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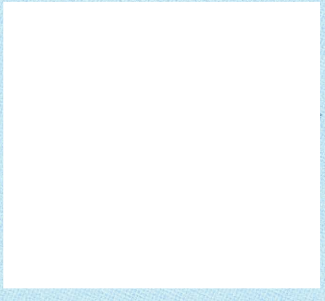
SOCIAL POLICY IN A UNITED EUROPE



Social policy series

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SOCIAL POLICY IN A UNITED EUROPE

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Free University of Brussels

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Foreword

Over the past few years, the social policy of the European Community has been given impetus, brought about by the new provisions introduced into the Community Treaties under the Single European Act and by the decision to draw up a Community Charter of Fundamental Social Rights for Workers.

While the intergovernmental conferences on political union and economic and monetary union are continuing their deliberations, it appeared useful to consult an expert on European social legislation in order to take stock of European social policy and work out some proposals for building further on the existing Treaty provisions.

The European Parliament's Directorate-General for Research has accordingly enlisted the assistance of Mrs Eliane Vogel-Polsky, Professor of Law at the Free University of Brussels and Director of Research at the University's Institute of Sociology.

Her report has been translated into English and German.

Robert RAMSAY
Director-General of Research

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Introduction

This study has been carried out for the Directorate-General for Research of the European Parliament, Division of Social Affairs, and its subject is social policy in a united Europe and the role of the European Parliament.

Article 2 of the research contract stipulates that 'the study should define the global concept of social policy in a united Europe. It will be based on current treaties and evolution of this policy, particularly during formulation of the Community Charter and of the action programme set up to implement it'.

This study adopts a two-fold approach.

The first aims to offer a critical review and analysis of Community history in the social sphere.

Given the acknowledged failure in the social sphere of the process of economic integration set in motion 33 years ago by the Treaty of Rome, it is important to examine the underlying reasons for this and to draw lessons from the failures, obstacles and possible successes encountered. An analysis of this type enables the institutional inadequacies and the constraints created by the unbalanced treatment of social matters in the treaties establishing the European Communities to be identified.

They can be attributed principally to an imbalance in the Community legal system between European social legislation with a strictly limited content and the ambiguous status of social policy, to a lack of cohesion at Community level between established legal procedures and the prescriptive nature of treaties and agreements resulting from a refusal to identify collective cooperation as one of the ways of achieving social objectives, and to the contradictions arising from the partial reforms of the Single Act in respect of social matters.

The second approach attempts to take a critical look at the results of this review and, amidst the institutional reforms under discussion, examines the essential bases for establishing a Community social policy.

It aims to outline new perspectives by taking stock of the status of social matters falling under the jurisdiction of the Union, the definition of social policy, the status of fundamental social rights, and the relationship between Community law and treaties relating to international and European social legislation. It seeks, moreover, to define the conditions which are necessary to provide a balance between Community legislative texts and European collective agreements and to give a boost to progress in the social sphere.

To this end, it examines individual spheres of jurisdiction and organic links within the Community's three main institutions, together with the roles of the Court of Justice, the Economic and Social Committee, and new bodies such as the European Labour Council, the Labour Court of the Court of Justice of the European Communities and the European Social Inspectorate.

I – CRITICAL ANALYSIS AND REVIEW OF COMMUNITY HISTORY IN THE SOCIAL SPHERE

In order to evaluate the prospects and strategies for achieving a social Europe, from a political and legal standpoint, it is essential to be familiar with the institutional constraints and mechanisms which, in the past, have influenced Community social policy and contributed to its weakness. It is also necessary to pick out the bases of the positive review which may be made of European social legislation established in accordance with the Treaty, namely the freedom of movement of workers, social security for persons moving within the Community, and professional equality between male and female workers. Of course, these are areas limited to specific problems and not a process for the global integration of working conditions, but their achievement reveals that such integration is possible.

Unlike European social law, it has been almost impossible to carry through social policy at Community level as a result of the ambiguous treatment it receives in the Treaty's institutional and decision-making system.

In reality, we have had to wait nearly 20 years for it to be possible for actions leading to Community standards and policies in the social sphere to come into force as a result of the adoption of the first social action programme.

It is proposed to divide firstly non-policy social matters and secondly the beginnings of a limited social policy into the following periods:

1958 to 1974: the status of social matters in the Treaty of Rome, January 1974;

1974 to 1980: the adoption by the Council of the first social action programme,
first directives relating to labour law,
first directives relating to health/safety at the workplace,
first directives relating to male/female equality;

1980 to 1987: the draft Treaty on European Union,
the Single Act;

1987 to 1991: entry into force of the Single Act (1987),
the draft for incorporating fundamental social rights into the Community legal system,
Declaration (by 11 Member States) regarding the Community Charter of the Fundamental Social Rights of Workers (1989),
Commission action programme relating to the implementation of the Community Charter of the Fundamental Social Rights of Workers, the European Parliament strategy for European Union.

This study cannot provide an exhaustive analysis of European social legislation and Community social policy, but we would like to concentrate on the reasons behind the considerable delay in establishing a European social structure in order to draw conclusions which will make it possible legally to formulate Community rules and measures capable of establishing economic and social cohesion.

A. The period 1958–74 — the status of social matters in the Treaty of Rome

One of the major features of the design of the common market is the greater importance given to economic matters as compared with social matters.

In its original form, the Treaty of Rome took no account of social matters except where these were related to the economic aims being pursued. When it became apparent that certain social conditions had to be satisfied in the realization of a given economic goal, they were to be integrated into the Community instrument system. This was the case of freedom of movement and social security for migrant workers and also that of the principle of equal pay for men and women imposed by Article 119 EEC. The Court of Justice of the European Communities has clearly revealed the economic aim of equal pay, namely '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' (paragraph 9). Therefore, wage dumping, which is contrary to the notion of free competition, is to be avoided[1].

Accordingly, it is possible to identify the explicit social fields of competence entrusted to the Community institutions in specific areas by Articles 119, 123 and 128 EEC and the explicit fields of competence of labour and social security legislation directly linked to the achievement of the free movement of persons and services by Articles 48 to 56 EEC. These matters constitute European social legislation.

On the other hand, social policy does not have the status of a 'common policy' like that relating to agriculture (Articles 3 d and 38 to 47) or transport (Articles 3 e and 74 to 84).

Title III of the EEC Treaty (Articles 117 to 128) relates to social policy and confers on it an ambiguous status. In fact, although this Title covers three fields covered by European social legislation, namely Articles 119 (male/female equality), 123 to 127 (the European Social Fund), and Article128 (common vocational training policy), it has to be acknowled

[1] Judgment of 8 April 1976, Case 43/75 *Defrenne II* [1976] ECR 455.

ged that Article 117 which defines the legal bases of Community social policy does so in an ambiguous manner and that Article 118 is very restrictive in scope.

A.1. *The legal bases of social policy*

A.1.1. On the basis of a general field of competence

(a) Article 117

Many authors deny that Article 117 gives the Community bodies any field of competence whatsoever. On the basis of the ideological and historical preconceptions of neoliberalism, they are of the opinion that this provision affirms only the theory of automatic progression in social matters which will ensue from the achievement of the common market.

The principally economic orientation of the EEC is already confirmed both in the preamble and in Part One of the Treaty, which defines the principles and the foundations of the Community. The improvement of the standard of living of populations and possible social progress are perceived not as prime objectives, but as the expected consequences of the establishment of the common market and of the development of the economic activities of the Member States of the Community. Article 117 gives an indication of this since it provides that 'the 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 harmonization while the improvement is being maintained'. This harmonization while the improvement is being maintained has an interesting dynamic significance to which we will refer again later.

Paragraph 2 of Article 117, however, does not formulate a proposal or impose implementation on the Community bodies, and is restricted to 'believing' that such a development will ensue:

1. from the 'functioning of the common market': this is the theory of the virtually automatic favourable consequences of the achievement of economic objectives;
2. 'from the procedures provided for in this Treaty': this is the realization of the specific social objectives introduced into the Treaty in connection with the attainment of the free movement of persons, social security for migrant workers, freedom of establishment, the European Social Fund and Article 119;
3. 'from the approximation of provisions laid down by law, regulation or administrative action'.

There is, however, a further school of thought which maintains that the 'ingredients' of Community law referred to Article 117 make it possible to detect a general field of competence for social policy. For some authors, the phrase 'Member States agree' has the nature of a contractual obligation. According to Schnorr and Egger[1], for example, Article 117 (paragraph 1) constitutes an agreement on the part of Member States in respect of 'the need to promote social progress'. If this is so, the nature of this agreement is seen in an interesting light in Article 5 of the Treaty. This provision lays down a so-called function-splitting principle conferring upon Member States special responsibility in the implementation of Community objectives: it provides that '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. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty'. In the social sphere, the Court of Justice of the European Communities has specified 'that the Member States' obligation arising from a directive to achieve the result envisaged by the directive, and their duty under Article 5 of the Treaty to take all appropriate measures ... is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts'.[2]

On the subject of requirements applicable to Member States under the terms of Article 5, the Court of Justice of the European Communities was particularly alert in a matter related to the conservation of stocks within the sphere of the common fisheries policy. The Council had not established, within the time-limits laid down by the Treaty and in regard to a matter entirely dependent upon Community legislation, the measures introduced by Article 102 of the Act of Accession of the United Kingdom. Faced with a lack of action on the part of the Council, Member States unilaterally took measures to conserve fishery stocks. The Court considered that, under Article 5, 'Member States are required ... to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty. That this provision imposes on Member States special duties of action and abstention in a situation in which the Commission, in order to meet urgent needs of conservation, has submitted to the Council proposals, which, although they have not been adopted by the Council, represent the point of departure for concerted Community action'.[3]

According to the decisions of the Court, Article 5 imposes on all Member States an obligation to loyally cooperate and assist in the tasks of the Community.[4]

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[1] Schnorr, G. and Egger J., *Encylopedia of labour law.* Article 120 of the Treaty, in the chapter on social policy, also constitutes a contractual obligation for Member States since 'they endeavour to maintain the existing equivalence between paid holiday schemes'.

[2] Case 79/38 *Dorit Harz* v *Tradax* Judgment of 10 April 1984 [1984] ECR 1921 (paragraph 26).

[3] Case 804/79 *Commission* v *United Kingdom* Judgment of 5 May 1981 [1982] ECR 1045 (paragraph 28).

[4] Case C 48/89 *Commission v* Italy Judgment of 14 June 1990; Case C 374/89 *Commission* v *Belgium* Judgment of 19 February 1991 (not yet published).

When read in conjunction with Article 5, Article 117 obviously gives greater emphasis to the notion of the 'need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained'. However, not only the Member States are involved here: Article 117 also provides for specific action in the field of social policy on the part of the common institutions, since paragraph 2 refers to the procedures provided for in the Treaty and to the approximation of legislation. This latter reference has in view a major system for the formulation of Community policies laid down by Article 3 h and Article 100. Nevertheless, approximation can proceed only if such a decision is made unanimously by the Council, by way of directives and solely for the approximation of provisions laid down by law, regulation or administrative action and directly affecting the establishment or functioning of the common market (Article 100).

This is precisely the principal question posed during the first period: the difficulty of demonstrating that the approximation of social provisions in a given sphere directly affected the common market.

(b) The restrictive scope of Article 118

Article 118 can immediately be seen as constituting a restriction of the fields of social competence in favour of Member States.

Besides the social objectives expressly laid down in other provisions of the Treaty, the list given in Article 118 clearly outlines the limits of Community social policy. This Article unquestionably has a restrictive nature since the tasks it entrusts to the Commission are confined to the promotion 'of close cooperation between Member States in the social field, particularly in matters relating to employment, labour law and working conditions, basic and advanced vocational training, social security, prevention of occupational accidents and diseases, occupational hygiene, the right of association and collective bargaining between employers and workers. To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at international level and those of concern to international organizations'.

The field of competence of the Community is thus restricted to cooperation between Member States organized by the Commission. The Court of Justice drew attention to this in a judgment of 9 July 1987 (Joined Cases 281/85, 283/85 to 285/85, 287/85, paragraph 14)[1] and rescinded a decision by the Commission, at the request of five Member States, because the said decision could not impose a result to be achieved by consultation on Member States nor prevent them from taking national measures in the field of immigration policies. The judgment stressed the pragmatic nature of Article 117 and specified that, since the Commission had only procedural powers to set up consultations between Member States, within the list of social spheres in Article 118, it (the Commission) could not impose results to be achieved in such consultation, nor prevent Member States from introducing proposals or controls which it considered out of keeping with Community policies and actions (paragraph 34 of the same judgment).

The list of social areas given in Article 118 demonstrates the extent to which the field of social legislation (whether individual or collective) originally lay outside the supranational jurisdiction of Community bodies, without prejudice, however, 'to the other provisions of this Treaty' and the general objectives thereof.

Although the role of the Commission is strictly limited, the means available to it under the terms of Article 118 are also negligible, above all if these are compared with those at its disposal in other spheres. These are studies, opinions and consultations together with the exercise of its general power of recommendation, arising from indent 2 of Article 155 of the Treaty. This explains why most of the actions taken by the Commission in the social sphere have been recommendations. 'A recommendation defines a course of action to be taken but has no binding force like a regulation or a directive'. Article 189 specifies that 'recommendations and opinions shall have no binding force'. It is thus possible to observe that, during the period in question (i.e. 1958 to 1974), results of Community measures in the sphere of social policy were very poor. The Commission endeavoured to promote social policies at Community level through studies, opinions, meetings of experts, etc., but to no great avail. These failures are attributable both to the institutional constraints and the political consensus within the Council not to formulate a European social policy.

A.1.2. On the basis of subsidiary social fields of competence

Nevertheless, it should have been possible to overcome this political impasse by means of the measures laid down in Articles 100 and 235 in the EEC Treaty.

(a) Article 100

It should have been possible for an initial potential development in the social sphere to ensue from Article 100, which refers to the approximation of legislation. However, this field of competence entrusted to the Council and enabling it to adopt an instrument of Community law is subject to a strict

[1] *Federal Republic of Germany and others v Commission of the European Communities* [1987]/ECR 3203.

precondition: it must be demonstrated that the harmonization of legislation in Member States which would be imposed supranationally directly affects the objectives or the functioning of the EEC, that is to say, in other words, the economic objectives of the Treaty. In point of fact, Article 118 made it virtually impossible to demonstrate this in that it constituted a virtually insurmountable institutional obstacle. In fact, legally speaking, Article 118 is a clause safeguarding the sovereign jurisdiction of Member States in the social sphere and it clearly states that there has been no transfer of this jurisdiction to the supranational Community authorities. This explains why the possibility of recourse to Article 100 in the social sphere was denied for a very long time as this would have constituted an infringement of the letter of the Treaty.

A second obstacle arose from the fact that jurisdiction in the field of the approximation of legislation was generally regarded as relating to 'existing' legislation having, due to its divergence, a negative impact on the implementation of the common market. This interpretation meant that a directive aimed at imposing social (or other) objectives which had not been the subject of any regulations in Member States would be regarded as illegal. A directive could not be the instrument of a new law. It will be seen that, in practice, the directives adopted thereafter in the social sphere have sometimes given rise to a new law. For example, before the adoption of Directive 76/207 relating to equal treatment of men and women, [1] Belgium had no law governing the topics referred to by the Directive. It therefore indeed had a creative effect. Directive 75/125 relating to collective redundancies also had a creative effect in several Member States.

(b) Article 235

Article 235 of the EEC Treaty could have provided a second source for development of the social sphere. This provision lays down that 'if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures'. In this field of competence given to Community bodies for action within the procedure covering 'unforeseen circumstances', it is possible to see the general regulatory power denied the Community bodies by the other Treaty provisions. [2] The very organization of the Community legal system is based on general objectives defined by the Treaties, but given the evolutionary and dynamic nature of the Communities, this has led to a reorientation of these objectives and to their being supplemented by the Community institutions. [3]. As regards general economic integration to be promoted and pursued in the long term, it was difficult, when the Treaty was concluded, to lay down all the rules designed to achieve this integration in all the sectors involved. Hence the notion of a framework treaty and of an institutional system whereby Member States agreed, from the outset, to the transfer of a certain number of powers and fields of competence to Community bodies, in the same manner as mechanisms were laid down for successive transfers as the consolidation of the common market proceeded. This system permits the identification of a potential social field of competence for the Community.

It was necessary to wait for the second period and the adoption of the first Community social action programme (1974) for this potential social field of competence to be acknowledged and to form the legal basis for secondary legislation in the social sphere.

A.2. *The legal foundations of European social legislation*

A.2.1. Freedom of movement of persons

The EEC Treaty has vested considerable power with the Community in this particular sphere of employment policy in Member States. These provisions constitute the Community right to the freedom of movement of persons and services and govern the conditions of mobility of the activities of employed persons and the establishment of the activities of self-employed persons.

The Community rule on the freedom of movement of persons and services as regards the common market is an important example which forcefully illustrates the essential interaction between the economic and the social sphere. By 1958, the objective pursued was both the opening-up of national markets and the integration of these markets into an enlarged economic area. This time, because this is a unified or single economic area, this interaction is all the more essential to eliminate obstacles to the achievement of this objective and to promote it. European social legislation in this sphere has been drawn up by the relevant Community bodies and has been the subject of many regulations and directives. Our intention here is not to examine their content but to formulate the following observations:

(i) on the one hand, this was a tricky area, involving national policies of Member States regarding the entry, residence and employment of foreign workers and their families. By virtue of Community legislation's supranational character, it has been possible to introduce a single set of rules with specific safeguards for employees in Member States in the field of employment, remunera-

[1] Directive of 9 February 1976 (OJ L 39, 14. 2. 1976).

[2] See Kovar, R., 'Le pouvoir réglementaire de la Communauté européenne du charbon et de l'acier' (Regulatory power of the European Coal and Steel Community), *Bibliothèque de droit international*, Vol. 28, Paris, LGDJ, 1964, pp. 141–142 and Morand, Ch. Alb., *La législation dans la Communauté européenne* (Legislation in the European Community).

[2] Cerexhe, E., *Le droit européen – Les institutions* (European law – The institutions), Vol. 1, Nauwelaerts, Leuven, 1979, p. 37.

tion and other working conditions. Despite reluctance on the part of national governments and differences in policy, the material right to the freedom of movement has been adopted and is applied;

(ii) however, secondly, the freedom of movement of workers also requires measures to harmonize legislation in respect of the socio-economic fields of competence implied in Article 3 f ('the institution of a system ensuring that competition in the common market is not distorted') and the general field of competence in social matters referred to in Article 117, which lays down 'the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained'.[1]

The right to freedom of movement progressed and developed in a variety of ways. Thus, Community institutions adopted several instruments which are concomitant with, support and even extend the contents of the objectives referred to in the Treaty with regard to the freedom of movement. There are several examples of this, such as the Resolution of 9 February 1976 (action programme in favour of migrant workers and members of their family) or Directive 77/486 of 25 July 1977 (education of the children of migrant workers). Requested to interpret the provisions of the Treaty or of secondary legislation in the field of the European freedom of movement, the Court of Justice of the Communities on several occasions considerably expanded the fundamental notions and the extent of social guarantees available to workers. Its teleological approach led to legislation on the freedom of movement being progressive and aimed at the constant improvement of the living and working conditions of migrants.

However, the economic aim of freedom of movement remains the focus of these Community rules, and the status of the migrant worker in the Community is that of an economic agent and a producer. Citizens of the Member States of the Community cannot lay claim to the application or to the enjoyment of the advantages arising from freedom of movement in the Community unless they participate in an economic activity in a real and effective manner.[2]

Finally, reference should be made to the difficulty of defining 'social' policy as explicitly or implicitly referred to in the Treaty. Obviously, the concept goes beyond the field of labour law or social legislation. The Treaty does not give a general definition of terms like 'employment, remuneration, working conditions, rules relating to employment, collective agreements, workers' representatives, workers, employers etc.'. It could even be stated that the Treaty avoids the term 'labour law' and refers to 'social policy' in a general manner (Articles 117–128 of the EEC Treaty). One might consider that the term is not comprehensively defined in the examples given in Article 118 and that it should be interpreted as all the measures directly or indirectly regulating employment relations and the employment market, and improved working conditions and an improved standard of living for workers so as to make possible their harmonization while the improvement is being maintained. The Treaty obviously refers only to workers, producers and economic agents.

A.2.2. Article 119 of the EEC Treaty and equality of pay for men and women

Article 119 clearly imposes on Member States the principle of equal pay for male and female workers for the same work. This should have been applied at the end of the first stage of setting-up the common market. In practice, this provision aroused massive resistance and problems in application. There was no political consensus either within the Commission or within the Council giving this provision its binding force. Quite the contrary, this is the only provision of the Treaty which has been repeatedly infringed by Community bodies and Member States.

In a critical review of Community history in the social sphere, this case is particularly revealing.

On the one hand, on a Community law level, this was a directly applicable mandatory measure which was binding on Member States and Community bodies and it was scheduled for full implementation on 31 December 1961.

Passage to the second stage of the transitional period was subject to it being established that the objectives referred to specifically in the Treaty in respect of the first stage had actually been achieved and obligations fulfilled.

In spite of efforts by Commissioner Mansholt in 1960 to obtain undertakings from Member States as regards active policies for the reduction of pay differentials, in 1961, on the eve of the passage to the second stage, considerable wage discrimination persisted in most Member States. However, neither the Community bodies nor the Member States wished, politically, to delay passage to the second stage on the grounds that the objective of equal pay for men and women had not been accomplished. A radical solution was adopted.

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[1] Recital 3 of Regulation 1612/68 (OJ L 257, 19. 10. 1968), relating to the freedom of movement of workers within the Community, which established the definitive system of the freedom of movement, provides: 'mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement'. This kind of motivation raises the status of social matters and refers to the social progress of migrant workers as an end in itself.

[2] See Case 53/81 *Levin* v *Secretary of State for Justice* [1982] ECR 1035 *et seq.*

The resolution of 30 December 1961 of representatives of the Governments of the Member States, meeting within the Council, did not abide by Article 119 and postponed the deadline for the first stage, fixing a timetable for the phased reduction of wage differentials up to 31 December 1964.

The practice of decision-taking by representatives has grown 'spontaneously' outside the system of institutional measures provided for in the Treaties. When faced with a specific problem, representatives may conclude that, as a Community body, the Council does not enjoy the desired powers of action. They then set up a diplomatic meeting of the representatives of the Member States in order to adopt appropriate measures, the Council providing a framework for these meetings and deliberations.

These are international agreements in simplified form, but they are concluded with a view to achieving the objectives of the Community. The most well-known example of this practice is the decision of 12 May 1960 relating to acceleration of the attainment of the aims of the Treaty.

However, in the case we are concerned with here, the system is working in reverse, since the measure adopted by the representatives of the Governments of the Member States amends Article 119 of the Treaty and amends the conditions for passage to the second transitional stage.

