where there is no direct link between transferor and transferee.

36. For example, in leasing arrangements, where the owner of premises terminates the contract of a lessee and undertakes to continue the operation of the business or grants the lease to a second lessee, employees may transfer to the owner or to the second lessee from the first lessee, though in the former case there is no transfer of assets, and in the latter case the transfer takes place between the owner of the premises and the second lessee.[26]

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25. It was noted that the majority of restructuring exercises took the form of share transfers in the UK, unlike on the continent. This provision can thus be characterised as another, though unacknowledged, British opt-out from the *acquis communautaire social.*

26. See *Daddy's Dance Hall,* Case 324/86, [1986] ECR 739. In *Ny Molle Kro,* Case 287/86, [1987] ECR 5465, the Court stated that (para. 12) 'employees of an undertaking whose employer changes without any change in ownership are in a situation comparable to that of employees of an undertaking which is sold and require equivalent protection'. Similarly in contracting-out: in *Merckx,* Joined Cases C-171-172/94, [1996] ECR 1-1253, a dealership

37. As appears through the case law of the European Court, an undertaking, business or part of a business may be a bundle of premises, equipment, services and employees without a separate *legal* identity. The object of the transfer is an autonomous *function* with a distinct identity. The logical thrust of the European Court judgments on the Directive is towards holding that the Directive applies when an autonomous *function* is transferred. This logic can be applied to the Directive's requirement that there be a transfer to another employer.

38. The logic would dictate that an employer is defined *not* only in terms of separate legal existence, but rather in terms of a distinct relationship to the employee. A change of employer occurs, arguably, when the *quality* of this relationship with the employee changes. This is *a functional* transfer in the position of the employer, even though, formally, the employer's relationship with the employee has not terminated and been transferred to another employer.

39. The *policy* of the Directive is that a major *change* in the employer's relationship with employees should *not* change arrangements regarding, for example, information and consultation of workers' representatives. If the economic entity 'preserves its autonomy, the status and function of the representatives or of the representation of the employees affected by the transfer shall be preserved on the same terms and subject to the same conditions as existed before the date of the transfer...'.[27]

40. However, major changes in the *functional* relationship between employer and employees are equivalent to the effects of a 'transfer'. The Directive's policy would require that the EU objective of legal protection by way of information and consultation of workers' representatives be extended to employees in these circumstances.

41. The implications of this are that, at present, transfers undertaken exclusively through the financial services sector (selling shares) fall outside the scope of the ARD: there is no protection of individual workers nor involvement of their representatives.

awarded to one undertaking was terminated and awarded to another; this was held to be a transfer of an undertaking covered by the ARD.

27. ARD, Article 6(1).

42. However, if the directive was re-interpreted or revised so that transfers of undertakings achieved through transfers of shares (the functional equivalent of a transfer of an undertaking) were covered, then those purely financial dealings which have a direct impact on workers could fall under the ARD.[28]

43. These financial operations of transfers of shares would be subject to:

    i. the requirements of transparency: prior disclosure of all relevant information to employee representatives;

    ii. prior consultation with employee representatives;[29]

    iii. protection of individual employees affected: no transfer of risk to employees, as there is liability of the transferor and/or the transferee of the shares.

Expanding *ordre communautaire social* to financial operations

44. Such a change in the scope of the ARD would mean a foothold gained for worker participation in share transfers on the stock market. This would be a first step in the participation of labour in financial operations.

45. This foothold would be reinforced by provisions in Directive 2002/14 and the EWCs Directive 94/45. Directive 2002/14 requires information and consultation on:[30]

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28. One difficult point concerns a transfer of a tranche of shares. Would this qualify as a 'part' of the business or undertaking as defined in Article l(l)(b) of ARD: 'an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'? The Court's decisions giving priority to the objective of protection of employees over the weight of the assets involved in the transfer might allow for such cases to be covered. A criterion of proportionality might operate.

29. Both requirements (i) and (ii) are already implied in Directive 2002/14 and the EWCs Directive. The difference is that Directive 2002/14 limits the requirements to each separate enterprise. The EWCs Directive purports to overcome this weakness, but is meagre in its provisions as regards the substance (number of meetings, powers of the representatives, etc.) The ARD could compensate for some of these weaknesses by explicitly combining the obligations of transferor and transferee of the shares, and incorporating stronger elements of the *acquis communautaire social*.

30. Directive 2002/14, Article 4(2)((b) and (c).

> *"the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment; ... decisions likely to lead to substantial changes in work organisation or in contractual relations".*

46. The EWCs Directive 94/45 allows for information and consultation on:[31] (italics added)

> *"the structure, economic and financial situation, the probable development of the business and of production and sales, the situation and probable trend of employment, investments and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closure of undertakings, establishments or important parts thereof, and collective redundancies".*

47. These are confined to information and consultation. But the parallel ARD requirement of transparency of capital movements (information and consultation) is combined with another: no transfer of risk to the workers affected (social dumping) by way of changed terms of employment or dismissal as a result of these financial operations. The impact of capital mobility on workers is subject to the requirements of *ordre communautaire social* as reflected in the ARD.

48. The first crucial step is to secure that purely financial operations (share dealings) having the impact functionally equivalent to transfer of an undertaking become subject to the requirements of *ordre communautaire social* reflected in the ARD.

49. The next step addresses the fact that most capital flows are not necessarily linked to the activity of transfers of undertakings. Financial operations are of enormous variety ranging from restructuring debt to foreign exchange dealings.

A list could include the following:
- investment strategies
- share dealings

31. EWCs Directive 94/45. Annex, paragraph 2.

– dividend distribution
– share buy-backs
– pension fund organisation/contributions
– capital structure
– loans and debt policy
– forex dealings, derivatives...

50. It may be that these purely financial transactions could be functionally linked to a change in the enterprise substantial enough to equate to a transfer of an undertaking.

51. But to insist on meeting the requirement of a 'transfer', whether formally or, as advocated, in functional terms, overlooks the policy objective of *ordre communautaire social:* labour is not a commodity like others. Operations on the financial markets must be consistent with the objective of improved working conditions, respect the fundamental rights of workers as human beings, acknowledge the central role of social dialogue and social partnership at EU and national levels, and adhere to the strict principle of equal treatment without regard to nationality.

52. The proposal is equivalent to a 'participation Tobin Tax', except not a tax, but automatic application of *ordre communautaire social* to financial operations, and not confined to currency transactions, but financial operations which impact on workers.

53. The application of such a proposal to the specific case of financial operations equivalent to a transfer of an undertaking has been explored. The operationalisation of the proposal to apply to the multitude of other financial operations requires further consideration. It could include, for example, a more institutionalised trade union role in regulating capital markets as they affect workers, via participation on financial market regulatory bodies...

Coordination and enforcement

54. The principle is that financial operations which impact on workers are subject to *ordre communautaire social.* Two aspects in particular: transparency (information and consultation) and without transfer of risk to workers affected (continuity of terms and conditions of employment).

55. Among many others, there are two critical questions: coordination and enforcement.

i. Coordination and adaptation

56. The operationalisation of the principle will have to be coordinated with existing rules governing a myriad of financial operations, such as those on stock exchanges, foreign exchange transactions, company law and regulation of capital mobility.

57. The existing rules and machinery governing financial transactions are aimed primarily at investor protection. They too include rules requiring transparency (for investors) and protection of investors against risk (time limits on offers, mandatory purchase at fair price if take-over reaches certain level, etc.). These rules and machinery need to be adapted to workers' protection.

ii. Enforcement

Regulatory

58. Regulatory machinery developed to enforce rules governing financial operations[32] needs to be adapted to control and regulate capital mobility in the interests of workers.

59. Mechanisms available in company law and securities law could be made available also for violations of the principle of *ordre communautaire social* and its rules.

Judicial

60. Just as ARD has engaged more than the employer in liability for failure to observe its rules (joint liability of transferor/transferee), so various parties engaged in financial operations (investment banks, private equity firms, specialist boutiques of financial advisers) may be engaged in responsibility for their financial operations.[33]

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32. E.g. in the UK; the City Code: at EU level: mergers and takeovers, financial services regulation.

33. Such efforts are beginning to emerge at EU level in the form of joint liability of employment agencies and user employers, or of subsidiaries and parent companies, or of primary

61. The rubric of *ordre communautaire social* has potential to expand this judicial protection. Capital mobility is conditional on respect for fundamental rights, including Article 27 of the EU Charter: workers' right to information and consultation in the undertaking.

Autonomous collective action

62. Trade unions depend traditionally not only on regulatory and legal mechanisms for defence of their interests. Autonomy requires freedom of collective action: a right to take collective action where capital mobility threatens *ordre communautaire social.*

63. The pending decisions in the *Laval/Viking* cases referred to the European Court offer an analogy. In *Viking,* employers are challenging the Flag-of-Convenience (FOC) policy of the International Transport Workers' Federation (ITF). Under the FOC policy, the ITF coordinates collective industrial action against employers who abuse their freedom to register ships anywhere in the world, to the detriment of the working conditions of transport workers.

64. By analogy, freedom of movement for capital is subject to *ordre communautaire social.* Learning from the experience of the ITF's FOC policy, free movement (flag-of-convenience) of capital is subject to (i) the obligation to inform and consult with, representatives of those affected; (ii) protection of labour standards/improvement of working conditions/ no social dumping. The policy moves from shipping pirates to other pirates...

65. Of course, this is not to disguise the many problems which will arise, some of which have already appeared in decisions of the European Court: from confidentiality of information disclosed to workers' representatives on company boards of directors[34] to identifying the employer responsible for information and consultation for the purposes of the EWCs Directive,[35] as well as providing the substantial resources required (experts in national and international finance; training, etc.).

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employers and sub-contractors/suppliers. See Marie-Laure Morin on the potential of joint liability arrangements; *op. cit.*, footnote 23, at pp. 23–24.

34. *Knut Grongaard and Alan Bang,* Case C-384/02, ECJ decision, 22 November 2005.

35. *Betriebsrat der bofrost Josef H. Boquoi Deutschland West GmbH & Co. KG, Straelen v. bofrost Josef H. Boquoi Deutschland West GmbH & Co. KG Straelen,* Case C-62/99, [2001] ECR 1-2579. *Gesamtbetriebsrat der Kuhne & Nagel AG & Co. KC v. Kuhne & Nagel AG & Co.*

Conclusion

66. In sum, the starting point would be a new Directive on acquired rights in the event of transfer of capital: Transfer of capital and protection of employment...

67. From there, extending the principle of *ordre communautaire social* to other financial operations.

68. Needless to say, there is a need for extensive preparation and great expertise. However, to borrow a phrase, it would be a worthwhile investment for workers and trade unions...

KC, Case C-440/00, ECJ. 13 January 2004. *Betriebsrat der Firma ADS Anker GmbH v. ADS Anker GmbH*, Case C-349/01, ECJ, 15 July 2004.

Chapter V

Economic freedom v. fundamental social rights

Chapter V: Economic freedom v. fundamental social rights

Introduction by Christhophe Vigneau

Looking back at an author's bibliography often sheds new light on its legacy. This approach appears doubly interesting with regard to Brian Bercusson who, to begin with, focused on English labour law and then moved on to European labour law. However, oddly but significantly, some subjects and issues remained constant objects of attention. Among these, collective industrial action and its restriction by the law, whether national or European, occupies an important place. Being, at the beginning of his academic career, a witness and a critic of the dismantling of collective rights in Britain,[1] Brian Bercusson found himself confronted, towards the end of it, with a similar phenomenon at EU level. His constant concern with these issues emerged even more topically during his last years when economic freedoms at European level appeared to threaten labour rights. As a lawyer coming from a labour law system characterised by collective autonomy and state abstentionism, Brian Bercusson attached considerable attention to trade union rights and industrial action.

Undoubtedly, Brian Bercusson's last concern was the judgments of the European Court of Justice in the *Viking* and *Laval* cases. He had rapidly understood the importance of the cases and their potentially detrimental effects on workers' protection in Europe. As he stated in an article published in the *European Law Journal*, it was 'judgement day' for the trade union movement and the European Union. With the question of the legality of transnational collective action confronted by economic freedoms, the question of social dumping in Europe was brought before the European Court of Justice. Brian Bercusson had shown, in his earlier writings, his acute consciousness of the implications

1. B. Bercusson and C. Drake, *The employment acts 1974–1980*, Sweet and Maxwell, 1981; B. Bercusson, 'A policy approach to labour law', in Lord Wedderburn and W.T. Murphy (eds), *Labour law in the 1980s*, pp. 179–88; 'Picketing, secondary picketing and secondary action', *Industrial Law Journal*, 1980, pp. 215–32.

for the future of Europe of the inequality resulting from employers taking advantage of European economic integration. He forecast the challenge and danger to national constitutional and international guarantees of the right to collective action.

In this article, Brian Bercusson analyses the submissions to the ECJ by the parties, the Commission and the Member States. The purpose is to provide a deep and comprehensive analysis of the position of each country and the Commission. In other words, it places the judgment to come within its political and legal context. The discrepancies between Member States, and especially between new and old Member States, appear on the various issues (the direct effect of Article 43 on trade unions and the effect of collective action on economic freedoms). In hindsight, the detailed analysis carried out by Brian Bercusson highlights the different positions taken by the ECJ and the one adopted by the Member States and the Commission. Here, the contextual methodology often followed by Brian Bercusson appears to be very fruitful.

It is known that the judgments delivered by the Court in the *Viking*, *Laval* and *Rüffert* cases were extremely disappointing for Brian Bercusson, in terms of both results and legal reasoning. This must be related to the great hopes raised by the adoption of the EU Charter of Fundamental Rights and its integration in the Treaty. The EU Charter was considered to have the potential to renew labour law in the Member States and at EU level,[2] even if Brian Bercusson had on many occasions underlined the various limitations imposed on fundamental rights.[3] The solutions provided in the relevant cases lead, according to Brian Bercusson, to a narrow interpretation of fundamental social rights in the face of economic freedoms in the European Union. He suggests forcefully that the ECJ should have adopted the opposite standpoint and interpreted economic freedoms in such a way as to ensure respect for the fundamental rights of workers.[4]

2. 'Social and labour rights under the EU Constitution', in G. de Burca and B. de Witte (eds), *Social rights in Europe*, Oxford University Press, 2005, p. 169; 'Interpreting the EU Charter in the context of the social dimension of European integration', in B. Bercusson (ed.), *European labour law and the EU Charter of Fundamental Rights*, Nomos, 2006.

3. 'Horizontal provisions. Title VII, general provisions governing the interpretation and application of the Charter (Articles 51–54)', in *European labour law and the EU Charter of Fundamental Rights*, op. cit., pp. 401–21.

4. 'Qu'attendre de la promotion de la Charte des droits fondamentaux par le Traité de Lisbonne', *Revue de droit du travail*, 2008, p. 74.

In one of his last papers, which was commissioned by the German Ministry of Labour and Social Affairs, Brian Bercusson points out the challenges to the trade union movement raised by recent ECJ case law. The judgments go against the foundations of labour law as an accepted restriction on free markets. Brian Bercusson sums up this reversal when he writes: 'Nineteenth century doctrinal ghosts of the dominance of market freedoms, long since revised to reflect the social model of industrial relations in twentieth century European welfare states, have returned to haunt EU labour law of the twenty-first century'. The article reveals many doubts on the part of the author concerning the application of the doctrine of horizontal effect with respect to collective agreements and also contains severe criticisms of the case law for violating various principles of EU law (equality on the grounds of nationality, subsidiarity and proportionality). Brian Bercusson also warns against the potentially damaging effect of those cases on national industrial relations systems, as employers take advantage of them to challenge collective action taken at national level.

The article demonstrates how the *Viking, Laval and Rüffert* cases reverse the basis on which labour law is established. Taking the opposite view, Brian Bercusson suggests that the fundamental right to collective action guaranteed by EU community law should predominate over economic freedoms. Derogations should be issued exceptionally, applying the proportionality principle. He calls for an economic balance of power between employers and workers in Europe. The primacy given to the economic freedoms by the law on free movement has shifted the balance at EU level in favour of the employers. For Brian Bercusson, this failure to establish a balance by the Court not only undermines workers' protection at EU level but also weakens support for the European political project.

Transnational trade union rights

Brian Bercusson (2001) *

1. Introduction: a legal framework for the European industrial relations system

The individual Member States of the European Union have separate, but coherent and comprehensive legal frameworks for their national industrial relations systems. During the past fifteen years, a number of developments have occurred which are recognisable as central features of an emerging European industrial relations system. Three in particular are concrete realities: European social dialogue, information and consultation at multinational enterprise level (European Works Councils), and transnational industrial action.

The EU social dialogue, the most prominent feature of the Europeanisation of industrial relations, is now incorporated into the EC Treaty by the Treaty of Amsterdam.[1] The social dialogue between the social partners at EU level becomes a, if not the primary instrument for social and labour regulation in the EU.

The success of the EU social dialogue depends on the capacity of the social partners to undertake, and of the EU institutions to support, the autonomous development of EU labour law. Both optimists and pessimists can point to developments since November 1993 which support their views.

The pessimists claim that progress has been slow and halting, and argue that the social partners are unwilling or incapable of engaging in

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* 'Transnational trade union rights', Brian Bercusson (2001). This article was first published in H. Collins, P. Davies and R. Rideout (eds.) *Legal regulation of the employment relation*, London: Kluwer Law International, 403-424 and is reprinted here with the kind permission of the publisher.

1. New Articles 136–139; formerly Articles 1–4 of the Agreement on Social Policy attached to the Social Policy Protocol of the Maastricht Treaty on European Union.

dialogue, as in the refusal of UNICE in October 1998 to enter a dialogue over information and consultation at national level.

The optimists point to the three agreements which have been made between the social partners at EU level and which have been transformed into binding directives.[2] They argue that the scenario of 'bargaining in the shadow of the law' has been vindicated in that failures of the social dialogue in the past have led to the European Works Councils Directive, and the recent UNICE refusal to enter dialogue on information and consultation at national level has led to a Commission proposal for legislation which promises much.[3]

The objectives of the social partners – control of the EU labour law-making process and autonomy of the rules of the industrial relations system – were achieved. But these objectives are vulnerable. The fragility and significance of these provisions of the Treaty are revealed by two recent developments.

In *UEAPME*,[4] the legitimacy of the EU social dialogue was subjected to fundamental challenge by the Court of First Instance. The decision of the Court poses a grave threat to the autonomy of the social partners, the independence of the social dialogue process, and the legitimacy of EU-level collective agreements.

In another recent case, an Opinion of Advocate General Jacobs denied the existence of a fundamental trade union right to collective bargaining in the EU legal order, and stated that collective agreements have only limited protection from the rules on competition in EU law. This Opinion posed a major threat until it was dissipated by the European

2. Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on parental leave concluded by UNICE, CEEP and the ETUC, [1996] OJ L145/4. Council Directive 97/8 I/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, [1998] OJ L14/9. Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, [1999] OJ LI 75/43.

3. Proposal for a Council Directive establishing a general framework for informing and consulting employees in the European Community, COM/98/612 of 11 November 1998.

4. Case T-135/96, *Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME) v. Council of the European Union* [1998] ECR H-2335; [1998] IRLR 602 (hereinafter referred to as *UEAPME).*

Court's decision on 21 September 1999.[5] These cases are powerful signals that trade union rights are on the agenda of the European Courts.

The law of the European Union has emerged to regulate the Single European Market, including Economic and Monetary Union. The EU law regulating these areas has developed without a coherent vision of a comprehensive legal framework for a European industrial relations system. This paper outlines a basis for such a coherent and comprehensive legal framework.

Certain features of any European industrial relations system are an inevitable legacy of the economic, social and political history of the Member States: trade unions, collective bargaining and industrial action. The legal framework for the European system will inevitably require EU law to embrace fundamental trade union rights recognised in the Member States: the rights of association, to collective bargaining and to strike.

Fundamental rights, though important, are only the starting point. They establish principles which underpin any European industrial relations system consistent with the systems of the Member States. But the legal framework of a European industrial relations system, like that of Member State systems, does not consist only of fundamental rights. An exclusive emphasis on fundamental rights has at least two disadvantages.

First, the legal framework of the industrial relations system may become excessively 'constitutionalised'. Concentrating solely on fundamental rights can lead to the EU law on trade unions being subjected to constitutional tests of democratic legitimacy, institutional balance and judicial review, as will be illustrated in the recent decision of the European Court of First Instance in the *UEAPME* case. Yet the EU law on trade union rights regulates what is first and foremost an industrial relations system, structured around the social partners.

Secondly, reliance only on fundamental rights could be taken as meaning that development of a legal framework for the European industrial

5. Case C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textiel-industrie,* Joined Cases C-115/97, C-116/97 and C-l 17/97, *Brentjens' Handelsonderneming BV v. Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* and Case C-219/97, *BV Maatschappij Drijvende Bokken v. Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven,* Opinion of Advocate General Jacobs delivered on 28 January 1999; n.y.r. (hereafter referred to as *Albany).*

relations system must await the formal revision of the Treaties through an Inter-Governmental Conference (IGC). This can mean delay in developing a European industrial relations system at a time when European economic and monetary union is proceeding at an ever faster pace. An example of the dangers is the Opinion of Advocate General Jacobs in *Albany* concerning an alleged conflict between collective agreements and EC competition law.

There are interim measures which may be adopted to address problems in the interval between IGCs. Such measures may take the form of legislation (Regulations, directives) adopted by the Council. An example is the 'Monti' Regulation, which recognises fundamental trade union rights.[6] Others may be Commission actions (training or support actions), or other forms. Further research is needed on the optimal legal forms for trade union rights in the short, medium and long term.

However, this is not to detract in any way from the importance of guaranteeing fundamental trade union rights in EU law. This paper will address the legal problems in achieving recognition of the principle of freedom of association in EC law to illustrate the general difficulties to be expected in the attempt to introduce fundamental trade union rights into the EC legal order.

The paper begins with a short account of the two cases mentioned above which have placed the issue of trade union rights on the EC's agenda: *UEAPME* and *Albany* (2). It then analyses the concept of 'freedom of association' and the methodology used to address this concept. The potential effect of an EC law right of association on national laws depends on its interpretation by the European Court (3). The objective of establishing a right to freedom of association in EC law may adopt a variety of legal strategies, engaging different institutions, processes, legal forms and time-frames (4). In conclusion, a proposal is made based on the experience of recent initiatives (5).

6. Council regulation (EC) No. 2679/98 of 7 December 1997 on the functioning of the internal market in relation to the free movement of goods among the Member States, [1998] OJ L337/8. Article 2 of this Regulation states: 'This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States.'

2. The European Court and transnational trade union rights

(a) UEAPME [7]

In *UEAPME*, an organisation representing artisans and small and medium undertakings (SMUs) challenged the Parental Leave Directive, which was the first product of the Protocol and Agreement on Social Policy. UEAPME brought an action under Article 173 (now Article 230) of the EC Treaty for annulment of the Directive. In its decision, the Court of First Instance (CFI) raised questions about the legitimacy of social dialogue agreements, the representativity of the parties to them, and the control by the EU institutions of the social dialogue process.

(i) Democratic legitimacy and representativity

The CFI contrasted the social dialogue process under the Agreement on Social Policy with the EU legislative process involving the Commission, the Council and the European Parliament:[8]

> "*the principle of democracy on which the Union is founded requires – in the absence of the participation of the European Parliament in the legislative process – that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council acting on a qualified majority, on a proposal from the Commission, with a legislative foundation at Community level. In order to make sure that that requirement is complied with, the Commission and the Council are under a duty to verify that the signatories to the agreement are truly representative*".

The most important part of the CFPs decision for the social partners concerns the *parties* to any social dialogue agreement. For an agreement to be democratically legitimate, the CFI stipulates that it must be ascertained:[9]

7. For more detailed analysis of this case, Bercusson, 'Democratic Legitimacy and European Labour Law' [1999] 28 ILJ 153–170.
8. *UEAPME*, para. 89.
9. *UEAPME*, para. 90.

> "*whether, having regard to the content of the agreement in question, the signatories, taken together, are sufficiently representative*".

The key phrase repeatedly used by the CFI to describe the parties to a democratically legitimate agreement was 'sufficient collective representativity'.[10] The requisite degree of representativity is not absolute. It must merely be sufficient. However, while emphasising the importance of representativity, the CFI was less than clear on the question of criteria. The CFI referred to the criteria set out by the Commission in its Communication of 1993,[11] but did not express a clear opinion about them.

(ii) Challenging the autonomy of the social dialogue

The Social Policy Agreement established a delicate equilibrium between autonomy of the EU social partners and the role of the Commission, an equilibrium I have characterised as 'bargaining in the shadow of the law'.[12]

However, the CFI took the view that this autonomy *ceases* when the parties wish their agreement to be transformed into an EC legal measure by a decision of the Council and turn to the Commission. The CFI has lengthened this shadow by reinforcing the Commission's power to assess the representativity of the parties to the agreement.[13]

Although apparently *post*-agreement, this examination in effect reaches back to the conduct of negotiations, since the social partners' exclusion of other parties from the negotiations may lead the Commission and Council to reject their agreement as insufficiently representative. The Commission can effectively force the participation of certain parties re-

10. The official language of the case was French. This phrase first appears in para. 90 (and thereafter is repeated in the same formulation) as 'partenaires sociaux signataires ... ont une representativité cumulée suffisante'. This is translated relatively accurately into English as 'signatories, *taken together*, are sufficiently representative'. In subsequent paragraphs, however, the phrase is formulated as 'sufficient *collective* representativity' (para. 94). This translation of 'cumulée' as 'collective' is questionable in failing to highlight a key dimension. Representativity is *cumulative* in that the signatories (on either side) may, taken separately, *not* be representative, but *taken together* may achieve the requisite degree of representativity. A better translation of this key concept, it is suggested, would be 'sufficient cumulative representativity'.

11. Commission Communication of 14 December 1993, COM (93) 600 final, para. 24, reaffirmed in the Communication of 10 May 1998, COM (98) 322, s. 1.2, p. 5.

12. Bercusson, *European Labour Law*, Chapter 35, pp. 538–52.

13. *UEAPME*, para. 85.

quired for the 'sufficient collective representativity' needed to achieve democratic legitimacy. If these are excluded, the agreement may be successfully challenged by the excluded party.

The impact on the autonomy of the social partners of the CFI's decision is evident in its aftermath. The indications were that UEAPME would appeal from the decision of the CFI to the European Court of Justice. It appears that the appeal was dropped. Instead, a 'Proposal for a Co-operation Agreement between UNICE and UEAPME', dated 12 November 1998 outlines 'the modalities of cooperation between UNICE and UEAPME in social dialogue meetings, including negotiations' (Clause 1.2). This includes provisions whereby 'UNICE undertakes to consult UEAPME prior to taking public positions on behalf of the employers group in social dialogue and negotiating meetings' (Clause 3.1) and 'UEAPME representatives fully participate in preparatory meetings of the employers group and in plenary meetings with ETUC' (Clause 3.2).

The shadow of the Commission was further lengthened by the CFI seeming to approve the view expressed in the Commission's Communication that it would consider:[14]

> "*the representative status of the contracting parties, their mandate and the 'legality' of each clause in the collective agreement in relation to Community law, and the provisions regarding small and medium-sized undertakings set out in Article 2(2)*".

This opens up new avenues for the Commission to exert influence on the social dialogue process, as the parties negotiate under this scrutiny.

Further,[15]

> "*The Council, for its part, is required to verify whether the Commission has fulfilled its obligations under the Agreement, because, if that is not the case, the Council runs the risk of ratifying a procedural irregularity capable of vitiating the measure ultimately adopted by it*".

14. *UEAPME*, para. 86, quoting para. 39 of the Commission's Communication of 1993.
15. *UEAPME*, para. 87.

The autonomy of the social dialogue process is compromised if the shadow of Commission scrutiny is enhanced further by the CFI's addition of the Council and, indeed, the Court.

The social partners are faced with three levels of scrutiny: Commission, Council and Court. It is questionable whether such scrutiny is compatible with the autonomy of the social dialogue, which is arguably among the fundamental rights of labour and management recognised in the constitutional traditions of the Member States and embodied in ILO Conventions 87 and 98.

European social dialogue makes it necessary to identify organisations entitled to undertake such a dialogue at EU level. The criteria for selection of the organisations were initially dictated by the Commission.[16] However, the optimal criteria for selection of social partners might differ from those selected by the Commission and applied by the Court. One problem is that EU rights of association at transnational level (including legal definition, legal personality, a right of association/right to join) are not explicitly recognised. If expressly incorporated into EU law, these rights should ensure the independence and autonomy of transnational social partners, including trade union organisations.

The EU social dialogue places heavy burdens on social partners required to undertake tasks of making EU labour law, which would normally be the responsibility of civil service bureaucracies and legislative bodies. For example, the role of the European Trade Union Confederation (ETUC) in the EU social dialogue requires that affiliated Member State trade union confederations participate actively in its internal processes, and are engaged by them. If the social dialogue is to succeed, much greater provision of resources needs be made than presently exists.

Attention should be paid to the implications for the autonomy of Member State trade unions, particularly where this autonomy is guaranteed in national laws. Procedures need to be streamlined in order to define negotiating mandates for the EU social partners and to obtain confirmation from affiliated organisations.

16. Commission Communication concerning the application of the Agreement on social policy, COM (93) 600 final, Brussels, 14 December 1993; para. 24.

(b) Albany

(i) The opinion of Advocate General Jacobs

In cases referred to the European Court of Justice[17] by the Netherlands courts under Article 177 (now Article 234) of the Treaty, the issue was the relationship between the EC rules on competition in Article 85(1) (now Article 81(1)) of the Treaty,[18] and collective agreements between representatives of employers and employees.[19] Advocate General Jacobs declared that the cases:[20]

> *"raise the fundamental issue of the relationship between the prohibition contained in Article 85(1) (Article 81(1)) of the Treaty and collective agreements concluded between representatives of employers and employees, an issue which the Court has not yet had occasion to consider".*

In his Opinion, Advocate General Jacobs denied the existence of a fundamental trade union right to collective bargaining in EU law and stated that collective agreements have only limited protection from EU competition rules. The Opinion includes important statements on three questions. First, does Community law protect rights of association and to take collective action? Secondly, 'is there a fundamental right to bargain collectively'? Finally, are collective agreements exempt from EC law's

17. *Albany*; Cases C-67/96, C-l 15-117/97 and C-219/97, above, note 5.

18. This reads:
'The following shall be prohibited as incompatible with the common market; all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts'.

19. The specific question was (para. 68): 'is Article 85(1) (Art. 81(1)) of the Treaty infringed where representatives of employers and employees within a particular sector of the economy agree collectively to set up a single sectoral pension fund with an exclusive right to administer the collected contributions and apply jointly to the authorities to make affiliation to the fund compulsory for all persons belonging to that sector?'

20. Para. 79.

competition rules? The Advocate General's Opinion will be examined on each of these questions.

a. Rights of association and to take collective action – protected by Community law

The Advocate General stated:[21]

> *"The Community legal order protects the right to form and join trade unions and employers' associations which is at the heart of freedom of association.*
>
> *In my view, the right to take collective action in order to protect occupational interests in so far as it is indispensable for the enjoyment of freedom of association is also protected by Community law".*

This conclusion is welcome and should be exploited. However, its limitations should be recognised. The implication is that *only* the right to form and join, the heart of the freedom of association, is protected. Other aspects of freedom of association may not be protected.

The right to take collective action is subjected to two conditions. First, it must be 'in order to protect occupational interests'. A conflict could go beyond narrow 'occupational interests'. Secondly, the right to strike is protected only to the extent of its link to freedom of association. So most industrial action after the employer had recognised a trade union would not be protected.

b. Is there a fundamental right to bargain collectively? The Advocate General concluded in the negative:[22]

> *"...it cannot be said that there is sufficient convergence of national legal orders and international legal instruments on the recognition of a specific fundamental right to bargain collectively".*

There is no analysis of national legal orders in the Opinion. His conclusion is surprising because the Opinion, at another point, refers to German law:[23]

21. Paras. 158–159.
22. Para. 160.
23. Para. 91.

> *"The Bundesarbeitsgericht [Federal Labour Court] stated ... that collective bargaining was one of the activities protected by the fundamental rights granted by Article 9(3) of the Grundgesetz (German Basic Law)".*

The Advocate General dismissed the ILO Conventions,[24] and rejected the Community Charter of Fundamental Social Rights of 1989,[25] the Council of Europe's Social Charter of 1961[26] and the European Convention on Human Rights as supporting a fundamental right to collective bargaining. This is not consistent with Professor Jacobs writing before he became Advocate General:[27]

> *"... now that all the Member States of the European Communities have ratified the Human Rights Convention, the material provisions of the Convention can reasonably be considered as part of the law common to the Member States of the Communities, even though not all of them recognize the Convention as part of their domestic law".*

(c) Are collective agreements exempt from EC competition rules?

The Advocate General's view was that there are justified limitations on the alleged right to bargain collectively, including the restrictions imposed by the EC's competition rules, notably, Article 85(1) (now Article 81(1)).[28] He was not deterred when the Commission pointed out that this meant most collective agreements would be prohibited and void.[29] In his view:[30]

> *"The authors of the Treaty either were not aware of the problem or could not agree on a solution. The Treaty does not give clear guidance. In those circumstances one has to draw a line according to established principles of interpretation".*

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24. He did not mention that all Member States have ratified ILO Conventions Nos. 87 and 98. Convention No. 98 is dismissed in two sentences; para. 147.
25. Para. 37: 'very limited legal effects'.
26. Para. 146. The Treaty of Amsterdam amended Article 117 (now 136) EC and the Preamble to the Treaty on European Union to make the 1989 and 1961 Charters obligatory reference points.
27. Jacobs, *The European Convention on Human Rights* (Oxford: Clarendon Press, 1975), p. 279.
28. Para. 161.
29. Para. 175.
30. Para. 179.

The line drawn by the Advocate General was as follows:[31]

> *"Since the Treaty rules encouraging collective bargaining pre-suppose that collective agreements are in principle lawful, Article 85(1) cannot have been intended to apply to collective agreements between management and labour on core subjects such as wages and other working conditions. Accordingly, collective agreements between management and labour on wages and working conditions should enjoy automatic immunity from antitrust scrutiny...*
>
> *Nevertheless I consider that the proposed antitrust immunity for collective agreements between management and labour should not be without limitations".*

Three conditions were posed for collective agreements to achieve legality in the EU:[32]

> *"[My] conclusion on antitrust immunity for collective agreements is that collective agreements between management and labour concluded in good faith on core subjects of collective bargaining such as wages and working conditions which do not directly affect third markets and third parties are not caught by Article 85(1) of the Treaty".*

These conditions raise more questions than they answer.

For example, Article 85(1) applies to the implied agreement between the employers making the collective agreement. The criterion of good faith applies to this implied agreement:[33]

> *"The issue is whether the implied agreements between employers – as far as they are not covered by antitrust immunity – 'have as their object or effect the prevention, restriction, or distortion of competition' within the meaning of Article 85(1)".*

31. Paras. 179, 186.
32. Para. 194.
33. Para. 245.

It appears that the implications for employees or trade unions have no bearing on the legality of the collective agreement. Similar problems arise with regard to questions of what constitute 'core subjects of collective bargaining such as wages and working conditions' and which agreements 'do not directly affect third markets and third parties'.

Of particular interest to British labour lawyers following EC labour law is that Advocate General Jacobs perceived the issue in terms of an 'immunity' of collective agreements from competition law ('an antitrust immunity'), an approach derived from the history of trade union law in Britain (the Trade Union Act 1871) and the USA (the Clayton Antitrust Act 1914). In contrast, the continental European approach of fundamental and positive trade union legal rights would have formulated the issue in terms of a 'right' of trade unions to enter into collective agreements.

Jacobs' Opinion meant that the legal protection of many, if not most collective agreements, painfully achieved over decades of struggle by trade unions in the Member States (in the UK, by granting immunity from judicial doctrines on restraint of trade, beginning with the Trade Union Act 1871) was now potentially threatened by the supremacy of EC competition law. The Opinion seemed to offer to employers a weapon to challenge collective agreements, and competition lawyers began to raise questions in the professional legal literature about what trade unions could and could not demand in collective agreements.

(ii) The decision of the European Court

On 21 September 1999, the European Court of Justice handed down what may be one of its most important labour law decisions.

The Court rejected the Advocate General's contention that collective agreements were in conflict with the competition provisions of the EC Treaty. Unusually, the Court did not mention the Advocate General's Opinion, either on this issue, or on the issue of fundamental trade union rights.

Instead, the Court emphasised the social policy objectives found in Articles 2 and 3 of the EC Treaty. These are to be given at least equal weight to competition policy objectives. More significant in the long term was the Court's decisive pronouncement that its conclusion acknowledging the legal status of collective agreements was justified by

provisions in the Social Chapter (the Agreement on Social Policy, after the Amsterdam Treaty, now Articles 138–139 of the EC Treaty) which explicitly supports social dialogue and collective bargaining between employers and workers, including at EU level.

While there are still questions as to the precise scope of the rights protected by the Court, its decision has at least two potentially fundamental implications for the future of labour law, both in the EC and in the UK.

First, EC labour law is not following the much criticised path of UK labour law, which has traditionally regarded trade unions and their collective agreements as merely enjoying special 'immunities' or 'privileges'. Instead, EC social policy acknowledges that there are trade union rights with equal or greater status than competition law.

These trade union rights derive support from the EC Treaty Articles 2 and 3. However, the future significance of the Court citing these provisions may be affected because, although they applied in the *Albany* case, they were later re-drafted and re-structured by the Treaty of Amsterdam.

Particularly important, therefore, is the Court's reliance in the *Albany* judgment on the provisions of the Social Chapter, now reinforced by their insertion into the EC Treaty by the Treaty of Amsterdam. The EC Treaty itself now not only encourages and recognises social dialogue and collective agreements at EU level, but authorises their mandatory extension in the form of Council directives.

Secondly, the success of the European Trade Union Confederation (ETUC) in achieving the agreement of 31 October 1991, which became the Social Chapter and is now in the EC Treaty, may now be seen to have been even more important than previously realised. It enabled the Court in *Albany* to assert that the EC Treaty protected collective agreements.

This has implications for labour laws in the Member States, including in the UK, which attempt to restrict trade union rights guaranteed by the EC Treaty. For example, if Member States try to constrain collective agreements by invoking competition law, they will encounter the EC law's protection of trade unions against competition law.

It highlights how the struggle by the European trade union movement through the ETUC to obtain trade union rights at EU level is of vital importance for the protection of trade union rights in the Member States, in the face of unforeseeable challenges from the EC law emerging from the economic and monetary union of the EU.

There are presently initiatives to enshrine fundamental rights in the EC Treaty, aimed at the Intergovernmental Conference scheduled for the end of 2000. These require careful scrutiny, not only to ensure that trade union rights are safeguarded, but that the existing rights recognised by the Court in *Albany* are not diminished by any new formulation.

3. Formulating trade union rights in EU law: Concepts and methodology

Fundamental trade union rights in the European Union need to address the different historical, legal and industrial relations traditions of the fifteen Member States. A detailed comparison of national laws produces all the well-known problems of harmonisation.

For example, what is included in the scope of 'freedom of association? If this right was to be included in EU law, would it be necessary or desirable to expressly include other rights (the right to collective bargaining/ collective agreements, the right to strike/take industrial action), or could these be assumed to be part of a right to 'freedom of association'?

To start from formulations of the concept in the laws of the Member States is to immediately encounter all the problems of different national traditions. It is unlikely that there will be exact legal equivalence in the meaning of 'freedom of association' in British or Irish law, 'liberté syndicale' in French or Belgian law, 'Koalitionsfreiheit' in German or Austrian law, or 'libertà sindacale' in Italian law. For example, in Sweden, freedom of association includes the right to take advantage of union membership and to work for the organisation; in the Netherlands, the right to participation through works councils (an institutional issue) is not included in freedom of association (self-organisation), which is tied to trade unions;[34] in Germany, it took twenty-five years of doctrinal debate

34. This distinction does not make sense in countries without works councils.

before the right of association guaranteed in the constitution was generally held to imply the right to strike.

It is not useful, therefore, to compare and contrast the meanings of the concept in each Member State. Rather than a detailed comparison, national laws on freedom of association should be analysed in order to break down the concept into a number of separate elements. Different Member State concepts of 'freedom of association' include some, many or even all of the elements identified. But there is no uniform pattern. The concepts of freedom of association in different Member States often overlap. But that does not mean they are the same. Beyond the areas of overlap, different Member States will include some elements and exclude others.

Analysis of Member State laws reveals that it is very difficult to separate off some trade union rights which all Member States agree are not included in the principle of freedom of association. The methodology of this paper, therefore, is to identify those elements of trade union rights which all, or most, Member States agree are protected. On this basis, it should be possible to determine which of these elements (where there is consensus) could be assembled into a principle of 'freedom of association' to be implemented at EU level.

Formulations of trade union rights could be made which resemble overlapping or, in some cases, concentric circles. For example, a narrow formulation of rights might embrace a large number of Member States where such a formulation is acceptable. The extent to which different formulations take in a *wider range of rights*, they will embrace a *lesser number of Member States* which accept that those rights are within the scope of fundamental trade union rights. Nonetheless, a formulation could be adopted which included fundamental trade union rights recognised in all (or most) Member States.

A Research Study on trade union rights in the Member States of the EU was recently carried out for the European Parliament.[35] Drawing on this, an attempt can be made to identify a *common core* of elements of a

35. *Trade Union Rights in the 15 Member States of the European Union*, Research Study for the Committee on Social Affairs and Employment, European Parliament, 1997; Summary translated and published in all EC languages (Luxembourg: Office of Official Publications of the EC).

right of 'freedom of association' which is shared by all, or a majority of the Member States.

The Research Study found that there was unanimous consensus in the EU in favour of five trade union rights: right of association/to join trade unions,[36] not to join trade unions,[37] to autonomous organisation,[38] to trade union activity (including in works councils)[39] and to a legal status for collective agreements.[40] For three of these trade union rights, all or all but one of the Member States have legislation in place.[41] For the other two rights, a majority have legislation in place.[42] These would seem to comprise the elements of a right to 'freedom of association' in all Member States. Beyond this common core, there is a *substantial majority* (10–11 Member States) in favour of trade union rights already in legislative form regarding legal definition (11),[43] information and consultation (including works councils) (10),[44] and extension of agreements (11).[45] There is also a substantial majority (11 Member States) in favour of trade union rights, in either legislative form (L) or through collective practice (CP), regarding financial autonomy (11),[46] or elections/decision-making autonomy (11).[47] There is a *substantial majority*

36. *All* the Member States have *legislation* on the *right of association/to join* trade unions.

37. *All but one* (Sweden) of the Member States have *legislation* on the *right not to join* a trade union. Sweden has collective practice.

38. There are *8* Member States which have *legislation* concerning trade unions as regards *autonomous organisation* (Austria, France, Greece, Ireland, Luxembourg, Portugal, Spain, the United Kingdom). The other Member States achieve this result through collective practice (Belgium, Denmark, Finland, Germany, Italy, the Netherlands, Sweden).

39. *All but one* (Denmark) of the Member States have *legislation* on the *right to trade union activity* (including works councils legislation). Denmark has collective practice.

40. There are *13* Member States which have *legislation* as regards *legal status for collective agreements*. The other Member States (Denmark, Italy) achieve this result through collective practice.

41. Right of association/to join trade unions; right not to join trade unions; right to trade union activity (including in works councils).

42. Right to autonomous organisation; right to a legal status for collective agreements.

43. Austria, Belgium, France, Germany, Greece, Ireland, Luxembourg, Portugal, Spain, Sweden, the United Kingdom. However, the other Member States do not appear to have produced legal definitions.

44. Austria, Belgium, France, Germany, Greece, Luxembourg, the Netherlands, Portugal, Spain, Sweden. Denmark and Finland have collective practice.

45. Austria, Belgium, Finland, France, Germany, Greece, Ireland, Luxembourg, the Netherlands, Portugal, Spain. However, the other Member States do not appear to have formalised collective practice or preclude this possibility (Italy).

46. CP: Belgium, Denmark, Finland, Germany, Sweden;
L: Austria, France, Greece, Italy, Luxembourg, Portugal. In other Member States, there are some externally determined rules on finances (Ireland, Spain, the UK).

47. CP: Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Sweden;
L: Austria, Portugal, Spain. In other Member States, there are some external constraints (Greece, the UK).

(11 Member States) against the closed shop, in either legislative form (10)[48] or through collective practice.[49] But collective practice is ambivalent in Belgium, Denmark and Sweden, and the Netherlands appears to authorise it in certain cases.

Finally, there is a *clear majority* (9 Member States) in favour of trade union rights in legislative form regarding the right to strike[50] and to legal personality.[51] Regarding two other trade union rights: the legal rights to recognition as trade unions, and to collective bargaining of trade unions are not clearly established, either in legislation or collective practice. This is, perhaps, due to the overlap with legal requirements for the establishment of workers' representative bodies (works councils) in dual channel systems.

In conclusion, a formulation could be adopted which included rights of association recognised in all (or most) Member States, as illustrated above.

The question then arises: how would recognition in EU law of such a concept of 'freedom of association' affect the rights recognised in Member States' laws? The issue would probably arise when, in a Member State, a claim based on the EU right of association was contested. An appeal to the national courts would allow for a reference to the European Court of Justice.

The Court could choose a number of interpretations. For example, it could expand the EU law concept to include as many as possible of the elements of the concept of freedom of association which are to be found in Member States' laws. Alternatively, rather than adopt a single interpretation of the right, the European Court could allow it to be applied differently in the different Member States, by leaving its detailed content to be interpreted and applied by national courts. Another alter-

48. Austria, France, Germany, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, the United Kingdom.

49. Finland.

50. Finland, France, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden. Belgium has collective practice. However, the law or collective practice in the other Member States is either ambiguous or negative.

51. Austria, Denmark, Finland, France, Greece, Luxembourg, the Netherlands, Portugal, Spain. But the other Member States appear to either resist this or are ambivalent.

native would be for the Court to confine the right to claims raising issues of a transnational nature, which were not covered by national laws.

In interpreting any formulation of the right at EU level, the European Court of Justice would be able to draw upon a range of sources, including international law, in particular, ILO Conventions, Council of Europe measures and existing EC law, particularly in light of the amendments to the EC Treaty by the Treaty of Amsterdam.

4. Strategic options

A number of strategic options are available to establish a right to freedom of association in EC law. They involve a number of dimensions: which institutions should participate; which processes should be followed; which legal forms should the right assume; over which time period(s) should the strategy (or strategies) be pursued? A simple Table illustrates the links in crude terms between these dimensions:

Table: **Strategic options**

Institutions	Processes	Measures	Time-frame
Member States	Treaty amendment	Treaty provision	long-term
Commission/Council	Legislation	Reg./Directive	medium-term
European Court	Litigation	Court decisions	short-term
Social partners	Social dialogue	EC level agreements	?

Individually, these strategic options do not require explanation. Their advantages and disadvantages can be assessed by those familiar with the nature of the institutions concerned, the processes to be followed, the different legal outcomes of the measures resulting, and the time-duration involved. In particular, the strategies of Treaty amendment and legislation are well known. That of litigation is less so, though courts have been powerful forces in the formulation of fundamental trade union rights in the Member States.

Similarly, in some Member States, fundamental trade union rights have been agreed by the social partners as part of the established 'rules of the game' for industrial relations. Examples include Denmark (September Compromise, 1899), Sweden (December Compromise, 1906) and Finland

(General Agreement, 1944). The ETUC/UNICE/CEEP Social Policy Agreement of 31 October 1991, which became the substance of the Social Policy Protocol of the Maastricht Agreement and is now in Articles 136–139 of the EC Treaty, is a precedent for such a 'Basic Agreement' at EU level between the social partners.

There are complementary strategies, where Treaty amendment, legislation, litigation and social dialogue may stimulate each other. For example, one proposal suggested integrating the 1989 Community Charter of Fundamental Social Rights, including fundamental trade union rights, into the EC Treaty. The proposal would allow for qualified majority voting on EC legislation implementing fundamental social rights. It would also specify a time limit, so that failure to implement fundamental rights would allow for them to become directly effective before the courts, or for the European Parliament to complain to the European Court about the failure to act.[52]

In another example, the Committee on Employment and Social Affairs of the European Parliament tabled its Own-Initiative Report on Transnational Trade Union Rights on 20 March 1998.[53] This Report originally aimed to convey to the Inter-Governmental Conference the views of Parliament on amendments to the Treaty. A first draft of this Report, dated 14 January 1997, was discussed by the Committee in February 1997.[54]

This first draft Report proposed a series of amendments to the Treaty. This included extending EU competence to cover fundamental trade union rights, and making it an EU objective to achieve them. Specifically, this draft Report proposed the inclusion of rights of association at EC level. This was to be implemented through social dialogue:[55]

> "Moreover, the Community shall adopt measures, in accordance with Articles 3 and 4,[56] to implement the rights guaranteed by the Charter of Fundamental Social Rights of Workers of 1989, and, in

52. Bercusson, Deakin, Koistinen, Kravaritou, Muckenberger, Supiot, Veneziani, *A Manifesto for Social Europe* (Brussels: European Trade Union Institute, 1996), in 'A Strategy for Social Europe', Chapter 10, pp. 147–156. Summarised in (1997) 3 *European Law Journal* 189–205.
53. PE 223.118/Fin., Rapporteur: Mrs Ria Oomen-Ruijten.
54. PE 220.024.
55. Proposed Amendment 3, to Art. 2, para. 4 of the Social Policy Agreement (now Art. 137(4) EC).
56. Of the Social Policy Agreement; after Amsterdam, Arts. 138 and 139 of the EC Treaty.

particular, Articles 11–13 of the 1989 Charter (freedom of association and collective bargaining).

In particular, management and labour (the social partners) at Member State level shall seek to implement by agreement the trade union rights guaranteed by these measures, taking account of different national circumstances. Such national 'basic agreements' shall conform to the requirements of directives or framework agreements concluded at Community level."

This draft of February 1997 proposing Treaty amendments was overtaken by the Treaty of Amsterdam of June 1997. Instead, the draft Own-Initiative Report of 20 March 1998:[57]

Confirms its demand for enshrining in particular the fundamental transnational trade union rights (right of association including the right of collective bargaining and trade union action) in the Treaty on European Union;

Considers that the trade union organisations should be involved in establishing trade union rights at European level;

Calls on management and labour either themselves or as part of the social dialogue to draw up proposals for negotiating rules and principles.

This draft carefully distinguishes the process of 'establishing *trade union rights* at European level' in which 'trade union organisations should be involved', from the social dialogue process 'to draw up proposals for *negotiating rules and principles*', in which 'management and labour' are engaged. It is an open question whether 'trade union rights' at European level can be separated from 'negotiating rules and principles' for the social dialogue at European level.

5. A proposal

Fundamental trade union rights need to be established on the basis of unquestionable legitimacy and consensus. Certain trade union rights,

57. PE 223.118/Fin., paras. 4–6.

established in international, national and EC law, possess that degree of legitimacy and consensus. The EU legislative institutions and the social partners' dialogue offer processes whereby these established standards can be translated into EU law. The final test which must be passed is the approval of the standards established in EU law by the European Court of Justice.

The decision of the CFI in *UEAPME* signals that the European Court would confirm a process whereby fundamental trade union rights were established in EU law. The Court asserted that the social partners could achieve a degree of 'sufficient collective representativity' which would confer on them the requisite *democratic legitimacy* to make an agreement forming the substance of a valid EC directive.[58] The requirement of 'sufficient collective representativity' of the social partners negotiating the agreement/directive was deemed necessary since the directive was not subject to scrutiny by the European Parliament, the indisputably democratically legitimate body.

On the one hand, this confirmation by the European Court that the social partners possess, in the case of the Parental Leave Directive, 'sufficient collective representativity', is welcome. But there are strings attached. The European Court warned that an assessment of 'sufficient collective representativity' was relative to the specific content of the agreement/directive in question. Further, it required the Council and Commission, when deciding to submit or approve the proposal for a directive based on the agreement, to adjudicate, on the basis of specified criteria, whether the social partners achieved 'sufficient collective representativity'. Finally, it claimed that the Court itself could undertake its own assessment of 'sufficient collective representativity', based on its own criteria.

Taken together, therefore, any social partners' agreement which aims to achieve the status of an EC directive faces close scrutiny, not only of its substance, but of the democratic legitimacy of the social partners in terms of their 'sufficient collective representativity'. This poses a potential threat to the autonomy of the social partners, both from the EU institutions (Commission, Council, Court) carrying out this scrutiny, and from the criteria they may choose to apply in their assessment.

58. *UEAPME*, paras. 88–91.

It might, therefore, be a preferable option for the social partners to seek to achieve the necessary degree of democratic legitimacy from the EU institution which the Court has described without reserve as possessing that quality: the European Parliament.

The indications are that the European Parliament is open to approval of fundamental trade union rights through a process which respects the autonomy of the social partners. As indicated by the recent draft Own-Initiative Report of 20 March 1998, it also recognises the primary, even the exclusive, right of *trade union organisations* in the process of establishing *trade union rights.*

At the same time, the Parliament recognises that *negotiating rules and principles* for the European social dialogue need to be established by the *social partners.*

The need is for a *social partners–EU institutional agreement* which will protect the primacy, and autonomy, of trade unions in establishing fundamental trade union rights, establish a framework of negotiating rules and principles for the EU social dialogue and provide the requisite democratic legitimacy required by the European Court. This agreement could provide the basis for the formulation of a legal measure which both enshrines fundamental trade union rights in EC law and establishes a legal framework of negotiating rules and principles for the EU social dialogue.

This is an ambitious agenda. The economic re-structuring which accompanies the onset of EMU will lead to situations de-stabilising national industrial relations systems. The negative response of the national social partners could threaten the success of the European integration project. The responsibility of Member State governments, the EU institutions and the social partners at EU and Member State levels is to create a workable system which can begin to meet this challenge. Time is short.

Fortunately, there is a substantial foundation on which to begin. As regards negotiating rules and principles, there is over a decade of experience of social dialogue at EU level, backed by immense experience of negotiators in the Member States. It would be possible to construct the framework of negotiating rules and principles for the EU social dialogue. Only the political will is needed.

As regards fundamental trade union rights, there is a basis in the trade union rights identified by the European Parliament's Research Study as common to all, or most Member States. These are supported by the unanimous ratification by all Member States of key ILO Conventions and Council of Europe measures.

On this basis, it should be possible to draft detailed proposals for a framework of trade union rights in EU law.

The trade union movement and the European Union: Judgment day

Brian Bercusson (2007) * **

Abstract: *The trade union movement faces a challenge to the legality of transnational collective action as violating economic freedoms in the EC Treaty. How are disparities in wages and working conditions among the Member States to be accommodated? Are national social models protected? Does the internal market allow for trade union collective action? How does EU law affect the balance of economic power in a transnational economy? What is the role of courts in resolving economic conflicts? This article analyses the responses to these questions as referred to the European Court of Justice by the English Court of Appeal and offers some conclusions. The purpose is to highlight the different positions adopted by the old Member States and the new accession Member States as regards the underlying substantive issues, and the options available to the Court of Justice in answering the questions posed.*

I. Introduction

Themes lurking below the surface of the internal market have broken into the light. Coincidentally, the legislative[1] and judicial[2] processes

* Professor of European Social and Labour Law, King's College London. I owe much of what follows to discussions during 2004–2006 in the Task Force, led by Catelene Passchier, Confederal Secretary, established by the European Trade Union Confederation to coordinate the legal teams in the *Viking* and *Laval* cases, in the legal team of the International Transport Workers' Federation, headed by Deirdre Fitzpatrick, Legal Officer, and in the European Trade Union Institute's (ETUI) Research Group on Transnational Trade Union Rights, which I coordinate (Thomas Blanke (Oldenburg), Niklas Bruun (Helsinki), Filip Dorssemont (Utrecht), Antoine Jacobs (Tilburg), Yota Kravaritou (Thessaloniki), Klaus Lörcher (Berlin), Isabelle Schömann (ETUI), Bruno Veneziani (Bari) and Christophe Vigneau (Paris)). I am solely responsible, as usual, for any errors.

** 'The trade union movement and the European Union: judgment day', Brian Bercusson (2007). This article was first published in the *European Law Journal*, 13 (3), 279-308 and is reprinted here with the kind permission of Wiley-Blackwell.

were simultaneously confronted with the same issues. The legislative process is now complete. The result of the judicial process is imminent.[3]

The nature of the EU has sometimes been defined in terms of a 'European social model'.[4] An implicit premise has been that the autonomous trade union movement is the backbone that supports the European social model.[5] The EU social model's industrial relations system was at the heart of these legislative and judicial processes. Judicial responses could precipitate a crisis for the European social model and for the EU,[6] but also could be a harbinger of a constitution responding directly to the social demands of the peoples of the EU, not only indirectly through the economic exigencies of the market.

The focus here is on the litigation. But there are valuable lessons to be learned from the parallel legislative process concerning the Services Directive. The central questions of substance can be formulated as follows:

1. 'Social dumping': how are disparities in wages and working conditions among the Member States of the EU, exacerbated by the accession of new Member States, to be accommodated in EU law?
2. Subsidiarity: are national social models and industrial relations systems to be protected?

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

2. Case C-438/05 *Viking Line Abp OU Viking Line Eesti v. The International Transport Workers' Federation, The Finnish Seamen's Union*; Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareforbundet, Svenska Byggnadsarbetareforbundet, Avdetning 1, Svenska Elektrikerforbundet*. This article focuses on the *Viking* case. For discussion of the *Laval* case, see K. Ahlberg, N. Brunn and J. Malmberg, 'The Vaxholm Case from a Swedish and European Perspective', (2006) 12(2) *Transfer: European Review of Labour and Research* 155. For an earlier commentary on *Viking*, see T. Blanke, 'The Viking Case', (2006) 12(2) *Transfer: European Review of Labour and Research* 251.

3. Written submissions in the two cases were made in 2006; oral submissions were made at the hearings in Luxembourg on 9 and 10 January 2007.

4. B. Bercusson, 'The Institutional Architecture of the European Social Model', in T. Tridimas and P. Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order*, Vol. 2 (Hart Publishing, 2004), pp. 311–331.

5. B. Bercusson and N. Bruun, *European Industrial Relations Dictionary* (European Foundation for the Improvement of Living and Working Conditions, Office for Official Publications of the European Communities, 2005), 'Overview' (55 pp.), especially 4–11 and CD-ROM.

6. The Deputy General Secretary of the Swedish trade union confederation, LO, Erland Olausson, warned that a negative outcome in the *Laval* case could result in Sweden leaving the EU.

3. Trade unions: are the Treaty's provisions on the internal market to be interpreted so as to allow for the activities of trade unions?
4. Economic power: how does EU law affect the balance of economic power in an integrated transnational economy?
5. The courts: what is the role of courts in resolving disputes involving economic conflicts?

The substance of these issues was translated tortuously into ten questions of law put to the European Court of Justice (EC J) by the English Court of Appeal.

In the *Viking* case, there were written and oral submissions to the ECJ by 14 Member States and Norway, as well as the parties and the Commission. In a significant innovation, for the first time in its history, the European Trade Union Confederation (ETUC) intervened by submitting a letter attached to the written submission of the International Transport Workers' Federation (ITF).[7] The submissions addressed some or all of the questions posed by the English Court of Appeal, but often, given their perceived significance, more directly the underlying issues of substance.[8]

After the Introduction (I) and reviewing the facts of the *Viking* case (II), this article analyses the responses to the questions under five headings reflecting the substantive issues corresponding to the ten questions (III–VII) before offering some conclusions (VIII). The purpose is to highlight the different positions adopted as regards the underlying substantive issues, and the consequent options available to the ECJ in answering the questions posed by the English Court of Appeal. But first, the facts.

7. The ETUC is recognised by the EU, by the Council of Europe and by the European Free Trade Area as the only representative cross-sectoral trade union organisation at European level. The ETUC, established in 1973, presently has in its membership 78 national trade union confederations from a total of 34 European countries, as well as 11 European industry federations, making a total of 60 million members.

8. The account of the submissions which follows draws on the written submissions of the parties, the Member States and the Commission, and the notes made by the author at the oral hearing before the ECJ in Luxembourg on 10 January 2007.

II. The facts of the *Viking* case

Viking, a Finnish shipping company, owns and operates the ferry, *Rosella*, registered under the Finnish flag and with a predominantly Finnish crew covered by a collective agreement negotiated by the Finnish Seamen's Union (FSU). During 2003, Viking decided to re-flag the *Rosella* to Estonia, which would allow the company to replace the predominantly Finnish crew with Estonian seafarers, and to negotiate lower terms and conditions of employment with an Estonian trade union.

Negotiations between Viking and the FSU for a new collective agreement for the *Rosella* were unsuccessful and the FSU gave notice of industrial action beginning 2 December 2003. The right to strike is protected by Article 13 of the Finnish Constitution as a fundamental right in Finnish law.

The FSU is an affiliate of the ITF. Pursuant to the ITF's 'flags of convenience' (FOC) policy, affiliates have agreed that the wages and conditions of employment of seafarers should be negotiated with the affiliate in the country where the ship is ultimately beneficially owned. According to the FOC policy, therefore, the FSU would keep the negotiation rights for the *Rosella* after the re-flagging. To support the FSU, on 6 November 2003, the ITF sent a circular letter to all affiliates in the terms requested. On 2 December 2003 a settlement agreement was reached.

