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The Maastricht Protocol on Social Policy:  
Theory and Practice

Gerda Falkner  
University of Vienna, Austria; University of Essex, UK

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## **The Maastricht Protocol on Social Policy: Theory and Practice**

Almost one and a half years have gone by since the Maastricht Treaty on European Union (TEU) and its *Protocol on Social Policy* came into force. In the Protocol the twelve contracting parties, i.e. all the member states at that time, noted that eleven of them (all except the UK) wished to 'continue along the path laid down in the 1989 Social Charter'. They agreed to authorise those eleven member states 'to have recourse to the institutions, procedures and mechanisms of the Treaty for the purposes of taking among themselves and applying as far as they are concerned the acts and decisions required for giving effect to the *Agreement on Social Policy*' (or Social Agreement, SA).

One Directive and one Recommendation have so far been agreed on this innovative legal basis; several other proposals are under consideration; and further significant developments are in view, making a first stock-taking worthwhile. This paper provides an overview of the rules and experience to date concerning: the legal nature of the Agreement on Social Policy Section 1; its policy innovations Section 2; its corporatist potentials Section 3; and the UK opt-out Section 4.

The trends, outlined below in more detail, can be summarised as *normalisation*, concerning the Agreement's legal character, and as *trend continuation*, concerning policy competences and majority voting. I shall argue that two considerable strains have so far determined the application of the new powers under the TEU, these being the opt-out of the UK, on the one hand, and the 1996 Intergovernmental Conference (IGC), on the other. In the longer run, the policy innovations of the SA will probably have much more of an impact than they have so far. However, two surprising developments may already be observed with regard to the limited achievements under the new European social policy rules: evolving patterns of 'Euro-corporatism'; and significant effects from and on the UK, in spite of its opt-out.

### **1. The Nature of the Beast: European or International Law?**

During the initial phase after the Maastricht negotiations only one point seemed undisputed: the lack of coherence in the TEU, including specifically its social provisions (Weiss 1992: 3) and their very poor wording (Watson 1993: 492ff). Consequently, it did not come as a surprise that diverse and even contradictory interpretations were proffered by legal scholars. In a report (DEC EN/CM/202155) to the Committee on Social Affairs, Employment and the Working Environment of the European Parliament (EP) the well-known Belgian European Community (EC) specialist Eliane Vogel-Polsky argued that the SA was not part of the Protocol on Social Policy (to which it is annexed) and thus not part of the corpus of EC law. As a mere *intergovernmental agreement*, the SA should have been ratified by the relevant national parliaments (Vogel-Polsky 1994). In the absence of such national transposition, the political will of the eleven governments to progress in the social area was stuck in a legal deadlock, 'une impasse juridique rendant impossible le développement d'une politique sociale communautaire' (Vogel-Polsky 1994: 86). Not only would any action by EC institutions be completely voluntary and the European Court of Justice (ECJ) not competent, but also, any measure adopted on this legal base would need ratification by national Parliaments in order to become effective. It would otherwise be void.

In contrast, most mainstream EC lawyers did not question so fundamentally the legal status of the SA (see Watson 1993; Séché 1993; Hailbronner 1994). They acknowledged that some questions were raised concerning the principle of unity of Community law, but argued that the wording of the relevant provisions meant that the SA was an inherent part of the Social Protocol and therefore (by virtue of Article 239) part of the Treaty. Notions like 'Community action' or 'at a Community level' they argued, showed clearly that the signatories considered that social deliberations by the eleven (now fourteen) member states, except the UK, were taken in a Community capacity. From this it follows that the relevant governments and EC institutions have retained their traditional powers and duties with regard to social provisions based on the SA; even the judicial principles of primacy and direct effect applied.

No legal action has yet been brought to challenge any of the decisions taken or the procedures employed under the SA. Thus, no final decision on the scholarly debate outlined above may yet be reported. The study of recent practice, however, suggests that the EC polity has accommodated the second, more 'integrationist' interpretation. When answering relevant parliamentary questions, both Commission and Council stated that measures adopted under the SA were EC law for the signatory states<sup>1</sup>. In its Communication on the application of the Social Agreement (COM(93) 600 final, 14 December 1993), the Commission explicitly stated that the Agreement was 'soundly based in law' and that the 'Community nature of measures taken under the Agreement is beyond doubt' (point 7).

The European Works Councils Directive (No. 94/45/EC) is so far the first and only binding instrument adopted under the new procedures. All the EC institutions operated on the basis of 'business as usual', fulfilling the duties imposed by the new legal base in the same way as under the previous basis. The public debate after the adoption of this Directive never questioned its character as EC law or the member states' duty to implement it. Thus, all practical indicators imply that 'the beast' is supranational (or 'European') in character. At least in the political reality of the past one and a half years, the SA has induced similar behaviour on the part of all the major actors (EC institutions, interest groups, addressees such as big firms) to that usually prompted by the classic supranational provisions of the EC treaties.

It thus seems improbably that the ECJ, if asked to assess the legal character of the SA and the legality or binding force of decisions based on it, would contradict the expressed will of the overwhelming majority of EC member states, as stated in many political statements, even if the wording of the Protocol itself is in some ways ambiguous. In a nutshell: in the day-to-day application of the SA we have so far witnessed a pragmatic 'normalisation' as regards its supranational character in respect of both its legal foundations and its policy output.