The EEC Treaty may be amended only by means of a treaty subject to ratification by Member States in accordance with their respective constitutional requirements (Article 236 of the EEC Treaty). 'Decisions' taken by the representatives could not validly revise primary treaties, since, according to H.-P. Ipsen, these measures 'may extend beyond the Treaties, achieve greater integration, and serve the Communities, but they may not go against the Treaties, have a detrimental effect on the Communities, delay their action or suppress them'.[1]

It is significant that the legal sleight of hand which enabled the Member States, with the complicity of the 'dynamic' Community bodies, to infringe Article 119 was not the subject of any appeal to the Court of Justice (quite understandably), nor of authoritative theoretical criticism. Despite the flagrant violation, there was a veritable conspiracy of silence surrounding this matter. It was not until the judgment of 8 April 1976, in the case of *Defrenne* v *Sabena*,[2] that the Court of Justice of the European Communities declared that it was impossible to amend the Treaty without having recourse to the revision procedure set out in Article 236 and that the resolution of Member States of 30 December 1961 had not been able validly to modify the deadline fixed by the Treaty.

Almost 15 years elapsed between 1976 (year of the delivery of the Defrenne II judgment) and 1 January 1962 (start of the second stage), during which the principle of equal pay was not applied in respect of millions of female workers in Europe!

In its order, the Court vigorously pointed out that 'the effectiveness of Article 119 cannot be affected by the fact that the duty imposed by the Treaty has not been discharged by certain Member States and that the joint institutions have not reacted... sufficiently energetically against this failure to act' (paragraph 33); 'to accept the contrary view would be to risk raising the violation of the right to the status of a principle of interpretation...' (paragraph 34).

The lesson which may be drawn from the failure to meet the obligations laid down in Article 119 shows that it is not enough to set out a fundamental principle in the Treaty and to give it the nature of a directly applicable provision, but that it is necessary that there should be a political consensus between Member States and common institutions not to infringe Community law. It is precisely because this involved an area of social policy, resistance on the part of business circles involved, a reprehensibly lax attitude on the part of Community bodies and, above all, a refusal to regard this aspect of social progress as one of the objectives of the Community that it was possible to push ahead with the process of European economic integration while flouting a fundamental provision of the Treaty.

In a spectacular U-turn, following the adoption of the social action programme in 1974, the sphere of professional equality between men and women became the subject of a major development on the basis of the subsidiary social field of competence of Article 235 EEC!

A.2.3. Vocational training

Another field to come under the explicit jurisdiction of the common institutions in social matters is that of the common vocational training policy. Article 128 establishes that the Council shall lay down 'general principles for implementing a common vocational training policy capable of contributing to the harmonious development both of the national economies and of the common market'. The juxtaposition in this provision of two apparently contradictory concepts — the 'general principles', on the one hand, and, a 'common policy', on the other hand — gave rise to a good deal of hesitation. Was this a common policy of a particular type, giving the institutions the authority only to define the objectives to be imposed on each State while giving them the scope to retain their individual vocational training structures and national regulations?

Up to the adoption of the Single Act, Community bodies acted very cautiously in the field of vocational training. The

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1 See Ipsen, H.-P., *Europäisches Gemeinschaftsrecht* (European Community law), p. 472, quoted by R. Joliet, op. cit., pp. 196–197.

2 Case 43/75 *Defrenne* v *Sabena* Judgment of 8 April 1976 [1976] ECR 455 *et seq.*

Council decision of 2 April 1963[1] was restricted to the definition of general principles. On 26 July 1971,[2] it set out general guidelines for a Community-level action programme. It also adopted a number of resolutions principally concerning young people or new technologies. However, the end-result is poor and in no way constitutes a genuine common policy. The Commission instituted major studies, meetings and research in various areas of vocational training and, among the institutions, the European Social Fund was directly involved in financing training activities.

A.2.4. Social aspects of the common transport policy

Articles 74 to 84 of the Treaty lay down that the common transport policy will be established in respect of railways, roads and inland waterways. Article 75, Paragraph 1 sections (a) and (b) list a series of areas to be regulated. Section (c) refers generally and explicitly to 'any other appropriate provisions' for attaining the objectives of the common transport policy. This resulted in the harmonization of provisions relating to workers' protection in specific transport sectors appearing to be of major importance in so far as the maintenance of national differences could prejudice the development of and endeavours aimed at the adoption of a common policy. Therefore, on the basis of the implicit field of competence recognized in Article 75 of the EEC Treaty, the Council adopted Regulation No 543/69 of 25 March 1969, relating to the harmonization of certain social legislation relating to road transport.[3]. The regulation related principally to the composition of crews, the minimum age of drivers, drivers' mates and conductors, the maximum driving period (4 hours), the daily driving period (8 hours), the weekly driving period (48 hours), rest periods (daily and weekly), and the prohibition of performance bonuses. Regulation No 178/73 refers to the obligation to equip road vehicles with European-type 'tachographs' intended to monitor work periods.

A.2.5. Social aspects of the common agricultural policy

A Council Directive adopted on 12 April 1972 related to socio-economic information on and vocational training of workers in the agricultural sector.[4]. It provides for the introduction of a system to encourage the professional advancement and adaptation of farmers, workers and family farmworkers. The transfer of farmers to other economic sectors is also provided for and steps must be taken to guarantee an income, during the transfer period, to those who wish to acquire professional qualifications in a sphere outside agriculture. Once again, it is remarkable that this Directive has not been adopted as part of the general regulation regarding vocational training, but as a necessary step in the common agricultural policy, based on Article 41 (a), which establishes 'an effective coordination of efforts in the spheres of vocational training, of research and of the dissemination of agricultural knowledge'. Article 41 forms part of the individual provisions of the common agricultural policy and not of the social provisions of the Treaty.

Reference should also be made to 'agreements between management and labour on hours of work in agriculture'. A European agreement on the harmonization of hours of work for agricultural workers permanently employed in farming was signed by employers and workers on 6 June 1968. A further agreement was signed on 18 May 1971 and this related to the hours of work in stock-farming (annual, weekly and daily hours of work). These agreements were made possible by the establishment of joint advisory committees, set up by the Council. Joint committees exist for road transport, inland waterways and agriculture. The legal literature concurs in recognizing the legal nature of these 'agreements' as being that of a 'framework' European collective agreement and refers to the member organizations of signatory professional organizations. It is informative to note that it was possible to set up the first European collective agreement only in a very limited sector: that of permanent farmworkers.

A.3. *The role and activities of the European Parliament (1958–73)*

The Parliamentary Assembly, which became the European Parliament in 1962, had very restricted powers during the period in question. Its monitoring functions included the annual review of those chapters of progress reports which dealt with social policy and the draft budgets of each executive body (ECSC, EEC, Euratom), which led to a parliamentary report and, after deliberation, to a vote on a resolution. Under the terms of Article 122/EEC, which lays down that one chapter of the annual report shall deal with social developments within the Community, the European Parliament could invite the Commission of the EEC to draw up reports on any particular problems concerning social conditions, and use of this option was initiated by the social committees or their members.

An examination of the oral or written questions addressed to the Council or to the Commission also reveals that a great many of these related to the social sector.

[1] OJ 63, 20. 4. 1963, see comments on the decision of 2 April 1963, in Ribas, J.-J., *La politique sociale des Communautés européennes* (Social policy of the European Communities), Dalloz et Sirey, Paris, 1969, pp. 223–224.
[2] OJ C 81, 12. 8. 1971, p. 5.
[3] OJ L 79, 29. 3. 1969
[4] OJ L 96, 23. 4. 1972

Finally, the EEC Treaty provided for responsibility for mandatory consultations on social matters in connection with various spheres (Articles 49, 54, 57, 126, 127/EEC).

From the outset, the Parliament emphasized the paramount importance of the social aspects of European integration. Several reports and resolutions have revealed that Community social policy would not arise spontaneously and that it would in no way result from a simple juxtaposition of existing national policies. [1]

It also shows that the limitation of social responsibility at Community level and the meagre financial resources available thwarted any Community social initiative which went beyond requirements directly connected with the attainment of the common market.

Faced with this institutional deadlock and its own lack of powers, the European Parliament could only express wishes, issue resolutions and formulate opinions, all of these short-lived.

1 See the Nederhorst report on social harmonization, Document 13.769 of the European Parliament (14 June 1965).

B. The period 1974–80 — A change in course — the adoption of the social action programme

B.1. *Preliminary remarks*

The Heads of State or Government at the Hague Conference (1 and 2 December 1969) wanted to give impetus to the creation of economic and monetary union. The conclusions reveal that this monetary cooperation development had to be based on harmonization of economic policies, but also recognize the possibility for close cooperation in social policy. Harmonization as compared with close cooperation — the imbalance between economic and social policy remains, but it is nevertheless interesting to witness the confirmation, at the highest level, of the need for a global approach combining harmonization of economic and monetary policies and an essential convergence of social policies.

B.1.1. The Werner report

The Conference gave Mr Werner, the Prime Minister of Luxembourg, the task of drawing up a report, which was submitted in October 1970. This report diagnoses and gives a multidimensional overview of the tasks of the economic and monetary union. Its conclusions confirm the realization that economic and monetary union and harmonization of social policies inevitably complement each other: 'the freedom of movement of persons is still not satisfactorily guaranteed and genuine progress has not been achieved in the harmonization of social policies ... The setting-up of such a union will make a lasting improvement to well-being in the Community and will strengthen the latter's contribution to global economic and monetary balance. It implies concerted action by the various economic and social strata so that the combined effort of market forces and policies conceived and consciously implemented by the relevant authorities gives rise both to satisfactory growth and a high degree of employment and stability. Moreover, Community policy must aim to minimize regional and social disparities and guarantee the protection of the environment ... It will be easier to guarantee economic and monetary union if the social partners are consulted before Community policy is drafted and implemented. It is important to clarify those procedures which will make these consultations systematic and continuous. In this context, in order to avoid too great a divergence, the evolution of incomes in the various Member States will be monitored and discussed at Community level with the participation of management and workers'.

And these two fundamental quotations: 'within the framework of economic and monetary union, it is not sufficient to concentrate only on policies for global economic equilibrium. It will also be necessary to consider actions relating to structural problems whose essence will be profoundly modified by the implementation of this process. In this context, Community action must relate essentially to regional policy and employment policy ... Economic and monetary union means that the main economic policy decisions will be taken at Community level and therefore that the necessary powers will be transferred from national level to Community level. This transfer of responsibilities and the setting-up of the relevant Community institutions represents a fundamentally significant political process involving the progressive development of political cooperation. Economic and monetary union will thus promote the development of political union, without which, in the long term, it cannot survive'.

B.2. *The guidelines proposed by the Commission*

In its turn, the Commission carried out a more careful analysis of the Werner report.

It proposed the phasing-in of economic and monetary union and stressed the importance of working closely with both sides of industry on the general directions of economic policy. [1]

B.2.1. The third medium-term economic policy programme

In addition, in a draft 'third medium-term economic policy programme', submitted to the Council on 21 October 1970, the Commission stressed that a change was needed in the relationship between social and economic affairs. It was no longer possible to restrict oneself to targets for growth and stability — the Community had to be given powers enabling it, as regards economic and monetary union, to ensure that the general objectives of social development which were currently the responsibility of national policy should progressively become those of Community policy. Social matters were becoming increasingly important, since 'better satisfaction of collective needs, particularly in the field of education, health and housing, the combating of the harmful effects of growth on the environment, greater equality in the distribution of incomes and assets, the adaptation of social protection measures to the requirements of the modern world, and, in particular, its strengthening in favour of those persons most affected by structural changes and by technical progress and those who cannot contribute to production' are also referred to. There would also be a need to develop and continue dialogue with both sides of industry on global developments and specific policies. The need for collective bargaining was demonstrated.

[1] Doc. COM(70) 1250 of 29 Octobre 1970, Commission proposal to the Council relating to the phasing-in of economic and monetary union.

B.2.2. Preliminary guidelines for a Community social policy programme

In March 1971, the Commission submitted 'preliminary guidelines for a Community social policy programme'.

This was a very important document: it diagnosed that 'the prospects opened up by the achievement of economic and monetary union place the subject of the common market in a different perspective'. Cohesion between the economic and social aspects of the integration process would become increasingly unavoidable. If the implementation of social aspects of integration were to lag behind that of the economic and monetary aspects, the success of the process would be compromised.

This verdict is all the more important since, as is known, in current plans for intergovernmental conferences, social aspects have disappeared from economic and monetary union and have been pigeon-holed with the plan for political union. The last chapter, which outlined the major aspects of the subsequent social action programme, stated 'that it is inconceivable that it should be possible for the Community to be established and strengthened on an economic and monetary level without the integration of social concerns, since these concerns are becoming increasingly important in economic policy within Member States'.

However, the immediate proposals formulated for the Community social action programme have been selected on the basis of responsibilities and instruments currently within the framework of the treaties.

B.3. *The Paris Sumnit (October 1972)*

The Paris Summit, held in October 1972, was to reaffirm the objectives of economic and monetary union (by 31 December 1980, at the latest!), and come down in favour of the setting-up of a regional development fund (before 31 December 1973) and the adoption of a Community social action programme.

This programme should aim in particular at reinforcing the role of the Social Fund and at carrying out a 'coordinated policy for employment and vocational training, and improving working conditions and conditions of life, at closely involving workers in the progress of firms, at facilitating on the basis of the situation in the different countries the conclusion of collective agreements at European level in appropriate fields and strengthening and coordinating measures of consumer protection'.

B.4. *Adoption of the social action programme*

On 21 January 1974, the first Community social action programme was adopted by a Council resolution. [1] The Governments of the Member States undertook, in a first stage of approximately three years, to adopt about 30 measures intended to contribute to the attainment of three priority objectives:

(i) full employment and job creation in the Community;

(ii) improvement of living and working conditions giving rise to progress by means of their mutual harmonization;

(iii) increasing participation of management and labour in economic and social decision-making in the Community and greater participation of workers in the running of companies.

The measures proposed were important because they enabled the Community to conduct its social policy more actively than had been provided for by the Treaty of Rome, principally in three areas:

(i) since the Commission operated essentially in the field of employment, working conditions, social security and workers, the action programme proposed the greater intervention on the part of the Community in favour of so-called 'disadvantaged' categories of the population. This led to proposals for special action programmes in favour of migrant workers and their families (above all those coming from third countries), handicapped people, more vulnerable persons (young people and elderly workers) and measures to combat poverty in the Community;

(ii) to settle the legal conflict surrounding the constraints arising out of Article 118 of the EEC Treaty, the Council decided in favour of the adoption of directives in the social sphere.

This was a watershed, a point of no return in the history of European social legislation. The adoption of the programme confirmed, for the first time, that social policy could itself constitute a field of binding secondary legislation and that, in accordance with Article 117, which refers to the approximation of legislation in Member States, such harmonization of social legislation could have a direct effect on the functioning of the common market.

B.4.1. The harmonization of workers' protection

In February 1975, the Council adopted Directive 75/129/EEC on collective redundancies and Directive 75/117/EEC relating to equal pay for men and women, [2] but in doing so, it was

[1] OJ C 13, 12. 2. 1974, p. 1.
[2] OJ L 45, 19. 2. 1975, p. 19.

using as a legal basis the explicit social field of competence of Article 119 of the Treaty. In the first case, for the first time, the Community adopted an instrument of Community law without individual social jurisdiction but based on the consideration that collective redundancies constituted a topic which could 'directly affect the functioning of the common market', an idea expressly provided for in Article 100 of the Treaty. The Commission then submitted further proposals for directives which were ratified by the Council. In the field of labour law, this was a directive of 14 February 1977 relating to the safeguarding of employees' rights in the event of the transfer of a business. It was adopted on the basis of Article 100 of the Treaty, with reference to Article 117.[1] In the wake of the economic recession, a large number of bankruptcies affected many employers in the EEC and the Directive of 20 October 1980, relating to the protection of employees in the event of the insolvency of their employer sought to harmonize conditions for protection between Member States and to eliminate distortion factors from the common market. It was also adopted on the basis of Article 100 with reference to Article 117.[2]

In these two cases, legal integration in areas of social protection was acknowledged as being necessary because it was revealed that the disparity which existed between national laws constituted an obstacle to the attainment of Community objectives. Articles 100 and 117 were implemented despite the safeguard clause of Article 118. This operation revealed that, using the third means proposed by Paragraph 2 of Article 117, that of the approximation of legislation, it was legally possible for social policy provisions to be incorporated into the Community legal system.

B.4.2. Social harmonization and the rights of working women

The difficulties of implementing Article 119 of the EEC Treaty were set out and their legal context analysed above. It will be noted that, following the adoption of the social action programme, the political approach adopted by the common institutions, in particular the Commission, consisted in recognizing the importance of the principle and in respecting and implementing Community undertakings in this area. Six directives supplemented Article 119 of the Treaty and expanded the sphere of equal pay to cover professional equality and equality in social security matters.

The period following the harsh Defrenne II judgment delivered by the Court of Justice of the Communities in 1976 therefore witnessed an increased awareness of the problems of professional equality between men and women and a considerable expansion of European social law. The trigger was Article 119 of the Treaty, but it was legally possible only due to an acknowledgement of the general social responsibility of the Community in the field of professional equality between men and women, regarded as a social objective of the Treaty and recognized by a political consensus of the Council.

B.4.3. Safety at work

A number of Community measures relate to safety at work and the protection of certain specific categories of workers.

Originally, explicit social responsibility was referred to in the Euratom and ECSC Treaties. The ECSC implemented global measures relating to hygiene and medicine at work and specific measures in the field of safety. Euratom adopted various directives which reinforced the basic standards applied in the Member States and monitored by the Commission. Moreover, as of 1977, directives were also adopted in respect of the remaining economic sectors covered by the EEC Treaty and without explicit social competence.

Any review of secondary legislation adopted in this area should be supplemented by various Council resolutions regarding safety and health at the workplace and Commission recommendations in various fields (protection of young people at work, industrial medicine in businesses, the adoption of a European list of occupational diseases, etc.).

In addition to the permanent agency overseeing health and safety in coal mines and in other extractive industries (created by a decision of the representatives of the Governments of the Member States in 1957), an advisory committee was set up. This was the Advisory Committee on Safety, Hygiene and Health Protection at Work (created by a Council Decision of 27 June 1974[3]). Its task related to all sectors of the economy excluding those covered by ECSC and Euratom.

Once more, it is possible to observe that, in the presence of a political consensus between Member States and within the Council, it was possible to promote and develop an important sector of European social law relating to the safety of working conditions, protection against accidents and occupational diseases, and hygiene at work, to observe that directives were adopted, and that programmes were developed, although Article 118 explicitly reserved this field of activity for the Member States. However, it must be acknowledged that this area was given more favourable treatment whereas sectors of social policy which were just as important remained untouched. Gains resulting from the action programme

[1] Council Directive No 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, 5. 3. 1977).

[2] Council Directive 80/987 of 20 October 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 (OJ L 283, 28. 10. 1980).

[3] OJ L 185, 9. 7. 1974.

are rare and isolated, although sometimes important. It cannot be stated, however, that the programme genuinely gave rise to the creation of economic and social cohesion which, in the mind of its promoters, was to supplement the plan for economic and monetary union.

However, the 1974 recession, following on from the first oil crisis, hit hard. The number of unemployed increased from three million in 1974 to six million in 1978. Although the Community had barely recovered from this experience, it received a further jolt in 1979 from a second oil crisis and faced a real economic crisis. On 28 June 1977, the Commission submitted to the Council its 'guidelines for the Community social policy'. This set five objectives for social policy: a return to full employment, the combating of discrimination and inequality of any type, the improvement of social security and public health and the stepping-up of the participation of management and workers at all levels.

Among the proposals relating to the extension of social protection, particularly social security, to categories which were not covered or were insufficiently protected, it proposed a draft regulation to the Council, subsequently amended on the basis of opinions expressed by the European Parliament and the Economic and Social Committee, requesting the extension of the application of national social security systems to self-employed migrant workers and their families and, in general, to all those covered by social security whether or not they were in active employment. This regulation was adopted on 14 June 1981 together with an implementing regulation of 21 March 1982.

From 1977, also, the Commission decided to strengthen the cooperation between national social security authorities with a view to fixing common priorities.

Two directives were adopted by the Council on 28 June 1978. The first concerned the education of the children of migrant workers, and the second the installation of safety signs at the workplace.

Health ministers met for the first time on 13 December 1977, this initiative marking the extension of social areas under the jurisdiction of the Community. The problems dealt with concerned the major choices to be made with a view to controlling health-care spending and thus illustrated the essential convergence of economic, budgetary and social policies.

A further measure deserves mention, namely the European programme to combat poverty, which had already appeared in the social action programme of 21 January 1974.

C. The period 1980–87 (the draft Treaty on European Union of the European Parliament and the Single Act)

C.1. *Endeavours aimed at alignment of social protection in Member States*

C.1.1. Health

On 13 September 1984, the Commission published a communication relating to cooperation at Community level on health-related problems. It proposed the creation of an advisory committee on public health to promote the alignment of efforts related to drug problems, tobacco use and infectious diseases. The European Parliament and the Economic and Social Committee relaunched the idea of the 'European emergency health card'. The Council was to give concrete expression to this project in May 1986.

This third period is characterized by attempts by Community bodies, in particular the Commission and the Parliament, to develop a policy in the field of social security and programmes for health protection. However, institutional obstacles, Article 118 in particular, prevented this resulting in anything other than comparative studies, pilot projects, debates and one-off measures (colloquia, seminars, etc).

The various advisory bodies for the protection of health and safety were to be combined. Research programmes in these areas are conducted by the European Foundation for the Improvement of Living and Working Conditions.

C.1.2. Poverty

The programme to combat poverty is stepped up.

C.1.3. Handicapped people

Measures to assist handicapped people include: professional integration, transport, access to public places, creation of Handinet networks and Helios programme.

C.1.4. The rights of women

The Parliament adopted a resolution on the rights of women in February 1981, following which the Commission submitted an action programme on the promotion of equal opportunities for women relating to the period 1982–85. The Commission also set up an Advisory Committee on Equal Opportunities for Women and Men.

However, attempts to introduce Community regulations failed, despite draft directives submitted to the Council on 24 November 1984 relating to 'parental leave', and to 'leave for family reasons'. Despite the firm support of the Parliament, the Council refused to commit itself in this area. In point of fact, the position of women in the labour market deteriorated considerably during this crisis; they were distinctly in the majority amongst the unemployed, particularly in the categories of unemployed young persons and the long-term unemployed. They also formed the vast majority of part-time workers and of workers with so-called atypical contracts of employment.