On 18 August 2004, shortly after Estonia became an EU Member State, Viking commenced an application in the High Court of Justice (England and Wales) (Commercial Court) for an order to stop the ITF and the FSU from taking any action to prevent the re-flagging of the *Rosella*. Viking was able to start proceedings in England because the ITF has its headquarters in London. On 16 June 2005, the English Commercial Court granted an order requiring the ITF and the FSU to refrain from taking any action to prevent the re-flagging and further requiring the ITF to publish a notice withdrawing its letter to its affiliated trade unions. The judge considered that the actions of the ITF and the FSU were contrary to European law by restricting free movement. On 30 June 2005, the ITF and the FSU appealed against this decision to the Court of Appeal.

In a judgment given on 3 November 2005, the Court of Appeal decided that the case raised important and difficult questions of European law and referred ten questions to the ECJ.

III. Is the ECJ to interpret the treaty so as to prohibit, allow or not cover collective trade union action to combat 'social dumping'? (Question 1: Is there an analogy with *Albany*?[9])

A. The argument

In *Albany*, the ECJ acknowledged that the EC Treaty provisions on competition policy must be conditioned by other Treaty provisions on social policy; specifically, collective action in the form of collective bargaining and social dialogue:

> It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were *subject to* Article [81(1)] of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.
>
> It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as *falling outside* the scope of Article [81(1) EC].[10]

Similarly to the reasoning in *Albany*, the conclusion would be that the free movement provisions of the Treaty, including Articles 43 and 49 EC, cannot be interpreted as negating the social policy objectives pursued by collective agreements by outlawing collective action, which

9. Case C-67/96 with Joined Cases C-115/97, C-116/97 and C-117/97, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR 1-5751.

10. *Ibid.*, paras 59–60 (emphasis added).

falls outside or is not subject to Treaty provisions and is, rather, a matter for Member State regulation.[11]

B. The submissions

Three lines of argument were developed in the submissions as to whether collective action by trade unions is subject to the economic freedoms in Articles 43 and 49 EC.

a) Subsidiarity excludes EC competence to regulate collective action

The argument was that the principle of subsidiarity precludes EC law intervening to regulate collective action by workers and their organisations, an area of law jealously guarded by Member States from EU intervention.[12] The Finnish social model establishes a specific balance between economic freedoms and fundamental rights. Transnational collective action potentially engages courts in different Member States. Viking is attempting to use EU law to require an English court to assess the Finnish social model. This presents grave risks.

The submissions pursuing this line of argument took different positions. Member States taking the view that the collective action of trade unions fell within the regulatory competence of the EC included the Czech Republic,[13] Estonia,[14] Latvia[15] and the UK.[16] Those denying EC competence asserted Member State competence: France,[17] Ireland,[18] Italy[19] and Sweden.[20]

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11. See also Council Regulation (EC) No. 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States [1998] OJ L337/8, Art. 2: 'This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States'.

12. E.g. Art. 137(5) EC: 'The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lockouts'.

13. By virtue of its restrictive effects on the functioning of the internal market, the collective action by the trade unions falls within the scope of Art. 43 EC.

14. Action such as that referred to does not fall outside the scope of the EC Treaty.

15. Collective action falls within the scope of Art. 43 EC.

16. Collective bargaining agreements are expressly made subject to Community law by existing legislation.

17. EC law cannot affect the right of Member States to organise as they think fit relations between workers and employers. EC competence is excluded by Art. 137(5) EC. Hence, collective action is outside the scope of Art. 43 EC.

Others were ambivalent. Denmark took the view that EC law respects different Member State traditions, hence there was no EU competence to regulate trade union action in accordance with national law. However, the collective action in this case was not covered by the right of industrial action, and thus was within the scope of the Treaty, including Article 43.

Finland stated that the ruling in this case may affect the substance and nature of the right to take industrial action in Finland. The right to take industrial action is an integral part of the right of association and restrictions must be specifically provided for in national legislation. Finland accepted that Articles 43 and 49 EC might apply to collective action, but concluded that the fact that a national trade union may take industrial action in accordance with national law is not contrary to Article 43 and Article 49 EC.

In light of the acknowledged difficulties facing the ECJ if collective action with cross-border effects was challenged as contrary to free movement provisions, the Commission was less ambivalent. It stated that it was preferable that collective action be governed by national law and disputes left to Member States to resolve.

Providing an overarching historical perspective, the ETUC stated in its letter attached to the ITF written submission:

The precise contours of the roles governing collective action in each Member State are the outcome of different national historical experience ... In the Member States of the EU the rules governing collective industrial action reflect an established equilibrium in the balance of forces between the social partners. It would produce a shock of incalculable magnitude if this equilibrium, carefully constructed over time in different Member States, were to be destabilised by an intervention reflecting Viking's interpretation of Community law.[21]

18. The principle of subsidiarity and the need to respect and uphold national traditions should be important considerations.

19. Core industrial relations activities fall within Title XI EC and should be regulated by national law.

20. The assessment of whether and, if so, how collective trade union measures are to be regulated is a matter for the Member States and they have a wide margin of discretion.

21. Paragraphs 4 and 6.

Finally, the ITF and FSU, in their oral submission of 10 January 2007, highlighted the recent adoption on 12 December 2006 of the Services Directive,[22] concerned to protect *national* social models, in particular, as regards collective bargaining, collective agreements and collective action. The statement in Article 1(6) that the directive on services in the internal market is not to affect 'the relationship between employers and workers, *which Member States apply in accordance with national law which respects Community law'*, and, in Recital 14, that it does not affect labour law, that is 'the right to strike and to take industrial action *in accordance with national law and practices which respect Community law'*, was read as reaffirming the autonomy of national social models.[23]

The FSU and ITF argued that these provisions of the directive on services in the internal market would be absurd if Articles 43 or 49 EC on free movement were interpreted as Viking proposes: to not only affect but to override the Services Directive's respect for 'the right to negotiate and conclude collective agreements, the right to strike and to take industrial action in accordance with national law and practices ...'.

b) Collective action falls within EC social policy, is not subject to and falls outside the scope of free movement provisions

The parties, understandably, took different views. The ITF and FSU followed the line taken by the ECJ in *Albany:* collective action taken by a trade union or an association of trade unions which, by virtue of its nature and purpose, promotes the objectives of the Community's social policy falls outside the scope of Article 43 and 49 of the EC Treaty. Viking argued that there is nothing in the Treaty to justify treating social policy (Title XI) any differently from any other policy.[24]

The Member States had divided views. The view that collective action by trade unions falls within the scope of Article 43 was upheld by new Member States (the Czech Republic,[25] Estonia,[26] Latvia,[27] Poland[28]),

22. Directive 2006/123/EC, note 1 *supra.*
23. *Ibid.*, Art. 1(6) and Recital 14 (emphasis added).
24. Even if Title XI EC took priority, not every trade union activity falls within Title XI and the scope of the right to take collective action is limited.
25. The collective action by the ITF and FSU was not aimed at achieving the objective of Title XI.
26. Free movement is a cornerstone of the internal market.

also by the UK,[29] and, perhaps surprisingly, Finland.[30] The contrary view was expressed by Austria,[31] France,[32] Ireland,[33] Italy,[34] Norway[35] and Sweden.[36] The Commission was ambivalent.[37] In sum, the Member States were divided. Some were content to accept both EC competence and application of Articles 43 and 49 EC. Others rejected EC competence, and by definition, therefore, application of Articles 43 and 49 EC. Others were ambivalent: there may be EC competence, but Articles 43 and 49 EC did (Denmark) or did not (Finland) apply to the collective action in the case.

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27. EC rules on free movement have a purpose different from competition law, which is narrower. Hence, there is no analogy with *Albany*.

28. Collective action by trade unions cannot be excluded *a priori* from the scope of Art. 43 by virtue of the EC's social policy. Ensuring effective exercise of fundamental Treaty freedoms is a priority objective. Title XI does not give social policy provisions priority over the freedoms. The exclusion in *Albany* is special in nature and not absolute.

29. There is no indication in the Treaty that social rights should have primacy over other provisions. Article 140 EC states it is 'without prejudice' to other Treaty provisions. *Albany* provides at best a limited immunity. Not all collective agreements conflict with free movement.

30. Social objectives of industrial action do not preclude application of free movement provisions. Under Title XI the EC does not have authority to regulate the right of association or the right to strike. However, absence of Community authority does not constitute an obstacle to application of provisions on free movement. *Albany* does not change this.

31. A collective measure such as in this case does not fall within the scope of Arts 43 and 49 EC.

32. Application to trade unions' collective action of Treaty rules on free movement would undermine the right of workers to take action to defend their interests.

33. Core industrial action for the purposes of Title XI is outside Art. 43 EC (with certain conditions). Every person should be free to withdraw his labour. The actions of a trade union engaging in industrial action for the express benefit of its members should be outside Arts 43 and 49 EC.

34. The competition provisions of the Treaty (Art. 81) clearly do have horizontal direct effect and can be enforced by private parties. Yet the ECJ in *Albany* refused to extend them to collective agreements. The ECJ has essentially held that social rights have primacy over competition rules. *A fortiori*, Arts 43 and 49 EC, which do not have horizontal direct effect, should not apply to collective action or agreements.

35. The test in *Albany* was whether the nature and purpose of the agreement in question justified its exclusion. The possible conflicts inherent in the relationship between social policy and internal market policy raise identical questions. Collective bargaining would be rendered without substance if the social partners are not given the means to protect their interests. *Albany* should thus be applied to the right to collective action in this case; it is outside the scope of Art. 43 EC by virtue of the EC's social policy.

36. The application of collective agreements to regulate pay and conditions of employment is a basic feature of the European social model.

37. Although the Commission agreed that Arts 43 and 49 EC are to be interpreted so that social policy falls outside them, the Commission also agreed with the UK that *Albany* was not generally applicable, in light of *Schmidberger* (Case C-l 12/00, *Eugen Schmidberger, Internationale Transporte und Planzuge v. Republic of Austria* 12003] ECR 1-5659). But although there is no social policy exclusion, this raises real problems in that any collective action with cross-border effects would have to be justified before the ECJ, and, the Commission asked, is the ECJ best placed to undertake this task? Hence its position on the subsidiarity issue, stated above. Germany was also ambivalent: collective action does not fall *per se* outside the scope of Art. 43.

Once again, the ETUC provides an historical perspective in its letter attached to the ITF's written submission:

The evolution of the legal rules in Europe may be characterised as a progression from repression, via toleration, to recognition...[38] The *Viking* case is an attempt to turn the clock back, not merely to the period of toleration, but to that of repression. Viking's arguments, reminiscent of ancient doctrines of restraint of trade and collective conspiracy invoked before national courts in historic labour law cases of the nineteenth century, interpret the language of the Treaty of Rome as reflecting long-abandoned doctrines condemning collective action by workers.[39]

c) Interpreting Title III consistently with the social policy provisions of Title XI

The third option proposed in the submissions of a number of Member States was that the provisions in Title III are to be *interpreted* so as to be consistent with the social policy provisions of Title XI of the Treaty.

The Belgian Government submitted that Community law cannot be interpreted in such a way that it would automatically impair exercise of the fundamental rights as recognised by the Union and the Member States; the French Government, that Article 43 EC is to be interpreted as meaning that collective action taken by trade unions does not fall within their scope; the Swedish Government, that Article 43 is not to be interpreted in such a way as to prevent a trade union or a federation of trade unions from taking collective measures to protect their members' interests.

The German Government noted that the ECJ had formulated a concept of restriction of fundamental freedoms in broad terms, but in this case there should be strict interpretation, to take into account principles of freedom of contract and freedom of association. The Irish Government similarly argued that the right of establishment should not be inter-

38. A. Jacobs, 'Collective Self-Regulation', in B.A. Hepple (ed.), *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945* (Mansell, 1986), Chapter 5, pp. 193–241.

39. Paragraphs 4–5.

preted so broadly as to call into question competence reserved to Member States under Title XI, and that core industrial relations activities fall within Title XI and should be regulated by national law. The Finnish Government, citing *Albany*, argued that the social objectives of collective agreements may not be undermined by Community law. That would be the consequence if trade unions were unable to take industrial action to achieve a collective agreement. In its oral submission, the Commission was succinct: Articles 43 and 49 EC are to be interpreted so that social policy falls outside them.

Again adopting a longer historical perspective, the ETUC's letter attached to the ITF submission shared this approach:

> The ETUC considers that the relationship between economic freedoms of movement and fundamental social rights to collective action should be consistent with the evolution of the EU from a purely economic Community establishing a common market to a European Union with a social policy aimed at protecting workers employed in the common market who are also citizens of the Union ...
>
> Economic provisions of the Treaty have to be interpreted in light of changes in the scope of activities of the EU ...
>
> The ETUC considers that the correct analogy with *Albany* is that the free movement provisions of the Treaty must be interpreted consistently with the fundamental right to collective action, as a general principle of EC law, in accordance with *ordre communautaire social*, i.e. principles which reflect the general *acquis communautaire* of social policy of the EU and, in particular, the regulation of ment and industrial relations in the Treaty and relevant secondary legislation.[40]

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

40. Paragraphs 14, 16 and 18.

IV. May undertakings invoke the economic freedoms provided by the Treaty against trade unions? (Question 2: Does horizontal direct effect apply?)

A. The argument

The issue is whether Articles 43 and 49 EC have horizontal direct effect so as to bind trade unions such as the FSU and the ITF in circumstances where, as here, they are seeking to bargain collectively or take collective action. The general consensus in the submissions was that these Treaty provisions do not have full horizontal direct effect. The submissions were concerned, rather, with whether the specific actions of the FSU or the ITF could be classified as regulatory or quasi-regulatory. This was because the exceptions to the general denial of horizontal direct effect are cases involving professional associations, as in *Bosman* and *Wouters*,[41] which have the primary aim of regulating access to the labour market, hence falling foul of free movement.

B. The submissions

In its written observations, Viking argued that collective bargaining agreements entered into by the FSU do regulate employment in a collective manner, that in Finland it is collective agreements rather than legislation that set minimum wages and this highlights the quasi-public role of the trade unions under Finnish law.

The FSU argued in its oral submission that to apply horizontal direct effect to collective agreements as having regulatory effect would open the floodgates. The immense diversity of national industrial relations and collective bargaining systems means it is scarcely conceivable that each and every collective agreement could be characterised as having the regulatory effect required to fall within the scope of the free movement provisions.[42] Yet national courts could be inundated with

41. Case C-415/93, *Union Royal des Sociétés de Football Association ASBL and Others v Jean-Marc Bosman* [1995] ECR 1-4921; Case C-309/99, *Wouters, Savelbergh, Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR 1-1577.

42. E.g., in the UK, collective agreements lack legal effect and are relatively sparse in their coverage of the workforce and it would then seem absurd to treat them the same as *erga omnes* collective agreements.

complaints that particular collective agreements similarly fall within the scope of Article 43 or 49 EC. Ultimately, the ECJ would be confronted with endless references from national courts asking whether a specific collective agreement in a particular Member State's collective bargaining system possessed the requisite regulatory effect. The English Court of Appeal rightly referred the question to the ECJ on the grounds that it was difficult to contemplate such an outcome.

Nor is it a practical solution to refer the question of whether collective agreements have regulatory effect to national courts. If so, first, criteria would be needed to distinguish regulatory agreements. The major differences among Member States' national industrial relations systems, reflecting different social models, and within national models, among an extraordinary variety of forms and legal effects of collective agreement would make it impossible to devise and then sensibly apply such criteria.[43] Secondly, these criteria would be applied to continual challenges to collective agreements and action, many of which would inevitably be referred to the ECJ. On balance, it is clear and consistent with the EU social policy protecting the autonomy of social partners and the social function of collective agreements to regard them as not subject to the horizontal direct effect of the free movement provisions of the Treaty.

As to the parallel with professional associations regulating access to the labour market, the FSU argued that this was not the case with trade unions engaging in collective action in pursuance of a collective agreement which regulates substantive terms and conditions of employment, not free movement.

Again, the Member States were divided. The view that Article 43 EC is directly applicable also to trade unions was upheld straightforwardly by the governments of the Czech Republic,[44] Estonia,[45] Latvia[46] and

43. This explains the Services Directive's exclusion of collective agreements. See below.

44. Trade unions may not lay down rules in a collective manner, but their action has this effect *de facto*. The ITF has international reach. It has the power to affect the conduct of its members. Cross-border action is the most powerful instrument available to workers.

45. The FSU and ITF are regulatory bodies. Where states leave regulation to private persons, trade unions have legal power comparable to the state. Trade unions are the stronger party and. are able to dictate in practice both hiring and employment conditions.

46. The Scandinavian social model provides for pay and conditions to be laid down not by legislation but by collective agreements. Trade unions thus assume functions of the state.

Poland.[47] Ireland was circumspect.[48] Other Member States took the opposing view: Austria,[49] Belgium, Finland,[50] France,[51] Italy,[52] Germany,[53] Norway[54] and Sweden.[55]

The Commission also took the view that Article 43 EC does not have horizontal direct effect so as to confer rights on a private undertaking which may be relied on against a trade union or an association of trade unions in respect of collective action by that union or association of unions. In contrast, Articles 39 and 49 EC catch provisions adopted in a collective manner as if they were state measures. It follows that Articles 43 and 49 EC apply to regulatory measures adopted by quasi-public bodies. But that is not the situation in this case. The ITF and FSU are not regulatory bodies. The threat to strike and the sending of the circular are not regulatory measures.

In oral submissions, various new and subtle points were raised. For the ITF and FSU, again, the recent precedent of the Services Directive was invoked. The Services Directive sets out rules on freedom of establishment and free movement of services. The directive does this by prescribing

47. ITF members are required to give effect to the circular in accordance with the principle of solidarity and on pain of penalties. Trade unions can be classified as associations exercising regulatory powers.

48. Insofar as industrial action falls within the scope of Art. 43 EC, then a private party, such as the employer, may rely upon that Treaty provision against the trade union.

49. Articles 43 and 49 EC apply not only to states but also to other collective rules, but they apply to non-governmental associations only if these adopt normative rules observed by all independent individuals. The present case is fundamentally different. Neither the ITF nor the FSU is empowered to adopt general rules. In particular, the ITF circular is not obligatory.

50. Articles 43 and 49 EC apply to rules not public in nature but which are designed to regulate, collectively, self-employment and provision of services. Industrial action does not involve measures designed to regulate collectively establishment and services. A trade union merely has the right to negotiate, not to specify terms with which an employer must comply.

51. Trade unions do not have regulatory powers which enable them to ensure measures they adopt are applied, unlike state authorities. The Treaty provisions on free movement impose obligations on Member States, not private undertakings. In contrast, the provisions on competition are addressed to undertakings.

52. Viking is trying to disturb the balance of power in negotiations by seeking to use Arts 43 and 49 EC in a private dispute. This is for the Member States, not for private parties to use.

53. There is no direct effect regarding trade unions. Individual employees achieve equality in negotiations only through trade unions. Trade unions and employers are in a position of equality, not superiority and subordination. Otherwise, there is a risk of limiting the freedom of contract guaranteed by EC law. Direct effect would impose more restrictions as undertakings cannot use the public policy and public security justifications that states can invoke.

54. Negotiations should not be interfered with by governments. Here Viking is asking the ECJ to use EU law to help it by stopping collective action.

55. The ITF circular has no direct effect. The effectiveness of the circular is entirely dependent on the degree of solidarity between members of the ITF.

that free movement is not to be subject to *requirements*,[56] existing *requirements* are to be evaluated,[57] and freedom to provide services is not to be subject to *requirements* as to access or exercise unless these respect certain principles.[58]

The target of the Services Directive is those *requirements* which are deemed to violate the rules on free movement. Article 4 ('Definitions') stipulates that collective agreements are *not* such requirements:

> '*requirement*' means any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of *professional* bodies, or the collective rules of *professional* associations or other *professional* organisations, adopted in the exercise of their legal autonomy. *Rules laid down in collective agreements negotiated by the social partners shall not as such be seen as requirements within the meaning of this Directive*.[59]

The directive's rules on free movement do not apply to collective agreements.

In sum, in the Services Directive, collective agreements are distinguished not only from state measures, but also from those of professional bodies or associations. As they lack the regulatory effect to be deemed *requirements* subject to the Services Directive's rules on free movement, the same argument should apply to Articles 43 and 49 EC.[60]

The German Government argued that trade unions represent the interests of workers and direct effect would affect their freedom of association. Trade unions, like other private actors, are free to pursue their private interests without the constraint of direct effect. Further, Article 137(5) EC militates against horizontal direct effect. Article 137(5) EC excludes harmonising directives on pay, the right of association, the right to strike and lockout. Applying Articles 43 and 49 EC horizontally

56. Article 14 ('Prohibited *requirements*').
57. Article 15 ('*Requirements* to be evaluated').
58. Article 16 ('Freedom to provide services').
59. Article 4(7) (emphasis added).
60. The link is made through the legal basis of the Services Directive: the first and third sentence of Art. 47(2) and Art. 55. See, further, Recitals 5 and 6.

to trade unions and collective action would be effective harmonisation of laws of Member States – by outlawing collective action – thereby circumventing the exclusion of Article 137(5) EC.

France pointed to a parallel with the horizontal direct effect of directives. Direct effect of directives applies vertically – to the state – but also to 'emanations of the state'. Criteria of 'emanations' were laid down in *Foster v. British Gas:* bodies established/controlled by the state, endowed by the state with regulatory powers and providing a public service.[61] If the same criteria were to apply to horizontal direct effect of Articles 43 and 49 EC, trade unions are not such bodies. There is no delegation of state authority.

C. Interim conclusion 1

By now a certain pattern has emerged: the preponderance of views that trade union collective action is not outside the scope of the free movement provisions (rejecting the analogy with *Albany)* and hence subject to the direct effect of those provisions is the view of governments of the new Member States. The contrary view, by and large, is that of governments of the old Member States.

The implications for trade union industrial action against undertakings seeking to relocate their establishments to or provide services from the new Member States with their lower labour costs are clear.[62] If the view of the new Member States is upheld, undertakings engaged in cross-border economic activities may seek to obtain court injunctions halting trade union collective action even when lawful in the Member State where the action takes place. National social models based on the lawfulness of collective action are overruled by the direct effect of EU law where there is a cross-border element. The implications for 'social dumping' are potentially dramatic.

But there are further issues and questions to address before that becomes the final conclusion.

61. Case C-188/89, *Foster v British Gas* [1990] ECR1-3313.
62. See Table 1 at the end of this article.

V. Is the nature of the Internal Market envisaged by the Treaty such that collective trade union action is to be regarded as a restriction on, or as an integral and essential component of its effective functioning? (Question 3: Is collective action a restriction on the Internal Market?)

A. The argument

The question is whether the restrictions on free movement envisaged by the Treaty, even as later expansively interpreted by the ECJ, can be interpreted to apply so as to prohibit collective action or proscribe collective agreements. This argument failed with respect to the competition provisions of the Treaty in *Albany*, but has now been resurrected under the free movement provisions.

The rationale for free movement is market integration. Market integration is premised on market efficiency. Market efficiency requires collective action by workers and trade unions to ensure their voice is heard and their interests are taken account of. As stated in the ETUC's letter attached to the ITF's written submission:

> Developments in EC law since 1957 support the view that EC law, like national legal and constitutional orders and international labour law, recognises and promotes collective self-regulation, including the legality of collective action ...
>
> More detailed regulation of labour standards and working conditions is normally to be left to social dialogue, negotiations between the social partners. EU law highly values this process of improvement of living and working conditions and therefore protects it in various ways.[63]

Drawing on concepts developed by Albert Hirschman,[64] Miguel Poiares Maduro develops an argument that 'voice' includes 'worker participation and strikes', concluding:[65]

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63. Paragraphs 9 and 11.

64. A. Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States* (Harvard University Press, 1970).

> In this respect, the system requires a set of social rights that can be said to guarantee participation and representation in market decisions and, by internalizing costs which tend to be ignored in those decisions, increase efficiency. Those social rights are related to forms of voice and exit in the market ... rights of participation and representation such as the freedom of association, the right to collective bargaining, and the right to collective action should be considered as instrumental to a fully functioning integrated market which can increase efficiency and wealth maximization.[66]

The Commission constantly cites the role of social dialogue as central to the EU economic model.[67] There is no contradiction between market integration, economic free movement and trade union collective action. The Treaty's provisions on free movement are to be so interpreted.[68]

Economic provisions of the Treaty have come to be re-interpreted in light of changes in the scope of activities of the EU. For example, the Commission must now take employment into account due to Article 127(2) EC inserted by the Treaty of Amsterdam, which requires that:

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

66. Maduro points out that 'labour lawyers try to reinstate the primacy of social rights over the market through common regulations at the European level'; Maduro, 'Striking the Elusive Balance between Economic Freedom and Social Rights in the EU', *ibid.*, p. 465.

67. The introduction to the Commission's Communication on 'The European social dialogue, a force for innovation and change' COM (2002) 341 final, states, at p. 6: 'The social dialogue is rooted in the history of the European continent, and this distinguishes the Union from most other regions of the world'.

68. The ECJ recognised the implications of the transformation from the purely common market nature of the EU in Case C-50/96, *Deutsche Telekom AG v. Schroder* [2000] ECR1-743. The court concluded, at para. 57, '... it must be concluded that the *economic aim* pursued by Art. 119 [now 141] of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is *secondary to the social aim* pursued by the same provision, which constitutes the expression of a *fundamental human right*' (emphasis added). There is similar reasoning in the Opinion of Advocate General Tesauro and the judgment of the ECJ in Case C-13/94, *P. v. S. and Cornwall County Council* [1996] ECR 1-2143.

'The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Community policies and activities'.

Even before, in interpreting the Treaty provisions on competition, the ECJ has explained that an agreement's beneficial effect on employment 'since it improved the general conditions of production, especially when market objectives are unfavourable, comes within the framework of the objectives to which reference may be had pursuant to Article [81(3)]'.[69] By way of analogy to social policy, a survey suggests that:

> The most recent decisions in the field of environmental agreements come close to making environmental policy a 'core' factor in competition cases. I have suggested that this is so because the Commission is transforming the definition of economic efficiency to include the concept of sustainable development. Another possible argument in support of the approach in these cases is that the duty imposed by Article 6 EC to integrate environmental protection in the Community policies and activities referred to in Article 3 EC means that environmental protection is normatively superior to the core values of EC competition law, and may thereby act as a 'trump' to justify even anticompetitive environmental agreements if these are necessary to safeguard the environment.[70]

The ECJ's decision in *Albany* is a crucial illustration where the court acknowledged that the EC Treaty provisions on competition policy must be conditioned by other Treaty provisions on social policy; specifically, collective action in the form of collective bargaining/social dialogue. Of these cases it is said:[71]

> The vital point, however, is that, as in *Wouters*, ... the Court in *Albany International* did not deny that the rules restricted competition. But it placed its investigation into the scope of Article 81(1) in a wider context. The Treaty competition rules are porous: the very

69. Case 26/76, *Metro-SB-Großmärkte GmbH & Co LG v. Commission & SABA* [1977] ECR 1875, para. 43. See the discussion in K. Mortelmans, 'Towards Convergence in the Application of the Rules on Free Movement and on Competition', (2001) 38 *Common Market Law Review* 613.

70. G. Monti, 'Article 81 EC and Public Policy', (2002) 39 *Common Market Law Review* 1057, at 1078.

71. S. Weatherill, *Cases and Materials on EU Law* (Oxford University Press, 6th ed., 2003), p. 526.

> scope of Article 81(1) is influenced by policy objectives located elsewhere in the framework of EC law and policy. It is worth recalling that both Articles 28 and 49 EC on the free movement of goods and services respectively offer similar insight into the way in which the Court interprets EC trade law in a manner that seeks to avoid trampling other regulatory objectives underfoot. In fact, an apparent convergence between the assumptions of EC law of free movement and EC competition law emerges from the ruling in *Wouters*. The Dutch rules prohibiting multi-disciplinary partnerships between members of the Bar and accountants were not only attacked as violations of Article 81 but also as violations of Articles 49 (ex 59) EC concerning the free movement of services ...[72]

B. The submissions

The ITF and FSU, in their oral submission, were able once more to invoke the recently adopted Services Directive in support. The (amended) Services Directive provides that the rules on freedom of establishment and free movement of services are not to affect labour law and employment conditions.[73] That employment conditions, etc. are not affected by, and, conversely, do not affect, free movement is further supported by the provision in Article 16(3):

> The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. *Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements.*[74]

72. Weatherill concludes: 'The key to this case seems to be a refusal explicitly to accommodate a "rule of reason" within EC competition law but a readiness to use the interpretative rule that restrictions on competition be seen in their full legal and economic context as a basis for permitting Article 81(l)'s scope to be affected by a range of (loosely stated) public interest considerations'; *ibid.*, p. 527.

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

74. Emphasis added. See also Recital 86.

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

In its written submission, Viking had referred to two factual developments since the Court of Appeal hearing. Viking had agreed a new collective bargaining agreement with the FSU, though still above Estonian levels. It had also ordered a new vessel suitable for use on the route, but argued that in order for it to be profitable, it would have to be flagged to Estonia and subject to an Estonian collective agreement. It argued that the Treaty precluded collective action restricting its economic freedom to do so. In its oral submission, Viking reiterated that, as the ship was running at a loss and Viking would have to sell it, the collective action and agreement was damaging its economic freedom.[75]

Again, the submissions of the Member States revealed divisions. Some were convinced of the restrictive effect of collective action on economic freedom: the Czech Republic,[76] Estonia,[77] Latvia[78] and Poland.[79] The

75. In contrast, the absence of any restriction on Viking's rights was highlighted by events subsequent to the Court of Appeal's judgment. Viking and the FSU concluded a collective agreement which was to remain in force until 2008. This did not dissuade Viking from carrying out its plans to set up a place of establishment in Estonia. In fact, it set up an Estonian subsidiary – Viking Eesti. Also, it appeared the financial position of Viking is buoyant and passenger traffic is on the increase. Other recent events in the maritime sector in the Baltic also served to illustrate how, in accordance with the well-functioning Finnish social model, the market operates effectively to balance the economic interests of management and labour. For example, the FSU concluded a collective agreement covering three Estonian vessels, Estonian flag and Estonian crew, which serve the route between Helsinki and Tallinn and Helsinki and Rostock (in Germany).

76. By virtue of its restrictive effects on the functioning of the internal market, the collective action by the trade unions falls within the scope of Art. 43 EC. The mere threat of collective action may constitute a restriction of the parent company's right of establishment under Art. 43 EC.

77. Entering into collective bargaining is a legitimate objective of the activity of a trade union. However, the actions became a restriction because of the measures accompanying the proposal to enter into negotiations (the ITF circular, the FSU's notice of a strike).

78. Where a trade union or association of trade unions takes collective action, that action constitutes a restriction for the purposes of Art. 43 EC. Threatened or actual collective action constitutes a restriction. The fact that a worker of a Member State receives a lower wage than a worker of another Member State cannot be considered unfair if the worker freely agreed to non-discriminatory conditions. The FSU does not have the right to take action to guarantee Finnish pay levels to workers in foreign countries. The wages paid to Finnish trade union members are higher than paid to others operating the same service. This distorts competition.

UK's position reflected its view that *Albany* was not applicable by way of analogy to this case as it was attributable to a specific tension between Treaty Articles on competition and social policy. Other Member States were adamant that collective action and collective agreements do not constitute restrictions on economic freedom: Belgium,[80] Germany,[81] Italy,[82] Finland,[83] Ireland,[84] Norway[85] and Sweden.[86]

C. Interim conclusion 2

The argument over whether collective bargaining, collective agreements and collective action are essential to the effective and equitable functioning of the labour market goes to the heart of the debates over European labour regulation. Is European labour law to include a collective dimension, or is it confined to an EU law of individual employment? Are the social models of the Member States, historically

79. The FSU's action was a *de facto* restriction of Viking's freedom of establishment, including its freedom to dispose of property.

80. The mere threat of collective action cannot be regarded as a restriction.

81. Threatened or actual collective action by a trade union or association of trade unions does not constitute a restriction. Individual employees achieve equality in negotiations only through trade unions. Trade unions and employers are in a position of equality, not superiority and subordination. Otherwise, there is a risk of limiting the freedom of contract guaranteed by EC law. The ECJ has formulated the concept of restriction of fundamental freedoms in broad terms. But in this case there should be strict interpretation, to take into account principles of freedom of contract and freedom of association.

82. Collective action taken by a trade union or association of trade unions in order to compel that undertaking to comply with a binding collective bargaining agreement in order to prevent the provisions of that agreement being circumvented by re-flagging the vessel is not a restriction within the meaning of Art. 43 EC. Flags of convenience are a flagrant circumvention of national laws and collective bargaining agreements, thereby entailing a distortion of competition and a breach of the rights of workers in the maritime sector.

83. The number of occurrences of industrial action has fallen continually as the trade union system has developed. A properly functioning system of negotiation between the two sides leads to settlement in the majority of cases without industrial action. Restricting the right to take industrial action would compromise the functioning of the labour market system. Without the right to take industrial action, the opportunities for employees to influence their terms and conditions would be reduced.

84. Core activities of trade unions are not subject to Arts 43 and 49 EC. There is a limit to union activities, but not where the purpose is to protect the welfare of trade union members.

85. The right of establishment and to provide services cannot be exercised in a way that eliminates the right to take collective action.

86. The measures at issue are not intended directly to prevent Viking from re-flagging. The measures are intended to protect pay and conditions of employment. There is a collective agreement presently in force between the parties. The aim of the trade unions' measures is to oppose a reduction in pay for the crew who are members of the FSU. The preservation and improvement of pay conditions constitute a fundamental interest for workers and one of the foremost reasons to join a trade union.

rooted in the social dialogue, sustainable unless the EU supports the collective dimension of labour relations? The discrepancy between the growing power of employers benefiting from European transnational economic integration, and the relative weakness of a declining labour movement which remains largely confined to national boundaries in its collective bargaining and collective action has profound implications for the future of the European social model.

The FOC illustrates how a balance of economic power in an integrated European market may be re-established. It is not surprising that it has come under challenge by employers invoking EC law. Nor that it is defended by the European trade union movement. As put by the ETUC in its letter attached to the ITF's written submission:

> Although the case concerns the specific collective actions of the FSU and the ITF, it is of the greatest importance to acknowledge that their actions are in no way unusual or exceptional. The FSU and the ITF have taken exactly the same type of collective industrial action as is taken on a regular, normal and systematic basis by organisations of workers everywhere in the European Union. Collective industrial action is part of the ordinary conduct of industrial relations involving the social partners engaged in collective bargaining ...
>
> The restrictions on employers' activities inherent in collective industrial action by workers may – and with the coming about of the internal market this may more frequently be the case – affect cross-border production and transport activities of the employer. However, this was also the case long before the economic integration of the European single market ...
>
> It cannot seriously be contended that the 1957 Treaty is to be interpreted, almost half a century later, to produce a violent overthrow of the norms established in national industrial relations systems ...[87]

The ECJ is confronted with this challenge. The legislative institutions were placed in a virtually identical position when confronted with the Commission's proposed Directive on Services. The outcome of the intensive debate over the Services Directive proclaimed that collective

87. Paragraphs 2, 7 and 8.

bargaining, collective agreements and collective action were not restrictions on free movement of services. The ECJ's response to the same challenge would be wise to follow the conclusion reached by the Member States.

VI. Is transnational collective action discriminatory on grounds of nationality when it protects workers in one Member State? (Questions 4, 5 and 6: Is transnational action directly, indirectly or non-discriminatory?)

A. The argument

The challenge posed in the *Viking* litigation is aimed precisely at the cross-border element in the collective action by the ITF and FSU. Transnational collective action is alleged inherently to entail discrimination on grounds of nationality. The FSU was alleged to be concerned with protecting Finnish workers or Finnish collective agreements, and hence discriminating against Estonian workers and Estonian collective agreements. The ITF's FOC was inherently discriminatory as requiring Viking to negotiate exclusively with a trade union in the Member State where the beneficial owners were established and not in the Member State where the ship was to be registered.

The implications for transnational collective bargaining and collective action in the European single market were clearly understood by the organisation representing trade union confederations in all the EU Member States.[88] Transnational collective action by trade unions in an integrated European economy, like most economic decision-making by enterprises, invariably affects undertakings in more than one Member

88. 'The role of the EU social partners, including the ETUC, in transnational industrial relations at EU level inevitably may entail engagement in disputes with cross-border effects. As part of its role as an association of trade unions, the ETUC, and its affiliates, have been involved in supporting various forms of collective action by trade unions in other Member States. The ETUC, like the ITF, may potentially be engaged when one of its affiliates undertakes collective industrial action and the ETUC would call for solidarity from other ETUC affiliates. The implications of the *Viking* case for the ETUC could be that, by calling for solidarity, the ETUC could face a claim in a Belgian court, like the ITF in the UK court, that its appeal for solidarity action violates EC law on free movement. The European trade union movement as a whole thus has a major, direct and practical interest in the outcome of this case'; ETUC letter attached to the ITF's written submission, paras 20–21.

State. The claim that the consequences reflect discrimination on grounds of nationality is pervasive.

The ETUC perceived the threat that allowing claims based on alleged nationality discrimination would have for the prospects of an integrated European industrial relations system: '[a]n interpretation of the free movement provisions of the Treaty outlawing collective action with cross-border effects would fatally undermine the development of an EU industrial relations system as a fundamental element in European integration'.[89]

B. The submissions

The submission by Viking stated bluntly that application of the FOC is dependent solely upon the country in which the owner of the vessel is established. This is direct discrimination. It reiterated the trial judge's finding of fact that the main objective of the FSU action was to protect Finnish jobs. Subjective intention is relevant, albeit not conclusive.

The submissions by a number of Member States agreed with Viking that the collective action at issue was discriminatory on grounds of nationality: the Czech Republic,[90] Estonia,[91] Latvia[92] and Poland[93] took an unequivocal

89. *Ibid.*, para. 22.

90. The application of a policy such as the FOC policy constitutes manifest indirect discrimination, since the application of criteria other than nationality leads to the same results as in the case of differentiation by nationality. It is difficult to prove that the FOC is directly discriminatory. The FSU and ITF are primarily defending the interests of their members, regardless of nationality. The requirement of a collective agreement is indirect discrimination. Both the subjective intention of the trade union taking the collective action and the objective effect of that action may be classed as indirectly discriminatory.

91. The FOC constitutes an indirectly discriminatory restriction. When evaluating discrimination, regard should be had to intention, but it is not a decisive factor.

92. The FOC is an indirectly discriminatory restriction under Art. 43 EC. The trade union action is directly discriminatory. The true aims of the trade union are relevant to this question.

93. The collective action by trade unions or associations satisfies the conditions relating to discrimination on grounds of nationality. The FSU's action is *de facto* restriction of Viking's freedom of establishment, including its freedom to dispose of property arising from the person's country of origin. This is discriminatory. The FSU's actions aim to preserve the Finnish crew (or, if mixed, a significant proportion of which is Finnish). This constitutes indirect or even direct discrimination. The FOC policy is tantamount to requiring the ship owner to have his establishment in the flag state. There are strong grounds for finding this to be direct discrimination.

position. Ireland was more measured.[94] Consistent with the trade unions' position were the submissions of a number of other Member States: Austria,[95] Belgium,[96] Finland,[97] Germany[98] and Italy.[99]

The trade unions, however, noted that the recently adopted directive on services in the internal market[100] does not contain a specific provision declaring collective agreements to be non-discriminatory *per se*. However, it follows from the wholesale exclusion from the subject matter of this directive on free movement of services of 'rules laid down in collective agreements negotiated by the social partners'[101] that an interpretation of the provisions of the directive as a whole, which is both effective and consistent, is that agreements concluded in the context of collective negotiations between management and labour must be regarded as falling outside the scope of the directive.[102] This can only be interpreted to mean that collective agreements are not discriminatory *as far as rules on free movement are concerned*.[103] The same principle applies to Articles 43 and 49 EC.

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94. *If* the FOC falls to be considered as a restriction for the purposes of Art. 43 EC, it would constitute an indirectly discriminatory restriction since it is designed to protect all seafarers employed in the Member State of beneficial ownership. The actions of the trade unions would fall to be regarded as a restriction on the right of establishment. But there is no evidence of a directly discriminatory policy or objectives by the ITF or FSU. Such a policy would be the antithesis of the goals of trade unionism. The type of restriction is, at most, indirectly discriminatory.

95. The present case is not discrimination on the basis of nationality.

96. There is no discrimination in this case on grounds of nationality.

97. The purpose of trade unions is to pursue the interests of their members. If limited to this, their actions cannot be regarded as discriminatory. The purpose here was not to change the terms of employment, but for the crew to continue on the same terms. Trade unions protect their members regardless of nationality. The action is against Viking, not Estonian workers.

98. The FSU's action is not discriminatory. Its ultimate aim is equal treatment of undertakings operating in Finland. The FSU's negotiating strategy is not linked to employers' nationality. The FOC is based on the objective criterion of whether the vessel belongs in the registry of a particular country. The FOC is not a directly discriminatory, indirectly discriminatory or non-discriminatory restriction under Art. 43 EC. Re-flagging changes nothing except working conditions. The ITF/FSU action is aimed at working conditions, not nationality. The national court must determine the issue solely by reference to the objective effects of the action.

99. If there is an infringement of freedom to provide services, the trade union action does not constitute a directly discriminatory restriction since it applies without distinction on the basis of effective ownership and control of the vessel.

100. Directive 2006/123/EC, note 1 *supra*.

101. These not being deemed 'requirements' (Art. 4(7)).

102. As put by the ECJ in *Albany*, paras 59–60.

103. Not being 'requirements', rules laid down in collective agreements are not prohibited as 'discriminatory requirements' (Art. 14(1)), they need not satisfy the principle of non-discrimination (Art. 16(l)(a)) and they are justifiable under the provision in Art. 16(3).

VII. How is the balance to be struck between internal market freedoms of undertakings and collective action by trade unions of workers? (Questions 7, 8, 9 and 10: How does EC law regulate the relationship between social rights and market freedoms?)

A. The argument

The Court of Appeal left the ECJ with a final set of questions which raised the issue of whether and, if so, how a balance might be struck between the economic freedoms of undertakings and the social rights of trade unions and workers.

The approach to these questions was signalled by the Court of Appeal's invoking a number of phrases, which duly attracted the attention of most of the submissions: justification on the basis of public policy, including fundamental rights and protection of workers; striking a fair balance between fundamental social rights and economic freedom; and assessment of proportionality.

Most of these issues were addressed through the lens of established precedent: what exceptions/derogations are available under Article 46 EC allowing for public policy, and whether in *Viking* it included protection of workers and fundamental rights. Or, as in *Schmidberger*, where EU law recognises a number of fundamental rights, and these conflict, a balance has to be sought in light of principles such as proportionality.[104] The argument in *Viking* was whether there was a fundamental right to take collective action to be balanced against freedom of establishment, and, if so, what was the correct balance.

104. *Schmidberger*, note 37 *supra*. In *Schmidberger*, the fundamental right to freedom of expression had to be balanced against the free movement of goods. A demonstration by environmental protesters in the Brenner Pass was not contrary to EU law, although it prevented the free movement of goods, because it was proportionate (e.g. limited in time, properly authorised, etc.).

B. The submissions

a) Article 46 and public policy, including protection of workers

The question was immediately posed whether, were the trade unions' action to be held a restriction of *Viking*'s economic freedom, public policy provided an objective justification in accordance with Article 46 EC. Some Member States answered bluntly in the negative: the Czech Republic[105] and Estonia.[106] Others, though negative, were more nuanced, like Poland.[107] Other Member States took a more positive view both of the application of Article 46 EC and its content as regards protection of workers, like Germany.[108] Others, again, though positive, were more nuanced: Ireland[109] and Finland.[110]

Viking took the view that protection of workers is not within the scope of public policy for the purposes of Article 46 EC. The ITF took the opposite view.[111] Some Member States supported Viking: Estonia.[112]

105. Activities not justified under Arts 45 and 46 EC as collective action is not linked to the exercise of official authority or grounds of public policy, security or health.

106. If the view is taken that action such as that at issue in the main proceedings constitutes direct discrimination, neither protection of the fundamental right to take collective action nor protection of workers may be relied upon under the heading of protection of public policy.

107. Sub-standard shipping is a sufficiently significant problem for reliance on Art. 46 EC public policy to be possible. However, the ITF's action is not proportionate, as the EC area has high shipping standards. It is uncertain that strike action may be justified under Art. 46 EC, which is strictly interpreted. It does not allow for economic grounds and, in this case, economic conditions were fundamental to the FSU's decision to take strike action.

108. Collective action by a trade union or association of trade unions which is a directly discriminatory restriction under Art. 43 of the EC Treaty can be justified on the basis of objective factors. The FOC is based on objective factors.

109. Restrictions flowing from industrial action may, insofar as they fall to be regarded as indirectly discriminatory, only be justified by reference to the public policy derogation recognised in Art. 43 EC. The action taken must be lawful in all Member States where it is put into effect and must be no more restrictive than is absolutely necessary to protect the rights and conditions of employment at issue. However, the objective of protecting the right to take industrial action constitutes a sufficiently fundamental societal interest for Art. 46 EC to apply.

110. The protection of a fundamental value enshrined in a national constitution is justification for a derogation on the ground of public policy under Art. 46 where the measures are proportionate.

111. As a matter of principle, collective action which is directly discriminatory can be justified on the basis that it protects workers,

112. The FOC policy does not have a social element. It could require re-flagging in a state with higher labour standards, but still impose lower standards if the beneficial owner was elsewhere. Hence, it is not motivated by social considerations. *Quaere:* one suspects the ITF might be prepared to make an exception in this case.

Others, while supporting Viking, were more nuanced: Poland,[113] Latvia[114] and the UK.[115] Some Member States were unequivocally supportive of the trade unions on the point of principle: Finland,[116] Germany[117] and Italy.

The Services Directive contains various provisions concerning public interest justifications for restricting free movement. Article 4(8) provides one definition: '"overriding reasons relating to the public interest" means reasons recognised as such in the case law of the Court of Justice, including the following grounds: ... the protection of ... workers ... [and] social policy objectives ...'[118]

The concept of 'overriding reason relating to the public interest' appears in a number of contexts.[119] Most important, in Article 15(3)(b), requirements restricting free movement must be evaluated in light of the criterion of 'necessity', which is defined in terms of 'an overriding reason relating to the public interest'.[120]

The argument is that, to be consistent, similar considerations apply to evaluation of justifications to balance freedom of movement under Articles 43 and 49 EC, if the latter were invoked against collective agreements and collective action in *Viking*.[121]

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113. Where collective action by a trade union or association of trade unions is a directly discriminatory restriction under Art. 43 EC, it cannot, in principle, be justified on grounds of the protection of workers if it is not consistent with the principle of proportionality.

114. The defence of workers is a worthy cause. However, in the present case, the methods used by the trade unions to attain their aims are not proportionate. The workers' interests could have been protected by a collective agreement with another trade union. If the Rosella went out of business, the crew would have more to lose than if it had been re-flagged.

115. The burden is on the trade unions to justify their action on the basis of public policy – a narrow ground. Protection of workers is acceptable, but public policy does not include strikes.

116. In the event that the court finds that Arts 43 and 49 EC have been infringed, that restriction is justified by the need to protect workers.

117. The action of the ITF and FSU serves to protect workers and falls within the scope of the right to freedom of association. It is therefore based on objective factors and it is for the national court to decide whether it is proportionate.

118. Recital 40 expands this.

119. See Art. 10(2)(b): a condition for the Member States making access to a service activity subject to granting of authorisation; Art. 1 l(l)(c): a condition for unlimited duration of authorisations granted.

120. So 'protection of workers' and 'social' policy objectives are grounds for evaluating restrictive requirements as 'necessary' and would be available to justify requirements, including labour law and collective agreements protecting workers (were these deemed to be 'requirements', but they are not so deemed under Art. 4(7) of the directive).

121. The concept of 'necessity' is defined differently, however, in Art. 16(1)(b): Member States must respect the principle of 'necessity' if they wish to impose restrictions on the provision of services. 'Necessity' is not defined in terms of 'overriding reasons relating to the public

b) Fundamental rights

The ITF and FSU submission was unequivocal: as a matter of principle, collective action which is directly discriminatory can be justified on the basis that it constitutes a fundamental right protected *by Community law*.

To the proposition that there existed a fundamental right to collective action there were varying degrees of assent in the submissions of the Member States. Some were explicit: Austria,[122] Belgium,[123] Finland,[124] France,[125] Germany,[126] Ireland,[127] Italy,[128] Norway[129] and Sweden.[130]

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interest'. Rather, 'the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment'. Social policy objectives and protection of workers are not specified.

122. Although Art. 11 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms does not contain any express right to strike, the right may be regarded as flowing from the fundamental right. Industrial action is one of the most important trade union rights. See also the Charters.

123. Community law cannot be applied or interpreted in such a way that it would automatically impair exercise of the fundamental rights as recognised by the Union and the Member States, including the right to organise, the right to bargain collectively, the right to take collective action and the right to strike. The freedom of establishment can justify restriction of these fundamental rights only in the event of manifest abuse.

124. In the event that the court finds that Arts 43 and 49 EC have been infringed, the restrictions resulting from the industrial action are necessary to guarantee the protection of the fundamental right of association and the fundamental right to take industrial action. The right to organise and the associated right to take industrial action are safeguarded in a number of international agreements and national constitutions. These are rights which may be relied upon as a justification for restrictions of free movement. In the event that a trade union was not able to take industrial action, the substance of the right to take industrial action would become meaningless. Many international instruments are cited: the European Social Charter, Art. 6(4); the 1989 Community Charter; the EU Charter of Fundamental Rights, Art. 28; International Labour Organisation Conventions 87 and 98, the 1966 UN International Covenant on Economic, Social and Cultural Rights. These are binding on states. Contrary to the UK, Finland does not regard these as merely 'political agreements'.

125. On the impact of the EU Charter, there is now the ECJ decision of 27 June 2006, Case C-540/03, *Parliament v. Council.* See below.

126. The action of the ITF and FSU serves to protect workers and falls within the scope of the right to freedom of association. Article 28 of the EU Charter is a fundamental right. Unlike the UK, Germany welcomes this as reflected also in Member States' constitutions.

127. The objective of protecting the right to take industrial action constitutes a sufficiently fundamental societal interest for Art. 46 to apply. Contrary to the UK's submission, the word 'fundamental' appears in the 1989 Community Charter and in the EU Charter: collective action is a fundamental right and deserves protection.

128. Even if there is indirect discrimination, it is fully justified by Title XI EC and the Charters.

129. Under Art. 11 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, even if the right to strike is not protected *per se*, it is seen as an important means to further the interests of the members of trade unions. This is supported by the Charters.

130. Fundamental rights are protected in EU law, including freedom of association: Art. 6(2) TEU. Sweden has no doubt that collective action is a fundamental right under EU law. The

Others were implicit: although they denied the protection afforded by the right in this case, there was confirmation that such a fundamental social right did exist: the Czech Republic,[131] Denmark,[132] Estonia,[133] Latvia,[134] Poland[135] and even Viking.[136] The only unequivocal assertion that there was no fundamental right to take collective action in Community law came from the UK.[137]

UK Commercial Court upholds freedom of movement across borders. There must be a corresponding right to cross-border collective action as a necessary consequence of EU law.

131. The FOC does not strike a fair balance between the fundamental social right to take collective action and the freedom of establishment and freedom to provide services.

132. The action here is not covered by the right of industrial action, but is within the scope of the Treaty, including Art. 43 EC.

133. Neither protection of the fundamental right to take collective action nor protection of workers may be relied upon under the heading of protection of public policy. Collective action such as that at issue in the main proceedings fails to take account of the balance to be struck between the fundamental social right to take collective action and the freedom to establish and provide services. Freedom of association is not absolute but may be restricted in certain cases.

134. There is no unequivocal indication that the right to strike is protected by Art. 11 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to take collective action is recognised but restricted in Art. 28 of the EU Charter.

135. Given that the FSU action is not proportionate to the objective of protecting workers, the protection of the right to organise strike action is not justified in this case. Reliance on fundamental rights is not limited to trade unions. The EU Charter of Fundamental Rights lays down a right to property and freedom to conduct a business. The FSU and ITF action infringed Viking's right to property.

136. The right to engage in collective bargaining and collective action are both facets of the fundamental right of freedom of association in Art. II of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. *Schmidberger,* note 37 *supra,* establishes that freedom of association is not exempt from the free movement rules. The unions argue their action is justified by the fundamental right to take collective action under Art. 11 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. They are also bound by Art. 14, which prevents discrimination. Article 14 must apply. Viking also argued that it was protected by the negative right of association in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

137. The taking of collective action (including strike action) is not a fundamental right protected by Community law. There is no legally binding fundamental social right to take collective action in Community law. There is no fundamental right at stake in this case. The right in question is not limited to strike action, but includes other forms of collective action. Although Art. 11 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms safeguards a generalised form of collective action, it is not the case that rights are guaranteed to take specific forms of collective action. Article 11 recognises a right to be heard but not as fundamental any of the specific actions a trade union may adopt in pursuit of that right. It does not confer a right to strike. None of the other Charters creates any fundamental right to take collective action that is protected by Community law. The fundamental social right to take collective action referred to in question 8 is not a legally binding right in Community law, as it derives from the Community Charter. The 1989 Charter is not legally binding. The UK accepts the trade union interest in collective action, but not that EU law accepts a right to strike.

Perhaps the biggest surprise was in the Commission's oral submission. The representative of the Commission, referring to the *Albany* question, cited the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 11; International Labour Organisation conventions; the European Social Charter; and the EU Charter, Article 28. He concluded that the right to collective action seems, in principle, to be part of the general principle of EU law that protects fundamental rights. Member States have a wide margin of appreciation. But EU law precludes measures that deny the essence of the fundamental rights protected.

The submissions thus achieved a broad consensus (except for the UK) as to the existence of a fundamental right to take collective action. Some were explicit that this was enshrined in Community law, others that the sources lay in other legal measures. The reference in the oral submission by the representative of the French Government to the first citation of the EU Charter, five and a half years after its proclamation, by the ECJ in *European Parliament v. Council* is significant.[138] The court stated:

> The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance ... Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and of the European Court of Human Rights.[139]

In other words, while not legally binding itself, the Charter reaffirms rights which are legally binding due to their provenance from other sources that are recognised by EU law as legally binding sources.[140]

138. Case C-540/03, *European Parliament v. Council* [2006] ECR1-05769.

139. *Ibid.*, para. 38.

140. Specific to these concerns in the *Viking* case is the view taken by Miguel Poiares Maduro of what he calls 'majoritarian activism', which he sums up as follows: 'Moreover, the Court has limited the effects of negative integration on national regulation whenever national regulations corresponded to a European majoritarian policy. If a certain social regulation is shared by a majority of Member States it has normally been upheld by the Court even if restricting trade'; Maduro, 'Striking the

Finally, the Services Directive provides strong evidence of the EU legislative bodies' evaluation of fundamental rights. Article 1(7) of the Services Directive provides: 'This Directive does not affect the exercise of fundamental rights as recognised in the Member States *and by Community law*.[141] Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law' (emphasis added). There is clear acknowledgment in the first sentence that 'fundamental rights ... [are] recognised ... *by Community law*'. The rights referred to are arguably these specified in the second sentence *(eiusdem generis)*: Community law recognises 'the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law'.

This is an interpretation consistent with Recital 15 (emphasis added):

> This Directive respects the exercise of fundamental rights applicable in the Member States and as recognised in the Charter of Fundamental Rights of the European Union and the accompanying explanations, *reconciling them* with the fundamental freedoms laid down in Articles 43 and 49 of the Treaty. Those fundamental rights include

Elusive Balance between Economic Freedom and Social Rights in the EU', *op. cit.* note 65 *supra,* at p. 451. He elaborates this approach in his earlier book, *We The Court: The European Court of Justice and the European Economic Constitution, op. cit.* note 65 *supra,* at pp. 61–78. Maduro develops a complex argument regarding the constitutional development of the EU through the ECJ and the balance between negative and positive integration, the former favouring economic freedoms and the latter social rights. Factors advancing the former include qualified majority voting rules in the legislative process and frequent access by powerful economic actors to the judicial process, while the latter are constrained by unanimity rules in the legislative process and less frequent access to the judicial process by those in need of social protection. Indeed, Maduro hints at the need for trade union intervention when he says: 'Moreover, the fact that the European Constitution is mainly a result of the judicial development of the Treaty rules supported by litigation means that the European Constitution will be a result of representation and participation in such a judicial process' (p. 455). He advocates the position of social rights and on a number of occasions he refers to 'a hard core of social rights', which includes 'the rights to collective action and collective bargaining'. He states: 'The right to collective bargaining, the freedom of association, the right to collective action ("rights immediately effective and judicially enforceable") ... are either expressly protected by other Treaty provisions (then Art. 117, now Art. 136) or should be considered as part of the "constitutional traditions common to the Member States"' (p. 461). There follows a footnote 51 in which Maduro refers to the Community Charter of the Fundamental Social Rights of Workers of 1989, and 'for a recent international example, including some of the rights which it has been argued constitute fundamental social rights: the ILO Declaration on Fundamental Principles and Rights at Work, approved at the 86th Session, Geneva, June 1998'.

141. The rights concerned are not the economic freedoms in Arts 43 and 49 EC, since these are the legal basis of the directive, which aims to supplement their inadequacies. See also Recital 6.

the right to take industrial action in accordance with national law and practices which respect Community law.

Recital 15's explicit reference to the EU Charter is significant. The reference to reconciliation with fundamental freedoms in Articles 43 and 49 EC may be read as confirming that, in particular, the right to take industrial action *can be reconciled* with Articles 43 and 49 EC – the point at stake in *Viking*.[142]

c) Striking a fair balance and proportionality

The submissions achieved a consensus (except for the UK) as to the existence of a fundamental right to take collective action. Where the submissions differed was in their approach to the questions posed by the Court of Appeal as to the 'fair balance between the fundamental social right to take collective action and the freedom to establish and provide services, and is it ... proportionate'.[143]

As regards the contentions as to whether and when there is a fair balance, some Member States struck a note of neutrality: Belgium.[144] Others were categorical as regards the balance in the present case: the Czech Republic,[145] Estonia[146] and Latvia.[147] While others were categorical in the opposite direction: Sweden.[148]

142. The position is further elaborated, if not clarified, by Recital 83, concerned with derogations from the freedom to provide services and exceptional measures against a given provider: 'In addition, any restriction of the free movement of services should be permitted, by way of exception, only if it is consistent with fundamental rights which form an integral part of the general principles of law enshrined in the Community legal order'.

143. Questions 8 and 9.

144. In order to strike a fair balance between these fundamental rights and the freedom of establishment, account must be taken of all the circumstances of the specific case.

145. The FOC does not strike a fair balance between the fundamental social right to take collective action and the freedom of establishment and freedom to provide services.

146. Collective action such as that at issue in the main proceedings fails to take account of the balance to be struck between the fundamental social right to take collective action and the freedom to establish and provide services and is not objectively justified, appropriate or proportionate.

147. The FOC does not strike a fair balance between the fundamental social right to take collective action and freedom of establishment and freedom to provide services.

148. The issue is to determine the scope of freedom of association as expressed in the measures of the ITF and FSU in comparison with the scope of freedom of establishment (see *Schmidberger,* note 37 *supra).* The right to freedom of association already creates a fair balance between the rights of employees and of employers. Only if measures have a purpose other than the protection of legitimate trade and professional interests should the question arise of setting them against the Treaty freedoms. The assessment of whether and, if so, how collective trade union measures are to be regulated is a matter for the Member States and they have a wide margin of discretion.

Similarly, as regards the principle of proportionality, Member States tended to follow their assessment of the balance, fair or unfair, in their assessment of whether the collective action was proportionate. In the negative were the Czech Republic,[149] Estonia,[150] Latvia[151] and Poland.[152] More positive were Belgium,[153] Ireland[154] and Finland.[155] Other Member States insisted the assessment was not for the ECJ, but for national courts to determine: Germany.[156]

149. The FOC does not strike a fair balance and is not proportionate. An undertaking not to make employees redundant (question 10) would make no difference in this respect. Applying *Schmidberger*, *ibid*., the benefits of the action are disputable, the Rosella is unprofitable, it will go out of business and the crew loses jobs. The action is not aimed at achieving the objectives of Title XI EC. It is disproportionate.

150. Collective action such as that at issue in the main proceedings fails to take account of the balance and is not proportionate.

151. The FOC does not strike a fair balance between the fundamental social right to take collective action and freedom of establishment and freedom to provide services and it is not proportionate. In respect of the answer to question 9, it is also important that the parent company provide an undertaking to a court that they will not by reason of the re-flagging terminate the employment of any person employed by those companies. The defence of workers is a cause worthy of interest. However, in the present case the methods used by the trade unions to attain their aims are not proportionate. The acts in the present case were more drastic than was necessary. The trade union did not take into account the undertaking not to make redundancies.

152. The FSU's means to protect rights of the crew were not appropriate. The majority of the Estonian sailors were protected by an agreement with the Estonian union. Preventing change to loss-making operations might lead to cessation of the service and dismissal.