## **2. Policy Innovation: Potential Only?**

Many of those involved looked for a profound reform of European social policy, especially after the British government veto in 1989 of a legally binding EC Social Charter. During the IGC preceding the TEU the negotiators were nonetheless cautious in terms of proposed policy innovation - mainly because of the British government's hostility to any extensive 'social' dimension to European integration. The extremely controversial and lengthy negotiations

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<sup>1</sup> See *OJ* 1992/C 289/20 of 5 November 1992; 1993/C 40/12 of 15 February 1993; 1993/C 95/17 of 5 April 1993.

even threatened the rest of the Maastricht texts, hence a compromise was sought on the reform of the 'social chapter' of the Treaty of Rome (EEC) since this required unanimous approval by all twelve member states. The compromise, drafted in haste over night at Maastricht gave the UK 'outsider status' regarding any social policy reforms. What should have been changes to Articles 117 to 122 of the Treaty of Rome (EEC) were in a last minute compromise simply put into a Protocol annexed to the new treaty - without restoring any of the more ambitious provisions which had previously been resisted by the British.<sup>2</sup>

Some policy innovation was, however, attempted - in terms of both procedures and common tasks for the eleven who signed up. Thus, there is an *extension of the explicit Community competences* to a wider range of social policy matters than hitherto. These include working conditions, information and consultation of workers, equality between men and women with regard to labour market opportunities and treatment at work (as opposed to only equal pay before), and the integration of persons excluded from the labour market (see Article 2 SA). Furthermore, *majority voting* has been accepted for a much wider range of issues, including, for example, information and consultation of workers.<sup>3</sup> Last, but not least, new patterns of *corporatist decision-making* have been introduced (see below). Thus we can endorse Hall's conclusion that 'indeed, Maastricht has the *potential* to be a watershed in the evolution of the EC's social policy role' (Hall 1994: 306; emphasis added).

This potential has not yet been fully exploited. Despite the *re-extended Community competences*, no legislative proposal has so far been introduced by the Commission without it having been debated under ECT provisions. During the first eighteen months of its application, the SA was used as a legal basis only for projects which had not proved 'yesable' before because of British dissent. This is true for the European Works Councils Directive (EWCD), the Council Resolution on Contribution to Economic and Social Convergence in the Union (6 December 1994),<sup>4</sup> and for various proposals only recently put under the SA and not yet agreed, i.e. parental leave, part-time work, and reversal of the burden of proof in sex discrimination cases.

Furthermore, the White Paper on European Social Policy (COM (94) 333 of 27 July 1994) and the Commission's new Social Action Programme (adopted on 11 April 1995) reveal that only very few legislative initiatives are planned in the near future.<sup>5</sup> On closer inspection among the few recently tabled proposals several are connected to either recent judgements on existing EC law by the ECJ (equal treatment in occupational pension systems, transfer of

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<sup>2</sup> Efforts in this direction by the French delegation seem to have been blocked by the Iberian governments (Barnard 1992:29).

<sup>3</sup> Unanimous decisions have been restricted to social security and social protection of workers; protection of workers where their employment contract is terminated; representation and collective defence of interests of workers and employers, including co-determination; conditions of employment for third-country nationals legally residing in Community territory; and financial contributions for promotion of employment and job creation (see Article 3).

<sup>4</sup> The German presidency had promoted that the twelve governments adopt a hard core of minimum provisions concerning working conditions, especially for part-time workers. Because the British remained completely hostile to the project, a non-binding resolution was finally adopted under the SA which contains little innovation but rather repeats the standard compromise formulae including improvement of competitiveness, subsidiarity principle and protection of employment rights via minimum provisions (*Agence Europe* 9 December 1994: 10).

<sup>5</sup> 'Given the solid base of European social legislation that has already been achieved, the Commission considers that there is not a need for a wide-ranging programme of new legislative proposals in the coming period' (White Paper on Social Policy, point 22).

enterprises) or to the functioning of the internal market, e.g. transfer of rights from occupational or supplementary pension schemes, and provisions concerning early retirement schemes. Thus undoubtedly, efforts will be made to an approach to include all member states.<sup>6</sup>

The non-use of the broadened Community competence under the SA confirms a wisdom among EC social policy analysts: *it is in fact not a missing explicit Treaty basis which prevented the development of a fully-fledged EC social policy* (this would always have been legally feasible under general treaty provisions such as Article 100 and 235 EEC). What has been absent is a consensus between the governments on the desirability and specifics of so doing.

As for the application of the extended *qualified majority voting procedure* under the SA, here too no revolutionary results have been evident. The two issues resolved so far on the basis of the SA have been unanimous – although Portugal abstained in the case of the EWCD. This fits well with the generally consensual tendency of EC social legislation. Obviously, the SA has not so far changed the pattern of decision making on the basis of the lowest common denominator in this area. However, one should not overlook that the mere possibility of eventually being outvoted often changes the character of the negotiations quite considerably.<sup>7</sup>

Also the field of *social partner involvement* in social policy decisions, which is the third considerable policy innovation by the SA, shows no eye-catching empirical success story so far. The first application of the new procedures saw no formal negotiations on a collective agreement between the two sides of industry, and eventually led to a Council Directive on European Works Councils. Yet, this is but the very tip of the iceberg. A closer look shows that there are significant developments towards more co-operative (and maybe even 'corporatist') patterns to be reported nonetheless.

