

Paper presented at the Fourth Biennial International Conference of the European Community Studies Association, Charleston, South Carolina, May 11-14, 1995.

A REGULATORY CONUNDRUM: INDUSTRIAL RELATIONS AND THE 'SOCIAL DIMENSION'¹

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INTRODUCTION

During the difficult negotiations which preceded the Maastricht summit of December 1991, Jacques Delors expressed his concern that an 'organised schizophrenia' was emerging in the Treaty on European Union (TEU).¹ In the final draft of the Dutch Presidency, as modified by the summit and signed on 7 February 1992, his fears were realised. For while efforts were made to ensure that progress in market integration was accompanied by parallel advances in *non-market* spheres such as social and labour market policy, Maastricht's main achievements related to European Monetary Union (EMU). Innovations in other areas were more modest and clumsily hedged with conditions and qualifications. Leaving aside the complicated relationship that now exists between the European Union and the distinct inter-governmental 'pillars' of foreign/security policy and home/judicial affairs, the alterations to the 'Communities' pillar alone reveal for one critic "more of a *bricoleur's* amateurism than a master brick-layer's strive for perfection and attention to detail".² Attempts to correct the Community's democratic deficit via constitutional reform were heavily constrained by the need to compromise between the desire for greater legitimacy and the political reality of the Community's power structure.³ The complexity of the new rules and decision-making procedures contributes neither to the democratic nature nor the efficacy of the Community's institutions.⁴

¹ Forthcoming in Stephan Leibfried and Paul Pierson (eds), *Fragmented Social Policy: The European Union's Social Dimension in Comparative Perspective*, Washington, DC: The Brookings Institution, 1995.

Social and labour market policy is one area where more questions are raised than answered by the Maastricht arrangements, and the creation of a regulatory regime rendered more complex. This reflects a more general feature of the TEU: its creation of a variegated regulatory structure - and a pragmatic and *à la carte* approach to integration - through its 'special case protocols'. These include the 'Danish second home' protocol, the 'Irish abortion' protocol, the 'Barber protocol' (on the equalisation of pensions payments'), the EMU 'opt-out' for the United Kingdom as well as the special social and labour market provisions which are contained in the Social Policy Agreement, allowing eleven Member States (the twelve excluding Britain) to continue along the path laid down in the 1989 Social Charter. The potential for 'variable geometry' in the integration process this creates may be no bad thing given the complications created by the prospect of EU enlargement including the EFTA and, eventually, some of the central and eastern European states. For as the *Financial Times* columnist, Samuel Brittan, has remarked: "Even those who are not particularly enamoured of free-market thinking can surely see that there is absolutely no prospect of anything like a Social Charter, with harmonised social security and similar provisions, being applicable in an enlarged Community of more than twenty countries, taking in the former communist countries, with widely varying living standards and productivity levels."⁵

Nevertheless, powerful interests within the European Union (EU) - including Europe's unions, the governments of a majority of the Member States and the European Commission itself - remain committed to the construction of a 'European Social Community' to ensure the preservation of workers' rights and entitlements and the creation of a higher degree of social cohesion and solidarity amongst the citizens of Europe. On the one hand it is clear that the concept of a European welfare state with harmonised social security structures to which Brittan alludes is infeasible - not least because the European Union lacks the resources required to engage in large-scale redistributive policies. But on the other, this does not prevent it from undertaking ambitious programmes of social (and economic) regulation if the political and administrative costs of the regulatory programmes are borne by the regulated (firms and individuals) rather than the regulators - in this case the institutions of the European Union.⁶ The future of the 'social dimension' will therefore necessarily be one in which the

core features of welfare state regimes remain nationally specific, with supranational influence restricted to a limited number of areas deemed crucial for integration.

But the question remains of exactly how that regulatory structure is to be built. What are the political and practical limits to the creation of a pan-European policy regime in this area? How effective can a structure of regulation or governance in this sector be given (a) the diversity of historical, legal and institutional traditions among the EU 12 and (b) the infinite scope for discord over two key regulatory issues: the desirability of new regulation in labour markets at either the national or supra-national level; and the assumption of Community competence in this domain, with all that that implies for the hallowed if notoriously imprecise notion of 'subsidiarity'?

The regulatory conundrum produced by this discord has been both evident and inevitable since the Treaty of Rome. For despite the predictions of the early theorists of the European Community that the integration of social security and labour market organisation would follow from the integration of the European market, social integration has proven to be anything but spontaneous. Nor, indeed, has there ever been any consensus as to its desirability, for interpretations of the legal basis for Community action in this domain (principally Articles 117 and 118 of the Treaty of Rome) have been divided from the outset over whether they establish the basis for a common social policy. Indeed, Article 117 stated both that harmonisation should result automatically from the functioning of the common market and that regulation and 'administrative action' was required to ensure that outcome.⁷ The consequence has been that, throughout the history of what was originally the Common Market, then the European Community and now the European Union, advances in social and labour market policy at the European level have been gradual, piecemeal and mostly unsatisfactory, to their supporters as much as to their opponents.

This chapter portrays the process of regulatory policy-making in the 'social dimension' as an ongoing attempt to resolve this regulatory conundrum. It begins by considering the context from which European level of social and labour market policy has begun to emerge: the actors, competing interests, institutions, pressures and counter-pressures which have simultaneously helped and hindered the construction of the limited regulatory regime that

currently constitutes the 'social dimension'. It then proceeds to consider the emergence of an embryonic system of governance in this area in terms of the three essential characteristics of a regime identified in the work of Oran Young: the *substantive* (the cluster of rights and rules associated with the regime), the *procedural* (the forms of decision-making) and the *mode of implementation*.⁸ This will be carried out via an examination of the twin 'pillars' of the 'social dimension'. The first (the legislative pillar) which comprises substantive and procedural developments (involving EC legislative acts and treaty arrangements) will be discussed in section two. The second (the social dialogue pillar) which comprises a potentially important second instrument of governance - agreements between the so-called social partners - will be discussed in section three. Section four considers developments since the Maastricht summit of December 1991. The Treaty on European Union attempted, via its Social Protocol and Agreement, to create a new architecture of social and labour market policy-making by reforming the procedural and implementation components of the nascent regime: firstly by eliminating the single Member State veto on a wide range of policy areas; secondly by bridging the legislative and social dialogue pillars to allow for decision-making and implementation via 'collective agreement'; and thirdly, by enhancing the powers of the European Court of Justice to penalise Member State failure to implement directives.

There are two main arguments in the analysis which follows. The first is that the creation of a transnational regulatory regime for industrial relations and the labour market has proceeded via a complex process of intergovernmental bargaining, involving the Commission as a critical, entrepreneurial policy actor, promoting alliances between Member States and exploiting to the limit both its own powers and the latitude allowed by the Treaties for Community competence in this domain. The second is that, regardless of the numerous impediments in its path, a transnational regulatory regime is being constructed, with important implications for national sovereignty (which is gradually being surrendered), traditional interest group activity (which has assumed a significant transnational dimension), and labour market policy (which is steadily being 'Europeanised'). The future, however, is uncertain. The greatest challenge for the EU is currently its high levels of unemployment. Confronting this problem will require creative and complex regulatory innovation in striking a balance between policies to protect employment and policies to create it.

1. BUILDING A REGULATORY REGIME: ACTORS, INTERESTS AND INSTITUTIONS

Taking Krasner's definition of a regime as a set of 'implicit and explicit principles, norms or rules [and] decision-making procedures'⁹, Teague and Grahl have argued that a European industrial relations regime - based on more than guidelines but less than legally binding obligations - offers a superior regulatory model to either a constitution-based system or a decentralised, neo-liberal mode of market regulation. While the former would be too rigid to accommodate European industrial relations diversity, the latter would fail to provide for labour market coordination and allow for a dysfunctional, 'Hobbesian' competition among agents and rules, leading to social dumping or 'regime shopping' and a process of competitive deregulation.¹⁰ A similar point has been made elsewhere in justifying Community *solidarity* in social security provision on efficiency grounds, arguing that the free play of market forces would lead to sub-optimal equilibria and underprovision.¹¹ However, creating such a regime has been impeded by a fragmented social policy framework in the European Community and an absence of interest group cohesion and common behavioral norms. Political fragmentation, as in other areas of policy, appears to be the principal obstacle to transnational governance.¹²

In order fully to understand the regulatory problems in this domain, the existence of a deep-seated conflict must be appreciated. From the very beginning, any attempt by the European Commission to set an agenda for the harmonisation or approximation of rules and regulations or promote supranational decision-making has provoked a two-way conceptual clash: between the competing philosophies of 'collectivism' and 'liberalism' in labour market regulation; and between 'solidarity' and 'subsidiarity' in the framing of Community policies. As elsewhere in the integration process, preferences for integration or decentralisation tend to be closely related to attitudes towards markets.¹³ This clash - which has become particularly acute since the 1987 Single European Act (SEA) - has underpinned an ongoing debate and conflict of interests within a highly heterogeneous and fragmented policy community. It has been complicated still further by the diversity of Europe's national labour market regimes, among which there has been little hard evidence of genuine convergence.¹⁴ In consequence, despite

the existence of numerous pressures working in favour of integration in this area - including market integration, the emergence of transnational union and business structures, and, arguably, the need for a more developed form of European social citizenship¹⁵ - there has been no simple process of spillover. Instead, supporting Keohane and Hoffman's argument that "successful spillover requires prior programmatic agreement among governments"¹⁶, there has been a sclerotic process of inter-governmental bargaining, spurred on in fits and starts by a European Commission which has always played the role of initiator, formulator and promoter of legislation, but which became increasingly entrepreneurial under the aegis of Jacques Delors.

Four major impediments to the creation of a fully-fledged industrial relations regime can therefore be identified: the low level of legitimacy attached to the project and the uncertain status of the regulator (the European Commission); the clash of philosophies and interests; the fragmentation of the policy community; and the complexity of the regulatory arena, stemming from the national (and even sub-national) diversity of European labour market regulation.

The legal basis: the Commission as policy entrepreneur

The creation of any system of regulation depends in large part on the legitimacy of the project and the status of the regulator. The first problem encountered by the Commission is that its powers in this area have always been weak and its dependence on the support of the Member States (and usually their unanimous support) strong. As already mentioned, the legal basis for a Community role in social and labour market policy has been ambiguous, forcing the Commission - which has always adopted a broad interpretation of its powers - to forge alliances with Member State governments and, where possible, interest groups, to fill the gap between formal competence and actual influence. If this has occasionally allowed it to make great leap forwards with the launch of 'social action programmes' (the most recent after 1987), it has also made it heavily reliant on working groups and consultative committees for its expertise, a dependence reinforced by the expansion of its policy interventions.

It has been argued that intergovernmentalism has been a major obstacle to progress and that this, rather than the fragile legal foundations provided by the Treaty of Rome, has been responsible for the problems encountered in creating a regulatory regime in the area of social policy.¹⁷ It may well be the case that intergovernmentalism (and the need for compromise between irreconcilable positions) was originally responsible for these fragile legal foundations. Nevertheless, the legal framework subsequently became extremely important in both constraining the range of opportunities and expanding them. Thus Treaty articles 117 and 118 can be interpreted either as establishing harmonisation as one of the aims of the Treaty (without, however, providing the Commission with the necessary instruments); or, as doing nothing to restrict the autonomy of the Member States (and, accordingly, giving few clearly defined powers in this domain to the Commission).¹⁸ This has allowed for shifts in the role of the Commission (in alliance with the Council of Ministers) in attempting to push forward its regulatory project and has legitimised its endeavours to bridge the gap between official competence and actual powers by taking recourse to other Treaty articles - the so-called 'Treaty base game' (see section two). Thus, the 1972 Conference of Heads of State in Paris emphasised the importance of more vigorous action in the social policy field and the Council of Ministers approved the use of Articles 100 and 235 of the Treaty of Rome in helping produce the dismissals directive of December 1974 and workers rights in event of mergers presented in 1975.¹⁹ More recently, as discussed in section two, the Commission has played upon this ambiguity in a highly entrepreneurial fashion to push forward its 1987 social action programme proposals in an effort to bypass the British veto. By the mid-1990s, the replacement of Jacques Delors and Member State resistance to an entrepreneurial style of policy-making signalled the beginning of a new and much more cautious era of Commission activity.