153. The freedom of establishment can justify restriction of these fundamental rights only in the event of manifest abuse.

154. The action taken must be lawful in all Member States where it is put into effect and must be no more restrictive than is absolutely necessary to protect the rights and conditions of employment at issue. Applying *Schmidberger*, note 37 *supra*, the key question is the test of proportionality, which is satisfied in the main proceedings.

155. In the event that trade unions were not able to take industrial action, the substance of the right to take industrial action would become meaningless. The application of the principle of proportionality may not result in the very substance of fundamental rights being impaired. It follows that free movement is not restricted more than is necessary for the protection of the objective pursued. This is not affected by the undertaking not to make any employees redundant.

156. Whether or not the FOC is proportionate in an individual case must be considered by the national court on the basis of the circumstances of that case. It is for the national court to consider, on a case-by-case basis, whether collective action based on objective factors is consistent with the principle of proportionality. An undertaking is not likely to affect this answer. The risk is apparent in Viking's submission that proportionality is a matter for the national judge and there was no reason for the ECJ to disturb the findings of the UK court which issued the injunction. The ITF sought a finding that the collective action was proportionate to the legitimate aim of protecting workers and the assessment would not be any different if the parent company gave an undertaking.

B. Interim conclusion 3

In the oral submission, the ITF and FSU made two specific points as regards balancing fundamental rights and economic freedoms in this case.

First, the *presumption* should be that economic freedoms *are* consistent with the exercise of fundamental rights. Both economic freedoms and the rights of workers to take collective action and to engage in collective bargaining are consistent with and necessary for the functioning of an efficient market.

Second, fundamental social rights are not derogations from the economic freedoms but are protected by EU law. Accordingly, in balancing the rights in this case the question is not whether fundamental rights justify restrictions on free movement; rather free movement must be interpreted to respect fundamental rights. This is exemplified by the approach taken by Advocate General Stix-Hackl in the *Omega* case:

> The need to reconcile the requirements of the protection of fundamental rights cannot therefore mean weighing up fundamental freedoms against fundamental rights per se, which would imply that the protection of fundamental rights is negotiable. It is also necessary to examine the extent to which the fundamental rights concerned admit of restrictions. The provisions on the fundamental freedom concerned and particularly the circumstances in which the exceptions are permissible must then be construed as far as possible in such a way as to preclude measures that exceed allowable impingement on the fundamental rights concerned and hence preclude those measures that are not reconcilable with fundamental rights.[157]

These considerations reflect important differences between the *Viking* case and *Schmidberger*, with four in particular: the first two apply to both the FSU and the ITF; the third is specific to the FSU; and the fourth to the ITF.

157. Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR 1-9609, para. 53.

First, Viking is seeking to restrain the FSU and the ITF from taking *any* collective action *in the future*. The consequence of this is that the workers in Finland represented by the FSU will be entirely powerless in negotiations to try and save jobs lost following any re-flagging to Estonia. The Finnish social model will also be seriously undermined. This would be calamitous, not only for the workers concerned and for the Finnish social model, but also for workers and the social models of the other Member States where the right to collective action by trade unions and their international organisations is protected. The ITF and all its affiliates would be similarly crippled.

Second, this case is different to *Schmidberger* in that one private party, an employer (Viking), is seeking to prevent other private parties, the trade unions, both FSU and ITF, from exercising fundamental rights. There is the difficulty of applying to private parties the 'margin of appreciation' afforded to Member States under *Schmidberger*. But of even greater importance is the risk in attempting to balance what are essentially opposing economic interests of trade unions and employers.

Workers only have negotiating power because of their ability collectively to withdraw their labour. Courts in the Member States, very sensibly, have been extremely cautious in invoking any test of proportionality as regards the right to strike. It is a right inextricably linked to the collective bargaining process and must be assessed in the context of that process. It is difficult sensibly in practice to apply any test of proportionality to the demands made by the trade unions in that process. It is in the very nature of negotiations that both parties set demands at their highest and through negotiation over time seek a compromise, if necessary, with the assistance of mediation and conciliation. At what stage of this process and against what criteria is the test of proportionality to be applied? Any test based on proportionality in assessing the legitimacy of collective action is generally avoided in the industrial relations models of Member States for the very reason that it is essential to maintain the impartiality of the state in economic conflicts.

The third difference specifically concerns the FSU and the Finnish social model. As the court explained in *Schmidberger*, the competent authorities enjoy a 'wide margin of discretion' when striking a fair balance between the protection accorded to environmental demonstrators as a result of the fundamental rights of freedom of expression and free

movement of goods. The protection afforded by the Finnish social model and Finnish law to the FSU in the exercise of its right to strike meets the test in *Schmidberger*.

The fourth and final difference specifically concerns the ITF. The question of the referring court considers the justification of the ITF's FOC policy itself rather than any action taken under it by its affiliates. Yet the ITF, as such, takes no collective action. The FOC policy is agreed by and implemented through its affiliates. It would be logical to adopt a consistent approach as regards the ITF, an international trade union acting in a transnational context, to that applied to the FSU's actions in a national context. The ITF does not have workers as members. The ITF's action consists of sending a circular to affiliated trade unions. Collective action, if any, by an ITF affiliate on receipt of the circular, to show solidarity with the FSU would be action identical to that of the FSU were it to have received such a circular – action consistent with the social model of the Member State concerned.[158]

The action taken by the ITF which is to be balanced against Viking's economic freedoms, therefore, is much less than the action taken by national affiliates, like the FSU, whose action is protected by virtue of compliance with their Member State social models. The difference is that the ITF, unlike the FSU, operates in an integrated single European market. EU internal market law has conferred transnational economic freedoms on employers. These are to be balanced with transnational fundamental social rights of workers and their organisations. Like *national* collective action, *transnational* collective action is a vital element in achieving economic efficiency in the single European market by requiring enterprises to consider the interests of workers. Economic efficiency demands that transnational free movement of enterprises be balanced with rights of workers and trade unions to take transnational collective action and engage in transnational collective bargaining.

The right to take collective action is a fundamental right protected by Community law, and in the EU context protects *transnational* collective

158. The nature of the ITF action is modest indeed: issuing a circular. The ITF affiliates would be expected to act lawfully within their national social models. Furthermore, the ITF affiliates are autonomous and can choose not to show solidarity even if legally able to do so. To adopt this approach would jeopardise their membership of the ITF but it is a choice they can make. Accordingly, it cannot be presumed that collective action would necessarily be taken.

action. This does not rely on the Finnish model, but on EU law, reflecting the protection of this fundamental right as the majoritarian position in the national laws and constitutions of Member States, and by the EU Charter of Fundamental Rights, International Labour Organisation conventions, the Community Charter and the European Social Charter.

It would be wholly disproportionate, and inconsistent with the fundamental rights to collective action protected in Member States' constitutions, in international instruments and in the EU Charter, for a transnational trade union organisation to be denied the right to issue a request to its affiliates to take collective action which is lawful within their national social models.

VIII. Conclusions

The submissions reveal the elephant lurking in the European social model which has been studiously ignored but is unavoidably centre stage in *Viking*: the consequences of the disparity in wage costs and labour standards between the old Member States and the new accession states.[159] It is a bracing reminder to EU lawyers of the power of political and economic context to influence legal doctrine that the new Member States making submissions were unanimous on one side of the arguments on issues of fundamental legal doctrine (horizontal direct effect, discrimination, proportionality) and the old Member States virtually unanimous on the other.

159. See Table 1.

Table 1 **Direct and Additional Hourly Labour Costs (HLC) in Manufacturing Industry in 2003 (Euros)**

Country	Direct HLC	Additional HLC	Total HLC	Additional HLC as % of direct HLC	
				1980	2003
Norway	18.96	9.19	28.15	48	49
Denmark	20.63	6.70	27.33	22	33
W. Germany	15.13	11.96	27.09	75	79
Switzerland	16.79	8.81	25.60	47	53
Finland	13.58	10.45	24.03	55	77
Belgium	12.46	11.34	23.80	80	91
Netherlands	12.90	10.30	23.20	76	80
Sweden	13.30	9.47	22.77	64	71
Austria	11.47	9.86	21.32	82	86
Luxembourg	14.01	7.14	21.15	41	51
France	10.48	9.67	20.15	80	92
USA	13.91	5.99	19.91	37	43
UK	12.84	5.88	18.72	39	46
Japan	10.93	7.35	18.28	64	67
Ireland	12.96	5.15	18.11	34	40
E. Germany	10.17	6.68	16.86	–	66
Canada	12.13	4.70	16.83	32	39
Italy	8.58	8.11	16.69	85	95
Spain	8.69	7.28	15.97	–	84
Greece	6.07	4.12	10.18	56	68
Portugal	3.98	3.02	7.00	–	76
Czech Rep.	2.35	1.95	4.30	–	83
Hungary	2.28	1.76	4.04	–	77
Poland	2.06	1.20	3.26	–	58
Slovakia	1.88	1.34	3.22	–	71

Source: 'Comparative Manufacturing Industry Labour Costs in 2003', (2005) 378 (July) *European Industrial Relations Review* 35, Table 2.

The interesting and heartening exception was the consensus over the existence of a fundamental right to collective action – the legacy perhaps of international labour law,[160] but also the EU Charter's recognition of this fundamental right in Article 28 and the ferment surrounding its incorporation into the proposed Constitutional Treaty.[161] The ECJ may

160. ILO Conventions Nos 87 and 98, the European Social Charter, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

161. Charter of Fundamental Rights of the European Union, proclaimed at the meeting of the European Council held in Nice from 7 to 9 December 2000, and adopted by the Commission, the Council and the Member States [2000] OJ C364/01. Subsequently incorporated in the proposed Treaty establishing a Constitution for Europe adopted by the Member States in the Intergovernmental Conference meeting in Brussels, 17–18 June 2004 [2004] OJ

also take as its point of departure the recognition in international labour law that certain fundamental rights of trade unions, to collective bargaining, collective agreements and collective action, are, in the long term, to be maintained regardless of what is claimed to be the short-term benefit of lower labour costs to the new Member States.

There is a tendency towards a somewhat one-sided debate emphasising the benefits to new Member States (or rather the often multinational enterprises taking advantage) of their low labour costs. What about the workers? As revealed in the debates over the Services Directive, workers moving to provide the services have to live in the old Member States. There are notorious examples of the desperation of workers from the new Member States forced to survive on lower wages. It is also not in the short- or long-term interest of new Member States if skilled workers emigrate to take even unskilled jobs undercutting the labour standards of workers in old Member States.

There is evident inconsistency with the established principle of free movement of workers. In the older manufacturing economy, workers moving to old Member States are entitled to equal treatment; if they move to provide services from service providers, however, they do not receive equal treatment. The disparity in principle did not survive the European Parliament's scrutiny of the Services Directive.

The right to collective action to demand equal treatment does not aim to discriminate against free movement of workers. There is no demand to take collective action to stop workers coming in if they are paid the *same* conditions, only to stop unequal conditions.[162]

Finally, in the longer term, and even the short term in some sectors, as labour standards converge, the competition which currently operates as between new and old Member States will engage states outside Europe, able to offer labour cost advantages that exceed even those of the new Member States. Denial of rights to take collective action may be much

C310/1, Art. 11–88. See B. Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights* (Nomos, 2006).

162. There are undertakings in the old Member States who also do not adhere to collectively determined labour standards. This raises a spectre of a complaint by domestic employers of discrimination. They cannot invoke EU law when collective action is taken against them. However, if the collective action is taken because the workers subject to unequal treatment come from another Member State, according to Viking, the employer would be able to do so.

harder to justify when enterprises move productive and profitable undertakings in order to exploit even lower paid workers. The consequences of unrestrained social dumping are not confined to old Europe.

The fundamental long-term significance of the EU legal order recognising the fundamental rights of trade unions was brought out by the ETUC's letter attached to the submission of the ITF:

Trade unions in the Member States, affiliated to the ETUC, support the single European market. However, there are increasingly concerns as to the balance of economic power in the transnational EU market.

Free movement of enterprise is transforming the balance of economic power in the EU. The freedom of enterprises to move throughout the single European market has shifted the balance of economic power towards employers. National and transnational collective action by workers and their organisations is one response, with a view to restore the balance.

A crucial element in maintaining a balance of economic power in Member States is the legal right to take collective action. The employers' parties to the *Viking* case seek to use Community law to override national and international guarantees of the right to collective action.

To the contrary, the ETUC considers that Community law on free movement is to be interpreted consistently with national and international protection of the right to collective action, thereby providing for a balance of economic power in the single European market.

Trade unions are in favour of European economic integration. But labour is not a commodity. Competition over labour standards threatens economic integration and undermines support for the European project. Collective industrial action is not protectionism. Community law on free movement, if interpreted consistently with the legal recognition of collective action in national law, Member States' constitutions, and international law, will encourage support for European integration by trade unions and their representative at EU level, the ETUC.[163]

163. Paragraphs 23–27. That this could be brought out at all is already a precedent worth noting. The first paragraph of the ETUCs letter declares: 'The ETUC has EU constitutional status as a Social Partner under the EC Treaty' and goes on in para. 10 to refer to Arts 138–139 EC.

As the title of this article suggests, the future of the trade union movement, but also of the EU, may depend on whether, on judgment day, the ECJ decides that the EU legal order upholds the right of trade unions to take transnational collective action.

First Submitted: January 2007
Final Revision Accepted: February 2007

Miguel Poiares Maduro has noted the less frequent access to the judicial process by those in need of social protection and hints at the need for trade union intervention when he states: 'Moreover, the fact that the European Constitution is mainly a result of the judicial development of the Treaty rules supported by litigation means that the European Constitution will be a result of representation and participation in such a judicial process'; Maduro, 'Striking the Elusive Balance between Economic Freedom and Social Rights in the EU', *op. cit.* note 65 *supra*, at p. 455. For a note analysing the prospects for the ETUC's obtaining the status of a 'privileged applicant' under the EC Treaty, Art. 230, see B. Bercusson, 'Public Interest Litigation in Social Policy', in H.-W. Micklitz and N. Reich (eds), *Public Interest Litigation before European Courts* (Nomos, 1996), pp. 261–295.

The impact of the case-law of the European Court of Justice upon the labour law of the Member States
Scope of action at the European Level

Brian Bercusson (2008) *

Executive Summary

The paper begins with an analysis of the decisions of the European Court of Justice in *Viking*, *Laval* and *Rüffert*. The decisions are criticised as inventing an EU law on workers' collective action. This new law establishes uncertain criteria for the legality of collective action, introduces horizontal direct effect against trade unions, allows for unequal treatment of workers on grounds of nationality, violates international labour law standards, infringes the principle of subsidiarity and is tantamount to a charter for "social dumping". This new EU law is already being invoked by employers at national level to block otherwise lawful collective action. It poses a threat to the stability of national industrial relations systems and to European integration.

The paper then explores the scope for action at European level to address this new EU law created by the ECJ which was not envisaged when the Lisbon Treaty was proposed. It suggests short, medium and long-term strategies in the context of the Irish rejection of the Lisbon Treaty.

Strategies in the short-term

In light of this new law, not foreseen by the Lisbon Treaty, Member States may now undertake a commitment to a stronger social dimension.

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* 'Scope of action at the European level', Brian Bercusson (2008). This article was first presented at the symposium 'The impact of the case-law of the European Court of Justice upon the labour law of the Member States', Federal Ministry of Labour and Social Affairs, 26 June, 2008, Berlin and first published in O. Schulz and U. Becker (eds.) (2009) *Die Auswirkungen der Rechtsprechung des Europäischen Gerichtshofs auf das Arbeitsrecht der Mitgliedstaaten, Studien aus dem Max-Planck-Institut für ausländisches und internationales Sozialrecht Band 46*, Baden-Baden: Nomos and is reprinted here with the kind permission of the publisher.

Suggestions are made as to the **legal form** and the **substantive content** of such a commitment.

As to **legal form**: Some Member States could adopt a ***Protocol*** on a stronger social dimension as a condition to final ratification of the Lisbon Treaty. All Member States could agree to this Protocol binding only those Member States who accept the Protocol.

If at least 14 Member States agreed, in the course of ratifying the Lisbon Treaty, that they wanted stronger social provisions, the mechanism of ***enhanced cooperation*** (Article 43 TEU) allows this, leaving it open to other Member States to join later.

A ***"Social Schengen"*** agreement between an initially small number of Member States, which more may gradually join, could be adopted in the course of ratification of the Lisbon Treaty, eventually to be incorporated into the legal framework of the EU.

A commonly agreed "***social declaration***", though not legally binding, could have a future impact on the political agenda of the EU institutions.

An ***interpretative instrument*** could be attached to the ratification in the form of an "opt-out" opposite to that of the UK and Poland: prohibiting any court from holding that national laws or practices regulating collective bargaining and collective action are inconsistent with the economic freedoms in the Treaties.

As to the **content**: An "***anti-social dumping principle***": exercise of economic freedoms without a guarantee of jobs and working conditions is an abuse which justifies collective action.

The social policy objective of "improved living and working conditions" (Article 136 EC) allows for a general ***principle of "non-regression"*** in EC law and extends to the freedom of Member States to require ***more favourable treatment*** of workers.

An ***interpretative framework for economic freedom*** to include the freedom of action of collective labour (trade unions) would include a ***rebuttable presumption in favour of collective action***, and a criterion of "***proportionality" based on the acquis communautaire social*** protecting workers. The exercise of economic freedoms

derogating from fundamental rights is only permitted if justified as "proportionate".

The proposed Agency Workers Directive should guarantee ***equal treatment of cross-border agency workers.***

Strategies in the medium-term

The ***"explanations" to the EU Charter*** should be "updated" to reflect a stronger social dimension.

A ***standard social safeguard clause for directives*** could include protection of fundamental rights and collective agreements, and a clearer non-regression principle allowing more favourable provisions.

Transposition of the Services Directive may allow for challenges to the ECJ's interpretation of Article 49 in *Laval* by requiring service providers to respect fundamental rights to collective action, collective bargaining and collective agreements. Commission proposals should include a "***social impact assessment***".

The Lisbon Treaty's ***horizontal social clause*** (new Article 5a EC) should be elaborated to make it effectively operational, given more precise meaning and adapted to specific Commission proposals. For example, to ***revise the Posting Directive*** to reverse the ECJ's interpretation in *Laval.*

Strategies for the long-term

The Treaty ***provisions on economic freedoms need to be redrafted***: to reduce their negative impact on fundamental rights of collective action and to protect workers; to prevent employers using economic freedoms against trade unions taking collective action ***(no horizontal direct effect),*** and the ***principle of subsidiarity should be reworked*** to reflect explicitly the protection of collective action.

Reform of the European Court of Justice includes establishment of a ***specialist tribunal***: the *chambre social*, ***excluding competence to override fundamental rights*** (to collective action) protected in

Member States, ***authorising the social partners to intervene*** in cases before the ECJ, and reconsidering the ***composition*** of the Court.

Reinforcing international labour law in the Treaties would mean ratification by the EU of the ***European Social Charter***, explicit recognition of specific ***ILO Conventions*** as interpreted by the Freedom of Association Committee, and ***interpreting "proportionality" in light of international labour law.***

Introduction: The price of not remembering history is to repeat it

1. A crucial element in maintaining a balance of economic power within EU Member States is the legal right of workers and their organisations to take collective action. A specific legal problem arises where *national laws* on collective action encounter *EU law* on free movement of goods, services, capital or workers.

2. The decisions of the European Court of Justice (ECJ) in *Viking*,[1] *Laval*[2] and *Rüffert*[3] share a common premise: collective action which restricts the economic freedom of employers may violate EU law (on free movement, on posted workers and on public procurement). Although recognising the right to collective action as a fundamental right, the reasoning of the ECJ reflects doctrines long superseded in national legal discourse. Nineteenth century doctrinal ghosts of the dominance of market freedoms, long since revised to reflect the social model of industrial relations in twentieth century European welfare states, have returned to haunt EU labour law of the twenty-first century.

3. The decisions reveal a conflict between the ECJ's doctrine on collective action and the express policy choices of the EU legislature. In contrast to the decision in *Viking*, the EU legislature in Council Regulation (EC) No. 2679/98 of 7 December 1998 declared that free

1. Case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti*, decided 11 December 2007.
2. Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd. 1, Svenska Elektrikerförbundet*, decided 18 December 2007.
3. Case C-346/06, *Rechtsanwalt Dr. Dirk Rüffert v. Land Niedersachsen*, decided 3 April 2008.

movement of goods was not to affect the right to strike.[4] In the Services Directive, the EU legislature explicitly provided that fundamental rights to collective action, collective bargaining and collective agreements were not to be subject to EU law on free movement of services.[5] In contrast to the decision in *Laval*, the EU legislature adopted the Posting Directive 96/71/EC in which Recital 22 states: "...this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions".[6] In contrast to the ECJ decision in *Rüffert*, the EC directives on public procurement, revised in 2004, reflected the policy allowing public authorities to make compliance with collective agreements a contract performance condition, duly acknowledged by Advocate General Bot in his Opinion.[7]

4. Unless the ECJ's doctrines are rejected and the decisions reversed, the EU will pay the price of years of painful struggle to lay these doctrinal ghosts to rest. The price of not remembering history is to repeat it.

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4. The "Monti" Regulation. Council Regulation (EC) No. 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States. OJ L337/8 of 12.12.98; Article 2: "This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States".

5. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L376/26 of 27.12.2006. Article 1(7) provides: "This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law". Recital 15 provides: "This Directive respects the exercise of fundamental rights applicable in the Member States and as recognised in the Charter of fundamental Rights of the European Union and the accompanying explanations, reconciling them with the fundamental freedoms laid down in Articles 43 and 49 of the Treaty. Those fundamental rights include the right to take industrial action in accordance with national law and practices which respect Community law".

6. Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. OJ 1996, L18/1.

7. Paras. 58-60. The Preamble of Directive 2004/18/EC confirms that: "Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents (Recital 33). The Advocate General concluded that there was little doubt that a restriction on the freedom to provide service exists (para. 102). But the public authority was not violating Article 49 because it sought to ensure the protection of posted workers (para. 118). This was an appropriate means of preventing social dumping as it ensures that local workers and posted workers on the same site will be treated equally (para. 119).

The ECJ invents a new EU law on collective action

Uncertain criteria for the legality of collective action

5. The European Court has spectacularly failed to establish clear rules of European labour law governing collective action. The Opinions of each of the Advocates General and each of the judgments of the ECJ in *Viking* and *Laval* prescribe very different principles for determining the legality of collective action. This does not produce certainty, nor inspire confidence in a judicial role in the regulation of collective action. The widely different propositions may be summarised very succinctly as follows.

6. For Advocate General Mengozzi in *Laval*, the lawfulness of primary collective action is subject to the criterion of "proportionality", which requires a *real advantage* which contributes *significantly* to workers' protection. The lawfulness of solidarity action depends on the lawfulness of primary action.

7. In complete contrast, for Advocate General Maduro in *Viking*, to be lawful, primary collective action must be taken *before* relocation. Solidarity action depends on whether it is *voluntary*.

8. The ECJ in *Viking* disregards Maduro's Opinion and, like Mengozzi, invokes the criterion of "proportionality". This requires a *serious threat* to jobs and conditions (not present where there is a legally binding guarantee of statutory provisions and collective agreements). But also, collective action must be *suitable* to achieve the objective, not go beyond what is *necessary* and any other less restrictive means have been *exhausted*. Solidarity action cannot be objectively justified, though it is to be balanced with workers' protection.

9. In contrast, the same ECJ in *Laval* looks to the Posting Directive for the criterion of lawful collective action. Collective action is lawful only to secure standards stipulated in the Posting Directive: legislation and collective agreements declared universally applicable in the construction sector. These are maximum standards. Transnational collective action to impose higher standards is unlawful as violating the Treaty's economic freedoms. Member States may extend this to include other collective agreements, other terms of employment and other sectors. But not negotiation at the workplace,

which prevents transnational undertakings from ascertaining labour standards with certainty.

10. A superficially common criterion of "proportionality" masks real differences.

11. Advocate General Mengozzi in *Laval* explicitly invokes "proportionality", but this is not to be applied to primary collective action in support of pay claims, even if "excessive", though such action may be unlawful if linked to other terms of collective agreement. Similarly for solidarity action.

12. This is contradicted by the ECJ in *Laval*, for whom the criterion of "proportionality" is implicit: collective action is lawful only up to the maximum standards allowed by the Posting Directive. But not if standards are uncertain, as in negotiation at the workplace.

13. For Advocate General Maduro in *Viking*, the criterion of "proportionality" is, at best, implicit: primary action is lawful if before relocation; solidarity action is lawful if voluntary.

14. These concepts disappear in the ECJ's judgment in *Viking*, which evokes the criterion of "proportionality" explicitly. Primary action is lawful if suitable to meet a serious threat, is not more than necessary and less restrictive means available are exhausted. Solidarity action is not proportionate, though it may protect workers.

15. In sum, there are two broadly opposing principles in the judgments of *Laval* and *Viking*, positing two different legal outcomes for the legality of collective action.

16. In *Viking*, legality depends on whether the action satisfies a general anti-social dumping principle (but subject to "proportionality").

17. In *Laval*, legality is subject to the maximum standards principle of the Posting Directive (which may be extended, but subject to "certainty").

18. So much for predictability... The outcome is deeply unsatisfactory.

Horizontal direct effect against trade unions

19. Trade unions are singled out by the Court as subject to complaints that their collective action violates the economic freedoms of others. The formulation is extremely wide: the economic freedoms may be invoked by "any individual who has an interest in compliance with the obligations laid down and... applies in particular to all agreements intended to regulate paid labour collectively".[8] Moreover, the Court focuses such complaints on trade unions.

20. Doctrinal objections to horizontal direct effect include:

    (i) collective agreements are not restrictions on freedom to provide services (as declared explicitly in the Services Directive);
    (ii) collective action is not a regulatory measure;
    (iii) trade unions are not regulatory bodies as "emanations of the State";
    (iv) horizontal direct effect violates freedom of association; and
    (v) horizontal direct effect harmonises EC law on collective action.

21. Practical objections to horizontal direct effect include:

    (i) a potential flood of complaints against collective agreements, and
    (ii) there are no practical criteria which distinguish agreements having regulatory effect.

Unequal treatment of workers on grounds of nationality

22. The fundamental principle of equal treatment regardless of nationality means that workers are entitled to the same terms and conditions regardless of nationality. The decision in *Viking* proposes restrictive criteria for lawful collective action against service providers aimed at ensuring the application to their employees in the host country of collective agreements equally applicable to workers in the host country. *Laval* and *Rüffert* go even further in restricting the kinds of collective agreements which may be applied only to agreements

8. *Viking*, para. 58.

prescribing legally binding national minimum standards. The decisions of the ECJ challenge the principle of equal treatment of workers by distinguishing migrant workers from those employed temporarily by service providers.

Violation of international labour law standards

23. It is questionable whether the international labour law obligations of Member States are compatible with the constraints imposed by the ECJ on the right to collective action. These obligations are incumbent on them not only as signatories to a number of international law instruments (*inter alia*, ILO Conventions 87 and 98, the European Social Charter, Article 6(4)), but as a general principle of Community law.

Violation of the principle of subsidiarity

24. The ECJ's decisions deal a potentially mortal blow to the national industrial relations systems of the EU Member States. The decisions restrict the right to collective action, restrict national collective bargaining systems and restrict labour standards to the minimum. Taken together, the decisions in *Laval* and *Rüffert* define a uniform model of industrial relations mandatory for all Member States. The ECJ's model of national industrial relations has the following characteristics as regards collective action, collective bargaining and collective agreements:

— national constitutional protection of the fundamental right of workers to take collective action is subordinate to economic freedoms of employers protected by the EC Treaty; the legality of collective action is subject to the criterion of "proportionality";[9]

9. The criterion of "proportionality" is indeterminate. For example, according to the ECJ in *Viking*, it disaggregates into a number of indicators: (i) there must be a "serious threat" to jobs and working conditions; (ii) there is no legally binding undertaking by the employer to maintain existing collective agreements; (iii) the collective action must be suitable to achieve its ends; (iv) no other means less restrictive of economic freedoms is available; and (v) all alternative methods of achieving the union's objective have been exhausted.

— only legally binding collective agreements fixing national minimum standards can be enforced against employers (from other Member States and, probably, to avoid discrimination, also against domestic employers);
— flexible collective bargaining arrangements at local level are not enforceable against employers from other Member States as setting standards so uncertain as to constitute obstacles to free movement.

25. Few national systems currently conform to this model. Nobody can have expected the EU, let alone the ECJ, to arrogate to itself the competence to impose a uniform model of industrial relations radically altering systems developed over centuries in accordance with very different national histories, cultures and social partnership institutions.[10]

A charter for "social dumping"

26. Beyond this devastation wrought on national industrial relations systems, the ECJ in *Viking* also condemns transnational solidarity action which interferes with free movement of employers, despite acknowledging its objective to protect workers.[11] It thereby established a legal framework for a balance of power which decidedly favours transnational employers against the protection of workers.

10. Providing an overarching historical perspective, the ETUC stated in its letter attached to the ITF written submission in *Viking*: (paras. 4 and 6): "The precise contours of the rules governing collective action in each Member State are the outcome of different national historical experience... In the Member States of the EU the rules governing collective industrial action reflect an established equilibrium in the balance of forces between the social partners. It would produce a shock of incalculable magnitude if this equilibrium, carefully constructed over time in different Member States, were to be destabilised by an intervention reflecting Viking's interpretation of Community law".

11. The ECJ condemns the ITF's Flags-of-Convenience (FOC) policy which: (para. 88) "results in shipowners being prevented from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, the restrictions on freedom of establishment resulting from such action cannot be objectively justified". This is either a misunderstanding or a misrepresentation of the FOC policy which was previously clearly stated to concern negotiating rights and not registration (para. 8). This is offset by positive statement that immediately follows: "the objective of that policy is also to protect and improve seafarers' terms and conditions of employment".

27. The proposed re-configuration of the legal framework of Member States' industrial relations systems by restricting collective action and collective agreements to limit labour standards to the minimum amount to a charter for "social dumping".

In sum...

28. The ECJ's doctrine on the EU law on collective action:

    (i) subordinates collective action to the economic freedoms of employers,
    (ii) requires collective action to be justified by public policy,
    (iii) in accordance with a criterion of "proportionality" which requires, among other conditions,
        (a) a "serious threat" to jobs and working conditions,
        (b) suitability to achieve its ends,
        (c) lack of other less restrictive means of action,
        (d) exhaustion of all alternative methods, and
    (iv) is enforceable against trade unions through the doctrine of horizontal direct effect.

29. The Court's doctrine adopts the premise that fundamental social rights are to be interpreted narrowly where they restrict economic freedoms guaranteed by the Treaty. This doctrinal approach is fatal to the purpose and function of collective action of workers, which is precisely to restrict the economic freedom of employers.[12]

30. The question is not whether the fundamental right to take collective action can be justified where it restricts employers' economic freedom. Rather, the Treaty's provisions on economic freedoms should be interpreted to ensure respect for fundamental rights of workers, protected as a general principle of Community law.

31. The decisions threaten to overturn national industrial systems in Member States. The immediate victims are Finland, Sweden and

12. As suggested above, it is questionable whether the international labour law obligations of Member States are compatible with the constraints imposed by the ECJ on the right to collective action.

Germany. But the same fate awaits others. The future of national industrial relations systems in the EU depends on whether these decisions and their consequences are reversed.

32. Aggressive employers have already sought to exploit the new EU legal doctrine to stop collective action protected by national laws. Early in 2008, the uncertain application of the criteria laid down by the ECJ to assess whether collective action which restricts economic freedom is lawful enabled British Airways to exploit this uncertainty to threaten legal action against Balpa, the pilots' trade union, which had voted by a large majority to take collective action.[13] The potential cost of defending against such legal threats forced Balpa to withdraw from collective action.[14]

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13. The *Financial Times* (12 March 2008, page 2) included the following report (Kevin Done, "BA uses EU law to prevent strike by pilots": "British Airways is looking to use competition law and a threat to seek 'unlimited damages' against the UK pilots' union in order to stop them going on strike. An overwhelming majority of BA's 3,200 pilots voted last month in favour of taking strike action over BA's plans to set up OpenSkies, a new airline subsidiary, with a pilot workforce separate to its mainline operations, which fly to and from Heathrow and Gatwick airports. Conciliation talks aimed at resolving the bitter dispute over future pilot staffing at BA subsidiary airlines in Europe collapsed on Friday. Balpa, the pilots' union, had planned to issue dates for its first strikes, which would ground the airline, but was forced to postpone the move when BA warned the union it had 'a valid legal claim' against it, if it 'took the disproportionate step of calling a strike'. The union said yesterday that BA was claiming its pilots could not legally pursue their concerns over job security because of European legislation. Balpa said BA was claiming it had a fundamental right under article 43 of the EC Treaty to establish operations in another European Union member state. The right included both establishing new airline services in other EU states, as well as acquiring existing operations from other airlines. BA was claiming that Balpa was seeking to limit that right by insisting that there should be a single pilot workforce with a shared seniority list to determine pilot employment. BA has already begun to recruit pilots for OpenSkies. Jim McAuslan, Balpa general-secretary, said BA 'should be at the negotiating table' and not using European legislation, designed to ensure free competition between companies, in order to restrict the freedoms of trades unions in industrial disputes. He said that Balpa was seeking a High Court hearing to clarify whether the European legislation could be used in an industrial dispute and whether the union could rely on the strike ballot to avoid a claim for unlimited damages. The union has won court backing for the strike vote to remain valid beyond the normal 28-day limit until applicability of European law is clarified. It rules out taking any strike action during the Easter holiday period. BA said yesterday it was 'pleased' Balpa had recognised it had 'a strong legal case'. It said that 'any strike action would be unlawful', and the union had therefore decided not to issue strike dates. OpenSkies is BA's most ambitious attempt to take advantage of the US/European Union 'open skies' treaty liberalising transatlantic aviation". On 15 March 2008, more than 1,000 British Airways pilots marched on BA's Heathrow headquarters over plans to use non-BA pilots in a new subsidiary after pilots had voted for industrial action, but BA applied for a legal injunction to prevent it going ahead. A spokesman said given that roughly 2,000 of BA's 3,000 pilots are usually either on duty or resting before or after flights, the turnout was very high. "Every pilot who could be there was there, which was quite remarkable," the spokesman said.

14. The union's legal action was heard by the High Court in London over four days, from 19-22 May 2008. The outcome was immediately reported in the on-line edition of the *Financial*

33. The lesson is clear. The uncertain application of the criteria laid down by the ECJ to assess whether collective action which restricts economic freedom is lawful enables employers (here British Airways) to exploit this uncertainty to threaten and thereby possibly obtain an interim injunction.[15] The cost and delay entailed in defending against such legal threats effectively deters collective action. In practice, the exercise of the fundamental right to strike, ostensibly protected as a general principle of EU law, is denied.

Times of 22 May 2008: "British Airways' new transatlantic airline has been cleared for take-off after the carrier's pilots on Thursday unexpectedly abandoned a High Court review of their right to strike. BA's launch of OpenSkies – an upmarket carrier that will fly between Europe and the US – had been marred by the threat of a crippling work stoppage at its mainline operations during the peak summer travel season. Members of the British Air Line Pilots Association overwhelmingly voted to strike over the initiative in February, claiming that it could be used as a 'Trojan horse' to usher less favourable working conditions across the airline. The union's decision to withdraw its challenge over the legality of industrial action means that OpenSkies remains on track to operate its first flight from Paris to New York on June 19. Balpa has agreed not to reballot its members to authorise a strike. The volte face came on the fourth day of a judicial review hearing over whether a walkout by pilots were to violate Article 43 of the Treaty of Rome, which gives any European Union-based company the right to set up a business in other EU states. John Hendy QC, for Balpa, on Thursday told the High Court the union simply could not afford to pursue the case through an exhaustive series of appeals. "It is very clear that win, lose or draw this case, there will be further litigation by way of appeals and further appeals, the House of Lords and perhaps the European Court of Justice as well, which will have the effect of increasing exposure to costs of whichever party ultimately loses", he said. "It would plainly be madness to embark on industrial action with the risk that, in the end, it would be declared unlawful". The first tickets for OpenSkies flights between Paris Orly airport and New York's JFK went on sale on Thursday. BA said it 'welcomed' Balpa's decision to withdraw the proceedings, reaffirming its stance that the new carrier posed no threat to the jobs, pay or working conditions of its mainline pilots. Balpa said it now planned to embark on an EU-wide campaign to clarify the purpose of Article 43, to ensure it could not be used to undermine workers' right to strike. The High Court tussle was being closely watched by unions throughout Europe, who feared that a ruling against Balpa would give multinationals another weapon to block industrial action. "We shall be pressing for a review of this law which has prevented British trade union members from protecting their careers", said Jim McAuslan, Balpa general secretary. BA set up the OpenSkies subsidiary to take advantage of the liberalisation of transatlantic aviation agreed last year by the US and the EU. The carrier's Paris-New York flights this June will be the first occasion when BA has operated long-haul services that do not begin or end in the UK".

15. The option of Balpa seeking to refer the legal issues to the ECJ was not pursued. Questions could include, e.g.: (i) Does compliance with domestic law on collective industrial action constitute a criterion for national courts assessing whether the fundamental right to take collective action restricts the economic freedom of employers in accordance with EC law? (ii) What further criteria does EC law provide to enable judges to determine whether the fundamental right to take collective action restricts the economic freedom of employers in accordance with EC law? (iii) What, if any, are the circumstances in which domestic courts may issue injunctions restraining the exercise of the fundamental right to take collective action which allegedly restricts the economic freedom of employers in accordance with EC law? (iv) Is it consistent with EC law for a domestic court to provide an interim remedy on the basis of the "proportionality" of collective action in changing circumstances and future and unforeseeable events?

Scope of action at European level after the Lisbon Treaty

34. This new EU law on collective action was not envisaged when the Lisbon Treaty was proposed. In the aftermath of the rejection of the Lisbon Treaty in the Irish referendum of 12 June 2008, the main objective of this paper is to explore the scope for action at European level, looking to short, medium and long-term strategies.

Strategies in the short-term

35. Apart from giving legally binding effect to the EU Charter of Fundamental Rights, the Lisbon Treaty did not contribute greatly to the social dimension of the EU. And, of course, the new EU law on collective action was not foreseen. Some Member States would have preferred a stronger social dimension. It is possible to reverse some of the negative consequences of the ECJ's decisions and to enable those Member States to undertake a commitment to a stronger social dimension.[16]

36. Two issues arise:

    (i) what would be the ***legal form*** of such a commitment;

    (ii) what would be the ***substantive content*** of such a commitment?

Legal form

37. A number of alternatives may be envisaged.

16. The following draws on some of the ideas prepared for the ETUC Congress in Seville in May 2007 by a group of European labour law professors, the Research Group on Transnational Trade Union Rights of the ETUI-REHS. B. Bercusson (ed.) *Manifesto for a Social Constitution: 8 options for the European Union*, European Trade Union Institute (ETUI-REHS), Brussels, 2007, (133 pp.) also available in French and German.

A Protocol[17]

38. A number of Member States could adopt a Protocol (attached to the Lisbon Treaty) on a stronger social dimension. These Member States would undertake to persuade all Member States to agree to attach this Protocol to the Treaties, though it would only bind those Member States which adopted it.

Enhanced cooperation[18]

39. Article 43 TEU allows for enhanced cooperation by a majority of the Member States. If at least 14 Member States agreed that, alongside the Lisbon Treaty, they wished to adopt provisions for a stronger social dimension, the mechanism of enhanced cooperation could allow this, leaving it open to other Member States to join later.

The "Schengen" model[19]

40. A stronger social dimension could follow the road of the Schengen model. The Schengen Agreement harmonising border controls was made initially by only 5 Member States in 1985. More Member States gradually joined, so that it now includes 25 Member States (except Ireland and the UK, but including also Iceland, Norway and Switzerland). In 1997, a Protocol attached to the Treaty of Amsterdam incorporated these advances into the legal framework of the EU. A "Social Schengen Agreement" could be adopted alongside the Lisbon Treaty.

17. See B. Bercusson, "Option 2: A 'Social Protocol' to the Constitutional Treaty", *ibid*., pp.30–31 and 63–73.
18. See Antoine Jacobs, "Option 3: Enhanced cooperation", *ibid*., pp.32–33 and 75–63.
19. See Isabelle Schömann, "Option 4: The Schengen Model: 'Variable Geometry'", *ibid*., pp.33–34 and 85–94.

A non-binding Social Declaration[20]

41. Member States desiring a stronger social dimension could attach to their ratification of the Lisbon Treaty a commonly agreed "social declaration". Though not legally binding, this could have a future impact on the political agenda of the EU institutions, including the Commission's action programme and the Court's interpretation of the EU Charter's social provisions.

An interpretative instrument (inverse "opt-out")[21]

42. The UK and Poland attached an "opt-out" to the Lisbon Treaty excluding application of the EU Charter to their laws. An inverse "social opt-out" could be modelled on Article 1 of this opt-out: "The Treaties do not extend the ability of the Court of Justice or any court or tribunal to find that the laws or practices of the Member States regulating collective bargaining and collective action are inconsistent with the economic freedoms that they affirm".[22] Member States desiring a stronger social dimension could attach this formula to their ratification of the Lisbon Treaty as an interpretative guide.

Content[23]

43. The Lisbon Treaty proposes to replace the present Article 2 of the Treaty on European Union with a new Article 2, including references to "social progress" and "social justice".[24] The new Article 2 affirms that "The Union shall establish an internal market".[25] But the internal

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20. See Yota Kravaritou, "Option 6: A Non-Binding Social Declaration'", *ibid*., pp.36–37and 105–110.

21. See B. Bercusson, "Option 7: An Interpretative Instrument", *ibid*., pp.37–38 and 111–123.

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

23. What follows are only a few illustrative suggestions among many possibilities.

24. Replacement Article 2(3) TEU. "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, *aiming at full employment and social progress*, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall *promote social justice* and protection, equality between women and men, solidarity between generations and protection of the rights of the child". (italics added) Formerly in the Constitutional Treaty, Part I, Article I-3(3).

25. *Ibid.*

market is only a means towards achieving a "social market economy, *aiming at* full employment and *social progress*" and the Union "shall *promote social justice* and protection".[26]

44. It may be necessary to redress the imbalance in Community law, as presently interpreted by the ECJ (and also the present Commission), by challenging the primacy given to the internal market over all other Community policies.

45. In *Laval* and *Viking*, the ECJ regarded collective action primarily in terms of its impact on the economic freedoms of the common market.[27] What was shocking, if not surprising, is how little weight was given by the ECJ to other, arguably equal if not more prominent, EU policies. These include fundamental rights (the EU Charter's freedom of association, collective bargaining and collective action), improvement of working conditions (Article 136 EC), the public policy of protection of workers against unfair competition (social dumping), and so on. Each of these was mentioned in the judgments in *Laval* and *Viking*, but ultimately subordinated to the economic freedoms of employers in the common market.

46. This is a threat to the entire *acquis communautaire social*. If economic freedoms override collective action, they could be invoked to circumscribe the rest of the *acquis communautaire social*.[28]

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26. *Ibid.*

27. Sophie Robin-Olivier, "Son raisonnement est, dans les grandes lignes, empreint du plus grand classicisme". "Liberté de l'action syndicale *vs* liberté d'établissement", *Revue de Droit du Travail*, Janvier 2008, p. 8.

28. For example, economic freedoms may be invoked against the many directives requiring information and consultation of workers and their representatives. Such requirements restrict the economic freedom of management to make speedy decisions in re-structuring undertakings. An item in the *Financial Times* of 28 February 2008 (page 24) reported: 'A new power struggle has broken out between Gaz de France and Suez, this time between the two companies' European works councils, which are crucial to breaking the union impasse that has repeatedly delayed the creation of the E 75bn ($113bn) energy giant. GdF's European unions are demanding that they represent the enlarged group when the merger is complete before they will give the non-binding opinion that is required under French law before the companies' board can approve the deal. Suez is resisting the demand and both sides are seeking agreement ahead of the next works council meeting on March 11. Failure to find a compromise could throw the merger timetable off track, further delaying a deal that has already been two years in the making. GdF's French unions also have yet to give their opinion and have been using efficient delaying tactics against the merger. Jean-Francois Cirelli, GdF chief executive, said he remained 'reasonably confident' that the deadline of June 30 could still be met, and that the European unions would give their opinion at the March meeting, Discussions with unions had entered a more positive phase, he said'.

47. The following are only a few proposals which could be reflected in one of the legal forms suggested above to accompany ratification of the Lisbon Treaty.

An "anti-social dumping principle" against abuse of the exercise of economic freedoms

48. *Laval* and *Viking* both contain expressions of concern by the Advocates General and the ECJ about "social dumping". The unrestrained exercise of economic freedom of movement may threaten existing jobs and working conditions. This may be characterised as an "abuse" of the exercise of economic freedoms. A condition of the exercise of economic freedom is that there is a guarantee of existing jobs and working conditions. Failure to provide such a guarantee justifies collective action against such an abuse.

A non-regression clause

49. The references in the social policy objectives listed in Article 136 EC to "improved living and working conditions" and "harmonisation while the improvement is being maintained" argue for a general principle of "non-regression" in Community social policy. This could be made more explicit and elaborate as a principle of Community law.[29]

A more favourable treatment clause

50. The ECJ adopted a bizarre interpretation in *Laval* of Article 3(7) of the Posting Directive to restrict the freedom of Member States to require more favourable treatment of workers. This was in order to support its view of the Directive as a stipulating a "maximum

29. The proposed revision of the Working Time Directive exemplifies the need for such a principle. Amended proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time – Political agreement on a common position. SOC 357, CODEC 758, Brussels, 11 June 2008.

standard".[30] This could be addressed by amending the Posting Directive. But this principle is found in many other legislative provisions and the ECJ's interpretation may be dangerous more generally. An attempt could be made to clarify and extend the principle.

An interpretative framework for economic freedoms

51. The market economy is not limited to the economic freedoms of enterprises only. Market freedom includes the freedom of action of collective actors both of capital (enterprises) and labour (trade unions).[31] The economic freedom of movement of one side should

30. Article 3(7) of the Posting Directive 96/71/EC appeared to support this principle: "Paragraphs 1 to 6 shall not prevent the application of terms and conditions of employment which are more favourable to workers". The ECJ interpreted this provision as follows (paras. 79–80; italics added): "It is true that Article 3(7) of Directive 96/71 provides that 'paragraphs 1 to 6 are not to prevent the application of terms and conditions of employment which are more favourable to workers'. In addition, according to recital 17, the mandatory rules for minimum protection in force in the host country must not prevent the application of such terms and conditions. Nevertheless, Article 3(7) of Directive 96/71 cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the *mandatory* rules for *minimum* protection. As regards the matters referred to in Article 3(1), first paragraph, (a) to (g), Directive 96/71 expressly lays down the degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to require those undertakings to observe. Moreover, such an interpretation would amount to depriving the directive of its effectiveness". Reiterated in *Rüffert*, paras. 32–33. Contrast the Opinion of Advocate General Bot in *Rüffert*: (paras. 81–83, italics added) "In addition, I would remind the Court that the 17th recital in the preamble to that Directive provides that 'the mandatory rules for minimum protection in the host country must not prevent the application of terms and conditions of employment which are more favourable to the workers'. The first subparagraph of Article 3(7) of the directive translates this *intention of the Community legislature* by stating that '[p]aragraphs 1 to 6 shall not prevent the application of terms and conditions of employment which are more favourable to workers". In my view, there are two aspects to this last provision. First, it means that the mandatory nature of the protective rules in force in the Member State where the services are performed may be eclipsed by application of the rules in force in the State in which the provider is established if those rules provide for terms and conditions of employment that are more favourable to the posted workers. Secondly, and it is this aspect which is relevant in the present case, Article 3(7) of Directive 96/71 also, in my view, permits the Member State where the services are performed to improve, for the matters referred to in Article 3(1) of the directive, the level of social protection which it wishes to guarantee to workers employed in its territory and which it can therefore apply to workers posted there. Hence in principle, this provision authorises the implementation of enhanced national protection". See also paragraphs 90–98 of the Opinion.

31. As stated by Miguel Poiares Maduro: "...the system requires a set of social rights that can be said to guarantee participation and representation in market decisions and, by internalizing costs which tend to be ignored in those decisions, increase efficiency... rights of participation

not be invoked to restrain the economic freedom of action of the other side, as the ECJ has done in *Viking* and *Laval*.[32] This should be remedied by amendments providing a more even-handed interpretative framework for economic freedoms. For example:

i. A rebuttable presumption in favour of collective action

52. A rebuttable presumption that collective action is presumed to be in response to a serious threat to jobs and working conditions. This may be rebutted when challenged by the employer.[33]

ii. Interpreting "proportionality" in light of the *acquis communautaire social*

53. The lawfulness of collective action is conditional on "proportionality" (*Viking*) and is explicitly linked to the Posting Directive (*Laval*). Why the Posting Directive? Collective action is proportionate where the employer fails to comply with obligations under the general *acquis communautaire social* protecting the rights of workers as an objective of general interest recognised by the Union.[34]

iii. Human rights are not mere derogations from economic freedoms; rather the reverse

54. The ECJ regards the fundamental right to collective action as a derogation from the Treaty's guarantee of economic freedoms. As such, collective action must be justified.[35] The ECJ also declares the

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and representation such as the freedom of association, the right to collective bargaining, and the right to collective action should be considered as instrumental to a fully functioning integrated market which can increase efficiency and wealth maximization". "Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU", in P. Alston (ed), *The EU and Human Rights* (Oxford University Press, 1999), pp. 449–472, at 470.

32. In a parallel case of alleged conflict between the Treaty's provisions on competition and collective agreements, the ECJ had refused to outlaw collective agreements in order to preserve competition. *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, Case C-67/96; with Joined cases C-115/97, C-116/97 and C-117/97; [1999] ECR I-5751. Unfortunately, the ECJ rejected this approach in *Laval* and *Viking*, distinguishing the Treaty's competition provisions from free movement provisions.

33. As stated in *Viking*, the presumption may be rebutted if the employer gives a legally binding undertaking providing guarantees in the form of a collective agreement. In the absence of such a collective agreement, judges should not intervene to restrain collective action in the course of collective bargaining. As stated by Advocate General Mengozzi in his Opinion in *Laval*.

34. In doctrinal terms, this is a specifically EU criterion based on the *acquis communautaire social* reflected in Articles 27 and 28 of the EU Charter: protection by EU law of the transnational economic freedom of employers is balanced with protection of transnational collective action by workers who should be properly informed and consulted before decisions affecting them are made. The common element is the prevention of "social dumping".

35. This approach, also applied by the ECJ to freedom of assembly and association in *Schmidberger* (Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republic of Austria*, [2003] ECR I-5659, 12 June 2003) and to human dignity in

fundamental right to collective action to be protected as a general principle of Community law. The Lisbon Treaty provides that the EU Charter is to have the same legal status as the Treaties and proposes that the EU ratifies the European Convention on Human Rights. The ECJ's approach should be reversed: economic freedoms may exceptionally derogate from fundamental rights guaranteed by Community law, but this has to be justified, and any derogation from fundamental rights is only permitted if "proportionate" (necessary and no alternative available).[36]

The Agency Workers Directive: Equal treatment of agency workers includes cross-border workers

55. The decisions in *Laval* and *Viking* threaten the principle of equal treatment of cross-border workers. The Commission's proposal on Temporary Agency Workers included a requirement that agency workers be treated equally to comparable workers employed by the user employer.[37] This could apply to temporary agencies who post workers to other Member States.[38] The principle of equal treatment could be applied to posted workers generally. For example, where posted by employers to work alongside comparable workers employed by other employers, or in sectors regulated by collective agreements covering comparable workers.

Omega (Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberburgermeisterin der Bundesstadt Bonn*, [2004] ECR I-9609, 14 October 2004) is offensive to fundamental human rights.

36. This is the approach proposed by Advocate General Stix-Hackl in her Opinion in *Omega*.

37. Commission of the European Communities, *Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers*, COM(2002) 149 final, Brussels, 20 March 2002; *Amended Proposal*, COM(2002) 701 final, Brussels, 28 November 2002. See now the Amended proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers – Political agreement on a common position, Brussels, 11 June 2008. SOC 358, CODEC 761.

38. For a discussion of transnational temporary agency work (excluded from the Services Directive) and the need for a directive, see B. Bercusson and N. Bruun, "Free movement of services, transnational temporary agency work and the *acquis communautaire*", in K. Ahlberg, B. Bercusson, N. Bruun, H. Kountouros, C. Vigneau, L. Zappalà, *Transnational Labour Regulation: A Case Study of Temporary Agency Work*, Peter Lang, Brussels, 2008.

Strategies in the medium-term[39]

56. The viability of strategies in the medium-term depends on the political context; not least, the elections to the European Parliament and of a new Commission in 2009.

57. The following proposals aiming for a stronger social dimension may involve new or revised directives, but may have wider institutional implications

"Update" the "explanations" to the EU Charter

58. These "explanations" were "updated" by the Convention on the Future of Europe and again by the Member States at the summit of June 2004. In particular, the explanations accompanying Article 28 on collective action were "updated" at the initiative of the UK government in an attempt to reduce its scope and impact. These "explanations" could be revisited, not least since the UK has opted out of the Charter. They could be revised to reflect a more satisfactory equilibrium between the fundamental right "to take collective action" and economic freedoms.[40]

A standard social safeguard clause in directives

59. Directives already contain standard clauses; for example, regarding obligations of Member States as regards effective enforcement. A standard social safeguard clause could be formulated for inclusion in directives.[41] This could include the following provisions:

39. Of course, some of the proposed short-term strategies become medium-term if they do not succeed in the short-term, and so on...

40. Revision of the "explanations" to Article 28's "right to negotiate and conclude collective agreements at the appropriate levels" might also assist the social dialogue, not least at EU level. There is no need to limit this to Article 28. The ECJ's reasoning in *Schmidberger* might attract support from human rights lobbies for a revision of the "explanations" to Article 12: Freedom of assembly and of association. Similarly, Article 27: Workers' right to information and consultation within the undertaking could also be revisited.

41. The proposed Lisbon Treaty includes a horizontal social clause, Article 5A.

- explicitly protecting national standards (e.g. as in the "Monti" Regulation);
- substantive provisions protecting fundamental rights and collective agreements *per se* (as in the Services Directive);
- a non-regression principle, following Article 136 EC, made more explicit and elaborate; or
- allowing national provisions more favourable to workers;[42]
- specifying obligations on Member States to provide information to employers on labour standards.[43]

Monitoring transposition of the Services Directive

60. *Laval*, by asserting the power of Article 49 EC, implicitly challenges the attempt in the Services Directive to protect fundamental rights to collective action and collective bargaining and collective agreements from liberalisation of services.[44] Member States transposing the Services Directive may offer an opportunity to promote legislation challenging the ECJ's interpretation of Article 49. This may allow for litigation enabling the ECJ to reconsider its decision in *Laval*.

Social impact assessments

61. Commission proposals should include a "social impact assessment". The content should assess the proposal not only in terms of specific social benchmarks, such as minimum standards required, but in terms of its potential impact on industrial relations systems and, in particular, collective bargaining and collective agreements. The formulation of this assessment could engage the social partners.[45]

42. Overriding the ECJ's bizarre interpretation of Article 3(7) of the Posting Directive.
43. A requirement in the public procurement directives, said to promote the transparency of the single market.
44. E.g. in Articles 1(7)), 4(7) 16(3), Recital 15....
45. Indeed, it might be a subject for social dialogue. This extends the Interinstitutional Agreement on Better Lawmaking of December 2003 between the Commission, Council and Parliament to include the social partners, recognising their privileged position. The "opinion" foreseen in Article 138(3) EC could include a social impact assessment

Operationalising the Lisbon Treaty's horizontal social clause

62. The Lisbon Treaty's horizontal social clause, Article 5A, provides:

> "In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health".

63. This could be elaborated so as to make it more effectively operational. Its terms could acquire more precise meaning and adapted to specific Commission proposals. Examples follow.

Revise the Posting Directive

64. The ECJ's interpretation of the Posting Directive in *Laval* is unorthodox, if not wrong as contradicting the aim of the EU legislator. The EU legislator could amend the Posting Directive in a number of ways; e.g.:

- extending the scope of collective agreements establishing standards binding foreign enterprises which post workers, and making mandatory what are currently only options under Article 3(8) of the Directive (amending the definitions of applicable collective agreements determining conditions applicable to foreign service providers);[46]

- make clear that both legislative sanctions and collective action are available to enforce these standards;

- expanding the scope of "public policy" provisions which may be extended to apply to foreign services providers under Article 3(10) of the Directive;[47]

46. This could introduce criteria of decentralisation and flexibility to provide for articulation between national/sectoral and local/enterprise/workplace agreements. This could accommodate the flexible qualities of the Nordic systems advocated by the Commission.

47. Not least in anticipation of the pending decision in Case C-319/06, *Commission v. Luxembourg*, Opinion of Advocate-General Trstenjak, 13 September 2007.

– making clear the power of Member States to require more favourable conditions, reversing the ECJ's bizarre interpretation of Article 3(7) of the Directive;

– making the equal treatment principle applicable to migrant workers applicable to posted workers; if necessary, by declaring that posted workers are to be treated equally to domestic workers after working for a specified (short) period in the host Member State.

65. By legitimizing collective agreements specifically applicable to transnational movement of labour, this would reinforce the principle of non-discrimination/equal treatment of workers, collective bargaining systems which are decentralised but articulated, legislative mechanisms available to enforce these standards and the right to collective action to support these standards.

Strategies for the long-term

66. The ECJ in *Viking* and *Laval* relied on the EC Treaty's provisions guaranteeing economic freedoms. These were characterised as equivalent, and indeed potentially superior to fundamental rights.[48] Action at European level is required for a stronger social dimension in the long-term by revising the Treaties.

67. The attack could be on the *substance* of the ECJ's approach to EC law (market primacy), or on the exercise by the EU of its *competences* (subsidiarity), and hence the scope of the ECJ's jurisdiction; or indeed both.[49] Three specific proposals may be suggested.

48. Unfortunately, at present, the formal supremacy of EU law is often translated into, and reinforces, the substantive primacy of promoting economic freedoms in the common market.

49. Or a combination, focussing on the limitation to transnational matters? The ECJ may determine rules on transnational collective action, but not on matters purely internal to Member States not affected by EC law. What is the consequence if there are radically different rules on transnational and national collective action, and between the national rules in different Member States? Do such differences inherently impede free movement, deterring employers, and hence violate the Treaty? Such differences might impede free movement of workers, as some might avoid moving to Member States where their rights to take collective action are more restricted. What are the criteria of "transnationality"? Is national action caught only if there is actual obstruction of a transnational market relationship, or is it sufficient if it merely (potentially) impedes market access?

Revise Treaty provisions on economic freedoms

68. The task is to re-draft the provisions on economic freedoms in such a way as to reduce or eliminate their negative impact on fundamental rights; specifically, on collective action, and so as to protect workers.

69. For example, the primacy of economic freedoms could be attacked by reformulating the provisions to include the statement that economic freedoms may not be interpreted as affecting in any way the exercise of fundamental rights based on the "common constitutional traditions" of the Member States; specifically, as regards protection of the right to collective action.[50] This also removes the primary obligation of Member States (and national law) to comply with the EU internal market objective.[51]

70. The fundamental economic freedoms of employers are usually exercised through the collective organisational form of corporate capital. The Treaty's economic freedom of workers applies only to individual workers. Another approach would be to draft a fifth fundamental economic freedom of collective organisations of workers.[52] This would promote an interpretation of the Treaty recognising that collective action by workers is consistent with the effective functioning of the internal market. Workers and trade unions, as market participants, may take collective action to ensure their voice is heard and their interests are taken into account, a feature essential to the effective functioning of the internal market. Collective bargaining, collective agreements and collective action are essential to the effective and equitable functioning of the labour market. This balances the discrepancy between the power of employers benefiting from European transnational economic integration, and the relative weakness of a labour movement largely confined to national boundaries in its collective bargaining and collective action.

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50. As in the "Monti" Regulation, Council Regulation (EC) No. 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States. OJ L337/8 of 12.12.98; Article 2, quoted above.

51. Thus reinforcing the ECJ's jurisprudence establishing a general principle of substance that EC law protects fundamental rights.

52. This could build on the precedent of the recognition of management and labour as institutional actors in the Maastricht Agreement's provisions on social dialogue.

71. Finally, as proposed under short-term measures, the Treaties could explicitly provide for an "anti-social dumping principle" against abuse of the exercise of economic freedoms.

Revise the Treaty to prevent employers using economic freedoms against trade unions taking collective action (horizontal direct effect)

72. EC Treaty Articles 43 (freedom of establishment) and 49 (freedom of services) were aimed at regulatory action by public authorities (vertical direct effect) or professional associations regulating access to the labour market. This is not the case with trade unions engaging in collective action in pursuance of a collective agreement which regulates substantive terms and conditions of employment, not free movement.

73. To apply horizontal direct effect to collective agreements means the ECJ will be flooded with endless references from national courts asking whether a specific collective agreement in a particular Member State's collective bargaining system possessed the requisite regulatory effect.