### **3. The Corporatist Elements of the Social Agreement: Potential and Practice**

The SA consists of three positive layers of participation in the policy process by the social partners: First, a member state may entrust management and labour, if they so jointly request, with national implementation of directives adopted under the SA.<sup>8</sup> Secondly, the Commission has now a legal obligation to consult both sides of industry *before* submitting proposals in the social policy field – initially on the general principles and later on the details of a policy proposal. Thirdly, and most importantly, management and labour may, on the occasion of such consultation, inform the Commission of their wish to initiate negotiations in order to reach a collective agreement on the matter. This would bring conventional EU decision-

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<sup>6</sup> Possible further legislative actions concerning working time for sectors which are excluded from the Working Time Directive, if not decided by the social partners on their own, would be based on Article 118a TEU (see White Paper, point 9). In this regard it has to be noted that the UK has initiated an action against the Commission in the ECJ, challenging the use of Article 118a for the adoption of the above-mentioned Directive (*European Industrial Relations Review* 243: 2).

<sup>7</sup> If a 'veto' had been possible, the Portuguese argument that the EWCD be too far reaching might possibly not have led to an abstention but to a further lowering of standards.

<sup>8</sup> Concerning the EWCD which has to be implemented by 22 September 1996, only Norway and Sweden seem to have chosen the way of collective agreements.

making to a stand-still for at least nine months.<sup>9</sup> Indeed, such agreements could, at the joint request of their signatories, even be incorporated in a Council decision on a proposal from the Commission.<sup>10</sup> The main social partners at the EU level are the European Trade Union Confederation (ETUC), the Union of Industrial and Employers' Confederation of Europe (UNICE), and the European Centre for Enterprises with Public Participation (CEEP).

In fact these new procedures have been suggested by the social partners themselves – in the most important achievement of the social dialogue at the EU level so far (see Falkner 1993a: 87).<sup>11</sup> Towards the end of the IGC, ETUC, CEEP and UNICE – the latter clearly in anticipation of social policy innovations to be agreed upon by the governments – followed a suggestion by the Commission and concluded an agreement on the role of the social partners. The incorporation of those provisions at Maastricht proves that *all major actors* at the EU level (governments, Council, Commission, ETUC, UNICE and CEEP)<sup>12</sup> are *ready to participate* in 'a mode of policy formation in which formally designated interest associations are incorporated within the process of authoritative decision-making and implementation' (Schmitter 1981: 295), a classic formula for corporatism. Thus the social partners are now co-actors within the new procedures, and may even decide independently on matters which might later on be turned into EC law by the Council. But even in those cases where efforts to reach an agreement fail, there will be elements of corporatism in the area of the SA, guaranteed by the double consultation of the social partners prior to any Commission proposal to the Council. Contrary to the weak signs of corporatist involvement during the pre-Maastricht era (mainly via the Economic and Social Committee, which could mostly deliver its opinions only at a stage when compromise had already been reached in the Council), the rules now established guarantee attention for the positions of the social partner federations.

In practice, the case of the EWCD has already revealed that, even in the absence of a final agreement by the social partners, their positions were referred to by Commission and Council delegations. For example, the Commission argued that it would not take over most of the EP's amendments in the first reading because it wanted to stick as closely as possible to the existing Council compromise at eleven and to the social partners' 'approached standpoints' (i.e. the text of pre-agreement almost signed by them, see below; EuroAS 6/1994: 4; *Agence Europe* 6 May 1994: 11). Furthermore, the Commission published the various social partner institutions' statements submitted during the double consultation process in the annex of its later proposal to the Council. The Portuguese Council delegation explicitly referred to them when it came to the final decision.<sup>13</sup> It seems likely that in future cases, without a long-standing history of negotiations at the Council level, there will be scope for an even more influential role of the social partners.

But one also has to ask whether the *structure* of interest representation at the European level invites the use of the more far-reaching corporatist potentials of the SA. Political scientists

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<sup>9</sup> The Commission and the social partners may jointly decide to extend this period (Article 3.4 SA).

<sup>10</sup> The alternative is implementation via 'the procedures and practices specific to management and labour and the Member States' (Article 4.2 SA).

<sup>11</sup> Since, there have also been joint proposals on the Implementation of the Agreement, addressed by UNICE, CEEP and ETUC to the Council in a letter of 29 October 1993.

<sup>12</sup> According to officials on both sides of industry, all member organisations of the European social partner federations supported this approach too.