C.2. *Social security*

In December 1982, the Commission endeavoured gradually to bring about the alignment of national social and economic policies in order to guarantee uniformity in the Community and it submitted a 'Communication on social security'. However, it was necessary to wait for the vote in the European Parliament on 22 May 1984 for genuine cooperation to materialize in the area of social protection.

On 1 April 1985, the Commission sent the Council a report on 'medium-term projections on social-protection spending and its financing'.

The basic data provided revealed:

(a) an exceptional increase in social-protection spending in Community countries. Without taking into account monetary depreciation, the percentage of GDP involved increased from markedly less than 20% in 1970 to over 30% in 1986;

(b) the continuing disparity in national systems which persisted despite repeated calls for alignment. Differences also existed both in amounts of benefits and in types of benefit and source of income. The effect of this diversity on the competitiveness of businesses, respective budget deficits, the rate of taxation and impositions of a like nature, and the different treatment of unemployment all illustrate the interdependence of social security policies and economic, budget and fiscal policies;

(c) finally, that, in all countries, the health and old-age/survivor sectors received the lion's share of spending, whereas the employment sector (unemployment and professional reintegration assistance) generally remained relatively poorly funded.

These data reveal that the organization of a Community single market in 1992, in which the freedom of movement of persons, goods, services and capital, together with common standards and standardization, Community-wide public-

works contracts and harmonized taxation will be achieved, whereas social policy alone will remain highly diverse and under the jurisdiction of national governments, can only result in insupportable economic, social, political and regional tension.

C.3. *The Draft Treaty establishing European Union*

There can only be a single global approach to European Union. An organized European area which is also an organized European social area, endowed at Community level with individual fields of responsibility and democratically controlled powers.

C.3.1. Preliminary remarks: the Marjolin report on economic and monetary union (1975)

In March 1975, the Commission filed the Marjolin report on economic and monetary union to be achieved in 1980. The analysis revealed that the coordination of national policies is a pious hope which virtually never produces any result. National policies continued to attempt to solve problems and difficulties on a national scale without reference to Europe.

In an economic and monetary union, national governments hand the use of all those instruments of monetary policy and economic policy which are to have an effect in the Community as a whole to the common institutions. These institutions must, moreover, have a discretionary power similar to that currently available to governments in order to be in a position to deal with unforeseen events ... they should include a European political power, a sizeable Community budget and an integrated system of central banks. In their particular field of competence, they would be called upon to operate in a similar manner to that of a federal State.

What is challenged here is the idea which has for 20 years served as the basis for thought of many Europeans, namely that European political unity, particularly in economic and monetary matters, would come about almost imperceptibly. This was the Europe of 'small steps'. Experience to date clearly does not reveal anything which could validate this idea. It could legitimately be asked today whether what would be required in order to set up the conditions for economic and monetary union might not, on the contrary, be a profound and virtually instantaneous transformation, taking place, undoubtedly, after lengthy debate, but coming into being at a precise moment in time in European political institutions.

C.3.2. The Tindemans report on European Union (1975)

Readers will remember that it was at the Conference of Heads of State or Government, held in Paris in December 1974, that the European Council conferred upon Leo Tindemans the task of defining the concept of 'European Union'. In his report, Mr Tindemans proposed that the different components of European Union should be as follows:

(1) a united front to the outside world, which implies joint action in all fields of external relations (foreign policy, security, economic relations, and cooperation);

(2) recognition of the interdependence of the economic prosperity of the Member States and, as a consequence of this, common policies in the economic and monetary field, in the industrial and agricultural sectors, and in energy and research;

(3) solidarity between our peoples, which presupposes a regional policy that will correct inequalities in development and calls for 'social measures' to mitigate the inequalities in income and encouraging society to organize itself in a fairer and more humane fashion;

(4) protection of the rights of the individual and improvements in lifestyle;

(5) a European Union having institutions with the necessary powers to determine a common, coherent and all-inclusive political view, possessing the instruments of democratic control, and giving each State the right to participate in the political decision-making process;

(6) Gradual attainment of the objectives of the Union.

In the chapter on social and regional policies, the Tindemans report refers to the following objectives whose attainment, at European level, will be the expression of the social aims of the Union: security of the workforce; cooperation between employers, workers and public authorities; workers' participation.

Security of the workforce implies that the Union must lay down standards applicable in all States in matters of wages, pensions, social security, and working conditions, with special attention to working women, and the setting-up of specific protection for certain categories of workers: migrants and handicapped persons. These are therefore explicit social fields of competence covered by European social law.

Cooperation implies the gradual transfer to the European level of some of the powers of decision in economic policy matters, reflecting the development achieved long ago in large businesses. Cooperation must facilitate the conclusion of framework agreements or European collective agreements by means of sector-based cooperation.

Taking into account the increasing integration of economic units, participation implies that the position of workers in businesses must be resolved at European level by means of participation in management, monitoring and business profits.

The protracted saga of successive and persistent failures experienced by plans to establish worker-participation bodies in businesses at European level (European public liability company, draft fifth Directive, 'Vredeling' Directive, etc.) speaks volumes on the gulf separating those with a vision of European Union from Community practice, and reflects the resistance of employers' circles and certain governments.

Moreover, the Tindemans report refers to the need to develop an employment policy, to strengthen intervention by the European Social Fund, and to find coordinated Community means, within the Union, to combat unemployment. Social aspects of regional policy and their relationship with economic, industrial and monetary policies of Member States are also lucidly analysed. European Union will be more than a form of economic collaboration between Member States and must become a citizen's Europe. This objective implies the protection of rights of Europeans, including protection of fundamental rights, consumer rights and environmental protection.

After the reports drawn up by the European Commission and by Mr Tindemans, which aimed to define the conditions for achievement of European Union, originally intended for 1980, had been buried by the Council in 1976, it would be necessary to await the European Parliament's initiative for relaunching European Union in 1980 in the form of a draft Treaty on European Union.

C.3.3. The draft Treaty on European Union (1980–84).

Starting with a group of nine delegates of various nationalities and political tendencies, led by Alterio Spinelli, the idea of drawing up a constitution for a European Union received the growing support of Parliament. Three major debates took place in 1981, 1982 and 1983, and the Assembly adopted the final text on 14 February 1984 with 237 votes in favour, 31 against and 43 abstentions. This success exceeded all predictions because all political tendencies and all nationalities were combined in the majority obtained. The principal innovations of the Treaty on European Union were institutional and legal in nature and reflected a distinctly federal choice. The draft Treaty confirmed:

(i) the progressive nature of European Union, whereby the successive transfers of areas under national jurisdiction would, by common agreement, become areas concurrently or exclusively within the competence of the Union;

(ii) the representative and democratic nature and legal status of the Union and its bodies;

(iii) the principle of separation, balance and democratic control of powers;

(iv) a system of conferred powers implying that the Union should exert only those powers conferred upon it, other powers remaining with Member States;

(v) the principle of subsidiarity, whereby only those powers which are generally regarded as being exercised most efficiently at European rather than national level are transferred to the Union;

(vi) the indefinite duration of the Union and the irreversible character of Community patrimony. [1]

From a social standpoint, in its initial articles the Union guaranteed citizenship of the Union to citizens of Member States as well as the effective recognition of fundamental rights and liberties resulting from the common principles of the constitutions of Member States and from the European Convention on Human Rights. Similarly, the Union undertook to maintain and develop economic, social and cultural rights ensuing from the constitutions of Member States and from the European Social Charter. Express provision was made for the accession of the Union to the abovementioned international instruments and to United Nations' Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. Moreover, the Union undertook to adopt its own declaration on fundamental rights within a period of five years.

In Title II of the draft Treaty entitled 'Policy for society', the 'concurrent competence' of the Union is defined in the areas of social policy and health policy, consumer-protection policy, regional policy, environmental policy, education and research policy, cultural policy and information policy.

Article 56 lists the areas of social policy in a non-comprehensive manner, this list preceded by the words 'in particular'. It deals with:

(a) employment, and in particular, the establishment of general comparable conditions for the maintenance and creation of jobs;

(b) the law on labour and working conditions;

(c) equality between men and women;

(d) vocational training and further training;

(e) social security and welfare;

(f) protection against occupational accidents and diseases;

(g) work hygiene;

(h) trade union rights and collective negotiations between employers and employees, particularly with a view to the conclusion of Union-wide collective agreements;

[1] See European Parliament, Doc. A 2-2/87 B, Interim report by the Committee on Institutional Affairs on the European Parliament's strategy as regards European Union (18 January 1985).

(i) forms of worker participation in decisions affecting their working life and the organization of undertakings;

(j) the determination of the extent to which citizens of non-member States may benefit from equal treatment.

This Article 56 radically modifies the status of social policy in the European institutional system. Article 118 of the Treaty which constituted (and still constitutes) the clause which reserves these areas to the fields of competence of Member States, for which no transfer has been granted, loses all meaning. Henceforth, competence in these areas of social policy is concurrent, which, according to Article 12, paragraph 2 of the draft Treaty, means that 'where this Treaty confers concurrent competence on the Union, the Member States shall continue to act so long as the Union has not legislated. The Union shall act to carry out those tasks which may be undertaken more effectively in common than by the Member States acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers. A law which initiates or extends common action in a field where action has not been taken hitherto by the Union or by the Communities must be adopted in accordance with the procedure for organic laws'.

Reference to organic law implies subservience in the drafting of the law to the very detailed procedures of Article 38 of the draft Treaty (predetermined time-limits, qualified or absolute majority for approval or amendment by Parliament, qualified or absolute majority for the Council according to the favourable or unfavourable opinion of the Commission, Conciliation Committee, etc.).

Jean de Ruyt observes that the failure of the Parliament's draft is explained, in addition to the size of the qualitative leap required, by the natural resistance of governments to a text which was too far removed from those they were accustomed to studying. Governments had never together studied Parliament's text as such. 'For diplomats to study it, it was necessary for the Dooge Committee to 'translate' the elements into a language closer to that used by the governments themselves at that time when speaking of the relaunch'.[1] The draft Treaty was undoubtedly principally a source for academic discussion between specialists in European law, federal law, public law and political experts in the European Parliament.

As regards the fields of competence of the Union, there was criticism of the lack of clarity of demarcation between exclusive and concurrent fields of competence. It was stressed that the Union Treaty attributed to concurrent fields of competence areas where a wider field of competence is already vested in the Community by the EEC Treaty or by secondary legislation, and that there could thus be a risk of an attack on Community patrimony.

As regards subsidiarity, the absence of a criterion for defining when common action would be more effective than that of Member States acting separately appears risky. Would the Union each time have to prove that it was more effective than Member States?

Must the application of the principle of subsidiarity to concurrent fields of competence be the subject of a political assessment or judicial monitoring?

It was also pointed out that the distinction between exclusive and concurrent fields of competence was very artificial and that the demarcation of fields of competence between the Union and the Member States could not be regulated by means of two provisions. The draft Treaty on European Union contains no provision analogous to Article 235 of the EEC Treaty. It would therefore lack a potential general field of competence. The Union being set up for an indefinite period and having a progressive character, the usefulness of a provision such as Article 235 can only be emphasized in so far as the Treaty cannot provide for every eventuality.

After the adoption of the draft Treaty in 1984, Parliament decided to send it to national governments and parliaments for ratification. The fate awaiting it is well known!

C.4. *The Single Act*

The Single Act was adopted by Heads of State or Government in December 1985 and entered into force on 1 July 1987, and it differs considerably from the draft Treaty on European Union. Although it makes major amendments to the existing Treaties, it does not change their essential nature. The main aim of Part One of the Single Act is to permit the completion of the internal market, whilst Part Two institutionalizes European political cooperation.

All commentators on the Single Act have emphasized that, in the face of the failure of the draft Treaty on European Union, the political choice made was to relaunch European integration in the only area in which Community bodies were competent and there was a consensus of Member States: the economy.

In order to do this, the Single Act introduced major modifications to the decision-making machinery: everything involved in the completion of the unified internal market would henceforth be subject to the qualified majority voting procedure. Moreover, it will be observed that it is not possible to restrict the Single Act to its economic aspect alone, since it

[1] De Ruyt, Jean, 'L'Acte unique européen' (the Single European Act), ULB edition, *Collection études européennes*, first edition, 1987, p. 44.

has introduced a new concept into the Community system, that of 'economic and social cohesion'.

On 18 February 1987, the Commission submitted a document to the Parliament (giving it priority, which was a new move): 'Making a success of the Single Act: a new frontier for Europe'. The intention here is to define 'the identity' and the 'aims' of the Community. The document defines the policies planned under the Single Act and announces a fifth point, 'the emergence of a European social dimension'.

When presenting the Commission's working programme in 1987, President Delors cited working conditions as one of the 'new fields falling explicitly within the scope of the Community constitution'. That is to say that, in parallel with the reaffirmation of priority treatment to combat unemployment, a turning point was announced, directed at expanding the content of Community social policy, which was also confirmed by the stated intention of 'relaunching the social debate on the organization of labour, the adaptation of working hours, the introduction of new technologies and the functioning of the labour market'.[1]

In May 1987, the European Parliament gave massive support to the Commission by adopting the Barón Crespo/Von Wogau report by a large majority. Point 8 of the resolution, however, stresses the crucial importance of the social dimension of the internal market and expresses amazement at the lack of a complete social section in the Commission's communication. Parliament invited the Commission to submit global proposals and a fixed timetable of measures to be taken (trade union guarantees, hygiene and safety, social security, vocational training, dialogue between the two sides of industry, etc.).

C.5. *Amendments made to the EEC Treaty by the Single Act which have implications for the social field*[2]

The Single European Act enlarges the area subject to qualified majority voting in the Council's decision-making procedure and makes this a requirement when dealing with the completion of the single market, strengthens the powers of the Commission and the role of the European Parliament, gives new impetus to social policy and suggests stimulating the dialogue between the two sides of industry at European level. It stresses the need for social and economic cohesion between the 12 Member States.

The Single Act explicitly and directly conferred new social fields of competence upon the Community by means of Articles 118a (health-safety-hygiene/working environment), 118b (social dialogue) and 130a to 130e (economic and social cohesion).

The Single Act implicitly conferred new social fields of competence upon the Community in the vast framework of measures required for the completion of the internal market (Article 8a), that is to say the area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. Article 8b requires that the Commission submit proposals to the Council, which will act by a qualified majority, determining the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

Our approach will firstly consist of an analysis of the institutional amendments introduced by the Single Act and which affect the development of European social legislation and European social policy. Secondly, we will examine the new social fields of competence explicitly conferred upon Community institutions.

C.5.1. The social consequences of Articles 8a and 8b: fate of the social dimension of the internal market

Article 8a

'The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Articles 8b, 8c and 28, 57(2), 59, 70(1), 84, 99, 100a and 100b and without prejudice to the other provisions of this Treaty.

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.'

Article 8b

'The Commission shall report to the Council before 31 December 1988 and again before 31 December 1990 on the progress made towards achieving the internal market within the time-limit fixed in Article 8a.

The Council, acting by a qualified majority on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.'

In accordance with conventional Community procedures, the attainment, as regards the internal market, of the new Community objectives described in Article 8a is entrusted

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1 Vogel-Polsky, Eliane and Vogel, Jean, *L'Europe sociale 1993: illusion, alibi ou réalité?* (Social Europe 1993: illusion, alibi or reality), published by the Free University of Brussels, European Studies, 1991, p. 38.

2 The essence of this section is dealt with in Vogel-Polsky, Eliane and Vogel, Jean, op. cit.

to the Community institutions which possess specific jurisdiction. The Commission will have to act as mainspring in the proposals it submits to the Council with a view to progressively establishing the internal market. Its proposals will be covered by other provisions of the Treaty, some of which are listed in the first paragraph, particularly Articles 100a and 100b, but also 118a and 130a to 130e.

Although the legal basis of a proposal submitted by the Commission lies in the observation that this is a measure necessary for the completion of the internal market, the decision-making process is immediately affected by it since it will then be subject to qualified majority voting within the Council and to a cooperation procedure with the European Parliament.

This institutional framework is also applicable to the social dimension of the internal market. It has, in fact, been demonstrated that measures for liberalization of the internal market will necessarily affect employment, pay, length and adaptation of working time, etc. The vast merger and acquisition operations[1] whereby industrial groups seek to achieve critical size for the large market in 1992 undoubtedly create problems in respect of workers' rights to information, consultation and participation. This unprecedented regrouping is reshaping the European economic landscape and the provisions which will establish the internal market cannot disregard their social dimensions. Social accompanying measures are intrinsically of the same importance as economic measures and failure to adopt them could jeopardize the social balance required for economic growth. These social measures form part of the objectives laid down for the achievement of the internal market. In fulfilling the mandate conferred upon it by the Single Act (Articles 8a and 8b) the Commission will thus have to be extremely vigilant in this respect.

It is impossible to disregard the fact that the Commission is the only truly supranational body in the Community and that it has the power to initiate the submission of proposals to the Council which can act on its own initiative only in exceptional circumstances (for example, Article 84, paragraph 2) or after consulting the Commission (Articles 126 and 237), and the Commission has a monopoly on initiative in the general institutional system. This political prerogative is important. In fact, legally speaking, it is the task of the Commission freely to determine the content and the legal basis of its proposals, the time at which to submit them and their tying-up with other proposals, the Council being unable to instruct it in this regard. Moreover, provided the Council has not legislated, the Commission can modify its initial proposal in order to take account of the Opinion of the European Parliament (Article 149, paragraph 3) within the framework of the new procedure for cooperation with the Parliament, established by the Single Act.

This brief reminder makes it possible to define the institutional scope of jurisdiction vested in the Commission within the framework of Articles 8a and 8b.

Article 8b specifies that the Commission must, in proposals relating to the achievement of the common market, 'determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned'.

One cannot but be seriously concerned at the delay already involved with regard to the social dimension of the internal market. In the two years following the entry into force of the Single Act, the 'social deficit' of the economic integration which is in progress has been glaringly apparent. If the Commission were to maintain its wait-and-see policy with regard to the achievement of the social dimension of the internal market, this could be penalized on the basis of the procedure for failure to act provided for in Article 175 of the EEC Treaty or by a motion of censure against the Commission by the European Parliament (Article 144 of the EEC Treaty).[2]

C.5.2. Modification of the institutional system within the framework of the approximation of legislation (Article 100a)

(a) Scope of Article 100a, paragraph 1

Article 100a of the EEC Treaty refers to the approximation of the provisions laid down by law, regulation or administrative action, which is used as one of the means for attaining the objectives of the Treaty and common policies.

The Single Act made a major amendment to the decision-making process based on unanimity laid down in Article 100. In fact, it provides that:

'Article 100 a

1. By way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 8a. The Council shall, acting by a qualified majority on a proposal from the Commission in cooperation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

[1] See *Le Monde* of 13 March 1990, 'Buying-up companies in the FRG: a market in full expansion', by Ch. Holzbauer-Madison. In 1989, the Federal Republic of Germany was in second place amongst vendors of companies, after Great Britain, and the third-placed purchaser in this market.

[2] See Rule 30 of the Rules of Procedure of the European Parliament (March 1981, amended in 1987).

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection.

4. If, after the adoption of a harmonization measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36, or relating to protection of the environment or the working environment, it shall notify the Commission of these provisions.

   The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.

   By way of derogation from the procedure laid down in Articles 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.

5. The harmonization measures referred to above shall, in appropriate cases, include a safeguard clause authorizing the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Community control procedure.'

Returning to the general rule imposed by Article 8b, Article 100a provides that, when it is a matter of the attainment of the objectives referred to in Article 8a, the Council will act by a qualified majority to adopt measures relating to the approximation of legislation which have as their object the establishment and functioning of the internal market. It should be pointed out that there is an important difference between the original Article 100 and Article 100a. In fact, in the previous system established by Article 100 of the Treaty, the technique for approximation of legislation could be used only when dealing with matters directly affecting the establishment or the functioning of the common market. We have already stressed the restrictive role played by this prior condition when dealing with European social policy. On the other hand, Article 100a is much more dynamic in character and aimed at integration, since it confers upon the Council the power to legislate by a qualified majority by means of the technique for approximation in order to achieve the objectives of the internal market. In other words, Community bodies need no longer demonstrate the direct effect of approximation measures on the achievement of the common market but, as one of the means of achieving the single market, may choose the technique of the approximation of legislation inasmuch as it relates to the establishment or the functioning of the internal market.

The approximation of legislation is analysed teleologically below and no longer as subordinate to the common market. Article 100a may have considerable relevance to social matters.

(b) Exceptional arrangements provided for by Article 100a, paragraph 2.

However, as regards the approximation of provisions laid down by law and administrative action in Member States which have as their object the establishment and the functioning of the internal market, three exceptions are given in the second paragraph of Article 100a. This reintroduces the requirement of unanimity for 'fiscal provisions, those relating to the free movement of persons and those relating to the rights and interests of employed persons'.

The meaning of the terms used merits examination. In fact, since the entry into force of the Single Act, we have witnessed an interpretative analysis based on the political choice of doing as little as possible in social matters at Community level.

This ideological wish led the Commission and the Council to give a wide interpretation to the exceptional arrangements in Article 100a in respect of social matters and, despite a clear and precise text which refers unambiguously 'to the rights and interests of employed persons', to consider it appropriate to interpret this concept as covering all labour regulations!

The question is one of prime importance, since the predominant interpretation will define the field of application of an exceptional arrangement in respect of the decision-making process involved in current European integration.

The rules of interpretation of international law and of Community law are well known. The Court of Justice of the European Communities has clearly confirmed and applied them. Clear and precise texts must be set in the general institutional context, and exceptional arrangements must be interpreted strictly, on grounds of legal security. The aim and the objectives promoted by the Treaty must be taken into consideration in order to give coherence and effectiveness to the Community legal system.

In interpreting Article 100a, paragraph 2, it is not a matter of vesting new fields of social competence in the Community, but simply one of examining whether, when dealing

with the social dimension of the internal market in the same way as its economic dimension, it will be possible to act by a qualified majority within the framework of procedures for cooperation with the European Parliament or whether it will be necessary to have recourse to unanimity.

(c) Interpretation of the concept of the rights and interests of employed persons (Article 100a, paragraph 2)

There are three possible interpretations leading to three options.

(1) Any proposal directly, indirectly or partially relating to the rights and interests of employed persons is excluded from the majority voting procedure.

For example, the planned European company, although fundamentally based on a commercial objective, will undoubtedly have an effect on the interests of workers, and certain provisions of the scheme explicitly confer a right of participation on employees. This would affect the entire scheme and would imply that its adoption was subject to the unanimity procedure of the Council of Ministers.

It should be added that the majority of schemes relating to the opening-up of markets or of competition will have direct or indirect consequences for the labour market and for the interests of workers. Does this mean that they will all be subject to the exceptional arrangements provided for by Article 100a, paragraph 2? Most schemes submitted by the Commission and relating to the implementation of the internal market will have both economic and social effects and any evaluation of respective responsibilities ensuing therefrom will vary according to the perception of those affected.