However, it is has long been clear that the Commission and its bureaucrats play a less dramatic - but often more consequential role - either by the promotion of relations between other organisations which may assist voluntarist regulation (as in the case of the 'social dialogue', discussed in section three), or via incremental bureaucratic pressure and the advocacy of non-binding instruments such as Opinions and Recommendations.²⁰ As Cram points out, 'it may be that EC soft law and Euro-rhetoric ultimately create their own dynamic, eventually leading to an expansion in policy activity'.²¹ Cram also shows how the

Commission has been especially successful in promoting legislation of a regulatory kind which is relatively costless to either the Community as a whole or to its Member State government, such as health and safety legislation. However, in order to understand why advances have been made in this and similar areas of policy such as the freedom of movement of workers, it is necessary also to consider the clash of philosophies and interests at work which prevents progress in some areas but not in others.

The clash of philosophies and interests

Since the late 1970s, there has appeared to be a clear division between the continental countries and the British government over the promotion of a European system of labour market regulation and industrial relations. This has not simply been related to the contrasts between the Anglo-Saxon and Romano-Germanic legal traditions (mentioned below), but also to competing notions of national sovereignty and philosophies of economic organisation. At the same time, there has been a clear clash of interests - and ideology - between Europe's employers and trade unions. The subsequent conflict has made the regulatory project more complex still.

The two-way clash between solidarity and subsidiarity and between the market and collectivism is especially acute in labour policy. This is closely linked to the diversity of Europe's national systems of labour market regulation. This generates different conceptions of regulation and, more generally, makes policy implementation and enforcement problematic. As for the clash between different conceptions of labour market organisation, broadly speaking, since the late 1970s, the British government and Europe's employers have become increasingly concerned to avoid the creation of a supranational level of regulation at a time when they have also been promoting national level *de*-regulation. They argue that economic efficiency and employment creation are hampered by excessive and ill-thought out regulation, and that instead of seeking an approximation of rights and entitlements across Western Europe, the Commission should be leading the debate on making labour markets more flexible, pointing to the dismal record of job creation in the Community.

The parallel clash between conceptions of solidarity and subsidiarity is a complex and probably unresolvable one, although it has been argued that in theory there may be no contradiction since solidarity itself is a contestable concept and does not necessarily imply collective and universal provision. Thus, in principle, solidarity in shaping Community-wide norms and standards should be able to accommodate diversity²². This is precisely what a regime in the area of the labour market could achieve, either by setting common minimum standards from which national departures are acceptable (the intention, after all, of much Community labour market legislation to date) or by creating rules via European 'framework' agreements which would then be implemented via further agreements at lower levels, thereby preserving national traditions. This innovation is contained in the Maastricht Social Protocol and Agreement (see section four). More generally, it has been argued that the strengthened subsidiarity clause in the Maastricht Treaty (Article 36) could reasonably be interpreted to mean that the EU should act to support the social protection activities of the Member States and to fill the gaps at the national level, in line with the Catholic doctrine of subsidiarity. However, the abstract nature of this theoretical debate tends to translate crudely into the political arena where it focuses, once again, on the competence of the Community to act in an area where - according to the opponents of a strengthened social dimension - it lacks the legitimacy to do so.

The fragmentation of the policy community

However, the problems of building a pro-regulation coalition derive as much from the fragmentation of the policy community as it does from disagreement on the form and extent of regulation. The task of the Commission in building the alliances with partners required to make progress has been made all the more difficult by the rudimentary form of interest group organisation and by divisions within the Commission itself: the clash of regulatory philosophies is replicated in the latter between DG 5 (Social Affairs) and DG 2 (Economic and Financial Affairs). As for interest groups, both UNICE (the Union of Industrial and Employers' Confederations of Europe) and the ETUC (the European Trade Union Confederation) have lacked negotiating mandates from their affiliate organisations.²³

And despite recent reforms by both organisations to increase their lobbying capacity, they remain weak by comparison with other actors such as large companies (especially multinationals) which are able to use an increasing array of channels and access points to influence Community policy. Labour is especially disadvantaged, regardless of claims by employers that Europe's union representatives enjoy special privileges (such as Commission funding).²⁴ While there has been growing confidence among business interests in using the direct Brussels route for access to the EC decision-making - as part of a multi-faceted strategy including direct representations, lobbying through national and European level trade associations and other ad hoc organisations - there is little evidence of organised labour following suit.²⁵

As for the labour movement, although it seems logical that the internationalisation of capital requires an international labour movement to deal with it, this does not necessarily follow. Indeed, as Barnouin points out, it may well be the case that international agreements would weaken the historically developed thrust with which labour unions pursue their objectives at the national level without leading to a corresponding increase in international bargaining power.²⁶ However, given the emergence of transnational structures of governance in the Community, it has been clear for some time that the labour movement must become transnational if it is to be part of the future. The main problem is less the loss of national strength than the creation of an effective transnational structure, for international coordination and centralisation is only coming about as a result of external pressure. The reform of the ETUC in the early 1990s have been the result of developments in Community policy-making, and aims to facilitate coalition building among its member confederations and pre-empt any challenge to the ETUC's role from the further development of European sectoral level bargaining. The first is to be achieved by the creation of a management committee between the ETUC's executive council and its secretariat, with ten delegates representing the forty confederations on its executive council. The second is to be achieved by giving the International Industry Committees sectoral representatives on the ETUC's governing body. Although these changes fall short of transforming the ETUC into a genuine supranational actor, they begin to make it more than simply a mediator of nationally-based organisations.²⁷ They will also make it a more effective interlocutor both for the Commission and Europe's employer organisations.

Creating greater cohesion in the employer camp may prove more difficult, simply because European business organisations have less immediate interest in coordination. It is precisely the proliferation of organisations and points of access for business lobbying that gives the employers their strength as the most 'over-represented' interest group in EC affairs, enjoying superior financial resources, a highly trained professional staff and a dense network of personal contacts and channels of information²⁸. Keeping UNICE weak has allowed business interests to avoid its co-option into a corporatist policy-making process and diversity has been encouraged by the EC's complex, multi-layered structure. However, as in the case of the labour movement, changes stemming from the creation of the internal market will have important implications. Lanzaletto suggests that the creation of the internal market will bring about more internal conflicts within the business community, making the management of diversity more difficult, especially between the national and sector specific associations which constitute a dual channel of access to decision-making and weaken UNICE as the 'voice' of Euro-business.²⁹ In future, business may be forced to rationalise its lobbying structures. At the same time, the new post-Maastricht social dialogue procedures will require business to give greater weight to UNICE than hitherto. Now that the Commission is putting pressure on UNICE to draw up EC level collective agreements with the ETUC, the issue of its resources will have to be seriously tackled.³⁰ Nevertheless, large multinationals are unlikely to adopt UNICE as their sole channel of influence, since they wield important power through the European Roundtable and the European Enterprise Group as well as lobbying via national and Euro-level trade associations and direct representations.³¹

The diversity of European labour market regulation

A more coherent set of relationships between the regulatory authorities and social actors may assist the creation of a regulatory regime. But a further set of problems is created by the complexity of the regulatory task. This can be illustrated by briefly examining the diversity of the *national* systems of regulation which a transnational regime must accommodate. National labour market regimes in Western Europe are embedded in diverse social, political and economic systems making harmonisation extremely difficult; their 'policy space' is already occupied by *national* behavioral norms, vested interests and organisations.³² Their

rules - derived both from law and collective bargaining - differ considerably, as does the combination of arrangements which underpins the organisation of the firm and determines its cost structure and position in the market place. "The firm is also linked in different ways to national welfare state traditions, which affect, for example, the ratio between its direct wage and non-wage costs (due to the balance between general tax and employer contributions to social security funding) and its willingness to engage in consensual as opposed to adversarial relations with the labour force.

There are considerable analytical problems in categorising European labour market regimes, a task made all the more difficult by evidence that the decentralisation of collective bargaining and the emergence of either regional or plant-level productivity coalitions is eroding distinctive *national* systems of industrial relations.³³ One way of grouping the different countries of the Community is to focus on state/legal traditions. Thus, in the *Roman-German* system (covering Belgium, France, Germany, Greece, Italy, Luxembourg and the Netherlands), the state plays a central role, through the constitutional provision of basic workers' rights (the right to collective bargaining, to form and join trade unions etc) and through comprehensive labour market legislation. In the *Anglo-Irish* tradition (Britain and Ireland) the state, by contrast, has traditionally abstained from regulating the industrial relations system - either by legislation or a labour code. In the *Nordic* system (currently represented by Denmark) the role of the state is less formal than in the Roman-German system; but industrial relations have been regulated by basic agreements between employers and unions which function much like the constitutional and legislative frameworks of the Roman-German countries. The state has frequently mediated between the two parties, creating a tripartite or corporatist element in the system.

These differences explain in part the tendency of the British and Danes in particular to resist the extension of the continental law-based system of regulation to their traditionally 'voluntarist' systems. However, they fail to capture the role played by labour market *management and organisation* in creating national regulatory systems. Accounting for this dimension produces a rather different configuration which helps explain important differences in the balance between types of labour market flexibility in the Member States and accounts to some extent for their different views of European-level innovations - even if, as Peter

Lange has argued, there has sometimes been a lack of correlation between governmental (and even interest group) positions and their real interests due to the environment of 'cheap talk' (ie. costless communication) in social policy bargaining.³⁴

1. Employers in the '*northern*' group of countries (including Germany, the Netherlands, Belgium and Denmark) are constrained by rules and regulations governing *external* flexibility (basically their ability to hire and fire and employ a wide variety of contracts) but are compensated by the greater flexibility provided by a high level of skills, a highly educated workforce, a lower level of hierarchy within the firm and a consensual treatment of issues such as the introduction of new technology, the restructuring of production or employment adjustment. Together, these promote a higher degree of *internal* (within firm) flexibility than in other Member States. Active labour market policies to reintegrate the unemployed into the workforce tend to receive greater emphasis than passive compensatory support (employment benefits) although there are important differences in this respect between the countries of this group. Their governments and unions are concerned to preserve their high-pay, high-productivity systems, which explains their fear of 'social dumping' (the relocation by employers seeking lower wage and non-wage costs) in a European labour market with diverse labour market standards and few impediments to 'competitive deregulation'.³⁵ Hence their support for a strong social dimension to European economic integration and disappointment with the failure to achieve this to date.