<sup>13</sup> Portugal eventually abstained because it considered the subject to require 'the greatest consensus between the social partners, at Community level, which unfortunately was not the case' (quotation from *Agence Europe* 20 July 1994: 15).

became used during the pre-Maastricht era to the prevailing assessment by Streeck and Schmitter in their paper 'From National Corporatism to Transnational Pluralism' (1991). These authors stated that 'interest representation around and within the Community was always much more "pluralist" than corporatist; more organisationally fragmented; less hierarchically integrated; more internally competitive; and with a lot less control vested in peak associations over their affiliates' (Streeck and Schmitter 1991: 200). Concerning the procedural dimension, they note the absence of a mutually organising *interaction effect* between labour, capital and the state which would prompt corporatist patterns at the expense of pluralist pressure politics. But while the innovative provisions of the SA directly address this deficiency, the system of interest representation may be influenced only via secondary effects and some incentives for evolution in a more co-operative direction. Some developments of this kind may already be reported (for a more detailed analysis see Falkner 1995) and in general, they seem to support the hypothesis that the SA provides supportive legal and procedural backing that in turn creates pressures for reforms within the groups of social partners that would make them more capable actors at the European level.

### 3.1. Who are the 'Social Partners'?

In its Communication on the application of the Social Agreement [COM(93) 600 final, 14 December 1993; see par. 22 ff.], the Commission defined a set of criteria for those organisations which have since been included in the *consultations* preceding legislative proposals pursuant to the SA. On the basis of a study on the various European trade union and employers' confederations, the Commission drew up a list of organisations which broadly fulfilled those criteria, subject to review in the light of subsequent experience. This list includes: the three general cross-industry organisations, UNICE, CEEP and ETUC; three organisations representing certain categories of workers or undertakings at the cross-industrial level; one specific organisation (Eurochambres); and twenty-two sectoral organisations outside a cross-sectoral federation.<sup>14</sup> It has been anticipated that there might be some selective consultation depending on the scope of the individual proposal, and depending on whether it would be 'horizontal' in its application or specific to a particular sector or category. In the past, the horizontal social dialogue has involved CEEP, ETUC and UNICE, while various European industry or employers' associations and the European Industry Committees of ETUC were involved by the Commission in dialogue on sectorial issues (*European Industrial Relations Review* 241: 30f).

All of these organisations might hence be considered 'formally designated interest associations' in the sense of Schmitter's description of corporatist systems. They will systematically be involved, i.e. consulted in the decision-making process under the SA. It is the same range of associations which may, during the process of consultation, theoretically decide to negotiate on a collective agreement. Yet, the Commission judges that it is up to the organisations themselves to develop their own dialogue and negotiating structure [see COM(93) 600, para. 26]. Thus, responsibility lies with the representatives of labour and management themselves. What does early experience of the SA tell us about the application of its notion of 'social partners' at the level of collective negotiations? It was exclusively the three general cross-industry federations which negotiated a possible agreement on European Works Councils. So, in the *practice* of the SA (even though it is early days) we were surprised by a *much more 'corporatist' system* of organised interests than hitherto – at least in

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<sup>14</sup> If necessary, the Commission also wants to consult the European Industry Committees within ETUC and the respective sectoral units of UNICE.

the sense of less organisational fragmentation and internal competitiveness among the collective negotiators than expected.<sup>15</sup> This trend is confirmed if we look at the attitudes and internal procedures of the three major federations; these have significantly changed since the SA entered into force – and will most probably continue to do so further.

### 3.2. Negotiating Capacity at the European Level

It is beyond any doubt that the system of interest representation at the European level is not to be compared with the centralised, monopolistic, hierarchical ones of the classic corporatist nation states. While many analysts have pointed this out (for a recent account see Obradovich 1995), less attention has so far been attributed to recent developments prompted, at least in part, by the SA.

ETUC was first to reform its internal structure with a view to enhancing negotiating capacity at the European level. In 1991, voting by two-thirds majority was introduced, and the European Industry Committees were attributed full voting power except in financial and statutory matters (Ebbinghaus and Visser 1994: 239). This may be seen as some improvement to the problem of coordinating both territorial and functional interests, both now directly represented within the umbrella of ETUC.

The change in UNICE's statutes in June 1992 was directly targeted at meeting the challenges of the Social Protocol. The organisation was formally assigned the task of representing its members in the dialogue between the social partners provided for in the SA (Article 2.1 of the Statute). Despite the fact that UNICE would 'normally seek a consensus among its members', and 'not adopt a position if this is contrary to the vital and truly justified interests of one of its members' (point 7.1), the association was given the possibility of approving proposals unless three member states vote against it (see Article 7.2). However, 'any draft agreement negotiated in the framework of the dialogue between the social partners' was to be 'approved by the Association on the basis of consensus among all the members affected by the agreement in question' (see Article 7.8).

Under those circumstances, UNICE could not overcome the non-approval of the last-minute compromise concerning European Works Councils by its British member CBI in March 1994. Only three days before the closing date of the second phase of consultation, UNICE and CEEP had (after the Commission had tried to mediate) proposed a text for a pre-agreement which went much further in the direction of ETUC's demands than previous ones (see Gold and Hall 1994: 180). Thus, a compromise on the formal start of collective negotiations, including important aspects as to their content, was *de facto* reached between the peak federations. There had also been consensus between the parties to submit any final agreement to the Council for implementation as European law.<sup>16</sup> Considering that the chances for a

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<sup>15</sup> On both sides of industry, some groups might actually challenge the three major federations' monopoly in negotiating as cross-sectoral social partners in the frame of the SA, e.g. UAPME representing small and medium size enterprises, and CESI representing independent trade unions. Yet, there seem only small chances that in case of a legal action the ECJ would open 'Pandora's box' and *de facto* hinder the development of effective collective bargaining at the European level by enhancing the number of participants against the will of the key actors.