(2) Article 100a would exclude majority voting only in respect of schemes whose objective or whose consequences were to have a predominant effect on the rights and interests of employed persons. However, how can texts be assessed on the basis of an assumed 'predominance'?

Is the aim of a draft directive on the obligation to set a minimum salary one of guarding against competition and wage dumping or one of safeguarding the rights and interests of employed persons?

Does a scheme relating to health and safety require businesses to bear comparable responsibilities by reducing accident costs or, alternatively, does it solely target the rights and interests of employed persons?

This type of interpretation gives rise to interminable discussion.

(3) Draft directives which have as their exclusive object the protection of the rights and interests of employed persons will have to be adopted unanimously. In this case, the text is unambiguous. The exceptional arrangement to the general rule imposed by paragraph 1 is interpreted in a restrictive manner as demanded by legal security.

After reflection and analysis, it appears that theories 1 and 2 have to be rejected. In fact, in the social sphere, it is possible to distinguish topics covered by individual labour law, labour regulations, collective labour law and social security. The fact remains that, with the exception of certain specific regulations such as, for example, the protection of the employed person in the event of individual redundancy, or the protection of the pregnant woman, or the obligatory recruitment of a quota of handicapped workers, these topics do not enter into the field of application of the rights and interests of employed persons only.

In respect of regulations dealing with contracts of employment, and those relating to part-time working, the adoption of a guaranteed minimum wage, distance working, the participation of workers in businesses, the duration of working time, rest periods, and collective bargaining, it is possible to see that labour law extends far beyond the context of a law whose sole aim is to protect the rights and interests of employed persons. Social legislation covers the reconciliation and compatibility of the respective rights and interests of employers and employees, its aim being to set compulsory common regulations for those involved in business activity who use the labour force in order to prevent unfair competition between businesses in the form of dumping of working conditions.

This is apparent to any specialist or historian dealing with labour law. Some authors have even pointed out that, during the last 10 years, with the formidable increase in deregulation, flexibility and recourse to poorly protected precarious forms of employment, it is no longer a case of labour law but rather one of the law of the labour market.

It is therefore necessary correctly to analyse Article 100a and to recognize that, when it refers to accompanying measures for the internal market in connection with social matters, these usually refer to the attainment of the objectives laid down by Article 8a. It is therefore impossible to demand or maintain that decisions should globally be taken unanimously, on the basis of the restriction laid down in paragraph 2 of Article 100a.

Paragraph 3 of Article 100a must also be taken into account when interpreting paragraph 2. Paragraph 3 stipulates that, in its proposals referred to in paragraph 1 (i.e. those which have as their object the establishment and the achievement of the internal market) in the area of health, safety, environmental protection and consumer protection, the Commission will take as a base a high level of protection.

This is a clear statement that these fields come under the jurisdiction of the internal market and not the exceptional arrangements of paragraph 2. In so far as labour is a factor of production in the establishment of a single market, it is obvious that the majority of schemes relating to the implementation of the internal market and affecting the labour market will have an impact, one way or the other, on the rights and interests of employed persons. We can find an example of this in the directive on the liberalization of public contracts. The refusal to adopt the social clauses recommended by the Economic and Social Committee and the European Parliament on the grounds that this would require unanimity is totally without foundation. They could be adopted on the basis of Articles 8a, 8b and 100a, which form the legal bases of the social dimension of the internal market.

In order to support our interpretation, reference may be made to several judgments by the Court of Justice of the European Communities which has on several occasions confirmed that, in order to interpret certain provisions or situations created by the institutions, it is necessary to have recourse to 'all the available elements of law, even though fragmentary', and by having regard, for the remainder, to the structural principles on which the Community is founded. These principles require the Community to retain in all circumstances its capacity to comply with its responsibilities subject to the observance of the essential balances intended by the Treaty'.[1]

This balance is defined, in particular, by Articles 117 and Article 8b.

C.5.3. The new explicit fields of social competence of the Treaty as amended by the Single Act

(a) Article 118a

'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.

In order to help achieve the objective laid down in the first paragraph, the Council, acting by a qualified majority on a proposal from the Commission, in cooperation with the European Parliament and after consulting the Economic and Social Committee, 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.

Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent measures for the protection of working conditions compatible with this Treaty.'

Interpretation of Article 118a

The chapter on social policy thus benefits from Article 118a which endows the Council with the power to adopt directives in the social sphere, this power being immediately defined by a series of restrictive clauses.

The text of the Single Act bears witness to the negotiation which occurred between the representatives of the Member States. The agreement reached is ambiguous and bears the hallmark of the contradictory attitudes of Member States — protectionism on the part of some and integration on the part of others.

Basic harmonization of minimum standards may be required. Paragraph 3 of Article 118a, however, would not prevent certain Member States from maintaining or introducing 'more stringent measures for the protection of working conditions compatible with this Treaty'.

The implementation of Article 118a gave rise to a crucial debate on the interpretation of the concepts of 'working environment, safety and health of workers'. The central issue is the determination of the fields of competence transferred from Member States to Community institutions.

It should be remembered, however, that Article 118a is not a genuine innovation in the field of European social competence. Certainly, it has the merit of transferring explicitly and generally a major aspect of social policy of Member States to the jurisdiction of the Community. However, by virtue of the institutional system and of the dynamics of the process of European integration, it cannot be forgotten that the developments in the social sphere prior to the adoption of the Single Act have already limited the sovereign power of Member States and transferred certain fields of competence to the Community, particularly with regard to safety and hygiene.

(b) Article 118b: social dialogue

'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.'

[1] Case 804/79, chapter one, note 27 [1981] ECR 045 (paragraph 23).

Many authors have criticized the weakness of the terms used when assigning to the Commission the task of endeavouring to develop the dialogue. Moreover, the objectives of this dialogue are somewhat hazy since it could result in 'relations based on agreement' between management and labour provided, however, that the two sides consider it desirable!

The French Government memorandum of October 1981, which historically launched the idea of a European social area, stipulated that this area had to meet three main objectives:

(i) it must enable employment to be placed at the centre of Community social policy by means of development of cooperation and adaptation of Community policies;

(ii) on both a Community level and on that of the various Member States, it aims to identify social dialogue both outside and inside businesses;

(iii) it must improve cooperation and concerted action in the field of social protection.

According to Caire, the current and future contribution to be made by agreement is essential due to the need for Community social policy, European law and national regulations to complement one another in order to give substance to Community directives or social policies. [1]

Social dialogue is thus a further means for constructing the European social area. This is essentially what should be drawn from Article 118b.

However, even the most optimistic observations highlight the feeble nature of the instruments and institutions of the Single Act on this point. No procedure is laid down or even recommended. In order to set up social dialogue, it will be necessary to await Commission initiatives and the reception these are given by management and labour.

Article 118b thus falls within a legal framework which includes the possibility of concluding European collective agreements whilst still leaving the way open to any other, undoubtedly weaker, formula of collective relations based on agreement.

In addition, in practice, this is what has been observed since the initiative taken by Jacques Delors to call a meeting of the European social partners (Unice, ESC and CEEP) in November 1985 at Val Duchesse.

Readers will know that common opinions were adopted, the first relating to the fundamental options of the strategy for cooperation targeting growth and employment (November 1986), the second relating to training and motivation, information and the consultation of workers (March 1987), the third relating to training and education (January 1990) and the fourth relating to the creation of a European area for geographical and occupational mobility as well as to the improvement of the functioning of the labour market in Europe (July 1990).

What is a common opinion from a legal viewpoint? It is a non-binding measure adopted by those involved in the social dialogue of which there are many examples in practice in various individual Member States.

However, in the European context, these common opinions will be of less value in terms of progress than their individual national counterparts. In fact, at a national level, these texts are the expression of genuine intentions which will be furthered by those professional organizations which are members of the signatory confederations. They define an 'economic and social programme' which it is intended to construct via collective bargaining, on which there is a consensus.

At European level, the weakness of procedures within the Community social dialogue mechanism holds back collective European framework agreements. This weakness was analysed by the Commission which attempted to give greater impetus by creating, in 1989, a 'steering group' consisting of a small number of officials from both sides of industry holding high rank in their respective organizations. The first European framework agreement in the field of vocational training was signed on 6 September 1990. Only the future will tell if this can generate genuine collective bargaining at European level.

C.5.4. Economic and social cohesion

The Single Act introduced a new Title V into Part Three (Policy of the Community) of the Treaty of Rome, entitled 'Economic and social cohesion', and comprising Articles 130a to 130e.

The first paragraph of Article 130a lays down the objectives of Community policy in a new area, referring to 'the strengthening of its economic and social cohesion'.

This is an active strategy (in fact, Article 130a uses two verbs: to 'develop and pursue' an action) intended to promote the harmonious development of the Community as a whole. This development is no longer worded as in Article 2 which was drafted in 1957, 'harmonious development of economic activities throughout the Community', but development guaranteed by economic and social cohesion.

[1] Caire, G., *L'espace social européen* (The Europeen social area), op. cit., p. 22.

This objective and this strategy are not specified further, although it ought to be pointed out that Article 130b assigns to Member States the task of conducting their economic policies and coordinating them in such a way as to attain the objectives set out in Article 130a. In other words, national economic policies should be coordinated whilst taking into account both the economic and the social dimension of cohesion.

The same article specifies that the institutions must take economic and social cohesion into account when implementing common policies and the internal market. Moreover, this implementation must contribute to the achievement of these objectives.

Part one of Article 130b has rarely been discussed. Hitherto, Title V has been read and interpreted, in connection with economic and social cohesion, with respect to the development of Community regional policy. This interpretation can be explained because Articles 130c and 130d target, as their first tool for strengthening the Community's economic and social cohesion, rationalization and improved coordination of existing structural Funds (the EAGGF, the European Social Fund, the European Regional Development Fund). Moreover, existing Community financial instruments must contribute to this, particularly the European Investment Bank. These provisions demonstrate a desire to mobilize resources, actions and energy on the part of these various bodies in order to reduce disparities between the various regions and the backwardness of the least-favoured regions (Article 130a).

Article 130d also provides that, once the Single Act enters into force, the Commission must submit a comprehensive proposal to the Council, the purpose of which is to make such amendments to the structure and operational rules of the structural Funds as are necessary to achieve their new objectives.

In the progress report by the Commission's interservices group, it was stressed that to limit the Community's economic and social cohesion to reform of the structural Funds would be insufficient and 'there are other fields of social policy where monitoring and coordination measures at Community level will be useful if not essential'. Our intention is, once again, to examine the extent to which Articles 130a and 130b strengthen or supplement the social field of competence of Community institutions when analysed in a legal context.

In point of fact, they refer directly to the internal market and common policies, therefore, obviously, Articles 8a, 8b and 100a must be examined in correlation with the provisions establishing their objectives.

Article 130b is unambiguous: not only must economic and social cohesion be taken into account upon implementation of the internal market and the adoption of common policies, but this implementation must be designed so as to contribute to the achievement of this cohesion. This means that all social matters involved in measures intended to establish the single market will be treated equally, that is to say they will be covered by the same qualified majority decision-making procedure and by the procedure of cooperation with the European Parliament.

In the context of the new provisions of the Single Act and from the point of view of explicit social fields of competence, Articles 130a and 130b form a major contribution and cannot be dissociated from the provisions establishing the objectives and the means of achieving the internal market.

However, legal analysis can only provide legal bases for Community action. Socio-political pressures may diverge or deliberately refuse to recognize its validity.

Nevertheless, although the Court of Justice was called upon to interpret the new social fields of competence of the Treaty, its decisions show that it continues to rely on principles arising out of 'the nature of the Communities', that is to say the organization of the system established by the Treaties and the objectives assigned to Community authorities.

This approach has enabled the Court to evolve a number of principles which, as they originate in the Community system, have the appearance of actual general principles of Community law. These principles were inherent in the concept of a common market and in the neoliberal economic philosophy underlying it. 'Economic and social cohesion' may undoubtedly constitute a new reference criterion for the interpretation of the concept of 'internal market', its objectives and its institutional framework.

D. The period 1987 to the present day

D.1. *The project to integrate fundamental social rights into the Community legal system*[1]

D.1.1. Preliminary remarks: the Resolution of the European Parliament of 4 April 1973

Integration at Community level of fundamental rights has long been the subject of debate. In 1973, the Parliament invited the Commission to submit a report on this matter.

The Commission submitted its report on 4 April 1976, and stressed its 'relative lack of jurisdiction', since the Community has no jurisdiction in this field.

However, the report emphasizes that, in the Community legal system, the protection of fundamental rights is based on certain provisions of the Treaty, particularly Articles 7, 48, 52, 117 and 119 thereof. The Court of Justice of the European Communities has handed down major judgments on this basis in respect of the protection of fundamental social rights.

However, analysis shows that the decisions of the Court of Justice in the field of fundamental rights are extremely cautious. It considers that it should draw its inspiration from constitutional traditions common to Member States and that, when determining general principles of law applicable to the Community legal system, it can be guided by international treaties relating to the protection of the rights of man which have been concluded with the participation of Member States or to which Member States adhere.

As regards fundamental social rights, the Court has been even more reserved. Principally, it reaffirms its task which is that of interpreting Community law and ensuring that the latter is observed, the specific nature of this law preventing it from taking the protection of a fundamental right into consideration unless the said right is guaranteed by Community law.

On 5 April 1977, the European Parliament, the Council and the Commission adopted a common declaration on fundamental rights in which the three institutions stressed the paramount importance they attached to the observance of fundamental rights deriving from the constitutions of Member States and from the European Convention on Human Rights, and declared that, when exercising their powers, they would respect these rights whilst pursuing the objectives of the European Communities. This declaration obviously had no legal effect on the Treaties and contributes nothing to the integration of fundamental rights in the Community.

In April 1978, the European Council meeting in Copenhagen endorsed the common declaration and solemnly affirmed that observance of human rights formed part of the common heritage of Member States. In 1983, this position was confirmed by the solemn declaration on European Union.

This did not prevent the Court of Justice from reaffirming, in 1987, that Community institutions can only monitor observance of fundamental rights guaranteed by Community law within the field of application of the latter.[2]

In 1979, the Commission submitted a memorandum relating to accession on the part of the Communities to the European Convention on Human Rights and Fundamental Freedoms. This accession procedure would solve the problem of the lack of a list of fundamental rights in Community law. This was all very well, but this approach on its own did not permit recognition and integration of fundamental social rights which, as we know, are not included in the said Convention. The memorandum was to no avail. In 1982, the European Parliament requested that the Commission submit a formal proposal on this to the Council. The Commission advised that it would do so when it had received an assurance that Member States were in agreement on this procedure, but in Permanent Representatives Committee debates, it appeared that five Member States were asking for this matter to be postponed despite the fact that all Member States adhered to the European Convention on Human Rights! The grounds for opposition on the part of the United Kingdom, Ireland and Denmark were obvious. The European Convention on Human Rights has no internal effect on the legal system of these States. In point of fact, if the Community, as an international legal person, were to ratify the Convention, the said Convention would become part of the Community legal system, become Community law and take full effect!

D.1.2. The attempt to adopt a Community Charter of fundamental social rights

Reference has been made above to various Commission reports recommending that the Community should adhere to international instruments guaranteeing fundamental social rights. We have also stressed that the draft Treaty on European Union referred both to membership, within five years, of the 'European Convention for the Protection of Human Rights and Fundamental Freedoms' (Article 4, paragraph 1), and the obligation of the Union to maintain and develop the economic, social and cultural legislation of the constitutions of Member States and of the European Social Charter. Moreover, within the same period, the Union was to adopt its own declaration of fundamental rights.

A faint trace of this stated desire to integrate fundamental rights into the Community legal system can be found in para-

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1 Lengthy expositions are devoted to the integration of fundamental social rights into the Community legal system in Vogel-Polsky and Vogel, op. cit., Part Two, Chapter III, pp. 145–184.

2 Case 60 and 61/84, Cinéthique judgment of 11 July 1987.

graph 3 of the preamble of the Single Act, which describes the support of Heads of State or Government for fundamental rights.

This was revived in 1987 by the Belgian Government, then holding the Presidency of the Community, when Michel Hansenne proposed the creation of a basis for fundamental social rights to be established uniformly throughout the Community.

D.1.3. The Opinion of the Economic and Social Committee[1]

In the same year, the Economic and Social Committee adopted an own-initiative Opinion on the basis of the remarkable Beretta report, entitled 'Social aspects of the internal market'.[2]

The European Council Summit meeting in Hanover (June 1988) once again confirmed the importance of the social aspects of the single market, and the Commission adopted a new approach by proposing the adoption of a Community instrument. On 9 November 1988, it brought it before the Economic and Social Committee and asked the latter for an urgent opinion on the possible content of a Community charter of fundamental social rights.

The Opinion was adopted at a Plenary Session of the Economic and Social Committee on 22 February 1989[3] and is divided into four parts which link a legal approach with a political strategy. In Part One, the Opinion defines the 'Foundations of Social Europe', which comprise three complementary components:

(1) Fundamental social rights guaranteed in the Community legal system;

(2) the social dimension of the internal market;

(3) Community social dialogue.

The Opinion opted for a wider view of social rights, encompassing not only aspects directly connected with European citizens who were regarded as producers, but also all the means for ensuring individual fulfilment and effective participation of persons in the political, economic, social and cultural organization of society.

In the light of current strategic priorities, the Committee decided to formulate its Opinion on the basis of those fundamental social rights which were of particular importance given the objective of the Single Act and the new and specific requirements involved in the achievement of the internal market. It proposed to give its Opinion in respect of the other fields at a future date.

In Part Two of the Opinion, entitled '1992: guaranteeing fundamental social rights', the Committee stated that the legitimacy of a Community guarantee of fundamental social rights was based on the fundamental principles of the Community which include an undertaking to enhance the prosperity of all citizens and to increase economic and social cohesion.[4] The achievement of the internal market must not challenge fundamental social rights (paragraph 2). The internal market must not be restricted to a free-trade area because the planned European integration it promotes has no direction or aim unless it improves the living and working conditions of all categories of the population (paragraph 3).

How was this to be done? The Opinion points out that fundamental social rights are not unfamiliar territory. Within various international organizations, governments and the social partners have been able to agree on the definition of fundamental social rights, and it is all the more urgent, in the context of the single market without frontiers, for certain social rights to be firmly rooted in Member States in order to constitute a coherent and interdependent whole forming part of the common heritage of the Member States. When reading this text, it might be suspected that it is the result of a compromise between those who wanted to confirm the need to guarantee fundamental social rights at Community level using instruments or procedures of Community law, and those who maintained that this was a field under the jurisdiction of Member States. The use of the word 'rooted' may be interpreted in two ways: rooting may be brought about through the Community institutions or through constitutions or national basic laws. However, the guarantee of fundamental social rights must constitute 'a coherent and interdependent whole'. This statement makes it possible to draw one conclusion: only a Community instrument can result in such an operation and root it in the internal system of Member States. In paragraph 8, moreover, the Opinion is more powerfully presented, since it considers that not all social policy need be the subject of Community law, but that, on the other hand, the recognition of fundamental social rights must be adopted by European legislation.

The principle of subsidiarity is implicitly evoked since paragraph 10 clearly states that concrete rules of application in respect of fundamental social rights at Community level remain, in principle, under the jurisdiction of Member States, professional organizations, businesses and services by means of national legislation and/or collective bargaining.

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[1] For a complete and detailed analysis, see Vogel-Polsky and Vogel, op. cit., pp. 55–63.

[2] Doc. CES 225/87 final of 17 September 1987 and Doc. CES 1069/87 of 19 November 1987.

[3] Doc. CES 270/89 of 22 February 1989.

[4] For further details on the views of the Committee on this point, see, in particular, the following: 'Making a success of the Single Act' (OJ C 180, 8. 7. 1987); annual Opinions on the economic and social situation; Opinions on social aspects of the internal market (OJ C 356, 31. 12. 1987 and Doc. CES 225/87 final).

The Committee adds that it will be very important to develop social dialogue at all levels with a view to drafting framework agreements. The opinion then devotes an entire paragraph to establishing the right of all categories of worker to conduct collective bargaining at all levels and then takes up the idea of the 'European social model', which is to a large extent similar in all Member States of the EEC and which combines the respective roles of the States, collective bargaining and recognizes freedom of association and collective bargaining as a fundamental element in regulating social relations and the possibility of worker representation in businesses.

Part Three of the Opinion is entitled 'Achieving the European social model' and it contains a clear message on achieving a guarantee of fundamental social rights: it is not a matter of devising a new Community instrument, but one of integrating fundamental social guarantees into the Community legal system with the specific supranational character attaching thereto.

The Opinion then makes a distinction between:

(a) the catalogue of general rules covering the entire field of fundamental social rights in their widest sense and which undoubtedly extends beyond the fields of social competence explicitly or implicitly recognized by the Treaty as vested in the Community institutions. This is a definition of the fundamental bases of a European Community which is not restricted to an economic area without internal frontiers;

(b) the catalogue of rules in the field of labour relations, the labour market and working conditions which coincides extensively with the basic instruments of the International Labour Organization, the European Social Charter and its additional protocol, the European Code of Social Security and its additional protocol (Council of Europe), as well as the United Nations Covenant on Economic, Social and Cultural Rights.

The Opinion deals clearly with the social dimension of the internal market which must combine observance of diversity in national legislation and national systems of labour relations, whilst adopting any necessary common regulations. It states that it is a matter of adopting specific social guarantee provisions which are essential for a balanced implementation of the internal market in order to avoid the risks of unfair competition, and in order to permit progressive approximation of working conditions and direct and indirect social costs in economic sectors affected by the achievement of the internal market, with regard to strengthening the economic and social cohesion of the Community.

The social dimension of the internal market must also include a 'consumers' policy' aspect. Finally, the importance of Community social dialogue is discussed with respect to the conclusion of framework agreements and European collective agreements.

Part Four, which is the last part of the Opinion, is unquestionably the most important because what is the use of proposing the potential contents of a 'Community Charter of fundamental social rights' if the matter of its legal status in the hierarchy of Community legal sources and thus its operational nature is not dealt with and a formula not proposed? The solution proposed by the Committee's Opinion is that it is the instruments and procedures laid down by the Treaty which must be used to guarantee, within the context of the legal systems of Member States, observance of fundamental social rights and to permit implementation of those social measures which are essential to the satisfactory functioning of the internal market. This clearly means that it will be necessary either to adopt a binding instrument of Community law (regulation or directive), or a Community legal procedure which confers on the Community the competence to conclude or accede to international agreements on all matters in respect of which it is vested with internal competence, taking into account not only the system of the Treaty but also its material provisions. Such a procedure would also have the effect of imposing these treaties on Member States with equal force, thus setting up a body of law applicable to their citizens and to themselves.