2. Employers in the '*anglo-saxon*' group (the United Kingdom and Ireland) enjoy a high degree of *external flexibility* (there are far fewer constraints on their powers to hire and fire and employ workers on fixed-term or temporary contracts), but due to a deficit in skills and a poorly educated workforce - and in the United Kingdom a tradition of adversarial industrial relations - their internal or organisational flexibility has been low and their capacity for adjustment weak. The solution has been to pursue a low skilled, 'price-oriented' adjustment path in which employers costs are lowered by a reduction in the level of labour market regulation. This prevents British unions working successfully for the adoption of the German 'skills-oriented strategy' which they admire and which underpins their support for a strengthened social dimension. It should be noted that Ireland has followed a different path from that of the UK by sustaining the role of the trade unions in bargaining and by extending

rather than reducing protective regulation. Its government has consequently been much less hostile than its UK counterpart to a strengthened social dimension.

3. Employers in the '*mediterranean*' group of countries (France, Italy, Greece, Portugal and Spain) have typically enjoyed neither a high level of external flexibility nor a high level of internal flexibility. If on the one hand there have been strict limitations on their freedom to hire and fire and recruit on part-time or temporary contracts, on the other a low level of skills provision and inadequate training systems, combined with an adversarial relationship between management and labour, has deprived them of organisational flexibility, except perhaps in the largely unregulated small-firm sector. More recently, the expanded use of fixed-term contracts in these countries has compensated for a lack of flexibility elsewhere, but at the cost of producing a dual labour market, dividing the privileged workforce of 'insiders' (the full-time, permanent, older workers) from a younger 'outsider' workforce locked into insecure, fixed-term employment. The support of their unions for a strengthened social dimension is not hard to explain, since these labour markets are already rather heavily regulated and a floor of rights and entitlements established at the European level would help prevent their erosion in these countries. Their governments, on the other hand, aware of the price of maintaining a high level of labour market regulation - in terms of both costs and employment as the barriers to competition with other countries fall - have supported the idea of a strengthened social dimension (as well as the strictures of EMU convergence), in part because of the prospect of an increase in regional aid.³⁶

In addition to the intricate, multi-layered, overlapping and rather disordered structure of the European Community, impediments to an industrial relations regime have therefore been created by problems of legitimacy, the clash of philosophies, policy community fragmentation and the sheer complexity of the regulatory task. Nevertheless, over the last twenty years, the twin pillars of a regulatory regime - based on legislation and social dialogue - have been in the process of gradual construction, albeit in fits and starts, subject to long delays and, due to their weak foundations, beset by occasional subsidence. That process of construction is the subject of the next two sections.

2. THE LEGISLATIVE PILLAR OF THE SOCIAL DIMENSION

The substantive and procedural foundations

As discussed in section one, it has long been clear that the Commission has played the role of initiator, formulator and promoter of legislative and other industrial relations developments. This entrepreneurial role has been essential because of the fragile legal foundations for a specific Community role. The response by the Commission - in alliance with certain (usually a majority) of the Member States - has been to bolster these foundations with recourse to other, controversial, Treaty provisions. For, as already mentioned, the Treaty of Rome makes no specific provision for a Community social policy and articles 117-122 are vague and repetitious and confer no real powers upon the Community institutions and little by way of direct rights upon Community citizens.³⁷

It was only in the early 1970s, when the Council of Ministers approved the recourse to other Treaty articles (in particular Article 235), that the EC's first Social Action Programme of labour market measures made significant advances, producing directives on equal pay and equal treatment for men and women, on rules for collective redundancies and on employees' rights in the case of transfers of undertakings or employer insolvency. Some modest initiatives in creating EC standards in health and safety also succeeded: between 1970 and 1985, the Commission proposed and the Council adopted six specific directives in this area.³⁸ However, further initiatives on more controversial issues - common regulations on part-time and temporary work and parental leave, for example - were blocked by the veto powers of the British government in the Council of Ministers. The European Commission's most ambitious projects - the Vredeling proposal of 1980 on employees' rights to information and consultation in multinational companies (MNCs) and the Fifth Company Law Directive on board-level, employee participation - were defeated by a campaign conducted by European employers, multinational companies and certain Member States. The American MNCs were especially influential, contesting the 'principle of extra-territoriality' by which the EC intended to extend its jurisdiction to cover non-EC companies.³⁹

Those initiatives which were market-oriented and which posed no threat to the autonomy of the firm - such as policies to increase the freedom of movement of labour in the Community and the use of the Structural Funds (and especially the European Social Fund) to assist training in less developed regions - have encountered far less resistance from Member State governments and have been widely supported by unions, employers and governments alike. However, even in those areas where policy has been market-oriented and where the grounds for Community action have been more solid, progress was also slow because of the need for a complex process of intergovernmental bargaining. Although pressure for a common policy to increase labour mobility should have been produced by the creation of a common market for goods, intermediation by a complex policy-making process ensured delays. Regarding the freedom of movement, for example, the Treaty of Rome obliges the Member States to remove domestic legislation which discriminates in employment terms against citizens from other parts of the Community. But despite the lack of open opposition, legislative progress was relatively slow: it took nearly a decade of debate and policy formulation before most legal discriminations against migrant workers within the Member States were removed in the late 1960s. Henceforth, workers were allowed to apply for jobs in any Member State, enjoy the same rights and entitlements as national workers and settle there with their families.⁴⁰

The next major step resulted from the combination of a favourable economic conjuncture (the period 1986-1990 was a period of renewed economic and employment growth in the European Community) and the emergence of a coalition of Member States and the Commission against the attempted shift of Community policy in a liberal market direction during the British Presidency of 1986. The opportunity for this shift was provided by the policy vacuum created by Jacques Delors' 1984 announcement that no new social policy initiatives would be undertaken unless they were sanctioned by the social dialogue between Europe's trade union and employer representatives. An attempt to stimulate bargaining between the European 'social partners', it succeeded only in producing a deadlock given the polarisation of the employers and unions on most labour market issues. Then, between 1987 and 1989, the Commission engaged in a process of coalition building and agenda setting for a social and labour market policy relaunch which eventually brought most of the Member States on board.⁴¹

The Community Charter of Basic Social Rights - adopted as a 'Solemn Declaration' by eleven of the twelve Member States at the Strasbourg summit in December 1989 - was the result of a compromise to accommodate the concerns of the British, Spanish and Portuguese governments. They remained uncertain about the desirability of the floor of social rights and entitlements now being promoted by the Commission in league with the Belgian, German, French and Greek governments - whose presidencies had been critical in moving the agenda forward. But it was the British Government that rejected the Social Charter, claiming that "it did not satisfy criteria which were unanimously agreed by the Heads of Government at the Madrid Summit in June 1989": priority to job creation, adequate regard to subsidiarity and respect for the diversity of practice between Member States.⁴² The decision of the British not to sign gave formal expression to an already well-established breach with their eleven EC partners who - regardless of their differences on detail - had reached a consensus on the need for progress. It also set a precedent for the Maastricht summit in December 1991: in effect, the British succeeded in diluting the substance and modifying the spirit of a document to which they themselves did not subscribe.

As far as *substantive* rights were concerned, the Social Charter was an immense disappointment for those seeking to enshrine citizenship rights at the centre of the project for closer political and economic union. Most seriously for those seeking a Community commitment to high common standards of social welfare, the final draft no longer referred to the fundamental rights of *citizens*: the use of that word in earlier drafts was replaced by *workers*. This was of more than symbolic importance. It meant that the prospect of a 'people's Europe' began to fade from the outset, to be replaced by much more limited - not to say 'minimalist' - set of provisions. Thus, the Charter focused overwhelmingly on policies required for the completion of the single market (primarily economic and industrial rights) with only limited reference to *social citizenship* rights.⁴³ Falling well short of the measures required to underpin a European welfare regime, the Charter betrays the more general tension in EC social policy between the provision of rights as an adjunct of economic policy (primarily to enhance the mobility of labour) and the more comprehensive conception of social rights - advanced by the European Court of Justice (ECJ) - which stems from a citizen's Community membership. Support for 'subsidiarity' - and its conflation (especially

by the British) with *sovereignty* - has served only to undermine the principle of universal rights and entitlements.⁴⁴

Even so, the UK Government was concerned both at the scope and the legality, under Treaty provisions, of the Social Action Programme measures that followed; and Europe's employers' organisation, UNICE, complained that around a quarter fell outside the Community's legitimate sphere of influence. Both the British and Europe's employers have been broadly supportive of social policy measures which secure the operation of the internal market (common health and safety standards, portable pensions and the mutual recognition of qualifications). But they have consistently opposed measures influencing the relationship between capital and labour (such as rights to consultation and information) and the 'equal protection of laws' in social security.⁴⁵

They find support for this stance in the Treaty of Rome and the Single European Act (SEA) of 1987 which also set precise limits on the *procedural* component of any emerging regulatory regime, resolving none of the ambiguity of the original legal bases for Community action. For while Article 118A of the SEA extended the scope of social policy-making (giving the Commission the power of proposition after consultation with the Economic and Social Committee, providing the European Parliament with a 'second reading' of proposals through a new 'co-operation procedure' and allowing the Council to act on a qualified majority), Commission initiatives were constrained by a number of provisos. Critically, only health and safety measures fell unambiguously under the new majority voting system and Directives were to avoid imposing burdens, be they legal, financial or administrative, on small and medium-sized firms. And although Article 100A introduced majority voting for measures essential for the single market, those relating to the free movement of persons and the rights and interests of workers were specifically excluded. Thus the fragile legal bases for a Community role in social integration were barely strengthened by the SEA.⁴⁶

Of course, the resistance of Britain to legislative interference in the sphere of labour market policy revealed the distinction between the British legal tradition and that of its continental counterparts - a tradition of voluntarism in labour market regulation (which it has shared with Ireland and Denmark) and for contractual relationships between employees and employers

rather than ones enshrined in legal statute (see section one). This distinction raises a third problem in building a regulatory regime in this area of policy - that of *implementation*. For both the Anglo-Saxon and Nordic legal families give pre-eminence to enforcement through collective agreement rather than social legislation, even if the UK has moved away from the voluntarist mode of regulation with the proliferation of restrictive labour legislation under the Conservative government since the early 1980s.⁴⁷ But even in the continental countries - which can broadly be described as belonging to a Romano-Germanic family, with a common tradition of individual, substantive rights in labour law - recent trends in industrial relations have seen a growing recourse to company or even plant level modifications to national labour regulation through bargaining.⁴⁸ Thus, the appropriate form of implementation of new labour regulations has also become an issue of debate, one which has been complicated further by the clash over the principle of subsidiarity. A key issue immediately prior to the Maastricht conference of December 1991 was therefore whether EC labour regulation should be implemented via collective bargaining, both as a means of encompassing diverse legal traditions and of avoiding disputes over regulatory competence.⁴⁹

Hence the regulatory impasse at the turn of the decade. For on the one side the British, backed by European employers, opposed any encroachment on national sovereignty and demanded the observance to the letter of Treaty law. And on the other, the Commission, backed by the European labour movement and by a majority of the other Member States, began seeking ways of evading the legal constraints. Both the substantive and procedural foundations of the new regulatory regime were therefore weak, and based on shifting ground. In the background, the viability of the entire project was threatened by uncertainty over implementation and enforcement. However, in the first half of 1990, Jacques Delors, the European Parliament, and the Irish president of the Labour and Social Affairs Council, all expressed support for the adoption of as many action programme measures as possible by a qualified majority, in an attempt to force a solution to the procedural problems.⁵⁰ This would require a 'creative' formulation of action programme measures which, in turn, would attempt to link contractual rights with more limited entitlements in labour law. As a result, both the substantive and procedural issues of regulation became embroiled in controversy.

