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# European collective bargaining and the Maastricht Treaty

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To write an article on the basis of a text which has not yet come into force – and indeed may never do so in its present form – may seem a rather hazardous exercise. It is now recognized that the process of ratifying the Maastricht Treaty on European Union, which was signed on 7 February 1992, will suffer some delay since not all the 12 Member States will have ratified it by 1 January 1993 as originally intended. The delay may even be considerable if the British authorities maintain their decision to ratify it only once the problem caused by the Danish people's "no" vote is solved, as the situation may then not be clarified until June or even September 1993.

Nevertheless, the analysis proposed in this article is, we believe, both useful and necessary, since it concerns one specific aspect of the future shape of Europe, namely the fashioning of its "social dimension" as collective agreements based on negotiations between management and labour at the European level gradually come to the fore. Because this trend is unavoidable, it can and indeed must be considered, irrespective of the fate awaiting the Maastricht Treaty. Furthermore, the model for negotiation proposed in the Treaty itself is worth examining, since it most closely reflects the views of the social partners – it was to a large extent inspired by an agreement they had concluded a few weeks earlier, on 31 October 1991 – and may thus legitimately be taken as a model for the future.

## Introduction

Europe will not acquire a true social dimension until the social dialogue initiated at Community level almost 20 years ago attains its objective, that is, until the officially recognized European social partners meet in a regular and timely fashion around the negotiating table and conclude, where appropriate

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and in accordance with certain pre-established rules of procedure, collective agreements which are binding at European level.

This power is indeed conferred on them by the wording of article 4(1) of the Agreement on Social Policy (the "Social Chapter") appended to the Treaty on European Union which was initialled by representatives of 11 of the Member States of the European Community (the United Kingdom having abstained),[1] during the meeting of Heads of State or Government (hereinafter the European Council) held at Maastricht on 9 and 10 December 1991. This article clearly spells out the principle of collective bargaining at Community level which could result in the establishment of European-wide agreements: "Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements."

By recognizing the social partners as fully-fledged architects of the social dimension of the Single Market, and accepting that their agreements may represent a genuine alternative to legislation on a European scale, this text contains all the elements needed to give impetus to the Community collective bargaining process. The Commission of the European Communities thus loses the exclusive regulatory rights it enjoyed hitherto – although it should be remembered that it was the Commission itself that wanted things this way. Convinced that European-level collective bargaining and negotiation between the employers' and workers' organizations were essential bases for the next stages in the construction of Europe, the Commission had always expressed the wish that social dialogue should lead management and labour to establish framework agreements at Community level, to which the parties negotiating collective agreements at Member State level could then refer.

The impetus the Commission has consistently given to social dialogue over the past ten years is clear evidence of its concern to encourage the social partners to assume their share of responsibility. Since the end of 1984, when he became President of the Commission, Mr. Jacques Delors has endeavoured to make this dialogue truly dynamic. Thus in late 1985 executive-level representatives of the Union of Industrial and Employers' Confederations of Europe (UNICE), the European Centre of Public Enterprises (CEEP) and the European Trade Union Confederation (ETUC) and their respective national organizations were invited to meet at the Val Duchesse Manor (on the outskirts of Brussels) to exchange views on the

[1] It is worth recalling that at the Strasbourg Summit of 8 and 9 December 1989 the United Kingdom was already the only State to refuse to adopt the Community Charter of the Fundamental Social Rights of Workers (the "Social Charter"). But as the Charter was only a "solemn declaration", this refusal had more effect at the political than at the legal level. By contrast, this second refusal by the United Kingdom creates a particularly complex legal situation, since two legal texts may now have to coexist in the social policy sphere: the "old" system appearing in the Treaty of Rome as amended by the Single European Act and the "new" system established by the Agreement on Social Policy.

major socio-economic problems of the moment: employment trends, technological progress, effective strategies to combat unemployment. At the close of the Val Duchesse meeting of 12 November 1985, it was decided to set up two small tripartite working groups, the first with a mandate to examine the macro-economic problems of establishing a cooperation strategy and the second to study problems resulting from the introduction of new technology.