D.1.4. The European Parliament and fundamental social rights

The European Parliament has itself been very active in this area. On 15 March 1989, it adopted a Resolution on the social dimension of the internal market. [1] Its preamble comprises 13 paragraphs which will not, however, be quoted in full. The striking feature is that the Resolution is in keeping with the same global perception of the notion of social guarantees to be granted to all citizens and not only to the working population. Paragraph K states that the internal market has forgotten a growing number of 'non-employed' social categories whose position is already unfavourable, which has contributed to the growth of discrimination within the Community. A parallel is drawn in the Resolution between, on the one hand, the desire for the adoption at Community level of fundamental social rights which should not be jeopardized because of the pressure of competition or the search for increased competitiveness and which could be taken as the basis for future dialogue between management and labour, and, on the other hand, the need to guarantee the social dimension of the internal market. It will thus be necessary to set up a harmonious economic and social area, and to adopt and implement a programme of specific measures which contribute to social progress and whose fixed timetable will give expression to the social dimension of the internal market.

[1] Doc. A2-399-88, European Parliament 130.923 (OJ C 96, 17. 4. 1989, p. 61).

This Resolution relates essentially to the social dimension of the internal market and envisages a programme of specific measures to be taken by the institutions in the following fields:

1. free movement of persons and the right of establishment;
2. the need for harmonization in social policy (including 'the need for Community legislation to achieve gradual convergence, at the highest level, of the rules, standards and systems of social security in the various Member States...');
3. the role of the social partners and industrial democracy (notably requires the Commission and the social partners, in accordance with Article 118b of the Treaty, to develop a binding framework *(sic)* for negotiations and calls upon the Commission to submit as soon as possible a directive on industrial democracy and a directive on the social reports of companies);
4. employment policy;
5. education and training;
6. the underprivileged;
7. the social position of workers from third countries with a view to 1992;
8. fundamental social rights.

This part is important because it provides details on the legal bases which are not given in the Opinion of the Economic and Social Committee. Note that it is necessary to 'introduce Community legislation laying down a platform of fundamental workers' rights related to the completion of the internal market, in order to ensure economic and social cohesion as mentioned in Article 130a of the EEC Treaty'.

This Community legislation should take the form of regulations and directives setting out these fundamental social rights, on the broadest possible legal bases, and in particular Article 118a in its wider sense, specifying, finally, that the following fundamental social rights will be guaranteed:[1]

(a) the right to equal opportunities and to equal pay for equal work, without discrimination on grounds of sex;

(b) the right to safety and health at the workplace;

(c) the protection of minors;

(d) the right to free association and the right to strike;

(e) the right of workers to be informed, to be consulted and to participate;

(f) the right to free collective bargaining;

(g) the right to initial and on-going vocational training and vocational guidance;

(h) the right to social protection and a pension;

(i) the right to an appropriate wage in accordance with national legislation or collective agreements and to financial security for workers, and the right to above-subsistence level compensatory payments and financial support for workers excluded from the job market through no fault of their own;

(j) the right to a minimum guaranteed wage and a minimum guaranteed income for workers excluded from the job market;

(k) the right to petition the Court of Justice of the European Communities;

(l) the right to free choice of job, place of work and place of training within the Community.

Moreover, emphasis is given to the importance of laying down, in particular, as the internal market is achieved:

(i) the right to vocational mobility, in its various forms;

(ii) the right to equal protection for all workers whatever their terms of employment;

(iii) the right to be informed and consulted and to participate in the event of technological innovation or change to the organization of work, transfers within undertakings or any change in the status of undertakings;

(iv) the right, in the same circumstances, to suitable training and/or retraining.

Finally, it is pointed out that the ILO and Social Charter of the Council of Europe agreements constitute a concrete reference point for the establishment of Community rights and those Member States who have not yet ratified these texts, in particular the Social Charter of the Council of Europe and its additional protocol, are requested to do so most urgently.

In possession of the two texts originating from the Economic and Social Committee and the European Parliament encouraging it to undertake an active policy in social matters and to draw up binding instruments of secondary legislation, in a context extending well beyond the explicit social competencies of the Treaty, the Commission decided not to submit a proposal to the European Council meeting in Madrid on 26 and 27 June 1989. Moreover, Mrs Thatcher had quite unambiguously reaffirmed her Government's reluctance to accept new undertakings in the social sphere, in whatever form, even that of a solemn declaration without binding force.

[1] See European Parliament Resolution of 15 December 1988 (OJ C 12, 16. 2. 1989, p. 181).

D.1.5. The draft Community Charter of fundamental social rights drawn up by the Commission

Commission departments worked on the preparation of a draft Community Charter of fundamental social rights on the one hand and, on the other, examined the contents of an Action programme relating to the implementation of the Community Charter of fundamental social rights. The Commission's draft was officially published on 2 October 1989.[1] The European Parliament commented by means of seven resolutions on economic and social cohesion which were adopted on 14 September 1989.[2] Relations between Parliament and the Commission were extremely tense on this matter. Politically speaking, a wide coalition had come into being in the European Parliament covering socialist groups, the Unitarian Left and the Christian Democrats. Parliament had specifically pointed out to the Commission that it considered that the social dimension of the Community was based on the adoption and implementation at Community level of all unchallengeable fundamental social rights covered by Community law, conferring the right to petition the Court of Justice. It also deplored the fact that it had not been consulted and had only been advised of the contents of the draft charter late in the day.

The Commission's draft document is entitled 'Community Charter of fundamental social rights'; however, on reading the 15 paragraphs of its preamble, it amounts to merely a solemn declaration without binding force and requiring no undertaking on the part of the Community institutions. The preamble, nevertheless, refers to explicit general social fields of competence in Article 117 of the Treaty and to specific social fields of competence (Articles 7, 48 to 51, 52 to 58, 118 to 122, 118a, 119, 128, 130a to 130g), and more generally, to the approximation of legislation (Articles 100, 100a and 235), which are conferred on the Community by the Treaty as amended by the Single Act.

It adds, however, that the initiatives to be taken relating to implementation of the fundamental social rights presented in a declaration fall under, according to the case, the responsibility of Member States and the bodies forming them or the responsibility of the European Community, pursuant to the principle of subsidiarity, that this implementation may take the form of laws, collective agreements or practices existing at various appropriate levels and that it requires, if appropriate, the active involvement of the social partners at the various levels in question. The reference to the principle of subsidiarity is to reassure Unice and the UK and other governments.

It could be argued that, in referring to the fields of competence of the Community as recognized by the Treaty, the preamble implicitly affirmed that, in respect of these fields, there is a transfer and thus relinquishment of sovereignty on the part of the Member States. However, this interpretation goes beyond the Commission's intentions.

The planned fundamental social rights include the following 12 topics:

1. the right to free movement
2. employment and remuneration
3. improvement of living and working conditions
4. the right to social protection
5. the right to freedom of association and to collective bargaining
6. the right to vocational training
7. the right to equal treatment for men and women
8. workers' right to information, consultation and participation
9. the right to health protection and safety in the work environment
10. protection of minors
11. elderly persons
12. handicapped people

These areas amply cover the list of the European Parliament and of the Economic and Social Committee, whilst, however, remaining in favour of workers and not taking the entire population (employed and non-employed) into consideration except in respect of specific points: the right to social protection must be guaranteed for any EEC citizen regardless of his/her status. What provision is made for implementation of the Charter, a crucial part of the instrument? Any reference to a common policy or to a binding undertaking on the part of Community institutions in respect of the basis of the provisions of the Treaty is carefully and deliberately avoided. By means of this declaration, Member States undertake to take appropriate initiatives and to mobilize the necessary means, either by legislation or by encouraging the social partners to conclude collective agreements at national, regional, sectoral or business level.

The Community is thus given no role in the achievement of a Community Charter of fundamental social rights! In this case, where will the common character of the various initiatives taken in certain Member States come from? How will alignment, harmonization, application and control at Community level be ensured? In other words, what new element does this plan contribute to the implementation of the social

[1] COM (89) 471 final, 2 October 1989.
[2] OJ C 256, 9. 10. 1989, p. 128 *et seq.*

dimension of the internal market or the safeguarding of social rights in the Community? Also, if the declaration constitutes an 'undertaking' on the part of Member States, is it an agreement in simplified form, a decision, or an agreement pursuant to Article 220 of the Treaty?[1]

D.1.6. The plan adopted by the Council (Social Affairs)

On 30 October, the Council (Social Affairs) put the finishing touches to the draft Community Charter of fundamental social rights which was to be submitted to the European Council meeting in Strasbourg. To some extent, it is a watered-down version of the original text. The title of the Charter is amended to the 'Community Charter of the fundamental social rights of workers', and only workers in the European Community are currently referred to.

In the chapter on freedom of movement, two important provisions are deleted; they related, firstly, to working conditions and the social protection of Community workers required to work permanently in a Member State, notably in the event of the award of public-works contracts, under conditions identical to those accorded to workers in the host country and, secondly, to the safeguards to be observed in the event of subcontracting in the context of freedom to provide services.

As regards the chapter dealing with social protection, it should be noted that its field of application *ratione personae* benefits solely Community workers and that the paragraph relating to persons with insufficient means of subsistence (particularly elderly persons) and to the social safeguards to be accorded to them has disappeared. The chapter devoted to the freedom of association and to collective bargaining has been slightly amended. The chapter on vocational training has lost the provision confirming the right of all European Community citizens to be considered on an equal basis with nationals in respect of vocational training courses, including those at university level. Only the style of the chapter on equal treatment for men and women has been touched. Its content corresponds to existing directives and it adds nothing.

The chapter relating to the right of workers to information, consultation and participation unquestionably touches on a highly controversial area. It states that these three forms of participation must be developed on appropriate terms, taking into account practices in force in various Member States. This remark apparently indicates that the development referred to will take place at Community level but will observe national diversities. The list of fields for which these areas of participation must be organized is covered either by existing directives (collective redundancies, transfers of undertakings, European interest grouping), or by draft instruments already being discussed (European company, transfrontier mergers, introduction into businesses of technological changes having major consequences for workers). This arrangement appears to confirm that, within the context of its fields of competence, this is Community policy and not spontaneous implementation on the part of Member States.

The chapter relating to health protection and safety in the working environment is drafted in a different way, and is based on paragraph 1 of Article 118a.

However, the draft specifies the need for workers' training, information, consultation and balanced participation as regards the risks incurred and measures taken to reduce or eliminate them. Provisions concerning the completion of the internal market must contribute to this protection. Two comments should be made about this provision: it confirms that the adoption of the measures referred to is at Community level, under the jurisdiction of the institutions. Secondly, it appears to opt for a narrow interpretation of the term 'working environment' taken in a material and environmental sense.

In the Commission's draft, the protection of minors provided for a minimum employment age of 16, but this is lowered to 15 in the final text.

The last two topics relating to elderly persons and handicapped people have not been substantially modified.

Title II, 'Implementation of the Charter', constitutes a major qualitative step backwards. In fact, any reference to an undertaking on the part of Member States is deleted and the chosen wording has the tone of a simple 'statement'. In order to define the ways and means for implementing the Charter, it is purely and simply indicated that the safeguarding of fundamental social rights and the implementation of social measures essential to the satisfactory functioning of the internal market fall more particularly, in the context of an economic and social cohesion strategy, under the jurisdiction of Member States in accordance with their national diversities.

The final text fails to establish the integration of the Community Charter of fundamental social rights into the European legal system and to confer on Community institutions the responsibility for achieving the safeguards set out in this Charter. Moreover, it dispenses with the concept of an undertaking on the part of the Member States. The mere reference to the framework of economic and social cohesion does not enable Member States to implement a coordinated

[1] Article 220 of the Treaty provides that 'Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals...'.

decision-making procedure. This text constitutes the death warrant of a genuine Community Charter of fundamental social rights.

The only opening left lies in the actions which the Community institutions must or could take on the basis of the social fields of competence of the Treaty. Paragraph 30 of the declaration expressly states that the European Council calls upon the Commission to submit as soon as possible initiatives falling within its field of competence pursuant to the Treaties with a view to adopting legal instruments aimed at the effective implementation of those rights falling under the jurisdiction of the Community. It cannot be more clearly stated that the Community Charter has not conferred new fields of competence in the social sphere on the Community, the only mechanism possible being that of achieving the existing objectives which relate to certain fundamental social rights, in strict application of the powers of Community bodies defined by the Treaty.

D.2. *The European Council at Strasbourg*

The reaction to the final version was immediate, with the European Trade Unions Confederation indicating its disappointment and its concern about the future. On 22 November 1989, Parliament adopted several resolutions, the first relating to the Community Charter on fundamental social rights. [1] It deplored the fact that the procedure followed by the Commission and the Council in adopting a text of such vital importance to the European Community did not permit the European Parliament to be associated with its adoption:

(i) it deplored the watering down of many points in the amended text by the Council (Social Affairs) on 30 October 1989 and called upon the Strasbourg Council to revise and improve the text to preserve its credibility in the face of the expectations of Community citizens;

(ii) it regretted that the Charter had not been embodied in Community law by means of binding instruments, as called for by the European Parliament in its Resolutions of 15 March and 14 September 1989;

(iii) it called upon the Council to conduct a conciliation procedure with Parliament on the Charter *before* the Strasbourg Summit;

(iv) it stated, in addition, that the adoption of the Charter must commit the Council, the Commission and Parliament to adopting practical implementing provisions in the near future and commit the Member States to carrying them out;

(v) it stated that the full value of the Charter would be brought out only through the implementation, in accordance with a strict timetable, of binding measures, in particular those provided for in the action programme submitted by the Commission and on which Parliament had delivered its opinion, and that these measures had to become an integral part of the Community's legal system and be accepted as a basis for legal action.

Next, the Resolution lists all the policies and social rights to which priority must be given with a view to the completion of the internal market.

Two politically important elements appear in the Resolution:

(1) Parliament requested that the extension of the procedures provided for in the Single Act (qualified majority voting in the Council and the cooperation procedure with Parliament) to include all those areas permitting establishment of the social dimension of the internal market to be placed on the agenda for the next intergovernmental conference;

(2) announced that it reserved the right to make its agreement to internal market measures in the business, financial and economic fields, which it was considering or was yet to consider, conditional on the content, legally binding nature and pace of introduction of measures contained in the social action programme.

However, we should remember that this was at the end of November/beginning of December 1989. Social Europe was unlikely to take a starring role on the European political stage — Europe was witnessing the end of an era. The Communist regimes in East European countries were being toppled like a house of cards in Hungary, Czechoslovakia, Poland and East Germany. The prospect of German unification not only turned geopolitical stability upside down but was apparently a threat to the plan for integration in the Community.

At the Strasbourg Summit on 8 and 9 December 1989, the Social Charter took a back seat amongst questions packed into a heavy schedule, notably due to the impasse with regard to economic and monetary union. As expected, the text was adopted by 11 Member States in the form of a non-binding declaration. The United Kingdom still refused to participate. [2] At the same time, the European Council noted that the European Commission had drawn up a social action programme whose text had been officially submitted to it. [3] This formula was thus not binding on the Council, Commission or Member States. The only significant point was the already published intention of the Commission to submit proposals in the social field before the end of 1992 and to select a first package of measures in the context of its employment programme.

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1 European Parliament, Doc. A3-69/89 (OJ C 323, 27. 12. 1989, p. 44).
2 Bull. EC 12-1989, p. 11.
3 Commission of the European Communities, 'Communication from the Commission concerning its action programme relating to the implementation of the Community Charter of fundamental social rights for workers', COM(89) 568 final.

No decisions were taken at the Strasbourg Summit. Nothing changed in the institutional system nor in the Community fields of competence from a social point of view.

Unlike the procedure implemented at the time of the adoption of the Community's first social action programme in 1974, the Commission was not empowered by the Council to extend the legal bases of Community social policy. The legal framework available to the Community when drawing up any social action programme remains that of the Treaty and may include only those initiatives covered by the fields of competence conferred by the Treaty.

D.3. *Commission communication concerning its action programme relating to the implementation of the Charter*

Analysis of this programme shows that several proposals appearing in this text are within the explicit fields of competence conferred on Community institutions by the Treaty. Ultimately, they appear in the action programme only as a reminder. If an action programme is not adopted, they will in any case be subject to binding instruments at Community level. This applies to four of the most important chapters of the document, namely Chapter 4 (freedom of movement), Chapter 8 (equal treatment for men and women), Chapter 9 (vocational training), and Chapter 10 (health/safety at the workplace). A fifth chapter, Chapter 7 (right of workers to information, consultation and participation) covers those measures in respect of which certain fields of competence have already been transferred to Community bodies by means of directives. [1] This does not mean that the measures proposed in these five chapters are of no interest, but that this does not constitute implementation of the Community Charter of fundamental social rights. These measures must be adopted, since Article 8b requires the Council and the Commission to act whilst ensuring balanced progress in all the sectors concerned and provides for legal action which may be taken to penalize failure to do so (Article 175). It is also important to note that, on several occasions, the Commission document presents the continuation of pre-existing programmes or simply the updating of insufficient directives (collective redundancies) or the adaptation of draft directives set aside since 1982 (part-time working, fixed term contracts, etc.) as 'new initiatives'. At the very least, this view on the part of the Commission is backward-looking and undynamic.

The action programme assumed particular political importance and remained the only area on which the social dimension of the internal market could be based. [2]

Implementation of the Commission's programme in the social field in 1990, particularly in the field of working conditions, has provided a caricature of problems connected either with differences in interpretation of the legal basis of draft directives submitted by the Commission, or with the absence of Community jurisdiction.

A real legal battle has been engaged around three draft directives on 'atypical work', adopted with difficulty by the Commission on 18 June 1990 and relating to part-time work (14 million workers), temporary work and fixed-term contract work (approximately 10 million workers).

It is known that four Member States (the Federal Republic of Germany, Denmark, Ireland and the United Kingdom) gained a considerable advantage from differences in social security for these categories of workers, which enabled the Commission to implement Article 100a (that is to say a qualified majority adoption procedure) by referring to distortions in competition and to Article 118a in connection with provisions relating to health/safety safeguards. Finally, the section relating to vocational training, rights of representation and participation, bonuses, leave, redundancy payments, and legal and vocational social security came under Article 100 and thus unanimous voting. The ups and downs experienced by the project, and the critical reactions of the Economic and Social Committee and of Parliament demonstrated the institutional and instrumental weakness of the EEC Treaty and the Single Act in a field of social policy which was nevertheless directly connected with the development of the internal market.

The imbalance between Community jurisdiction in the field of company law, for example, and social matters is such that it can be described as legal schizophrenia. It led to a split in the measures applied to the project for a European company (whose origins and successive misfortunes date back to 1970): firstly, a regulation on the status of the limited company in commercial law (qualified majority) and, secondly, a directive (unanimity, Article 100) regarding workers' participation!

D.4. *The inadequacies of the social dialogue (Article 118b)*

In principle, the social dialogue was to form the second part of the European social dimension, its role being to provide the complementary link, in an industrial and economic society in the throes of great change, between observance of national diversities and the adoption of Community standards.

[1] Directives 75/129 on collective redundancies (OJ L 48, 22. 2. 1975) and 77/187 on transfers of undertakings (OJ L 61, 5. 3. 1977).
[2] See Vogel-Polsky and Vogel, op. cit., p. 173 *et seq.*

The system of participation already created by the conciliation procedures between the Commission and those involved in the social dialogue did not result in the conclusion of European collective agreements relating either to topics which could be tackled at interprofessional level and sectoral level (adaptation of working times, wage moderation, vocational training), or working conditions in sectors of industry (motor vehicles, computing, etc.).

Although it is notoriously difficult to transplant social institutions from one country to another, sectoral analysis of the alignment of requirements and conditions for meeting these can result in negotiated rules which may be in the form of bilateral, trilateral or European or regional collective agreements. It must be recognized that progress towards economic integration will multiply those social policy areas requiring regulation at European level and that this will have to be supplemented by collective action.

The current inadequacy of the social dialogue is all the more flagrant since the implementation of the internal market in economic and commercial terms involves greater emphasis on transnational regrouping and restructuring. Businesses aim to achieve optimum size in the internal market. The increase in concentration operations of intra-Community type has been investigated in a study carried out by the Directorate-General for Competition of the Commission [1] and the phenomenon has become so important that it has become the subject of a major regulation relating to the control of concentrations between undertakings. [2] This regulation is the cornerstone of Community policy on competition and sets up economic control of concentrations between undertakings of a Community dimension, conferring substantial powers on the Commission for this purpose. Once again, it has to be pointed out that the social dimension is totally lacking from this regulation, although there is a risk of the absence of working standards peculiar to these concentration operations leading to a downgrading of working standards in the face of pressure from increased competition, and the absence of any collective consultation on the negative social consequences of concentration operations means that there is no way of making up for the lack of Community standards.

The inexorable development of transfrontier business groupings would require a legal framework enabling workers' representatives to have the opportunity to participate in the taking of decisions affecting them and to be involved in negotiating the social consequences of these decisions.

D.5. *European Parliament strategy in the context of European Union*

This section deals with the European Parliament, so it would be superfluous to describe here all its recent work and deliberation with a view to defining its strategy in anticipation of the intergovernmental conferences on economic and monetary union and on political union.

It should be pointed out that the erosion of the social aims of the Commission is becoming increasingly unacceptable and that there is a considerable consensus on the need resolutely to undertake a new global and societal approach which recognizes the need for achievement of the single market and economic and monetary union to be accompanied by the promotion of simultaneous economic, social and cultural development.

However, reference should be made to a debate which was significant both in respect of the subjects dealt with and the extent of the work done on it by the Committee on Social Affairs, Employment and the Working Environment, at Parliamentary part-sessions in March, May, June, July and September 1990. This was the van Velzen report on the communication from the Commission on its action programme relating to the implementation of the Community Charter of fundamental social rights for workers — priorities for the period 1991–92.[3]

The Social Affairs Committee in fact wanted to make an in-depth investigation of the various aspects of the Commission's social action programme. Moreover, the communication by the Commission was also submitted for the opinion of various Parliamentary committees: the Committee on Legal Affairs and Citizens' Rights, the Committee on Youth, Culture, Education, the Media and Sport, the Committee on Institutional Affairs, the Committee on Women's Rights, and the Committee on Economic and Monetary Affairs and Industrial Policy. This work was the basis of an important resolution proposed by the Social Affairs Committee and adopted on 12 September 1990 by the European Parliament. The explanatory statement by the general rapporteur, Willem van Velzen, analyses and gives fundamental reflections on relationships between the completion of the internal market in January 1993 and Community social policy.

He shows that social progress is not the automatic corollary of the internal market and that, on the contrary, the increased dependence of various national economies arising out of the single market might give rise to the risk of a watering down of the prerogatives of States in several fields, including that of social policy.

This analysis reveals the need to develop social policy measures at Community level. Recourse to the principle of subsidiarity must not impede the adoption of these measures.