<sup>16</sup> There is widespread consensus in Brussels that future agreements between the social partners would be 'implemented' by Council decision: e.g. concerning the case of parental leave, there exists apparently already a consensus in that respect. Thus, the problem of enforceability, often raised because the European associations' decisions are not legally binding for their members, would be circumvented.

collective agreement on employee information and consultation were almost zero from the outset,<sup>17</sup> the negotiation process so far and this convergence of positions has to be called surprisingly successful. However, at that point the Confederation of British Industries (CBI) withdrew from the negotiations, because the latest compromise reached in Brussels just before the weekend could not be submitted to the relevant body before the formal deadline.

Under the then governing rules, CBI could not be outvoted within UNICE. Furthermore, ETUC made it a necessary precondition for entering into formal negotiations that CBI would participate. Here, the European federation has been seen as taken hostage by the British TUC which wanted to force its national counterpart into an agreement.<sup>18</sup> Thus, the controversial declaration of CBI was a lethal stumbling-block to a European collective agreement on works councils.

Further developments clarified the rules of the game for the future, both within and between labour and industry associations at the European level. An internal agreement of UNICE implies that CBI will continue to participate but not have a veto right in negotiations pursuant to the SA. On the other hand, CBI will not be bound by an agreement of which it does not approve.<sup>19</sup> The ETUC has accepted this special status of CBI, and TUC might also content itself with an observer role.

### 3.3. Readiness to Enter into Collective Agreements

Traditionally, scholars have identified a complete absence of interest in centralised negotiations at the European level on the side of business (see Streeck and Schmitter 1991: 206), and even the political strength that business was able to derive from its organisational weakness. Following these premises, it may be seen as a first effect of the SA's promotion of corporatism that UNICE was at all ready to enter into collective negotiations. When the Commission had launched its new initiative on EWCs at the beginning of the 1990s, UNICE had rejected the draft on the grounds that it undermined national law, the authority of management and the autonomy of the social partners, and caused 'unnecessary and intolerable complications' and a 'negative impact on investment, especially in the less developed regions' (UNICE 1991: 2). Shortly before the SA entered into force on 1 November 1993, however, UNICE announced that it was 'ready to sit down with the Commission and/or the European unions to develop a positive and constructive procedure for information and consultation that is acceptable to all parties...' (cited from *European Industrial Relations Review* 238: 13; see also *Agence Europe* 15 October 1993: 7).

Apart from this first practice under the SA, the overall climate currently found in Brussels contrasts with the sceptical scholarly views which pre-dated Maastricht. *De facto*, we may currently observe something like an 'issue coalition' between relevant actors within the

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<sup>17</sup> Controversial negotiations on employee participation in general and on EWCs in particular had already been going on for many years (see Hornung-Draus 1994, 5). The ETUC had repeatedly claimed that the major labour law proposals originating from the Commission's 1989 Social Action Programme were not adequate topics for agreement. On those issues, which it considers central to the 'social dimension' of the internal market, ETUC wants to see legislative action. This might already be different concerning the next text negotiated under the Social Protocol, parental leave.

<sup>18</sup> As long as the strong German unions would not support the agreement, TUC was indispensable for the necessary two thirds majority within ETUC.

<sup>19</sup> This is laid down in an unpublished letter of CBI to UNICE of April 1993 (confirmed to the author by both UNICE and CBI).

Commission and the European peak federations, aiming at the conclusion of a social partner agreement on the next issue to be processed pursuant to the SA, i.e. reconciliation of family and professional life, especially the question of parental leave. This subject seems apt for a compromise because of its lower degree of politicisation (compared to the EWCD) in the past and its lower ranking within the priorities of both sides of industry<sup>20</sup>. On 20 June 1995, the second phase of consultation on reconciliation of work and family life was launched by the European Commission. The seventeen contributions by diverse interest groups which were received during the first phase, reportedly expressed 'the general opinion that the social partners have to play an active role in drawing up the fundamental principles, and then in their implementation through collective bargaining' (*Agence Europe* 22 June 1995: 14). Until December 1995, the 'social partners' now have to elaborate their opinions on respective details or to declare readiness to enter into formal collective negotiations.

Several factors obviously contribute to a more collaborative posture of industry since the SA has entered into force. By asking for the new corporatist procedure within EC social policy, the European federations UNICE, ETUC and CEEP created high expectations. For the sake of their reputation, they now feel considerable pressure *to meet those expectations* — especially considering that the next IGC, with possibly further relevant innovations, is approaching. Examples for a successful use of the corporatist potential of the SA seem urgent in the self-interest of management and labour. Already, the Council report on the functioning of the Union (see point 41, SN 1821/95, 14 March 1995), which will serve as an input for the IGC, notes concerning the SA that the dialogue of the social partners at the European level has not yet succeeded in the establishment of a collective agreement.