74. The Treaty should be revised to clarify that economic freedoms may not be invoked against trade unions taking collective action.

Revise the subsidiarity principle to exclude EC competence to regulate collective action

75. National laws on collective action by workers and trade unions reflect an equilibrium carefully constructed over time. It is an area of law jealously guarded by Member States. The principle of subsidiarity aims to preclude EC law intervening as EU intervention could be destabilising. Transnational collective action raises difficult questions in private international law: which national court has jurisdiction and the law of which Member State applies. Different laws and different courts take different views regarding the legality of cross-border collective action.

76. The Services Directive rejected the "country of origin" principle to protect national social models, in particular, as regards collective bargaining, collective agreements and collective action: "the exercise of fundamental rights as recognised in the Member States and Community law... the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices..." (Article 1(7)). The principle of subsidiarity could be reworked to reflect explicitly the protection of collective action.

Reform the European Court of Justice

i. Structure of the ECJ

77. There have been reforms to the structure of the ECJ in the past.[53] The decisions in *Viking*, and particularly in *Laval* with its bizarre interpretation of the Posting Directive and dramatic consequences for the entire Swedish system of industrial relations, make a powerful case for establishment of a specialist tribunal: the *chambre social* of the European Court.

ii. Competences of the ECJ

78. The ECJ (and the EU) should not have competence to override fundamental rights (to collective action) protected in Member States.[54] This could be reinforced, for example, specifically as regards collective action, by curtailing the jurisdiction of the ECJ.[55] Article 234 EC could be amended to limit the discretion of national courts to make preliminary references to the ECJ on matters concerned with collective action.[56]

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53. The Single European Act 1986 created the European Court of First Instance. The Treaty of Nice 2000 allows for the creation of specialist tribunals; the first is the European Civil Service Tribunal.

54. As in the "Monti" Regulation, quoted above.

55. This was the effect of the decision in *Albany*, where the ECJ ruled that collective agreements fell outside the competition provisions of the Treaty.

56. In *European Social Policy: Between fragmentation and integration*, (eds. Stephan Liebfried and Paul Pierson, The Brookings Institution, Washington, 1995), the editors offer insights into the role of the courts in EC labour law: (p. 26) "...joint-decision traps in the United States helped push national initiatives for social reform in a rights-based, court-led direction, with disappointing results... the relatively activist role of the European Court of Justice in social policy stems in part from a similar desire of European federalists to avoid the daunting problems associated with joint decision-making through the European Council". And pp. 36–37: "...the dilemmas of shared decision-making in the EU lead to strategies of circumvention... the efforts of actors to escape the gridlock in social policy-making is a central theme. For advocates of social integration, institutional

iii. Procedures of the ECJ

79. The ETUC's experience in *Viking* demonstrated that, although cases before the ECJ may be of vital concern to trade unions, the rules of procedure before the Court make it difficult for trade unions to make representations. The consequence is that the ECJ may not be alerted to important issues. In particular, the rules of procedure should acknowledge that the privileged status of the social partners as institutional actors in the EU Treaty authorises them, like the Member States, to intervene before the ECJ.[57]

iv. Composition of the ECJ

80. The legislative institutions of the EU, Council and Parliament (and in the future, even the Commission) reflect the relative weight of different Member States. The European Court does not: each Member State appoints one judge. The latest enlargement means there are 15 judges from the "old" Member States and 12 from the "new" Member States.[58]

Reinforce international labour law in the Treaties

i. The European Social Charter

81. The Lisbon Treaty proposes that the EU ratifies the European Convention on Human Rights. Article 136 EC already refers to the

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constraints within the Union have made court-led policy development an important path of social reform... [However] multi-tiered systems make centralized policymaking difficult for a reason – to protect local interests – and circumvention of these protections is likely to generate resentment... one aspect of the current disquiet over the Union's 'democratic deficit'...".

57. This should be extended to allowing the social partners to take legal action against the Member States or the other EU institutions for failing to observe Community law (e.g. against the Commission for failure to observe Treaty provisions on the social dialogue process).

58. The *Viking* and *Laval* cases were illustrations of the fact that the disparity in labour costs among "new" and "old" Member States and the willingness of enterprises to exploit economic freedoms has the potential of social dumping as between "old" and "new" Member States. There was a clear difference between the submissions to the ECJ of the "old" (except for the UK) and "new" Member States. See B. Bercusson, "The Trade Union Movement and the European Union: Judgment Day", (2007) 13 *European Law Journal* (No. 3, May), pp. 279–308. The Court deciding *Laval* and *Viking* included 9 judges from the "old" Member States (Austria, Belgium, Denmark, Finland, Greece, Ireland, Luxembourg, Spain and the United Kingdom), and 4 judges from the "new" Member States (Estonia, Latvia, Lithuania, Poland). There was no judge from France, Germany or Italy. The *juge rapporteur* in *Viking* was from Luxembourg; the *juge rapporteur* in *Laval* was from Estonia. Submissions broadly supporting the employer in *Viking* were made to the ECJ by representatives of all 4 "new" Member States on the Court and the Czech Republic, Hungary, and the United Kingdom. Submissions broadly supporting the trade unions were made by representatives of 5 of the "old" Member States on the Court (Austria, Belgium, Denmark, Finland and Ireland), and France, Germany, Italy, Norway and Sweden.

Community "having in mind" the European Social Charter (ESC) of 1961. The Treaty should allow for ratification by the EU of the ESC, which includes the right to strike in Article 6(4).

ii. ILO Conventions

82. All Member States, as members are bound by the ILO Declaration of Principles of 1998, and have ratified ILO Conventions 87 and 98. Article 307 EC means that the obligations under these Conventions "shall not be affected by the provisions of this Treaty". This could be made explicit as regards specific Conventions of the ILO, as interpreted by the ILO's Freedom of Association Committee. ILO Convention 87 has been interpreted to include the right to strike. Rights under international labour law are not to be affected by the free movement provisions of the Treaty.

iii. Interpreting "proportionality" in light of international labour law

83. The criterion used by the ECJ to assess the lawfulness of collective action is "proportionality".[59] This is not the standard used in international labour law, either by the Committee on Social Rights interpreting Article 6(4) of the European Social Charter (ESC) (which the Community is to be "having in mind" under Article 136 EC) or by the Freedom of Association Committee interpreting ILO Convention No. 87, ratified by all Member States (usually before accession to the EC, hence "shall not be affected" by the Treaty (Article 307 EC)).

84. The principles established under the ESC and ILO should be invoked to shape the criterion of "proportionality" invoked by the ECJ.

Conclusion

National labour law

85. National labour law in the EU Member States emerged to redress the imbalance of power between employer and employee in national labour markets. It did this through two principal mechanisms: national legislation protecting employment and working conditions

59. In *Viking*, the standard is whether the threat to jobs and conditions is "serious" and the action is "suitable"; in *Laval*, the standard is that stipulated in the Posting Directive.

and national organisations of workers, trade unions, engaging in collective bargaining and collective action.[60]

86. The labour law on national organisations of workers developed in the Member States through successive stages of repression, recognition and promotion. Although courts in the nineteenth century initially invoked legal doctrines protecting economic freedom to repress collective action by trade unions "in restraint of trade",[61] legislative policy and judicial doctrine eventually recognised and even promoted the rights of workers and their organisations to collective bargaining and collective action.

The balance of power in the EU economy

87. The transnational economy of the European Union, like the national economies of the Member States, requires an economic balance of power between employers and workers. In the Member States, this balance is achieved, in part, through the collective action of trade unions and organisations of employers. The social partners at EU level have not achieved this balance of power.

88. EU law on free movement transforms the balance of economic power in the EU. The freedom of enterprises to move throughout the single European market has shifted the balance of economic power towards employers. This is particularly evident in the overwhelming economic power of multinational enterprises, the magnitude of transnational capital movements and the social dumping effects of global trade. The changing balance of economic power, together with competition over labour standards, weakens European economic integration and undermines support for the European political project.

60. B.A. Hepple (ed), *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945*, London, Mansell, 1986.

61. An example is the British experience, see K.D. Ewing (ed), *The Right to Strike: From the Trade Disputes Act 1906 to a Trade Union Freedom Bill 2006*, Liverpool, The Institute of Employment Rights, 2007.

The law on workers' collective action

89. One response to the shift in the economic balance of power resulting from the growth of the transnational economy is workers' traditional defence of collective action. As stated in the first sentence of this paper, a crucial element in maintaining a balance of economic power *within* Member States is the legal right to take collective action. National labour laws include the right to collective action. Though legal systems differ, no Member State outlaws collective action.

90. Under the pressure of EU law, Member States adapted their law to the requirements of free movement in the single market. The EU law of the common market transformed national rules governing the free movement of goods, services, capital or workers. However, national laws have not yet adapted to trade unions' response in the form of collective action which impacts on the transnational economy.[62]

Transnational collective action and EU law

91. Globalisation means that collective action frequently has an impact beyond national borders. National rules on collective action are inadequate to regulate transnational collective action having an impact on free movement in the EU. The decisions of the European Court of Justice in *Laval, Viking and Rüffert*, although not repressing collective action, indeed recognising it as a fundamental right, conspicuously failed to rise to the challenge of accommodating labour law doctrine to the new balance of power in a transnational European economy.[63] Action on the European level is required to compensate for this failure.

62. B. Bercusson, "Foreword", to F. Dorssemont, T. Jespers, A. van Hoek (eds), *Cross-Border Collective Actions in Europe: A Legal Challenge*, Intersentia, Antwerp-Oxford, 2007.

63. I concluded my article of May 2007 in the *European Law Journal* on an earlier stage of this litigation by speculating that the future of the European trade union movement but also of the EU could be at stake. Now that the decisions have come out, it may be necessary to add the future of the European Court to this list...

Chapter VI

Discrimination and equality in employment

Chapter VI: Discrimination and equality in employment

Introduction by Csilla Kollonay-Lehoczky

Brian Bercusson's interest in EU equality law was connected to his overall interest in making economic and social rights a reality. Naturally, this entails equality in the enjoyment of such rights. He acknowledged that European law exerts a significant influence on the development of law in the Member States, but he also asserted – in both the articles reproduced here – that the transposition of the prohibition of discrimination into national law could not have a significant impact on discriminatory practices in the Member States. While, formally, there has been some harmonisation between the Member States, substantive harmonisation – that is, the genuine implementation of the principle of equal treatment – has failed, even in the case of the 'most easily enforceable part'[1] of EU equality law, the directly applicable (both vertically and horizontally) Article 119 on equal pay. While traditional legal instruments – mainly litigation (which, in relation to other matters, he considered a successful way of achieving compliance with European requirements) – have failed to bring about effective implementation of Community law, he attributed great importance to collective bargaining and social dialogue for realising genuine harmonisation.[2] His findings in these two papers – confirmed by research that he published elsewhere[3] – increased his concern, not only with regard to the weak role of traditional legal instruments, but also the difficulties which derive from the differences between collective bargaining systems. The discovery of

1. *Discrimination in employment: Reflections on the European Community experience*, p. 135.
2. *Discrimination in employment: Reflections on the European Community experience*, pp. 136–37.
3. B. Bercusson and A. Weiler (1999), *Equal opportunities and collective bargaining in the European Union. Volume 3. Innovative agreements: An analysis*, Luxembourg: EUR-OP. B. Bercusson (1996), *Equal opportunities and collective bargaining in the EU. Exploring the national situation in the United Kingdom*, Dublin: European Foundation for the Improvement of Living and Working Conditions. B. Bercusson and L. Dickens (1996), *Equal opportunities and collective bargaining in Europe. 1. Defining the issues*, Luxembourg: Office for Official Publications of the EU. B. Bercusson (1991) 'Database of Collective Agreements on Women and Work: Final Report', (mimeo), Brussels: Equal Opportunities Office, DG V, Commission of the European Communities, May 1991 (42 pp + appendices).

these tensions prompted him to analyse the complexity of the ways in which EU equality law interacts with collective bargaining.

This combined analysis makes his input to our knowledge on European labour law uniquely valuable. A great deal has been written on collective bargaining in Europe and there has been a huge amount of analysis of equal opportunities; however, it was Brian Bercusson who linked the two topics. His vision is also evident: reading the two papers today, the reader is struck by how much they are suffused by a sense of developments in the 15–20 years following their publication.

While not denying the view promulgated by classical market economics that discrimination conflicts with market efficiency, to the extent that by acting in that way employers are proceeding on the basis of non-economic factors,[4] Brian Bercusson goes further than establishing a connection between 'capitalist efficiency' and the need for effective anti-discrimination laws. His approach to equality inseparably connects fundamental social and economic rights and equality, thereby reversing the logic of Article 119 of the Treaty of Rome. Linking equality in a primary way to fundamental social and economic rights, he also identifies substantive equality with their guarantee (compensation, in his approach, is rather a guarantee than a remedy). For Brian Bercusson, 'equal treatment' is not only more than the formally equal application of rules ('formal equality'), but also supersedes 'equal opportunity', which also relies on formal rules and procedures. Admittedly, his concept concerns rather 'equal shares' and equality of outcomes.[5] His assessment of equality is based on the 'finishing line' rather than the 'starting line' and focuses on just treatment of the group instead of – or not only – justice for the individual.

It has become evident over the years that litigation may play only a limited role in the enforcement of gender equality legislation at EU and national level. It might be initiatory or supplementary to a collective bargaining strategy,[6] emphasising collective actions. However, in equality enforcement its role remains restricted. The article published in the *Georgia Journal of International and Comparative Law* in 1990 deals with discrimination on a larger scale, beyond the limits of the EU

4. This is the logic underlying Article 119 of the Treaty of Rome.
5. See also B. Bercusson (1996) *European Labour Law*, London: Butterworths, pp. 174–75.
6. *Discrimination in employment: Reflections on the European Community experience*, p. 137.

equality law of the time. The two thematic issues besides the gender pay gap are discrimination on the basis of trade union membership and religious discrimination. He finds that the modest role of the law in these cases, too, underlines the superiority of negotiations and other collective methods over litigation.[7]

Besides the close connection between equality and social rights, not to mention the limited role of traditional legal instruments, two further characteristics of his approach to equality are demonstrated by the selected articles. In order to achieve genuine and substantive equality, he desires, first, procedures which detect the hidden, invisible discrimination in employment and, second, effective enforcement by means of sophisticated strategies involving balances and compensation – in present day terms, his conceptual approach is close to mainstreaming and even transformative equality.

It was obvious to Brian Bercusson that both of his goals – detecting hidden discrimination and eliminating it through compensatory balances – could and should be achieved predominantly by means of collective bargaining and social dialogue, a strategy which makes it possible to go beyond formal rules. He demanded extended affirmative action which would seek to obviate the disadvantages present, invisibly and inherently, in the law and all labour market arrangements governed by the traditional male-oriented standard.

His paper 'EC equality law in context' provides a deeper analysis of the potential of and possible barriers to the implementation of gender equality through collective bargaining. His numerous country researches showed him that hidden discrimination is frequently embodied in collective agreements (for example, in wage structures and categories, as well as apparently affirmative action which can perpetuate inequalities), and also in the exercise of managerial prerogatives.[8] While the primary concern of both collective bargaining and EU gender equality law has been pay (wage equality), the progress of EU gender equality law in the late 1980s and 1990s has supplemented the equality agenda with a number of other terms and conditions of employment which are, or could be, determined through collective bargaining, although

7. *Discrimination in employment: Reflections on the European Community experience*, pp. 142–43.
8. *EC equality law in context: Collective bargaining*, p. 187.

collective bargaining is itself a gendered process.[9] After noting shortcomings in terms of personal scope (separate bargaining units for women), procedure (lack of transparency of wage systems) and results (prevalence of women in lower wage segments, men dominating the higher wage grades),[10] he undertakes a complex and multidimensional analysis, at both EU and national level, of traditional (individual) legal and collective bargaining strategies. (Interestingly, and remarkably, the dimensions of his analysis seem to reflect, albeit indirectly, the concept of 'horizontal' subsidiarity elaborated in the 1996 *Manifesto for a Social Europe*.[11])

His optimism regarding the possibility of changing the gendered process of collective bargaining is rooted in two considerations:

(1) The 'feminisation' of the labour market in terms of women's quantitative presence, not only in the workplace but also in the trade unions. He saw that the increase in the proportion of women in the labour force would impact trade union decision-making, somewhat weakening the hegemony of the traditional male labour force in collective negotiations.
(2) Hope of the better utilisation of national bargaining strategies. The current state and quality of the national collective bargaining system determines the application of EU norms, determined by diverse industrial relations traditions and practices.

Brian Bercusson's pertinent analysis of a number of countries led him to discoveries not only about pay structures but also, and more importantly, about the prospects of and demand for substantive equality and equal treatment in legal and industrial relations regimes themselves. His assertion that 'the context of the very different social and industrial relations systems of the Member States requires equal consideration in any debate over new fundamental social and economic rights'[12] sounds, to a reader from a post-Soviet country, like a farsighted claim with strong relevance to the present post-enlargement years. Admitting a number of countries with systems of social and economic rights that have

9. *EC equality law in context: Collective bargaining*, p. 183.
10. *EC equality law in context: Collective bargaining*, pp. 180 and 182.
11. B. Bercusson, S. Deakin, P. Koistinen, Y. Kravaritou, U. Mückenberger, A. Supiot and B. Veneziani, *A Manifesto for Social Europe*, Brussels: European Trade Union Institute, 1996.
12. *Discrimination in employment: Reflections on the European Community experience*, p. 135.

such different roots and historical remnants, has obviously required adjustments to the common system. However, the 'single standard' approach to which these new Member States have been subjected has paid insufficient attention to the manner in which adjustment might be facilitated, resulting in frequent failures of real transposition, although formal requirements appeared to have been complied with. By this token, it is also worth mentioning that his visionary mind prompted Brian Bercusson to extend his view to the Eastern part of the continent before these countries were reconnected to Europe, adopting a 'candidate country's view' before enlargement took place.

Based on his analysis of the interplay between EU (ECJ) law, national legal systems and collective bargaining, Brian Bercusson demonstrates a progressive and mutual effect: although European law was integrated into the national context of collective bargaining and could take into account the particular characteristics of the parties and procedures concerned, EU equality law could not be shielded from the influence of the collective bargaining context. It had to 'accommodate the national context', which, in turn, resulted in distinctive development of the law in the process of its application.

Discrimination in employment: Reflections on the European Community experience, with particular reference to the United Kingdom

Brian Bercusson (1990) * **

I. A brief excursus on markets and discrimination

The role of markets in promoting equal opportunity is illustrated by a study published in September 1988 which predicted that the demand for labor in the City of London banking sector would increase by 11,000 jobs over the five years between 1987 and 1992.[1] During this period, the population of London is likely to remain stagnant. Where are the people going to come from to fill these jobs in banking and finance?

One answer is that industries which traditionally rely heavily on female employees will have to rely on women even more. It is not a coincidence, therefore, that suddenly, in the last year, a number of financial institutions have introduced career-break schemes to encourage women desiring families to remain with the firm. This practice is an example of policies encouraging female participation in the labor force, often at higher levels of management. Another example comes from the Midland Bank, which recently initiated a program for which people had been lobbying for years. It announced in early 1989 its intention to set up 30 work-place nurseries for the children of its staff.[2]

These developments are not the result of a particular desire for social justice or equality on the part of management in these industries. They reflect the conditions of the market in which these employers have to recruit labor.

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** 'Discrimination in employment: reflections on the European Community experience with particular reference to the United Kingdom', Brian Bercusson (1990). Reprinted with the permission of the Georgia Journal of International and Comparative Law from Vol. 20, No. 1 (1990).

1. *Finance Moves to Retain Women Employees*, 441 Indus. Rel. Rev. & Rep. 2 (June 13, 1989).
2. *Childcare Pressures Grow*, 437 Indus. Rel. Rev. & Rep. 2 (April 4, 1989).

The policy argument based on market economics is as follows. The capitalist entrepreneur should be required to recognize the economic merits of an equal opportunity policy. Classical market economists take the view that discrimination is inefficient in that it involves the introduction of non-economic factors in making a judgment as to the hiring and dismissal of workers. Employers, in making their business decisions, should be required to refrain from the temptation of resorting to factors, such as race or sex prejudice, which are unrelated to labor efficiency. Capitalist efficiency, therefore, favors the introduction of an effectively implemented anti-discrimination law.[3]

My theme, however, is not capitalist efficiency and discrimination laws. Rather, I want to address three separate but related topics. My remarks refer mainly to the situation in the United Kingdom, but I will also make some comparative comments on European Community and international law. This is the counsel of necessity, for it is evidently hopeless to try to describe on this occasion even the broad framework of British legislation on discrimination covering women, racial minorities, disabled, migrant workers, and so on.

I am going to focus on three different points. First, I want to highlight the differential impact of the European Community's law on discrimination in different Member States. Second, I will illustrate the relative lack of impact of the law on discrimination, looking in particular at the area of anti-union discrimination which has so far received little attention. Third, another area which has been scarcely mentioned, but which has a particular resonance in the United Kingdom, is discrimination on grounds of religion. I want to inform you specifically about the experience in Northern Ireland and the legislation introduced to try to redress the discrimination practiced against Catholics.

II. Discrimination law and equal pay for female workers in the European Community

As has been mentioned many times now, Article 119 of the Treaty of Rome applies to all Member States of the European Community. Yet, when one compares the situation regarding equal pay for men and

3. *Benedictus & Bercusson, Labour Law: Cases and Materials*, 191–240 (1987).

women in the Member States, it is clear that the application in practice of the same law is very different. This fact has important implications for current social policy-making in the Community. Presently, a great debate exists over the introduction into the Community's legal order of fundamental social and economic rights. Much of the recent debate has concerned the formulation of these rights. But in my view, application across the Community, in a uniform or harmonious way, of whatever rights are formulated, in the context of the very different social and industrial relations systems of the Member States, requires equal consideration in any debate over new fundamental social and economic rights. I want to illustrate the nature of this problem of application by looking at existing fundamental social and economic rights against discrimination and, specifically, the application of the law on equal pay in a number of European Community Member States.

Article 119 of the Treaty of Rome on equal pay is the most easily enforceable part of European Community law on sex discrimination. By virtue of its direct horizontal effect in all Member States, a formal harmonization of the law results across the Community. In addition to the provision in the Treaty of Rome, there is also Directive 75/117 on equal pay which each Member State must implement.[4] For the most part, implementation has been achieved through the traditional means of legislation and judicial enforcement. The result has been to achieve a degree of *formal* harmonization of law among the Member States. However, considerable reservations about the reality of *substantive* harmonization of the right to equal pay as applied across the Community do exist.[5] This fact will be illustrated here through an examination of a different aspect of implementation of Community law on equal pay: its impact on trade union activity in the field. One issue addressed is the extent to which harmonization of social and economic rights embodied in legal instruments of whatever kind at the European Community level could be achieved through collective bargaining in the Member States.

When one thinks of European collective bargaining, the temptation is usually to conceive of Europe as a geographical area, trade unions and employers' associations organized at the European level and collective agreements applying across the Community. The prospect of European

4. 18 O.J. Eur. Comm., (No. L 45) 19 (1975).

5. See *generally* 1–2, 7 Equality in Law Between Men and Women in the European Community, (M. Verwilghen ed. 1985) (European Conference organized at Louvain-la-Neuve, Belgium).

collective bargaining in this sense is often discussed but generally dismissed as hopeless, apart from certain exceptional cases where multinational enterprises have set up European works councils or a very rare sectoral initiative, such as in agriculture.

When I think about Europe, a constant preoccupation at the European University Institute in Florence, there is no presumption against diversity in favor of harmonization or uniformity. To this way of thinking, the objective of research into fundamental social and economic rights at the *European* level – such as that against discrimination – is to find a method of formulation and implementation of such rights across the Community in all its diversity. One method is that such rights be implemented, and their substantive content be given further definition, through *national* systems of collective bargaining. I want to try to demonstrate the difficulties of this method, as well as its potential, through a discussion of the Community law on equal pay.

The law on equal pay is a useful illustration because I think Britain has something to offer which probably is not apparent in other Community Member States. The most important piece of British legislation on equal pay is the Equal Pay (Amendment) Regulations 1983. These regulations provide that a woman can claim equal pay not only when she is doing equal work, work that is the same or broadly similar to that of a man, but also work that is completely different from that of a man, but which is deemed to be of equal value. A very complex procedure was established for determining whether a woman's work is of equal value to that of a man.

One interesting point to note is that, although there have been in absolute terms a large number of claims – over 2,000 claims registered so far – this large figure is somewhat misleading. Of these claims, the National Union of Mine Workers, which is supporting a campaign for equal pay by female canteen workers in the mining industry, has backed some 800 claims. Furthermore, the Manufacturing, Science, and Finance Union has brought in addition 900 of these claims on behalf of speech therapists claiming equal value work with clinical psychologists. Therefore, although the overall number of claims is high, this number does not represent widespread use of the law through claims. Rather, it reflects relatively narrowly campaigns by unions for equal pay in specific industries. Nonetheless, the two examples I mentioned do illustrate that some trade unions have been active in promoting equal pay using the legislation.

This phenomenon deserves more attention than it has previously received. Equal pay legislation has been the object of a deliberate trade union strategy in the United Kingdom. It has been taken up, as I have indicated, using traditional litigation methods. More particularly, unions have attempted to implement the objectives of the legislation through collective bargaining. In this way, the European Community law on equal pay has had a degree of success which reliance solely on traditional legal strategies such as litigation would have never achieved.

Before outlining the trade unions' strategy, it is important to highlight its significance in a European dimension. This strategy could be applied to fundamental rights in the European Community generally. Instead of focusing solely on litigation strategies and legal rights, consideration should be given to strategies involving the trade unions in different Member States. The unions' highly developed systems of collective bargaining could be exploited to implement effectively fundamental social and economic rights. Such rights are part of the daily diet of negotiators engaged in bargaining and are not the exclusive prerogative of traditional litigation strategies.

To return to the exemplar of trade union strategies on equal pay in the United Kingdom, close analysis of these union strategies demonstrates a great deal of divergence among different unions.[6] Some unions have no national strategy for using the law on equal pay for work of equal value; nonetheless, they will allow local officials to use their initiative in exploiting the law to undertake equal value claims based on the enterprise or the work place. One should not underestimate the importance of allowing such initiatives given the specific quality of British industrial relations. The highly decentralized nature of the British collective bargaining system allows for local union officials to exercise a degree of discretion, which offers prospects of local enforcement of Community law on equal pay.

In contrast, other unions discourage or even prohibit their officials from pursuing equal pay claims. Although these are exceptional, interestingly enough, they include the National Association of Teachers in Further and Higher Education (NATFHE).

6. *Equal Value: A Union Update*, 22 Equal Opportunities Rev. 9 (1988).

Still other unions have developed a deliberate national strategy to encourage and to coordinate local union claims. Three varieties of this type of strategy exist. First, some insist upon collective bargaining over equal pay first, and employ litigation only as a last resort. Second, some seek to integrate the *threat* of litigation into their collective bargaining strategy. Third, some adopt from the very beginning a test case strategy, The point I am making is that, in the United Kingdom, litigation is only part of a broader strategy of implementing anti-discrimination legislation. The objective of the fundamental right against discrimination is achieved also through a collective bargaining strategy. Once one turns to the situation in other countries, however, a combination of legislation, litigation, and collective bargaining similar to that exploited in the United Kingdom cannot simply be exported to other European countries. Their industrial relations systems are different.

In Italy, for example, very little pressure comes from the trade union movement in the area of equal pay because the trade unions do not believe in promoting equal pay as a policy. Rather, they favor a general "low pay" policy, rejecting a specific gender dimension to the problem of low pay. Italian trade unions campaign to support low paid workers generally. This may involve policies which have a greater impact on women, but these are not deemed to be part of an equal pay policy. An example is flat rate increases in collective agreements, as opposed to percentage increases. Percentage increases benefit the low paid less than a flat rate increase. Italian unions do try to tackle equal pay, but not directly through collective bargaining over wages. Their main efforts aim at combating equal pay problems or sex discrimination problems through action directed at the labor market. Positive action programs are used to combat discrimination.

Many collective agreements in Italy prescribe positive action programs providing special opportunities to women for training and accessing jobs. The Italian unions try to promote higher paying jobs for women and, in this way, to reduce the degree of sexual segregation in the labor market. Their strategy thereby differs from the litigation strategy pursued by unions in the United Kingdom. One should note that in both cases inspiration is drawn from European Community law. In the case of the equal pay strategy of the British union, this is obvious. In collective agreements in Italy, one also finds many references to European Community instruments, particularly references to the 1976

Directive on Equal Treatment,[7] often cited to support the limitation of positive actions.

The situation in the Federal Republic of Germany further illustrates the difficulties on the path towards a harmonized implementation of a fundamental right to equal pay in the European Community, already evident from the comparison of the strategies of the British and Italian unions. Pay bargaining in Germany takes place not at the enterprise but at the regional, national or sectoral level. Where wages are successfully negotiated at these levels and not at the level of the work place, it is very difficult to implement an equal pay strategy, based on direct comparisons between two workers of different sexes working in the same establishment allegedly doing the same work or work of equal value. The implementation of an equal pay policy through national or regional bargaining systems may be theoretically possible; however, this requires a sophisticated system of job evaluation. The only trade union, as far as I know, that has introduced any kind of job evaluation into its collective agreements on wages is IG Metall, which organizes metal workers in the Federal Republic.

An aspect of the German pay bargaining system is intriguing on this point. At the plant level, no pay bargaining occurs because, by law, plant-based works councils have no jurisdiction to negotiate. But, four to five hundred thousand *de facto* arbitrations take place each year at the plant level over the grading of workers in the trade union negotiated wage structure. This allows for a measure of plant level control over wages. Wage increases can be pushed through at the plant level, not through negotiating flat rate increases or percentage increases, but by upgrading the employees' job classification, thereby effectively obtaining a *de facto* wage increase. The question, to which I do not know the answer, is to what extent do or could works councils use this form of arbitration at the plant level as a means of either promoting or not promoting equal pay between men and women?

The Danish situation is completely different because Denmark is the only country that I know of in Europe with separate trade unions for each sex. That is to say, there is an all-female unskilled workers' trade union and an all-male unskilled workers' trade union. This separation

7. 19 O.J. Eur. Comm. (No. L 39) 40 (1976).

has had very important implications, for example, concerning the willingness of the Danish trade union movement to organize what are in Europe frequently called "atypical workers."

The difficulty of this comparison may be highlighted by the problems I always have in persuading my Danish colleagues[9] to adopt the concept of atypical workers. As far as they are concerned, part-time workers and other atypical workers are in fact the norm in Denmark. A higher proportion of people in Denmark work part-time jobs, casual jobs, temporary jobs, and so on, than work in what is elsewhere recognized as typical employment, namely full-time employment of indeterminate duration.

The Danish system is further complicated by the effective existence of two wage determination systems: the normal wage system, where the results of negotiations are what is actually paid; and the minimum wage system, where what results from negotiations is only a minimum wage, which is usually increased by various bonus payments and premiums negotiated individually between workers and employers. The minimum wage system, bolstered by bonus payments, is often the vehicle for indirect sex discrimination because, not surprisingly, most of the bonuses tend to go to jobs held by male workers.

To summarize, a legal strategy addressing sex discrimination in employment can benefit considerably from integration with a collective bargaining system. However, a strategy which seeks to coordinate legislation against discrimination with collective bargaining must account for the very different industrial relations systems, as the experience of the Member States of the European Community demonstrates.

III. Anti-trade union discrimination

The second area I want to address is anti-union discrimination. Reference here is obligatory to several international instruments: the International Labour Convention No. 87 concerning Freedom of Association and Protection of the Right to Organize (1948), Convention No. 98 concerning the Application of the Principles of the Right to Organize and to Bargain Collectively (1949), and Convention No. 135 concerning Protection and Facilities to Be Afforded to Workers' Representatives in the Undertaking (1971). Furthermore, the European Convention on

Human Rights and Fundamental Freedoms (1950) and the European Social Charter (1961) both provide various protections against anti-union discrimination.

Not until 1971, however, with the Industrial Relations Act, did Great Britain actually introduce legislation giving employees the right to be trade union members and to take part in trade union activities. The relevant provisions are now found in the Employment Protection (Consolidation) Act 1978. This legislation contains provisions protecting against dismissal or any form of discipline or discrimination resulting from union membership or union activity. The law also provides employees with time off enabling them to take part in trade union activities and, for employees who are trade union officials, to take time off to carry out their union duties. This last provision is subject to amendment by a Bill now before Parliament,

In contrast to these legal provisions, both international and British, I want to bring to your attention some empirical research undertaken in 1987 on anti-union discrimination. This work focused particularly on the construction industry.[8] It argues that, although *overt* anti-union discrimination is very infrequent, it *is* systematic at critical moments of challenge to management control. In other words, anti-union discrimination only arises when something important is at stake. As long as there is no conflict and no problem, one does not find anti-union discrimination.

Discrimination emerged in different forms in what was called the pre-recruitment stage and the post-recruitment stage. At the pre-recruitment stage, it took the form of screening. Employers in the construction industry were found to prefer systematically certain kinds of workers – those thought to be more reluctant to assert their trade union rights. Employers tended to prefer workers, selected on criteria of race, gender or age, perceived rightly or wrongly as being more reluctant to exercise trade union rights. An active blacklist was operating in the construction industry whereby workers, known to be trade union activists or militants, were systematically excluded.

8. S. Evans & R. Lewis, *Labour Clauses: From Voluntarism to Regulation*, 17 Indus. L. J. 209 (1988).

The law protecting employees from anti-union discrimination was useless.[9] This fact is demonstrated by a 1977 case which concerned a worker, a noted trade unionist, who was convinced that no large employer would give him a job because of his record of union activism.[10] Using a false name and bogus references, he was finally hired by a foreman on a construction site who did not recognize the name. However, he was recognized one hour later by another foreman and thrown off the site. When this happened a second time, he claimed that he had been a victim of anti-union discrimination. He lost the case because no right against discrimination existed *prior* to employment. Employer maintenance of a blacklist is not against the law. There is no pre-employment protection. This is particularly important in light of the increasing use by employers of internal labor resources; in hiring recruits, employers rely on existing personnel who introduce and vouch for prospective employees. This operates as an indirect mechanism for keeping out workers regarded as unsound.

The second form of anti-union discrimination is post-recruitment. In Britain, the practice whereby workers are required to sign a declaration stating that they will not join a union no longer exists. But dismissal of employees after they have been recruited for reasons of union activity still exists and takes two main forms. It may occur on an *ad hoc* basis where the employer decides that in a situation of conflict he is not going to tolerate certain union activity or union militancy and simply dismisses the worker concerned. This tends to be a practice found primarily in small firms. A small and, in personnel management terms, unsophisticated employer will resort to instant retaliation in a case of conflict. The second form has been called the "safe" method. An employer, confronted with a union militant or union activist who is causing him difficulty, does not seek instantly to dismiss the employee but adopts a series of other mechanisms. He prepares the grounds for an eventual dismissal based on a history of disciplinary misconduct: bad time keeping, poor work, and so on. Various forms of harassment are exercised against the worker, or the worker is transferred to less desirable work, or he is isolated in a certain work place, or, he is surrounded by workers deemed more trustworthy so he can never mobilize work mates to support union action. The above-mentioned research on the construction industry demonstrated that employers will use these

9. In proposals currently being put forward by the Government, consideration is being given to the possibility of extending protection against anti-union discrimination at the pre-recruitment stage.

10. *City of Birmingham Dist. Council v. Beyer* [1977] I.R.L.R. 211, 1 A.E.R. 910 (1978).

techniques even if they have to sacrifice other workers in order to justify the ultimate dismissal of the union activist. The employer will impose sanctions on nonunion employees as well as unionists in order to protect the eventual dismissal from challenge on grounds of discrimination.

The law plays a very minor role in preventing this kind of pre- or post-recruitment discrimination. Generally speaking, surveys of the construction industry show that the law fails to deter employers, who regard it as an insignificant obstacle. The risk of complaint is very low. Any remedy that might ensue as a result of an anti-union discrimination complaint is regarded as a cheap price to pay. Union officials also do not regard the law as being of much help. In fact, they regard the law as positively undesirable because it effectively deters negotiations. If the union represents a union member allegedly dismissed for union activity, any litigation over the issue would effectively put a stop to negotiations with the employer over eventual reinstatement or settlement of the problem.

IV. Discrimination on grounds of religion

The last area I want to address is the very special problem of religious discrimination in Northern Ireland, Twenty-one years ago, in 1968, the civil rights movement reached Northern Ireland. It sought particularly to eliminate or at least protest employment discrimination against Catholics. The constitution of Northern Ireland was amended in 1973 to prohibit direct discrimination against Catholics. Further legislation was passed in 1976 (the Fair Employment Act), and a special enforcement agency was set up in 1977. More than ten years later, the Catholic rate of unemployment for males in Northern Ireland is 35%, which is two and a half times the rate for Protestants. In other words, despite ten years of legislation, with an average of 100,000 job changes a year, the rate of Catholic unemployment is still much higher than that of Protestants. Religion remains the major factor determining recruitment.[11]

An authoritative report published in 1987 stated that the legislation had had little effect on the practices of employers. Employers continue to think that such discrimination is justifiable. They still resort to old established

11. See McCaudder, *The Northern Ireland Fair Employment White Paper: A Critical Assessment*, 17 Indus. L. J. 162 (1988).

methods of informal recruitment. Investigations undertaken by the special Fair Employment Agency have had no impact beyond the immediate employer investigated. Employers have made no effort to monitor recruitment according to religion, and very few equal opportunity measures exist.

The point I want to emphasize, however, is that there has been, since the mid-1980s, considerable development in this area. This development has come from an unexpected quarter, not normally considered in the context of anti-discrimination law. It is a result of a kind of non-traditional international law. I am referring to political pressure from the United States on Northern Ireland. This pressure, since the mid-1980s, has given rise to serious proposals for reform, the McBride principles.

These principles incorporate the results of long-standing pressure brought to bear on American corporations and state and municipal governments with investments in Northern Ireland to insist upon certain positive action and anti-discrimination policies with respect to employment practices in Northern Ireland. The McBride principles, named after Sean McBride, assumed a serious dimension in the United States by July 1988. Last year, eight state governments passed legislation, including Massachusetts, where then Democratic presidential candidate Governor Michael Dukakis signed a bill which implemented the McBride principles.

This political development had a tremendous impact in Northern Ireland, so much so that in May of last year a White Paper was issued which contained considerable changes to the law. The White Paper sought to enforce equal opportunity through positive action policies, to impose monitoring requirements, to introduce a principle of contract compliance for government contracts, to ensure that certain quotas or targets were met, and to provide more effective remedies where the employer was found to have discriminated.

Experience does not make one optimistic about the success of even these new developments in the law. However, the experience of Northern Ireland is interesting as a legal strategy against religious discrimination – relying on transnational legal developments to create an impact on the domestic law of the United Kingdom. It is important to seek to develop new strategies in the attempt to make laws against discrimination more effective.

Origins and development of EC labour law on sex equality

Brian Bercusson (1996) *

Introduction

There is an interesting paradox at the origins of the EU labour law on sex equality. The quantitative and qualitative significance of the EU law on equality between men and women is undisputed. The amount of legislation and the number and importance of decisions by the European Court exceed any other area of social policy. The fundamental principles created in the context of this evolution have had an impact on EU law going far beyond the area of policy concerned. It has probably had greater influence on the domestic law of the Member States than any other area of social law and policy.

Equal opportunities between women and men has been in the forefront of the social policy of the European Community since its beginnings. Article 119 of the Rome Treaty, Directives on equal pay,[1] equal treatment[2] and social security,[3] the extensive case law of the European Court of Justice (beginning with *Defrenne v. Belgium*[4]), and a quantity

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* 'Origins and development of EC labour law on sex equality', Brian Bercusson (1996). This article was first published in B. Bercusson, *European labour law*, London: Butterworths, 169–173 and is reprinted here with the kind permission of Cambridge University Press.

1. Council Directive 75/117/EEC of 10 February 1975, on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L45/19 of 19.2.1975.
2. Council Directive 76/207/EEC of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, OJ L39/40 of 14.2.1976.
3. Council Directive 79/7/EEC of 19 December 1978, on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L6/24 of 10.1.1979; Council Directive 86/378/EEC of 24 July 1986, on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ L225/40 of 12.8.1986; Council Directive 86/613/EEC of 11 December 1986, on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, OJ L359/56 of 19.12.1986.
4. Case 80/70: *Defrenne v Belgian State* [1971] ECR 445, 25 May 1971.

of 'soft law' (such as the Recommendation on the Promotion of Positive Action[5]) have contributed to the prominence of this social policy. It has been argued that equal treatment of men and women has achieved the status of a 'fundamental right'.[6]

The concept of equal opportunities in the EC has undergone an impressive theoretical development following debates in the women's movement. The original concept of direct and intentional discrimination in the form of less favourable treatment of women by reason of their sex expanded to include, among others, indirect discrimination, positive action, critical review of protective legislation, pregnancy, maternity and childcare and sexual harassment. The scope of the concept expanded beyond pay to include discrimination in access to work, conditions of work, vocational training, pensions, both public and private, and social welfare.

Yet these major EU initiatives towards the achievement of equality between men and women were undertaken despite the fact that women as a pressure group were relatively unorganised. During the period when these legal foundations were being laid, it was argued that the women's movement had little impact on political institutions and on the political arena in general. Hoskyns concludes that:[7]

> the scope and form of the European policy is such that it does not connect easily with either the thinking or the practice of the women's movement as this has developed since the early 1970s. Nor is the European Community set up in such a way that makes it easy for grassroots movements to become involved in its activities.

The impressive expansion of the EU law on equality was decidedly top-down in its origins. The French government negotiating the Treaty of Rome of 1957 was sufficiently anxious about competition with its domestic textile industry from the Belgians to insist on the inclusion of Article 119 on equal pay, to preclude under-cutting by lower-paid Belgian women workers. The Council of Ministers, in its path-breaking

5. Council Recommendation 84/635/EEC of 13 December 1984, on the promotion of positive action for women, OJ L331/84.

6. C. Docksey, 'The principle of equality between men and women as a fundamental right under Community law' (1991) 20 *Industrial Law Journal* 258.

7. C. Hoskyns, 'Women, European law and transnational politics' (1986) 14 *International Journal of the Sociology of Law* 299, at 300.

Resolution concerning a social action programme of 21 January 1974, famously reaffirmed the conclusions of the Paris Conference of October 1972 and declared:[8]

> that they attach as much importance to vigorous action in the social field as to the achievement of Economic and Monetary Union and invited the Community institutions to draw up a social action programme providing for concrete measures and the corresponding resources ...

Specifically:

- to undertake action for the purpose of achieving equality between men and women as regards access to employment and vocational training and advancement and as regards working conditions, including pay, taking into account the important role of management and labour in this field,
- to ensure that the family responsibilities of all concerned may be reconciled with their job aspirations.

The inspiration of Article 119 and the initiatives that followed received the benediction of the Court of Justice in its judgment in *Defrenne v. SABENA*:[9]

> '8. Article 119 pursues a double aim.
>
> 9. First, in the light of the different stages of the development of social legislation in the various Member States, the aim of Article 119 is to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay.
>
> 10. Secondly, this provision forms part of the social objectives of the Community, which is not merely an economic union, but is

8. (1974) OJ C13/01.
9. Case 43/75: *Defrenne v. Société Anonyme Belge de Navigation Arienne (SABENA)* [1976] ECR 455, 8 April 1976, paragraphs 8–12.

at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasised by the Preamble to the Treaty.

11. This aim is accentuated by the insertion of Article 119 into the body of a chapter devoted to social policy whose preliminary provision, Article 117, marks 'the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained.

12. This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community'.

It is important to appreciate, therefore, that the specific nature of the EU law on equality may be explicable in terms of its development *apart* from the women's movement. However, the feminist critique which has gathered apace with the evolution of the body of European law on equality is beginning, and continues to have a major formative influence on its future development.

Future developments

In contrast, the labour and trade union movement in the Member States and at EU level has been formidably organised. Yet, measured in terms of the development of EU labour law, it has to be conceded that, during the period when equality law was in the forefront of developments of EU social and labour law, the successes of the European trade union movement were few and far between. The failures with respect to the proposed 'Vredeling' Directive on information and consultation were particularly evident.

This situation is now changing. EU social and labour law is currently receiving a powerful impulse from organised labour. The institutionalisation of the European social dialogue and the new competences acquired by the Community under the Maastricht Treaty's Protocol and Agreement on Social Policy are the concrete evidence of organised labour's new influence. On the other hand, it seems that the original

inspiration for the EU law on sex equality is diminishing. This is in part due to the critique of the legal concept of equality embedded in the legislation and case law, which has led to efforts being directed elsewhere than the law.

One of these directions, perhaps the most promising, is an attempt to build on the presence of women in the trade union and labour movement to further the interests of women workers. If the European social dialogue is to assume an ever greater role in the formulation and implementation of EU social and labour law, it is seen as important that equal opportunities for women in collective bargaining be one of the priorities.

The EC's equal opportunities policy has looked primarily to formal legal means of implementation: legislation and enforcement through the courts or administrative agencies. However, doubts have been expressed as to whether reliance on these legal mechanisms is sufficient to achieve the policy objectives.[10] There is no detailed system of Community required procedures and remedies laid down as minimum requirements for the enforcement of European gender equality law.[11] However, national approaches may encompass social regulation through collective bargaining, as well as the enactment of legislation or other means.[12] In some countries, social regulation is prioritised over legal regulation.[13] The increased importance of collective bargaining in equal opportunities policy has been emphasised by the European

10. See the Report on the 1992 Louvain-la-Neuve Conference on procedures and remedies: access to equality between women and men in the EC, C. McCrudden (1993) 22 *Industrial Law Journal* 77 (March). Also 'The effectiveness of European equality law: national mechanisms for enforcing gender equality law in the light of European requirements' (1993) 13 *Oxford Journal of Legal Studies* 320.

11. But see K. Banks, 'Equal pay and equal treatment for men and women in Community law', and D. Kontizas, 'Equal treatment in social security', in *Equal Opportunities for Women and Men*, *Social Europe*, 3/91, 1991, Chapter 2, pp. 61–84.

12. See the national reports Vol. 2 of *Equality in Law between Men and Women in the European Community*, M. Verwilghen (ed.), Louvain-la-Neuve, 1986.

13. In the case of equal pay, for example, the Danish government argued, and the European Court accepted, that the main implementation mechanism was collective agreements (Case 143/83: *EC Commission v Denmark* [1985] ECR 427). In Italy, the Positive Action Act 1991 empowers various agents to promote positive action and considers collective agreements as the ideal means to control and promote positive action. Priority for reimbursement of expenses is given to positive action programmes agreed upon by employers and representative unions. M.V. Ballestrero, 'New Legislation in Italian Equality Law' (1992) 21 *Industrial Law Journal* 152. See generally, L. Gaeta and L. Zoppoli (eds), *Il Diritto Diseguale: La legge sulle Azioni Positive*, Giappichelli, Torino, 1992.

Commission: 'The social partners will also be encouraged to make equal opportunities an issue in the collective bargaining process'.[14]

At EC level, the growing awareness of the role of collective bargaining in implementing equal opportunities policy coincides with developments which recognise and promote the role of social dialogue in EC social policy. As noted, these developments were formalised in the Protocol and Agreement on Social Policy of the Treaty on European Union, which came into effect 1 November 1993.

The Agreement on Social Policy attached to the Protocol explicitly recognises the implementation of Community social policy and labour law through collective bargaining within Member States.[15] The agreement provides a role for the social partners at EC level in formulating Community social policy and labour law.[16] Finally, if the social partners at EC level reach agreements, it appears that Member States are obliged to implement these agreements within their national legal orders.[17]

Conversely, the evolution of the EU social and labour law on sex equality has provided valuable lessons to the trade union and labour movement in its attempts to assume a greater role in determining EU labour law through social dialogue. The critique of equality law by the women's movement has contributed to radical rethinking of the shape of the future EU social and labour law. It is women's influx into the labour force that has produced many of the new ideas on organisation of working time, new forms of employment, and reconciliation of work and private/family life. Some of these aspects are explored in other chapters in this book: the gender implications of the EU labour law on working time, and the regulation of new forms of employment, in particular, part-time workers, most of whom are women. The critical analysis of equality law by the women's movement, therefore, has had important consequences for the general direction of EU labour law.

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14. European Commission, Third Action Programme on Equal Opportunities, 1991. In response, in a meeting of the Social Dialogue Committee on 11 February 1994, the social partners at EC level (ETUC, UNICE, CEEP) proposed to undertake a joint project on equal opportunities. *ETUC Report* – Press Department 5–94.

15. Article 2(4).

16. Articles 3 and 4(1).

17. Article 4(2). B Bercusson 'Maastricht: a fundamental change in European labour law' (1992) 23 *Industrial Relations Journal* 177; 'The dynamic of European labour law after Maastricht' (1994) 23 *Industrial Law Journal* (March) 1.

The substantive law on sex equality: equal pay, equal treatment, social security, has been the subject of several monographs.[18] The purpose of the following chapters is to put this law in its context. Specifically, the contribution which the feminist critique emerging from the women's movement has made in shaping the debates over EU labour law on equality, and, beyond, the emerging alternative means of implementation, and the latest proposals from the Commission. This will be undertaken in three separate chapters. First, the critique of equality law as it has developed will be presented. Then, the implications of using social dialogue and collective bargaining as the instrument for equality law will be explored. Finally, the impact of the critique of equality law on the developing EU social law and policy on reconciliation of work and family life will be examined.[19]

18. B. Creighton, *Working Women and the Law*, Mansell, 1979; S. Predial and N. Burrows, *Gender Discrimination Law of the European Community*, Dartmouth, 1990; E. Ellis, *European Community Sex Equality Law*, OUP, 1992; T. Hervey, *Justifications for Indirect Discrimination*, Sweet & Maxwell, 1993.

19. The writing of these chapters has benefited considerably from my participation in the International Research Group on Equal Opportunities and Collective Bargaining, supported by the European Foundation for the Improvement of Living and Working Conditions, Dublin. Parts of the chapters are inspired by drafts of the Concept Report prepared for this Group, which was written by Professor Linda Dickens of Warwick University and myself.

Chapter VII

Health and safety in respect of working time

Chapter VII: Health and safety in respect of working time

Introduction by Klaus Lörcher

Health and safety in the workplace is often regarded as a rather technical and complex problem.

However, the issue is of fundamental importance for European social legislation, emerging as the first example of genuine EU social legislation in the European Single Act in 1987, constituting the first specifically social legislative competence. Previous EU social legislation on equal treatment and collective labour law, mainly concerning the transfer of undertakings, redundancies and insolvency, was based on provisions permitting secondary legislation in respect of the internal market and/or unforeseen cases, and so was not primarily aimed at securing social rights. In the meantime, EU social legislation now includes not only Framework Directive 89/391/EC, but some 20 individual directives on specific issues and further directives on health and safety, such as the Working Time Directive 2003/88/EC (replacing the original directive 93/104/EC).

Brian Bercusson worked mainly on the issue of working time, but was always interested in the general issue of workers' health and safety in the workplace. His major publications on working time began to appear shortly after the Working Time Directive entered into force, starting with a study on working time in the UK related to the new EU legislation, published in two parts at the beginning of 1994.[1]

1. B. Bercusson, 'Working time in Britain: towards a European model': Part 1: 'The European Union Directive' (January 1994), Part 2: 'Collective bargaining in Europe and the UK' (February 1994).

An overall assessment was published in 1999.[2] This study may be regarded as an in-depth exploration of all the relevant dimensions of working time in relation to European legislation. From a professional point of view, it seems 'natural' that the basis of the article is a detailed legal analysis of the relevant provision. In this respect, it is important to stress how much he is aware of the gender implications, particularly in relation to part-time work, although he also deals with overtime as a mainly male-oriented phenomenon, thereby linking working time issues to anti-discrimination legislation. Furthermore, he strongly emphasises relations to collective bargaining in their various dimensions. The negotiations are linked to possible derogations with regard to minimum standards. In contrast, the Working Time Directive also offers possibilities for further specification, for example, with regard to the 'humanisation of work' for specific patterns of working rhythms.

But Brian Bercusson went far beyond strictly legal arguments, demonstrating his outstanding capacity to see and analyse (working time) legislation in a broader context. Thus, he stressed the relationship between working time and the economic and political context. Economically, he emphasised the important 'competition' aspect of working time. Politically, he drew attention to the question of votes in the Council (unanimity and majority voting) and the possible interests of a blocking minority.

Again, he did not limit his analysis to this level. Taking a comparative approach, he looked at legislation and practice in various member states in order to show the possible consequences of EU legislation, but also the complexity of very different situations and systems.

This approach was also followed in his next study, dealing with the situation in France[3] and specific problems, such as on-call work or working time patterns of managers

However, it is not enough merely to hail Brian Bercusson's outstanding analytical capabilities. In many respects, he engaged in legislative debates in a proactive manner. These dimensions are best demonstrated by the

2. B. Bercusson, 'The working time directive: a European model of working time', in Y. Kravaritou (ed.), *The regulation of working time in the European Union: a gender approach*, Brussels: P.I.E.–Peter Lang, pp. 135–76.

3. B. Bercusson (2000) 'Le temps après la loi Aubry. Les temps communautaires', *Droit Social* (3) : pp. 248–56.

way in which he proposed specific demands and formulations in order to improve workers' protection, while taking into account (political) barriers which might have to be surmounted or removed. Two examples must suffice.

The first relates to so-called 'excluded sectors', such as transport. Brian Bercusson's study was commissioned by the European Parliament[4] in order to analyse the different national situations (data collected by questionnaires) and possible solutions in respect of the Working Time Directive.

Another good example, illustrating his specific trade union commitment, is a paper delivered at a trade union conference 'Worked to the bone – Regulating the UK's long-hours culture' and entitled 'Bringing the regulations into line with Europe'.[5] Although focusing to a significant extent on the UK situation, it emphasises the need to influence the debate on the revision of the Working Time Directive and develops important legal arguments, such as the 'non-regression' principle.

In conclusion, convinced that EU working time legislation was an important part of securing workers' health and safety and particularly relevant for UK legislation, Brian Bercusson showed a specific interest in this topic. He always situated working time at the heart of health and safety at work. He would undoubtedly have continued this line of thinking by developing a new framework of interpretation for the fundamental social right to 'fair and just working conditions' (Article 31) enshrined in the EU Charter of Fundamental Rights.

4. B. Bercusson (1996) 'A study of working time: extent of coverage of sectors and activities excluded from the Working Time Directive in national regulations of the member states of the European Union'. http://ec.europa.eu/social/BlobServlet?docId=2418&langId=en

5. B. Bercusson (2006) 'Bringing the regulations into line with Europe', paper presented at the conference 'Worked to the bone: regulating the UK's long-hours culture', Institute of Employment Rights, NATFHE Centre, London (15 March 2006).
Available at: http://www.ier.org.uk/system/files/Bercusson+speakers+paper_0.doc

The Working Time Directive: A European model of working time?

Brian Bercusson (1999) *

I. Introduction

A. The Council Directive on the organisation of working time

On 1 June 1993, the Council of Social and Labour Affairs Ministers of the EC adopted a common position on a Council Directive on the organisation of working time.'[1] The final Directive was adopted on 23 November 1993.[2] The new Directive will provide new rights to workers, impose new obligations on employers and governments, and give new opportunities to trade unions.[3]

This Directive must be implemented by the Member States, including the UK. The obligations it imposes may be enforced in a variety of ways:

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* 'The working time directive: a European model of working time?', Brian Bercusson (1999). This article was first published in Y. Kravaritou (ed.), *The regulation of working time in the European Union: gender approach*, Brussels: Peter Lang, 135–176 and is reprinted here with the kind permission of the publisher.

1. The initial proposal for a Directive 'concerning certain aspects of the organisation of working time' was adopted by the Commission on 25 July 1990, *European Industrial Relations Review* (*EIRR*), No. 202, November 1990, p. 27). An amended proposal was submitted to the Council on 23 April 1991 (*EIRR*, No. 210, July 1991, p. 27). On 1 June 1993 the Council reached agreement on a common position with all Member States voting in favour, bar the UK, which abstained and announced its intention to challenge the legal basis of the proposed Directive in the European Court, *EIRR*, No. 233, June 1993, p. 2; *Industrial Relations Law Bulletin*, No. 475, June 1993, p. 12; Communication from the Commission to the European Parliament pursuant to Article 149.2(b) of the EEC Treaty. Common Position of the Council on the amended proposal for a Council Directive concerning certain aspects of the organisation of working time. SEC(93) 1054 final – SYN 295. Brussels, 7 July 1993.
2. *Agence Europe*, No. 6113, 24 November 1993, p. 10. Minor amendments were made to the common position following scrutiny by the European Parliament; see 'Re-examined proposal for a Council Directive concerning certain aspects of the organisation of working time', COM(93), 578 final – SYN 295, Brussels, 16 November 1993.
3. Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, OJ L307/18 of 13.12.93; *Agence Europe*, No. 6113, 24 November 1993, p. 10.

first, a Commission complaint to the Court under Article 169;[4] secondly, references by national courts to the European Court under Article 177 and the requirement that national courts interpret national legislation in line with the Directive;[5] thirdly, the possibility of individual workers invoking the 'direct effect' of the Directive in claims against employers before national courts;[6] and, finally, potential claims for compensation against a Member State in the event of losses suffered by workers due to non-implementation of the Directive by that Member State.[7]

The working time Directive illustrates an ongoing process of Europeanisation of labour law: its roots are to be found in the experience of the Member States which, in the process of formulating the Directive, has been moulded into a new shape. The working time patterns proposed by the Directive are modelled on predominant continental European experience, in contrast to the singularity of UK patterns of working time. On the other hand, the Directive offers considerable space for flexibility through collective agreements, which reflects the singularity of the UK's tradition of regulating working time through collective bargaining and collective agreements, in contrast with some continental traditions of legislation on working time. The working time Directive has to be seen in the context of working time patterns and the forms of legal regulation to be found in Europe.

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4. EC Treaty, Art. 169: 'If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.'

5. *Marleasing v. La Commercial International de Alimentation*, Case 106/89, (1990) *European Court Reports*, p. 4135; B. FITZPATRICK & C. DOCKSEY, 'The Duty of National Courts to Interpret Provisions of National Law in Accordance with Community Law' (1990) 20 *Industrial Law Journal*, p. 113.

6. *Van Duyn v. Home Office*, Case 41/74, (1974), *European Court Reports*, p. 1337: 'It would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.'

7. *Francovich and Bonfaci v. Italian Republic*, Cases 6/90 and 9/90, (1992) *European Court Reports*, p. 5357.

B. Working time and the 'Social Chapter'

The Working Time Directive also emerges at a potential turning point in the social and labour policy of the European Union. The institutional arrangements for the production of European labour law were changed dramatically by the Protocol and Agreement on Social Policy attached to the Maastricht Treaty on European Union.[8] Collective bargaining (or the social dialogue) at EU level was given the potential to be transposed into the sphere of EU labour law in three ways.

First, the social dialogue was prescribed as a mandatory step in the formulation of the social policy of the EU. The Commission, when envisaging and actually proposing social policy initiatives, is obliged to consult the social partners at EU level.[9] Second, when the social partners are consulted, they may assume the responsibility for making an agreement at EU level which shall be implemented in a number of prescribed ways in the Member States.[10] Third, EU Directives may be implemented by Member States in the form of collective agreements.[11] The future of European labour law lies with the instruments agreed by the Member States at Maastricht: Directives and EU level collective agreements to be implemented within Member States, and enforced using the techniques developed to enforce Community law.

The European social dialogue thus emerges as a critical feature of Community social law and policy. The European social dialogue could take up working time as a subject to be regulated at EU level.

C. The White Paper and new forms of work and employment

The Commission has announced the preparation of a new phase of social policy in the EU, heralded by publication of a White Paper.

8. B. BERCUSSON, 'Maastricht: a Fundamental Change in European Labour Law', (1992) 23 *Industrial Relations Journal*, p. 177. Also, 'The Dynamic of European Labour Law after Maastricht' (1994) 23 *Industrial Law Journal*, (March), p. l.

9. Agreement on Social Policy (annexed to the Protocol on Social Policy of the Treaty on European Union) concluded between the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland, Article 3(1)–(3). The terminology adopted of 'social partners' reflects vocabulary on the continent and refers to representatives of employers' and workers' organisations at EC level.

10. *Ibid.*, Articles 3(4) and 4.

11. *Ibid.*, Article 2(4).

Among others, questions are raised about the concept and definition of work itself, including paid and voluntary work. Attention is focused on the work/leisure dichotomy in the light of more complex patterns of use of time over the life cycle. These issues are central to a consideration of the regulation of working time.

The importance and timeliness of the European Commission's initiative were highlighted by contemporaneous developments at the end of 1993. On 8 November 1993, the French Senate approved a scheme which would provide public subsidies for firms adopting a 32-hour working week.[12] Shortly afterwards, the Italian Minister of Labour appointed an expert Commission to examine and make proposals for the modernisation of the law on working time.[13] The Government in the Netherlands has decreed that no new employee in the public sector will work more than 32 hours per week.[14] On 25 November 1993, an agreement was reached between the unions and management at Volkswagen for a 20% reduction in the working week, from 36 to 28.8 hours, a 4-day working week affecting 120,000 workers.