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1 *Social Europe*, special issue on the European economy, 1990, pp. 60–61.
2 Council Regulation No 4064/89 of 21 December 1989, which entered into force on 1 September 1990 (OJ L 395, 30. 12. 1989).
3 European Parliament, DOC A3-175/90. The report was drafted with the collaboration of 11 co-rapporteurs.

By 1993, the European market will be virtually entirely opened up, and it is in this context that it is essential to consider its social dimension from the very start. 'The free movement of capital and free competition must not lead to negative developments in the field of wages, working conditions and social security or to the weakening of trade unions' rights'.

After mentioning the legal bases in the Treaty in respect of social matters and the provisions introduced by the Single Act in Articles 100a, paragraph 3, 118a, 118b and 130a to 130c, the general rapporteur opines that the adoption of the Community Charter of fundamental social rights, the communication by the Commission on its action programme relating to the implementation of the Charter, and the agreement concluded on 3 April 1990 between the Commission and the Enlarged Bureau of the European Parliament relating to a legislative programme for 1990 have laid the foundations of social Europe. Articles 110a and 118a must be taken as a basis for the adoption of social policy measures, this being the only way of guaranteeing that these articles are translated into fact as of 1 January 1993.

In its report, the Social Affairs Committee clearly set out its priorities and presented Community instruments it regarded as essential. Its priorities relate to employment and wages policy, the improvement of living and working conditions, the rights of workers and workers' organizations, equal treatment for men and women, wages and minimum incomes, the social status of workers, vocational training of workers and those seeking employment, the harmonization of training and diplomas at vocational-training level and the situation of young people, the elderly and handicapped persons. The results presented below are based on a considerable consensus: 11 political groups participated in drafting the report.

The importance of the van Velzen report and the resolution adopted on the basis thereof is apparent from the 'extraordinary' agreement on the legislative programme of the Community concluded on 3 April 1990 between the Enlarged Bureau of the European Parliament and the Commission. In fact, this agreement confirms the principal claims submitted by the European Parliament and in particular provides that, at each stage of the adoption procedure of Community legislation, the Commission will remind the Council of the need to give greater consideration to the position expressed by the European Parliament.

The result of this is that the Resolution of 12 September 1990 assumes new significance and acuity since it presents the basic demands of Parliament in the field of Community social policy from a position perhaps not of strength but of modified and increased influence. At least, that is what Parliament hoped. Only the future will actually show whether institutional progress has been achieved.

As indicated at the beginning of this section, it seems superfluous to describe to Parliament its recent work and decisions, but it is nevertheless appropriate to refer to the fundamental attitude expressed in the resolution on fundamental social rights for workers (Doc. A3-175/90). There is a general section which puts forward important points, notably:

(i) the legal bases of social policy must guarantee that Community standards will be adopted at the end of the cooperation procedure with the European Parliament and by a qualified majority vote of the Council;

(ii) matters dealt with by forthcoming intergovernmental conferences will include the extension of Community jurisdiction to the social sphere, and the cooperation procedure will also be applied to them;

(iii) integration of fundamental social rights in the Community legal system must take place in particular by means of the Community as such adhering to the European Social Charter of the Council of Europe and to international labour agreements;

(iv) the application of Community law by Member States provides for specific procedures and proposes the creation of a European Labour Court within the Court of Justice of the European Communities.

The resolution is divided into 11 parts covering the entire range of social policy. We will return to this later.

II – REFLECTIONS ON SOCIAL POLICY IN A UNITED EUROPE

A. The lessons to be drawn from a review of the social dimension of the Communities

A.1. *The first period (1958–74)*

The principal lesson which may be drawn from Community experience during this period is that the theory of social progress being automatic, a result of the functioning of the common market, is inaccurate. Amongst the causes of this lack of social progress at Community level are the institutional inadequacies and imbalance of the Treaty in the social sphere.

A.1.1. Underutilization or non-achievement of explicit social fields of competence

Although explicit social fields of competence are provided for in several areas, the only one to see any effective result is that of the free movement of workers and the implementation of social security for Community migrant workers.

On the other hand, implementation of freedom of establishment of self-employed persons will be postponed until after the expiry of the transitional period, due to deep-seated cultural and political resistance. The concept of equal pay for men and women has been deliberately infringed and set aside by the resolution on the part of Member States on 31 December 1961.

Vocational training has not made significant steps forward. The restrictive interpretation of Article 128 led to the adoption by the Council of a Council Decision of 2 April 1963 relating to the laying down of general principles for a common vocational training policy, drafted in such general terms that it is virtually impossible to regard it as binding (despite the fact that Article 189 EEC qualifies the decision as an instrument which is 'binding in its entirety upon those to whom it is addressed').

The European Social Fund has neither the financial resources nor an independent enough operating mechanism to enable it to achieve the task entrusted to it under the EEC Treaty. It is known that the Fund functioned by means of a posteriori reimbursements for operations already undertaken on the initiative of Member States and could thus not give impetus to a genuine Community policy.

In practice, the mechanisms created and the meagre resources allocated to the Fund permitted it action in only a very limited field. The automatic nature of its interventions on behalf of strictly national objectives was severely criticized. Member States introduced projects to recover their share in the Fund's activities to such a point that it was possible to speak of a rule of 'just return'. A review carried out at the end of the transitional period demonstrated particularly that the largest contributions made by the European Social Fund were allocated to the richest countries (such as the Federal Republic of Germany).

A.1.2. Failure to grasp the potential for drafting operational Community social standards: the case of Article 119 EEC

The failure to achieve equal pay for men and women arises not only from the lack of political will on the part of Member States and Community bodies to achieve this objective but, above all, from the almost absurd inadequacy of the system of Community instruments. Article 119 is undoubtedly drafted as a binding provision, for direct application, but it is not in its rightful position within the Treaty. It comes after Articles 117 and 118, which are instruments demonstrating the feeble nature and insignificance of social policy.

As a text, it is totally out of context. It is binding on Member States but its field of application refers essentially to working relations between employers and employees which are based on agreement, the determination of wages by means of collective agreements, the structure of wage negotiations, trade union politics, the underrepresentation of women in skilled occupations and the subdivision of qualifications and the labour market on the grounds of sex.

In the absence of recognition by the Community legal system of fundamental social rights for workers in general, and for female workers in particular, without Community legislation being brought in to promote equal treatment in respect of working conditions and collective bargaining in connection with the latter, Article 119 could never be effective. The ultimate paradox is that, being a directly applicable provision, it was not implemented at Community level and this was essential in order that those measures necessary for the establishment of comparable and equitable working conditions for male and female workers could be adopted and serve as the basis for the equal pay process.

A.1.3. Failure to integrate fundamental social rights into the Community legal system

Neither the preambles of the three Treaties establishing the European Communities nor the principal provisions setting out their missions and the major principles on which they are based make any reference to fundamental rights (human rights, fundamental liberties, fundamental social rights).

Failure to integrate fundamental social rights into the Community legal system was to influence and still does influence opportunities for developing a Community social policy and the protection of fundamental rights in the Community. The initiative for debate lies with the European Parliament which, in a Resolution of 4 April 1973, based on the report by its Legal Affairs Committee, [1] called upon the Commission to submit a report demonstrating the manner in which fundamental rights could be guaranteed by European law. Decisions of the Court of Justice in the field of fundamental rights had been over-cautious, since in two judgments delivered in 1959 and 1960, it declared that it did not fall to it to monitor the legality of the acts of the Community institutions in respect of national fundamental rights. [2] As regards fundamental social rights, the Court of Justice absolutely rejected the idea that 'the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question'. [3]

In point of fact, the integration of fundamental social rights in the Community could, to some extent, serve as a Community social constitution, with a legal status superior to any other Community or national standard.

A.1.4. Lack of cooperation in the social sphere

As regards consultation between and with management and labour, the founding Treaty envisaged the Economic and Social Committee as a purely advisory body, composed of representatives from three large groups: employers, workers and the group of representatives of businessmen, craftsmen, farmers, members of cooperatives, the liberal professions and general interest groups.

In the social sphere, it was compulsory to consult the Committee in the few cases of explicit social jurisdiction provided by the Treaty. It had no right to take the initiative in a problem not referred to it and the publication of its opinions depended on the good-will of the institution which had consulted it. Its advisory capacity was thus restricted to the bare minimum.

With few exceptions, Community practice in the area of social cooperation has been more limited than that broadly implied by the 'close cooperation' laid down in Article 118. The implementation of a social policy at Community level can be made possible only by means of two complementary strategies: firstly, the taking into consideration of and the interdependence of social aspects of other policies (economic policy, regional policy, sectoral policy, environmental policy and foreign policy), and, secondly, mechanisms and procedures for cooperation and participation with those involved in the social dialogue resulting in collective agreements which are valid at European level. The introduction of a permanent social dialogue at Community level making it possible to establish the objectives and content of Community social policy was made impossible by the initial ambiguous nature of the status of social policy in the text of the Treaty, by opposing interests and attitudes on the part of employers' and trade union organizations, by opposing views within trade union organizations themselves, by strategies aimed at favouring national measures over and above ambitions to harmonize working conditions and specific social matters at Community level, and, finally, by the conflict between the political doctrines of the governments of Member States divided between a conservative-dominated liberal trend and social, democratic and socialist trends.

Over the years, certain formal participation structures have been set up, such as the convening of tripartite conferences. In 1970, a Standing Committee on Employment was created with the participation of four parties: the Council, the Commission, the representatives of governments of the Member States, and professional organizations of employers and workers. Article 2 of the Council Decision of 14 December 1970 conferred on it the task of ensuring, in compliance with the Treaties and with due regard for the powers of the institutions and organs of the Communities, that there shall be continuous dialogue, joint action and consultation in order to facilitate coordination by the Member States of their employment policies in harmony with the objectives of the Community.

In practice, the Standing Committee on Employment did not fulfil the role expected of it and did not produce positive results.

Numerous advisory committees were also set up in various sectors: agricultural markets, transport, industrial sectors. The latter were composed of representatives of employers and trade unions in an industry, chosen by the relevant European trade union associations.

Despite efforts to institutionalize the social dialogue, the exchanges were disappointing and sporadic and had no specific influence on legislation or agreements.

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[1] OJ C 26, 30.4.1973.

[2] Decision will be referred to below.

[3] Judgment of 17 December 1970, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

A.1.5. Lack of automatic or spontaneous development of a Community social policy or coordination of the national policies of Member States

Despite the fact that the period under consideration largely coincides with the economic expansion of the 'golden 1960s', there was increasing socio-economic disparity between Member States, but this economic growth in no way automatically gave rise to harmonization of social matters.

During this same period, the Commission made resolute attempts to offset the consequences of the institutional imbalance created between the economic objectives and the social objectives of the common market.

The Commission's 1960 memorandum on this matter, related to the acceleration of the common market, is illuminating.

This text sets out the principal lines of measures to be taken in the field of social policy. The Commission confirmed that it could not accept a notion of economic integration in which social progress depended solely on the interplay of market forces and in which the prosperity of certain regions and of certain sectors was matched by increasing economic and social imbalances existing within the Community.

When President Hallstein of the Commission in turn defined the general concept of Community social policy, he forcefully stated that social policy should not simply supplement economic policy, that the aim of the Community is social justice and that the Treaty will not be fairly implemented unless the results of all the actions involved in its implementation are judged on the basis of criteria which are in accordance with the ethic of our Community, being centred on an equitable distribution of opportunities and risks and on a fair distribution of the advantages of this great undertaking.

Commissioner Levi-Sandri, responsible for Community social policy, commented as follows: 'On the basis of what is perhaps a superficial interpretation of the Treaty of Rome, it should not be assumed that social action must develop exclusively as a function of aims for economic integration ... that efforts at cooperation and coordination between States to promote harmonization of social systems do not permit an independent common policy to be implemented ... . He added that, in his opinion, the authors of the Treaty did not have such a limited and small-minded view and concept of Community social policy.

He went on to say that it should not be forgotten that, in effect, in the spirit and in the intentions of the Treaty of Rome, economic integration is only the forerunner of any degree of future political union which can be achieved only if the European idea ceases to be the monopoly of the initiated and of small groups of politicians and specialists and becomes the common heritage of our entire generation and a driving force for the people of Europe.

He then stated that the idea of the harmonization of wage systems was one of the most important aspects of the measures the Community could take in the social sphere and that it was inappropriate to concern oneself with whether the powers referred to in Article 118 seemed limited and unable to result in measures binding Member States, particularly since he believed (and this reasoning was valid, above all, for the field of wages and other working conditions) that one can and must achieve much by means of freely coordinated collective agreements at Community level on the part of the professional organizations themselves. In any case, he thought that harmonization of social systems would undoubtedly mean the integration of the most fundamental and problematic structures of Community regulations and could contribute to decisive progress being made towards political integration and that this was why the European Commission paid such great attention to these problems.

At the end of the first stage of the transitional period, the chairman of the Social Affairs Committee of European Parliament, Léon Eli Troclet, drew up a report giving a review of the social dimensions of the Europe of the Six at the end of the first stage. He set out the problems clearly and proposed solutions. The Council must be made to admit that the essential aim of the Community is eminently social in nature and that it must ensure that:

(i) equal living and working conditions are achieved while the improvement is being maintained, as desired by the Treaty;

(ii) management and labour are brought together at European level because the professional groupings must become accustomed to seeking European solutions rather than national solutions when the latter are inappropriate for particular reasons;

(iii) the role of the Economic and Social Committee must be strengthened in the field of consultation and the monitoring of social problems;

(iv) cooperation between the Commission and the Parliament (which he still calls 'the Assembly') must be strengthened;

(v) there must be a democratization enabling 'the Assembly' to fulfil its parliamentary mission;

(vi) it must never be forgotten that economic integration is not a goal *per se*, but that the goal is social.

The lack of precision in setting out the provisions of the Treaty in no way means that the Commission and the Council

have a monopoly on inaction and have only to take the course of least resistance. Nor does it mean that Member States can avail themselves of the fact that the Treaty envisaged only harmonization when they do not wish to accept a majority decision relating to alignment of a particular regulation ... . The limits to be achieved in each particular case will depend solely on what will be necessary to achieve the objectives of the Treaty.

The point of referring to these earlier analyses is that they illustrate the gulf between the will, the interpretations and the aspirations (confirmed in these official documents) of two of the institutions of the Community (the Commission and the Parliament) and the mediocre nature of specific results. The legal curbs have fulfilled their purpose. Community rules in the field of European social legislation will be created as and when required by the Treaty, and only then. Not everything has yet been accomplished and there is still far to go.

Save in exceptional cases, social policy does not come under the jurisdiction of the Community, but is subject to the sovereignty of the States in social matters. No matter how bold these attitudes may be, they will be countered by the formal prohibitions of the Treaty and its decision-making machinery which rests solely with the Council.

A.2. *The second period 1974–80*

Reference has been made to the preliminary analyses and positions which led to the Council adopting an action programme in the field of social policy in 1974.

Reference has also been made to the obvious imbalance existing, in the approach to economic and monetary union, between social policy and other Community policies. However, the significant thing is the sudden official realization that it is necessary to embark upon a process whereby the various policies to be conducted at Community level, including social policy, are treated as a whole and as interdependent items.

Economic and monetary union is presented as the basis of future political union. According to the Commission, a transformation in the relationship between the social sphere and the economic sphere being inevitable, it will be necessary to transfer to the Community the competence necessary to ensure that social development objectives gradually become those of Community policy.

Without going as far as the Commission, the Paris Summit decided in favour of the adoption of the social action programme which was to centre on three principal topics: employment, harmonization of living and working conditions and the participation of management and labour.

Given the go-ahead of the social action programme, recourse to Articles 100 and 235 in social policy matters was to permit the adoption of major directives relating to equality of the sexes, as well as three directives relating to restructuring in connection with the development of European economic integration. However, the latter directives are obviously not texts directed at protection of wage-earners, but, rather, at seeking ways of facilitating flexible adaptation of economic structures. This way, in spite of everything, there is continuity. In this context, 'social' simply refers to market organization.[1]

The entire social action programme would not be achieved. One area in which there was entrenched opposition on the part of Unice and certain governments was that of workers' participation within national and transnational businesses.

Title V of the European public limited liability company, the draft 'Vredeling' directive, and the draft fifth Directive are a source of strong and effective opposition. The right to information and consultation on the part of workers' representatives when events are serious enough to affect continuation of employment and working conditions in a business were only partially recognized by directives on collective redundancies and transfers of undertakings. However, progress was incomplete. The unanimous decision-making procedure in the Council made it possible to block Commission proposals, opinions from the Economic and Social Committee and Parliament amendments despite the fact that the social action programme adopted by the Council expressly provides for the development of Community law in the field of participation.

Once again, it will be seen that the feeble powers of the European Parliament prevented it from exercising political control over the Council and from pushing forward the process of advancement in social policy decided by the social action programme.

The reader will be aware that the Treaty of Rome allows Parliament to exercise control only over the Commission but that it does not have this power over the true decision-making body, the Council. According to Article 140, paragraph 3, only the Council decides when and how it will refer to the European Parliament. Similarly, the Council is not bound by the Treaty to respond to oral or written parliamentary questions. In practice, if it agrees to reply, this is subject to the reservation for oral questions followed by a debate that the European Parliament should not adopt any resolution!

[1] Lyon-Caen, Gérard, 'L'avenir de l'Europe sociale: 1992 et après?' (The future of social Europe: 1992 and after?), introductory report of the Colloquium on the same subject organized at the Free University of Brussels on 16 and 17 November 1990 (colloquium proceedings to be published in 1991).

The Treaty provides for a motion of censure only as a means of political control against the Commission. The Commission is politically and collectively responsible to the European Parliament (Article 144 EEC). The Council is not subject to European Parliament control. The ECSC Treaty system, in which the High Authority was the true decision-making body, has been incorporated in the EEC Treaty and the shift in the decision-making centre has deliberately not been taken into account. [1]

Finally, it was highly unlikely at that time that the European Parliament would institute proceedings against the Commission or the Council on the basis of Article 175, for not having given a ruling on the terms of reference established by the social action programme, because how would it be possible to maintain that a Council Resolution of 21 January 1974 constituted an undertaking in Community law?

One final criticism must be made: the choice of Community instruments in the sphere of social policy.

One of the criticisms frequently levelled, not without justification, at Community legislation in the social sphere is that it is impossible to impose uniform regulations which are explicit as to the objectives and the means for achieving them, and defining, in minute detail, the respective rights and obligations of employers and workers, action on the part of public authorities, and penal and/or civil penalties in the event of noncompliance, due to the diversity of employment rights, their sources, the places and methods for drawing up and implementing them, and the systems of professional relationships in the various Member States.

The problem in respect of European social law and exclusive competence in the field of freedom of movement has been seen completely differently. The regulations and directives adopted are texts with uniform, precise and detailed scope. Even directives, for example Council Directive 64/221/EEC of 25 February 1964 on public order restrictions, may be regarded as models of their type and contain provisions whose direct applicability has been acknowledged. Safeguards in the form of deportation on grounds of public order, public security or public health (the only exemption accepted by Article 48 EEC to the effectiveness of the right to freedom of movement) have been defined and recognized by this directive, since, in this case, it constitutes the implementation of fundamental principles of Community law.

On the other hand, what of European social policy, i.e. concurrent jurisdiction and thus a common measure to be achieved by means of approximation, i.e. the harmonization of provisions laid down by law, regulation or administrative action of Member States? When the directive is based on Articles 100 or 235 of the Treaty, i.e. on a potential social field of competence, it is important to observe that this instrument has generally been adopted after lengthy negotiations, that it is almost always the result of a compromise between various Member States and the divergent interests of interest groups, and that its content and scope do not always equal genuine progress in respect of the average level of social protection already guaranteed by the greater part of national legislation.

(a) The minimalist content of directives and new provisions

Experience shows that the constraints imposed by the Treaty on the Council's method of formulating its wishes lead, in certain cases, to directives having a minimalist content, the provisions of these directives being, moreover, often composed of or accompanied by optional clauses. [2] This contributes to the maintenance of variable national standards. Of course, the minimalist content of the directive is principally attributable to political divergences and does not ensue from the legal nature of the instrument as such. However, the fact that the Member States are left with so many options as to the decision to introduce such and such a provision into their legislation is facilitated by the legal nature of this instrument. The application of a directive to national legal systems, subject to what will be said on the direct effect of the directive, in fact requires, as has been seen above, the 'transposition' of the provisions it contains into national legislation as seen fit by the Member States.

Moreover, in certain cases, the harmonization referred to by the directives is only partial. In particular, directives in the field of labour law have failed to regulate matters of vital importance which, in this case, remain subject to national regulations. This was recognized by the Court of Justice of the European Communities in the *Mikkelsen* case, [3] when it described Directive 77/187/EEC, on the safeguarding of employees' rights in the event of transfers of undertakings as a partial harmonization directive which does not aim to establish a uniform level of protection for the Community as a whole by referring to common criteria. In fact, Directive 77/187/EEC does not offer common guidelines to be adopted in respect of key questions, such as: the existence or non-existence of an employment contract on the date of transfer, which employees are to be transferred when part of the

[1] See Joliet, R., *Le droit institutionnel des Communautés européennes* (Institutional law of the European Communities), Liège, 1986, p. 95.

[2] See, for example, the Directive of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (OJ L 48, 22. 2. 1975, p. 79), the Directive of 14 Februrary 1977 on the approximation of the laws of Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings and establishments (OJ L 61, 5. 3. 1977, p. 26), and the Directive of 20 October 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 (OJ L 283, of 28. 10. 1980, p. 23).

[3] Judgment of 11 July 1985, Case 105/84 *Mikkelsen* [1985] ECR 2639.

undertaking is transferred, the definition of those 'employees' to whom the directive applies, which transactions are covered, the meaning of 'date of transfer', transfer of collective agreements, definition of the 'economic, technical or organizational reasons' justifying the dismissal of the transferred employees, etc. [1]

(b) The directives' lack of a horizontal direct effect

Although labour relations and social protection are regulated by provisions laid down by law and regulation, those areas governed by contractual law (collective or individual) are undoubtedly the most important. This is a decisive element when seeking implementation of Community social policy. Groups defending the legitimate interests of workers must be guaranteed the possibility of recourse to guaranteed principles in relationships between individuals and of possibly going to Court. Otherwise, there is a risk of the rights guaranteed by the 'framework directive' not being applied in important areas of social relations, assuming that national legislation has not adopted the necessary provisions or has adopted inadequate or incomplete provisions. The problem of Member States' failure to observe time-limits laid down by directives or that of inadequate or incomplete provisions could have been solved by the Court conferring horizontal direct effect on the directives.