Another activating factor within the SA is the increased *possibility of legislation* (often via qualified majority voting) by the Council in the case of failure to reach an agreement on a particular issue (see the case of the EWCD). Relevant incentives do certainly come from the prospect of more adverse results from formal legislation. The ETUC might fear that comparatively low standards might prevail in the Council, and the employers would rather like to prevent any provisions they would perceive as too costly or rigid (as was the case concerning the EWCD). In either case, the lever of Council legislation – or of the deliberate absence of legislation, which might put enormous pressure on ETUC – might prove to be some compensation for the absence of a real capacity for Keynesian-expansion at the EU level (or a political movement in that direction). This had seemed indispensable for the 1970s macro-corporatist concertation at the national level (see Streeck and Schmitter 1991: 211).

It should be mentioned that although in theory the procedures of the SA should be applied to all policy proposals equally, there are *de facto* considerable differences concerning the probable outcome. These depend on both the chances of a Council compromise (which in turn influences the social partners' negotiating tactics) and the character of the specific policy instrument. An example of the latter is the current issue reversing the burden of proof in sex discrimination law cases, which directly touches court procedures. This will probably be excluded from the field of possible collective agreements by both sides of industry.

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<sup>20</sup> Which might certainly be criticised by feminists.

## 4. The UK and the Social Agreement: Opt-out or Interdependence ?

In theory, 'acts adopted by the Council and any financial consequences other than administrative costs entailed for the institutions shall not be applicable' to the UK (Protocol on Social Policy, Article 2, last paragraph). This made John Major rejoice: 'Europe can have the social chapter. We shall have employment ... Let Jacques Delors accuse us of creating a paradise for foreign investors: I am happy to plead guilty' (cited from *Agence Europe* 3 March 1993: 13f). However, what seems a clear statement in legal terms might cause considerable difficulties when applied within a context of otherwise integrated economic and political entities.

### 4.1. Participation in Deliberations

The UK's opt-out from the social policy measures agreed by the rest of the member states under the SA has no predecessor within EC history. Accordingly, the new arrangement, whereby the eleven were authorised to have recourse to the institutions, procedures and mechanisms of the EC Treaties and the TEU for the purposes of implementing their Agreement on Social Policy, caused legal as well as political questions, not least as regards the participation of UK members within the EC institutions. The text of the Protocol on Social Policy clarifies only that 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 ... Agreement' (Article 2). In practice, this means that the British delegation does not leave the meeting room, but remains passive in Council debates and votes under the SA.

There has been considerable debate on what procedures are appropriate concerning British members of the other EC institutions (Barnard 1992: 27; Schuster 1992: 182ff; Watson 1993: 503f). Why should British members of the Commission, the ECJ and the EP be given the possibility of influencing decisions under the SA? Because they are not chosen as representatives of their country in the proper sense, is the mainstream answer for Commission and Court (Watson 1993: 303f). By contrast, the participation of the MEPs has been contested more often (Hailbronner 1994: 122), as they are legitimated by direct election from their own countries', not the European, electorates. Indeed, the Liberal Group in the EP had proposed the exclusion of British MEPs under the SA, on the grounds that they should not be voting on matters which would not affect them. However, the EP voted by a *large majority in favour of allowing its members* from countries which have opted out from various aspects of the TEU (thus also referring to the Danish defence policy 'opt-out') to participate in debates and votes related to the relevant subjects (plenary session of 17-21 January 1994; see *European Industrial Relations Review* 241: 3).

In practice, *even the British representatives of labour and industry* – although traditionally playing only a very limited role in British politics especially since the Thatcher years – chose participation in the new model of EC social policy-making. In the case of the EWCD, as we have seen, all member organisations of UNICE agreed to enter into some kind of collective negotiations<sup>21</sup> – and the same is true for the workers' side. *Contrary to their government, the British members of the major federations do clearly prefer voice to exit.* This is even true for CBI which has traditionally been known for its hard-line position against any social dimension to the internal market. Confronted with the new situation since Maastricht, British

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<sup>21</sup> Although those were not yet formal negotiations in the terms of the SA.

employers see good reasons for not being absent from the debates on what might one day be European social policy also applicable to them. The legitimacy of this reasoning becomes very clear if we look at the case of the EWCD.

#### 4.2. The UK and the Works Councils: Not Affected At All?

The British government does not have to implement the EWCD in the UK legal system. *De facto* there are nonetheless direct legal obligations for British firms, as well as indirect pressures, to be noted.

As to the former, the EWCD indeed applies also to the non-UK operations of firms with headquarters in the UK, which have enough subsidiaries and employees in other member countries of the European Economic Area (EEA) to fulfil the necessary conditions, i.e. at least 1000 employees within, and subsidiaries in at least two of the 16 EEA states where the Directive applies with at least 150 employees each (see Hall *et al.* 1995: 11). There are obviously serious difficulties in finding complete breakdowns of employment figures amongst UK companies. However, experts have estimated that 'the impact in the UK in terms of numbers of companies affected looks likely to be similar to that in France and Germany' (Hall *et al.* 1995: 12). As many as 130 UK companies might be directly affected in that way.