'Creative' regulation: playing 'the Treaty base game'

Thus began some eighteen months of tactical manoeuvring as an entrepreneurial Commission sought to outwit the British Government (and evade its powers of veto) by playing the 'Treaty base game' - attempting, that is, to push its legal competence to the limit by a skilful (and at times rather devious) interpretation of Treaty provisions. For the Commission, this was the only option pending a clarification of the Community's legal framework. Maastricht, it was hoped, would achieve this.

In the interim, legislation that fell unambiguously under Article 118A proved the least problematic. This was the case, for example, with the third draft Directive on atypical work which sought to improve the health and safety requirements for work at temporary or mobile work sites: a common position was formally adopted by the twelve in December 1991. These represent significant advances on both the extent of entitlements already available in most European countries and substantially extend the regulatory scope of the European Community in this area. But as mentioned above, Europe's employers and the British government view these advances as important for securing the internal market: after all, comparable health and safety costs are essential in creating a level-playing field for competition among EC firms. *Contractual* rights are viewed differently. Thus, other Commission proposals had to be more 'creative', taking the form of 'hybrid Directives' which combined contractual rights with what were strictly health and safety entitlements. They were therefore also more open to challenge. Both the draft working time Directive - with its minimum requirements for daily and weekly rest periods and on night and shift work - and the draft Directive on pregnant women in the work place fell into this more controversial category.

In the case of working time, the British challenged the Directive's legal basis, arguing that it placed financial and other burdens on employers (which paragraph 2 of Article 118A excludes) and that it stretched the meaning of 'health and safety' beyond recognition. In the event, however, the British employment minister, Mrs Gillian Shephard, accepted the Directive at the Lisbon summit in June 1992, but only after she had won a number of concessions, including a seven-year period of grace for its implementation in Britain (beyond the three years permitted for the other Member States), an agreement that the 48-hour limit

agreed for the working week could be exceeded *voluntarily* in Britain, and exemptions from this limit in a number of sectors, including continuous process work and the fishing, transport and security industries. A common position was reached in the Council of Ministers on 30 June 1993 (although the UK Government abstained in the vote) and the Working Time Directive was formally adopted on 23 November 1993. In March 1994, the UK government initiated action against the European Court of Justice, challenging the use of Article 118A as the Directive's legal base. The Commission's legal service maintains that "the legal base was 100% correct", and fully expects a ruling in its favour.

In the case of pregnant women in the work place, the British challenged the attempt to combine contractual employment and social security rights with more conventional health and safety measures: alongside protective provisions on exposure to toxins, for instance, the Directive also sought to regulate maternity leave and pay, presenting both together under Article 118A. However, a compromise was reached and a common position adopted in December 1991. Britain abstained in the vote to express its disapproval at the Commission's sleight of hand. But once again, it gained some key concessions: for while a 14 week entitlement to pregnancy leave was agreed to, an earlier draft's right to full-pay was replaced by a minimum allowance equivalent to sickness benefit; and eligibility was made conditional on national legislation, rather than the originally proposed condition of service since before the onset of pregnancy - provided that any length of service condition does not exceed twelve months (Britain's is currently two years).⁵¹

The most controversial directives hit a solid wall of opposition, constructed, as one would expect, from mainly British bricks and mortar. Playing the 'Treaty base game' in the case of the second draft Directive on atypical work was always going to be difficult. Covering entitlements for part-timers and temporary workers affecting employers' variable costs (including the same rights, on a pro-rata basis, as full-timers to social protection, holidays and dismissals procedures), the Commission has promoted this Directive under Article 100A, arguing that a lack of harmonisation will distort competition. However, this article specifically excludes workers' rights, leaving the Commission wide open to challenge. But quite apart from its procedural objections, the British Government has claimed that alongside the first atypical work Directive - which would extend pro-rata rights to occupational

pensions, sick pay and training - the new substantive rights provided by this Directive "would cost employers in the UK around *£1 billion*" and "imperil tens of thousands of jobs".⁵² This relates to the structure of UK employment, for Britain has one of the highest proportions of employees on part-time contracts in the EC, and - with the exception of Belgium since 1990 - the highest proportion of women on such contracts. The Belgian Presidency attempted to revive both the first and second draft directives on atypical employment in the second half of 1993 by merging them into a new compromise text on non-standard employment. But this has not prevented further disagreements - mainly between the British and the rest - which have blocked further progress. Other highly controversial items of legislation such as the draft Directive on young workers (protecting children and adolescents from exploitation in the work place) have had to accommodate UK objections, allowing a controversial exemption to allow 14 and 15-year-olds in Britain to continue to work more than 12 hours a week. While the UK government has celebrated this as an 'opt-out', the Commission maintains that this amounts only to a temporary concession.

The Commission has also attempted a 'creative' interpretation of the Treaty with the European Company Act (which falls, strictly speaking, outside the Social Charter programme). Promoted by DG 15, social clauses of this proposal would require transnational companies in Europe opting for a Community rather than national legal statute (and thereby obtaining certain tax concessions) to implement one of three types of workers' consultation: West German-style co-determination, internal workers' committees (along Belgian, French or Italian lines) or a model established via bargaining between workers and management. In this case, the Commission has invoked Article 54 (3)(g) of the Treaty of Rome which allows for qualified voting on co-ordinating safeguards required by Member States of companies or firms. The Act's company law provisions have been linked to Article 100A and can only be passed by unanimity in the Council. The Commissions' approach to other directives has been more conventional - but, for the British at least, no less controversial. DG 5's proposals for a European Works Council (EWC) have been linked, like the first atypical work Directive and the proof of employment Directive (discussed below) to Article 100 of the Treaty of Rome, demanding, once again, unanimous support. The EWC Directive (in its original form) would have required companies with a minimum of 1,000 EC employees and operations with at least 100 workers in two or more Member States to arrange for consultation procedures on job

reductions, new working practices and the introduction of new technology. Regardless of the proliferation of voluntary forms of European Works Councils in a number of large European multinationals (primarily German and French, reflecting, respectively, the lobbying strength of the German unions and the influence of French Socialist government legislation in the early 1980s), this directive has been opposed by Britain - and by Europe's employer's association, UNICE - since it "would impose a form of collective arrangement" and undermine the Government's efforts to limit employee involvement to share-ownership, team briefings and 'quality circles'. In its place, Britain, like UNICE, wanted a non-binding recommendation or resolution which "would emphasise the need for effective employee involvement practices based on flexibility".⁵³

The Commission had one clear, uncontested success under pre-Maastricht procedures in introducing binding legislation relating to wider employment rights - the Directive on proof of an employment relationship. Its passage was eased considerably by the fact that UK law already required a written statement from an employer (unlike in a number of other Member States). But the British Government still abstained from the Council vote which adopted the Directive on 14 October 1991 (in protest against the use of Article 100 as its Treaty base) after successfully demanding a number of changes to the Commission's original draft. Nevertheless, modifications to UK labour law will have to be made, most notably in reducing the time in which an employment statement must be provided from 13 weeks to two months and providing employees working between 8 and 16 hours a week with the same rights to a statement as those working more than 16 hours (until now there has been a five-year service condition!).⁵⁴

Progress with these proposals has been agonizingly slow, and a number of the most important draft Directives became 'dead letters' under the pre-Maastricht procedures. But although in heavily modified form, and despite the legal constraints and the opposition of the British (often allowing those who share their misgivings to conceal them and seem more *communautaire*) the Commission and the Member States have been creating a patchwork of minimum social standards. These clearly move beyond measures strictly required for the freedom of movement towards an approximation - if not harmonisation - of certain limited *industrial* citizenship rights. A major contribution has been made by the entrepreneurial role

played by the Commission under Jacques Delors and by the pursuit of alliances with a majority of the Member States. Absolute sovereignty in this domain *is* being slowly eroded, even if national preoccupations (and scope for variable geometry) have thus far prevailed over the supranational ardour of the Commission. In the process - even before the reforms of the Treaty on European Union - the bare bones of a pan-European regulatory regime were being slowly put in place.

3. THE 'SOCIAL DIALOGUE' PILLAR OF THE SOCIAL DIMENSION

The procedural and implementation debates have been complicated further by an ambitious effort to complement the EC legislative process with pan-European collective bargaining. After all, all national industrial relations systems embrace both legislation and law to one degree or another; and in the Anglo-Saxon and Nordic traditions, rule setting by collective bargaining has been primordial. But introducing collective bargaining at the EC level has provoked the hostility of capital - a major obstacle to any regime of social regulation dependent for its operation on economic agents. However, by the time of the Maastricht negotiations, employers had accepted - at least in principle - the *procedural* importance of rule setting at the EC level via the 'social dialogue'. This represented a major advance - even if, as discussed in section four below, its inclusion as a form of policy-making has introduced an untried and potentially counter-productive procedural element into the regime.

If the British veto has been the major stumbling block to legislative progress, Europe's employers have successfully kept the 'social dialogue' in check. UNICE has consistently opposed both EC collective bargaining and any enhancement of workers' participation rights *by legislation* in transnational companies. Thus, while discussions between UNICE, the European Centre of Public Enterprises (CEEP) and the ETUC have been promoted by the Commission in the framework of the 'social dialogue' (the *Val Duchesse* discussions launched in 1985), prior to Maastricht, the employers refused to be party to any statement which might be used for legislation. UNICE's member employer associations have refused and are still generally opposed to making UNICE an effective bargaining authority (see section one).⁵⁵

However, Article 118B of the Single European Act envisages just that in obliging the Commission to "endeavour to develop the dialogue between management and labour at the European level which could, if the two sides consider it desirable, lead to relations based on agreement". The vague and open-ended nature of this obligation has been criticised. Nevertheless, it has provided Treaty support for Europe's trade unions which want to make collective agreements integral to a European industrial relations system. National union confederations are no longer opposed (as in the 1970s) to the ETUC advancing the collective rights of European workers at the EC level. However, as mentioned in section one, like UNICE, the ETUC does not at present have a mandate for negotiating agreements, and even if ad hoc solutions to the problem of mandates can be found (see section four) neither has yet the organisational strength - or legitimacy - to become major industrial relations actors.

It is easy to draw up a negative balance-sheet for the social dialogue. But it would be inaccurate to say that nothing has been achieved since the mid-1980s. Although its achievements have been limited, they may provide the basis for a more substantial process of negotiation between management and labour at the EC-level in the post-Maastricht period. Certainly, they were critical in creating the conditions in which, by October 1991, UNICE and the ETUC could agree on a joint proposal for a new form of bargaining over the content of Action Programme Directives. It is certainly true, however, that the first steps were cautious. Phase one of the Val Duchesse dialogue (1986-1988) saw the creation of two working parties - one to monitor economic developments and employment (the macroeconomic working party), the other on social dialogue and new technologies - and agreement on three rather imprecise (if not ineffectual) joint opinions. Two of these came from the macroeconomic working party - the first on the need for a 'cooperative growth strategy' (November 1986), the second supporting the Commission's strategy for the European economy (November 1987). The third came from the new technology working party (March 1987) on 'training and motivation and information and consultation', proposing the introduction of EC mutual recognition of qualifications, an enhanced dialogue with employees over the introduction of new technologies and a more sophisticated training system in Member States.