These developments should be seen against the background of the fragmentation of the workforce into categories characterised by different working time regimes. These categories of workers with variable working time have been a focus of labour law regulation in Europe during the past decade. Close attention to the patterns and distribution of working time among industries and occupations and between men and women reveals the potential scope for regulation. In the UK, for example, this regards the prevalence of singularly high levels of working hours among male workers, and the predominance of women in the part-time workforce.

The questions of working time, family and work, working women and the role of the social partners, and collective bargaining are at the heart of the future of European social policy. The Working Time Directive is an important element in the shaping of this policy. The standards prescribed in the first and the second amended drafts of the proposed Directive appeared to be relatively innocuous: 11 hours minimum daily rest period, 24 hours minimum weekly break, unspecified rest breaks

12. *Le Monde*, 9 November 1993, pp. 2–3 which lists the various conditions attached to the subsidy.
13. *La Repubblica*, 18 November 1993, p. 45.
14. *Financial Times*, 19 November 1992, p. 2.

during working hours, 3–4 weeks annual leave, some protection for night workers, and so on.

These standards are nonetheless worth close attention because they exist alongside two other provisions which were inserted only when the Council of Ministers of the Community agreed upon a common position on 1 June 1993, adopted definitively on 23 November 1993. A new Article 6 prescribes *maximum weekly working time* so that 'the average working time for each seven-day period, including overtime, does not exceed 48 hours'. A new Article 13 lays down a general principle of *humanisation of work*, so that 'an employer who intends to organise work according to a certain pattern takes account of the general principle of adapting work to the worker'. These new provisions, both on their own and as they permeate the others, promise to have a substantial impact on working time in the UK.

The common position agreed by the June Council also transformed the role of collective bargaining with respect to the working time standards prescribed by the Directive. In earlier drafts, collective bargaining was granted the important, though limited, power to derogate from those standards. The new draft systematically inserted collective bargaining into the formulation and implementation of almost every standard of working time.

II. The principle of the humanisation of work

In the first two drafts proposed by the Commission, there was a general provision in Section III on 'Night work, shift work and patterns of work' that: (Art. 11)

> Member States shall ensure that employers take the necessary measures to ensure that changes made to patterns of work take account, according to the type of activity, of health and safety requirements, especially as regards breaks during working hours.

This text was changed in the common position adopted by the Council on 1 June 1993, so the Directive now reads: (Art. 13)

A. Pattern of work

> Member States shall take the measures necessary to ensure that an employer who intends to organise work according to a certain pattern takes account of the general principle of adapting work to the worker,[15] with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate, depending on the type of activity, and of safety and health requirements, especially as regards breaks during working time.

This provision contains new requirements:

1. The obligation arises not only when the employer *changes* patterns of work. It applies to the *initial* organisation of working time.

2. The obligation refers back in time to when the employer *intends* to organise work according to a certain pattern.

3. The exclusive reference to health and safety is replaced by *two* factors which must be taken into account:
   a. the general principle of adaptation of work to the worker, to a human being; and
   b. health and safety requirements, a second and separate factor.[16]

4. The principle of humanisation of work is to have particular regard to alleviating monotonous work and work at a predetermined work-rate – factors which, narrowly considered, are not related to health and safety requirements.

Both drafts emphasise breaks during working hours. However, the first draft's required provision of such breaks, aimed at avoiding health and safety risks, is transformed by the final text's inclusion of the principle of the humanisation of work. The WHO definition[17] and the Nordic countries' emphasis on psychological and social aspects of working time

15. The French version speaks rather of the '*principe général de l'adaption du travail à l'homme*'. Hence, my preference for the general principle of humanisation of work.

16. Contrast Article 6, which imposes requirements regarding maximum weekly working time, and mentions only that these are necessary 'in keeping with the need to protect the health and safety of workers'.

17. The World Health Organisation's definition is that: 'health is a state of complete psychic, mental and social well-being and does not merely consist of an absence of disease or infirmity'.

such as monotony, lack of social contacts at work or a rapid work pace, here receive explicit recognition. Breaks at work are not aimed solely at avoiding dangers to health and safety; they are to be integrated as a means of humanising work patterns.

B. Rest breaks during working hours

In addition, the common position adopted by the Council on 1 June 1993 and approved on 23 November imposed two further constraints:

1. maximum weekly working time (Art. 6, see below);

2. rest breaks during daily working hours (Art. 4).

The duration of the rest break during working hours is not specified (Art. 4).

C. Breaks

Member States shall take the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation.

The EU standard is to be determined by collective bargaining, though without specifying the appropriate level and, in its absence, by legislation. The duration of rest breaks is not indicated, but certain criteria may be expected to emerge following precedents involving the balancing of employer and worker interests in the EU law on sex discrimination.[18] These criteria might require that the *duration* of the rest period:

18. Compare the criteria laid down by the European Court of Justice in *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz*, Case 170/84, 13 May 1986, (1986) *European Court Reports*, p. 1607, at p. 1628, para. 36:

> 'It is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer to explain the adoption of a pay practice which applies independently of a worker's sex but, in fact, affects more women than men may be regarded as objectively justified (on) economic grounds. If the national court finds that the measures chosen by Bilka correspond to a real

1. respond to the human needs of the worker;

2. be appropriate, having regard to the length of the preceding and subsequent work periods;

3. take into account all the different possibilities of organising the working time of the workforce as a whole so as to provide adequate rest periods for all workers.

These will be supplemented by the Directive's requirement in Article 13 that the employer:

> who intends to organise work according to a certain pattern takes account of the general principle of adapting work to the worker ... especially as regards breaks during working time.

Member States must require employers to organise working time taking into account this principle of humanisation of work. Working time regimes which aim to avoid risks only to health and safety, understood as limited to the physical well-being of workers, but do not 'alleviate monotonous work and work at a predetermined work-rate', are not adequate. If it can be shown that an organisation of working time to include work breaks would ameliorate these problems, it is arguable the employer has at least to justify not introducing them.

To determine the extent of the employer's obligation to organise working time so as to include work breaks, again the law on justification of indirect sex discrimination may be invoked as a precedent. A working time regime which fails to include work breaks reflecting the worker's human needs would have to be justified by the employer demonstrating that:

1. it responds to a real need of the enterprise;

2. it is appropriate in that the benefit to the employer is proportionate to the unpleasantness, stress or damage to the workers affected by it;

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need on the part of the undertaking, are *appropriate* with a view to achieving the objectives pursued and are *necessary* to that end, the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute an infringement of Article 119.' (my italics)

3. it is necessary in order to achieve this objective, *i.e.* no alternative working time regime could achieve it.

Daily rest breaks which do not respond to the worker's human needs, and which cannot be justified by the employer, violate the EC standard. Member State legislation which does not secure that such rest breaks are provided would arguably be in violation of the duty to implement the Directive's requirements, and State liability might be imposed to compensate the workers affected.[19]

The mere avoidance of health and safety risks is transformed by the principle of the humanisation of work. The translation of this new EC law principle into measures which must be adopted by Member States poses a challenge. For example, the obligation focuses on the employer who envisages organising work according to a certain rhythm. He is to be required to take account of the general principle of adaptation of work to human beings. This could be read as implying a requirement of consultation and participation of workers and their representatives.

The Directive, in many places, emphasises the role of the social dialogue in setting standards (examples will be provided later). This is in line with the Commission's general duty to promote social dialogue (Art. 118B). The second draft of the proposed directive required that: (Art. 9)

> Consultation and participation of workers and/or their representatives shall take place in accordance with Article 11 of Directive 89/391/EEC on the matters covered by this Directive.

This disappeared, though the Preamble to the final text contains in the third recital:

> "Whereas the provisions of Council Directive 89/391/EEC of 12 June 3989 on the introduction of measures to encourage improvements in the safety and health of workers at work are fully applicable to the areas covered by this Directive without prejudice to more stringent and/or specific provisions contained there".[20]

19. *Francovich and Bonifaci v. Italian Republic*, Cases 6/90 and 9/90, 19 November 1991, (1992) *European Court Reports*, p. 5357.

20. The first of the Statements for entry in the Council Minutes attached to the final text reads that the Council and the Commission stated: 'Although this Directive is not an individual

Moreover, Article 1 (4) provides:

> "The provisions of Directive 89/39 I/EEC are fully applicable to the matters referred to in paragraph 2,
>
> (which reads: 'This Directive applies to: (a) minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time, and (b) certain aspects of night work, shift work and patterns of work.")

without prejudice to more stringent and/or specific provisions contained in this Directive.

The substance of the requirement in the second draft may therefore survive in the measures to be adopted by Member States, in accordance with their obligation under the Directive, to secure that employers do take into account the general principle of adaptation of work to human beings. The obvious way to achieve this is to consult those human beings and engage them in the process of organising working time.

III. Maximum weekly hours

The first two drafts of the Directive did not mention a maximum limit to weekly working hours.[21] However, the European Parliament proposed such an amendment, and this provision is now to be found in the final text: (Art. 6)

A. Maximum weekly working time

> "Member States shall take the measures necessary to ensure that, in keeping with the need to protect the health and safety of workers:

Directive within the meaning of Article 16(1) of Directive 89/391/EEC, the provisions of that Directive are applicable in this field insofar as they affect aspects regulated in this Directive and, in addition, when they are applicable by their nature.'

21. Article 6 of the first two drafts of the Directive did so obliquely by requiring that: 'The performance of overtime must not interfere with the minimum rest periods laid down in Articles 3 and 4' (daily and weekly rest periods).

(1) the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry;

(2) the average working time for each seven-day period, including overtime, does not exceed 48 hours".

The reference period over which the average 48 hour weekly working time is to be calculated is not to exceed four months, periods of paid annual leave and sick leave not being included in the calculation of the average (Art. 16(2)).

B. Health and safety and humanisation of work

The point of reference specified in this Article is health and safety. However, with respect to breaks during working time, the general principle of humanisation of work is required to be taken into account (Art. 13). It is not easy to see how such a principle can fail to affect maximum weekly working hours. Rest breaks mandated by such a principle, and not only health and safety, imply limits on weekly working hours.

C. Derogations

The EU standard stipulates that weekly working time must be limited by national law, or by collective agreements reached by the social partners (Art. 6(1)). However, the weekly working time specified in these instruments is subject to a maximum of 48 hours working, including overtime, per week on average, calculated over a maximum 4-month period (Art. 16(2)). Member States *are* permitted to derogate from this standard 'with due regard for the general principles of the protection of the safety and health of workers' in some specified activities (Art. 17(1), quoted above).

However, derogations are *not* permitted as regards *maximum weekly working time* (though it *is* allowed as regards daily and weekly breaks):

- in the longer list of specified activities in Art. 17(2);
- through the general power to derogate through collective agreements in Art. 17(3).

With regard to these specified activities, or the general power to derogate through collective agreements, the sole derogation possible is *not* to the 48 hour maximum, but only to the *reference period* over which it may be calculated. Article 17(2) and (3) allow for derogations from Article 16(2)'s fixing of a maximum 4-month reference period. But even then, Article 17(4) limits the possible extension of this reference period to a maximum of 6 or 12 months:

> "The right to derogate from Article 16(2), provided for in (Art. 17(2) and (3)) may not result in the establishment of a reference period exceeding six months.
>
> However, Member States shall have the option, subject to compliance with the general principles relating to the protection of the safety and health of workers, of allowing, for objective or technical reasons or reasons concerning the organisation of work, collective agreements or agreements concluded between the two sides of industry to set reference periods in no event exceeding twelve months".

Also, the qualification of 'compliance with the general principles relating to the protection of health and safety of workers' requires that Member States justify any derogations.

IV. The role of collective bargaining in the working time standards of the new Directive

Introducing its first proposal for a Directive on working time, the Commission explained that:[22]

Accordingly, pursuant to the Charter and as announced in its action programme, the Commission intends to propose a groundwork of basic provisions on certain aspects of the organisation of working time connected with workers' health and safety at work which relate to:

- minimum daily and weekly rest periods;
- minimum annual paid holidays;

22. Explanatory Memorandum, p. 2, para. 2.

- minimum conditions determining the recourse to shift and especially night work;
- protection of workers' health and safety in the event of changes in working patterns resulting from adjustments in working time.

However:[23]

> "other issues mentioned in the action programme in the field of the adaptation of working time should be left to both sides of industry and/or national legislation. In addition these matters should be dealt with in depth within the framework of the dialogue between both sides of industry at Community level without prejudice to the Commission's prerogative to submit proposals should it see fit to do so".

In particular, the Commission emphasised that 'the question of *systematic overtime* is a subject best dealt with by the two sides of industry and by national provisions'. The role of working time in achieving flexibility of capacity utilisation was seen to be due to the social partners:[24]

> "In many cases legislation, but above all the conclusion of a large number of collective agreements have supported the trend towards more flexible use of productive equipment..."

Explicit reference was made to recent draft laws on the regulation of working time in Germany, to collective agreements (or even enterprise agreements) in the Netherlands which made it possible to amend or adjust statutory maxima, and to experience in Belgium where very high numbers of hours can be worked in a week provided the average weekly working time over a 13-week period does not exceed 38 hours.[25] Even with night work, collective agreements may derogate from a general ban, as is often the case in Germany, Greece, France, Italy and Portugal.[26]

23. *Ibid.*, p. 3.
24. *Ibid.*, p. 4, para. 4.
25. *Ibid.*, p. 8, paras. 12, 14.
26. *Ibid.*, p. 13, para. 25.

The delicate balance between legislation and collective bargaining was spelled out twice in the Explanatory Memorandum in almost identical terms; once at the beginning and again in its final provisions:[27]

> "... given the differences arising from national practices, the subject of working conditions in general falls to varying degrees under the autonomy of both sides of industry who often act in the public authorities' stead and/or complement their action. To take account of these differences and in accordance with the principle of subsidiarity the Commission takes the view that negotiation between the two sides of industry should play its full part within the framework of the proposed measures, provided that it is able to guarantee adherence to the principles set out in the Commission's proposals... In other words, it is important in this field to take into consideration the fact that such agreements concluded by management and labour can in principle make a contribution to the application of Community directives, without, however, releasing the Member States concerned from the responsibility for attaining the objectives sought via these instruments".

In light of this explicit, even enthusiastic, recognition of the role of collective bargaining in the Community Charter, Action Programme and Explanatory Memorandum, the first two drafts of the Working Time Directive took an important, if cautious, initiative. There was no mention of collective bargaining in the Preambles, but both drafts provided for the possibility of general derogation in Article 12(3):

> "In case of collective agreements made between employers and representatives of the workers at the appropriate levels, aiming at setting up a comprehensive set of provisions regarding the adjustment of working time corresponding to the specific conditions of the enterprise, including daily and weekly rest periods as well as night- and shift-work, subject to the condition that on these specific points equivalent periods of compensatory rest are granted to the workers within a reference period that must not exceed six months".

27. *Ibid.*, p. 4, para. 3 and again in para. 32 on pp. 16–17. The former added at the beginning of the extract quoted: 'While acknowledging the need for certain basic rules with regard to working time at Community level, it should be emphasised that ...'. The latter began: 'Finally, it should be emphasised that...'.

Both drafts also allowed for the possibility of implementation of the Directive through collective agreements: (Art. 14)

> "Member States shall comply with this Directive ... by bringing into force the laws, regulations or administrative provisions necessary or by ensuring that the two sides of industry establish the necessary provisions through agreement, without prejudice to the obligation on the Member States to achieve the results to be obtained by this Directive".

In addition, the second draft added an Article 9:

> "Consultation and participation of workers and/or their representatives shall take place in accordance with Article 11 of Directive 89/391/EEC on the matters covered by this Directive".

This initial caution was overcome in the final draft. The Preamble of the Directive incorporates a new penultimate paragraph:

> "Whereas it is necessary to provide that certain provisions may be subject to derogations implemented, according to the case, by Member States or the two sides of industry..."

The final text of the Directive also included a large number of new provisions which made collective bargaining an element in the setting of EC standards on working time. In the final text, the role of collective bargaining in determining *some* of the EU standards on working time has undergone a significant *qualitative* change. In the past, it was largely confined to allowing for derogations to prescribed standards. The present Directive also allows for collective agreements themselves to fix or define relevant standards, usually only with the consent of the Member State concerned, but in one exceptional case, with *priority* over Member State legislation (daily rest periods, Art. 4). The range of EU standards on working time affected by collective bargaining in these different ways includes the following.

A. Night work: night workers, reference periods, kinds of work

Collective bargaining plays a role in *defining* who night workers are; 'night worker' means: (Art. 2(4)(b))

> "any worker who is likely during night time to work a certain proportion of his annual working time, as defined at the choice of the Member State concerned:
> (i) by national legislation, following consultation with the two sides of industry, or
> (ii) by collective agreements or agreements concluded between the two sides of industry at national or regional levels."

Article 8 prescribes for night workers normal hours not exceeding an average of 8 hours in any 24-hour period. However, the reference period over which the average is calculated is not specified and Member States may provide for the *reference period* to be *defined* by collective bargaining: (Art. 16(3))

> "for the application of Article 8 (length of night work), a reference period defined after consultation of the two sides of industry or by collective agreements or agreements concluded between the two sides of industry at national or regional level".

Collective bargaining may also *define* the *kind of work* which prohibits averaging out the maximum 8 hours work in any 24-hour period: (Art. 8(2))

> "Member States shall take the measures necessary to ensure that:
>
> ... (2) night workers whose work involves special hazards or heavy physical or mental strain do not work more than eight hours in any period of 24 hours during which they perform night work.
>
> For the purpose of this point, work involving special hazards or heavy physical or mental strain shall be defined by national legislation and/or practice or by collective agreements or agreements concluded between the two sides of industry, taking account of the specific effects and hazards of night work".

B. Rest breaks: priority to collective agreements

As regards *rest breaks* during working hours, the Directive gives *priority* to collective agreements over legislation in *determining* the EC standard: (Art. 4)[28]

1. Breaks

"Member States shall take the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation".

The EU standard is to be determined by collective bargaining (though without specifying the appropriate level) and only in its absence, by legislation.

Again, the provisions of Article 4 may be derogated from by collective agreements under the general derogation provisions of Art. 17((2) and (3)). The effect of such derogation is rendered more problematic by the fact that the standard being derogated from by collective agreements may also have been established by collective agreements. This raises complex questions of the relations between different levels of collective agreements. The law governing these questions is not homogeneous across the Community. National labour laws which purport to structure collective agreements in an articulated hierarchy may come into conflict with the EC provisions authorising derogation.

28. This is a step further down the road taken by the European Court of Justice. In an early judgment concerning Denmark, the Court rejected the Commission's argument that collective bargaining was not an adequate means of implementing Community obligations under the Council Directive 75/117 on equal pay. The Court held: 'That Member States may leave the implementation of the principle of equal pay in the first instance to representatives of management and labour. That possibility does not, however, discharge them from the obligation of ensuring, by appropriate legislative and administrative provisions, that all workers in the Community are afforded the full protection provided for in the directive. That State guarantee must cover all cases where effective protection is not ensured by other means, for whatever reason, and in particular cases where the workers in question are not union members, where the sector in question is not covered by a collective agreement or where such an agreement does not fully guarantee the principle of equal pay.' *Commission of the European Communities v. the Kingdom of Denmark*, Case 165/82, (1983) *European Court Reports*, p. 427, at pp. 434–435, para. 8.

C. Maximum weekly hours: limits, reference periods

Article 6 provides:

1. Maximum weekly working time
"Member States shall take the measures necessary to ensure that, in keeping with the need to protect the health and safety of workers:

(1) the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry;
(2) the average working time for each seven-day period, including overtime, does not exceed 48 hours".

D. More favourable collective agreements

Article 15 provides:

1. More favourable provisions
"This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers".

E. Conclusion

Most of the working time standards specified in the first two drafts of the Directive ignored the role of collective agreements, except by way of potential *derogations* from EU standards, and as a means of implementing the Directive. In contrast, the final draft *additionally* incorporates collective bargaining in *setting* substantive EU standards in relation to night work, daily rest breaks, maximum weekly working hours, including overtime and annual holidays. There is explicit provision requiring Member States to consult the social partners before legislating standards on night work. There is an argument that the principle of humanisation of working time contained in Article 13 requires consultation of workers and their representatives when the

employer 'intends to organise work according to a certain pattern'. Derogations at enterprise level are to be shaped by framework agreements at national or regional levels.

It becomes evident that the Directive is likely to engage national courts, and eventually the European Court, in questions of collective labour law not previously encountered. The Directive will bring before these courts issues of:

- proper consultation of trade unions, by Member States or employers;
- the relations between:
  - collective agreements and law,
  - different levels of collective agreements, and
  - individual contracts and collective agreements.

In this sense, the Working Time Directive breaks new ground in the development of a European collective labour law.

V. Working time and new forms of work and employment

A. The concept of work and employment

The Commission has published a White Paper on future European social policy options. It reflects an approach to social policy which starts from a fundamental questioning of traditional concepts of work and employment.

The starting point is that social identity is bound up with activity recognised as socially useful. New groups seek to enter the labour market not only for economic motives, but also to establish for themselves an identity as part of the active working population. This raises the questions of whether work and employment can be provided to all those seeking it, and what mechanisms can guarantee equal opportunity to work for all those who seek it. There is also the corollary question of the role of the welfare state in managing the balance between work and non-work.

The fundamental issue of the quality of *life* for citizens of the Community is therefore bound up in the issue of the quality of *working life*. Without work, it is difficult for citizens to forge their identities and

enjoy leisure, culture or even health. The resolution of the fundamental question of the quality of life to be promoted in Europe is inextricably linked to the organisation of production into new *working time* patterns and the development of new forms of work and employment.

Though the starting point has to be work, this cannot be separated from issues of general social protection. The separation of 'work' from other activities has created the division between 'working time' and 'other time'. A central objective of the new European social policy could be to re-link the policy objectives of full employment and social protection by spreading jobs and income across the population: work sharing. The need is for more flexible and varied life-cycle patterns, linking training, part-time working, flexible retirement and other activities. As put in the Commission's consultative paper on Reconciliation of Professional and Family Life:[29]

> "Reconciliation is a concept which is still developing within the EU. In recent years, experience in different Member States has highlighted the importance of this idea in several contexts. The first of these contexts is equal opportunities. There will be no substantial progress towards greater equality between men and women until a comprehensive reconciliation policy is put in place for all workers. It will be instrumental in relieving women in particular from unreasonable and conflicting demands in their working and family lives. It may also open up new employment opportunities for men and women".

The implications of this are that the broadest possible definition of work is needed, and that the organisation of working time requires the most intensive consideration, especially by the social partners. Article 13 of the Working Time Directive:

> Member States shall take measures necessary to ensure that an employer who intends to organise work according to a certain pattern takes account of the general principle of adapting work to the worker, is the first step in re-thinking the concept of work. In the organisation of working time, the needs of the worker, considered as a human and social being, are foremost. Trade unions should take

29. Paragraph 6.

up the challenge of representing the human and social needs, as well as the economic needs, of their members with regard to working time.

B. New forms of work

The use of labour law tools to analyse the concept of the 'worker' has been challenged as never before by the disintegration of the standard employment relationship and the emergence of new forms of work.[30] It is necessary to determine which elements of the contract of employment should be emphasised for different social purposes.

The debate has been influenced less by labour lawyers than by economists and industrial relations experts. The labour law literature seeks to distinguish the standard employment relationship from other 'atypical' forms, with implications for labour and social security law. The industrial relations literature places the issue in the context of the debate over labour market flexibility. Specifically, the concept of 'new forms of employment' is included in that part of employers' strategies on flexibility concerned with external or numerical flexibility. The employer changes the numbers and types of employees' relationships to the enterprise in order to achieve the desired flexibility of response to changing market conditions. Another part of the same strategy is internal or functional or task flexibility, where existing employees are required to change their jobs at the workplace where necessary to meet market demands.

30. U. MÜCKENBERGER & S. DEAKIN, 'From Deregulation to a European Floor of Rights: Labour Law, Flexibilisation and the European Single Market', (1989) 3 *Zeitschrift fiir ausländisches und internationales Arbeits- und Sozialrecht*, p. 153. See also U. MÜCKENBERGER, 'Non-Standard Forms of Work and the Role of Changes in Labour and Social Security Regulation', (1989) *International Journal of the Sociology of Law*, p. 381. Yota KRAVARITOU-MANITAKIS elaborates two basic legal models of employment: (1) the classic job with its traditional employment contract, and (2) work under new forms of great variety, among which she distinguishes (a) those jobs which may be termed employment without an employer – the status of fake self-employed, subcontracting, possibly homeworking and teleworking, clandestine work in the grey or black economy – and (b) new forms under a non-permanent employment contract, notably the fixed-term contract, the temporary employment contract, the employment-training contract: 'it is in this type of contract that one finds the greatest lack of traditional guarantees, and this is the place where "new" rights and minimum standards are beginning to be defined – although this has not yet happened in all countries.' Y. KRAVARITOU-MANITAKIS, *New Forms of Work: Labour Law and Social Security Aspects in the European Community*, European Foundation for the Improvement of Living and Working Conditions, Luxembourg: Office for Official Publications of the EC, 1988.

In the economic literature, 'new forms of employment' is part of the more general debate on segmentation of the labour market. This examines broad cleavages in the workforce: between large employers and small employers, unionised and non-unionised workers, firms using advanced technology and firms using low technology, low-paying and high-paying sectors, and so on. These cleavages do not correspond to the 'typical/atypical' employment distinction, nor to the contours of the flexibility debate. As with the other disciplines, economists see new forms of employment as only one component of the problematic.

Each of these formulations by different disciplines includes the issue of 'new forms of employment' as a component of a broader problematic. The question as to the strategies of the actors on new forms of employment will be answered differently, depending on whether the legislator addresses the problem as one of typical/atypical employment, labour market flexibility, or labour market segmentation.[31]

These different perspectives all relate the issue of atypical work to the enactment of legislation concerned with termination of employment.[32] The origins of this linkage lie in the economic crisis of the 1970s and 1980s, mass redundancies and restructuring leading to unemployment reaching new heights in Western Europe.[33] The earlier responses of the

31. For further argumentation on this point, see B. BERCUSSON, 'Legal, Political and Industrial Relations Strategies Regarding New Forms of Employment', in *L'Evolution des Formes d'Emploi*, Actes du colloque de la revue 'Travail et Emploi', 3–4 novembre 1988. See also C. HAKIM, 'Core and Periphery in Employers' Workforce Strategies: Evidence from the 1987 E.L.U.S. Survey', in (1990) 4 *Work, Employment and Society*, No. 2, p. 157.

32. This is not a new phenomenon: the enactment of legislation concerned with termination of employment was designated some time ago by KAHN-FREUND as the most noteworthy and important extension of regulatory legislation in the field of labour law. *Labour and the Law*, (3rd ed.), 1983, p. 38.

33. As in the case of new forms of employment, there is an interesting point to be made about the concentration of labour law on the termination of employment as *the* issue, a focus which demonstrates something of the ideological constraints imposed by the concept of the contract of employment in the classical sense outlined above. I defined the issue in the following way some years ago. The enactment of statutory provisions on unfair dismissal has resulted in an inordinate amount of attention being paid to and emphasis placed upon termination of work. Instead of being perceived as only one of a variety of solutions, and by far the least desirable in many ways, to problems of workers who are ill, incompetent, uncooperative, insubordinate, inefficient, etc., termination has become accepted as such a solution, subject only to occasional challenge. A different approach would question whether termination is the best solution to these problems. The industrial practice of the social partners provides examples of many other measures which can deal with sickness or injury, incompetence and misconduct much more efficiently than termination. B. BERCUSSON, 'Labour Law and the Public Interest: A Policy Approach', in LORD WEDDERBURN & W.T. MURPHY (eds), *Labour Law and the Community: Perspectives for the I980s*, London:

1970s and 1980s aimed mainly at trying to force new forms of employment into old models, and trying to slow down, regulate or prevent terminations.[34] Analysis of the new forms of work aimed to develop some alternative model or classification of the individual employment relationship to replace the standard contract of employment model — so far without much success.[35]

National labour laws in practice demonstrate quite a different approach to these same issues. First, there is a fundamental attack on the standard employment relationship through the regulation of working-time, mainly part-timers, temporary work, and various forms of 'atypical' work. Secondly, the response to recession and economic slowdown has been less termination of employment than flexibility, mobility and re-training. Some brief examples should demonstrate this.

In *Germany,* the struggle for reductions in working time has been at the centre of attention since the early 1980s. A breakthrough was the agreement signed 5 May 1990 in the engineering industry in Nord-Württemberg–Nord-Baden with the consequence that, by the end of 1995, some 4 million workers would have a 35-hour week. Interestingly, the employers had insisted that a pre-condition of reductions was the narrowing of the discrepancy between the average annual working hours in Germany and other Community Member States from the present 114 to 60. The agreement provided for reductions, though the timing was to be negotiated and to depend partly on working time trends in other Member States.[36] Up to 18% of a company's employees may, on the basis of individual working time contracts, voluntarily work up to 40 hours per week, for which the compensation may be pay (though not at overtime rates) or blocks of free time.[37] It is estimated

Institute of Advanced Legal Studies, 1982, p. 179 at p. 180. Also, B. BERCUSSON, 'Labour Law', in A. MARTIN & P. ARCHER (eds), *More Law Reform Now*, 1983.

34. See 'Restructuring Labour in the Enterprise', (1986) 15 *Bulletin of Comparative Labour Relations* for a comparative survey.

35. See the papers presented in the volume of the Actes du colloque de la revue 'Travail et Emploi', 3–4 novembre 1988, *L'Evolution des Formes d'Emploi, op. cit.* note 31. Also M. PEDRAZZOLI (ed.), *Lavoro subordinato e dintorni: comparazioni e prospettive,* Bologna: II Mulino, 1989. Compare G. & J. RODGERS (eds), *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe,* Geneva: International Institute for Labour Studies/Free University of Brussels, 1989.

36. See Appendix 3, paragraph 2 of the text of the agreement reproduced in '35-hour week settlement in engineering', *EIRR,* No. 198 (July 1990), p. 11 at p. 12.

37. *Ibid.*, clause 7.1.4.

that more than one-third (34%) of the total labour force in the Federal Republic of Germany in 1987 were engaged in some form of 'atypical employment'.[38] In the *Netherlands*, the approach to working time took a different direction. The trade union campaign for reductions in working time began in the 1980s and, in 1982, there was a central agreement with employers in the bipartite Labour Foundation to seek reductions as a means of reallocating employment. The result was that the general working week was reduced from 40 to 38 hours, and sometimes even to 36 hours. However, this movement lost momentum as the difficulty of measuring employment creation was acknowledged, and there were complaints of increased workloads and skill shortages. In 1989, the FNV union confederation decided to pursue reductions to 35 hours per week by 1993, but the powerful Industriebond FNV, the industrial workers union, later announced that it would no longer seek reductions as they were not seen as an effective way of increasing employment. Hours cuts have, as a result, been little in evidence during recent bargaining rounds (except construction). On the other hand, there has been a demand for a 4-day working week by workers in the food (100,000 workers) and transport (117,000 workers in ports, railways and road transport) sectors.[39]

In the Netherlands, it is estimated that some 250,000 workers out of a 5.3 million workforce (5%) are in 'flexible employment relationships', notably, on-call labour, homeworking and freelance work. Increasing numbers of collective agreements contain clauses regulating the extent and nature of flexible employment, for example, the dairy industry, hotels and catering and hospitals.[40]

As described in more detail above, in the *United Kingdom* the issue of reductions in working time was the main cause of the breakdown of national bargaining in the engineering industry. The last national agreement expired on 31 October 1988 and negotiations failed in April 1989 over the issue of reductions. The CSEU confederation claimed a reduction from 39 to 37 hours in 2 stages: 1 hour in November 1989 and 1 hour in November 1990, without loss of earnings. The employers federation (EEF) offered 37.5 hours in 3 stages with conditions. After

38. C.F. BOCHTEMANN & S. QUACK, 'Configurations, Patterns and Dynamics of "Atypical" Employment in RFA', in *L'Evolution des Formes d'Emploi*, *op. cit.* note 31, pp. 166–169.
39. 'Unions to Abandon Hours Cuts?', *EIRR*, No. 198 (July 1990), p. 8.
40. 'Developments in Flexible Employment', *EIRR*, No. 199 (August 1990), p. 23.

the breakdown of national negotiations, member companies of the EEF began to sign domestic agreements, often after strikes, with varying formulas.[41] The union claimed it had agreements on the 37-hour week in 554 workplaces covering some 300,000 workers.[42]

In the UK, it is estimated that 1,465,000 people are in temporary jobs (5.7% of the workforce), including seasonal, casual, agency and short-term contract workers.[43]

C. Conclusion

These two problems – atypical work and termination – are linked in ways which put working time at the centre of attempts to resolve them. One of the key strategies for the avoidance of termination as a solution to the specific problems of economic recession has been reduction of working hours. This strategy was taken up by many national trade union movements, often with considerable success. It has been noted that 'the reduction of working time becomes the means of exchange for the flexibility demanded by employers'.[44] The outcome is the much remarked upon separation of working time from the operating time of workplaces.[45]

The strategy of reduction of hours and re-organisation of working time produces severe distortions in the standard employment relationship, which nonetheless remains in the legal form of the contract of employment. This can take two forms. First, the reduction of working time down to 35 hours a week or less renders any difference in employment protection with part-time workers working between 25–30 hours a week less defensible. Secondly, the variety of working time regimes resulting from attempts to increase operating time is remarkable. Complicated shift systems whereby employees work different numbers

41. 'Engineering: Cost Offsets for Reduced Hours', *EIRR*, No. 197 (June 1990), p. 15.
42. 'More 37-hour Week Deals in Engineering', *EIRR*, No. 200 (September 1990), p. 11.
43. 'Employers' Use of Temporary Working', *EIRR*, No. 199 (August 1990), p. 15.
44. J. BASTIEN, 'Les syndicate européens face au temps de travail: le marché unique comme défi pour le reformulation de revindications syndicales' (1989) *Sociologie du Travail*, No. 3, p. 283 at p. 295.
45. T. TREU, 'Introduction' to Chapter II, 'New Trends in Working Time Arrangements', in A. GLADSTONE (ed.), *Current Issues in Labour Relations: An International Perspective*, Berlin: Walter de Gruyter, 1989, p. 149 at pp. 155–156.

of days and hours in different weeks produce work patterns not so very different from the ostensibly 'atypical' casual or temporary workers.[46]

The conclusion to draw from this is that the White Paper's focus on the concept of work should not be misdirected towards an attempt to formulate a new legal concept of worker/employee. Rather, the focus of attention should be *working time.*

The starting point is that workers with different work time schedules should not be *a priori* excluded from consideration when labour standards are in question. But that is not to say that all should *a priori* benefit from the *same* labour standards. It is probable that different working time schedules imply different needs and hence different standards may be applicable. What is important is that the legal category of 'employment' and the (ideologically unsavoury) criterion of sub-ordination should not be used as the crude instrument for distinguishing among workers.

The search for a solution should not look to the adoption of different criteria to define 'work', or the formulation of imaginative frameworks for the extension of (typical) employee rights to other workers. It should attend closely to differences in the *working time* schedules of all workers – employees or whatever – and formulate labour standards appropriate for different working time schedules.

In the following section, these reflections on the concept of work and employment and new forms of work and employment will be applied to the particular situation of working time in the UK.

VI. Working time in the UK: exceptional features

Analysis of working time in the UK, using evidence from the 1991 Labour Force Survey, throws up a number of features which distinguish Britain from other EU Member States.[47]

46. See arrangements in the auto industry described in 'Seven-day 24-hour Working at Rover' (U.K.), *EIRR*, No. 201 (October 1990), p. 11; 'Working Time Arrangements at BMW Regensburg' (Germany), *EIRR*, No. 197 (June 1990), p. 11; 'Creation of a Third Shift at Renault-Flins' (France), *EIRR*, No. 196 (May 1990), p. 5; 'Flexible Working Time Referendum at General Motors' (Belgium), *EIRR*, No. 188 (September 1989), p. 4.

A. Long hours for full-timers: the re-distribution dimension

The 1992 *Employment Gazette* included a table which showed the *average* hours worked by employees in each Member State in 1990 (the most recent year's data available).[48] It was observed that 'there are not great differences between many countries'; considering the largest economies, the UK average hours of 37.8 per week was not out of line with average hours of 37.5 in France, 36.8 in Germany and 38.0 in Italy. The UK average is only achieved, however, by conflating the average hours of part-time and full-time workers. When these are taken separately, the UK emerges as distinctively different from all other EU Member States.

The *average* hours worked by *full-time* employees in the UK is the *highest* in the EC at 43.7 hours. Only Portugal comes close with an average 41.9 hours. Comparing the other big economies, full-time workers in the UK work on average 5.1 hours more per week than Italian full-timers, 4.1 hours more than the French, and 3.8 hours more than German full-time workers.

At the same time, the *average* hours worked by *part-time* employees in the UK is, next to the Netherlands, the *lowest* in the EU at 17.6 hours. Comparing the other big economies, part-time workers in the UK work on average 7.4 hours less per week than Italian part-timers, 4.2 hours less than the French, and 1.9 hours less than German part-time workers.

This is further illustrated by the figure showing the large differences between Member States in the proportions of employers usually working long hours (defined as over 48 hours per week) and the proportions working in jobs involving only a small number of hours (defined as less than 16 hours per week).[49] At the lower end of weekly hours worked, the UK is not alone: the Netherlands (15.1%), the UK (9.7%) and Denmark (9.5%) have the highest proportions of employees working in small hours jobs (reflecting the higher overall proportion of

47. The analysis which follows draws on G. WATSON, 'Hours of Work in Great Britain and Europe: Evidence from the UK and European Labour Force Surveys', (1992) *Employment Gazette* (November), pp. 539–557, who states: '... probably the greatest advantage of the LFS over all other sources of hours data is that a comparable survey is conducted in all other EC member states' (p. 540).

48. *Ibid.*, Table 15 on p. 553.

49. *Ibid.*, Figure 4 on p. 554.

women in employment in these countries). Each of these countries, however, is far above the proportion working in such small hours jobs in the other nine Member States, ranging from 0.8% in Greece to 4.2% in Germany. And the UK's 9.7% is far above the other three largest economies (Germany, 4.2%, France, 2.6%, Italy, 1.7%).

At the upper end of weekly hours worked, however, the UK stands alone, with 16% of employees usually working more than 48 hours weekly. This is far above the proportion working such long hours in the other Member States, ranging from 1.7% in the Netherlands to 8.3% in Ireland. The UK proportion is more than three times the proportion working such long hours in each of the other three largest economies: France, 5.3%, Germany, 4.8%, Italy, 3.5%. The number working such long hours in the UK is probably more than all those working similar long hours in the other three countries combined!

The exceptional length of the working week in the UK coincides with other features already noted: the UK shares with Spain the highest overall proportion of employees doing regular and occasional shiftwork (29%); it has by far the highest proportion of employees in manufacturing doing regular and occasional shiftwork (64%).[50] The UK also has the highest proportion of employees in regular and occasional night work: 25%.[51]

The *Employment Gazette* survey observes:[52]

> "In Britain overtime has historically been an important element of employees' working time in manufacturing industry and, in particular, for manual workers ... overtime hours whether paid or unpaid are, for many people, an integral part of their working week".

Some 9.5 million employees (43.8%) usually work some form of overtime each week. Some 23.4% (over 5 million) work basic hours and *paid* overtime averaging 7.1 hours per week, and 17% (about 3.7 million) work basic hours plus *unpaid* overtime averaging 7.3 hours per week.[53]

50. The next highest proportion of employees in manufacturing doing regular and occasional shiftwork is Italy, with 46%. In France, it is 25% and in Germany, 22%.
51. The next highest is Greece with 17%; in France, it is 15% and in Germany, 9%.
52. *Employment Gazette*, p. 544.
53. 3.4%, 0.75 million work both; *ibid.*, pp. 550–551.

> "Working long hours in a paid job ... is very much a male phenomenon.'[54] Some 2.9 million male employees (24.8%) usually work more than 48 hours per week compared with only 0.5 million women (4.8%). Full-time men work the highest levels of overtime: on average 5 hours overtime per week (3 hours paid and 2 hours unpaid)".

Unpaid overtime working is very common amongst managerial and professional workers: some 25–40%, with the highest incidence among teaching professionals (63.7%). These occupations, with a higher proportion of women workers, illustrate the fact that the proportion of unpaid overtime worked by women is considerably higher (58%), compared to men (40%).

The long hours and overtime working by full-time men in the UK can be characterised in the EU context as *atypical* work. In this light, the Directive on working time can be seen as the functional corollary of other EU initiatives aimed at regulating atypical work in order to approximate the European model of the other 11 Member States.[55] The UK needs a reduction in the hours of work of full-time workers – a redistribution of working time. The *Employment Gazette* speculates that 'with the introduction of more flexible working time patterns such as Annualised Hours Contracts, overtime generally will be drastically reduced and extra hours worked one week will simply be taken as time off in lieu at a later date'.[56]

B. Part-time workers: the gender dimension

Not only do part-time workers work shorter hours in the UK, there are also many more of them than in any of the other three larger economies. The 1990 Labour Force Survey shows that the proportion of workers in the UK usually working up to 30 hours a week is 22.5%, as compared with 14.8% in Germany, 14.4% in France and 11.5% in Italy.

54. *Ibid*., p. 549.

55. Council Directive 91/383 of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship, *OJ* 1991, Labour 206/19; Council Directive 91/533 of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract *or* employment relationship. *OJ* 1991 L 288/32.

56. *Ibid*., p. 551. Annualised Hours Contracts are where employees' hours are determined over a full year rather than a week or other period. For example, instead of working 40 hours per week an employee may work 1,800 hours per year (after allowing for leave and other holiday entitlements).

In the EU, part-timers comprise a larger proportion of workers only in the Netherlands (28.6%) and Denmark (22.8%).[57] The striking feature of part-time work throughout the EU is the predominance of *women part-time workers*: over 80% of persons employed part-time in 1988 were women; the figure for men was only 18.2%. The UK was above the average: 85.7% of part-time workers were women.[58] Again, the UK, Denmark and the Netherlands, with the highest proportion of part-time workers, also have the highest proportions of women workers in the part-time workforce.[59] In March 1989, almost 1 in 4 of all employees in the UK worked less than full-time:[60]

	All employees	Of which part-time employees	
Total	22,235,000	5,295,000	(23.8%)
Women	10,255,000	4,394,000	(43%)
Men	11,980,000	901,000	(8%)

In spring 1992, 45% of all women in work in the UK, but only 6% of men, worked part-time in their main job.[61] Two salient facts characterise women's part-time employment:

1. women employees with dependent children aged 1–15 work an average of 25.1 hours, compared to 32.7 for those with no dependent children;[62]
2. only 40% of part-time workers are women with one or more dependent children under 16.[63]

The first fact indicates that children dictate the hours of work of working women. Although, overall, only 19.4% of women work less than 16 hours a week, the figure for women with children aged under five is nearly twice as high, at 34.3%. For women without dependent children only 11.7% work fewer than 16 hours, that is, less than a third the rate for women with children.

57. *A Social Portrait of Europe*, Statistical Office of the European Communities (Eurostat), Luxembourg, 1991, Table 5.6 on p. 62.
58. *Ibid.*, Table 5.11 on p. 63.
59. *Ibid.*, Table 5.7 on p. 62.
60. Industrial Relations Services, *Employment Trends*, No. 449, 10 October 1989, p. 6. See also (1990) *Employment Gazette* (December), p. 619.
61. G. WATSON & B. FOTHERGILL, 'Part-time Employment and Attitudes to Part-time Work', (1993) *Employment Gazette* (May), pp. 213–220. Over 80% of the men were over 50 or under 25, compared to less than 40% of the women, whose age distribution is more even.
62. (1992) *Employment Gazette*, (November), at p. 549 and Table 9 on p. 550.
63. (1993) *Employment Gazette* (May), p. 214, Table 1.

The second fact indicates that the absence of children does not preclude women choosing to work part-time. This is significant because, nonetheless, more than one in three (35.2%) women without dependent children work the standard 35–39 hour week. The working pattern of this group of women only differs from that of male workers when it comes to those working beyond 45 hours: 52.6% of women without dependent children have working hours of between 35–44 hours a week. The corresponding figure for men is almost exactly the same at 52.9%.

The conclusion to be drawn is that working women's hours of work are, like men's, spread over a large spectrum. There is a substantial overlap in the range of working hours of the two groups, but the range of women's hours begins much lower down and that of men extends much higher up:[64]

Employees total usual weekly hours by sex and for women, by family status

	0–15	16–24	25–34	35–44	45–48	49+
All men	3.0	1.6	2.1	52.9	15.5	24.9
All women	18.4	16.7	11.7	44.0	4.4	4.8
Women with d/c	28.0	25.8	14.5	26.2	2.5	3.3
Women/no d/c	13.7	12.2	10.5	52.6	5.3	5.5

Note: d/c – dependent children aged 0–15.

Comparing both ends of the range we see huge concentrations of either sex at the ends of the range of working hours: women at the lower end and men at the higher end:

Employees total usual weekly hours by sex and for women, by family status

	0–34	35–44	45+
All men	6.7	52.9	40.4
All women	46.8	44.0	9.2
Women with d/c	68.2	26.2	5.8
Women/no d/c	36.4	52.6	10.8

Note: d/c – dependent children

64. Data derived from (1992) *Employment Gazette* (May), Table 9, pp. 548–549.

Certain conclusions may be drawn from the predominance of women in part-time employment and the concentration of men with longer working hours. Before expounding these, a third feature which distinguishes working time in the UK from working time in other Member States should be noted.

C. The distribution/dispersion of working hours

The UK has a very different distribution of working hours to other Member States of the EU. Employees in every other country are heavily concentrated within a narrow range of hours. In most other States, a narrow hours-band accounts for a significant section of employees. The Table presents the single hour-band with the densest concentration in each country:[65]

Proportion of employees in a single hour-band (%)

Luxembourg	83% work	40 hours
Spain	71	40
France	50	39
Denmark	49	38
Ireland	49	40
Belgium	49	38
Greece	49	40
Italy	48	40
Portugal	38	45
Germany (W.)	30	38
Netherlands	30	38
UK	10	40

In eight of the 12 Member States, very close to half or more of all employees work within a single hour-band. When the hours-band is widened to include the most common range between 38 and 40 hours, the result is as follows:[66]

65. Table derived from *ibid.*, Figure 5, p. 556.
66. *Ibid.*, derived from Table 16, pp. 554–555.

Proportion of employees working 38–40 hours weekly (%)

Luxembourg	83.4%
Spain	75
Belgium	68.6
France	64.4
Greece	64.4
Germany	63.4
Netherlands	57.2
Ireland	54.8
Denmark	53.2
Italy	52.8
UK	45.9
Portugal	24.7*

Notes: * In Portugal, a further 41.7% work 45–48 hours.

In all Member States except the UK and Portugal, more than half of all employees work within the 38-40 hours band. The *Employment Gazette* explains:[67]

> What the data clearly show is the extent and influence of labour market regulation on the hours worked by employees. With the exception of the UK and, to some extent, Ireland and Denmark, all other EC states have wide-ranging regulation of their labour markets, either through direct legislation or through legally binding collective agreements. It is this which no doubt explains in part the concentration of working time within these countries. If we consider France, for example, where the statutory working work for many employees is set at 39 hours, we see that there is indeed a heavy concentration of employees working at exactly this number of hours.
>
> Consequently, it is possible to see that the UK with its highly deregulated labour market has a greater diversity of working time than elsewhere in the EC. In other countries, where the majority of employees work within a small range of hours, it is quite feasible to talk of a 'standard' employee. However, in the UK the idea of a standard amount of working time is less appropriate and even potentially misleading.

Yet, even in Ireland and Denmark, almost half of employees work within a single hour band. In Italy, the country closest to the UK in

67. *Ibid*., p. 555.

terms of the proportion of employees working 38–40 hours weekly, 48% of employees work a 40-hour week. The dispersion of hours around the average worked by employees is wider in the UK than any other Member State.[68] The dispersion of hours in the UK may be due in part to the absence of national regulation and legally binding collective agreements, but it may also owe something to the decentralisation of the processes of regulation of working time in the UK, including collective bargaining.

If the factor of national regulation by legislation or collective agreement is critical, it highlights the potential role of EU legislation in the form of the Working Time Directive and EU-level collective agreements in developing a European model.

VII. Working time in Britain: towards a European model

Working time in the UK is characterised by three features:

- First, nearly half of all employees, whether male or female, work a 'typical working week' in a relatively narrow band of hours: 52.9% of men and 44.0% of women usually work between 35–44 per week.

- Secondly, a large group of full-timers usually works much longer hours: 16% of employees, mainly men (2.9 million, 24.8% of male employees), usually work more than 48 hours per week.

- Thirdly, a large group of part-timers: 22.5% of employees, 85.7% of whom were women (43.% of female employees were part-timers) usually work below 30 hours per week; 9.7% of employees usually work less than 16 hours per week.

A. The nature of part-time work

The UK already has an unusually large number of part-time workers. Most of these are women (85.7%; 45% of women but only 6% of men work part-time in their main job). The common stereotype of these

68. *Ibid*., Table 16, p. 555.

women is that they have dependent children. However, the data show that *slightly more (i.e. most)* women part-timers do *not* have dependent children:

Women employees' total usual weekly hours, by family status

		%	%	%	%	%
	1000s	0–15	16–24	25–30	Total	1000s
All women	10,224	18.4	16.7	8.2	43.3	4,427
Women with d/c	3,338	28.0	25.8	11.1	64.9	2,153
Women/no d/c	6,906	13.7	12.2	6.9	32.8	2,265

Note: d/c = dependent children aged 0–15.

A majority of women who do *not* have the constraints of childcare responsibilities nonetheless work part-time. Most men also do not have the constraints of childcare responsibilities, but very few work part-time. An examination of the attitudes of part-time employees to their work may illuminate why many *women without* childcare responsibilities *do*, and most *men without* childcare responsibilities *do not*, work part-time.[69]

Recent research has found that 'the main factors motivating respondents to work part-time, and the things they looked for in a job were: money, social contact and self esteem'.[70] This echoes the conviction formulated in the Commission's Green Paper as to the importance of work to the social identity of men and women.

A key finding of the research was that 'most people have a variety of reasons for working part-time and for women in particular, motivations may have changed over time'.[71] For many, 'the main reason they worked part-time was to balance work with other (usually domestic) responsibilities'. However, the research also found that 'many respondents said their initial reasons for working part-time (for example, looking after child(ren) were no longer valid or relevant). Now they were used

69. G. WATSON & B. FOTHERGILL, 'Part-time Employment and Attitudes to Part-time Work', (1993) *Employment Gazette* (May), pp. 213–220.
70. *Ibid.*, p. 216.
71. *Ibid.*, p. 215.

to working part-time, the benefits outweighed the disadvantages. What had started as a transition had become a satisfactory end in itself.'[72]

The research referred to a number of respondents, who tended to be older and/or those financially better off, who described part-time working as 'the best of both worlds'. The satisfaction was derived 'not so much from the qualities of the job itself but rather from the overall benefits part-time work had on an individual's life-style'. This was said also possibly to help explain the 'generally higher levels of job satisfaction found amongst part-timers in surveys such as the BSA (British Social Attitudes) ... the 1989 survey found that 91% of part-time employees compared to 81% of full-timers were satisfied with their jobs'.[73]

Finally, the research commented on factors which hindered workers taking up part-time work and specified two in particular. First: 'it was usually lower skilled jobs which were offered on a part-time basis ... the recession had adversely affected many of the innovations designed to "tempt" people back into work – *e.g.* flexi-time, workplace nurseries, jobshares, etc.' But probably the key issues for part-timers 'were the number of hours involved in a job and the times of day they could work'. The 1989 British Social Attitudes Survey found the largest difference between full and part-timers as regards important aspects of a job was in relation to 'flexible hours': there was a 20% difference (62% to 42%) in the proportion of full and part-time employees saying that these were important. The research in question 'adds to the BSA findings ... that convenient or flexible hours were the *sine qua non* for some part-timers'.[74]

Three conclusions may be drawn from these findings:

- First, the initial experience of part-time working, early exposure/ socialisation to this form of work, is important. Most men, and many women, never work part-time and are never in a position to

72. *Ibid.*, p. 215: 'Also, the nature of domestic responsibilities can change over time and may not only involve looking after young children. Older children (now adults themselves) or ill/disabled partners could also involve a great deal of work ... For many, the main reason they worked part-time was to balance work with other (usually domestic) responsibilities.'
73. *Ibid.*, p. 220.
74. *Ibid.*, p. 217.

assess whether the benefits outweigh the disadvantages. If a person easily obtains part-time employment and becomes used to working part-time, it may become a satisfactory end in itself. Not necessarily for everybody, but for a great many more men and women than is now the case.

- Secondly, part-time work is not an end in itself. In many cases, it is undertaken to balance work with other (usually domestic) responsibilities. Socialisation to part-time work must ensure that other responsibilities are not ignored. There are many forms of community service, vocational training and creative and leisure forms of activity, as well as domestic responsibilities: housework, childcare, caring for the disabled or elderly, which could and should accompany working part-time. Such activities beneficially complement the formation of a social identity beyond work and increase the general welfare of society.

- Thirdly, a worker willing to undertake part-time work as well as other social responsibilities confronts the barriers to part-time working in the labour market. There is a lack of skilled and satisfying part-time jobs, or such jobs providing for flexi-time, workplace nurseries and job shares, without demands for extra hours at short notice, travel and transport difficulties, and so on.[75]

B. EU policy to date: equal rights for women part-timers

EU law has already made considerable progress in the prohibition of discrimination against part-time workers. This is due to the fact that in *every* Member State of the EU the *majority* of part-time employees is *female*.[76] The consequence is that if an employer treats part-time workers less favourably than full-timers, such treatment is more likely to have a negative impact on women than on men – as most part-timers are women. Such treatment therefore constitutes 'indirect discrimination' and is unlawful under Community law.[77]

75. Other barriers mentioned include the attitudes of others to part-time workers, particularly prevalent amongst husbands of inactive women. *Ibid.*, p. 217.

76. *A Social Portrait of Europe*, Statistical Office of the EC (Eurostat), Luxembourg, 1991, Table 5.11 on p. 63.

77. *Bilka Kaufhaus v. Weber von Harz*, Case 170/84, (1986) *European Court Reports*, p. 1607.

This is not the place to analyse the many contributions and incidental defects of the EU law on discrimination. For the purposes of analysing working time in Europe, the inestimable contribution of EU law is that it has drawn attention to and, in part, remedied the grosser forms of discrimination against women part-time workers.

But EU law has two critical limitations. First, part-time workers are only the incidental beneficiary of a policy and principle aimed at equal opportunity for women part-timers. If male workers join the ranks of part-timers, EU law will become inapplicable. Less favourable treatment of part-timers will not be discriminatory, since male and female part-timers are treated equally badly.

Secondly, given discriminatory effects against female part-timers, their maximum entitlement under EU law is to equal treatment with male full-timers, on a *pro rata* basis. If part-time work is to be promoted, much more is required by way of entitlements.

C. The new European model: re-distribution, rights and incentives

EU law and policy are taking two important steps towards a European model of working time. The steps can be seen as consistent with the analysis presented above. They have in common an attempt to deal with two 'atypical' forms of work. First, employment for 'atypically' very long hours is to be prohibited. Secondly, part-time employment is to be protected.

1. Redistribution of working time

The first step, of banning 'atypically' long working hours, is to cut off the longer end of the range of working hours. The Working Time Directive imposes a 48-hour limit on the working week. The provisions of the Directive will preclude employers offering work exceeding the 48 hours weekly maximum. Even in the case of countries opting to delay introduction of this provision for seven years, employees will be entitled to refuse to work more than 48 hours. This will affect case law in the UK; for example, where an employee obliged under the terms of his

employment to work overtime 'as required' was held to have been fairly dismissed for persistently refusing to do weekend standby duty.[78]

Not least because of high levels of unemployment, there is an argument for the redistribution of hours, at least from those working very long hours, into shorter-time employment; in particular, more part-time jobs could be created.

2. Rights for part-timers: beyond equality

The law on indirect discrimination precludes less favourable treatment for women part-time workers. The Commission has long proposed directives to extend this entitlement to equal treatment to all part-time workers. The earliest proposals contained this entitlement by way of a prohibition on discrimination in labour and social security entitlements.[79] But they went beyond the formal equality principle by providing also the right of full-time workers to change to part-time work, and vice-versa (Art. 6). Two later proposals added the entitlement of part-timers to equal treatment with full-timers specifically with regard to access to vocational training, benefits in cash and in kind granted under social assistance and social security schemes (statutory and occupational), annual holidays, dismissal and seniority allowances and social services within the undertaking.[80]

These entitlements to equal treatment are important. But to achieve the objective of redistribution of working time. Measures are required which encourage or require employers to go beyond equal treatment: to offer jobs with flexible hours and provide for the special needs of workers with other responsibilities.

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78. *Kirkpatrick v. Lister-Petter Ltd.*, Industrial Relations, *Legal Information Bulletin* No. 415, 21 December 1990, p. 12. This is one illustration of how EC labour law infiltrates and absorbs labour law in general, here on unfair dismissal, despite the absence of specific EC competence.

79. Draft directives on voluntary part-time work were presented by the Commission as long ago as 4 January 1982, OJ C/62, p. 7, and 5 January 1983, OJ C/18, p. 5, articles 2 and 3.

80. Proposal for a Council Directive on certain employment relationships with regard to working conditions; Proposal for a Council Directive on certain employment relationships with regard to distortions of competition, COM(90) 228 final – SYN 280, Brussels, 13 August 1990, *OJ* C/224, p. 6, as amended by COM(90), 533 final – SYN 280, Brussels, 31 October 1990. The proposal also contained a measure with ambiguous consequences for part-timers: requiring employers intending to have recourse to part-time work to inform workers' representative bodies within the undertaking (Article 2(3)).

Such provision has already been adopted by some employers seeking to attract women workers. A survey of 96 organisations employing between them 800,000 people found that of the possible measures to improve the recruitment and retention of women, flexible working provisions were used by the largest number of organisations. This was followed in descending order by recruitment and selection measures, consultation with and research into women employees' needs, job-sharing, maternity leave provisions, career breaks and family leave. Childcare provision was the least popular measure, although many organisations said they were considering the introduction of childcare measures.[81]

A survey of 120 employers employing over one million workers found that one in five employers had agreements which provided more than the minimum statutory maternity provision, and that the average return to work rate of women covered by these agreements was almost twice that of women who did not benefit from additional maternity pay or leave. Paternity pay was available to male employees in one-third of the surveyed organisations. Only four (3%) organisations provided childcare facilities for their employees, although such provision was under consideration or planned by six others. Thirty per cent of employers gave women the opportunity to work part-time when they returned to work after maternity leave; in most cases, this could be a permanent arrangement if the woman wished.[82]

In a survey of 2,000 employees, 53.5% said they combined work with caring responsibilities for children, elderly, ill or disabled relatives or friends who need support or attention on a regular basis. The percentage of women in employment who were also carers, 54%, was almost the same as the percentage of male carers, 54%. Caring responsibilities caused difficulties for employees. Some 42% of men and women had had to take time off work during the previous year because of childcare responsibilities, with 36% having to leave work early and 31% having to arrive late. The percentage of men who said they had to take time off because of childcare responsibilities was very similar to that for women. Caring for an adult had adversely affected the working lives of 47% of female and 35% of male employees surveyed.[83]

81. Industrial Relations Services (IRS), *Recruitment and Development Report*, No. 6, 19 June 1990, p. 2.
82. IRS *Employment Trends*, No. 439, 10 May 1989, p. 6; No. 442, 27 June 1989, p. 12.
83. IRS *Employment Trends*, No. 468, 17 July 1990, p. 4.

A survey found that, despite the projected fall in the number of young people coming into the labour market, few employers had adopted 'family friendly' policies aimed at attracting and keeping people with caring responsibilities in their workforce. In particular, none of the private sector employers offered their employees any specific help with caring for elderly dependents. Yet, as the age profile of the labour force changes, with an increasingly large proportion likely to be concentrated in the 45–55 age bracket, the factor determining the ability of many workers to take on paid employment may well be the availability of 'eldercare'.[84]

The EU law on sex discrimination does not provide adequate protection. For example, an employer's insistence that an employee should work at certain times of the day can, in some circumstances, amount to indirect sex discrimination. The Court has to strike a balance 'between the discriminatory effect of the condition and the reasonable needs of the party who applied the condition'. In a case where the employee refused to work certain hours required to teach sport to school-children because of her childcare responsibilities, the Court held the school-children's needs outweighed the discriminatory effect on the woman employee.[85]

There is, therefore, a need for measures to encourage the provision of part-time work and to recognise the family and other responsibilities of workers. This will include rights in labour law to require employers to make special provisions. It will also impose obligations on Member State social welfare systems to assist part-timers and workers with special caring responsibilities.

The solution is not only the redistribution of working time by constricting the upper range of working hours. It requires incentives to adopt a lower range of working hours by providing benefits to part-timers who do socially useful work: childcare, care for the aged and disabled, undergo education and training, undertake community service, perform public functions, and so on.