Furthermore, for companies with headquarters outside the UK it will be 'very difficult from a human resources and an industrial relations point of view' to exclude the British employee representatives from the European information and consultation exercise if they, possibly with support from their continental colleagues, so request (Blanpain and Windey 1994: 65; see also *European Industrial Relations Review* 246: 15) – so that most British subsidiaries of European groups might in the end benefit from the Directive.

Indeed even many groups with UK headquarters, where subsidiaries would have to comply with the Directive, already negotiate EWC agreements centrally. Among the practical reasons for this is that the British headquarters do not want to hand over the running of an EWC to colleagues from other member states. And *de facto*, those British headquartered firms which are affected by the EWCD abroad will extend the arrangements to their UK employees: more than 90% of those British multinationals will, according to CBI, thus ignore the British government's opt-out (see *Sunday Times*: 6 November 1994)!

As of May 1995, three UK-based multinationals are already establishing European Works Councils: United Biscuits, Coats Viyella (a leading textile group), and BP Oil.<sup>22</sup> United Biscuits employ 40,000 people world-wide, 18,000 in the UK and 5,000 in other European countries (see *Agence Europe* 3 November 1994: 13). Its Human Resources Director, Wilkinson, comments: 'We believe that a workforce that understands the objectives of business and the pressures on it is better able to respond appropriately to necessary operational change.' (*Agence Europe* 10 November 1994: 15). The example of the EWCD is clearly a quite specific one. It nonetheless underlines that the British opt-out might well fit better into a world of legal theory than into one of economic interdependence.

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<sup>22</sup> Apart from those institutionalised forms, there has also been a boom of transnational meetings of workers' representatives in multinational corporations, fuelled by the Commission's budgetary support under EC budget line B3 4004 (containing payments as high as ECU 15.000 to 17.000 annually between 1993 and 1995; *OJ* 94/L 369/896ff). 'UK companies, employees and trade unions have been very much involved in these developments' (*European Industrial Relations Review* 246: 16).

#### 4.3. The UK's Influence on the SA: A Whip in the Window?

The fact that Great Britain is exempted from the SA's policy deliberations creates a situation where one member in a common market is not bound to a specific set of rules governing the game. It is true that in the past, most social policy has been confined to the nation state. Yet, the increasing economic interdependence, in general and within the EC internal market in particular, has made social and labour standards ever more susceptible to arguments of competitiveness. It was exactly against this background that a 'social dimension of the internal market', the so-called EC Social Charter, and eventually the SA were fought for.

But any social directive may to some extent create (additional) distortions of competition, if direct or indirect labour costs are increased outside the UK only. This would be the case to a greater extent with other directives compared to the EWCD. Even though economists argue that labour costs are multifaceted and productivity is more important in general, politicians tend to be susceptible to arguments by industry not to lift respectively even to lower employers' burdens (Falkner 1993a) what is further eased by the current general trend of flexibility and de-regulation in labour law (Falkner and Tàlos 1994).

It is clearly to be understood in this light why the eleven signatories of the SA have initially not wanted to employ their new Treaty base, but rather preferred to keep the UK in the game.<sup>23</sup> So far, *only reluctant and incremental* use has been made of the SA. Soon after the EU had entered into force, the Greek council presidency opened its term in January 1994 with considerable verbal devotion to the social dimension. The President of the Social Affairs Council, Mr Giannopoulos, told MEPs that he intended to unblock several issues by majority voting if necessary – especially the directives on parental leave and on reversal of the burden of proof: 'It is difficult to move away from the system of unanimity, but .... I will bring these things forward and get a decision even if that means just eleven' (*Agence Europe* 15 January 1994: 8). Despite all this, no new use of the SA had been made by the end of June 1994 – as the overwhelming majority of delegations preferred to continue the tiring negotiations among all member states (see Euro AS 5/1994: 4).

Meanwhile, the quality of the compromise solutions reached among the twelve, e.g. on young workers, became heavily criticised. The bargaining processes following any Commission proposal typically ended in significant lowering of standards in order to make the UK (plus occasionally other Council members) drop its opposition – an often useless attempt. The EP had already made it clear earlier that it preferred 'a good directive by 11 countries to a bad one by 12' (van Velzen, Chairman of the Committee on Social Affairs, *Agence Europe* 15 January 1994: 8). By the end of the Greek presidency 1994, the social policy spokesperson of the EPP, Ralf Chanterie, warned that social affairs ministers 'now have the wrong idea' of seeking consensus 'even on subjects where the majority can be attained'. Consensus was always sought by reducing demands, he added, so that 'the European Parliament consequently wonders if it is still useful to approve directives on which there is consensus' (cited from *Agence Europe* 28 May 1994: 8) – for they were completely watered down.

It was during the second half of 1994, that the Council became gradually ready to have more legal projects transferred to the SA: this concerned mainly parental leave and atypical forms

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<sup>23</sup> Except for the EWCD, which was put under the SA only a few days after the TEU entered into force.

of employment. But despite the Commission's announced 'intention to use both ... (the SA) ... and the other Treaty provisions to ensure a dynamic social dimension of the Union' (White Paper on Social Policy, point 23), the uniformity of EC law – and thus, the level playing field for economic actors – will clearly continue to be a major concern also in the future. In its Communication on the implementation of the SA, the Commission accordingly highlights as its central goal the development of a social policy that finds the approval of, if possible, *all* member states (see point 8).