Phase two began in 1989 when Jacques Delors relaunched the dialogue after two years of inertia due to discord between the social partners. This phase proved more productive, in part

because of stimulation by a new steering committee (composed of representatives of the employer and union organisations) but also because of the Commission's agreement to consult the 'social partners' over its draft Action Programme directives. It also coincided with the beginning of a new Commission's term in office and the arrival of Vasso Papandreou as the new Commissioner responsible for labour and social affairs. The second phase of the dialogue was much more focused, placing priority on education and training. Four joint opinions were issued during this period: on the creation of a European occupational and geographical mobility area, advocating measures to reduce the barriers to labour mobility in the Community (February 1990); on education and training (June 1990), emphasising the importance of initial and continuous training and the role of the collaboration between the social partners in this area; on the transition from school to adult and working life (November 1990), defining priorities in educational and vocational guidance and emphasising, once again, the importance of bipartite arrangements; and on access to training (September 1991), noting the need for partnerships between management and labour in promoting 'synergies' between company training programmes and for a Community role in affirming the right to vocational training.

A system of neo-corporatist policy-making it is not: the social partners have no formal role in the policy process, the joint opinions do not amount to real and consequential agreements, and even if they did, neither UNICE nor the ETUC have the means of delivering the support of their members behind them. Nor do they have sufficient organisational strength to engage in a genuine process of neo-corporatist bargaining: for both the employers' and union representatives are subordinate to the authority of their member associations and federations. Similarly, despite Commission encouragement of a sectoral social dialogue⁵⁶, the joint committees composed of employer representatives and union delegates from the 15 European Industry Committees (the sectoral union organisations which are linked to the ETUC) have produced only opinions and recommendations. The absence of effective employer organisation at this level and lack of interest in going beyond diffuse joint opinions hampers efforts of Commission to promote more concrete outcomes. Although its significance to date may have been largely symbolic, the importance of the social dialogue at both peak and sectoral levels lies rather in its potential as a spring-board to a more substantial form of consensus-based policy formation.

Arguably, it has achieved this in a number of ways. Firstly, it has allowed the social partners to appreciate the diversity of national positions - and seek areas of convergence - and become aware of their own organisational deficiencies, especially the need for a wider mandate. The need for a double compromise in negotiations - between the EC level employers and the ETUC, and between themselves and their national members - reveals both the problems and required reforms (a strengthened ETUC secretariat, for example) in moving beyond joint opinions to genuine contractual agreements.⁵⁷ And secondly, the limited success of the dialogue has proven its potential as a more formal forum for negotiation and debate, convincing many Member States that its role should be reinforced. For as part of an emerging policy network involving the Commission, sectoral working groups, advisory groups and lobbyists, the dialogue has influenced opinion on key issues such as training and had a direct impact on certain Commission proposals.⁵⁸ There is also the prospect of joint opinions influencing sectoral and national bargaining.⁵⁹ In addition, on the labour side, European Industry Committees are not only active in the sectoral social dialogue, but have been involved in promoting cross-national meetings of plant representatives in certain multinational companies as a prelude to the creation of European Works' Councils (with the help of Commission funding) and in exploring the potential for cross-national sectoral and firm-level collective bargaining, although on this issue employers are much more resistant.⁶⁰

The dialogue's credibility has been enhanced by two agreements which transcend the standard joint opinion format. The 'European Framework Agreement' signed by CEEP and the ETUC in September 1990 does not have the status of a contractual bargain (it is not binding on its signatories or their members). But it does invite public sector enterprises and unions to proceed through dialogue and agreement in improving initial vocational training, establishing new technology training schemes and implementing new preventive policies and training in health and safety.⁶¹ In adopting the language and spirit of bargaining, the CEEP-ETUC agreement moves one step closer to a genuine framework agreement and a neo-corporatist policy process at the European level. A further step in the same direction was taken in October 1991 when an ad hoc group created by the social partners submitted a proposal to the Inter-governmental Conference advocating an enhancement of their role in the making and implementing of EC policy. It is from this point that the 'social dialogue' becomes of central importance for both the procedural and implementation components of the regime. The

submission echoed an earlier Belgian proposal advocating 'law by collective agreement'.⁶² Under its terms, the European employer and employee representatives would be consulted on the content of draft EC social and employment legislation and would reach agreement on it before passing it back to the Commission. The proposal was inserted almost verbatim into the Maastricht social chapter, and transferred to the Social Agreement with the rest of the chapter in response to British opposition. Its greatest significance could lie in the UNICE's concession to negotiate, even if its principal motivation may have been to ensure that employers assumed the veto removed from the Member States by Maastricht.

4. INDUSTRIAL RELATIONS AND THE LABOUR MARKET AFTER MAASTRICHT

The draft social chapter of the Maastricht Treaty on European Union (TEU) represented an ambitious attempt to resolve the regulatory problems discussed above. Firstly it sought to end the dispute over procedure by revising the Treaty basis for decision-making and bringing most areas of labour market policy under qualified majority voting (QMV). Secondly, it sought to extend Community competence in the area of substantive rights, including influence over contractual rights and provision for workers' representation and consultation. Thirdly, the inclusion of a new decision-making procedure - the formulation of EC policy via 'collective bargaining' - sought to deal with two other related issues: the implementation of EC labour policy in Member States with diverse legal traditions; and the need to respect the principle of subsidiarity which had been strengthened at the insistence of the British in the TEU. And finally, it attempted to make the implementation of social legislation more effective by empowering the European Court of Justice to enforce Community law by imposing fines or penalty payments.

The draft of the Treaty's social chapter was largely the work of Member States belonging to the 'northern' camp of labour market management. Both the Luxembourg and Dutch presidencies of 1991 were instrumental in drawing up a set of provisions which would extend QMV to a number of new areas, including 'working conditions' and 'the information and consultation of workers'. In principle, this would help fill the gaps in the Commission's powers and exclude the single Member State veto, thereby making the 'Treaty base game'

redundant. The Germans - keen to ensure that their own high labour market standards were protected - sought to bring under EC jurisdiction issues such as redundancy conditions and the representation and collective defence of workers and employers, including co-determination.⁶³ By November 1991, the social chapter also included the proposal from the social partners on European collective agreements.

Based on a potent mix of neo-liberal ideology and expediency (anything which might undermine Britain's position as a low cost location for foreign investors must be avoided), the UK Conservative Government's intransigence was unlikely to be softened by attempts at accommodation. And yet the final draft of the Maastricht Treaty did make genuine concessions to the British position. In the Treaty itself, British hostility to 'federalism' (a synonym for centralisation for the British Conservatives) was accommodated by altering Article A of the Treaty's Common Provisions (replacing the word 'federal' with 'union') and inserting a strengthened subsidiarity clause (Article 3(b)), which stated that the Community shall only take action when its objectives cannot be better achieved by the Member States themselves.⁶⁴ Advocates of a strengthened 'social dimension' fear that this clause in itself will place severe constraints on social policy, given the tendency, especially on the UK's part, to interpret 'subsidiarity' in terms of absolute sovereignty, rather than in terms of diversity within a framework of Community solidarity. It also runs counter to the emphasis elsewhere in the Treaty on extending Community competence in social affairs where, hitherto, the primary responsibility lay with the Member States.⁶⁵ Both subsidiarity and the need to take competitiveness into account are also stressed in the revised Article 117 of the Treaty (which became Article 1 of the Agreement on Social Policy) which stated that "the Community and the Member States will take account of the diverse forms of national practices and the need to maintain the competitiveness of the Community economy." The limits on Community intervention are also reiterated in the revised Article 118(2) (Article 2 (2) of the final Agreement): minimum requirements must avoid "imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings."⁶⁶ More generally, the explicit aim of 'upward harmonisation' - which has underpinned much of the Community's social policy over the years - was dropped from the new Agreement.⁶⁷ In terms of voting procedures, the social chapter excluded social security and the social protection of workers from the extended list of measures falling under

QMV (alongside the protection of redundant workers, the representation and collective defence of workers, conditions of employment for third country nationals and financial contributions for the promotion of employment and job creation). Collective rights at work (pay, the right of association, the right to strike or impose lock-outs) were explicitly excluded from Community competence.

But the British Government was not prepared to accept any changes to existing Treaty provisions which extended majority voting or Community competence. Nor was it prepared to accept the social partner's proposal on collective bargaining over the content of Community legislation - regardless of the fact that it strengthened still further the spirit of decentralisation and flexibility evident elsewhere in the social chapter.⁶⁸ Indeed, the new role for the social partners helps bridge the divide between the legalism of continental industrial relations and Britain's 'voluntarist' (or bargaining-based) approach, often cited as an obstacle to Britain's full participation in an emerging 'Social Community' based on the equivalence of laws.

Arguably, it does so in several ways. First, all directives, whether adopted by a qualified majority or unanimity may be entrusted 'at their joint request' to management and labour for implementation via collective agreement (Article 2, paragraph (4) of the Social Protocol). Second, under the new social dialogue procedures, the Commission is obliged to consult management and labour "on the possible direction of Community action" *prior* to submitting proposals, and consult on their content if it "considers Community action advisable". In response, management and labour "shall forward to the Commission an opinion, or, where appropriate, a recommendation". And third, the social partners may also opt for contractual relations - negotiating the content of the Commission's proposals - and proceed, should they wish, to agreements. These can be implemented via negotiation (providing further flexibility) "in accordance with the procedures and practices specific to management and labour and the Member States". This is the 'voluntarist' path. But in those areas in which the EC has competence, the agreements can also be implemented "at the joint request of the signatory parties, by a Council decision on a proposal from the Commission". This course is much more problematic since decisions are binding on the specified parties, involving a rigid application of EC law. Although the British Government had much else to object to, this new

procedure made the social chapter quite unacceptable, given its combination of EC-level collectivism and the option - via Council decision - of an imposition of law.

The sheer quantity of political capital invested in the social chapter excluded either further dilution or abandonment. Two weeks before the Maastricht summit, the ETUC threatened a campaign of industrial action if Community leaders watered down the Dutch draft to accommodate British opposition and said that the unions would be prepared to put pressure on national parliaments to throw out a diluted treaty.⁶⁹ An opt-out clause seemed the only solution, even if this meant the danger, evoked by Jacques Delors, of setting up "one country as a paradise for foreign investment, particularly Japanese investment".⁷⁰ In the event, the solution to the 'British problem' left the UK within existing Treaty arrangements (which remained unrevised by Maastricht) while the rest opted 'up and out' into a separate Agreement on Social Policy (containing social chapter provisions) appended to the Treaty. The Protocol which precedes it - and which was signed by all twelve Member States - excludes the UK from involvement "in the deliberations and the adoption by the Council of Commission proposals" and from "any financial consequences other than administrative costs entailed for the institutions". The other eleven are authorised "to have recourse to the institutions, procedures and mechanisms of the Treaty" to give effect to the Agreement. In a derogation from the Treaty, proposals adopted by a qualified majority must receive at least 44 out of a possible 66, as against 54 out of 76 under standard QMV procedures. This formula is fundamentally different from that adopted for the UK on monetary union, which allows Britain (and Denmark) to opt out, while the others can proceed under Treaty provisions.

The Treaty on European Union therefore provides for twin-track policy-making in social affairs. Since the Maastricht Treaty retains the original provisions of the Treaty of Rome and the Single European Act, the twelve can still make policy together -with majority voting on health and safety measures only (and yet more 'Treaty base game' controversy) and the threat of a UK veto on any other proposals. However, the 'Protocol' eleven can avoid British obduracy by taking the second track, allowing QMV in a number of new areas (most importantly work conditions and the information and consultation of workers) and the involvement of management and labour in policy-making through the procedures discussed

above. At least in theory, the procedural, substantive and implementation components of the regime have been clarified and strengthened. If procedurally the Council of Ministers has a much wider basis for decision-making via QMV, in terms of substantive rights the notion of 'social justice' appears to be the rationale for future progress (under Article 2 of the Social Agreement), replacing the controversial use of an 'integrated market' rationale for legislation. And as far as implementation is concerned, the exclusion of Britain makes the Romano-Germanic legal tradition prevalent within the 'social Community', creating greater potential for consensus on individual rights, facilitating enforcement and simplifying the relationship between the different legal traditions of the Community.⁷¹ Finally, the European Court of Justice has been given new powers to ensure compliance with legislation.