84. IRS *Employment Trends*, No. 457, 6 February 1990, p. 4.
85. *Briggs v. North Eastern Education and Library Board*, (1990) *Industrial Relations Law Reports*, p. 181.

This is a theme consistent with the thrust of the Commission's White Paper on the future of European social policy. The stark work/leisure dichotomy should give way to more complex patterns of the use of time incorporating the elements of social responsibility, education and training.

New patterns of working time offer the possibility of new combinations of work, education, social responsibility and leisure in a more integrated life cycle.

The measures required will therefore go beyond the traditional labour law rights and social security law entitlements. They will include rights and entitlements to training, caring responsibilities, community service, and provide incentives to workers to undertake these activities. The objective is to make paid work not the sole, nor always the central activity of human life. Work is traditionally separated from the rest of life by time. Labour law does not formally or directly regulate non-working time. But the availability of non-working time, and the uses to which it can be put, depend on the regulation of working time. The development of a European model of working time is central to the lives of all those who live in Europe. The division between labour law and social security law should be replaced by a new structure of social regulation which integrates labour standards and social standards, working and living.

D. Implementing the European model: the roles of legislation and social dialogue

EU legislation in the form of the Directive on working time is potentially a major step forward. There is also scope for sectoral agreements on working time at EU level, described in detail above. However, working time is an area in which both the European Union and the Member States have competences. Following Maastricht, this competence may also be exercised by the social partners in the form of social dialogue at EU level or by the social partners within Member States through collective bargaining. To determine the appropriate level, the principle of subsidiarity defined in Article 3B of the Treaty on European Union applies.

The subsidiarity principle has been misconceived as implying an allocation of powers to *either* a higher or a lower level.[86] However, it is not a question of exclusive allocation, but of *relative* efficiency. Deciding which level is *better* implies that *both* have something to contribute. Though one may be better *overall*, the other may be more advantageous *in some respects*. The solution is to use the subsidiarity principle to delineate the respective advantages of *each* level and promote *cooperation* between them, rather than assign exclusive jurisdiction to one or the other. *Within* the relevant field of competence, different levels can coordinate their action. This is a familiar problem in labour law and industrial relations: the relative roles of legislation and collective bargaining in regulating different policy areas.

Within this general framework, much of any progress towards the new European model of working time will be made within Member States. It falls to national legislatures, trade unions and employers and their associations within Member States to undertake this task. Nonetheless, in its consultative document on Reconciliation of Professional and Family Life, the Commission states that:[87]

> The specific objectives of promoting reconciliation between family and professional life, laying down minimum standards of protection and establishing common rules ensuring fair competition within the Community cannot be sufficiently achieved by the Member States acting alone and can therefore by reason of the scale and effects of the proposed action, be better achieved by general framework arrangements operating at Community level.

VIII. Conclusion

Collective bargaining has received a major stimulus in the Working Time Directive. This reflects a general trend in European labour law, to which the UK industrial relations tradition has made a fundamental contribution. The emergence of a European model of working time exemplifies the dynamic process of evolution of a European labour law.

86. This argument is developed in B. BERCUSSON, 'The Dynamic of European Labour Law after Maastricht', (1994) 23 *Industrial Law Journal* (March), p. l.
87. Paragraph 21.

UK labour law, like that of the other Member States, is increasingly influenced by EU labour law. The dynamic of national labour laws is no longer determined solely, or even mainly, by domestic developments. It is not merely that UK labour law comes increasingly to reflect EU norms. EU norms are themselves the reflection of the national labour laws of Member States. In this indirect way, other national labour law developments are influential in the development of UK labour law.

The emergent European model of working time is not that of one or other Member State. It draws on the experience of *various* Member States so that to each it is both familiar in some of its elements and yet different in its entirety. This can exemplified through the impending encounter of the European model of working time with UK experience.

As regards the UK, the Directive and resulting European model curtail the tradition of very long working hours in certain industries and occupations. The impulse is towards a redistribution of working hours from longer to shorter hours. This reflects the narrower range of working hours, with high concentrations in specific hours-bands, to be found in many other Member States, quite different from the exceptionally wide distribution currently to be found in the UK.

On the other hand, the Directive and European model introduce a potentially dynamic role for collective bargaining both for derogation and for standard setting, which is familiar to the UK, but less so to many other Member States where legislation plays the key role in regulating working hours. The distinctive EU contribution may be perceived, first, in the law on indirect sex discrimination. Through the statistical fact of female predominance in part-time working, this has led to extensive legal interventions to ensure equal treatment for part-timers. Secondly, there have been corollary initiatives in the form of the proposed Directives on atypical workers, and, in particular, part-timers. These directives are largely confined to the old logic of equal treatment. But the White Paper promises a more dynamic approach: providing incentives for part-time employment, guaranteeing part-timers equal protection and recognising family and other social responsibilities of workers.

This is an important opportunity for trade unions to re-think traditional bargaining packages and promote the new European model, including rights and entitlements to training, caring responsibilities, community

service, and providing incentives to workers to undertake these activities. In this sense, the labour law of the UK, and of other Member States, is, and will become, more truly European than is apparent from the formal imprint of EU labour law. It is European in that it reflects the cumulative experience of national labour laws filtered through the prism of the EU institutions and refined in the crucible of the developing European polity. There is a tendency towards convergence of UK labour law with the labour laws of other Member States of the EU. This tendency is, in the main, driven by the institutional pressures of EU membership and, to a lesser extent, is the consequence of the workings of an international economy and, though less significant, a single European labour market. The dynamic of this convergence process is complex and its results are far from complete. The adoption of the EU Directive on working time and the emergence of a European model of working time are manifestations of the process of evolution of this new European labour law.

Bringing the regulations into line with Europe?

Brian Bercusson (2006) *

Regulation of Working Time in the United Kingdom and in Europe

1. The UK's Working Time Regulations[1] were introduced in order to implement European Community (EC) law in the form of Working Time Directive of 1993.[2] But for this legal intervention by the European Community, there would be little regulation of working time in the UK.[3] Nor is there likely to be any revision in the UK's regulation of working time without further intervention from Europe.

2. Bringing the UK Regulations into line with Europe may be achieved through litigation. Notable successes have been achieved, as when BECTU succeeded in challenged the Regulations excluding temporary workers from the Directive's provisions on entitlement to paid holidays.[4]

***** 'Bringing the regulations into line with Europe?', Brian Bercusson (2006). This article was first presented at the conference 'Worked to the bone: regulating the UK's long-hours culture', Institute of Employment Rights, 2006, London. For further information on the Institute of Employment Rights please visit www.ier.org.uk.

1. The Working Time Regulations 1998. S.I. 1833 (as amended).

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

3. The then Conservative UK government fought to prevent the adoption of the Directive, and then challenged it before the European Court of Justice. It lost both battles. *United Kingdom v. Council*, Case C-84/4, [1996] ECR I-5755.

4. *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v. Secretary of State for Trade and Industry*, Case C-173/99, [2001] ECR I-4881. Other possibilities remain to be exploited: *Bernhard Pfeiffer et al. c. Deutsches Rotes Kreuz Kreisverband Waldshut eV*, Joined Cases C-397/01 to C-403/01. Opinion of Advocate-General M.D. Ruiz-Jarabo Colomer, 6 May 2003; Second Opinion, 27 April 2004, ECJ decision, 5 October 2005.

3. However, more substantial changes bringing the UK into line with Europe will depend on whether and how the European Community decides to revise the Working Time Directive.

Revision of the Working Time Directive

4. Council Directive 93/104/EC included provisions allowing an opt-out from the mandatory limit on a maximum of 48-hours average weekly working (Article 6), but required the Commission, before 23 November 2003, to "re-examine the provisions... and decide on what action to take".[5] A similar review was envisaged of the reference periods over which the maximum average was to be calculated.[6] Of concern initially primarily to the UK, other Member States have become engaged because of decisions of the European Court of Justice (ECJ) affecting, in particular, the hospital sector.[7] The result was a highly controversial proposal for revision of the Working Time Directive by the Commission of 22 September 2004.[8]

Proposals for revision of the Working Time Directive

5. The proposals of the Council under the Dutch Presidency (July-December 2004) included a number of options:

   — eliminate the "opt-out" altogether;
   — keep the opt-out but under a process of peer review and revision;

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5. Article 18(1)(b)(i) of Council Directive 93/104/EC of 23 November 1993. Now Article 22)(1) of Directive 2003/88/EC of 4 November 2003.

6. Article 16: "Member States may lay down... (b) for the application of Article 6 (maximum weekly working time), a reference period not exceeding six months...". Article 19: "...Member States shall have the option, subject to compliance with the general principles relating to the protection of the safety and health of workers, of allowing, for objective or technical reasons or reasons concerning the organisation of work, collective agreements or agreements concluded between the two sides of industry to set reference periods in no event exceeding 12 months".

7. *Sindicato de Médicos de Asistencia Pública (Simap) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, Case C-303/98, [2000] ECR I-7963. *Landeshauptstadt Kiel v. Norbert Jaeger*, Case C-151/02, 9 September 2003. *Abdelkader Dellas v. Ministre des Affaires Sociales*, Case C-14/04, ECJ decision, 1 December 2005.

8. *Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time*. COM(2004) 607 final, Brussels, 22 September 2004.

— extend the 12 month reference period without any conditions;
— re-define on-call work so that inactive time while on-call is not working time (reversing the European Court's decisions that all on-call work at the workplace is working time);
— the period of compensatory rest to extend to 7 days after the limitation on working time is exceeded (reversing the European Court's decision that compensatory rest must follow immediately after excessive working time).

6. In the European Parliament's Opinion of 11 May 2005 on the Commission's proposal, its counter-proposals included:

— phasing out of the "opt-out";
— on-call time (at the workplace), including inactive time, is working time, but derogations may be allowed;
— extension of the reference period to 12 months (annualization), but subject to strict conditions.

7. Other proposals have circulated. For example, as to the reference period over which the 48-hour maximum working work was to be calculated, that Member States can allow extension to 52 weeks by collective agreement (the current position) or by the employer fulfilling certain conditions:

— undertaking a risk assessment, updated annually,
— monitoring health and safety, including via sickness and accident records, keeping written records of the monitoring;
— keeping records of time worked over 52 weeks;
— providing free health checks at least once a year;
— specifying maximum weekly hours in any week during the 52 week period (e.g. Dutch presidency proposal: maximum 55 hours weekly over average 28 days where individual opt-out outside collectively agreed opt-out).

8. Additional safeguards might be required, such as announcing the pattern or changes in working time at least 4 weeks in advance, taking into account the needs of individual workers as regards work and family life and informing and consulting worker representatives before introducing annualised working time (linked to the framework information and consultation directive, which came into force on 23 March 2005).

9. Under the Luxembourg Presidency of the Council during the first half of 2005, the European Commission made another proposal accepting some but not the most important amendments suggested by the European Parliament, arguing that they "disrupt the balance of the initial text and make it more difficult to obtain an agreement or a sufficient majority in the Council".[9] Specifically, the Commission's new proposal rejected the Parliament's proposed amendment abolishing the individual opt-out, but "while unable to accept it as it is, it is prepared to explore a possible compromise on this question which is dividing the co-legislators".

10. The UK held the Presidency of the Council during the second half of 2005. On 26 October 2005, Tony Blair said to the European Parliament that "on Working Time, I hope we can reach agreement in the UK Presidency – we will certainly try" and on 21 November the UK presented its proposals.[10] As regards the opt-out:[11]

> "The Presidency has therefore come up with a proposal to accommodate those concerns in a balanced way. The principle of the Directive – that no worker should be forced to work longer than 48 hours a week – remains paramount. However, those Member States that wish to allow their citizens to choose to work longer, either now or in the future, would be able to do so. Those Member states that wanted to remove the possibility of the opt-out on their territory would be able irrevocably to renounce it. Furthermore, to address the concerns of Member States about opted-out workers coming in from other countries, Member States would be able to ban workers from using the opt-out on their territory even if they had signed it elsewhere.
>
> This proposal also addresses the concerns of those Member States who wish to allow their citizens to work more than a total of 48 hours a week in one or more jobs, whilst also

9. European Commission, Amended proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time, Brussels, 31 May 2005, COM(2005) 246 final.

10. UK Presidency, Amended proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time, Brussels, 21 November 2005, Doc. 14687/05.

11. *Ibid.*, pp. 3–4.

> addressing the concerns of those that wish to protect these workers by letting them work within a legal framework and not be driven into the black economy by unnecessarily restrictive limits on the hours they may work...
>
> It is clear that some Member States could never accept a proposal that included the removal of the opt-out. A proposal to phase out the opt-out would have a huge impact on those Member States and individual EU citizens who value it, and a very limited impact on those Member States and the citizens that do no. The proposals in the Annex address the practical concerns of both groups in a neutral way...".

11. One can draw one's own conclusions about the "neutrality" and "balanced way" of a proposal which retains the opt-out indefinitely.

12. Following the Commission's proposal of 2004, the European Trade Union Confederation put together a Task Force of representatives of its trade union affiliates from all Member States and various experts which has been meeting regularly. It has mounted a very dynamic and effective campaign of information and lobbying, at both European and national levels. In no small part due to these efforts, the UK's proposal of November 2005 was blocked in the Council. No further attempt has been made under the Austrian Presidency which took over on 1 January 2006

13. In considering any revision of the directive, two issues should be borne in mind.

    i. General principles of Community law must be respected: non-regression and fundamental rights/principles, including protection of the health and safety of workers.

    ii. In negotiating the revision, a distinction can be made between substantive and procedural changes. Any changes in substantive protection must be compensated for by procedural changes, so that, arguably, the principles of non-regression and of protection of the health and safety of workers are not violated.

General principles

15. The revision of the Working Time Directive has raised issues with potential longer-term implications, including a "non-regression principle".[12]

A "non-regression principle"

16. The concept of "non-regression" in EU law needs to be analysed and developed. This will become of increasing importance in a political climate where the Member States or EU institutions seek to attack the EU's social *acqui*s.

17. Article 136 EC:

> "*The Community and the Member States... shall have as their objectives... improved living and working conditions*, so as to make to possible their harmonisation *while the improvement is being maintained...*".

18. Article 137(1) EC:

> "*With a view to achieving the objectives* of Article 136...".

19. Article 137(2)(b) EC: (as amended by the Treaty of Nice)

> "To this end, the Council... may adopt... by means of directives, *minimum requirements...*".

20. The Working Time Directive is the minimum requirement adopted by the Council in 1993.[13] Any amending directive aiming at further

12. The application of this principle has arisen in relation to the Fixed-Term Work Directive: Council Directive 91/383 of 25 June 1991 supplementing the measures to encourage improvements in the safety and health of workers with a fixed-duration employment relationship or a temporary employment relationship, OJ 1991 L206/19. See *Werner Mangold v. Rüdiger Helm*, Case C-144/04, ECJ, decided 22 November 2005.

13. See also the Preamble to the Working Time Directive, which cites the Community Charter of the Fundamental Social Rights of Workers, Article 7: "The completion of the internal market *must lead to an improvement* in the living and working conditions of workers in the European Community. This process must result from an approximation of these conditions

harmonisation must ensure "the improvement is being maintained".

21. There are problems in interpreting and applying the principle of non-regression in various circumstances.

22. For example, is it a regression:

- where the amendment affects both individual workers and their representatives (trade unions); for example, the European Court held that trade unions could not by collective agreement agree that individual workers work more than 48 hours; the individual worker had to give individual consent;[14]
- conversely, where the amendment affects the workers' representatives (trade unions), but not any/some/many individual workers;
- where the amendment adversely affects some workers, but not others;
- where it extends the opt-out by allowing individual workers to extend reference period, but allows for pressure to be exerted by employers...?

23. These problems are illustrated by the difficulty of the European Parliament's compromise proposal: revision of the *reference period* in exchange for a phasing out of the opt-out and a different on-call formula. This might benefit some/all individual workers. But it means losing the current provision allowing extension of the reference period to 12 months by collective agreement only, which is a major incentive to employers to recognise and negotiate with trade unions, since their consent is needed

24. On the other hand, if the opt-out by way of an agreement to work *more than 48 hours* was allowed, but *only* by collective agreement, this would support the collective dimension. However, if individual workers were thereby denied the opportunity to opt-out, would this be considered a regression? It would depend on whether the possibility to opt-out (working more hours) could be characterised

while the improvement is being maintained, as regards in particular the duration and organization of working time...".

14. See cases in footnote 7 above.

negatively as a regression in EU labour standards, or positively as the exercise of freedom.

25. A list of proposed amendments may illustrate the arguments as to whether there is regression by looking at evidence of the consequences for conditions of work which demonstrate the regression.

The opt-out

26. The Commission's first consultation[15] included evidence that the opt-out was abused in and by the UK. Also, that its use by Member States had increased, not least as a result of the European Court's decisions on the definition of working time which were said to have a substantial impact on the health service. [16] The consequence that the protection against excessive working hours was removed from more and more workers.

27. A revision proposing to maintain the opt-out, or make it permanent, will undoubtedly lead to regression.

28. In these circumstances, a simple extension of the opt-out arguably constitutes regression, particularly if further review is not guaranteed. In contrast, a guaranteed phasing out would counter tendencies to abuse and encourage moves to achieve compliance before the deadline.

29. Similarly, reducing the conditions currently required for an opt-out might constitute regression. Any alteration of the conditions of opt-out could also be regarded as regression. At a minimum, maintaining the existing conditions, ensuring they are enforced

15. *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions concerning the re-exam of Directive 93/104/EC concerning certain aspects of the organization of working time*, COM(2003) 843 final, Brussels, 30 December 2003. See C. Barnard, S. Deakin and R. Hobbs, "Opting out of the 48-hour week: Employer necessity or individual choice? An empirical study of the operation of Article 18(1)(b) of the Working Time Directive in the UK", (2003) 32 *Industrial Law Journal* 223–252.

16. See above, footnote 3. "According to the German government, medical staffing requirements will rise by 24% requiring 15,000 to 27,000 doctors at a cost of Euro 1.75 billion; the UK government believes it will need between 6,250 and 12,550 more doctors and 1,250 other staff, at a cost of Euro 540 million to Euro 1.1 billion; and the Dutch government estimates that it will need 10,000 new care staff at a cost of Euro 400 million". *Industrial Relations Services (IRS) Employment Review* No. 792, 23 January 2004, p. 49.

and not abused, or adding conditions is required to ensure there is no regression.

On-call time

30. The European Court interpreted the directive to mean that all time at the workplace is working time, active or inactive.[17] This is the standard laid down by the directive which cannot be regressed from.

31. The Council proposes that on-call time is no longer completely to count as working time: inactive on-call time is not to count as working time. This is clearly a regression where it leads to violation of the directive's provisions on, for example, minimum rest periods or maximum daily or weekly working hours.

32. The European Parliament's proposal is that on-call time count as working time unless there are derogations. This simply means that such derogations, not currently allowed by the directive, amount to a regression.

Compensatory recuperative time

33. The Council proposes that the compensatory recuperative period may be delayed until a maximum of 7 days after on-call duty. A Press Release of the Social Affairs Council admits that "the Court stated that compensatory recuperative period, which usually follows working time, must begin immediately after the on-call service". The justification for the Council's proposal is that "the member states will be faced with high costs and personnel problems". Such a justification was rejected by the Court as excluded by the Directive's Preamble stating: "the improvement of workers' safety, hygiene and health and work is an objective which should not be subordinated to purely economic considerations". To this might be added evidence that delaying recuperative rests is detrimental to health and safety (airline pilots, surgeons).

Annualization

34. The Council proposes that the reference period for calculating average maximum weekly working hours be extended without the present requirement of a collective agreement. The European Par-

17. See above, footnote 3.

liament proposes that such extension be allowed without a collective agreement, but only under strict conditions.

35. The Council's proposal is equivalent to extending the individual opt-out dramatically. Individual workers could be required to work more than the average 48 hours weekly over a 4- or 6-month period. At present, this can only be done if the Member State opts out, and then under stringent conditions, including that the individual worker has agreed. Both these conditions would disappear if annualization was automatic. For example, individual workers could be required to work for 60 hours per week over a 4/6-month period, with none of the opt-out conditions, provided the average over 12 months was 48 hours (e.g. a 36 hour week for the next 6 months).

36. It is not clear whether the proposal to allow extension to 12 months is subject to the condition that it is allowed only where there are objective/ technical/organisational reasons. A blanket extension deleting this condition is arguably regression. Also, is the condition that it is subject to general principles of protection of health and safety to be retained?

Negotiating the revision

37. It may be argued that the substantive changes proposed by the Council, and even those of the Parliament, are regressive, thereby violate the EC Treaty and may be challenged before the European Court.

38. Negotiations might avoid this outcome if sufficient concessions are made so that changes in substantive protection are compensated for by procedural changes. By reinforcing the provisions on monitoring and enforcement, arguably, the principles of non-regression and of the health and safety of workers are not violated.

39. It may be argued that the Commission, Council and Parliament should have taken this approach from the beginning. Two general principles will be highlighted: the 1989 Framework Directive on health and safety, and Article 13 of the Working Time Directive.

40. The 1989 Framework Directive is a health and safety directive.[18] The EU institutions should have followed the basic principles set out in the 1989 Framework Directive. The Preamble to the Working Time Directive states that the 1989 Directive applies.[19] Basic principles of the 1989 Directive should have been followed.

41. *Risk assessment*: Article 6(3)(a) states the requirement to "evaluate the risks to the safety and health of workers". The EU institutions should be expected to do the same when they propose revisions of health and safety directives.

42. *Collective measures:* Article 6(2)(h) specifies "giving collective protective measures priority over individual protective measures". The EU institutions violate this principle, for example, in the proposal to extend the reference period without the need for collective agreement.

43. The EU institutions have failed to observe these basic principles as regards the proposed amendments concerning the opt-out, definition of working time, managing on-call work and reference periods.

44. *Humanization of work*: Article 13 of the Working Time Directive provides: (Pattern of work)

> "Member States shall take the measures necessary to ensure than an employer who intends to organize work according to a certain pattern takes account of the general principle of adapting work to the worker...".[20]

18. Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work. OJ L 183/1.

19. "Whereas the provisions of Council Directive 89/391/EEC of 132 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work are fully applicable to the areas covered by this Directive without prejudice to more stringent and/or specific provisions contained therein".

20. Note the wholly inadequate implementation of this provision in Regulation 8 of the UK's Working Time Regulations 1998: "Pattern of work. Where the pattern according to which an employer organises work is such as to put the health and safety of a worker employed by him at risk, in particular because the work is monotonous or the work-rate is predetermined, the employer shall ensure that the worker is given adequate rest breaks".

45. The Directive emphasises the role of collective bargaining in setting many specific standards. Article 13 could be read as implying a general requirement of consultation and participation of workers and their representatives. Member States are obliged to secure that employers take into account "the general principle of adapting work to the worker". The obvious way to achieve this is through consultation of workers and their representatives.

46. Monitoring and enforcement*: There are well-known problems of monitoring and enforcement of the Directive's provisions on working time. Additional safeguards might be a condition for further flexibility to be granted. In other words, concessions on substance might be traded for stronger enforcement provisions. Some examples:*

Reinforced monitoring.

47. Where sector specific problems are identified as justifying an opt-out (e.g. the extension of the reference period, or a re-definition of "working time" to exclude (inactive) on-call time), there should be sector-specific enforcement mechanisms (reporting, inspection agencies...).

48. It may be that the burden of undergoing special monitoring (e.g. providing extra information) and enforcement may deter employers from exploiting the new provisions. The burden of extra monitoring and enforcement will deter governments of some Member States.

Information and consultation

49. Where employers are able to use the opt-out, or extend the reference period, or exploit the re-definition of "working time" to exclude (inactive) on-call time, there should be reinforced obligations of information and consultation of employee representatives over scheduling the pattern of working hours.

50. *Trade-offs*: A number of specific trade-offs may be suggested to balance concessions.

51. **On the opt-out**: more stringent information requirements. For example, recalling the UK's watering down of this requirement. The original UK Regulations of 1998 required detailed information

about hours worked; this was changed in 1999 to require only information identifying the employees concerned.

52. **On reference periods**, if the reference period is extended to 12 months, the employers should keep records on anybody working more than 48 hours averaged over a period exceeding 17 weeks. If the reference period is so extended, this should be allowed only:

    i. by explicit derogation (as is currently the position for 26 weeks), and/or
    ii. be time-limited (sunset clause); and/or
    iii. by derogation in specific cases which must be justified on narrowly defined grounds, and/or
    iv. subject to specified conditions; and/or
    v. subject to review by the Commission.

53. **On-call work**: if working time is to exclude some (inactive) on-call time at the workplace, there should be precise information, e.g. quantifying it; or defining the "active" work obligation precisely so that inactive (non-working) time is clearly understood. If working time is to exclude some (inactive) on-call time at the workplace, this should not to be a general rule. It should only apply:

    i. by derogation for specific sectors (e.g. health); and/or
    ii. be time-limited (sunset clause); and/or
    iii. by derogation in specific cases which must be justified on narrowly defined grounds, and/or
    iv. subject to specified conditions; and/or
    v. subject to review by the Commission.

Conclusion

54. There are a large number of proposals currently circulating which aim to revise the Working Time Directive. Many of these would have a substantial impact on working time regulation in the UK. The final content of any revised Directive will depend on the proposal of the Commission, and negotiations between the European Parliament and the Council of Ministers. The UK government's position in the Council has aimed to minimise EU

intervention, protect its opt-out from the European regulations, and, where possible, reduce the protection they currently offer. The European Parliament, including some British MEPs, have tried to resist this.

55. The outcome in the form of a revised directive may well compromise some of the protection currently available under the Directive. The UK government may then implement the revised Directive reducing further the protection provided. If so, it may be worth considering whether such regulations, and indeed the Directive, itself, may be challenged before the European Court as violating the principle of non-regression: that European Community labour law, and consequently the labour law of the Member States, including the UK, cannot reduce or withdraw from the minimum standards of protection established in European law.

Chapter VIII

European labour law: What's in a name?

Chapter VIII: European labour law: What's in a name?

Introduction by Filip Dorssemont

One of the major 'intellectual' challenges of any author or even lecturer trying to provide a comprehensive survey of European labour law is to come to terms with the very notion of it. A subsequent challenge is to find an adequate classification scheme for primary and secondary EC law and, indeed, ECJ case law. As with domestic labour law, the conceptualisation of European labour law within a coherent intellectual framework only started decades after the emergence of its precepts. In an inspiring article entitled 'The conceptualisation of European labour law', which preceded the first edition of *European labour law*, Brian Bercusson provides various clues for a better understanding of the essence of European labour law.[1] Its development is rightly described as 'spasmodic, episodic and unsystematic'. He seeks insight by way of contrast and comparison vis-à-vis the essence of international and domestic labour law. The author masterfully detects the absence of a common classification of EC labour law materials and subjects in existing treatises and manuals published in English, French and Italian. The deeply rooted dichotomy of domestic labour law in terms of individual and collective labour law appears to be insufficient to offer a comprehensive framework for the subject matter. Hence, some manuals supplement this dichotomy by adding new categories (such as 'Employment Policy' and 'Restructuring'), which tend to supersede issues categorised in terms of individual or collective labour law. Other manuals endeavour to follow a classification unrelated to traditional categories of domestic labour law, but more closely related to common

1. B. Bercusson, 'The conceptualisation of European labour law', *Industrial Law Journal*, 1995, pp. 3–18. The author revisited the issue in subsequent articles. See B. Bercusson, 'Le concept de droit du travail européen', in A. Supiot (ed.), *Le travail en perspectives*, Paris: LGDJ, 1998, pp. 603–16 and B. Bercusson, 'European labour law in context: review of the literature', *European Law Journal*, 1998, pp. 87–102. For a 'constitutional' analysis of the various paradigms of labour law pervading primary EC law, see also J. Kenner, *EU employment law. From Rome to Amsterdam and beyond*, Oxford: Hart, 2003. The book was reviewed by Brian Bercusson in *Common Market Law Review*, 2004, pp. 1462–65.

market concepts. Furthermore, authors disagree on the exact allocation of some key issues of EC labour law within such a classification. The proportional space allocated to various issues is extremely divergent among the authors concerned – this is true especially with regard to the space devoted to equality law and health and safety issues.

It is well worth comparing these reflections with the general structure Brian Bercusson applied in his *European labour law*.[2] In this volume, the author managed to overcome these classification difficulties by offering two distinct perspectives. In the second Title, he assesses the subject matter from a 'law in context' standpoint. The author thus situates *European labour law* within the context of sex equality, the enterprise, health and safety protection and free movement. In a third Title, other materials are classified in a more 'dogmatic' way, alongside the traditional dichotomy ('twin pillars') of individual and collective labour law. Since there is no material overlap, the major lesson seems to be that a dogmatic approach is worthwhile but insufficient to address the subject as a whole.

In his article, Bercusson warns against an isolated research approach to EC labour law as a set of rules adopted by EC institutions. The author rejects criticism of this approach in at least two respects. Despite the current tendency towards negative integration, he explains how it is impossible to comprehend the making of EC labour law without a knowledge of comparative (domestic) labour law. He understands EC labour law as being influenced by 'highly developed and technically sophisticated national labour law systems'. Furthermore, he criticises the idea that the making of EC labour law should be entirely dependent on EC institutions, neglecting the role of supranational interest groups. Their importance has been increased by the dynamics of the European social dialogue and the dynamics of domestic social dialogue related to transpositional bargaining. In sum, despite the rather 'static' outlook of the title of the contribution, it also prefigures a more dynamic or genetic framework in which to apprehend the making of EC labour law as opposed to a framework to which the results of this process can be allocated.

2. B. Bercusson, *European labour law*, London: Butterworths, 1996.

The recent 'Lessons for transnational labour regulation from a case study of temporary agency work'[3] provides an powerful intellectual framework for such a dynamic analysis of the making of European labour law. As indicated in the previous contribution, the author focuses on both substantial (the state of the art of domestic labour law within the context of the transformation of labour markets in an evolving transnational economy) and procedural elements (transnational social dialogue and legislative procedures) which shape European labour law directives. The documented genesis of both the Services Directive and the proposed Working Conditions for Temporary Workers Directive serves as an example. The author ended this contribution with an admonition to respect the existing *acquis communautaire social* and the EU Charter of Fundamental Rights as the most suitable safeguards for achieving the required balance between the concern for market freedoms and the need to protect workers and social standards. The booby trap of dismantling this *acquis* under cover of resolving an insider–outsider dilemma can thus be avoided.

3. B. Bercusson, 'Lessons for transnational labour regulation from a case study of temporary agency work', in K. Ahlberg, B. Bercusson, N. Bruun et al., *Transnational Labour Regulation*, Brussels: P.I.E. P Lang, 2008, pp. 321–51.

The conceptualization of European labour law

Brian Bercusson (1995) * **

1. Introduction

European labour law, when it has exceptionally appeared in texts on British labour law, has been a vehicle for traditional comparative law insights,[1] or the manifestation of specific European Community law requirements on domestic legal development. It is ironic that British labour law is perceived as European only in these ways. For the dominant conceptualization of British labour law is the intellectual product of Otto Kahn-Freund, a labour lawyer who analysed the British system using the tools of the German labour law tradition founded by Sinzheimer – an intellectual legacy with a specific set of normative assumptions.[2]

Although the vision of British labour law has been filtered through this continental lens, the focus of the discipline is still on the domestic context. The orthodox analysis is that of a fundamentally voluntarist-abstentionist tradition reflecting domestic historical origins, followed by corporatist legal interventions from the mid-1960s to the late 1970s, and de-collectivization and deregulation beginning with the election of the Conservative government in 1979.[3]

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** 'The conceptualization of European labour law', Brian Bercusson (1995). This article was first published in the *Industrial Law Journal*, 24 (1), 3–18 and is reprinted here with the kind permission of the Industrial Law Society.

1. The most dedicated comparativist in this sense was Otto Kahn-Freund in his *Labour and the Law*, 1972, 3rd edition, edited and with an introduction by P.L. Davies and M.R. Freedland (London: Stevens, 1983).
2. See R. Lewis, 'Kahn-Freund and Labour Law: An Outline Critique' (1979) 8 ILJ 202.
3. Lord Wedderburn, R. Lewis and J. Clark (eds), *Labour Law and Industrial Relations: Building on Kahn-Freund* (Oxford: Clarendon Press, 1983).

European legal developments, however, are intruding upon this national perspective.[4] UK labour law, like that of the other Member States, is increasingly influenced by EC labour law. The dynamic of national labour laws is no longer determined solely or even mainly by domestic developments. It is not merely that UK labour law is required to incorporate EC norms. EC norms are themselves the reflection of the national labour laws of Member States. In this indirect way, other national labour laws are influential in the development of UK labour law.

This will be particularly so for UK labour law now that the Maastricht Treaty and its Social Policy Protocol and Agreement are in force. EC labour law will then reflect even more the experience of the labour laws of the other 11 Member States, which the UK will have to incorporate when eventually a government is elected with a commitment to join the process of European Union.[5]

The UK's very reluctance to join the other 11 Member States has had a fundamental impact on the structure of EC labour law, all the more ironic given the inspiration for its reluctance. Since 1979, EC legislative activity in the social field has largely halted in the face of the UK government's rejection of almost all proposals from the Commission, and their consequent failure to achieve the necessary unanimous approval in the Council of Ministers.

This UK veto was one of the reasons which led Jacques Delors to initiate the policy in 1985 of stimulating the European social dialogue as an alternative path to a social dimension for the EC. The development of the social dialogue, its gradual emergence as a pillar of EC social policy, formalized in the Maastricht Protocol and Agreement, is the (unintended) consequence of UK domestic policy. It is ironic that the Conservative government's policy of reducing the influence of trade unions and de-collectivizing industrial relations should have been a prime cause of the

4. This was recognized in particular by Bob Hepple; see B.A. Hepple, 'The Crisis in EEC Labour Law', (1987) 16 ILJ 129, B.A. Hepple and A. Byre, 'EEC Labour Law In the United Kingdom – A New Approach', (1989) 18 ILJ 129, and B.A. Hepple, 'Social Rights in the European Economic Community: A British Perspective' (1990) 11 *Comp Lab Law J* 425.

5. B. Bercusson, 'Maastricht: A fundamental change in European labour law', (1992) 23 IRJ 177. Also 'The dynamic of European labour law after Maastricht', (1994) 23 ILJ 1.

emergence of the trade unions and of collective bargaining as a major instrument of social and labour policy at European level.[6]

The labour law of the UK, and of other Member States, is, and will become, more truly European than appears from the formal imprint of EC labour law. It is European rather as reflecting the cumulative experience of national labour laws, filtered through the prism of the EC institutions and refined in the crucible of the developing European polity. The tendency towards convergence of UK labour law with the labour laws of other Member States of the EC is driven in the main by the institutional pressures of EC membership, and, to a lesser extent, is the consequence of the workings of an international economy and, though less significant, a single European labour market. The dynamic of this convergence process is complex and its results are far from complete. But European labour lawyers must come to terms with this new dynamic of labour law evolution and its results.

2. An analytical framework for EC social and labour law

The European Community was created by the Treaty of Rome of 1957. Its history includes that of the European Coal and Steel Community founded by the Treaty of Paris in 1951. The law of the EC was famously declared by the European Court of Justice in Case 26/62, *Van Gend en Loos* to be: 'a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'.[7] This new legal order may also be said to have a labour law.

Since its beginnings, a fundamental debate has been conducted on whether the framework of analysis of the law of the EC should be inspired by the law of international organizations (international law) or by the law of an emerging confederation of states ((supra) national

6. B. Bercusson, UK National Report, Session: 'La politique sociale dans l'ordre juridique communautaire et dans l'Espace Economique Européen', XVI FIDE Congress, Rome, 12–15 October 1994.

7. Case 26/62, *N. V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse administratie der belastingen (Netherlands Inland Revenue Administration)* [1963] ECR I, at 12.

constitutional law).[8] A third approach, inspired by the sociology of law, analyses EC law looking beyond the interaction of Member States and EC institutions.[9]

3. Contrasting international and EC labour law

International labour law has its most important source in the norms promulgated by the International Labour Organisation (ILO), established in 1919, which declared as one of its principles that 'labour should not be regarded merely as a commodity or article of commerce'.[10] ILO norms are numerous and cover a huge range of topics, but the standard of the norms adopted is often the lowest common denominator. The tripartite principle of participation of representatives of employers and workers alongside governments has increased the likelihood of approval of norms by ILO institutions and enhanced their legitimacy. However, the mechanisms of enforcement of norms adopted have been acknowledged as often inadequate.

In contrast, labour, and even more so social matters, were relatively marginal to the original objectives of the European Economic Community, founded in 1957 to establish a common market for goods, services, capital and labour. The development of norms regarding labour during almost four decades of existence of the EC has been spasmodic, episodic and unsystematic. Tripartism heretofore has been limited and there has been frequent institutional blockage of approval of norms proposed. However, the mechanisms of enforcement extend far beyond the possibilities available to the ILO machinery. Given these differences in substantive content, procedures of adoption and mechanisms of enforcement, the influence of international labour law and organizations on EC labour and social law has been relatively insignificant.[11]

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8. J.H.H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

9. F. Snyder, *New Directions in European Community Law* (London: Weidenfeld & Nicolson, 1990).

10. Article 427 of the Treaty of Versailles, 1919, which contained the first ILO Constitution. The Constitution was revised in 1944. and Article 1 declared its aims and purposes to be those of the Declaration annexed to the Constitution, which 'reaffirms the fundamental principles on which the Organisation is based and, in particular, that – (a) labour is not a commodity'.

11. P.L. Davies, 'The Emergence of European Labour Law', in W. McCarthy (ed.), Chapter 10 in *Legal Intervention in Industrial Relations: Gains and Losses* (Oxford: Blackwell, 1992), pp. 313–59.

4. European labour law: a symbiosis of EC and national labour laws

National labour legislation emerged much earlier than international and EC labour law. But it is important to emphasize that the conceptualization of these legislative and other norms into national labour laws with coherent intellectual frameworks was much more recent.[12] In general, the intellectual framework for national labour laws, in the case of the original Member States but also later adherents to the EC, emerged only or mainly in the years following the end of World War II, that is to say, almost contemporaneously with the founding of the European Coal and Steel Community and EEC and the first developments of their labour and social law.

The evolution of the labour and social law of the EC has been influenced by the mature and maturing conceptualizations of the national labour laws of the original Member States and of later adherents. Conversely, as EC labour and social law norms developed, they began to influence the formulation and conceptualization of national labour laws. The two processes are thus linked in a specific symbiosis. A major premise in understanding EC labour and social law is the need to avoid thinking about it *exclusively* in terms of EC institutions and legal provisions.[13] EC labour and social law is not wholly autonomous and independent, but is rather influenced by highly developed and technically sophisticated national labour law systems.

A number of examples from different periods illustrate the historical continuity of this influence. The insertion of Article 119 into the Treaty of Rome was due to the insistence of France, concerned to extend its own legislation on equal treatment for men and women. The Commission's proposals beginning in the 1970s on workers' participation in company structures owe their inspiration to the German labour law on co-determination. The Thatcher government's declared policy of labour

12. For an account, see B. Bercusson, 'Law, legal education and practice and labour and social law', in B. De Witte and C. Forder (eds), *The Common Law of Europe and the Future of Legal Education* (Deventer: Kluwer, 1992), p. 423.

13. It is often acknowledged that national labour law systems were subjected to mutual influences: that of Germany on Denmark, France on Belgium, various foreign influences on French labour law, the revolution wrought by the German-trained Otto Kahn-Freund on British labour law, and, more recently, that of the Italian Workers' Statute of 1970 on Spanish labour law.

law deregulation in Britain during the 1980s led to the blockage of new EC social regulations during that decade. The Danish tradition of basing labour law primarily on collective agreements between the social partners rather than legislation, and the Italian emphasis on the autonomy of the social partners, led to pressures allowing for EC labour law directives to be implemented through collective agreements. Finally, the experience of the constitutionalization of social and economic rights in the new or revised constitutions of Spain, Portugal, Greece and the Netherlands contributed to the formulation of the Community Charter of Fundamental Social Rights of Workers of December 1989. The symbiosis of national labour law systems and EC labour law is important, but the nature of their relationship is complex, with major dissonances between them at certain periods, and variations between Member States in terms of their interaction with EC labour law.

5. Sociology of labour law

The sociological approach to EC labour law looks beyond the interaction between Member States and EC institutions. It looks also at the role of sub- (and to a lesser extent, supra-) national actors, processes and outcomes as being of equal importance to those on the State level: a shift from the dominant focus on the Member State–Community axis to other levels where non-State actors are involved. This includes how interest groups *within* Member States influence national law and politics as they interact with Community law, and how the organization of interests at *European* level (employers, workers, the poor, women's groups, and so on) interacts with both Community and national law and politics.

In this approach, EC labour law focuses not only on Community or national institutions, but on EC law as influenced (e.g. as regards formulation) by other supra-national actors and (e.g. as regards implementation) by sub-national actors. One illustration of the implications of this approach is the question of the legitimacy of EC law. It follows that issues of legitimacy incorporate a wider range of polities, with institutional arrangements for representation of interests going beyond State and Community structures. The interaction of legitimacy arrangements within interest groups with those of Community law-making institutions produces a wider and more complex politics than is normally admitted by constitutional or supra-national architects. Legitimacy as an issue implies this wider politicization of the process of European law-making. The sociological approach is

particularly significant for EC social and labour law in view of the potential significance of the European social dialogue, including as major protagonists the organizations of workers and employers at European level, in the formulation and implementation of EC social and labour law.

6. Legal and contextual approaches

The meaning of 'labour and social law' derives from a specific context. In the case of the ILO norms, for example, the historical context following World War I dictated that the norms promoted have as their objective the protection of workers and their organizations, and that workers' and employers' organizations take part in their formulation. The EC context is quite different. Indeed, contrast between the EC and ECSC demonstrates just how significant the context is in determining the meaning of 'labour and social law'. The active labour market policy of the European Coal and Steel Community, with labour representation in its major organs, was in stark contrast with the neo-liberal labour market policy which prevailed in the EC between 1957–1972. The EC was founded to create a common market in services, goods, capital and labour. Freedom of movement for labour in a common market as a founding objective is quite different from the objectives associated with national labour laws and also those of international labour standards. This primary association of EC labour law with free movement provides the initial context of labour and social law of the Community in its earlier stages.

How did EC labour and social law develop beyond the confines of free movement of workers? This is a fundamental issue of much more than historical interest. It concerns an explanation of the dynamics of EC social policy development. What factors operate to develop, either progressively through new initiatives, or regressively through repeal of previous initiatives, the social dimension of the EC? There are at least two approaches to explaining the substance and development of EC labour law and social policy.

The first takes as its starting point the Treaties and other legal measures and EC institutions. The law contained in these instruments is the substantive basis for social policy; its development is a function of the dynamic operation of the EC institutions. But the law operates to limit the potential creativity of the EC institutions within the confines of the

competences allowed for by the Treaties. An example of this approach would be the dispute over the legal status of the Maastricht Protocol and Agreement on Social Policy. Vogel-Polsky denies these instruments any status in EC law since, according to her reading, they do not fall within the possibilities offered by the Treaty of Rome.[14] Their adoption is portrayed as the exploitation of ambivalent Treaty provisions by Member States who have no power to create a new social order, though the Member States may mislead the public into thinking there is such power.

Of course this legalistic approach does not exclude social policy development, provided it falls within the legal prospect of the Treaty. This is still much room for creativity. Vogel-Polsky herself made such a contribution when she argued for the direct effect of Treaty provisions, later approved by the European Court in Case 43/75 *Defrenne*.[15] It also allows for unilateral initiatives to be taken by EC institutions, again within the constraints of EC law. Examples would be the development by interpretations of the Court of Justice of principles such as that of non-discrimination, or the initiative of the Commission in the form of the European social dialogue launched by its President, Jacques Delors, in 1985.

This approach, which focuses on internal dynamics within the EC – its law and institutions – to explain social policy development may be contrasted with a second approach which incorporates and emphasizes a dynamic between EC law and institutions and the external environment, comprising also non-EC law and non-Member State actors. A major force in the development of EC social law and policy is the interaction of Member States, both individually and collectively, with EC institutions. This is not simply to look to the role of the Council of Ministers, as an EC institution, and its activities in the EC law and policy-making process. It is a political perspective which looks to the policies of individual Member States, or some of them, and regards their pressures upon EC institutions, including the Council of Ministers, but also, and, in particular, the Commission and even other EC institutions, as a major

14. E. Vogel-Polsky, 'Evaluation of the social provisions of the Treaty on European Union agreed by the European Summit at Maastricht on 9 and 10 December 1991', Committee on Social Affairs, Employment and the Working Environment of the European Parliament, 7 February 1992, DOC EC/CM/202155, PE 155.405.1.

15. Case 43/75, [1976] ECR 455.

determinant of EC social law and policy. These pressures as a factor in the development of EC labour law may be illustrated by the cases mentioned earlier of influences of national labour law on EC labour law.

The difference between the two approaches lies in whether the emphasis is put on law or politics as an explanation for the development of EC labour law and social policy. It is a question of emphasis because those who take the legalistic approach do not exclude political pressures, and those who emphasize politics do not exclude legal constraints and possibilities. The question is whether one starts with a view of the law as setting the limits to EC labour law and social policy, or whether one starts with the view that the political will and ability of the actors involved determines its development. As put by a former Commissioner for Social Affairs, commenting on the adoption of the pathbreaking Social Action Programme of 1974: it 'reflected a political judgment of what was thought to be both desirable and possible, rather than a juridical judgment of what were thought to be the social policy implications of the Rome Treaty'.[16]

The argument of this article is that the conceptualization of European labour law is influenced by the symbiosis of national labour law systems and EC labour law, and the interaction of law and context. The remainder of this article illustrates this argument by looking at a number of textbooks which have recently appeared proposing frameworks for EC labour law. Since all seek to expound the law on the basis of the same legal measures, it is all the more remarkable that the pictures of EC labour law which emerge from them are so very different.

7. Primary materials: equal treatment and health and safety at work

In two complementary volumes, Angela Byre, a British lawyer, collected laws, cases and materials on the social policy of the EC.[17] The first volume brought together nearly 20 Directives and 50 judgments of the European Court, mostly dating from the 1980s. The text of 532 pages

16. M. Shanks, *European Social Policy, Today and Tomorrow*, 1977, p. 13.

17. The two volumes were published by Kluwer, Deventer, in 1989 and 1992, *Leading Cases and Materials on the Social Policy of the EEC*, 1989, and *EC Social Policy and 1992: Law, Cases and Materials*, 1992.

was divided into 3 Parts: 'Equal Treatment' (294 pages), 'Health and Safety at Work' (126 pages) and 'Employment Protection' (88 pages). The outstanding feature of this structure is that more than half of EC labour law and social policy appears concerned with equality between the sexes, and almost a quarter with health and safety, leaving less than a quarter to other matters.

The second volume, published in 1992, was intended to update the 1989 collection. While it differed in its structure, it did not differ with respect to the outstanding feature noted above: the proportion of the text dedicated to the topics of equality and safety.[18] Taking the two volumes together as a collection of primary materials on EC labour law and social policy, the combined text of 925 pages (532 + 393) comprises 395 pages (42.65%) on equality issues, 263 pages (29.25%) on health and safety, and 151 pages (16.30%) on employment protection.

The concentration of attention on these specific topics is completely at variance with the structure and proportions of national labour law texts. While such texts often deal with equality and safety, these matters are relegated to a much inferior position both in terms of their place in the overall structure of national labour law, and in the amount of space allocated to them.[19] EC labour law as it emerges from this text is primarily about equal treatment of men and women and protection of health and safety in the working environment.[20]

18. The text of 393 pages, after a brief introductory Part I, consists of a Part II divided into 13 different 'Action Areas'. The longest of these is Section 10 on 'Health protection and safety at the workplace' (137 pages), followed by Section 8 on 'Equal treatment for men and women' (101 pages). Again in the second volume, therefore, the two subjects of equality and safety account for over 60% of the text. The third substantial section is Section 3 on 'Improvement of living and working conditions' (63 pages). The proportion allocated to Section 3 accounts, as in the first volume, for about one-sixth of the text. The remaining roughly 20% of the text is divided among ten other Sections: information, consultation and participation (19 pages), employment and remuneration (16 pages), freedom of movement (11 pages), the elderly, and the disabled (6 pages each), vocational training, and the labour market (5 pages each), social protection, and association and collective bargaining (3 pages each) and protection of children (2 pages).

19. Byre does not explain this concentration of legal materials on certain subject matters. One may note that she was the first co-ordinator of the Community's network of experts on equality law.

20. Article 1 ISA of the EC Treaty: 'Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonization of conditions in this area while maintaining the improvements made'. It is worth noting the potential of this provision. In the Explanatory Memorandum (p. 17, para. 33) to the Working Time Directive 89/391/EEC, the Commission emphasized the World Health Organization's definition that: 'health is a

8. The traditional model of national labour law

Droit du Travail Communautaire is by Roger Blanpain, a Belgian, and Jean-Claude Javillier, a Frenchman, both professors of labour and social law.[21] Their text of 222 pages is divided into three parts. Part I, 'Generalities', is 64 pages long (28.8% of the text), of which almost half is on the institutions and instruments of EC law in general.[22]

Part II, entitled 'Individual Labour Law', is the longest (118 pages, 53.2% of the text). About one-third of it is concerned with free movement of workers. Two other chapters comprise each about one-fifth: equal treatment between men and women (thus comprising only 11.26% of the text) and re-structuring enterprises. Chapter 8 on re-structuring enterprises covers the Directives on collective dismissals, transfers of enterprises and employer insolvency, which protect the rights of individual employees affected by such events. However, though classified under Individual Labour Law, the first two directives also include important provisions concerning the provision of information to and consultation of employee representatives. Part III, entitled 'Collective Labour Law', is only 30 pages long (13.5% of the text), a proportion abnormally low when compared with books on national labour law. Moreover, only two pages are on collective bargaining. In contrast, 28 pages are on worker participation.

The overall impression that emerges from the Blanpain–Javillier text is that EC labour law uses the familiar categories of individual and collective labour law. However, a number of features render these categories suspect. Individual labour law is dominated by free movement of workers. It also includes instruments with a strong collective dimension (collective dismissals, transfer of undertakings). There is relatively little space for collective labour law, and what there is is almost exclusively about workers' participation, not collective

state of complete psychic, mental and social well-being and does not merely consist of an absence of disease or infirmity'. The Commission appears to have moved towards the Nordic countries' concept of physical, psychological and social aspects such as monotony, lack of social contacts at work or a rapid work pace.

21. Litec, Paris, 1991.

22. This introduction of EC labour law by an account of the law and institutions of the Community is a common feature of those texts which have so far emerged. It is presumably justified by an assumption of the relative ignorance of the labour law reader of the rudimentary elements of Community law.

bargaining. Finally, despite the relatively large amount of legislation and case law on equality between men and women and on health and safety, neither of these is given much attention: equality gets 25 pages, 11.26% of the total, and health and safety less than half that (chapter 7, 12 pages). EC labour law as it emerges from this text is premised on a dichotomy between individual and collective labour law. Individual labour law is dominated by rights to free movement, with parity of treatment for equality and workers' rights in a context of enterprise re-structuring. Collective labour law is about worker participation in the enterprise.

9. The new model of national labour law

Diritto del Lavoro della Comunità Europea by Massimo Roccella and Tiziano Treu, both Italian labour law professors, comprises 386 pages of text.[23] Part I, entitled 'Principles and Sources' is similar to the introduction in Blanpain–Javillier.[24] Part II (110 pages, 28.5% of the text) is entitled 'Employment Policies' and almost half of it is the chapter on free movement of workers. There are also chapters on promotion of employment and vocational training and social security, but this latter chapter begins by explaining that social security under the Treaty is functionally associated with free movement and hence focuses on migrant workers only.[25] Together, the two chapters on freedom of movement and related social security comprise 86 pages or 22.27% of the text. The emphasis on employment and labour market policy is consistent with a trend in academic treatment of national labour law systems. No doubt, the large quantity of legal material on free movement in EC labour law is a further influence in this direction. The question remains whether it is a social policy or an economic policy objective.

23. Cedam, Padova, 1992.

24. But 63 pages comprise only 16.3% of the total (compared to 64 pages and 28.8% of the text in Blanpain–Javillier).

25. It is true that the book is on EC labour law, not social security law. And the importance of social security entitlements and their mobility to the free movement of workers in the EC is undeniable. But social security has an autonomous set of objectives and doctrines which goes far beyond assisting free movement. It would be unfortunate if the impression were given that social security is subordinated in EC law to the exigencies of assisting free movement. This distorts both the broader scope of social security, and also those potential links between labour and social security law which go beyond labour mobility.

The prominence given to free movement is evident when contrasted with other topics. Part III, entitled 'Individual Relations', is only marginally longer than Part II on 'Employment Policies' (117 v 110 pages). It comprises six chapters on different topics, none of which is accorded treatment as long as any of the chapters in Part II. The first and longest chapter is on 'Atypical Work' (31 pages) – another new trend in labour law studies related to employment policy. The second longest chapter is on 'Equality and Non-Discrimination' (25 pages). There is also a chapter on 'Safety and the Working Environment' (17 pages). The allocation of space to these subjects is in strong contrast with Byre, and even less as a proportion of the text than Blanpain–Javillier.

As in Blanpain–Javillier, Part III on 'Individual Relations' includes a chapter on 'Restructuring and Enterprises in Difficulty' which covers the three directives on collective dismissals, transfers of undertakings (with their collective elements) and employer insolvency.[26] Part IV on 'Collective Relations' is shorter than either of the two preceding parts on 'Employment Policies' and 'Individual Relations' (76 v 110, 117 pages). Unlike Blanpain–Javillier, it is not concerned with the participation of the social partners at European level in EC institutions and processes. Rather, the focus is on collective bargaining at European level, which is given treatment more extensive than that allocated to the subject of workers' participation through information and consultation.

EC labour law as it emerges from this text is distinguished by an emphasis on labour market regulation. A substantial Part II on 'Employment Policies' comprises chapters on regulation of freedom of movement of workers through a common market and related social security. A labour market orientation is also evident in the treatment of 'Atypical Work', the longest chapter in the Part on 'Individual Relations', as well as policies on promotion of employment and vocational training.

10. Labour law as common market law

Droit Social Européen, by Nicole Catala, a French professor of labour law, and Réné Bonnet, editor of a French legal journal on social security,

26. The remaining two chapters in this Part are entitled 'Proof of an Employment Contract', and 'Working Time'.

comprises 400 pages, divided into 3 parts: 'General Presentation of European Social Law' (54 pages), 'Community Labour Law' (180 pages) and 'European Social Security Law' (160 pages).[27]

Unlike the previous texts, therefore, Community law, first, is regarded as only part of European Social Law. The 'General Presentation of European Social Law' begins with a review of the instruments of the Council of Europe, the ILO and bilateral and multilateral Treaties. Only then does it provide a brief account of the institutions and social objectives of the Rome and Paris Treaties. Secondly, 'European Social Security Law' is deemed autonomous and granted almost equal status (160 v 180 pages) to 'Community Labour Law'. 'Community Labour Law' (180 pages) comprises three Titles: 'Harmonisation of National Laws' (63.33%, 114 pages), 'Free Movement of Persons' (49 pages, 27.22%) and 'Employment and Vocational Training' (10 pages, 5.55%). This structure follows neither the traditional structure, nor the more recent trends (labour market regulation) of labour law. Rather, it adopts an EC law framework: free movement, in this case of labour, and harmonization of different national regulations within a common market – together constituting 90% of the text.[28]

Of the five chapters in 'Harmonisation of National Laws', the longest (40 pages) is Chapter 3: 'Conditions of Employment and Work' , in which the longest of four sections is Section I on the 'Principle of Equal Treatment of Men and Women' (19 pages). The shortest section is number IV on 'Health and Safety' (6 pages). Chapter 5 on 'Collective Labour Relations' (38 pages) is concerned almost exclusively with workers' representation, primarily within company structures. Collective bargaining is only mentioned as regards the difficulties in elaborating EC law regarding collective agreements with an international character.[29]

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27. Litec, Paris, 1991.

28. The drawback of this framework is the difficulty of accommodating a Community social policy independent of the creation of a common market. Developments such as the Community Charter of Fundamental Social Rights of Workers are marginalized in a separate chapter comprising three pages. Given the trend indicated by the Maastricht Social Policy Protocol and Agreement, this conceptualization seems unlikely to be sustainable.

29. This focus on workers' participation in company structures (and hiving off of the Directives on dismissals and transfers) was also to be found in the Blanpain–Javillier volume. In one way, this perspective on collective labour law in the EC reflects the French labour law emphasis on worker representation within the enterprise, though this is not done within company structures. In fact, the inspiration for the EC law on worker participation in company structures derives more from the German labour law experience.

The overall impression of the Catala–Bonnet text is that EC labour law should be placed in a context which includes non-EC law, and which attributes to social security an equal status. The principles are determined more by EC law than by labour law. The pillars are free movement and harmonization.

11. Conceptualizing EC labour law: comparative models

The Social Dimension of the European Community, by Ruth Nielsen and Erika Szyszczak, respectively labour law academics in Denmark and the UK, comprises 258 pages of text divided into seven chapters.[30] The longest of these is Chapter 3 on 'Equal Treatment between Men and Women' (70 pages, 27.14% of the text): a striking prominence for this topic recalling that of the Byre volumes. Chapter 2 on 'Free Movement of Persons' is next, with 64 pages (24.80%). There are three other substantive chapters: on 'The Working Environment' (Chapter 6, 34 pages), on 'The Protection of Employment Rights' (Chapter 4, 32 pages), and on 'Information, Consultation and Worker Participation' (Chapter 5, 30 pages). Finally, the text begins with a chapter on 'The Historical and Legal Basis of EC Social Policy Law' (40 pages) and concludes with a chapter on 'The Future Direction of EC Social Policy Law' (9 pages).

The conceptual structure seems to be that substantive fields are the framework for EC social law rather than common market imperatives. Within those substantive fields, the traditional perspective of employment protection and employee rights prevails. The new developments in national labour law – employment policy, atypical workers, labour market regulation, vocational training – are absent.

This text on EC labour law may be compared with another which argues that the labour law systems of Sweden, Norway, Denmark and Finland constitute *The Nordic Labour Relations Model*.[31] This text is divided into 6 sections, of roughly equal length. Five are on different substantive

30. 2nd ed., Handelshojskolens Forlag, Copenhagen, 1993.
31. Dartmouth, London, 1992. The authors are a group of Scandinavian labour law academics, Niklas Bruun, Boal Flodgren, Marit Halvorsen, Hakan Hyden and Ruth Nielsen.

areas with a concluding section on the future of the model. Four of the five substantive areas which form the framework of the Nordic model parallel chapters in the Nielsen–Szyszczak text on the social dimension of the EC: equality, protection of employment rights, worker participation and working environment. Unlike the book on EC law, that on the Nordic model does not have a section on free movement of workers; and unlike the book on the Nordic model, that on the social dimension of the EC does not include a chapter on trade union activity. For the Nordic countries, the EC labour law emphasis on free movement does not seem crucial, for this is effectively the case among those countries. However, the difference between the Nordic and the community models as regards the role of trade unions cannot be overestimated.

This difference between the multi-country models of labour law in the Nordic countries and the EC is visible in the levels of union membership in the States in each group, but its implications for labour law extend much further. The parallel structures of the two books may be questioned. The role of unions and their activities in the Nordic countries, or their absence in the Member States of the EC, transforms the labour law applicable in virtually all substantive areas. A formal structure based on the same substantive topics in the two books is misleading as regards any parallel between EC and Nordic labour law.[32]

12. Conclusion

A number of conclusions can be drawn from this review of recent texts on EC labour law. First, there is a major disproportion between the relatively substantial amount of primary legal materials, legislation and case law, on the topics of sex equality and health and safety, reflected in the Byre volumes, and the relatively meagre treatment of these topics in most of the other texts. The exception to this, Nielsen–Szyszczak, only highlights the point.

Secondly, there is a division regarding treatment of the collective dimension of EC labour law. In Roccella–Treu, the emphasis is on

32. As Jelle Visser points out, the difference in trade union density is the most significant social-political indicator in comparing industrial societies. 'In Search of Inclusive Unionism', (1990) 18 *Bulletin of Comparative Labour Relations*, Kluwer, Deventer at p. 239.

collective bargaining and the autonomous organizations of workers and employers at European level. In Blanpain–Javillier, Nielsen–Szyszczak and, even more so, in Catala–Bonnet, the emphasis is on worker participation, mainly through integration into company structures or, at enterprise level, information and consultation. The uncertainty about the collective dimension is manifest also in the classification of the directives on collective dismissals and transfers of undertakings. In Blanpain–Javillier and Roccella–Treu, these are dealt with under the general rubric of individual employment relations. The sub-heading is that of re-structuring enterprises, which allows for recognition of the collective dimension, but the framework is that of protection of individual rights. This is made explicit in the Catala–Bonnet text, and is also indicated in the Nielsen–Szyszczak chapter.