## 5. The Social Agreement and the IGC

According to Commission sources, the social dimension, in the broad sense, will undoubtedly play an important part in the IGC commencing in 1996 (see e.g. Social Action Programme of 11 April 1995, point 3). Within this debate, the British opt-out will clearly present the major topic: in its report on the operation of the Treaty on European Union which was presented to the reflection group for the IGC [SEC(95) 731 final, 10 May 1995; see point 102 ff.], the Commission criticises the EC social policy for now being covered by two distinct legal bases. It indicates that the choice between the two sets of rules may be problematic. Concerning the Social Agreement among fourteen members only, it considers 'regrettable that not all Member States are involved because it rather blurs the Union's image with respect to social policy and creates the potential for disputes over distortions of competition' (*ibid.*, point 105). The Council report on the functioning of the Union (SN 1821/95, 14 March 1995) hardly suggests any directions of reform in general – but this is in particular true for social policy. Nonetheless, criticisms from at least a considerable proportion of Council members is made public with the statement that 'certain actors' esteem that the search for compromise among all member states, which has so far been conducted before having recourse to the SA, lead to a process of lowering standards of the texts finally adopted (see point 41).

Other actors such as the EP, the Economic and Social Committee (ESC), and ETUC, have made it explicit that they prefer an integration of the SA into the revised Treaty. For the EP, 'Social policy should be a core area of EU competence (with incorporation of the Social Charter, and an ending of the United Kingdom opt-out) and should be better integrated with economic policy as a whole' (Resolution on the functioning of the TEU with a view to the 1996 IGC, A4-0102/95, 17 May 1995, point 10 ii). The ESC feels that the IGC's programme should aim at 'achieving consistency between the chapters on social policy, *inter alia* by incorporating basic social rights and the Social Protocol into the Treaty proper, abolishing opt-outs and extending qualified majority in social matters' (CES 273/95 fin, 4. May 1995, point 5.7.). Also ETUC's General Secretary, Gabaglio, called for the integration in any new Treaty of both the Charter of fundamental social rights and the Maastricht Social Agreement (*Agence Europe* 9 February 1995: 14).

However, the decisive actors of the IGC are the member governments. Thus, much will again depend on the UK and the party then in

government, since it will once again possess veto powers. Clearly, the outcome of the forthcoming IGC will shape the future of an even wider Union, including e.g. the Central and Eastern European countries whose social standards do not meet the EC level. So far, the Union has with its relevant White Paper<sup>24</sup> indicated that social affairs be part of a 'programme for meeting the obligations of the internal market which could be followed by each associated country and monitored by the Union' (ibid., point 1.4). This constitutes an important achievement of DG V (social policy) vis-à-vis other units of the Commission which would have given less importance to social standards within the widening process. It seems that the concept of allowing for long transition periods, rather than accepting further opt-outs from common social policy, might prevail with a view to further enlargements.

Meanwhile, the imminent IGC impacts on the major actors' behaviour. As we have seen, the social partners and the Commission have formed an 'issue coalition', working towards a collective agreement on parental leave. This is in order to legitimate the new corporatist procedures and to help them to survive possible future changes in the Treaty base. At the opening of ETUC's 8th Congress, Commission President Santer stated that the European social partners 'must show that the European constitutional legislator was right to trust them and give them considerable coregulatory power' (*Agence Europe* 10 May 1995: 11). On several occasions, high-ranking Commission members have publicly expressed their optimism about the social partners becoming reconciled to rules on parental leave (see President Santer and Commissioner Flynn, cited in *Agence Europe* 31 May 1995: 9).

Also the recent Commission strategy within the social area (as expressed for example in the April 1995 Social Action Programme) may be interpreted as 'tactics of legislative moderation', chosen with a view to 1996. In the absence of any further legislative proposals, which might divide the Council members, numerous studies, expert hearings or reports, observatories etc. are being initiated. One way of thinking about those voluntary, co-operative projects is that they might prepare the ground for a legally more activist strategy during the post-IGC era, when the extended Community competences and the increased possibility of majority voting under the SA might be employed amongst all EU member states.

According to another, maybe more realistic interpretation, however, the scarcity of binding EC social and labour law will continue after the next IGC – regardless of the question of whether the SA then be included in the Treaty. This view builds on the often antagonistic interests within the EC Social Council (even if composed of only 14 members), and on the general political trend towards flexibility and lowering of social and labour standards, due to increased pressures from the internationalisation of the economy. Those two main factors might thus bring about a 'neo-voluntarist European Social Policy Regime', which 'represents a break with the practice of the European national welfare state to create "hard", legally enforceable status rights and obligations for individual citizens and organised collectives acting in, taking advantage of, and being disadvantaged by, market relations' (Streeck 1995: 52).

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<sup>24</sup> White Paper: Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union'; COM(95) 163 final, 3 May 1995.

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