It has long been known that directives are capable of having a vertical direct effect, [2] i.e. capable of directly giving rise, in the case of individuals, to rights which they may invoke before national tribunals against a public authority. If the directives were also capable of having a horizontal direct effect, they could themselves give rise to rights which individuals could invoke before national tribunals not only against any public authority but also against any other individual, including, in particular, private employers. Workers would thus no longer have to wait for the Member States to completely and correctly implement a directive in order to be able to benefit from the protection provided by it and could refer directly to its provisions following expiry of the time-limit set for its entry into force and obtain its application through the national courts.

However, in a series of judgments, the Court has rejected any possibility of directives themselves giving rise to obligations in respect of individuals.

The choice of the directive may be at the root of divergence in the treatment of workers in different Member States and thus of social dumping, this being due to the varying degree of implementation of the directives which often exists.

(c) The problem of penalties

Most social directives adopted hitherto refrain from laying down penalties for common application at Community level. They refer this problem to national systems, thus maintaining the inconsistency of the protection of the safeguard to be accorded to those persons to whom the directives are addressed. This results in a considerably weakened Community law which may be ignored or violated, with virtually non-existent risks of being penalized.

Naturally, the 'principle of non-discrimination' means that national regulations for implementing Community laws must not be 'less favourable than those administering the same right of action in an internal matter'. However, these two principles are applied only to directly effective provisions. [3]

The *von Colson* and *Harz* cases [4] offer a significant example. The Court of Justice of the European Communities considered that, when a Member State chooses to penalize violations of the directive on equal treatment by awarding compensation, this must, in all cases, in order to ensure its effectiveness and its dissuasive effect, be adequate in comparison with the damage suffered and must thus be more than purely symbolic compensation.

The House of Lords in the United Kingdom has declared that this did not mean that 'the German Court was obliged to invent a German law for adequate compensation if such a law did not exist'. [5] This suggests that it is for the governments of Member States rather than the Courts to draw up effective remedies. However, can this be done when practice and law vary on this point (for example as regards reappointment in the case of unfair dismissals and other forms of specific application, levels of compensation and implementation procedures)? [6]

(d) Failure of Member States to observe implementation deadlines laid down by the directives

This can also undermine the aim pursued. A considerable number of directives are not implemented by Member States within the deadlines laid down. The Commission has recourse to proceedings for non-fulfilment in order to place on record that the Member State has not fulfilled the obliga-

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1 See the critique by Professor Bob Hepple in his report to the conference on 'The legal structure and implementation of the social dimension of the internal market', 4–6 December 1989, European University Institute, *Community Legal Instruments*, Florence, pp. 1-2.

2 See, in particular, the judgment of 8 October 1970, Case 9/70 *Grad* [1970] ECR 837 *et seq.*, the judgment of 17 December 1970, Case 33/70 *SACE* [1970] ECR 1221 *et seq.*, the judgment of 4 December 1974, Case 41/74 *Van Duyn* [1974] ECR 1374 *et seq.*, the judgment of 1 February 1977, Case 51/76 *Verbond van Nederlandse Ondernemingen* [1977], ECR 123 *et seq.*, the judgment of 23 November 1977, Case 38/77 *Enka* [1977] ECR 2209 *et seq.* and the judgment of 5 April 1979, Case 198/78 *Ratti* [1979], ECR 1638 *et seq.*

3 Oliver, P., (1987) 50, *Modern Law Review*, 881.

4 Judgment of 10 April 1984, Case 14/83 *von Colson and Kamann* [1984] ECR 1891; judgment of 10 April 1984, Case 79/83 *Harz* [1984] ECR 1921.

5 *Duke* v *GEC Reliance Ltd* [1988] 1 All ER 626, p. 637.

6 See Hepple, B., op cit. (note 6) pp. 3–4.

tions incumbent upon it under the Treaty. However, this weapon is limited in its effectiveness. Although, in fact, Member States finally bow to a judgment recording their non-compliance, this sometimes happens only after a considerable delay or after a second or third judgment from the Court, despite the fact that Article 171 of the EEC Treaty requires Member States to take the necessary measures to comply with the judgment of the Court recording their failure to comply.

The truly operational way to establish viable instruments of Community social policy will be to combine framework laws and instruments for European collective bargaining. Community law should promote collective bargaining, but do so while setting up the means required to ensure acceptance of the contents of collective bargaining by Community law sources. Community social policy cannot be released from deadlock while the connection between instruments of Community law and European collective bargaining is not institutionally guaranteed.

A.3. *The period 1980–87*

From an institutional standpoint, one fact is relevant.

The European Parliament was from then on elected by direct universal suffrage (1979), and, since 1974, the Economic and Social Committee had had the right to issue own-initiative opinions and to have these published in the *Official Journal of the European Communities.*

Since the Economic and Social Committee and Parliament were both advisory bodies, their relations were competitive and ambiguous. From the time when the European Parliament was given new institutional legitimacy due to its being elected by universal suffrage, it was possible to observe that the strategies and attitudes of the Committee and of Parliament reinforced each other and would have greater impact on public opinion in Member States. The notorious democratic deficit of the EEC's institutional system would be denounced in the media more and more often and would be better understood by public opinion.

This third period began at a time of downgrading of social policies in Member States to be reflected at Community level: the attack by neoliberalism, deregulation, the mythologizing of flexibility, the questioning of the welfare State, the slump in the economy due to the petrol crises, the decline of trades unionism, etc. A generalized move towards deregulation in social matters arose, to the profit of businesses which were subject to competition, and to the detriment of the workers.

Jean Duren commented: 'For their part, workers have had to adapt, accept unemployment or, quite simply, withdraw from the labour market. Traditional working conditions have fundamentally changed. Workers' representatives have seen their weakened position, in so far as trade union membership has fallen, as, moreover, a search for protection. It is significant to observe that, in the same period, the welfare State has become aware of the enormity of its task and no longer knows how, in the future, it will be able to meet its obligations, particularly in the retirement pensions sector where demography is the dominant aspect. The individual must henceforth fulfil his requirements himself, at least by supplementing the minimum social cover guaranteed by national solidarity. If not, he will find himself with the minimum so-called social integration income, if this exists...'

Several disquieting phenomena go hand in hand with this new method of managing the economy and social matters. In the 1950s and 1960s, a 3 to 4 % rate of unemployment in the working population appeared to be an unsurpassable maximum. At the end of the 1970s, this maximum was in the region of 6%. From 1985–90, the irreducible minimum figure for unemployment was in the region of 8.5 to 9 % during this boom period. The boom is currently falling off, giving rise to fears that unemployment may take off even more vigorously and again exceed 10 %. Where will it stabilize?

A second phenomenon which gives cause for concern is the disparity between incomes. The breakdown of the population into 10 % bands shows that there was a marked increase in the difference between incomes in the 1980s. This phenomenon was observed in most developed countries, including France, the United Kingdom and even the United States of America, i.e. the governments in power (regardless of their political tendency) only promoted possibilities for gain and the concentration of the fruits of growth in the hands of the few. Any incomes policy is a distant hope.

Deregulation will only cause training problems. It is enough to find the most able persons on the labour market, without taking on a cost which the business prefers to see borne by the population as a whole. Deregulation aims to realize maximum financial profit for the business. It has no connection with labour-intensive workshops returning small profits. In the extreme case, it prefers the management of a portfolio entrusted to a skeleton staff.

Examples of further short-term advantages which are likely to swell profits could be multiplied in this way. They may cause greater attention to be given to social problems but this is no justification for 'Community' intervention in social affairs. This is the question of a separation of fields of competence at national and Community level'. [1]

[1] Duren, Jean, 'La Charte communautaire des droits sociaux fondamentaux devant le Parlement. Esquisses et perspectives' (The Community Charter of fundamental social rights before Parliament. Outline and perspectives), *Revue du Marché* (Common market review), January 1991, p. 23.

A.3.1. The draft Treaty on European Union

The need for a global and active approach by the various Community policies, including social policy, and the taking into account of their relationship with one another in an overview of the problems and changes going on in society as a whole was the subject of gradual awareness in Community circles. In this connection, the European Parliament stepped up its efforts and the draft Treaty on European Union, which it adopted on 14 February 1984, demonstrated this very clearly in the new powers and fields of competence it proposed for Community bodies.

However, from the social viewpoint, it appeared that the principle of subsidiarity approach ought to be further defined in order to prevent a backward step into interminable and fruitless discussions on the assessment of the best level for action: either common measures, by a cooperative effort, or measures at State level. It was necessary at all costs to avoid falling into a trap like that constituted by Article 100: the need to demonstrate the direct effect of the directive envisaged on the establishment or functioning of the common market. Article 56, which defines the field of social policy, expressly abolishes Article 118 of the Treaty of Rome and enlarges its subject area. However, it constitutes a backward step by conferring concurrent jurisdiction on the Union over those areas in respect of which transfers had already been made in favour of the Community.

Article 9, which defines the objectives of European Union, does not appear to formulate the social objective of union sufficiently clearly.

The status of fundamental rights and of fundamental social rights, as laid down by Article 4, provides that, within a time-limit of five years, the Union will take a decision on its accession to international instruments, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter, and the United Nations Covenants on Social, Economic and Cultural Rights. However, no provision is made should there be a refusal to adhere to these international instruments except that the Union will adopt, within the same time-limit, its own declaration on fundamental rights according to the revising criteria provided for in Article 84 of the draft Treaty: i.e. the initiative may lie with a third of the Members of Parliament, or with the Commission, or with a representative group within the Council. It is also necessary to question the legal value of a declaration which does not have all the safeguards of genuine integration into the Community legal system.

The draft Treaty brought about major reforms which give rise essentially to a new institutional balance; they relate to:

(1) the European Parliament
The reforms concern the granting:

(i) of supplementary powers to the Parliament;

(ii) of the power enabling the Commission to take office (Article 16, indent 2);

(iii) together with the Council, of the joint exercise of legislative authority with the active participation of the Commission (Articles 36 and 38);

(iv) of a right to initiate secondary legislation (Article 38);

(v) together with the Council, of the exercise of the power to approve international agreements (Article 65, paragraph 4).

The role of budgetary authority, shared with the Council, is also reconfirmed and strengthened (Articles 70 *et seq.*).

Together with the Council, the Parliament exercises the power of revision during the stage reserved for Union institutions (Article 84).

It is also involved in the appointment of half the members of the Court (Article 30, paragraph 2) and of half the members of the Court of Auditors (Article 33, paragraph 2).

(2) The Council

Article 20 provides for the new composition of the Council whereby it is made up of representations of the governments of Member States led by a minister specifically and permanently responsible for Union affairs.

As regards the decision-making procedure, it should be noted that the weighting rules borrowed from Article 148, paragraph 2 of the EEC Treaty (Article 22 of the draft) also apply to simple majority voting (Article 23).

Article 23, paragraph 3, introduces the possibility, during a transitional period of 10 years, of postponing the vote under the conditions provided for. Article 24 of the draft requires that Council meetings when the latter is acting as a legislative or budgetary authority are to be open to the public.

The Council shares with Parliament the exercise of legislative authority, budgetary authority and the power to approve agreements.

These elements make profound changes to the nature of the Council. Should the system be regarded as a bicameral system?

The role of the Council in the adoption of penalties (Article 44) and in conducting cooperation (Article 67) should also be noted.

(3) The Commission

The Commission sees its current powers confirmed (Article 28). Moreover, its power to determine regulations for the implementation of laws is given, in Article 40, a more direct basis than in Article 155, indent 4, of the EEC Treaty.

The power of international representation of the Commission is recognized (Article 65 of the draft) together with its role in relations with international organizations and in the diplomatic relations of the Union (Article 69).

This basic power of the Commission tends to be reinforced by the fact that the determination of the conditions under which the Commission monitors the application of the law of the Union (Article 42) is vested in an organic law.

(4) The European Council

The European Council is expressly created by Article 8 of the draft Treaty.
This is the body responsible for undertaking commitments in the sphere of cooperation (Article 10, paragraph 3) and is responsible for the latter (Article 67).

Pursuant to Article 32, its functions include the possibility of deciding that matters covered by cooperation will henceforth fall under the common action programme, and that of deciding the appointment of the President of the Commission.

It also has a role to play in the achievement of a homogeneous judicial area (Article 46).

The Presidency of the European Council shares representative power with the Commission (Article 69) and the European Council determines the seat of the institutions (Article 85). [1]

From the standpoint of social procedure, the draft Treaty on Union fails to consider participation by management and labour in drafting decisions related to various common policies, and the creation of a 'social dialogue' relationship and procedures for drawing up European collective agreements within a particular field or sector.

A.3.2. The Single Act

We have spoken at some length about the Single Act and the modifications it brings to the social fields of competence of the Community. Our interpretation has been accepted by the European Parliament which, in several resolutions, grants the same scope to Articles 118a, 130a *et seq.*, 8a and 8b. However, this interpretation is not accepted by the Legal Services of the Commission, and in the Council is accepted by certain Member States and rejected by others.

In the social sphere, the lesson which may be drawn from the Single Act is that it does not clearly and explicitly confer a status on social policy even if social policy were to be understood in the restricted sense of 'social dimension of the internal market', i.e. taking into account only those social areas necessary for the achievement of the internal market.

The idea of 'economic and social cohesion' introduces a new aspect to the aims and objectives of the Treaty but the terminology is so general that, at the present time, it can be considered only symbolic, except in those particular areas of regional policy aimed at reducing the backwardness of disadvantaged regions.

When Article 130b affirms that Member States must coordinate their economic policies in such a way as to attain the objective set out in Article 130a, i.e. the promotion 'of the overall harmonious development of the Community', the Treaty certainly goes beyond the regional aspects of economic and social cohesion, and when it confirms that the implementation of common policies and of the internal market must take into account economic and social cohesion and contribute to their achievement, it is certainly possible to see for which policies these precepts could be a vehicle.

Nevertheless, the chapter on economic and social cohesion restricts itself to confirming a principle to serve as a guide for common policies and the achievement of the internal market and, although it offers an interpretative assessment and evaluates in Community terms the lawfulness of the methods chosen by the dynamic agencies or by the Member States to draft them and achieve them, it does not provide an explicit legal basis for a common social policy.

On the other hand, as regards reform of the European structural Funds, Article 130d does provide a clear and explicit legal basis which has already been the subject of five Council regulations which all entered into force on 1 January 1989.

If the new titles added to Part Three of the Treaty by the Single European Act (economic and social cohesion (Title V), research and technological development (Title VI), and the environment (Title VII)) are placed side by side, one cannot but acknowledge that, since the creation of the EEC, the text of provisions, the definition of objectives and the means to be implemented have been drawn up, for Titles VI and VII, with a view to ease of operation. By contrast, economic and social cohesion in the global sense is set out in an absence of instruments which can only be described as derisory.

[1] See Institut d'Études européennes (European Study Institute), 'Le projet du Parlement européen après Fontainebleau' (The European Parliament project after Fontainebleau), study day, Brussels, 17 November 1984, 58 pp.

In this connection, we need to remember the countless declarations which have been made following countless European Councils reiterating the desire of the Council to respect fundamental social rights, to ensure balanced economic and social development and to take into account the social objectives of the evolution of the Community, etc. To quote just one example, the reader may refer to the conclusions of 22 June 1984 of the Council: 'The Community will not be able to strengthen its economic cohesion in the face of international competition if it does not strengthen its social cohesion at the same time. Social policy must therefore be developed at Community level on the same basis as economic, monetary and industrial policy (...). These differences between the institutions and social policies do not preclude the implementation of joint measures aimed at gradually promoting a European social area'. [1]

On examining all the literature produced by the Council, the Commission and the European Parliament, there is apparently considerable consensus on the need to simultaneously promote the economic and social spheres, but this intention has never been incorporated into the Treaty, into secondary legislation or into Community programmes and can never be incorporated if the Treaty itself is not radically amended.

A.4. *The fourth period: 1987–91*

A.4.1. The Community Charter of the fundamental social rights of workers

The Charter adopted by 11 States represented at Strasbourg is not a Community text but a legal work of fiction. We have described the laborious process behind its formulation and we would like to raise two important questions: What was this Charter meant to represent? What concept did it challenge?

1. What were the European Community's objectives in adopting the Social Charter? These were:
   (a) to integrate, harmonize or unify the expression of principles and general rules which were universally recognized by all Member States and by all social partners;
   (b) to ensure generalized introduction of more specific rights which it seemed important to recognize at European level given the changes brought in by the achievement of the internal market;
   (c) to ensure recognition for new rights where appropriate;
   (d) to establish the legal bases for collective bargaining at European level;
   e) to define unified control and monitoring procedures.

With this in view, the Charter laid down the basis for a gradual extension, at European level, of both social policy and the dialogue between management and labour. Without prejudging the content and the effective results of this policy and dialogue, it was to set up a new legal structure intended to encompass the European social dimension by incorporating all fundamental social safeguards into the Community legal system. This was not a maximalist option, nor did it imply that rights which could not be applied in such and such a State should be proclaimed, resulting in a catalogue of pious wishes, but it opened the way for progressive evolution with a view to an upgrading of living and working conditions for all workers in Europe.

2. For opponents of social harmonization at Community level, the 'social dimension' of tomorrow's united Europe meant:
   (a) harmonization at European level of a few minimum standards for protection and simplified and uniform compensation mechanisms, laying down, as it were, the limits to the ground rules of the internal market;
   (b) maintenance of the provisional status of national differences in respect of other aspects of social policy.

Given this juxtaposition, there was to be competition not only between producers of goods and services but also between governments in drafting new regulations, covering labour relations and social protection, which might be more attractive to investors. There is no need to point out that this rivalry would only 'gradually' lead to the deregulation of entire sections of national social protection systems, bringing about a reduction in rules, diversification of working conditions and erosion of compensation mechanisms. This was precisely the train of thought in influential employers' circles in Europe, such as the European industrialists' round table group, when dealing with European integration.

The declaration of intent known as the Charter in fact offered no opportunity for thwarting this type of strategy. At the same time as the adoption of the Charter the Commission also adopted an 'action programme' for social matters which planned for the future adoption of Community instruments (regulations, directives and recommendations) intended to supplement the objectives of the internal market. However, this programme has three major defects:

(1) it ratifies the 'principle of subsidiarity' as it essentially means that each State retains sovereignty in social matters and can therefore avoid any Community regulations;

[1] OJ C 175/1, 3–4.7.1984.

(2) the timetable for implementing social directives is spread over 1990, 1991 and 1992, with 18- to 24-month deadlines for their implementation by Member States. The Commission has thus given up ensuring that its social and economic programmes run simultaneously. Social concerns will be three or four years behind the financial and commercial field;

(3) most directives concern fields which should have in any case been determined at European level (health and security at the workplace, in particular). On the other hand, matters as vital as subcontracting, the opening-up of public contracts and workers' rights to information and consultation in businesses remain untouched.

A 'European social area' (to use a phrase which no longer appears to be in current usage) is not, however, restricted to the adoption of laws and regulations. In all European countries, the industrial relations system includes an essential and crucial part, which has come into being via contracts and agreements, created by action and negotiation on the part of employers and employees. It was with this in mind that the European Council meetings in Hanover and Rhodes called upon the Commission to reopen the social dialogue at Community level and that, in January 1989, it therefore set up a 'steering group' at the highest level. Nearly two years later, the end-result has been that discussions between representatives of those involved in the social dialogue have been set up at Community level, but these have remained formal in nature, lack individual dynamism and independence, and have produced only common opinions devoid of any binding force and relating merely to peripheral aspects of social relations. [1]

Both the Commission and the trade unions have confirmed the need for a qualitative change in the social dialogue so that, according to the field, it can result in either collective bargaining or proposals intended to serve as a basis to legislators. Unice, the body representing employers at Community level, has been intransigent in its rejection of this plan, arguing that neither those involved in the dialogue nor those employers willing to accept the decisions taken had the mandate for this.

Recent developments appear to confirm the overall diagnosis: without a genuine break with (bad) established practices, the social dialogue will in no way constitute a genuine tool for the creation of a European social area. Any reference to 'social dialogue' has, moreover, become intrinsically ambiguous in Community debate, since it is understood sometimes to denote those (rare), relatively formal, discussions between trade union representatives and employers with vague mandates relating to restricted subject areas, and sometimes the aim of bringing social collective bargaining on essential matters within the Community framework and of achieving alignment of industrial relations systems.

[1] With the exception of the European Framework Agreement signed on 6 September 1990 between the European Centre of Public Enterprises (CEEP) and the European Trade Union Confederation (ETUC). In the sectors of rail transport and power distribution, there will be European-level negotiations regarding the public enterprise.

B. Revision of the Treaty in the social field. The role of the European Parliament

Up to this point, our approach has been to combine both historical and legal reviews, and this has brought us to the conclusion that the possibilities for the development of a social policy at Community level are extremely slim. Now that institutional reform is in progress, it is important to define those bases essential for the establishment of a Community social policy.

When writing this report, we had at our disposal many documents originating from the Commission, the European Parliament and the Economic and Social Committee. Moreover, submissions by the Presidents of the European Councils, particularly of 27 and 28 October 1990 and of 14 and 15 December 1990, as well as proposals submitted by the Belgian and Italian Governments in relation to 'social' matters were made available to us.

As stated in the contract signed with the Legal Research Department of the European Parliament, the aim of this study is to 'define a global concept of social policy in a united Europe'.

In our opinion, Parliament, as the only European body representing European Community citizens, has been shown to have the political desire and consensus in respect of the following objectives:

(1) the rights of European citizens will be guaranteed at European level in those fields relating to employment, working conditions, training, public health, family policy, and categories of disadvantaged persons;

(2) fundamental social rights will be guaranteed in Community law so as to provide a common protection framework;

(3) the social aims of European Union will be clearly set out and the objectives of the social policy of the Treaties will be extended, improved and supplemented;

(4) the powers of the European Parliament will be reinforced:

  (a) in the direction of a co-decision procedure which will result in Parliament and the Council having an equal share in the legislative process which is to involve a conciliation procedure in the event of disagreement, and recognition, in specific cases, of the European Parliament's view being final;

  (b) the European Parliament will be granted the right to initiate legislation in certain cases where the Commission fails to act;

  (c) in the area of political control over the Commission and of budgetary control;

(5) guarantees of a political and legal nature must be set up with respect to the principle of subsidiarity, and effective and democratic procedures must be sought to enable European Union to exercise the power necessary to accomplish its mission without the risk of institutional impasse;

(6) the Court of Justice must be given constitutional jurisdiction, with the task, particularly, of:

  (a) ensuring that the distribution of fields of competence between the European Community and the Member States is respected;

  (b) monitoring lawfulness, in the field of fundamental rights, of acts by institutions and Member States;

(7) the ratification by the Community of the Social Charter of the Council of Europe and of those International Labour Organization agreements relating to fundamental social rights and to fields covered by Community law;

(8) the setting-up of a Community legal framework intended to develop European collective bargaining. [1]

Below, we propose to set out those bases which are essential for the European Union to have true social competence.