But where will the second track lead the 'Protocol eleven'? In principle, while the Protocol's provisions fall legally outside the new Treaty, the EC institutions are 'on loan' to the 'Protocol eleven' and legislation adopted by them can be enforced through the European Court of Justice. Also in principle, this will allow certain blocked Commission proposals to proceed - including the two most controversial draft Directives: that providing part-time and temporary workers with the same employment protection and social security rights, pro rata, as full-time and permanent workers; and the other requiring European Works Councils in companies with a minimum of 1,000 EC employees and operations with at least 100 in at two or more Member States. In the event, the latter became the first piece of legislation to advance under the new procedures (see below). Thus, with Britain marginalised, the other Member States could shore up the pillars of the social dimension. The construction of a fully-fledged European industrial relations regime could now proceed unopposed.

That, at least, was the expectation. But the reality was likely to be more complicated. For while existing Treaty provisions have to some extent been clarified - strengthening the legal bases for regime construction - the new arrangements are full of loopholes, contradictions and ambiguities.

1. The implications for social legislation

First, there appears to be infinite scope for *legal* controversy. Some lawyers argue that the Social Protocol and Agreement amount only to an *inter-governmental* agreement with no status under Community law; in consequence, the Commission and the Court of Justice (which could have been awarded explicit competence by the contracting parties) may be prevented from making or implementing policy under the Agreement. Thus, measures would have none of the force of EU Directives and would have to be transferred into law through ratification by national parliaments, creating serious delays in implementation and the potential for dilution.⁷² However, according to other legal commentators the fact that all 12 Member States - including the UK - have agreed to the Social Policy Protocol means that the Protocol and the Social Agreement, are part of the Treaty.⁷³ But even if this problem can be resolved (which seems likely, given the lack of controversy surrounding the adoption of the Directive on European Information and Consultation in June 1994), there are clear conflicts of law between the Social Agreement and the Treaty. Indeed, the boundaries are quite blurred between areas subject to QMV, those subject to unanimity and those where the Community (of eleven) has no competence at all. Thus, while Article 100A(2) of the Treaty states that provisions relating to employee rights are subject to unanimous voting in the Council, Article 2 of the Agreement allows QMV on working conditions and the information and consultation of workers - clearly employee rights. And while pay is excluded from Community competence in the Treaty, there are specific provisions on equal pay in the Agreement. All in all, rather than resolving the Treaty base problems, there is ample scope (perhaps even more than hitherto) both for Member States to contest Community competence and for the Commission to engage in 'creative regulation'. For example, the phrase 'working conditions' - an area falling under QMV - could apply to virtually any employment-related matter.⁷⁴

There are also potential *political* problems. For the Commission, the pursuit of social policy reform along the Protocol track would undermine its efforts to ensure a united, cohesive approach to integration and set precedents for 'variable geometry'. This would defeat the entire object of the TEU. For this reason, it may well prefer the slower but more consensual path involving all twelve Member States, while using 'Treaty base game' methods to avoid the British veto. As shown by the progress achieved with the Working Time Directive (with

Britain eventually accepting the principle of a 48-hour week), this strategy may occasionally pay dividends, even if the most controversial Commission proposals remain blocked. For *the eleven*, the legal ambiguities may also make Member States reluctant to take the Protocol track, preferring the much more limited - but more certain - option of operating, alongside the British, under existing Treaty arrangements.⁷⁵

2. The implications for the social dialogue

Important claims have been made for the new social dialogue as a means of building a new consensus on employment. Indeed, at the end of 1993, Padraig Flynn - the commissioner responsible for social affairs - argued that it could provide the basis for a pan-European 'social pact'. However, it seems unlikely that the provisions of the Agreement will produce a European level of industrial relations in the short term. The relationship between the Commission and the social partners, for example, is not clearly defined: do the legislative process and the social dialogue proceed in tandem or does the social dialogue pre-empt the legislative process? What is the contractual status of 'Euro-agreements'? Can the social partners sue each other for breach of agreement? And while UNICE says that it is committed to creating new structures for the "broad consultation of business circles", its motives are rather different from those of the ETUC. Concerned at the loss of its British ally should the eleven take the Protocol path, the employers now have a means of replacing the UK veto with their own. For not only is UNICE's membership internally divided on the desirability of bargaining (with the British and Dutch the least enthusiastic), but there is little sign of a moderation in its position on most of the Commission's proposals. And as Zygmunt Tyszkiewicz remarked before the Maastricht summit, his organisation still intends "to put strict limits on the scope of EC intervention in this area, whether by law *or by agreement*".⁷⁶ Even if other intractable problems can be resolved - including the still uncertain status of the social partners as negotiating authorities⁷⁷ - there is a high risk of paralysis under Social Agreement arrangements. And one can add to this the potential opposition of certain of the eleven to costly new social provisions now that they are unable to rely on the British veto: for their agreement to new legislation is heavily linked to compensation via side payments (the structural and new cohesion funds).⁷⁸ A further problem has been created by the exclusion of the European Parliament from the legislative process under the new social dialogue arrangements. Regardless of the fact that its powers have been generally

strengthened by the new 'co-decision' procedure for EU decision-making, this has caused considerable concern among Euro-MPs.⁷⁹

There is the additional question of exactly how meaningful the new collective bargaining process will be. One of the two declarations annexed to the protocol would seem to limit its potential. The declaration on Article 4(2) states that "this arrangement implies no obligation on the Member States to apply the agreements directly or to work out rules for their transposition, nor any obligation to amend national legislation in force to facilitate their implementation".⁸⁰ Moreover, the problems of actually making the new arrangements work may mean that far from being resolved, this component of the regulatory regime has been rendered practically meaningless.⁸¹ This derives from the complexities of introducing a new instrument of European policy-making ('law by collective agreement') - especially if, as outlined in the Social Agreement, policies are to be implemented via *national* collective bargaining. For while this approach may in principle accommodate national diversity, in practice it will encounter other impediments. These include: conditions placed on the representativeness of workers' organisations (Belgium, Spain and France); requirements for ratification of collective agreements by vote of the membership (Denmark); non-legally enforceable agreements (the UK and Ireland); the growing practice of union derecognition (the UK) and the regionalisation of sectoral bargaining (Germany and Spain). And unlike the other Member States, Denmark, Ireland, Italy and the UK have no provision for the extension of agreements *erga omnes* to non-unionised workers. All in all, these place severe constraints on the role and potential of both the peak-level and sectoral-level social dialogues.⁸²

The new arrangements have also provoked new discord between the social partners. Both UNICE and the ETUC have strong feelings on the role to be played by Euro-agreements. While UNICE stresses that the relationship between legislation and agreements should be dealt with at the EU level to ensure that national traditions are not violated, the ETUC stresses that agreements should not be seen as alternatives to directives. Specifically, the ETUC wants workers' rights to be covered by legislation (thereby pre-empting problems of implementation via diverse national arrangements) and for negotiation to be restricted to specific employment and social policies.⁸³

A first sign of what can be expected under the new regulatory arrangements has been seen with the passage of the first major piece of legislation to be adopted under the new post-Maastricht procedures - the European Works Council Directive (renamed the Directive on European Information and Consultation). As discussed above, the EWC Directive has been fiercely opposed by both the UK Government and Europe's employers' organisations, despite the proliferation of works councils among large Euro-companies. In a clear example of policy entrepreneurialism, the Commission managed to break the deadlock by late 1993: by pre-empting legislation and encouraging transnational meetings of workers' representatives from European multinationals (it made available Ecu31 mn - US\$37.5 mn - in 1992-93 for this purpose)⁸⁴; and by shifting the Directive from its original Treaty base (Article 100 - requiring unanimity) to the new social policy procedures established at Maastricht. There followed two rounds of consultations with the social partners in late 1993 and early 1994 when they were given the option negotiating an agreement. However, they were unable to agree to do so and talks broke down in acrimony: the ETUC claimed that UNICE and CEEP still rejected the notion of workers' transnational information and consultation rights (in fact, the British CBI effectively scuppered the negotiations by withdrawing) and UNICE accused the ETUC of wanting legislation rather than an agreement.⁸⁵ As a result, the Commission had no option but to submit a new draft Directive which the Member States (excluding Britain) agreed to in June. Companies employing more than 1000 people and more than 150 in at least two Member States will have to ensure that workers' representatives are consulted and informed on cross-border business decisions from 1996.⁸⁶

The successful passage of this Directive proves the potential of the Maastricht innovations. Not only do they allow the British veto to be evaded but they also allow an unprecedented degree of consultation with employers and unions. However, the desire of the Commission (and the Belgian Presidency under which the new Directive was drafted) to achieve a consensus meant a significant dilution of the original proposals. Thus, the requirement for a Works Council was replaced by a 'European Committee' or an unspecified 'procedure for informing and consulting' and UK-based employees were removed from the threshold at which the Directive applies (a measure the European Parliament attempted unsuccessfully to reinstate). Moreover, the breakdown of talks between UNICE and the ETUC suggests that the dialogue route to policy-making will remain blocked.

3. The implications for enforcement

Finally, what of enforcement? Quite apart from the problems of implementation via collective agreement, there are already gaping holes in regulatory compliance across the EC, due either to intentional evasion or to the inadequacy of national enforcement mechanisms. Wide disparities have been recorded in the implementation of health and safety legislation, for example, and this has much to do with the diversity of regulatory styles and machinery among the Member States. Italy has been particularly poor at ensuring compliance.⁸⁷

Notification of implementation measures has also been very poor in certain countries. By the end of 1993, only Denmark, Ireland and the UK had notified the Commission of implementing measures for over 90 per cent of the Social Directives applicable to them, while Germany, Italy and Luxembourg had notified less than 70 per cent. In 1992 infringement proceedings were made against six countries for failure to notify measures implementing the 1986 Directive on equal treatment in occupational security, and against Belgium and France relating to the implementation of the 1976 equal treatment directive. However, notification in itself does not signify a genuine application of the law. Also in 1992, proceedings were taken against the UK for failure properly to implement the 1975 Directive on collective redundancies and the 1977 Directive on the transfer of undertakings, and Greece for failing to comply with the 1980 Directive on Insolvency.⁸⁸ Until now there has been no way to ensure compliance, even when the ECJ has ruled that a Member State has infringed the Treaties or legislation. The TEU has introduced powers for the ECJ to impose fines to rectify this. The main powers lie with the Commission which must bring a Member State before the ECJ if it fails to take the necessary compliance measures within a set time limit, specifying the amount of a lump-sum fine or penalty payment it considers appropriate.⁸⁹ Nevertheless, the diversity of national regulatory styles and enforcement mechanisms will continue to prevent the even application of EU law.