Thirdly, the texts tend to vary in their treatment of social security in the framework of EC labour law. The traditional distinction between labour law and social security law is maintained even where European social security law receives the most extensive treatment, in Catala–Bonnet. In Roccella–Treu, social security is treated in the chapter following free movement, within the general section on employment policies. In Blanpain–Javillier, it receives only marginal attention, and in Nielsen–Szyszczak, only a mention (p. 38).

Finally, the overall structure of EC labour law adopted by these texts reflects different points along a spectrum ranging from pure EC law to traditional labour law. At one end of the spectrum, the Catala–Bonnet text classifies the subject along strictly EC law lines: freedom of movement and harmonization are the organizing categories. At the other end, Blanpain–Javillier classify the subject along the traditional labour law lines of individual employment protection and rights and collective labour law, albeit the latter is given relatively scant treatment and collective bargaining is marginalized.

Between these, Roccella–Treu opt broadly for the individual–collective dichotomy of traditional labour law, but add a substantial new section on employment policies. It is not clear whether this reflects EC law imperatives, since much of it is concerned with freedom of movement, or whether it reflects a new trend in conceptualizing labour law as labour market regulation. However, their treatment of the collective dimension of EC labour law places the emphasis firmly on the traditional sphere of collective bargaining. Nielsen–Szyszczak do not explicitly opt for the

individual–collective division of traditional labour law. Their chapters appear to be framed more in terms of substantive issues which contain a mixture of collective and individual. The substantive issues are, however, conceptualized in the traditional terms of employment protection and collective rights, and not the new trend of labour market regulation.

The two ends of the spectrum: EC–national labour law interact. On the one hand, the emphasis on free movement of workers within a common market in EC law finds an echo in the trend in national labour laws towards conceptualization of the subject in terms of labour market regulation. On the other hand, the traditional national labour law conceptions of employment rights and collective bargaining/worker participation increasingly influence the new developments towards employee protection in EC labour law.

It is open to debate which of these trends is in the ascendant. The Commission's White Paper on 'European Social Policy – A Way Forward for the Union' noted the difference of views among Member States in a section on 'Encouraging high labour standards as part of a competitive Europe'.[33] On the other hand, there has emerged in the past few years a growing momentum towards collective labour rights at EU level. This includes recognition of collective agreements as 'essential' standards,[34] the recognition of collective agreements as universal standards,[35] the collective representation of workers,[36] and even, as I

33. COM(94) 333, Section III. The Commission referred to four proposals in the health and safety area then still under discussion in the Council and four other proposals outstanding before the Council:
(i) information and consultation of workers
(ii) non-standard employment:
* working conditions
* distortion of competition
(iii) posting of workers.
It stated categorically that 'In the next phase of social policy the Commission believes that the highest possible priority must be given to bringing these proposals to a successful conclusion'. In addition, it referred to 'a range of other areas ... put forward for legislative action at Union level' which were being studied. These included protection against dismissal, privacy of workers, sick pay and holiday pay. and grievance procedures.

34. Council Directive 91/533 of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. OJ 1991 L288/32. Among the '*essential aspects* of the contract or employment relationship' to be included in the written document provided by the employer under the Directive are 'the *collective agreements* governing the employee's conditions of work'. Article 2(2)(j)(i).

35. The proposal for a Council Directive on the posting of workers in the framework of the provision of services, COM(91) 230 final, SYN 346, Brussels, 1 August 1991, as amended on

have argued elsewhere, in some circumstances, an embryonic right to strike![37]

The expansion of the substantive social competences of the EU by the Protocol and Agreement on Social Policy attached to the Maastricht Treaty on European Union opens the way for development of the labour law of the EU without the considerable constraints of strict adherence to the objectives of market integration. Even more important is the manifestation of a principle of collective negotiation of labour standards embodied in the new institutional arrangements for the production of European labour law introduced by the Protocol and Agreement on Social Policy. It remains to be seen whether these substantive and procedural changes will suffice to maintain the momentum of development of the labour law of the European Union.

10 May 1993, inspired by the decision of the European Court of Justice in *Rush Portuguese Lda v Office national d'immigration*, Case 113/89, [1990] ECR 1417.

36. Well established in the EU legislation on health and safety. Council Directive 89/391 of 12 June 1989 (the Framework Directive) defines a 'workers' representative' (Article 3(c)) and grants them rights and protection. The decision of the Court in Cases 382/92 and 383/92 *Commission v UK* appeared to make representation mandatory in the case of certain directives. On 22 September 1994, the Social Affairs Council, acting under the Maastricht Protocol on Social Policy, at long last approved the Directive on European works councils representing employees. See note by Clare McGlynn in this issue.

37. EC law provides no explicit right to strike. But a right to strike is largely a right of strikers to protection against dismissal. And EC law does have rules on collective dismissals. The argument is that where workers go on strike, it is likely that the employer contemplates dismissals. Dismissals related to a strike (e.g. against derecognition) would be 'for a reason not related to the individual concerned' (as in new section 195 of TULRCA reflecting the EC law definition of redundancy in Article l(l)(a) of the Collective Dismissals Directive). Hence the Directive applies. A litigation strategy would attempt to persuade a UK court to make a reference to the European Court for an interpretation of the Directive. An interim injunction to stop dismissal of strikers could be sought. See 'Derecognition: Uses of EC Law', in *European Law Bulletin* No. 1, Robin Thompson & Partners and Brian Thompson & Partners, London, August 1994, p. 7 at pp. 9–10.

Lessons for transnational labour regulation from a case study of temporary agency work

Brian Bercusson (2008) * [1]

Introduction

This concluding chapter summarises lessons to be drawn from this case study of the regulation of temporary agency work at national and transnational levels. While the book focuses on temporary agency work, the larger purpose of our research has been to throw light on a number of different issues which arise when efforts are made to regulate transnationally in general, and in the EU in particular.

The 'lessons' are organised under six headings, focusing in turn on how transnational labour regulation may be affected by the *substance* of national regulation of labour (Section 1) and the transformation of labour markets in an evolving transnational economy (Section 2); then on *processes* of transnational labour regulation through transnational social dialogue and legislative procedures (Sections 3 and 4). Both substance and process issues are evident in the lessons to be learned from the EU's recent adoption of a Directive aiming at regulation of the transnational market in *services* (Section 5).[2] Finally, there are *lessons for the future* of transnational labour regulation envisaged by the divergent perspectives in the proposed Constitutional Treaty, incorporating the EU Charter of Fundamental Rights,[3] and the contrasting vision of the present European

* 'Lessons for transnational labour regulation from a case study of temporary agency work', Brian Bercusson (2008). This article was first published in K. Ahlberg et al. (eds.) *Transnational labour regulation. A case study of temporary agency work*, Brussels: Peter Lang, 321–351 and is reprinted here with the kind permission of the publisher.

1. This chapter is based on common considerations and discussions throughout the lifetime of the project and all co-authors of the book actively participated in it.

2. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L3 76/26 of 27 December 2006.

3. The EU Charter of Fundamental Rights was adopted at Nice on 7 December 2000 and published as a 'solemn proclamation' of the European Parliament, the Council and the Commission in the Official Journal of 18 December 2000, OJ C 364/1. The Charter is incorporated, with amendments, in the Treaty establishing a Constitution for Europe adopted

Commission in its recent Green Paper (section 6).[4] In more detail the lessons are grouped under the following headings.

1. What have we learned about the development of the regulation of temporary agency work at *national* level in the EU Member States which helps us to address issues of transnational labour regulation in general in the EU?
2. What are the lessons of the emergence of *cross-border temporary agency work* in the EU for the regulation of labour in a transnational economy in general?
3. What does the experience of the *combined* attempts at transnational labour regulation of temporary agency work at EU level through *both the European social dialogue and the EU legislative process* teach us?
4. What does the process of European social dialogue on temporary agency work reveal about the efficacy and democratic legitimacy of social dialogue as a mechanism of transnational labour regulation?
5. What does the EU's adoption of the *Services Directive* in December 2006 teach us about the balance between market forces and the protection of labour in transnational labour regulation?
6. Finally, we offer some conclusions drawn from this research on transnational labour regulation for the *future of European labour law*, including reflections on the implications of the proposed Constitutional Treaty and the Commission's Green Paper of 22 November 2006: 'Modernising Labour Law to Meet the Challenges of the 21st Century'.

1. What are the lessons of regulation of temporary agency work at national level for issues of transnational labour regulation in the EU?

1.1 National diversity: an obstacle to transnational labour regulation

Diversity among the labour laws of Member States is hardly surprising. But the case study of regulation of temporary agency work at national

by the Member States in the Intergovernmental Conference meeting in Brussels, 17–18 June 2004, OJ C 310/1 of 16 December 2004. See Bercusson (2006).

4. Commission Green Paper, 'Modernising Labour Law to Meet the Challenges of the 21st Century', COM(2006) 798 final, Brussels, 22 November 2006.

level reveals the extent to which such diversity poses difficulties for transnational labour regulation.

Member state regulation of temporary agency work reveals radically different ideological perceptions of temporary agency work, ranging from the view that temporary work agencies are legitimate and, indeed, fulfil a valuable service to the labour market, to the view that the activities of such agencies are a form of illegitimate exploitation of workers and intervene to commercialise the employment relationship between worker and employer. The resulting diversity takes the form of a variety of rules which were explored in detail in earlier chapters of this book; for example, integrating temporary agency work into the general system of regulation by the social partners, including special collective agreements (Denmark), combined with a very liberal regime allowing for the operation of temporary agency work (Sweden), severe restrictions and even prohibitions (for example, in the building sector) giving way to gradual liberalisation subject to regulation (Germany), treating temporary agency workers as a normal segment of the workforce, but regulating the operations of temporary agency businesses (UK), or establishing an equilibrium involving restricted use of agency work, more security of employment contracts and a specific legal status for temporary agency workers (France).

Divergent views may be expected as regards the perspectives of the social partners, employers' organisations and trade unions, in a given Member State, but compromises may nonetheless be achieved and concretised in national legislation. It becomes very difficult to unravel hard-won national compromises in some Member States where the principles underlying them are at variance with those in other Member States.

The difficulties may be reduced or augmented depending on the practical, ideological and legal importance of the issues at stake: practical in the sense that a greater or lesser proportion of the workforce, or numbers of temporary work agencies may be engaged in the temporary agency work market and are likely to be affected by transnational regulation; ideological in the sense that the national legislation may be considered to reflect fundamental principles (temporary agency work as an 'abuse' of the normal functioning of the labour market vs. temporary agency work as essential to 'labour market flexibility'); legal in the sense that there may be pre-existing norms established at different levels in national legal orders (constitutions, legislation, regulations, collective agreements, judicial decisions) which

may have to be accommodated or else block progress. In general, where the practical consequences are great, ideological principles are considered to be at stake, and where there are substantial legal obstacles to be overcome, there is less potential for transnational labour regulation.

1.2 Convergence trends contribute to transnational labour regulation

That is not to say that compromise and convergence are not possible and trends in that direction can improve the prospects of transnational labour regulation. In the case of temporary agency work, a general trend can be perceived towards acceptance of temporary agency work as one particular flexible mode of hiring labour, but a mode that must be regulated to avoid abuses and dilution of labour conditions for weaker groups.

The trend towards convergence has been driven by the general increase in the use of temporary agency work in the Member States as problems of application of standard employment law to this growing proportion of the workforce lead to pressures for regulation. The impact of the accession of new Member States in May 2004, when provision of temporary agency workers through service providers usually avoided the restrictions imposed by the accession treaties on free movement of workers to the old Member States, stimulated a common trend towards reform of the regulation of temporary agency work.

Furthermore, the prospect of transnational labour regulation may itself be a factor promoting compromise and consensus. ILO Convention 181 on Private Employment Agencies, adopted in 1997, provided a benchmark for convergence. Pressures from the EU for harmonisation of standards and practices in the internal market, or the emergence of specific EU labour market policies, for example, encouraging certain forms of 'atypical' employment across the EU, may overcome the obstacles posed by national diversity.

In the case of temporary agency work, national developments over the period highlighted in our research reveal that new Member States in

particular – but also others, such as Germany[5] – were strongly influenced by the Commission's proposals on temporary agency work.

1.3 Sectoral specificity can work both for and against transnational labour regulation

The extent to which a labour issue is sector-specific may affect the prospects for transnational labour regulation. In the case of temporary agency work, the particular form of labour and temporary work agencies as employers may be said to comprise a specific sector. Interests common to the sectoral actors across different Member States may improve the prospects for transnational labour regulation.

But the case for general labour regulation may be weakened where the proposals address only one sector and sectoral specificity reveals conflicts. The interests of others, whether permanent workers or user employers, may be in conflict with the temporary agency work sector and a powerful force obstructing transnational regulation. This was evident in the European social dialogue on temporary agency work where tensions emerged on the employer side between UNICE, representing user employers, and CIETT, representing temporary agency employers, and, on the workers' side, between the ETUC and UNI-Europa.

Among employers, there were probably also divisions between large multinational enterprises in the temporary agency work sector, prominent in some Member States, and seeking legitimation through harmonised transnational rules and a highly fragmented sector comprising small temporary work agencies in other Member States, concerned with the potential additional costs of transnational regulation.

1.4 Legal concepts and regulatory traditions can pose problems

There are difficulties for transnational labour regulation when there are important differences in legal concepts commonly used in Member States. The particularly complex triangular relationship characterising

5. As pointed out by Kerstin Ahlberg, Germany wanted to try out the temporary agency work reforms at domestic level before binding themselves at EU level.

temporary agency work was highlighted in our research. The concept of whether an agency worker is a 'worker' or 'employee' differs among Member States, and in some, such as the UK, there is considerable dispute as to the identity of the employer: the agency or the user of the agency worker. Transnational labour regulation can contribute to a solution of these issues by providing a definition binding all Member States.[6]

But major problems can arise if it is left to the Member States to define the concept of the employment relationship delimiting the scope of application of the Directive.[7] Major discrepancies appear in the application of transnational labour regulation in Member States. Furthermore, opportunities are available for Member States to avoid it through manipulative definitions of their domestic legal concepts, deferred to by the transnational regulation.[8]

Different regulatory traditions in Member States also have to be accommodated, in particular the different roles played in regulating the labour market by the social partners and legislative and administrative action by the state and the courts. On the one hand, transnational labour regulation in the EU has addressed these concerns by allowing for transposition of directives through collective agreements, thereby respecting the traditions established in the Nordic states.[9] Directives, including the proposed directive on temporary agency work, increasingly make reference to agreements between the social partners as a flexible means of implementing the transnational labour standards prescribed.

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6. Either through legislation, as in Council Directive 91/383 of 25 June 1991 supplementing the measures to encourage improvements in the safety and health of workers with a fixed-duration employment relationship or a temporary employment relationship, OJ 1991 L206/19, or by judicial decision, as in Case C-256/01, *Allonby v. Accrington & Rosendale College*, [2004] IRLR 224.

7. As proposed in the draft temporary agency work Directive. Commission of the European Communities, *Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers*, COM(2002) 149 final, Brussels, 20 March 2002; *Amended Proposal*, COM(2002) 701 final, Brussels, 28 November 2002.

8. One incongruity already revealed concerns the Part-Time Work Directive (Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETXJC, OJ L14/9 of 20 January 1998). In the UK, the relevant Regulations apply to all workers due to the impact of the EU definition of the scope of coverage of equality law (see the Part-time Worker (Prevention of Less Favourable Treatment) Regulations 2000, S.I. 2000, N. 1551, as amended). In contrast, the application in the UK of the Fixed-Term Work Directive (Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ Ll75/43 of 10 July 1999) is limited to 'employees', not the wider category of 'workers'. See the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, S.I. 2002. No. 2034.

9. The so-called 'Christopherson clause', now in Article 137(3) EC.

On the other hand, the decline or even absence of substantial collective bargaining activity in the Member States can undermine attempts to achieve flexibility by means of channelling implementation through collective bargaining. Resistance to regulation may emerge if collective bargaining becomes the sole channel available for achieving flexibility, to the detriment of those Member States without recourse to this mechanism.

1.5 Spillover effects of transnational labour regulation of one issue to national regulation of other issues

Selective transnational regulation of one issue affecting labour can spill over to affect other issues, a risk that poses potential difficulties. An example was the warning that excluding temporary agency work from the scope of the Fixed-Term Work Directive could lead to a shift from employers hiring fixed-term workers directly – and thereby becoming subject to the Directive – to employers resorting to hiring workers from temporary work agencies, thereby avoiding the Fixed-Term Work Directive.[10]

A similar phenomenon of spillover can operate in national regulation of temporary agency work. Insofar as temporary agency work is attractive to employers by allowing for flexible hiring and firing, reducing the *general* employment protection law against unfair dismissal reduces this competitive advantage of agency workers. Hence the concerns allegedly felt by large temporary work agencies in France when the government proposed to reduce the employment protection against dismissal. Similarly, the adoption of a broader definition of 'employee' created anxieties for the UK government which feared that this could have a wider impact on its domestic labour law position.

1.6 Summary and conclusion

But the consequences of diversity in the case of temporary agency work appeared too great and may have contributed to the current position of a failure to achieve transnational regulation. This may be seen in the

10. See Vigneau et al. (1999).

comparative success in achieving transnational regulation of part-time and fixed-term work, on which it was possible to achieve greater consensus.

But many other factors led to the current situation, and it is not impossible that changes in these may allow for the emergence of transnational regulation of temporary agency work. Some of these factors are explored in the following sections.

2. What are the lessons of the emergence of cross-border temporary agency work in the EU for labour regulation in a transnational economy?

2.1 Pressures for transnational labour regulation in an integrated economy

One of the defining characteristics of the single European Market consists of the free movement of labour and services, freedoms carefully protected by EU law. The emergence of cross-border temporary agency work is the natural consequence of the absence of any, or the existence of only marginal, restrictions on the free movement of workers and services. It is precisely the largely unregulated nature of the European labour market which allows for unregulated cross-border temporary agency work.

In this context, transnational regulation of labour is driven by two considerations. One is the pressure to harmonise conditions of competition among enterprises using temporary agency work in the different Member States, to the ultimate benefit of consumers. The other is the pressure to regulate the operation of temporary work agencies and the conditions of temporary agency workers in the temporary agency work sector, whether this be regulation to protect the working conditions of the latter (workers) or to further facilitate the operations of the former (agencies).

In an increasingly integrated European economy, the emergence of cross-border temporary agency work is to be expected, as are the pressures for its regulation.

2.2 Practical consequences of free movement in an integrated economy

The normal pressures for regulation have been exacerbated, however, by two factors. The first was the accession of a large number of new Member States in May 2004. The second was that the accession treaties allowed for the placing by old Member States of limitations on the free movement of workers from the new accession states. This limitation, however, normally did not apply to free movement of services (exceptions being Germany and Austria).

The activities of temporary work agencies qualify as the provision of services. The activities of such agencies in the movement of workers from the new to the old Member States increased the pressures for transnational labour regulation of temporary agency work.

The movement of workers from new to old Member States excited considerable controversy, increasing this pressure. 'Polish plumbers' were highlighted as one factor in the French rejection of the Constitutional Treaty in the referendum. The decimation of the German workforce in abattoirs and their replacement by workers from the new accession countries led to protests. The deaths of some Chinese cockle-pickers by drowning led to scrutiny of the use of immigrant workers and produced British legislation seeking to regulate the activities of 'gang-master' agencies supplying workers, including those from the new Member States, to the agricultural and food processing sectors.

Not least, the high profile cases of *Laval/Vaxholm*[11] and *Viking*[12] provide evidence of the potential pressures that can lead to transnational labour regulation through legislation or case law. *Laval/Vaxholm*, in particular, raised questions as to the adequacy of the limited transnational regulation that does exist, the Posting of Workers Directive[13] and its implementation in Sweden.[14]

11. Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, Avdelning 1, Svenska Elektrikerförbundet.*

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

13. Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. OJ 1996, L18/1.

14. See Ahlberg et al. (2006).

In sum, the unregulated movement of workers in an integrated transnational economy creates numerous occasions for public concern, generating pressure for transnational labour regulation.

2.3 Transnational labour regulation and national labour policy: pre-emption and non-regression

The emergence of cross-border temporary agency work and the resultant pressures for transnational labour regulation may be resisted on the grounds that they pre-empt initiatives in national labour policy. Regulation at transnational level may preclude liberalisation (deregulation) at national level, and vice versa. Doctrines of non-regression may make it impossible, once transnational regulation is adopted, to reverse the policy enshrined in it.

The consequence can be either resistance to, or support for, transnational labour regulation. As transnational labour regulation can constrain the ability of Member States to promote national policies, support for transnational labour regulation may depend on whether it is consistent with national policy priorities at present, and/or whether it is perceived as desirable to constrain future national policy choices.

The experience of the attempts at transnational labour regulation of temporary agency work demonstrates this. The Commission's proposed Directives would have required Member States to provide for comparison of working conditions between agency workers and employees of the user undertaking: regulation. But the Directive would also have constrained Member States to scrutinise their legislation with a view to justifying any constraints on temporary agency work, and possibly removing them: liberalisation. The failure of the Commission's proposal to achieve consensus may have been due to the resistance of some Member States to the perceived threat to their future freedom to regulate, and of others to liberalise.

The Nordic Member States provide a specific example. Transnational labour regulation has to take account of the central role of collective bargaining in their national labour laws. The Swedish government indicated that it would block the draft Directive unless it affirmed the autonomy of the social partners to regulate temporary agency work. The

Laval/Vaxholm case is a concrete illustration of the fears of the Nordic trade unions that their freedom of action might be constrained.

Another example is Germany, where legislation along the lines of the proposed Directive had recently been adopted. The government was unwilling to support the proposed Directive unless and until the experience under its domestic legislation proved to be satisfactory.

2.4 Transnational labour regulation as an instrument of national labour policy

The prospect of transnational labour regulation may be instrumentalised to promote particular national labour policies. In the case of temporary agency work, there are national sensitivities to the regulation of transnational temporary agency work: on the one hand, concern over exploitation/*marchandage*, security of employment and immigration; on the other hand, anxiety about social exclusion from the labour market, the monopoly of public employment agencies and the legitimacy of temporary agency businesses.

Various actors concerned, from trade unions through multinational temporary work agencies to governments, may seek to promote or condemn transnational labour regulation to advance their own priorities. One illustration is the way in which the Italian government of Silvio Berlusconi invoked the EU Directive on Fixed-term Work to promote a domestic agenda of liberalisation of the Italian labour market.

2.5 Changing ideology and policy in transnational labour regulation

The introduction of new measures of transnational labour regulation implies consistency with earlier measures. This can be problematic when policies or ideological preferences have changed.

In the case of temporary agency work, there was a pre-existing Directive on the Posting of Workers. This laid down specified minimum labour standards to be applied by employers established in one Member State to their workers posted to another Member State. The proposed Services Directive represented an ideological shift by the Commission.

It was an attempt to partly change policy to allow these employers to apply to their workers some of the labour standards applicable in the Member State of establishment (the 'country of origin' principle).

The effect was to confine the Posting Directive to those workers who fell within its scope, and only with respect to the terms specified. It was thereby changed from a minimum standard applicable to posted workers to a maximum standard: workers falling outside its scope and terms of employment not specified in it were not applicable to workers engaged in providing services.

The perceived difficulties in accommodating the ideology and policy of the Posting Directive to the proposed Services Directive led to the three-year struggle to amend it, and very nearly led to its demise, illustrating the problems of changing policy and ideology in transnational labour regulation.

2.6 Summary and conclusion

The pressures for transnational labour regulation resulting from the cross-border movement of temporary agency workers posed problems for national labour laws. Member States are faced with the prospect of pre-emption and non-regression, and their choices are conditioned by their policy preferences, present and future. These preferences differ, depending on whether the Member State in question is primarily an 'exporter' of agency workers (such as Estonia or Poland) or a state which is on the receiving side, which is the case for old Member States such as Finland and Germany. The temptation of instrumentalisation is always present. Finally, initiatives at transnational level are conditioned by preceding transnational labour regulation, which can be problematic when there are changes of ideology and policy.

3. What are the lessons of the *combined* attempts at transnational labour regulation of temporary agency work through both the European Social Dialogue and the EU legislative process?[15]

3.1 The changing dynamic of transnational labour law-making in the EU

In the aftermath of the Maastricht Treaty, the dynamic of the early stages of the social dialogue was described as 'bargaining in the shadow of the law'.[16] This research on temporary agency work refines certain features of that dynamic emerging in the more mature stage of the processes of transnational labour law-making some ten years after Maastricht. In sum, the shadow has become more pronounced, in several respects and in different senses.

First, the social partners have become more experienced in assessing the prospects of legislation, should negotiations fail. European employers' organisations remain opposed in principle to regulation. They may calculate that the Commission will not take any initiative, or, as in the case of temporary agency work, enough Member States can be mobilised to prevent any initiative receiving the requisite majority vote for its adoption in the Council of Ministers. Trade unions may be less willing to accept agreements merely for the sake of demonstrating that the social dialogue is capable of producing transnational labour standards, and look to the legislative process which may offer more. The experience of temporary agency work illustrates an outcome, to date, which reveals both these calculations, aptly described by the title of the chapter (Chapter 9) by Kerstin Ahlberg: 'A Story of a Failure – But Also of Success', though this might be qualified by 'so far'.

Second, the role of the Commission as a dynamic actor capable of intervention galvanising the social dialogue is not to be taken for granted. The achievement of the Barroso Commission in the area of labour law has been virtually nil, while the preceding years of the twenty-first

15. It is not proposed here to replicate the valuable conclusions reached by Kerstin Ahlberg in her chapter (Chapter 9) analysing the social dialogue and legislative processes which attempted to regulate temporary agency work.

16. Bercusson (1992, 1996).

century managed only to produce extremely modest outcomes.[17] The poverty of the Commission's ambition was evident in its Communication of 9 February 2005 on the Social Agenda 2005–2010.[18] This included only one specific proposal which the Barroso Commission explicitly committed itself to adopting: on transnational collective bargaining.[19] And even this has now been abandoned.[20] The absence of achievement and lack of ambition are evident when compared to the European Commission's activity in the last decade of the twentieth century. This saw the vast expansion of the EU's labour law and employment policy competences by the Treaties of Maastricht (1991) and Amsterdam (1997). In that ten-year period, the Commission's initiatives produced at least ten significant directives.[21] 'Bargaining in the shadow of the law' requires legislative initiatives as a stimulus to bargaining. In the EU law-making process, the power of initiative lies with the Commission. This was manifest during the 1990s. So far, in the twenty-first century

17. The last significant achievement was five years ago, in March 2002 (Council Directive No. 2002/14 establishing a framework for informing and consulting employees in the European Community. OJ 2002, L80/29). Previous developments were directives on discrimination (Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L303/16) aims at 'combating discrimination on the ground of religion or belief, disability, age or sexual orientation as regards employment and occupation' (Article 1); Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 LI 80/22); Council Directive 2002/73/EC (OJ 2002 No. L269/15) amended Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976, No. L39/40)). There was also consolidation of directives, such as on working time (Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time; OJ L299/9 of 18 November 2003 consolidated Council Directive 93/I04/EC of 23 November 1993, OJ L307/18 of 13 December 1993, as amended by Directive 2000/34 of 22 June 2000, OJL195/41).

18. Communication from the Commission on the Social Agenda, COM(2005) 33 final, Brussels, 9 February 2005.

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

20. In a conference organised by the Commission on 27 November 2006, the survey of transnational collective agreements conducted by the Commission was marginalised and the expert study proposing a directive was brusquely buried. Instead it was announced that no regulatory initiative was in prospect and the Commission planned at most another Communication in 2007.

21. On health and safety for temporary and agency workers (1991), mandatory information on employment conditions for employees (1991), protection of pregnant and breastfeeding mothers (1992), working time (1993), European Works Councils (1994), parental leave (1996), part-time work (1997), the burden of proof in cases of sex discrimination (1997), fixed-term work (1999) and substantive amendments to the Directives on collective dismissals (1992) and transfers of undertakings (1998).

incentives for the social partners, particularly employers, to embark on social dialogue in the absence of Commission initiatives are lacking.

Third, the calculus has become more complex as the number of Member States in the Council has increased. The account of the proceedings concerned with the proposed directive on temporary agency work in a Council of 15 Member States reveals the difficulty of reaching consensus and the complexity of the compromises sought, in this case in vain. The prospects for transnational labour law-making through a legislative process in a Council of 27 Member States are even less promising.

Fourth, the composition and engagement of the social partners themselves in the social dialogue has also become more complex. New organisations on the employers' side (UEAPME, CIETT, including powerful multinationals) joined in the negotiations on temporary agency work, leading to different positions being promoted. Decision-making procedures requiring unanimity, as is the case with UNICE's internal procedures, are a further serious obstacle. On the trade union side, past experience led to greater familiarity with the process, but also sensitised national confederations to the issues at stake. Divisions among national confederations and also with European sectoral organisations made adoption of common positions ever more difficult. These problems were exacerbated when divisions among trade union confederations did not always reflect the same divisions among Member States in the Council. Compromises reached within the organisations taking part in the social dialogue, or even in the social dialogue, did not necessarily reflect the same compromises among Member States.

Fifth, the European Parliament has increasingly asserted its position as an important player. The Parliament's criticism[22] of the framework agreement on fixed-term work reinforced the reluctance of some national trade union confederations to engage in further social dialogue on temporary agency work. The Parliament's concern that its legislative role in the field of social policy is being usurped is well known.[23] The Parliament's rapporteur, Karin Jöns, was highly critical of the procedure of social dialogue which led to the Fixed-term Work Agreement, describing it as too time-consuming and extremely cumber-

22. Draft report on the framework agreement on fixed-term work concluded by UMCE, CEEP and ETUC, 12 March 1999, PE 230.208.

23. See the discussion in Herzfeld Olsson et al. (1998).

some. She concluded that it should not be allowed to become a systematic replacement for the normal legislative procedure. The evidence of the legislative process concerning temporary agency work, however, reveals an even more time-consuming and cumbersome process, with no result after years, never mind months.

It is as yet too early to say whether the original dynamic has been transformed, or merely elaborated, or whether the collective bargaining nature of social dialogue has given way permanently to a more politicised process. On the one hand, the social partners continue to embark on action programmes of social dialogue. But these do not engage the legislative institutions nor lead to legally binding outcomes, at times because of the social partners' own reluctance for such engagement or their preoccupation with autonomy. On the other hand, the legislative institutions remain relatively inactive, with few Commission initiatives and even fewer legislative achievements – a fact which impedes the development of social dialogue since it strips the process of any pressure for positive, concrete outcomes.[24] It is as yet unclear whether the current stalemate, or even paralysis, will be overcome through a revival of the social dialogue and/or revision of legislative processes, or awaits a political stimulus which will achieve either, both or none.

3.2 Constraints on the scope of transnational labour regulation

Peculiar to the EU system of transnational labour regulation, but especially significant in the processes concerning temporary agency work, was the provision in Article 137(5) of the EC Treaty purporting to exclude pay from the scope of directives adopted under that article. The issue of whether the outcome, either of the social dialogue or the legislative process, could include references to the pay of agency workers was continually raised as an obstacle to agreement. The point is that the process of transnational labour regulation can be inhibited where there is no agreement on the potential scope of regulation.

24. Cf. the *Report of the High-level Group on the Future of Social Policy in an Enlarged European Union*, European Commission, Directorate-General for Employment and Social Affairs, May 2004, p. 75: 'The Commission should continue to play a key role with its right of initiative for new legislation, hereby giving an incentive to social partners to opt for a negotiation route to settle the issues at stake between themselves'.

That the scope is alleged to be the result of legal constraints is incidental. Solutions can be found, as indeed was the case when the particularly damaging effect of the alleged constraint regarding pay was alleviated, albeit late in the day, by the Commission's Legal Service changing its position. But the disruptive effect of lack of consensus on the scope of the proposals was a feature highlighted in the account of both processes, social dialogue and legislative.

The fact that it was not the only disruptive feature was also evident in the dispute over whether use of temporary agency workers as replacements for striking workers was also outside the scope of negotiations, despite the centrality of this issue for the trade union side and the lack of widespread opposition to the principle (of non-replacement) among employers. Again, the lack of consensus on the scope of the proposed measure was expressed through a legalistic point, which acted as a constraint on the progress of transnational labour regulation.

3.3 Competition or cooperation between social dialogue and legislative process

The changing dynamic of transnational labour regulation in the EU, as between social dialogue and legislative process, engages the social partners with a number of institutional actors: the Commission, the European Parliament and the Council of Ministers.

The relationship between the Parliament and the social partners is characterised by a degree of competition, at least on the side of the Parliament, jealous of its exclusion from the process of social dialogue. On the other hand, the social partners, at least the trade unions, appear more than willing to cooperate with the Parliament, once the social dialogue is over.

The relationship with the Commission is complex. Apart from its vital role as a potential stimulant by way of taking legislative initiatives, the Commission provides practical support for the social partners and the social dialogue process (premises, interpreters, legal advice, and so on), as well as supplying the experienced chair of the negotiations. If the social dialogue fails to produce an agreement, however, it appears there is some continuity, but also discontinuity. In the case of the social dialogue on temporary agency work, the Commission was able to build on

compromises which had been reached, and, indeed, was given the drafts produced by the social partners during negotiations. On the other hand, the Commission official monitoring the social dialogue was not permitted to engage in the subsequent legislative process.

As to the Council, the evidence from the experience of the temporary agency work processes is that there was no apparent contact: once the social dialogue was over, the issue passed to consideration in the Council and the social dialogue was never mentioned in Council. But it was clear that individual Member States were subjected to domestic pressures from their national trade union confederations and employers' organisations.

3.4 Problems of diversity

The problem of diversity is reflected in the varied positions adopted by national employers' organisations and trade unions in the different Member States. The process of social dialogue does assist in channelling, if not reconciling, these differences through the single spokesperson who represents each side. The contrast is particularly clear with the process in the Council of Ministers, where each Member State speaks and represents itself alone. The problem is acute in COREPER where the ultimate objective is to achieve a solution respecting different member-state practices. The increasing number of Member States makes finding a satisfactory solution all the more problematic.

The problem can be illustrated through the experience of temporary agency work. A key element in the social dialogue, as in the legislative process, was the issue of applying the principle of discrimination, and specifically, the identification of appropriate comparators for temporary agency workers. The problem is much more acute where arrangements for setting wages and conditions of employment are highly individualised than where there are collective arrangements. The former allow for greater diversity and hence offer greater prospects for comparison between individuals, whereas the latter accommodate diversity within collective structures. The differences among Member States on this issue reflected their different traditions of individualisation and collectivism in determining conditions of employment.

3.5 Overload and spillover

Different processes of transnational labour law-making through social dialogue or legislation have different capacities. The limited infra-structural capacity of the European social dialogue means that it cannot engage with more than one or two issues simultaneously. This not only limits the scope of the social dialogue, but can also have negative effects insofar as it limits the potential for trade-offs between social dialogues on different issues which might allow for agreements to be reached.

It is arguable that the EU legislative process is much better equipped to deal with multiple issues. But there is the converse risk of negative spillover as problems in one area threaten to contaminate other issues. The social dialogue on temporary agency work broke down in May 2001. The Commission did not produce its draft directive on temporary agency work until March 2002. The legislative process on temporary agency work appears to have come to a halt in June 2003. In January 2004, the Commission produced its draft directive on the liberalisation of services, which purported to cover services provided by temporary work agencies. This proposed Services Directive excited much controversy. The Services Directive was eventually amended by the European Parliament to exclude temporary work agencies, an amendment reluctantly accepted by the Commission. These developments show how different parts of the Commission pursue different agendas. It is not evident that they were interlinked, but it is hard to ignore the potential for spillover of one agenda into the other.

3.6 Summary and conclusion

The experience of the combined attempts at transnational labour regulation of temporary agency work at EU level through the social dialogue and legislative processes did not produce an outcome in the form of an agreement or legal measure. But analysis of these processes has yielded a number of important insights into the evolution of transnational labour regulation: a changing dynamic, involving cooperation and competition, problems of constraints, diversity, overload and spillover. Finally, as Kerstin Ahlberg notes in the epilogue to her chapter, transnational processes did have consequences for national regulation of temporary agency work in some Member States.

4. What did the process of European social dialogue on temporary agency work reveal about the efficacy and democratic legitimacy of social dialogue as a mechanism of transnational labour regulation?

4.1 Actors, processes and outcomes of the social dialogue mechanism of transnational labour regulation

This book describes in detail the process of social dialogue on temporary agency work between the EU social partners.[25] The book focuses on the trade union side of the EU social dialogue because more material was available which illuminated that side of the social dialogue.[26] The analysis examines the actors, processes and outcomes of the EU intersectoral social dialogue.

The EU social dialogue engages the social partners in the Member States who are affiliated to the EU-level organisations: ETUC, UNICE, UEAPME and CEEP. The relationship between these EU intersectoral organisations and their national affiliates affects crucial aspects of the social dialogue: for example, the decisions to undertake social dialogue on a particular subject, to define the negotiating mandate, to decide whether to approve the agreement reached and to resolve disputes over interpretation of the agreement. In the case of the social dialogue on temporary agency work, the ETUC's wish to enter into negotiations was tempered by the reluctance of some of its affiliates, less than happy with the framework agreement concluded on fixed-term work, who wished to postpone negotiations until the consequences of implementation of the fixed-term agreement could be assessed clearly. Despite this, the ETUC succeeded in convincing these affiliates to allow it to proceed.

The involvement of the social partners in the Member States in the process of EU social dialogue is a function of their ability to participate in and monitor the activities of the negotiators. For example, the flow of information about the progress of negotiations downwards from the negotiators to the national social partners and outwards from them to

25. An earlier study had provided an outline account of the social dialogue on fixed-term work. See Ahlberg (1999).

26. Kerstin Ahlberg emphasises the problem for researchers of a general lack of accessibility of records of proceedings in the European social dialogue and similarly highlights the greater difficulties of obtaining sources from and communicating with the employers' side.

their affiliates (regional, sectoral, and so on) and the communication of responses and reactions from the national social partners reflects the 'internal' dialogue within each of the social partners. The nature and quality of this 'internal' dialogue has important consequences for the effectiveness of the social dialogue process, as well as its democratic legitimacy.

Finally, the social partners in the Member States have been allocated a role in the implementation of the outcomes: agreements concluded in the social dialogue and the transposition of resulting directives into national law. The interaction between the social partners at national level and the EU social partners reflects some of the tensions resulting from the different roles played by the social partners in a number of Member States in the transposition into national law of the framework agreements reached through the EU social dialogue.

4.2 The EU 'bargaining order': preparing and conducting negotiations

The three successful EU social dialogues at intersectoral level which have produced directives provide some basis for establishing an EU 'bargaining order': the procedure to be followed by the social partners in conducting the social dialogue. Articles 138–139 of the EC Treaty, which provide the legal basis for the EU social dialogue, are notoriously inadequate as a framework. The absence of an established and structured bargaining order, either in legislation or in an agreement between the social partners themselves, is a serious defect in terms of the legitimacy, transparency and efficacy of the EU social dialogue.

In terms of preparation of the EU social dialogue, there are particular points in time which are of maximum concern to affiliates and which may require them to engage more actively: for example, the point of determining the negotiating mandate. The difficulties in determining the negotiating mandate will reflect national differences among the affiliates of the EU intersectoral social partners. Kerstin Ahlberg describes the greater problems in the ETUC agreeing the mandate on temporary agency work as national trade union confederations had

different strategies for dealing with this kind of work,[27] while UNICE's position was rendered more complicated by the role of the temporary work agencies employers' confederation, CIETT.[28]

In terms of structuring the social dialogue, the question is how to define the composition and respective roles of the Negotiations and Drafting Groups. The issue is primarily that of the roles of each Group and their interaction. As to their respective roles, the borderline between drafting and negotiating is not always clear. It seems inevitable that there will be a need for a Committee with restricted numbers to undertake some negotiations, which will leave outside the representatives of many affiliates. This makes the reporting-back procedure between a restricted membership Drafting Group and a fully representative Negotiations Group all the more essential.

The ETUC Negotiations Group in the social dialogue on temporary agency work comprised 29 persons. An important point providing continuity of experience was that the spokesperson for the trade union side in both the fixed-term and temporary agency work negotiations was Jean Lapeyre, Deputy General Secretary of the ETUC. In contrast, on the employers' side, the spokesperson in the fixed-term negotiations was Dan McAuley from the Irish employers' confederation; in the temporary agency work negotiations, it was Wilfrid Beirnaert, Chair of UNICE's social affairs committee.

The Drafting Group on the trade unions' side was similar in both sets of negotiations: two from sectoral federations (European Metalworkers' Federation and UNI-Europa), two from the ETUC, and three from national confederations (in the temporary agency work negotiations, these were from the UK, Spain and the Netherlands). But in the negotiations over temporary agency work, the employers' side included not only UNICE and CEEP, but also representatives from CIETT, the

27. Thus the French FO and the German IG-Metall both opposed the use of temporary agency work, while trade unions in the UK and Sweden took a more permissive approach. Ahlberg also concludes that one major factor dividing the social partners was whether temporary agency workers with open-ended contracts were covered, and suggests that this was a matter of particular sensitivity to the German trade unions.

28. Ahlberg notes that the ETUC's mandate, finally unanimously adopted on 22 March 2000, was a detailed list comprising two pages, and comments that although there was one formal mandate, the employers seemed to have two separate negotiating agendas.

temporary work agencies employers' federation and two observers from UEAPME.

Certain factors may be relevant in constructing a relationship between negotiating and drafting bodies, and between them and the organisations represented on them.

First, in addition to these bodies, there were other ETUC bodies which received regular reports on the negotiations: the ETUC Executive Committee and the ETUC Industrial Relations Committee. Affiliates could keep track of negotiations through these bodies, as well as through their representatives on the Negotiations Group.

Secondly, of course, some affiliates were represented on the Drafting Group itself, and this gave them privileged access to developments. While reports went back from this Group to the Negotiations Committee, affiliates whose representatives were on the Drafting Group had some time advantage in consulting their own organisations.

Thirdly, there may be scope for horizontal arrangements between groups of national affiliates, which may overcome some of the problems of lack of representatives on the smaller 'Executive Committee' of negotiators.

4.3 Internal constitutional arrangements of the EU social partners

The aspect of the EU bargaining order of concern here is not so much that *between* the social partners, though this is of primary importance.[29] The concern here is with that part of the 'bargaining order' which regulates the relationship between the EU social partners and their *affiliates* in the Member States.

29. Indeed, Ahlberg remarks on the very great differences as regards the behaviour of the employers' side between the negotiations on temporary agency work and those on fixed-term work. Unlike in the latter, in the former negotiations few draft texts were exchanged between the parties and there were no meetings between the drafting groups of the two sides until very late in the negotiations.

The extent to which representatives of the affiliates in the various bodies engaged in negotiations did in practice inform and consult their organisations is crucial. It is not clear whether some affiliates were continuously well-informed and others much less so. Failure to maintain the 'internal dialogue' undermines both the effectiveness of negotiators, who are denied information, ideas and proposals coming up from the affiliates, as well as the legitimacy, and indeed the successful ratification of the outcome of negotiations when affiliates are not regularly informed and consulted. The great diversity of organisations of workers in the different Member States and their different traditions of collective bargaining make it difficult to find a common solution to this problem. Yet a solution which can accommodate those traditions is necessary.

4.4 The sectoral dimension of the intersectoral social dialogue

Given the weakness or frequent absence of sectoral organisation and initiative on the side of employers at EU level, the engagement of specific EU sectoral organisations (where these exist) in the *intersectoral* dialogue could encourage developments in the EU *sectoral* social dialogue. A striking example of the interaction of intersectoral and sectoral social dialogues at EU level took place in the course of the negotiations over fixed-term work. The sectoral federation, Euro-FIET (now UNI-Europa) agreed with the representative of the employers in the field of temporary agency work (CIETT)[30] to exclude this field from the scope of the negotiations in the intersectoral social dialogue on fixed-term work. A letter addressed to UNICE, CEEP and ETUC, signed by the Director of Euro-FIET and the first vice president of CIETT, dated 3 July 1998, expressed their joint view that it was inappropriate to include temporary work businesses. Significantly, they concluded that it would undermine the progress they were trying to make at the sectoral level.

It was stated, therefore, that any EU-level agreement on fixed-term contracts should exclude triangular agency work relationships. But this exclusion should be accompanied by a commitment to negotiate a specific agreement for this type of relationship at the appropriate EU

30. *Confédération Internationale des Entreprises de Travail Temporaire.*

level. This request was acceded to by the EU intersectoral social partners and temporary agency work was excluded from the scope of the negotiations. The agreement eventually concluded did, however, include the commitment to undertake an EU intersectoral social dialogue on temporary agency work.[31]

Kerstin Ahlberg describes how the intersectoral social dialogue on temporary agency work was stimulated by the activities of CIETT together with UNI-Europa which in 1999 established a sectoral social dialogue committee. The prospect of the sectoral social partners undertaking to negotiate their own sectoral agreement was problematic for the EU-level intersectoral social partners: for the ETUC, UNI-Europa did not represent temporary agency workers in all sectors; for UNICE, CIETT did not represent the user employers of temporary agency workers. Sectoral initiatives thus provided an incentive for the EU level intersectoral social partners to negotiate on temporary agency work.

On the other hand, Ahlberg describes how the activities of the sectoral organisations could also create problems and exacerbate divisions between and within the social partners involved in the negotiations. She describes how, on 3 July 2000, UNI-Europa and CIETT made a joint declaration expressing strong support for sectoral social dialogue while also stating their support for the ongoing negotiations between ETUC and UNICE/CEEP. The declaration, however, also expressed the view that agency work could play a positive role in the labour market; a statement which created some dissension within the ETUC delegation. At a crucial point in the negotiations on temporary agency work, at a meeting of 9 February 2001, the position of CIETT on some issues differed from that of UNICE and instead CIETT adopted the same viewpoint as the ETUC.

The intersectoral negotiations were ultimately unsuccessful and on 22 March 2001 the ETUC Executive Committee abandoned negotiations and called on the Commission to propose a directive regulating temporary agency work. The Commission finally adopted such a proposal one year

31. Recital 13: 'Management and labour wished to give particular attention to fixed-term work, while at the same time indicating that it was their intention to consider the need for a similar agreement relating to temporary agency work'.

later, on 20 March 2002.[32] In between, early in October 2001 the sectoral organisations, UNI-Europa and CIETT, had signed a joint declaration on temporary agency workers in favour of European legislation.[33]

4.5 Bilateral social dialogue at national level as an aid to successful EU social dialogue

Individual trade union confederations or employers' organisations at national level may pose problems specific to their national context which threaten to block progress in the EU social dialogue.

Contacts between the social partners at national level may attempt to reach compromises where one or more of the national social partners are raising difficulties in the EU negotiations. A dispute could be resolved between the national social partners to avoid it contaminating the EU-level negotiations. Ahlberg explains how, in the negotiations on temporary agency work, the British employers' federation, the CBI, once again pushed for the exclusion of pay from the scope of any agreement on temporary agency workers. The employers' side opposed any explicit reference to pay in an agreement, and this persistence raised doubts on the trade union side as to whether the employers were willing or would be able to conclude an agreement.[34]

Ahlberg observes that the EU social dialogue seems to involve disproportionate attention being paid to resolving difficulties with the UK and Ireland. She reports that the standard UNICE solution was to propose to the trade union side that these issues be resolved internally between the social partners in the Member States. This, however, did not suffice in the British context due to the pro-employer attitudes of the British government and the absence of adequate collective bargaining structures at national or sectoral level capable of resolving the difficulties.[35]

32. Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers, Brussels, 20 March 2002, COM(2002) 149 final, 2002/0072(COD).

33. Immediately afterwards, on 12 October 2001, the EU intersectoral social partners opened negotiations on telework, which this time were successful.

34. On another occasion, Ahlberg reports, an ETUC proposal in a meeting of the drafting groups on 26–28 February 2001 sought explicitly to accommodate a demand from the British employers' confederation regarding derogation by collective agreements.

35. Ahlberg reports the same problem of absence of adequate collective bargaining structures as a factor in the UK government's position on stipulating comparators in the user enterprise for temporary agency workers in the Council negotiations over the proposed Directive.

4.6 Breaking deadlocks in negotiations: the (temporary) role of mini-summits

It is not clear that the EU social dialogue has yet achieved the 'normalisation' – the longer term stability – which could ensure that parties' expectations would be that obstacles encountered in negotiations would eventually be overcome. This apparent fragility may offer the temptation to some participants, national affiliates of the EU social partners, to perceive breakdowns in negotiations as more than temporary and 'normal' obstacles to be encountered in a mature bargaining process. In particular, the temptation might be to seize the opportunity to wreck the process in its entirety. It may be necessary to develop mechanisms to avoid this temptation and resolve deadlocks.

It seems that a change in the level of negotiations, in the form of 'mini-summits' between the leaders of the EU social partners, are used to achieve such breakthroughs. Ahlberg reports on one such unsuccessful attempt which followed the breakdown of negotiations on temporary agency work. On 14 March 2001, Jean Degimbe, the chair of the negotiations, concluded that no agreement was possible. Nonetheless, on 21 March 2001, UNICE persisted and at a 'Social Dialogue mini-summit' in Stockholm, further attempts were made, leading to a meeting on 6 April 2001 of the leaders of the EU social partners in the office of the Commissioner for Social Affairs. Further efforts produced some progress, including a proposal by the Commissioner herself on 10 May 2001, but these final attempts were unsuccessful in resolving the deadlock.

In sum, in a mature process of EU social dialogue there should be mechanisms of mediation and conciliation which may successfully break deadlocks and achieve the necessary agreement.[36] Efforts should be made to develop such mechanisms at EU level, and reduce the reliance on interventions from the top level to achieve the necessary breakthrough.

36. For a study of this issue, see Fernando Valdés Dal-Ré, *Synthesis Report on Conciliation, Mediation and Arbitration in the European Union Countries*, Report for DG Employment and Social Affairs of the European Commission, 2002.

4.7 The role of the Commission in the EU social dialogue

The position of the Commission in the EU social dialogue is extremely delicate. Formally, the person chairing the negotiations and his assistant were paid by the Commission, which also provided logistical and financial support for the meetings of the social partners (for example, paying for interpreters and meeting rooms). But the social partners insisted on the bipartite nature of the social dialogue, autonomous from the Commission. Having said that, the record of documentation of the negotiations reveals something, if only partial, of the dynamic reality behind this formal position.

The potential consequences of Commission intervention were unambiguously revealed in the negotiations on temporary agency work. As described by Ahlberg, at the meeting on 11–12 January 2001 both sides decided to refer to the Commission's Legal Service the question of whether a social dialogue agreement could cover the issue of pay of temporary agency workers, or whether this was excluded by Article 137(5) of the EC Treaty.[37] On 13 February, Jean Degimbe, who was chairing the negotiations, reported that the Commission's Legal Service did not wish to give a written opinion, but orally expressed the view that, in light of Article 137(5), it was not advisable to mention pay in the agreement. He further expressed the Legal Service's view as being that to require agency workers to be paid rates comparable to those in the user company would be to regulate pay, contrary to Article 137(5). This intervention had a major negative impact on the substantive position of the trade unions in the negotiations and Ahlberg opines that this may have had a decisive influence on the outcome of the negotiations. The intervention by the Commission was all the more detrimental in that, as she reports, the Legal Service later reversed its viewpoint and accepted that an agreement on temporary agency work could include pay.[38]

37. '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'.

38. The Commission's initial proposal for a directive on temporary agency work included a provision which made express reference to employment conditions, including pay. Commission of the European Communities, *Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers*, COM(2002) 149 final, Brussels, 20 March 2002, Article 5. Ahlberg cites the written opinion of the Council's Legal Service of 14 October 2002, which also accepted that the proposed Directive could include pay. Nonetheless, the British and Irish governments continued to contest this.

The position of the social partners on the issue of the Commission's role is ambivalent. Considerations, sometimes of a character derived from constitutional traditions in individual Member States, may dictate absolute autonomy of the social partners and their dialogue from any intervention by public authority, at EU level embodied in the Commission.[39] On the other hand, the role of the Commission in the creation and maintenance of the EU social dialogue is undeniable; and, perhaps, unavoidable.

4.8 Summary and conclusion

The attempt by the European social partners to regulate temporary agency work in the EU failed. But the analysis in this book identifies important issues concerning not only the interactions between the EU social partners, but also the engagement of sectoral federations, and of representatives of the EU social partners' affiliates in the Member States. The relationship between the EU social partners and their national affiliates affects the decisions to undertake the social dialogue on a particular subject, to define the negotiating mandate, to decide whether to approve the agreement reached, and to resolve disputes over interpretation of the agreement. Attention must also be paid to the internal institutional dynamics of the social partners. Experience has also demonstrated the need for mechanisms to break deadlocks and of the importance of the role of the Commission.

5. What does the adoption of the Services Directive teach us about the balance between market forces and the protection of labour in transnational labour regulation?

5.1 Achieving a balance between economic freedom and protection of workers in transnational labour regulation

The Commission's proposal to liberalise the transnational market in services included the operations of temporary work agencies and

39. This is reflected in the practice, reported by Ahlberg, that the Commission official acting as secretary to the social dialogue negotiations is never the official in charge of the preparation of a subsequent directive. On the other hand, in the negotiations on temporary agency work, both social partners handed over to the Commission all their draft texts, which gave the Commission considerable insight into their positions.

temporary agency workers, both part of the free movement of services protected by the law of the EU. Transnational labour regulation balancing the economic freedoms of the agencies with protection of the workers was already reflected in the EU's regulation of the health and safety of temporary workers[40] and certain of their working conditions.[41] The controversy aroused by the Commission's proposal on services, however, revealed that it had failed to achieve a balance in transnational labour regulation between the economic dimension of the internal market (freedom to provide services) and the social dimension (protection of employees). One of the qualities of transnational labour regulation through the social dialogue process is that it is unlikely to ignore this requirement of balance.

5.2 Transnational labour regulation as a political process

The Commission's proposal was significantly amended by the European Parliament in its passage through the EU's legislative process. The legislative process focused on the 'country of origin' principle. This principle aimed to enhance the economic freedom of service providers to engage in cross-border activities. But its application to the workers engaged in the provision of services raised serious questions as to both the protection of labour standards and their effective enforcement.

The implications went beyond the provisions of the Services Directive and were thought to have influenced the negative result in the referendum in France on the proposed Constitutional Treaty. The political passions aroused by the proposed Directive led to intensive lobbying efforts by a variety of interest groups. The European Parliament played a major role in the formulation of the provisions of the Directive, including the deletion of the 'country of origin' principle.

Transnational labour regulation was not perceived as peripheral to internal market freedoms, best left to formulation by experts in the Commission and a decision-making process in a Council lacking in

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

41. Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. OJ 1996, L18/1.

transparency, but rather as a highly political issue requiring wide democratic debate and participation.

5.3 The relevance of established international labour standards to transnational labour regulation

The Commission's proposed Services Directive disregarded the EU's longstanding commitment to social and labour standards, the *acquis communautaire social*. The European Parliament refused to follow this path: its amendments to the proposed Directive re-established the basic principles of the *acquis communautaire social*. The primary principle upheld was the reaffirmation of the equal treatment of workers, specifically, authorising the host Member State to apply its labour law rules to employees of service providers from other Member States. Other key amendments included the explicit protection of collective agreements, the acknowledgment of protection of workers as an overriding reason relating to the public interest, and the re-affirmation of the fundamental rights of labour. Transnational labour regulation cannot overlook established international labour standards.

5.4 The implications of the Services Directive for transnational labour regulation of temporary agency work

The final Services Directive excluded temporary agency work from the scope of application of the Directive. The debates over that measure show how imperative is the need for adoption of a Directive on temporary agency work which achieves a balance between economic and social concerns. As with the Services Directive, transnational labour regulation of temporary agency work should draw on the principles of the *acquis communautaire social*.

The starting point must be that the social protection of workers is not to be subordinated to free movement of services and the interests of service providers. There is a need for specific legal protection of workers having the status of temporary agency workers. A central principle of the *acquis communautaire social* as regards conditions of work is equal treatment. The most effective application of this principle is through collective agreements which avoid the damaging effects of competition among individual workers in the labour market, producing unequal

treatment. As stated in the Services Directive: Member States are not to be prevented from applying rules on employment conditions 'including those laid down in collective agreements'.[42] Protection is to be secured by *national* collective agreements. *Transnational* collective agreements could achieve the same protection specifically as regards the transnational provision of services by temporary work agencies. Finally, the relevant standards should draw on the EU Charter of Fundamental Rights. The Services Directive states: 'This directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law'.[43] Regulation of temporary agency work should also respect these fundamental rights.

These starting points can provide the foundation for a specific legal instrument of transnational labour regulation of temporary agency work in the EU.

5.5 Litigation as an alternative to transnational labour regulation

In the absence of a specific legal measure regulating temporary agency work, the exclusion of temporary agency work from the scope of the Services Directive leaves this task to legal developments in the European Court of Justice. The position under the Services Directive produces uncertainty about the labour standards applicable to transnational temporary agency workers. Inevitably, litigation will follow. Remaining doubts as to the protection of labour standards by the *acquis communautaire social* are already evident in the continuing attempts through litigation in the *Viking* and *Laval/Vaxholm* cases to use the free movement provisions of the Treaty to limit the nationally recognised freedom to take industrial action in the Member States concerned.[44]

42. Article 16(3). Article 4(7): 'rules laid down in collective agreements negotiated by the social partners shall not as such be seen as requirements [subject to] within the meaning of this Directive'.

43. Article 1 (7). That the rights in question are fundamental labour rights is evident in the following text: 'Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law'. Recital 15 includes specific reference to the EU Charter.

44. Case C-438/05, *Viking Line Abp OU Viking Line Eesti v. The International Transport Workers' Federation, The Finnish Seamen's Union*; Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, Avdelning 1, Svenska Elektrikerförbundet*. Bercusson (2007).

5.6 Summary and conclusion

The contemporaneous debates on the Services Directive and the outstanding proposed Directive on temporary agency work reveal both the need for transnational labour regulation of temporary agency work and the relevant principles of the *acquis communautaire social* which should guide that regulation.

6. Lessons for the future of European labour law

The Barroso Commission appears to have rediscovered ambition in a Green Paper entitled 'Modernising labour law to meet the challenges of the 21st century'.[45] An earlier draft of September 2006[46] was entitled 'Adapting labour law to ensure flexibility and security for all', echoing the Commission's focus on employment policy, one of the mantras of which had been to balance flexibility and security. The Barroso Commission appears to have lifted its sights from mere labour market reforms of balancing flexibility and security to an approach which looks to 'modernising' labour law as a whole.

The Green Paper projects a vision which seeks to transform the nature of labour law itself 'to meet the challenges of the 21st century'. It takes the view that the original purpose (to offset inequality between employer and employee) and traditional model (secure employment status protected against dismissal) of labour law is no longer appropriate because it operates to the detriment of newcomers and jobseekers. EU labour law is to intervene through legislative and political actions in the conflict between workers ('insiders') and the unemployed and 'atypical' workers ('outsiders') by promoting flexibility. Employers become neutral observers of this conflict.

This vision is likely to be contested with the argument that the original purpose and traditional model of labour law remain valid and should be reinforced, not dismantled. Labour law and collective agreements should continue to support the original purpose and reinforce the tradi-

45. COM(2006) 798 final, Brussels, 22 November 2006.
46. Communication from the Commission, Green Paper, 'Adapting labour law to ensure flexibility and security for all' (n.d.).

tional model. This is not a purely normative position. The economic and legal arguments for EU labour law are well-known ('social policy as a productive factor'), if insufficiently acknowledged.[47] The EU should intervene to secure the efficient functioning of the single European market, which depends on protection of employment security, decent labour standards and the active participation of workers through their collective organisations to ensure their interests are taken account of in economic decision-making at all levels. These are values enshrined in the EU Charter of Fundamental Rights, to which the Commission is ostensibly committed.