B.1. *Explicit confirmation of the social aim of European Union*

The social aim of European Union must be expressed as forcefully as its political, economic and monetary aims. The social sphere can no longer be subordinated to the other aims of European Union or be a mere supplement of secondary importance.

The equal status of the four cornerstones of European Union must appear in the preamble and in the general provisions.

In its introduction to the basic document drawn up on economic and monetary union in August 1990, [2] the Commission confirms that the qualitative leap at institutional level required by economic and monetary union necessitates agreement by Member States as to the aims of economic and social policy but, immediately afterwards, any reference to the social sphere is absent, and the document refers to the objectives and anticipated effects of economic union or of economic and monetary union.

[1] Reference is made here only to those aspects likely to have an effect on social policy.

[2] See *Agence Europe*, No 1650/1651 of 27 September 1990.

The way in which the effects of economic and monetary integration will be and can be as beneficial to prosperous regions as it is to less-developed regions is set forth. The place of social matters in the Commission's draft does not appear as a supplement in the aims which are specifically proposed.

'Economic union would be founded on the internal market, on closer coordination of economic policies and on the development of common policies... .'

'Common policies would be further developed in the economic union with the aim of improving economic efficiency and fostering economic and social cohesion. In the final stage of economic and monetary union, there might also be the need to further strengthen Community structural policies; their instruments and resources would have to be adapted to the needs of the Union... '.

'The historical deadlines awaiting the Community in respect of its capacity to meet the double challenge of achieving internal prosperity and assuming its responsibilities as a rich country in external matters, in the form of a great world power in the eyes of the international community... will include "those associated with the success of economic and monetary union, the single market by the end of 1992, cooperation in technological research, the environment, infrastructure systems, the social dimension and, more directly still, economic and social cohesion. The latter objective, which is embodied in the Single Act, is currently being pursued through structural policies aimed at giving maximum opportunities to each region".'

In the analysis in Section 3, entitled 'Economic union', the document looks at the principles, objectives and coherence and devotes a section to efficiency and cooperation, finally dealing with 'economic and social cohesion'. The latter topic is considered only in its restrictive concept of a policy to readjust regional and structural imbalances.

In the view proposed by the Commission, economic and monetary union will clearly not be social union. Does the Commission opinion of 21 October 1990 relating to political union make it possible to give a status to social policy?

The introduction describes 'the single Community': the central element of any revision of the Treaty, according to the historical legacy of the founding fathers of the Community, will be 'the integration of new objectives in a single Community'.

'Interaction between economic, social, financial and monetary matters, on the one hand, and foreign policy, on the other hand, is and must remain the very philosophy of European Union... .'

How does the Commission propose to guarantee this interaction in social matters?

This can be deduced from the strengthening of the democratic legitimacy from the dual point of view of the institutions and of the citizens.

Reinforcement of the powers of the European Parliament and greater links with national parliaments will unquestionably (this is our personal opinion) result in common social policies and the social aspects of other common policies being taken into consideration.

If the legislative powers of the European Parliament are truly of a legislative type, it suffices to refer to the work, reports and resolutions produced by the European Parliament, for example since the adoption of the Single Act, to be assured that social matters will not take a back seat in the integration process.

If the notion of European citizenship, referred to in the Commission's opinion, is recognized by the Community legal system, that, too, will bring with it essential social safeguards such as the establishment of fundamental human rights, rights of residence and of movement not linked to the capability of the Community citizen as a producer in economic terms, and the establishment in the Treaty of new rights in the civil, economic, social and cultural fields.

Finally, the Commission would envisage developing the social dialogue by putting greater emphasis on it and by organizing it more efficiently.

In the section devoted to the extension of the Community's fields of competence, which are defined not in general terms but on the basis of a selection of the requirements for Community measures to permit a balanced development of common policies, the Commission proposes that the expansion of fields of competence has as its first priority the social dimension, the major infrastructure systems and the freedom of movement of persons. It adds that these are all matters which are linked to optimum development of the large market.

In the declaration of the President-in-Office of the European Council which met in November 1990 to discuss economic and monetary union and political union, it is possible to detect that, taking the Gulf crisis into account, the debates were centred particularly around problems of foreign policy and security. In the opinion of the President, the issue of political union is not yet sufficiently prepared but, nevertheless, confirms that the citizen is at the centre of the European structure and that the Council has undertaken to establish European citizenship in the forthcoming treaty, accompanied by a number of political, social and economic rights

which must be guaranteed by adequate political and legal protection mechanisms.

This declaration thus does not imply any acceptance on the part of the Council in respect of the extension of common social fields of competence in the Treaty.

At the European Council meeting in Rome on 14 and 15 December 1990, the Council reaffirmed its consensus on European citizenship, but remained extremely vague and uncertain as to the extension and reinforcement of Community action (point 4 of the Conclusions). It asked the Conference to take the following aspects, *inter alia*, into account:

(i) the social dimension, including the need for a social dialogue;

(ii) economic and social cohesion between Member States;

(iii) better environmental protection;

(iv) the health sector, and, in particular, the combating of major diseases, etc.

Thus, on the eve of the forthcoming 1991 intergovernmental conferences, the European Council appears to be conducting a wait-and-see policy which masks the actual major divergences and strong opposition on the part of the Member States and seems to indicate that, in the revised Treaty, social matters will not be the subject of an essential change of course.

We will end on this first point, which is that it is therefore of prime importance for Parliament to devote its entire attention to the new name for the Community. Either one can speak of European Union (a generally accepted term) or it must be economic, social, monetary and political union.

B.2. *Subsidiarity*

Before defining the general fields of competence of the Union (to be defined in the initial articles) and specific policies in the social sphere, it is appropriate to examine the 'principle of subsidiarity' and its place in the Treaty. In fact, it is intrinsically linked to the redefinition of fields of competence.

In the draft Treaty on European Union of 1984, the principle of subsidiarity is referred to in several provisions (indent 9 of the Preamble, Article 12 paragraph 2, relating to concurrent fields of competence; Article 66, indent 2, cooperation in international relations). In this draft, the principle of subsidiarity appears to govern the distribution of fields of competence subject to judicial monitoring. It makes no reference to the exercising of these fields of competence on the part of the Union. In the field of common action, the principle is expressly confirmed only in respect of those matters covered by concurrent jurisdiction. It would not apply with regard to exclusive jurisdiction on the part of the Union.

As is known, this principle is referred to in various European Parliament resolutions, the Council seems to want it included in the Treaty, [1] and the Commission describes it as 'a common-sense principle' and considers 'that it should serve as a main guide to the institutions, within the framework of a renovated Article 235 and released from its economic finality, in order to unanimously decide upon the principle of new Community actions for continuing in the general objectives of the Treaty; monitoring of the principle could consist of a posteriori monitoring of the acts of the institutions so that the exercise of competencies does not turn into an excess of power'. [2]

It is conceivable that the principle should be referred to:

(i) in the preamble to the Treaty,

(ii) in the general provisions, and/or

(iii) in the specific provisions.

Incorporation into the preamble would make it possible to give it the quality of an interpretative principle. Covered by the Treaty, it would gain legal or programmatic value, according to the wishes of the Court.

Two types of judicial monitoring are envisaged: a priori or a posteriori monitoring, the Giscard d'Estaing report advocating specific a priori monitoring. There seems to be a preference among Member States for an absence of a priori monitoring (monitoring of the legality of acts, Articles 173 and 174 of the EEC Treaty) and there is also a trend for incorporating the principle into the preamble.

In the light of these elements, it is possible to see progress towards a minimalist concept of the role of the principle of subsidiarity.

Moreover, the problem of subsidiarity has also been linked with the drafting of a 'renovated' Article 235 of the Treaty, i.e. one unconnected with its economic functions. Thus, without a revision of the Treaty, it would be possible for new Community fields of competence to be transferred.

In our opinion, Parliament ought to be mindful of lessons from the past and of the consequences of the Community's failure in social matters. The institutional impasse which totally paralysed the development of social policy from 1958

[1] Session of 27 and 28 October 1990.
[2] Commission on Political Union, Opinion of 21 October 1990, Office for Official Publications of the European Communities, 1990, p. 24.

to 1974 due to the need to demonstrate the direct effect on the common market of an envisaged social policy, and which could be surmounted only rarely and sporadically during the 1974–81 period (with recourse to Articles 100 and 235), the resurgence of difficulties in interpreting transfers of jurisdiction in employment matters (Article 118a) and in connection with the scope of the exemption referred to in Article 100a, paragraph 2, and all the institutional constraints born of the need to demonstrate Community competence in a field touching on the social sphere risk being reproduced if the principle of subsidiarity is not considered simply as an interpretative principle incorporated in the preamble and intended to guide the legislative power and the Court of Justice in the exercise of concurrent fields of competence.

B.3. *The definition of social fields of competence*

There are two types of areas covered by provisions relating to social fields of competence which may be envisaged.

B.3.1. General social fields of competence

Article 2 EEC

In the third interim report, the proposal by D. Martin, [1] relating to the amendment of Article 2 EEC, clearly sets out the Community's task as that of implementing common actions in the social and employment fields, and states that the introduction of the common economic and monetary policy will be compatible with ... an accelerated raising of the standard of living and convergence upwards of living and working conditions while the improvement is maintained.

Various bodies made other proposals in respect of the text, the proposed revisions having the drawback of reworking the former Article 2 of the EEC Treaty and thus incorporating new text into the earlier document without showing a clear new direction. The ultimate meaning of a redefinition of tasks and objectives must be clearly demonstrated: an economic, social, monetary and political Community is to be set up. The social dimension is a primary aim and no longer has secondary status.

In our opinion, to state that economic and monetary policy must be compatible with social objectives once again strongly suggests that social matters will be somewhat subordinate to economic matters in the Common Market. Economic and monetary policy must be conducted with a view to ensuring chosen social objectives and is not an end in itself. Economic and social solidarity should be confirmed.

Article 3: Explicit fields of competence defined in Article 3

This defines the activities of the Community. It is important to provide for the introduction of a common policy in the field of social matters and employment and the development of a common policy with a view to the achievement of the Community's economic and social cohesion.

It also seems important to provide for 'the introduction of a Community legal framework guaranteeing the right of management and labour to conciliation and collective bargaining'.

Articles 4 to 8c

When revising Articles 4 to 8c of the EEC Treaty, the obligations for cooperation between Member States with a view to achieving the objectives of the Community must be extended to economic and social policies (Article 6). In Article 7, it seems appropriate to provide for the prohibition of any discrimination on the grounds of nationality regardless of sex, race, language, religion, political opinion and personal and social circumstances.

Revision of Article 8a should involve the qualitative leap which defines the aim of the internal market as being the economic and social development of the Member States and thus requires completion of the definition of the internal market as proposed in the report by Mrs Martine Buron with a paragraph stating that the achievement of the internal market is to be accompanied by social provisions ensuring the harmonization of living and working conditions subject to the same rules and at the same rate as economic harmonization.

The third interim report (by D. Martin) of the European Parliament proposes the introduction into the second part of the Treaty ('the foundations of the Community') of a new title devoted to the protection of fundamental rights and liberties and provisions relating to European citizenship as well as racism and xenophobia. This must receive full support.

B.3.2. Specific social provisions

Title III of the Treaty should be entitled 'The common social policy'.

In accordance with the approach we have followed in this study, we would like to indicate the legal foundations for the common social policy without entering upon a detailed examination of the various proposals for a revised text available to us.

The first article of this Title III (former Article 117) must reaffirm the objectives of the common social policy. It should

[1] 'Third interim report of the Committee on Institutional Affairs on intergovernmental conferences within the framework of the strategy of the European Parliament', Martin, D., 31 October 1990, A3-270/90.

avoid recourse to such stylistic formulas as 'shall agree to' and 'shall endeavour to', and use positive terminology: the objective of the Community and the Member States is the improvement of living and working conditions.

Former Article 118 must be abolished and the provision replacing it must indicate the means for achievement and implementation, namely:

(i) introduction of common social policies;

(ii) adoption of organic laws in certain fields to be defined;

(iii) possibility of implementing European social law in social matters by means of national laws and/or by means of European collective bargaining;

(iv) obligation to act in the social dimension of other common policies;

(v) adoption of an action programme;

(vi) accession of the Community to international treaties in the social sphere.

This would give clear expression to the various levels at which Community social action could be developed as well as the respective scope of integration techniques, including the use of appropriate methods: standardization, harmonization, cooperation and convergence.

Next, the same title relating to common social policy must list:

(1) the field of application *ratione personae.*

The Treaty will no longer regard people as economic agents. Nationals and residents of non-Community nationality legally residing in Community territory will actually be referred to in the Community's social provisions;

(2) the field of application *ratione materiae.*

In addition to the social fields of competence already transferred to the Community, the following areas must be explicitly encompassed thereunder:

1. employment;
2. labour law and working conditions; [1]
3. right of association and collective bargaining between employers and workers;
4. transfrontier working relations of a Community dimension and negative social consequences of restructuring operations within the internal market;
5. vocational training;
6. hygiene, safety and health of employees;
7. social protection and living conditions;
8. social security;
9. immigration policies of Member States.

B.3.3. Social dialogue = European social cooperation

Former Article 118b should be removed and replaced by a new provision which requires Community bodies to set up, within a predetermined period, a legal framework permitting the development of cooperation between management and labour, collective bargaining and the adoption of European collective agreements between professions or within sectors.

To this end, in accordance with the Belgian Government proposal and the Resolution of 12 September 1990 on fundamental social rights, a European Committee on Employment should be set up to draft these agreements. [2]

At the request of the parties concerned, framework collective agreements may be made binding for the duration of their application at the proposal of the Commission, by means of a Council decision, acting by a qualified majority, addressed to the Member States.

The European Committee on Employment, a permanent body with equal representation of employers and workers, appointed following a proposal from their representative organizations, will have the following tasks conferred upon it:

(1) drawing up and concluding, while respecting the responsibility and independence of the social partners and according to conditions to be determined, collective employment agreements;

(2) being consulted on Commission proposals touching on the field of competence of the European Committee on Employment. There would then be two assumptions:

(a) the European Committee on Employment would make no observation as to the nature of the act proposed (directive or decision). In this case, normal procedure would be followed without modification. Similarly, after the adoption of the act by the Council, it would be incorporated in a conventional manner;

(b) the European Committee on Employment would decide that the matter should be the subject, in part or otherwise, of a collective agreement. It would draw this up. The Commission would then submit to

[1] For the significance of this concept, see the very interesting study by Spyropoulos, G., 'Conditions de travail: élargissement du concept et problématique juridique' (Working conditions: expanding the concept and legal problem), in *Droit Social*, Paris, December 1990, No 12, pp. 851-861.

[2] See the Van Velzen resolution, DOC. A3-175/90 (Part I, point 24).

the Council a proposal for the formalization of this agreement which, if the Council is in agreement, would have binding force throughout the Community. If the agreement covered only part of its initial proposal, the Commission could also propose that the usual adoption procedure be followed in addition;

(3) during the adoption procedure of a proposal for a directive, it could request that provision be made for its incorporation to take place by means of collective agreements which were binding at national level and not only by means of traditional regulations;

(4) it could at any time call upon the Commission to submit a proposal to the Council in a field under its jurisdiction. This is referred to in the Belgian Government proposal dated 25 January 1991.

B.3.4. Professional equality between men and women [1]

Former Article 119 should be expanded (as proposed in the report by D. Martin) to cover all those fields relating to professional equality. However, it should be added that, in drawing up common policies, the Community should particularly formulate rules and conditions opening up all sectors of the labour market equally to men and women.

B.4. *Institutions and procedures*

The problem of the reform of the institutions cannot be dealt with within the framework of the present study and we can merely confirm, as does the European Parliament, that only the growth of the legislative and monitoring powers of the European Parliament can ensure socialization of the aims of the Union. This means, in any case:

(i) co-decision of the legislative authority between Parliament and the Council;

(ii) that the objectives set out in the new Articles 117 and 118 are guaranteed by organic laws (or a framework law) decided jointly by the European Parliament and the Council after consulting the European Committee on Employment and the Economic and Social Committee on a proposal from the Commission or at the initiative of the European Parliament (under the conditions laid down for this right of initiative);

(iii) that the vote by a qualified majority is made general practice in the social sector;

(iv) that Article 100a is modified and paragraph 2 thereof abolished.

B.5. *Economic and social cohesion*

The provisions of Title V (Economic and social cohesion — Articles 130a to 130e) should be reworked so as to give a clear indication of the global dimension of economic and social cohesion within the framework of economic and monetary union and political union. The objective of economic and social cohesion should be set out within the context of the adoption of policies and instruments which will be adopted on implementation of the internal market and of economic and monetary union. Structural policies aimed at reducing disparities must not be purely regional but must also refer to disparities between different categories in the population.

It could prove necessary to conduct policies which correct negative social consequences created by the implementation of economic and social policies.

In particular, provision must be made for an obligation on the part of the Commission to draw up a report on the progress or delay in economic and social cohesion and the adoption of re-balancing measures which are deemed necessary.

In so far as the general objectives of the Treaty and the specific objectives have been clearly established, the social aim of the Community and of its common policies, the concept of economic and social cohesion, will be fully accepted. The proposal of Report III by D. Martin sets out an excellent proposal for Articles 130a and 130e.

B.6. *The Economic and Social Committee*

In expanding social policy and in the desire to create, according to the European social model, a legal and instrumental framework intended to promote the development of cooperation and European collective bargaining, it is appropriate to re-examine the task and fields of competence of the only remaining advisory body, the Economic and Social Committee.

The EEC Treaty laid down that the Economic and Social Committee had to be consulted in a certain number of fields (CAP, freedom of movement of workers, free provision of services, transport, Article 100, Article 118).

The advisory role of the Economic and Social Committee has evolved in a positive manner throughout its existence, notably as a result of recognition of the right of initiative (1972), the extension of its fields of competence by the Single Act, the furthering of its relations with the European Parlia-

[1] See the Report of the Committee on Women's Rights, by M. van Hemeldonck, 6. 12. 1990, Doc. A3-0358/90/Part A.

ment and its participation in drawing up the Community legislative programme through its participation in the extended work of the European Parliament.

In its current institutional role, the Economic and Social Committee is the only body giving general advice to the Council and the Commission (and the European Parliament after the institutional reforms).

Its composition means that it is a body which represents all the components of the population and socio-professional milieux.

It has a general advisory role which is thus distinguished from the tasks fulfilled by certain specialized advisory committees.

However, the advisory role of the Committee cannot be put to full use for several reasons. In most cases, the Economic and Social Committee is consulted after the process of drawing up legislative proposals, that is to say when guidelines are already to a great extent established.

This advisory task would have more sense if it could mandatorily intervene at the stage of drawing up texts on important matters and, particularly, the definition of major economic and social guidelines and, *a fortiori*, the development of new common policies.

A second weak point in the functioning of this advisory procedure is that no provision in the Treaty lays down that the Economic and Social Committee should be informed of action taken by the decision-making bodies in respect of its opinions.

In order to make the advisory role of the Committee truly effective, these weaknesses should be corrected and a provision of the Treaty should expressly establish:

(a) a priori advisory intervention; and

(b) information on the action taken in respect of its opinions by Community bodies submitting proposals and making decisions.

The proposal to create a European Committee on Employment, with equal representation from professional organizations representing employers and workers, is likely to create difficulties for the Economic and Social Committee.

In its proposal, the Belgian Government suggested incorporating the European Committee on Employment within the Economic and Social Committee, but with the chairman provided by the Commission. It justified this latter requirement on the grounds that the European Committee on Employment would be the forum for drawing up European agreement legislation.

The proposed creation of a body such as the European Committee on Employment certainly deserves consideration and in-depth discussion.

We think that the current composition of the Economic and Social Committee, a body whose members are appointed in their personal capacity and who may not be bound by any mandatory instructions, is not consistent with the requirements of a European Committee on Employment composed of members representing their respective professional organizations and in whom is vested the mandate to negotiate and conclude collective agreements.

The European Committee on Employment could in no case be a section restricted to the first two groups of the Economic and Social Committee.

Discussions during intergovernmental conferences will enable guidelines and proposals to be formulated.

In so far as revision of the Treaty involves an increase in the responsibilities and powers of the European Parliament, which will assume a more genuine Parliamentary function, we think it is essential for there to be a general institution which is purely advisory in nature but whose advice is acted upon.

B.7. *The Court of Justice*

The development of European integration from the viewpoint of political union, the safeguarding of fundamental rights, European citizenship and social rights in turn calls for a redefinition of the tasks and fields of competence of the Court of Justice of the European Communities.

Experts are working on this. We also have available 'Reflections on the future development of the Community judicial system', drawn up by the Court of First Instance of the European Communities on 3 December 1990.

From the point of view of social fields of competence, we think it is essential for the Court of Justice to have the following fields of competence:

(i) to be the guardian of fundamental rights and liberties, fundamental social rights and Community law;

(ii) unique, constitutional and supreme jurisdiction in the Community legal system. This constitutional jurisdiction is particularly aimed at specifying the distribution of fields of competence between the Community and the Member States, and thus observance of the principle of subsidiarity, as well as the distribution of fields of competence between the various Community institutions;

(iii) taking into account the expansion of the fields covered by Community law in the context of economic, monetary and political union, the creation of a section specializing in social matters within the Court of Justice should be examined, ensuring that, in the procedures for appointing judges, there is full observance of the principle of balanced representation of the various national legal systems. The Van Velzen resolution of 12 September 1990 calls for the creation of a European Labour Court.

B.8. *The integration of fundamental social rights into the Community legal system*

By virtue of the procedures laid down in the Treaty and conferring on the Community, an international legal person, the external competence to conclude international treaties, it is henceforth possible to integrate fundamental social standards into the Community legal system so that they acquire the status of supranational provisions of Community law. This hypothesis refers particularly to the European Social Charter of the Council of Europe and its additional protocol, certain international labour agreements, the European Convention on Human Rights, the United Nations Convention relating to the abolition of all forms of discrimination against women, and the Convention relating to the abolition of all forms of racial discrimination. This method of embodying fundamental social rights in instruments has been recommended by various Parliament resolutions and by the Belgian Government. If the integration of fundamental social rights takes place in this manner, new safeguards will be introduced and judicial monitoring by the Court of Justice will be opened up, whereas the current solemn declaration concerning the Community Charter of fundamental social rights has no binding legal value.

Now that this study — in which I have attempted, by means of critical and historical analysis, to draw lessons from the end-results of social progress in the Community, to identify the obstacles and pitfalls which have frustrated the harmonious development of economic and social policies, and to suggest essential bases for the integration of social matters into the process of economic integration — is complete, I hope that I have been able to make a modest contribution, prior to the forthcoming intergovernmental conferences, to the future endeavours of the European Parliament, its Committee on Institutional Affairs and its Committee on Social Affairs.

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