CONCLUSION

This article began by asking how effective a structure of regulation or governance for the European labour market could be given (a) the diversity of historical, legal and institutional traditions among the EU 12 and (b) the infinite scope for discord over two key regulatory

issues: the desirability of new regulation in labour markets at either the national or supra-national level; and the acceptability of the assumption of Community competence in this domain. The answer is that the future of the social dimension will continue to be constrained by both of these factors, with little prospect of their being overridden by the spillover effects of market integration. For regardless of the Treaty on European Union, and its Protocol and Agreement on Social Policy, the supranational authorities still lack the legitimacy to act as a regulator of the labour market beyond a number of limited areas; and the European social partners are as yet in no position to participate in a system of voluntary, joint regulation with the institutions of the Union. Yet important progress has been made in putting a regulatory framework in place and in resolving some of the regime's procedural and implementation problems. At the same time, significant advances have been made with its substantive elements. Although many of the more ambitious pieces of social legislation have been blocked, an impressive corpus of minimum rights has been put in place, not just in the area of health and safety (where there is the greatest degree of consensus among the Member States) but in more controversial areas of workers' right and entitlements.

The future of the regime is difficult to predict. But in the second half of the 1990s, the greatest challenge to the EU and its Member States will be to find an adequate response to the European employment crisis. Rising unemployment and the associated income disparities, social divisions and threats to stability and cohesion have major policy implications. In mid-1993, there were some 17 million people out of work in the EU and 1.4 million jobs had been lost since 1990. This presents a difficult policy challenge because of the absence of any clear relationship between economic growth and employment creation in the 1980s. The debate this has provoked has given new support to the deregulatory position of the British and Europe's employers; and numerous Member States have embarked on radical labour market reforms to reduce labour costs, improve competitiveness and boost employment. Under these circumstances, the Commission has had to address the issue of employment creation head on, and has sought a compromise between its traditional emphasis on improving worker protection and a new concern with labour market flexibility.⁹⁰ Moreover, the agenda for the European labour market at the national level is increasingly being set by the twin constraints of market integration (the EMU convergence criteria are demanding austerity policies throughout the EU) and intensified international competition. Systems of social

security and labour market organisation are beginning openly to compete with one another, placing a premium on the reduction of labour costs and increased efficiency. This explains the recent position of the Commission which combines a concern to consolidate and implement the advances already made, while taking greater account of labour market flexibility.

There are two possible futures for the European 'social dimension', although the reality is likely to lie somewhere between the two. The first is one in which the 'Social Agreement eleven', the Commission and the social partners manage to clear the numerous legal, political and institutional hurdles in their path and succeed in building a 'European Social Community'. This will extend to the EFTA countries which, under the terms of the European Economic Area (EEA) - operational from 1993 - will have to fall into line with EU law. In this optimistic scenario, a limited 'social pact' would be achieved on broad principles of employment policy at the European level and corporatist bargains (or limited 'social pacts') would be struck in those Member States with the institutional pre-requisites. This consensus will be conditional, however, on a commitment by the EU to an expanded budget and a higher level of spending to assist the poorer Member States with economic and social convergence. It will also require some adjustment to the EMU convergence criteria and timetable to allow a more flexible and expansionary policy in those countries whose social consensus has been fragile and undermined by austerity policies. This will be neither cheap nor rapid, requiring a long-term commitment across the EU to labour market harmonisation and a concomitant investment in training and skills provision. Common standards could conceivably be put in place through both EU legislation and framework agreements, allowing a degree of flexibility and subsidiarity in the industrial relations regime.

The UK (probably under a Labour government) would be brought under the Social Agreement, ending the procedural - and increasingly substantive - bifurcation of the regulatory structure.

A more pessimistic scenario is one in which the 'Protocol eleven' and the Commission refrain from using the second, social policy 'fast track', due both to reluctance over breaking European unity and the concern of the poorer Member States to avoid any costly upward approximation of employment rights. The new procedure for reaching collective agreements

between the social partners will be deadlocked due to UNICE opposition to measures imposing costs or constraints on employers. The debate on employment protection versus labour market flexibility will become more intense. Austerity policies linked to the achievement of EMU convergence criteria will frustrate the search for a social consensus on economic policy, and many Member States will experience an upsurge in industrial militancy. Under these circumstances, the 'European Social Community' will be most solidly anchored in the 'northern' group of countries. Nevertheless, the latter will find that market integration will have destabilising effects on traditional levels of workers' rights and entitlements, as well as on systems of corporatist or tripartite decision-making.⁹¹ In the rest of the EU, there will be strong pressures for the adoption of social policy measures *à la carte*, with Britain, once again, following an insular path, and providing an attractive location for inward investment, not just from Japan but from firms in other EU member states, provoking conflict over social dumping and 'regime shopping'.

Notes and References

1. *Financial Times*, 12 December 1991
2. See D. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', *Common Market Law Review*, Vol. 30 (1993), p. 24.
3. See P. Raworth, 'A Timid Step Forward: Maastricht and the Democratisation of the European Community', *European Law Review*, Vol. 19 (February 1994), pp. 16-30 for a useful discussion of this issue.
4. An in-depth analysis of the significance of the Treaty reforms and their significance for efficacy, transparency and democracy can be found in J.-C. Piris, 'Maastricht, les institutions communautaires sont-elles plus efficaces, plus démocratiques et plus transparentes?', *Revue trimestrielle de droit européen*, no. 1 (January-March 1994), pp. 1-37.
5. S. Brittan, 'A better UK road to Maastricht', *Financial Times*, 31 October 1991.
6. See G. Majone, 'The European Community between Social Policy and Social Regulation', *Journal of Common Market Studies*, Vol. 31 (June 1993), pp. 160-161.
7. For a discussion of the Treaty foundations of European social policy making, see J. Holloway, *Social Policy Harmonisation in the European Community* (Farnborough: Gower, 1981), pp. 11-39.
8. See O. Young, *International Cooperation: Building Regimes for Natural Resources and the Environment* (Ithaca, N.Y.: Cornell University Press, 1989).

9. S. Krasner, *International Regimes*, (Ithaca, New York: Cornell University Press, 1983), p. 14.
10. See P. Teague, 'Constitution or Regime? The Social Dimension to the 1992 Project', *British Journal of Industrial Relations*, Vol. 27 (November 1989), pp. 310-329; J. Grahl and P. Teague, 'Integration Theory and European Labour Markets', *British Journal of Industrial Relations*, Vol. 30 (December 1992), pp. 515-527; and P. Teague and J. Grahl, *Industrial Relations and European Integration*, (London: Lawrence and Wishart, 1992).
11. See M. Kleinman and D. Piachaud, 'European Social Policy: Conceptions and Choices', *Journal of European Social Policy*, no. 1 (1993), p. 3ff.
12. See B. Kohler-Koch, 'Changing Patterns of Interest Intermediation in the European Union', *Government and Opposition*, Vol. 29 (Spring 1994), pp. 166-167.
13. See, for example, M. Shackleton 'The European Community Between Three Ways of Life: A Cultural Analysis', *Journal of Common Market Studies*, Vol. 29 (1991), pp. 575-601 and for a discussion of conflict-based analyses, S. Hix, 'Approaches to the Study of the EC: the Challenge to Comparative Politics', *West European Politics*, Vol. 17 (January 1994), pp. 21-22.
14. For recent refutations of the convergence hypothesis, and evidence of persistent diversity among national institutional arrangements, see C. Baldry, 'Convergence in Europe - a Matter of Perspective?', *Industrial Relations Journal*, Vol. 25 (June 1994), pp.96-109 and R. Hyman, 'Industrial Relations in Western Europe: An Era of Ambiguity', *Industrial Relations*, Vol. 33 (January 1994), pp.1-24.
15. See Teague and Grahl, *Industrial Relations and European Integration*, pp. 85-91.
16. R.O. Keohane and S. Hoffman, 'Conclusions: Community Politics and Institutional Change', in W. Wallace (ed.) *The Dynamics of European Integration* (London: Pinter, 1990), p. 287.
17. See L. Cram, 'Calling the Tune without Paying the Piper? Social Policy Regulation: the Role of the Commission in European Community Social Policy', *Policy and Politics*, Vol. 21 (1993), p. 136.
18. See Holloway, *Social Policy Harmonisation in the European Community*, pp. 11-32. Article 117 of the EEC Treaty states that the member states agree that the development of improved working conditions and an improved standard of living for workers as well as their harmonisation will flow from the functioning of the common market (implying some sort of neo-functionalist spillover). But according to the same article, they will also be developed from the procedures provided for in the Treaty and from the approximation of provisions laid down by law, regulation or administrative action.
19. Articles 100 and 235 allow measures to be adopted which are not otherwise provided for in the Treaty and empower the Council of Ministers - on a unanimous vote - to issue directives and regulations for the approximation of member state laws, regulations and administrative instruments in so far as they directly affect the establishment and functioning of the common market.
20. On the importance of bureaucratic politics and policy making in the Community, see B. Guy Peters, 'Bureaucratic Politics and the Institutions of the European Community', in A.M. Sbragia (ed.), *Euro-politics: Institutions and Policy Making in the European Community*, (Washington DC: The Brookings Institution, 1992), pp. 75-122.
21. Cram, 'Calling the Tune without Paying the Piper?', p. 144.
22. See M. Kleinman and D. Piachaud, 'European Social Policy: Conceptions and Choices', p. 14.
23. UNICE was formed in 1958 and its membership is comprised of 32 national employers' and industrial federations from 22 countries. The ETUC was established in 1972 and has 40 affiliated confederations from 21 countries, including all of the most important EC national union confederations, apart from the Communist

French CGT and the Portuguese CGTP-IN. The third important interest organisation, CEEP (the European Centre of Public Enterprises) was formed in 1965 and represents 260 of the European Community's public enterprises (from all Member States except Britain and Denmark) and provides them with information and research on EC activities.

24. See J. Visser and B. Ebbinghaus, 'Making the Most of Diversity? European Integration and the Transnational Organisation of Labour', in J. Greenwood, J.R. Grote and K. Ronit (eds.), *Organised Interests and the European Community* (London: Sage, 1992), p. 214ff.

25. See J. Greenwood, J.R. Grote and K. Ronit, 'Introduction: Organised Interests and the Transnational Dimension', in Greenwood, Grote and Ronit (eds.), *Organised Interests and the European Community*. On employers strategies for influencing decision making, see L. Collie, 'Business Lobbying in the European Community: The Union of Industrial and Employers Confederations of Europe', in S. Mazey and J. Richardson (eds.), *Public Lobbying in the European Community* (Oxford: Clarendon Press, 1993), p. 222ff.

26. B. Barnouin, *The European Labour Movement and European Integration* (London: Frances Pinter, 1986), p. 126.

27. See Visser and Ebbinghaus, 'Making the Most of Diversity', p. 210ff.

28. Kohler-Koch, 'Changing Patterns of Interest Intermediation', p. 169.

29. L. Lanzalaco, 'Coping with Heterogeneity: Peak Associations of Business Within and Across Western European Nations', in Greenwood, Grote and Ronit (eds.), *Organised Interests and the European Community*, pp. 173-205.

30. Collie, 'Business Lobbying in the European Community', p. 222ff.

31. J. Sargent, 'The Corporate Benefit of Lobbying: The British Case and its Relevance to the European Community', in Mazey and Richardson (eds.), *Lobbying in the European Community*, p. 244.

32. See the introduction to this volume.

33. See H.C. Katz, 'The Decentralisation of Collective Bargaining: A Literature Review and Comparative Analysis', *Industrial and Labor Relations Review*, Vol. 47 (October 1993), pp. 3-22.

34. See P. Lange, 'The Politics of the Social Dimension', in Sbragia (ed.), *Euro-politics*, p.242 and P. Lange 'The Social Protocol: Why Did They Do It?', *Politics and Society* (Vol. 21), March 1993, pp. 5-36. My own view is that Lange overstates this argument since it would in any case be unusual for government representatives to appreciate the potential impact of legislation on their economies and act so strictly in accordance with rational expectations.