The Green Paper poses the question of whether there should be clarification of the responsibilities of various parties within multiple employment relationships (for example, sub-contractors) and, specifically, of the employment status of temporary agency workers.[48] There was indeed such clarification in the 1991 Directive on health and safety of temporary agency workers.[49] This precedent could be built upon.[50]

But the precedent set by the Barroso Commission's proposal of the Services Directive does not promise that this clarification will reflect the required balance between concerns for market freedoms and the need for protection of workers and social standards. Rather, the future of transnational labour regulation through EU law lies in respect for the *acquis communautaire social* and the EU Charter of Fundamental Rights, to which future Commissions should return.[51]

47. See, *inter alia*, Majid (2001), Fourage (2003) and Sen (2000).
48. In Questions 9 and 10.
49. Council Directive 91/383 of 25 June 1991 supplementing the measures to encourage improvements in the safety and health of workers with a fixed-duration employment relationship or a temporary employment relationship, OJ 1991 L206/19.
50. The responsibility of sub-contractors should be addressed in a number of contexts: public procurement, information and consultation where redundancies or restructuring affect the employees of sub-contractors, and so on.
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Chapter IX

Globalisation

Chapter IX: Globalisation

Introduction by Simon Deakin

There is a considerable literature on the impact of globalisation on labour law, most of it highly pessimistic concerning the feasibility of strategies for countering the negative effects for labour of growing cross-border trade and capital mobility. It is characteristic of Brian Bercusson's work that, in one of his last publications, he should have avoided apocalyptic predictions of the end of labour law in favour of careful and nuanced analysis of the options available to workers and unions.[1] His approach is notable, above all, for its emphasis on the institutional origins of globalisation. Globalisation is not a force of nature, but a process instituted by national governments and the transnational agencies which they have chosen to empower, both of which use legal means to achieve their ends. In the European context, this involves recognising that the shift in the balance of power between labour and capital which has occurred as a result of the freedom of enterprises to move across national frontiers is a direct consequence of the EU law on free movement and associated legal aspects of the European integration process. This argument – which Brian Bercusson applies to the European case, as that is the focus of his analysis – could be extended to the global level in light of the role of the WTO, regional trade agreements and various bilateral and multilateral investment treaties. Having stressed the legal–institutional origins of globalisation, Brian Bercusson turns conventional wisdom on its head by arguing that cross-border economic integration, far from denying a role for labour law and trade unions, *requires* a rebalancing of social and economic forces at transnational level. This is for various reasons, but the most pressing is the loss of political legitimacy which stems from the

1. B. Bercusson, 'Implementation and monitoring of cross-border agreements: the potential role of cross-border collective action', Chapter 6 in K. Papadakis (ed.), *Cross-border social dialogue and agreements: an emerging global industrial relations framework?* (Geneva: International Institute of Labour Studies, 2008), reproduced below.

perception that European integration now threatens the viability of national-level welfare state and labour law regimes.[2]

It has become clear since Brian Bercusson's analysis was published that the *Viking* and *Laval* judgments represent a further and very dangerous twist in this downward cycle. The logic of viewing collective labour standards as a 'distortion' of the Single Market has not been lost on anyone. The consequences in the political sphere include further delays to treaty reform. In particular, the reaction to *Viking* and *Laval* seems to have contributed to the rejection of the Lisbon Treaty in the Irish referendum of 2008. In addition, the judgments have been linked to growing industrial unrest in the construction sector. For example, in the UK, the Lindsey oil refinery dispute, which continued at intervals for several months in the first half of 2009, was driven in part by the belief that employers were using the *Laval* judgment to undercut local collective agreements.

Brian Bercusson's response to the very negative developments presaged by *Viking* and *Laval* was both practical and informed. In the chapter reproduced below he suggests that, in a context in which employers refuse to engage in transnational social dialogue, except on marginal issues,[3] and in which the Commission's proposals for the 'modernisation' of labour law imply a weakening of the collective dimension of labour relations,[4] unions must find ways of strengthening the standard-setting process at European level. Cross-border agreements on labour standards are emerging, but they are unlikely to be effective in the absence of a right to take transnational industrial action. It goes without saying that the process of establishing mechanisms of worker voice at transnational level which are in any way comparable to those which have existed at national level in some member states for several decades, and which the legal systems of all member states to some degree acknowledge and protect, is not going to be straightforward. However, Brian Bercusson offers a careful analysis of two legal arguments that might be used to this end. He points out, first, that litigation arising from the EU Charter of Fundamental Rights could become a basis for securing social and labour rights and influencing the political agenda both of the EU and of the member states. The Court's recognition of the Charter as a source of

2. Ibid., p. 140.
3. Ibid., p. 134.
4. Ibid., p. 138.

law on the content of the fundamental rights which are protected by the Community legal order is highly significant in this regard.[5] Second, Brian Bercusson suggests that the *Viking* and *Laval* judgments, despite their overall negative impact, contain the seeds of an approach to the definition of proportionality, in the context of the free movement case law, which would make it possible for the courts to recognise the validity of transnational industrial action. Here he builds on dicta from the two cases to make the case for what he calls an 'anti-social dumping principle', according to which transnational strike action would be legitimate where existing jobs and conditions were threatened and guarantees of equivalent protection were not forthcoming from employers.[6]

Brian Bercusson's friend and collaborator Alain Supiot has written that, while the labour law of the future, like that of the past, will be forged through collective action, conflict and negotiation, the role of the expert in labour law reform is to engender public debate, supply material for reflection and, above all, to challenge conventional wisdom.[7] There could not be a better description of Brian Bercusson's contribution, as the works in this volume testify.

5. Ibid., p. 150.
6. Ibid., p. 154.
7. A. Supiot, 'Préface', in A. Supiot (ed.), *Au-delà de l'emploi: Transformations du travail et devenir du droit du travail en Europe* (Paris: Flammarion, 1999), p. 14.

Implementation and monitoring of cross-border agreements: The potential role of cross-border collective industrial action

Brian Bercusson (2008) * [1]

Introduction

The present chapter examines the potential role of cross-border collective industrial action in ensuring effective implementation and monitoring of cross-border agreements at European level, including international framework agreements (IFAs). We focus on the evolution of the debate on cross-border social dialogue and industrial action from a legal viewpoint, and in particular, on two relevant cases recently decided in the European Court of Justice (ECJ), namely Case C-438/05: *Viking* (ECJ, 2007a) and Case C-341/05: *Laval* [EC], 2007b). These cases have the potential to proclaim that trade unions in a European single market are free to undertake cross-border collective action, with obvious consequences for improving the implementation prospects of cross-border agreements.

The chapter is structured as follows. The first section places the issue of cross-border collective industrial action in the European Union (EU) area in context. It examines the framework within which the European cross-border social dialogue operates today, and how this framework was developed. The second section examines the follow-up action to the European Commission's Social Agenda 2005–2010 regarding the issue of transnational collective bargaining. The following section analyses the context within which collective action might take place in the framework of the European single market, and the fourth section the legal dimension of transnational collective industrial action and free movement in the EU

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* 'Implementation and monitoring of cross-border agreements: the potential role of cross-border collective industrial action', Brian Bercusson (2008). This article was originally prepared for the International Institute for Labour Studies of the ILO in Geneva and first published in K. Papadakis (ed.) *Cross-border social dialogue and agreements: an emerging global industrial relations framework?*, Geneva: ILO, 131-157 and is reprinted here with the kind permission of the publisher.

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context. The role of the EU Charter as a legal basis for cross-border industrial action is then analysed. The sixth section examines the ECJ's caution vis-à-vis the integration of the Charter in the Community's legal order. The conclusions refer to the ECJ's use of the Charter in the cases of *Laval* and *Viking* and the implications for transnational industrial action.

Cross-border social dialogue in the European Union

An analysis of the implementation and monitoring of cross-border agreements requires an understanding of the *dynamic* of the process of cross-border social dialogue and its outcomes, namely cross-border agreements. In this respect, the experience of the EU may be instructive. The focus of this chapter is on what may emerge as a key element in this dynamic, namely the potential role of cross-border collective industrial action.

The current state of the evolution of EU policies on labour regulation may be sought in the European Commission's Communication of 9 February 2005 on the Social Agenda (European Commission, 2005). What is striking is that there is not one single proposal for *new* legislation in the labour law field. If labour legislation is not foreseen up to 2010, what is?

> While respecting the autonomy of the social partners, the Commission will continue *to promote the European social dialogue* at cross-industry and sectoral levels, especially by strengthening its logistic and technical support and by conducting consultations on the basis of Article 138 of the [EC Treaty]. (European Union, 2002; emphasis added)

This focus on social dialogue is warranted because of all the proposals on the Social Agenda, the one that the European Commission explicitly commits to adopting is on transnational collective bargaining:

> The Commission plans to adopt a proposal designed to make it possible for the social partners to formalise the nature and results of *transnational collective bargaining.* The existence of this resource is essential but its use will remain optional and will depend entirely on the will of the social partners. (European Commission, 2005; emphasis added)

This commitment has to be seen in the context of the social dialogue as it has developed over 20 years, and particularly in the recent past.[2]

The development of the European social dialogue is illustrated by an early experience of failure, which nonetheless produced a success, namely the European Works Councils (EWC) Directive (European Council, 1994). The EU social partners came close to an agreement on establishing EWCs, but failed at the last moment.[3] The failure of the European social dialogue on EWCs led the dynamic Commission of the time to propose, and 11 Member States of the EU (excluding the United Kingdom) to adopt, the EWC Directive in 1994.

The catalyst for the European social dialogue, which eventually led to the EWC Directive, was the Hoover case of January 1993, which involved the closure of a factory in Dijon, France and its transfer to the United Kingdom (*EIRR*, 1993). Similarly, the closure of the Renault factory in Vilvoorde, Belgium in February 1997 led to a fresh Commission initiative on information and consultation of workers' representatives, following the refusal of the European employers' organizations to engage in social dialogue at all (Moreau, 1997; *EIRR*, 1998). The framework Directive 2002/14 on information and consultation emerged only in March 2002, after long and painful negotiations among the institutions (European Council, 2002).

This experience reveals two dynamics at work. First, in the short term, events can have a catalytic effect. However, waiting on events may not be the optimal dynamic of social dialogue. Second, the impact of catalysing events is subordinate to another, longer-term dynamic, namely 'bargaining in the shadow of the law' (Bercusson, 1992). It has become clear that the willingness of the social partners to engage in social dialogue is dependent on the political balance of power in EU institutions. If the Commission takes initiatives, if Member States mobilize in Council and if Parliament is supportive, the social partners

2. On 14 April 2005, the European Economic and Social Committee organized a conference in Brussels, 'The 20th Anniversary of the European Social Dialogue'. The author presented the introduction and conclusions to the opening session of this conference.

3. The reasons for failure are disputed, though some commentators point to the role of the UK employers' organization, the Confederation of British Industry. This reflects the odd position that, while the UK as a Member State had opted out of the Social Protocol, the UK social partners continued to participate in the social dialogue.

are confronted with the likelihood of regulation. A logical calculus of self-interest points to incentives to self-regulate via social dialogue.

This clearly explains the 31 October 1991 agreement that led to the Maastricht Protocol, which appears now in Articles 138–139 of the EC Treaty (Dølvik, 1997: Chapter 8). At that time, employers and unions at EU level, faced with the Netherlands' presidency's draft of the Maastricht Treaty (which proposed expansion of social and labour competences exercised through qualified majority voting), agreed on the alternative of labour regulation through social dialogue (Bercusson, 1996a),

However, this dynamic is fragile, as it depends on the political balance of power in the EU institutions. For instance, if the Commission does not push for social policy initiatives, if there are blocking minorities of Member States in the Council of Ministers, or if the Parliament is not supportive, then the likelihood of legislative regulation recedes. In these circumstances, employers particularly are unlikely to look to alternative forms of regulation voluntarily, unless they can be offered incentives.

This is the major difference between European social dialogue and social dialogue within the Member States of the EU. Unlike trade unions in Member States, the European Trade Union Confederation (ETUC) lacks the power to force employers to bargain. This has become increasingly evident. Employers will not agree to social dialogue, or, if they do, only on marginal issues, and then only if the results do not take the form of binding obligations. Employers provide many justifications for their actions, such as the need to maintain competitiveness, flexibility and deregulation. The outcome, however, is the impoverishment of European social dialogue.

Follow-up to the Commission's Social Agenda

Following the Commission's Social Agenda 2005–2010 of February 2005, a group comprising labour law academics coordinated by Professor Edoardo Ales of the University of Cassino, Italy, prepared a legal study in response to a tender advertised by the Commission (Ales et al., 2006; Hall, 2006, pp. 12–20; Ales, forthcoming).[4] This report proposes

4. The Commission has organized two study seminars on this theme. See also Bé (this volume).

a directive that builds on the experience of EWCs to develop an optional framework for an EU transnational collective bargaining system within which transnational collective agreements with legally binding effect could be concluded. The optional framework would be activated by a number of different mechanisms, all of which, however, involve the *voluntary and joint* initiative of European trade unions and employers' organizations at sectoral or cross-industry level, sometimes triggered by a joint request from an EWC and the management of the relevant multinational enterprise (MNE).

The response of the European employers' organization, the Union of Industrial and Employers' Confederations of Europe (UNICE, now BusinessEurope), has been one of opposition to any new framework for transnational collective bargaining, even an optional one. The experience of EWCs to date is indicative of the problems.[5]

The experience of European works councils

The recent data published by the European Trade Union Institute for Research, Education and Health and Safety (ETUI-REHS) calculate that there were 772 MNEs with EWCs in place as of June 2005. This is 35 per cent of the total of 2,204 MNEs covered by the Directive (Kerckhofs, 2006).[6] It appears that initiatives to establish an EWC have not been taken in the large majority (1,432 or 65 per cent) of the MNEs concerned. One conclusion that had already been drawn in early 2000 was that 'the establishment of EWCs seems never to have gained momentum and their growth rate appears to have stabilised at a relatively low level' (Platzer et al., 2001, p. 91). Most agreements were

5. 'The European Commission issued a first consultation document on the possible review of the European Works Councils (EWCs) Directive on 20 April 2004. In this, it asked the EU-level social partners how they believe the EWC Directive, which dates from 1994, can best respond to the challenges of a changing economic and social environment ... [In early 2005] the European Commission issued a Communication dealing with Industrial restructuring and EWCs, which constitutes the second formal consultation of the social partners on EWCs ... During the second half of 2005, the social partners issued their responses to the Communication. The ETUC has stated that it would like to see a legislative revision of the EWCs Directive ... By contrast, UNICE neither wants the Commission to prepare further legislation on EWCs, nor to interfere with local-level decisions. There have been no further pronouncements on this from the Commission during the first six months of 2006' *(EIRR,* 1996, pp. 16–18).

6. For a summary, see Hall (2006), pp. 4–6.

made by favourably disposed managements who made 'voluntary agreements' either before the Directive was adopted, or to beat the 22 September 1996 deadline for agreements to be made under Article 13 of the Directive, which provided that such agreements were not subject to the requirements of the Directive.[7] Remaining managements appear not to be so favourably inclined. It is not only management resistance which explains the decline, even though one analysis does observe that:

> ... the employer side may erect hurdles to hamper the establishment of an EWC. There are instances of particularly uncooperative companies where the management takes early action to block or delay an EWC initiative: for example, by refusing employee representatives the requisite information on the company's international structure or by threatening to impose sanctions. (Platzer et al., 2001, p. 97)

Additionally, Platzer et al. (2001) argue that 'existing structures and cultures of industrial relations at national level are a key determining factor and may have a conducive or inhibitory effect'. Considerable initiative, indeed competence and even courage is called for on the part of individual employees and representatives; hence, lack of protection for those taking the initiative is not to be underestimated as an inhibiting factor. Again, there are the possible negative effects on existing industrial relations, which may be sensitive when there are national as opposed to transnational priorities.

It is too early to draw definitive conclusions about the long-term effectiveness of EWCs as mechanisms for labour's influence on multinational capital. A 1999 survey of 71 agreements reached under Article 6 of the Directive showed that:

> ... virtually all Article 6 agreements explicitly define the EWC as an information and consultation body, yet most of them understand consultation merely to mean a 'dialogue' or an 'exchange of views' between the EWC and central management. Only 11 percent of

7. Of the EWCs in 2005, 56 per cent were established on the basis of voluntary Article 13 agreements; 44 per cent are based on Article 6 agreements reached under the Directive's statutory negotiating procedure. The ETUI-REHS study points out that the average number of new EWCs established since 2001 has been between 30 and 40, and at this rate it will take another 35 years to establish EWCs in all the companies covered by the Directive.

> Article 6 agreements describe the EWC's consultative function in more detail or actually empower it to negotiate. Indeed, 10 percent of agreements explicitly rule out a negotiating role. (Carley and Marginson, 1999, cited in Platzer et al., 2001, p. 104)[8]

Reasons for the lack of enthusiasm on the part of workers and their representatives to establish EWCs may be found in a report based on 41 case studies of the practical operation of EWCs in companies based in five countries (France, Germany, Italy, Sweden and the United Kingdom) (Hall, 2005, p. 18). Experience was extremely diverse. For example, information provided to employees through EWCs could be the 'bare minimum', though in most cases employee representatives judged positively this information. But as regards consultation, most employee representatives stated that their involvement was at the point at which decisions were taken by management, or even after that. In the minority of cases where employees did exercise some influence, it was only over implementation issues, not the content of the decision. Employee representatives' general view was that EWCs were weak and their expectations were low for potential influence.[9]

The problems of EWCs might be addressed through revision of the EWC Directive, aimed at: making the establishment of EWCs mandatory; elaborating the duties of information and consultation in order to reinforce a duty to engage in collective bargaining;[10] and strengthening sanctions in order to secure effective implementation of these obligations. However, there is little indication that the European Commission in its present form (December 2007) is inclined to take any such initiatives.

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8. However, for an account of the as yet rare practice of negotiating in EWCs, see the 26 examples of joint texts concluded by management and either an EWC or some other representatives in the context of an EWC, engaging 12 multinational companies (Carley, 2002).

9. Although the overall view expressed by case studies' interviewees was that 'the advantages and benefits of EWCs far outweigh the disadvantages', the report concluded that 'the main objective of providing workers with a view in transnational corporate decision-making processes has been achieved only "in a minority of cases researched"' (Hall, 2005, p. 20).

10. *See Irmtraub Junk c. Wolfgang Kuhnel als Insolvenzverwalter über das Vermögen der Firma AWO*, Case C-188/03, Opinion of Advocate General Tizzano, 30 September 2004, ECJ decision, 27 January 2005.

The Commission's Green Paper on modernizing labour law

The Commission's Green Paper of November 2006 (European Commission, 2006a)[11] and its legislative programme for 2007 (European Commission, 2006b)[12] do not even mention cross-border social dialogue or transnational collective bargaining. The Green Paper addresses the challenge of modernizing labour law. At the end of the first section, the Commission states that it seeks:

> To identify key challenges which have not yet yielded an adequate response and which reflect a clear deficit between the existing legal and contractual framework, on one hand, and the realities of the world of work on the other. *The focus is mainly on the personal scope of labour law rather than on issues of collective labour law*. (Emphasis added.)

It is significant that the Barroso Commission in 2006 put forward a project to modernize labour law with a focus on the *personal scope* of labour law affecting individual employment rather than on collective labour law, given the centrality of collective organization to labour law's protection of workers in employment. The Green Paper has multiple references to collective agreements, but all are in the spirit of the role that collective agreements negotiated between the social partners can play in promoting a flexible individual employment agenda.

There is widespread recognition of the role that collective agreements can – and do – play in promoting this, and other, agendas. What is

11. This begins 'The purpose of this Green Paper is to launch a public debate in the EU on how labour law can evolve the Lisbon Strategy's objective of achieving sustainable growth with more and better jobs. ... As the Commission's 2006 Annual Progress report on Growth and Jobs emphasizes: "Increasing the responsiveness of European labour markets is crucial to promoting economic activity and high productivity".'

12. Under the heading, 'The Priorities for 2007', the subheading: 'Addressing the challenges of European society' states: 'At the heart of aspirations of European citizens, in particular young Europeans, is the breaking down of barriers to the opportunities offered by the European labour markets. "Flexicurity" has been acknowledged as a promising approach to marrying labour market flexibility and the development of skills with robust social protection. The Commission will put forward proposals to encourage common principles to stimulate *flexicurity*. The Commission is undertaking a *comprehensive stocktaking of European society*, to serve as a basis for a new agenda for access and solidarity and for European policy-making into the next decade. As part of this exercise, the Commission will present a mid-term review of the implementation of its Social Agenda with a view to taking stock of EU achievements in delivering more and better jobs and offering equal opportunities for all' (European Commission, 2006b, p. 6).

absent from the Green Paper is whether modernizing EU labour law requires intervention to *support and reinforce* the role of trade unions, collective bargaining and collective agreements, which are so important to the individual employment agenda. The circumstances in several Member States (such as anti-union employers, reduced coverage of collective agreements and declining trade union membership) reveal the clear need for EU intervention to support collective bargaining if the Commission wishes to promote its individual employment agenda.

A distinctive characteristic of the European social model is that it attributes a central role to social dialogue at the EU and national levels in the form of social partnership. It would be a radical deviation from the European social model for the Commission to modernize labour law by separating EU labour law on individual employment from EU collective labour law.

The fundamental problem, as to how to engage employers in effective cross-border social dialogue or transnational collective bargaining, remains. The Commission's sole specific proposal in its Social Agenda for 2005–2010, on transnational collective bargaining, has been abandoned. In a conference organized by the Commission on 27 November 2006, a survey conducted by the Directorate General Employment and Social Affairs on transnational collective agreements was presented, only to be harshly criticized by UNICE. The expert study proposing a directive was brusquely buried. Instead, it was announced that no regulatory initiative was in prospect and the Commission planned at most another communication (see Bé, this volume).

Context: Collective action in the European single market

The EU, a transnational European economy, as in the national economies of the EU's Member States, requires a balance of economic power between employers and workers. In EU Member States, this balance is achieved in part through the collective action of trade unions and employers' organizations. The social partners at EU level have not achieved this balance.

EU law on free movement transforms the balance of economic power in the EU; the freedom of enterprises to move throughout the European single market has shifted the balance of economic power towards

employers. This is particularly evident in the overwhelming economic power of MNEs, the magnitude of transnational capital movements, the social dumping effects of global trade, delocalization, unemployment and de-skilling.

The changing balance of economic power, together with competition over labour standards, weakens European economic integration in that national labour forces become opposed to economic integration. Of course, the ability to relocate operations increases integration from the perspective of big business. The dissatisfaction that results undermines support for the European political project. There are ominous signs of strain: rejection of the proposed Constitutional Treaty; disputes over the Services Directive; and resistance to further enlargement for fear of migration of labour from new Member States.

One response to the shift in the balance of economic power resulting from the growth of the transnational economy remains the trade unions' traditional defence of collective industrial action. A crucial element in maintaining a balance of economic power within Member States is the legal right to take collective action. National labour laws include the right to collective action: though legal systems differ, no Member State outlaws it.

Under the pressure of EU law, Member States have adapted their laws to the requirements of free movement in the single market. The EU law of the common market transformed national rules governing the free movement of goods, services, capital and workers. However, national laws have not yet adapted to trade unions' response in the form of transnational collective action, which impacts on the transnational economy; unlike national strikes, transnational solidarity strikes are not legal in all Member States.

Globalization of production chains means that collective action frequently has an impact beyond national borders. National rules on collective action are inadequate to regulate transnational collective action having an impact on the free movement of enterprises in the EU. A specific legal problem arises where national laws on collective action encounter EU law (and adapted national law) on free movement of goods, services, capital or workers.

The remainder of this chapter examines the role of (transnational) collective action in its traditional role as a dynamic mechanism to promote (cross-border) social dialogue, and its radical consequence in the potential emergence of transnational collective bargaining.

The law: Transnational collective industrial action and free movement in the European Union

Collective action to promote transnational collective bargaining is also a mechanism to secure effective implementation and monitoring of cross-border agreements. One axiom of labour law is that the effectiveness of labour law rules is in inverse proportion to the distance between those who make the rules and those who are subjected to them. In other words, the greater the distance the less their effectiveness; the less the distance, the greater their effectiveness. The presumption is that rules originating from social partners engaged in collective bargaining, being closest to those subject to these rules (employers and workers), achieve a higher level of effectiveness. Conversely, those emerging from legislative or administrative processes, distant from employers and workers, will have relatively less efficacy. Whatever the national equilibrium among various mechanisms of labour law-making and enforcement (legislative, administrative, judicial), the argument is that those systems in which the social partners are more prominent in rule-making will be those in which the effectiveness of labour law is greater. Having a stake in the standard-setting process promises well for the involvement of the social partners in the mechanisms of implementation and enforcement of national law, including their freedom to decide to take collective action to secure the standards to be agreed or enforced.

This axiom of social partner participation in standard setting and enforcement is about to be tested at EU level. Whether EU law allows for the social partners to take collective industrial action has been the subject of litigation in two cases referred to the ECJ at the end of 2005, namely the *Viking* case, referred by the English Court of Appeal (ECJ, 2005a; 2007a), and the *Laval* case, referred by the Swedish Labour Court (ECJ, 2005b; 2007b).

Viking

Not surprisingly, as an organization of workers operating in the globalized market of international transport, the International Transport Workers' Federation (ITF) has been at the forefront of developments that confront (a) national laws protecting the economic power of workers taking collective industrial action with (b) EU law protecting the economic power of employers exercising freedom of movement for goods and services. The campaign by the ITF against flags of convenience (FOCs) in the maritime industry involves ITF affiliates taking industrial action in support of other affiliated unions in dispute, often in other countries.

The *Viking* case concerns industrial action by the Finnish Seamen's Union (FSU) in Helsinki against Viking Line Abp (Viking). Viking, a Finnish shipping company, owns and operates the ferry *Rosella*, registered under the Finnish flag and with a predominantly Finnish crew covered by a collective agreement negotiated by the FSU. The *Rosella* operates between Helsinki in Finland, a member of the EU since 1995, and Tallinn in Estonia, which became a member of the EU in May 2004. During 2003, Viking decided to reflag the *Rosella* to Estonia, which would allow the company to replace the predominantly Finnish crew with Estonian seafarers, and to negotiate cheaper terms and conditions of employment with an Estonian trade union.

In late 2003, Viking began negotiating with the FSU about the possible reflagging. Negotiations for a new collective agreement for the *Rosella* were unsuccessful and the FSU gave notice of industrial action beginning on 2 December 2003. The right to strike is protected in Finnish law by Article 13 of the Finnish Constitution as a fundamental right. The FSU claimed that it had a right to take strike action to protect its members' jobs and the terms and conditions of the crew.

The FSU, an ITF affiliate, requested that the ITF assist by informing other affiliates of the situation and by asking those affiliates to refrain from negotiating with Viking pursuant to the ITF FOC policy. Under this policy, affiliates have agreed that the wages and conditions of employment of seafarers should be negotiated with the affiliate in the country where the ship is ultimately beneficially owned. In this case, the *Rosella* would remain owned by Viking, a Finnish company, even if reflagged to Estonia. According to the FOC policy, therefore, the FSU would keep the negotiation rights for the *Rosella* after reflagging. To

support the FSU, on 6 November 2003, the ITF sent a letter to all affiliates in the terms requested. Further meetings took place and on 2 December 2003 a settlement agreement was reached. Viking claimed they were forced to capitulate because of the threat of strike action.

In August 2004, shortly after Estonia became an EU Member State, Viking commenced an application in the Commercial Court of England and Wales for an order to stop the ITF and the FSU from taking any action to prevent the reflagging of the *Rosella*, which would contravene its right to free movement under EU law. Viking was able to start proceedings in England because the ITF has its headquarters in London. In June 2005, the English Commercial Court granted an order requiring the ITF and the FSU to refrain from taking any action to prevent the reflagging, and further requiring the ITF to publish a notice withdrawing its letter to its affiliated trade unions. The judge considered that the actions of the ITF and the FSU were contrary to European law. The ITF and the FSU appealed against this decision in the Court of Appeal.

In a judgment given on 3 November 2005, the Court of Appeal decided that the case raised important and difficult questions of European law and referred a series of questions to the ECJ. It also set aside the order granted by the Commercial Court against the ITF and the FSU. Proceedings in London were put on hold until the ECJ provided answers to the questions that the Court of Appeal has referred (see below). Following the recent ECJ answers to these questions, the case is to be returned to the Court of Appeal for a final decision. However, the judgement of the ECJ has already become part of European law and should apply throughout the EU (see also Bercusson, 2007a, pp. 279–308).

Laval

Baltic Bygg AB is a Swedish subsidiary fully owned by 'Laval' un Partneri Ltd Laval, a Latvian company. Baltic Bygg was awarded a public works contract in June 2004 by the City of Vaxholm in Sweden for construction works on a school.[13] Negotiations on a collective agreement between the Swedish Building Workers' Union (Svenska Byggnadsarbetareförbundet, or Byggnads) and Laval began in June 2004, but Laval refused to sign a collective agreement on terms acceptable

13. Latvia became an EU Member State in May 2004. Sweden has been an EU Member State since 1995.

to Byggnads. Instead, Laval entered into a collective agreement with the Latvian Trade Union of Construction Workers. Byggnads gave notice of industrial action and industrial action was taken by Byggnads and the Swedish Electricians' Union (Svenska Elektrikerförbundet) in late 2004, including a peaceful boycott of the building and construction work. The right to strike is protected as a fundamental right by the Swedish constitution. Laval started proceedings before the Swedish Labour Court, claiming, among other things, violation of its freedom of movement under the EC Treaty. The industrial action continued and Baltic Bygg AB went bankrupt. The Swedish Labour Court referred questions to the ECJ.

The issues at stake are as follows. In both cases, the employers' claim was based on EU law: that the industrial action had violated the employer's freedom of establishment and to provide services, as provided in the EC Treaty, Articles 43 and 49. As the unions claimed in the Swedish Labour Court in the *Laval* case regarding the Swedish Constitution, the FSU in the *Viking* case invoked the Finnish Constitution, which protects the fundamental right to strike. At first instance in *Viking* in the English Commercial Court, the judge upheld the employer's complaint, on the grounds that EU law overrode any national law, even the national constitution of a Member State.

However, the EC Treaty provisions on free movement are not absolute. Free movement is limited by public policy considerations, both in the Treaty[14] and as developed by the ECJ through its extensive case law. The reference to ECJ jurisprudence made by the English Court of Appeal in *Viking* highlights the limits to free movement: whether EC Treaty provisions on free movement may be limited by collective action that is lawful under national law is the specific issue. One question raised, consequentially, is whether EU law includes a fundamental right to take collective action, including strike action, as declared in Article 28 of the EU Charter of Fundamental Rights.[15]

14. Articles 30 [goods), 39(3) (workers), 46(1) (establishment), 55 (services), 58(1) (capital).
15. [Missing in original text].

The Charter of Fundamental Rights and the European Court of Justice

The European Union's Charter of Fundamental Rights proclaimed at the summit held in Nice on 7 December 2000 (European Union, 2000) attracted much attention, not least because it seemed likely that the Convention on the Future of Europe established following the Laeken summit of December 2001 to prepare a constitution for the EU would propose that the Charter be incorporated into the text. The EU Charter was Part II of the Treaty establishing a Constitution for Europe proposed at the EU summit in June 2004 (European Union, 2004). However, this proposed Constitutional Treaty failed to be ratified following its rejection by referenda in France and the Netherlands in 2005. The Charter survives in the Reform Treaty proposed at the EU summit in Lisbon in December 2007. The 'Lisbon Treaty', which also remains to be ratified by all EU Member States, provides for the Charter to have legally binding status.[16]

The EU Charter includes provisions that are at the heart of labour law and industrial relations in Europe.[17] The incorporation of the EU Charter into the primary law of the EU will have an impact not only on the EU's institutions but perhaps even more on the Member States, which are bound by the Charter through the doctrine of supremacy of EU law. The inclusion of fundamental rights concerning employment and industrial relations in an EU Charter incorporated into the EU Treaties may well confer on them a constitutional status within national legal orders. In some cases, the EU Charter's labour standards and

16. The Charter of Fundamental Rights becomes legally binding and has the same legal rank as the Treaties, although its text will not be in the Treaties. The Charter was solemnly proclaimed at a plenary session of the European Parliament by the presidents of the Parliament, the Council and the Commission on 12 December 2007 and subsequently published in the *Official Journal*. The Treaty article giving the Charter its legally binding character will refer to the abovementioned proclamation. A protocol introduces specific measures for the United Kingdom and Poland establishing exceptions with regard to the jurisdiction of the ECJ and national courts for the protection of the rights recognized by the Charter. For discussion of this position and others, see Bercusson (2007b).

17. Freedom of association (Article 12), right of collective bargaining and collective action (Article 28), workers' right to information and consultation within the undertaking (Article 27), freedom to choose an occupation and right to engage in work (Article 15), prohibition of child labour and protection of young people at work (Article 32), fair and just working conditions (Article 31), protection of personal data (Article 8), non-discrimination (Article 21), equality between men and women (Article 23), protection in the event of unjustified dismissal (Article 30).

industrial relations requirements may exceed those of Member States' laws. Similarly, the ECJ may adopt interpretations consistent with international labour standards, while national labour laws may fall short. In sum, the EU Charter promises a renewal of labour law, both at European transnational level and within EU Member States.[18]

The ECJ will become a central player in the enforcement of the EU Charter. It will decide disputes where Member States are charged with failing to implement or allegedly violating rights in the EU Charter. The Court has played this role in the past, relying on free movement of goods, services, capital and labour, guaranteed in the EC Treaty, to override national restrictions on free movement. The EU Charter provides a further means whereby the Court can promote European integration, this time in the social and labour field.

Litigation based on the EU Charter could become an important means of securing social and labour rights, and could influence the political agendas of both EU institutions and Member States, For example, the ECJ may be willing to recognize, as protected by the EU Charter, those fundamental trade union rights that all, most, or even a critical number of, Member States insist should be protected. The Court may interpret the articles of the EU Charter on fundamental trade union rights consistently with other international labour standards and could be sensitive to where national laws have protected trade union rights. A comprehensive and consistent litigation strategy could enable trade unions to use the rights guaranteed by the EU Charter to shape a system of transnational industrial relations at EU level.[19]

Response of the European Court of Justice to the Charter

Since its proclamation on 7 December 2001, the Charter has been cited repeatedly by all the Advocates General of the ECJ in their opinions delivered before the Court makes its final judgements, and in decisions

18. See the commentary in Bercusson (2006a).

19. For this reason, it is important that trade unions should have direct access to the Court to intervene, or initiate complaints before the Court, to protect fundamental rights. For a note analysing the prospects for the ETUC's obtaining the status of a 'privileged applicant' under the EC Treaty, Article 230 see Bercusson (2000a), p. 720; (2000b), pp. 2–3. For a longer analysis, see Bercusson (1996b). p. 261.

of the Court of First Instance (CFI), which was created in order to relieve the ECJ of its growing caseload and has assisted the Court since 1989.[20] However, the ECJ remained extremely cautious in its response to the Charter as regards integrating it into the Community legal order, preferring to rely on the existing range of international human rights instruments. The legal advice and policy orientations encouraging references to the Charter, to be found in the opinions of all the Advocates General, were for long ignored or cautiously circumvented by the Court.

For example, one ECJ decision involving the EU Charter was the *Omega* case (ECJ, 2004). This concerned an alleged restriction on free movement of services and goods as a consequence of a German regulation banning a video game in which players killed people. The German defence invoked the German constitutional principle of protection of human dignity as falling within the permissible public policy derogation to free movement. The ECJ concluded:

> Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that the activity is an affront to human dignity. (ECJ, 2004, para. 41)

In its reasoning, the Court recalled that fundamental rights form an integral part of the EU legal order and, in para. 34 of the judgment, specifically cited paras. 82-91 of the opinion of Advocate General Stix-Hackl. Paragraph 91 of that opinion stated:

> The Court of Justice therefore appears to base the concept of human dignity on a comparatively wide understanding, as expressed in Article 1 of the Charter of Fundamental Rights of the European Union. This Article reads as follows: 'Human dignity is inviolable. It must be respected and protected.' (ECJ, 2004, para. 91)

The Court itself would not directly cite the EU Charter. Rather, the first judicial reference to the EU Charter was made by the CFI in a decision of 30 January 2002. In *Max.mobil Telekommunikation Service GmbH*

20. In the first 30 months of its existence, up to July 2003, there were 44 citations of the Charter before the European courts. For details of these 44 cases, see the appendix, prepared by Stefan Clauwaert and Isabelle Schömann, in Bercusson (2006b), pp. 633–714.

v Commission, the CFI twice referred to provisions of the EU Charter, first Article 41(1) (right to good administration), and then Article 47 (right to an effective remedy and to a fair trial) in the following terms:

> Such judicial review is also one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States, as is confirmed by Article 47 of the Charter of Fundamental Rights, under which any person whose rights guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. (ECJ, 2002, paras. 48 and 57)

Even as a mere political declaration, the EU Charter appeared to be accepted by all the Advocates General and the CFI as reflecting fundamental rights that are an integral part of the EU legal order – but not by the ECJ.

European Court of Justice citation of the Charter

The question was whether, and for how long, the ECJ could hold out. The answer arrived with the first citation of the EU Charter five and half years after its proclamation by the European Court, in *European Parliament v Council*, decided on 27 June 2006 (ECJ, 2006). The European Parliament had sought the annulment of a subparagraph in a Council directive on the right to family reunification. In so annulling, the Court stated:

> The Parliament invokes, first, the right to respect for family life. ... This principle has been repeated in Article 7 of the Charter which, the Parliament observes, is relevant to interpretation of the ECHR [European Convention for the Protection of Human Rights and Fundamental Freedoms] in so far as it draws up a list of existing fundamental rights even though it does not have binding legal effect. The Parliament also cites Article 24 of the Charter ...
>
> The Parliament invokes, second, the principle of non-discrimination on grounds of age which, it submits ... is expressly covered by Article 21 (1) of the Charter. (ECJ, 2006, paras. 31–32)

But in contrast, the Court refers to the Council's submission as adopting the following position: 'Nor should the application be examined in the light of the Charter given that the Charter does not constitute a source of Community law' (ECJ, 2006, para. 34).

As to the Court s own view of the precise legal effects of the Charter, the key text in the judgement is under the rubric, 'Findings of the Court' (ECJ, 2006, para. 35), with regard to the issue, 'The rules of law in whose light the Directive's legality may be reviewed' (ECJ, 2006, para. 30). The Court states:

> The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court... and of the European Court of Human Rights'. (ECJ, 2006, para. 38)

In other words, while not legally binding itself, the Charter reaffirms rights that are legally binding due to their provenance from other sources that are recognized by EU law as legally binding sources.[21] The Court elides this subtle distinction (reaffirming other binding instruments versus declaring rights) when, in another section under the rubric, 'Findings of the Court', it uses the word 'recognises':

> The Charter recognises, in Article 7, the same right to respect for private or family life. This provision must be read in conjunction with the obligation to have regard to the child's best interests, which

21. '[T]he constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court and of the European Court of Human Rights'.

> are recognised in Article 24(2) of the Charter, and taking account of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents. (ECJ, 2006, para. 58)

The recognition was made easy for the Court, as noted by Advocate General Kokott in her opinion of 8 September 2005:

> In so far as it is relevant here, Article 7 of the Charter of Fundamental Rights of the European Union ... is identical to Article 8 of the ECHR. Moreover, the first sentence of Article 52(3) of the Charter (Article II–112 of the Treaty establishing a Constitution for Europe) provides that its meaning and scope are to be the same. (ECJ, 2006, para. 60)

As interesting as her reference to the (then) proposed Constitutional Treaty is the following statement of Advocate General Kokott:

> Article 21 of the Charter of Fundamental Rights of the European Union expressly prohibits certain forms of discrimination, including that based on age. While the Charter still does not produce binding legal effects comparable to primary law, it does, as a material legal source, shed light on the fundamental rights which are protected by the Community legal order (74). (ECJ, 2006, para. 108)[22]

It is perhaps significant that the Court should have first cited the Charter in a legal action by one (supranational) EU institution, the Parliament, against another, the Council (representing the Member States). In this context, the statements of the Court concerning the Member States are important. The Court repeats the mantra that fundamental rights 'are also binding on Member States when they apply Community rules' (ECJ, 2006, para. 105).[23]

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22. Footnote 74 of the opinion cites opinions of other Advocates General, including that of Advocate General Tizzano in Case C-173/99, *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v Secretary of State for Trade and Industry*, [2001] ECR1-4881. Opinion of Advocate General, 8 February 2001, the second citation of the Charter before the ECJ some two months after its proclamation, and other opinions by Advocate General Kokott herself.

23. This leaves open the question of when it can be said that the Member State's law is implementing Community rules; see, for example, Case C-144/04, *Werner Mangold v Rüdiger Helm*, decided 22 November 2005. The Court concludes (para. 104): 'consequently, they are bound, as far as possible, to apply the rules in accordance with those requirements...'.

The tension between the law of the EU and that of the Member States is particularly evident in disputes over EU competences. The ECJ may rely on the Charter to support EU legislative initiatives based on the EU Charter against challenges from Member States or other EU institutions. The Charter may also be used by EU institutions challenging Member States' failures to implement, or even violations of rights in, the EU Charter. In this way, as stated earlier, the ECJ plays a political role in overcoming political opposition to European integration, a role it has frequently fulfilled in the past, relying on fundamental freedoms (of movement of goods, services, capital and labour) guaranteed in the EC Treaty. The EU Charter now provides another legal basis on which the ECJ may choose to rely in overcoming challenges to European integration in the social and labour field.

European Court recognition of a fundamental right to collective action

The EU Charter represents values integral to 'Social Europe'. In the sphere of employment and industrial relations, these values include those reflected in the fundamental rights to collective bargaining and collective action embodied in Article 28 of the Charter. Litigation before the ECJ confronts the Charter with freedom of movement in the European single market.

In *Viking* and *Laval*, employers were seeking to override national and international guarantees of the right to collective action, invoking their freedom of movement in EU law. The references to the ECJ pose the question of whether collective industrial action at EU level contravenes the EC Treaty provisions on free movement, or whether the ECJ will adapt the EU law on free movement to redress the balance of economic power on a European scale. The reference to the ECJ by the English

This could be read two ways. First, Member States are obliged to apply Community rules in accordance with fundamental rights. If this is not possible, their application (indeed, the Community rule itself) is challengeable as violating fundamental rights. Alternatively, Member States are obliged to apply Community rules in accordance with fundamental rights only as far as possible. If this is not possible, their application (and the Community rule) is still valid. It would seem that the first interpretation is preferable, and supported by the Courts immediately preceding statement, which appears to emphasize Member States' margin of appreciation, but again only 'in a manner consistent with the requirements flowing from the protection of fundamental rights'.

Court of Appeal in *Viking* highlights the issue of the limits to free movement: whether EC Treaty provisions on free movement may be limited by collective action that is lawful under national law. One specific issue raised is the potential applicability of Article 28 of the EU Charter, which provides for the fundamental right to take collective action, including strike action.

The issues put by the English Court of Appeal to the European Court raise the question of whether EU law includes a fundamental right to strike. The potential role of collective industrial action in shaping cross-border collective bargaining and the implementation of cross-border collective agreements may be determined by the response to this question by the ECJ. The Advocates General in *Viking* and *Laval* delivered their opinions on 23 May 2007. Both of them cited the EU Charter in proclaiming the existence of a fundamental right to take collective action protected by the Community legal order.[24]

The ECJ delivered its judgment in *Viking* on 11 December 2007 (ECJ, 2007a) and in *Laval* on 18 December 2007 (ECJ, 2007b). In both cases, the ECJ cites Article 28 of the EU Charter and proclaims:[25]

> ... the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures ... (ECJ, 2007a, para. 44; see also ECJ, 2007b, para. 91)

In both *Laval* and *Viking*, the ECJ affirms that protection of this fundamental right:

> ... is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods ... or freedom to provide services ... (ECJ, 2007b, para. 93; ECJ, 2007a, para. 45).

24. Advocate General Mengozzi, paras. 78; 142; Advocate General Maduro, para. 60. For a critical analysis of the opinions of the Advocates General, and proposals for resolving the issues at stake in *Viking* and *Laval*, see Bercusson (2007c).

25. The quotation in *Viking* refers to: 'the right to take collective action, including the right to strike, must therefore be recognised...'.

The ECJ reinforces this by adding:

> ... it must be observed that the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty ... and that the protection of workers is one of the overriding reasons of public interest recognised by the Court. (ECJ, 2007a, para. 77)[26]

However, in both cases the ECJ qualifies these affirmations of the fundamental right to take collective action for the public interest in the protection of workers with the statement that: '[Its] exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality ...' (ECJ, 2007b, para. 94; ECJ, 2007a, para. 46).

An 'anti-social dumping principle'

The judgments in *Laval* and *Viking* offer a variety of propositions aimed at assisting national courts to assess the 'proportionality' of collective action by workers and their organizations in relation to economic freedoms of employers. In the two cases before it, the ECJ offers guidance aimed at the specific threat of social dumping in the form of an 'anti-social dumping principle' of proportionality.

This emerges in most detail in the ECJ's statements in *Viking* regarding the primary collective action of the FSU and the secondary collective action of the ITF. As regards the primary collective action of the FSU, the question concerns the public interest test of protection of workers which, says the ECJ: 'would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat' (ECJ, 2007a, para. 81).

The ECJ then proceeds to provide indicators (but only by way of example: 'in particular')' of what would establish 'that the jobs or con-

26. In *Laval*, para. 107: '... it must be observed that, in principle, blockading action by a trade union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers'.

ditions of employment at issue were not jeopardised or under serious threat'. This would require an undertaking by the employer that was:

> ... from a *legal* point of view, as *binding* as the terms of a collective agreement and if it was of such a nature as to provide a *guarantee* to the workers that the *statutory provisions* would be complied with *and* the terms of the *collective agreement* governing their working relationship *maintained*. (ECJ, 2007a, para. 82; emphasis added)[27]

The only way an employer can show there is no jeopardy or threat is to guarantee jobs and conditions of employment – otherwise, collective action is justifiable. In practice, this is a mandate for collective bargaining, as such a guarantee is the first trade union demand to be put forward. Failure to give the guarantee, to reach a collective agreement, so that jobs or conditions of employment are 'not jeopardised or under serious threat', thereby justifies collective action. Collective action will not be taken in practice if collective agreements are reached guaranteeing no jeopardy or threat to jobs and conditions of employment.

As regards the secondary collective action by the ITF, the ECJ states:

> ... ITF is required, when asked by one of its members, to initiate solidarity action ... irrespective of whether or not that owner's exercise of its right of freedom of establishment is liable to have a harmful effect on the work or conditions of employment of its employees. Therefore, as Viking argued during the hearing without being contradicted by ITF in that regard, the policy of reserving the right of collective negotiations to trade unions of the State of which the beneficial owner of a vessel is a national is also applicable where the vessel is registered in a State which guarantees workers a *higher* level of social protection than they would enjoy in the first State. (ECJ, 2007a, para. 89; emphasis added)

27. Note the parallel with the protection of workers under Council Directive 77/187 of 14 February, 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. *OJ* L 61/26, as amended by Directive 98/50/EC of 29 June 1998, *OJ* L 201/88, consolidated in Directive 2001/23 of 12 March 2001, *OJ* L/82/16. The parallel is reinforced if 'working relationship' includes the collective relationship with the trade union, as presumably it does as it is in a collective agreement.

The implication is that solidarity action is only unlawful if higher (or equivalent) conditions are available in the State of reflagging. If not, collective action is justifiable to protect workers' conditions. Of course, it is logical that if the State of reflagging guarantees a *higher level*, no collective action is likely to be taken. It may be argued that, as a matter of practice, conjecture about future conditions in the State of reflagging cannot be foreseen. The answer is: as in the case of the FSU, they must be guaranteed by legally binding agreements.[28]

The substance of the statements regarding the FSU and ITF may be characterized as justifying collective action where employers do not guarantee equivalent jobs and conditions, in the form of legally binding collective agreements. The FSU's collective action is justifiable as, in the absence of such binding agreements, jobs or conditions of employment may be presumed to be 'jeopardised or under serious threat'. The ITF's action is justified where higher or equivalent conditions cannot be guaranteed.

In substance, this is a principle that collective action is justifiable to counter 'social dumping' – where existing jobs and conditions are threatened and no guarantees are forthcoming of equivalent protection.[29] The ECJ stated this even more emphatically in *Laval.*[30]

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28. The next paragraph of the Court's judgment does not clearly state this, but it may be read in by implication (ECJ, 2007a, para. 90): '... collective action such as that at issue in the main proceedings, which seeks to induce an undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of that Article [43]. That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective'.

29. The principle is reminiscent of case law on the Posting Directive 96/71, which allows the host Member State to impose mandatory employment conditions unless equivalent protection is provided by the home Member State. This element is found in Advocate General Mengozzi's Opinion in *Laval.* At a more fundamental level, it translates as an application of the equal treatment principle: the exercise of freedom of establishment to another Member State is conditional on equal treatment of posted workers with other workers in each Member State, both before and after the relocation.

30. In the *Laval* decision (ECJ, 2007b, para. 103), citing, among other authorities, para. 77 of the *Viking* decision of the previous week (ECJ, 2007a). Although the ECJ disqualified the collective action in *Laval* by reference to the labour standards in the Posting Directive 96/71 as transposed into Sweden, the ECJ's understanding of the application of the Posting Directive 96/71 in the Swedish context is questionable, and the Swedish Labour Court may take a more informed view of the facts when it comes to decide the case.

In that regard, it must be pointed out that the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty (ECJ, 2007b, para. 103).

Conclusions

One obstacle to the taking of transnational collective action has been, at best, its uncertain legal status, and at worst, its explicit prohibition in some national labour laws. The ECJ has declared that trade unions, entitled to take collective industrial action in a national context, are similarly free in a European single market to exercise cross-border collective action. If the European Commission remains passive, with consequences for a moribund European social dialogue, and employers refuse voluntarily to engage, trade unions may have no alternative but to draw on the collective strength they have traditionally used in collective bargaining at national level: to take transnational collective action in order to conclude cross-border collective agreements.

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Chapter X

Brian Bercusson and the future of the trade union movement

Chapter X: Brian Bercusson and the future of the trade union movement

Introduction by Catelene Passchier

In the last message I received from Brian Bercusson, just before his sudden passing away, in the summer of 2008, he commented on the high level Summer School meeting with trade union leaders of the ETUC which would take place in September and at which he would deliver the keynote speech. 'To do this in just 10 minutes is a real challenge', was his understatement.

Brian Bercusson's were lengthy and thoroughly elaborated notes, preceded by an executive summary to make them user-friendly and accessible to people less interested in the detail. But the detail *was* always interesting and thought-provoking; and on many an occasion since I got to know him in 2003 it was my experience that Brian Bercusson would always sit down and provide an answer to a pressing question – be it day, night or weekend. In the course of time, we became good friends. We shared the experience of lawyers active in a trade union environment, often accused of 'making things difficult', but badly needed when legal difficulties are caused by the outside world.

This became very apparent when the trade union movement was confronted with the ECJ judgments in the *Laval* and *Viking* cases. Brian Bercusson immediately started to work on what would become an endless stream of notes, comments, analyses and suggestions for (legal) action. He made every effort to ensure that the ETUC would play a visible role in these proceedings, even drafting an ETUC submission to be annexed to the *Viking* case without his name anywhere being mentioned, a rare thing nowadays for an academic. He was unique in his dedication to the good cause of the trade union movement, and strongly believed in its essential role in the development of Europe's '*ordre social communautaire*'.

The piece that he had just finalised before his death, which is published hereafter, was going to be *the* discussion paper to be put before the above mentioned ETUC Summer School. It shows the wealth and breadth of his thinking on what should be urgent issues to be addressed by the trade union movement. Although a lawyer and academic, he did not shy away from issues such as declining trade union membership and fragmentation of the workforce and what actions could be taken to counter these developments. The note shows that he was capable not only of analysing complex developments, but also devising legal responses, which could be put into practice by trade unions. This was how Brian Bercusson tried to influence the course of social and labour law in Europe, bringing academic work closer to trade union practitioners, offering them his phenomenal knowledge and expertise for discussion and reflection and as a basis for policy-making. For the ETUC and its member organisations, this was an invaluable contribution on which they can build the today and tomorrow of the European trade union movement.

Challenges for the European trade union movement
A menu of 12 issues and 28 questions for discussion

Brian Bercusson (2008) *

1. Globalisation and Europe

Globalisation is characterised by **international trade** and integrated **transnational production processes**, both dominated by **multinational enterprises** (MNEs), the expansion of **foreign direct investment** (FDI) and the emergence of massive **cross-border financial flows**.

1. What is the **potential role of the EU** in economic globalization? Can **trade unions influence** the regulatory power of the EU over MNEs and capital mobility where these produce negative effects for workers? For example, are there lessons to be learned for **transnational delocalisation** of enterprises from experience of national regulation of transfers of undertakings (information and consultation, protection of jobs and working conditions? Are strengthened **European works councils** a viable option to control global MNEs? Can **labour standards** be attached as conditions to free movement of capital, foreign direct investment, transnational provision of services, international public procurement, or international trade within or outside the EU? What mechanisms are available to achieve this?

2. Is **collective bargaining** at national or transnational level a viable mechanism to control international capital and transnational production processes? If so, how? How can **transnational solidarity** among EU trade unions be strengthened? Is EU trade union solidarity sufficient, or need it be extended to **non-EU**

* 'Challenges for the European trade union movement', Brian Bercusson (2008). This article was first published as a background paper for the ETUC/ETUI-REHS top-level summer school, 26 and 27 September 2008, London.

trade unions in, for example, the BRICs (Brazil, Russia, India, China)? If so, how?

3. Can globalisation be controlled by domestic labour law and collective bargaining? Or should trade unions aim at regulation at EU level? What should be **protected at domestic level** and what are the advantages, and the risks, of **transferring competences to EU level**?

2. Trade union membership

Trade union membership is declining. The **age profile** of trade union membership is an indicator of further decline. The increase in **working women** is accompanied by increasing female trade union membership. The major challenge is at national level.

4. What, if anything, can be done **at European level** to assist **recruitment** and **retention** of trade union members, particularly women?

5. Would **new EU laws** assist? If so, what could these provide? For example: can the **right to freedom of association** be enhanced at EU level to assist recruitment of new members? Would mandatory rules on representation, information and consultation rights assist retention of existing members? Can conditions be put on public procurement or free movement which offer incentives to join or protect existing trade union membership? Can mechanisms at EU level protect or advance trade union membership (e.g. an independent monitor of trade union freedom of association along the lines of the Fundamental Rights Agency)?

3. Multinational enterprises

Multinational enterprises are the **most powerful economic actors** in the global economy. The challenge for trade unions is to find some way of controlling them.

6. What can trade unions do to **establish European Works Councils** (EWCs) where they are absent? What can trade unions do to **improve the effectiveness of EWCs** (e.g. resources,

training, transnational cooperation, enforcement of information and consultation rights through litigation, alliances with pressure groups (e.g. consumer or environmental NGOs))?

7. What other mechanisms are available? For example, do **corporate governance mechanisms**, at national or multinational level, offer opportunities (e.g. representation on boards of directors; appointment of "independent" directors; duties of directors in ctompany law to take account of employees' interests; shareholder meetings)? Can internal corporate monitoring mechanisms (e.g. on quality, consumer safety or environmental standards) be used to monitor and protect labour standards?

4. Fragmentation of the workforce and the "informal" economy

The multiplication and expansion of **new forms of employment** (e.g. "self-employed" workers, casual labour, temporary agency staff) often undercuts labour standards and threatens employment security and is linked to the growth of **"informal" employment** (often of illegal migrant workers) which escapes regulatory control.

8. What can be done at **EU level** to combat problems of fragmentation of the workforce? Is an **EU law definition of "employee"**, eligible for employment protection, possible or desirable?

9. Can the equality (non-discrimination) principle in the social dialogue agreements on part-time and fixed-term work be extended to cover all workers? **Is equality enough**, or should there be special provision for specific categories (e.g. part-timers)?

10. Can trade unions undertake a role in **labour inspection** mechanisms monitoring employment status and equal treatment?

11. Can **coordinated efforts at EU level** assist trade unions at national level to combat "informal" employment?

5. Migrant workers and labour standards

In the ***Viking, Laval, Rüffert* and *Commission v. Luxembourg*** cases, the European Court of Justice (ECJ) refused to apply the normal equal treatment principle to EU nationals who migrate to work temporarily as "posted" employees of service providers. The Commission seems open to **revising the Posting Directive 96/71/EC.**

12. What should be the trade union response to the problem of **posted workers**? Should national systems be adjusted to accommodate whatever appears to be required by the current Posting Directive? Or should efforts be directed towards amendment of the Directive (and if so, which amendments)? Or both?

13. How can trade unions respond to the **East/West difference in labour standards** between the new and old Member States being exploited by employers and politicians?

Many non-EU migrant workers **are illegal migrants**, work in the "informal" economy and their exploitative working conditions often threaten both labour standards and lawful employment.

14. **What can trade unions do** to meet this threat? For example, should enforcement mechanisms be aimed primarily against employers of such workers who are responsible for these conditions?

6. Social dialogue

The Commission is failing. It has (i) failed to propose legislative initiatives which would stimulate the social dialogue; (ii) violated the spirit, and even the letter, of Articles 138–139 of the EC Treaty by not privileging consultation of the social partners; (iii) promoted the use of the "soft law" non-legally binding mechanisms of the "open method of co-ordination" instead of the legally binding labour standards envisaged by the Social Chapter of the EC Treaty. Not surprisingly, therefore, **BusinessEurope resists** a meaningful social dialogue at EU level.

15. What can trade unions do to **bring pressure** on both the Commission and BusinessEurope to change their attitudes to social dialogue?

16. What form of **legally structured European social dialogue** could be provided for in the Treaty (e.g. the role of the Commission, the obligation of the social partners to negotiate in a spirit of cooperation, the legal status of EU social dialogue agreements).

7. The European Court of Justice

The European Court of Justice (ECJ) has in the past played an important and progressive role in the evolution of European labour law. However, in the recent *Viking*, *Laval*, *Rüffert* and *Luxembourg* cases the ECJ has **interpreted the Treaty's provisions on employers' economic freedoms** as promoting competition on labour standards between employers from the new and old Member States, and precluding national legislation or trade union collective action to combat "social dumping".

17. In the short-term, should trade unions at both national and EU levels adopt a **litigation strategy**: (i) **defensive** when monitoring cases raising issues of EU significance, particularly when referred by national courts to the ECJ; (ii) **offensive** when seeking out cases which could usefully be brought before national courts and referred to the ECJ with prospects of encouraging the ECJ to adopt a more positive approach to trade unions?

18. In the longer-term, should trade unions aim to **reform the ECJ** so as to enable it to achieve a proper balance between economic and social policy in the EU? This could include (i) establishment of a specialist tribunal: the *chambre social*, (ii) excluding competence to override fundamental rights (to collective action) protected in Member States, (iii) authorising the social partners to intervene in cases before the ECJ, and (iv) reconsidering the composition and political balance of the Court.

8. Multi-speed Europe

The need for unanimous approval of 27 Member States blocks the modest improvements of the Lisbon Treaty and qualified majorities are difficult to achieve even for modest social policy directives. **Some Member States** prefer and would commit to a **stronger social dimension**.

19. Should trade unions support a "multi-speed Europe" (a **Protocol** on a stronger social dimension binding only those Member States who agree; **"enhanced cooperation"** under Article 43 of the Treaty on European Union; a **"Social Schengen"** agreement? Which Member States might agree?

20. What could be the **content** of such a mechanism (for example, the ETUC has proposed a **"social progress" clause**, to include, for example, (i) an "anti-social dumping principle"; (ii) a general principle of "non-regression"; (iii) re-drafting economic freedoms to respect fundamental rights and protect workers and trade unions?

21. How could this be promoted?

9. The EU Charter of Fundamental Rights

The EU Charter is **vulnerable**. First, if the Lisbon Treaty is not ratified. Second, due to the ECJ's interpretation of the Charter in the *Viking* and *Laval* cases.

22. **If Lisbon fails**, how can trade unions ensure that the Charter's fundamental rights are safeguarded? Could it be adopted as a **separate Protocol** to the Treaty (if necessary, with opt-outs by the UK and Poland)?

23. Can the ECJ's **restrictive interpretation of the fundamental right to collective action** in the *Viking* and *Laval* cases be changed by revising the Charter (e.g. by "adjustments" to the Preamble, or by "updating" to the "explanations" to the Charter)?

24. How to **prevent employers exploiting** the ECJ's decisions by using national courts to challenge collective action as violating EU economic freedoms?

10. Inequality

Inequality (in income, wealth, education, social mobility) has **increased and is growing** in most EU Member States. Labour's share of national income/wealth decreases while its share of the tax burden increases.

25. What can trade unions do to combat growing inequality? **Which policies are priorities at EU level** (e.g. minimum wages; extension of collective agreements; equal treatment of all workers; a non-regression/most favourable principle; protection of fundamental rights to freedom of association, collective bargaining and collective action; fiscal reforms (corporate taxation); etc.)?

11. Effective enforcement of EU labour standards

Labour standards adopted at EU level, even minimum standards, are often implemented unsatisfactorily and enforced inadequately at national level. **Enforcement procedures** are impractical and sanctions ineffective.

26. What **improvements at EU level** could secure better implementation and enforcement? Can the EU provide support to Member State enforcement mechanisms? Can EU legislation provide for effective sanctions tailored to specific labour standards? Can trade unions be allocated a role in effective enforcement?

27. How can the Commission be persuaded to take up **trade union complaints** that Member States are in breach of their obligation to implement and enforce EU labour standards?

12. Future institutional paths for EU labour law

The present **European Commission**'s neo-liberal outlook is manifest in its Green Paper of November 2006 on "Modernising labour law to meet the challenges of the 21st century". The decisions of the **European Court of Justice** in *Viking* and *Laval* appear to favour economic freedoms of employers over fundamental rights to collective action by trade unions. Yet an earlier ECJ supported and reinforced an *ordre communautaire social* based on a social *acquis*. The **European**

Parliament and the **Member States**, first in the Constitutional Treaty and then the quasi-constitutional Lisbon Treaty, included the EU Charter and commitments to social progress and social justice (new Article 2, subparagraph 3 of the Treaty on European Union).

28. Which **institutional option** for the future for European labour law appears to be the most promising for trade unions? Which EU institutions are most **effectively influenced** to promote a favourable agenda for EU labour law? How can national trade union confederations be effective in influencing EU policy?

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Price : € 35
D/2009/10.574/26
ISBN: 978-2-87452-160-7