35. The fear of social dumping - based on wide disparities in labour costs - has probably been exaggerated, as have employer fears in high labour cost countries such as Germany that their competitiveness will be threatened unless these costs are lowered. 'Competitiveness' depends on a host of factors in addition to labour costs, including education, training, the domestic financial system, and the degree of consensus in industrial relations. See Commission of the European Communities (DG V), *Employment in Europe 1993*, (Luxembourg, 1993) and 'Labour Costs and International Competitiveness', *European Industrial Relations Review* (London), no. 241 (February 1994), pp. 13-17.

36. Indeed, the Cohesion Fund established by the Maastricht Treaty (to which the Commission wants to allocate some Ecu 2.6 bn by 1997 and designed to provide additional assistance to those Member States with a per capita GDP or less than 90 per cent of the Community average) was the price for gaining the assent of the poorer countries to the programme of integration contained within the Treaty on Political Union.

37. See P. Watson, 'Social Policy after Maastricht', *Common Market Law Review*, Vol. 30 (1993), p. 483.

38. See R. F. Eberlie, 'The New Health and Safety Legislation of the European Community', *Industrial Law Journal*, Vol. 19 (June 1990), pp. 81ff and, more generally, P. James, 'Occupational Health and Safety', in M. Gold (ed.), *The Social Dimension: Employment Policy in the European Community* (London: Macmillan, 1994), pp. 135-154.
39. See Barnouin, *The European Labour Movement and European Integration*, pp. 102-141.
40. For an extended discussion of policies to promote the free movement of labour, see Teague and Grahl, *Industrial Relations and European Integration*, pp. 142-162.
41. For a fuller discussion of the genesis of the Social Charter, see M. Rhodes, 'The Social Dimension of the Single European Market: National versus Transnational Regulation', *European Journal of Political Research*, Vol. 19 (1991), p. 256ff.
42. Department of Employment, *People, Jobs and Progress* (London, February 1992), p. 4.
43. In Marshall's sense these would entail for all Community citizens "the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in society". See T.H. Marshall, *Class, Citizenship and Social Development* (Westport: Greenwood Press, 1964), p. 96. For a useful discussion of citizenship and the Social Charter, see P. Kenis, "Social Europe in the 1990s: Beyond an Adjunct to Achieving a Common Market", *Futures*, Vol. 23 (1991), pp. 724-738. Kenis uses the work of Eduard Heimann to assess the Social Charter in terms of three types of social policy: measures that either (a) secure, or (b) change the course of the economy, or (c) promote social citizenship rights. In focusing on the removal of barriers to labour mobility, Kenis argues that the Charter supports especially the first category of measures.
44. See P. Spicker, 'The Principle of Subsidiarity and the Social Policy of the European Community', *Journal of European Social Policy*, Vol. 1 (1991), pp. 3-14.
45. In other words, 'type II' and 'type III' social policies in the schema presented by Kenis, 'Social Europe in the 1990s', pp. 725-726.
46. See E. Vogel Polsky, 'L'Acte unique ouvre-t-il l'espace social européen?', *Droit Social*, No. 2 (1989), pp. 177-189.
47. See, for example, B. Fitzpatrick, 'Community Social Law after Maastricht', *Industrial Law Journal*, Vol. 21 (September 1992), pp. 210-211. It is ironic that the Anglo-Saxon and Nordic countries have been more efficient in implementing social legislation than their continental counterparts.
48. See Katz, 'The Decentralisation of Collective Bargaining'.
49. For a discussion of this debate and the potential problems of implementation of directives via collective bargaining, see A. Adinolfi, 'The Implementation of Social Policy Directives through Collective Agreements?', *Common Market Law Review*, no.2 (1988), pp. 291-316.
50. See Rhodes, 'The Social Dimension of the Single European Market', p. 264.
51. In its second reading of the draft Directive, the European Parliament tried to claw some of these concessions back, calling for improved protection on night work and for maternity pay of at least 80 per cent of normal pay (rather than the equivalent of sickness benefit). Only Italy supported the Parliament's proposed revision. See *European Industrial Relations Review* (London), no. 222 (July 1992), p. 2.
52. Department of Employment, *People, Jobs and Progress* (London, February 1992).
53. See Department of Employment, *People, Jobs and Progress*, p. 11 and M. Hall, 'Legislating for Employee Participation: A Case Study of the European Works Council Directive', *Warwick Papers in Industrial Relations*,

- no. 39 (March 1992), p. 9. In the event, this became the first directive to be dealt with under the new regulatory procedures adopted by the eleven Member States (the twelve minus Britain) under the Maastricht Social Protocol and Agreement (see section four).
54. For a detailed analysis, see J. Clark and M. Hall, 'The Cinderella Directive? Employee Rights to Information about Conditions Applicable to their Contract or Employment Relationship', *Industrial Law Journal*, Vol. 21 (June 1992), pp. 106-118.
55. See M. Rhodes, 'The Future of the 'Social Dimension': Labour Market Regulation in Post-1992 Europe', *Journal of Common Market Studies*, Vol. 30 (1992), pp. 40-46 and W. Streeck and P. Schmitter, 'From National Corporatism to Transnational Pluralism: Organised Interests in the Single European Market', *Politics and Society*, no. 2 (1991), pp. 133-164.
56. See 'The Sectoral Social Dialogue', *European Industrial Relations Review*, No. 224 (September 1992), p. 14.
57. See J. Goetschy, 'Le Dialogue Social Européen de Val Duchesse: un premier bilan', *Travail et Emploi*, No. 1 (1991), pp. 42-52 and P. Héritier et al., *Les enjeux de l'Europe sociale* (Paris: Editions La Découverte, 1991), pp. 80-87.
58. See S. Milner, 'European Community Training Policy and Social Dialogue at European Level: A New Agenda?', Paper for BSA Conference 'A New Europe?' University of Kent, 6-8 April 1992.
59. See I. Roberts, 'Industrial Relations and the European Community', *Industrial Relations Journal*, Vol. 13 (Spring 1992), pp. 3-13.
60. See L. Turner, 'Beyond National Unionism? Cross-National Labor Collaboration in the European Community', prepared for the conference 'Rethinking the Boundaries of Labor Politics: New Directions for Comparative Research and Theory', Minda de Gunzburg Center for European Studies, Harvard University, March 12-14, 1993.
61. See 'The Social Dialogue - Euro-bargaining in the Making?', *European Industrial Relations Review* (London), no. 220 (May 1992), p. 28.
62. See Rhodes, 'The Future of the Social Dimension', p. 39.
63. On the background to the German position, see W. Streeck, 'More Uncertainties: German Unions Facing 1992', *Industrial Relations*, Vol. 30 (Fall 1991), pp. 317-349.
64. *Treaty on Political Union, Final Draft by the Dutch Presidency as Modified by the Maastricht Summit*, reproduced as a supplement to *Europe*, no. 1750/1751, 13 December 1991.
65. Cf. E. Whiteford, 'Social Policy After Maastricht', *European Law Review*, Vol. 18 (June 1993) p. 207.
66. See Spicker, 'The Principle of Subsidiarity', pp. 9-13.
67. See 'Maastricht and Social Policy - Part Two', *European Industrial Relations Review* (London), no. 239 (December 1993), p. 19.
68. See M. Gold 'Social Policy: the UK and Maastricht', *National Institute Economic Review*, no. 1 (February 1992), p. 99 and his 'Overview of the Social Dimension' in Gold (ed.), *The Social Dimension*, pp. 10-40.
69. *Financial Times*, 27 November 1991.
70. *Financial Times*, 11 December 1991.

71. See Fitzpatrick, 'Community Social Law after Maastricht', pp. 210-212 for a discussion of these issues.
72. See the arguments in E. Vogel-Polsky, 'I maghi di Maastricht, ovvero come parlò la carta sociale europea', *Politica ed Economia*, no. 3 (1992), pp. 23-25.
73. See Fitzpatrick, 'Community Social Law after Maastricht', p. 202. For a discussion of the constitutional aspects of the question, see Curtin, 'The Constitutional Structure of the Union', pp. 52-62.
74. See 'Maastricht and Social Policy - Part Two', p. 23.
75. There have been numerous complaints about the dual legal framework now in place and the recent Commission white paper on the future of social policy (the details of which became available in July 1994) explicitly calls for a return to a single structure, a change considered vital if the integrity of the law and the principle of equal opportunities for all in the EU are to be upheld. This suggests that the Treaty discussions scheduled for 1996 will seek to bring the UK back into the fold.
76. *Financial Times*, 11 November 1991 (author's emphasis).
77. Apparently the issue of mandates for the European social partners from their national members is now much less problematic than hitherto. UNICE has amended its statutes (June 1992) allowing it to seek specific mandates on an issue-by-issue basis from its members who will then have to abide by the results of negotiated Euro-agreements. The ETUC is adopting a similar process for obtaining ad hoc mandates. For further details, see 'Maastricht and Social Policy - Part Three', *European Industrial Relations Review* (London), no. 241 (February 1994), p. 31.
78. See Lange, 'Maastricht and the Social Protocol: Why Did They Do It?', pp. 5-36.
79. The new co-decision procedure applies to areas previously covered by the cooperation procedure (the free movement of workers, freedom of establishment and mutual recognition of qualifications). Other Articles on which draft employment legislation is normally based - Articles 100 and Article 118A - remain covered by the consultation and cooperation procedure respectively. Provision for the use of the cooperation procedure under Article 100A does not apply to provisions relating to 'the rights and interests of employed persons', which are also therefore excluded from the new co-decision procedure. In addition, the Parliament can request the Commission to submit any appropriate proposal on matters on which it considers a Community act is required and this could lead to numerous requests for proposals in social areas. But the Parliament only has the power to specify the subject of a proposal, not the proposal's content, and it may only 'request' a proposal, not demand one. See 'Maastricht and Social Policy - Part One', *European Industrial Relations Review* (London), no. 237 (October 1993), pp. 14-20.
80. See Whiteford, 'Social Policy after Maastricht', p. 209.
81. Fitzpatrick, 'Community Social Law after Maastricht', pp. 204-206.
82. See B. Bercusson, 'European Law and Sectoral Bargaining', *Industrial Relations Journal*, Vol. 24 (1993), p. 258 for a discussion of the potential for regulation via the social dialogue and, more generally on the problems of 'law by collective agreement', Adinolfi, 'The Implementation of Social Policy Directives through Collective Agreements'.
83. See 'Maastricht and Social Policy - Part Three', pp. 32-33.
84. See 'EC Funding for Transnational Meetings - Part One', *European Industrial Relations Review* (London), no. 238 (November 1993), pp. 15-19.
85. For details, see 'Information and Consultation Talks Fail', *European Industrial Relations Review* (London), no. 243 (April 1994), pp. 3-4.

86. The operations of UK companies in the EU outside Britain will be covered by the Directive.
87. See D. Matthews, 'Enforcement of Health and Safety Law in the UK, Germany, France and Italy', paper presented to the ESRC-NWO Research Meeting, Noordwijk, The Netherlands, October 27-28, 1993.
88. See 'Application of Social Legislation', *European Industrial Relations Review* (London), no. 237 (October 1993), p. 3.
89. See 'Maastricht and Social Policy - Part One', pp. 17-18.
90. See M. Rhodes, 'The Social Dimension after Maastricht: Setting a New Agenda for the Labour Market', *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 9 (Winter 1993), pp. 297-325.
91. For a discussion of the possible threats to the German system, see Streeck, 'More Uncertainties: German Unions Facing 1992'.