On 12 January 1989 – a few days after the new Commission had taken office – the President, Mr. Delors, resumed the initiative by bringing together at the Egmont Palace all participants in the social dialogue, in order to establish new objectives in the light of the perspectives opened up by the Single European Act, which had come into force on 1 July 1987. The new Act officially opened the path to social dialogue by including in the Treaty of Rome the "contractual relation" as one of the possible sources of European social policy. This makes it easier to understand why the discussion at the 12 January meeting stressed the need to strike a balance between legislation and collective agreements as means of social regulation. It was decided to set up a tripartite steering group which would be responsible, inter alia, for ensuring that this dialogue was maintained. The major role the Commission played in this process will be seen below, together with the ensuing explicit recognition of the principle of collective bargaining at European level.

It is worth recalling that European agreements had already been concluded at sectoral level – for example the agreement on vocational training in the retail trade industry signed on 19 October 1988 between the European Confederation for Retail Trade (CECD) and EURO-FIET (the European Regional Organization of the International Federation of Commercial, Clerical, Professional and Technical Employees); and the framework agreement signed on 6 September 1990 between the CEEP and the ETUC on the development of employment and training in public enterprises in the railway transport and energy distribution industries. However, in practice these agreements remain limited both in their aims and in their application.

Although the social partners have clearly received the green light to proceed towards Community-level collective bargaining, the fact remains that no treaty nor any other kind of text can make it an obligation to negotiate, let alone conclude an agreement. The flexible wording of the above-mentioned article 4(1) in the Agreement on Social Policy appended to the Maastricht Treaty is evidence of this wish to give management and labour the greatest possible freedom in this respect. In other words, one can indeed envisage a (rather gloomy) scenario in which, because one of the social partners drags its feet, no European collective agreement would ever be concluded, which would demonstrate the powerlessness of the collective bargaining approach. Community legislators would be quick to draw the necessary conclusions.

For our part, we remain convinced that priority must be given to the use of collective bargaining in the formulation of labour standards since the

social partners, working in their own sphere of competence close to the reality of the workplace, are in a better position than anyone to define these standards. Increasing the influence of bargaining at the expense of legal regulation is often the best way of furthering social progress. Of course, the pace of change will be slower, being the fruit of compromise, but the important point is that there should be consensus. Negotiated texts are generally better applied than statutes, since the enterprises and employees concerned feel their interests are better represented by their respective organizations than by some external and remote political authority.

To date no real power has existed at Community level to propose an alternative to legislated standards in the labour sphere since, under the provisions of the Treaty of Rome, the Commission was in sole charge, with a monopoly over the initiation of Community law. But an executive that hopes to control or regulate everything will find its decisions increasingly contested. It must be able to rely on effective social networks; the roles of employers and trade unions at European level are therefore crucial if a balance is to be established between legislation and regulations on the one hand and collective agreements on the other.

It is in this area that action by the Commission has been central to the future of a "social Europe". By encouraging dialogue between both sides of industry since 1984, the Commission has given management and labour the opportunity to know each other better, to learn to listen to one another and to hold discussions at a European level. All those – and there have been many – who have remarked with irony on the meagre results of the "social dialogue" at Community level have been guilty of misjudgement in losing sight of the real context: the situation is one in which everything has yet to be discovered and developed and it will remain so for a long time; pragmatism and experiment, gradual progress and a step-by-step approach are essential. Of course it is easy for the sceptics to point out that the impetus Mr. Delors gave to "social dialogue" on two occasions – at Val Duchesse in 1985 and at the Egmont Palace in 1989 – has resulted merely in the adoption of "joint opinions" (eight to date), which have no binding force at all and amount at the very most to a verbal commitment by the social partners to continue discussions within their national organizations. But it is also true that these opinions concern subjects of considerable importance and impact: growth and employment; completion of the internal market; worker motivation; education and training; information and consultation; geographical and occupational mobility and functioning of the labour market; flexibility in employment; vocational qualifications. Furthermore, trying to subject the nascent social dialogue to any kind of legal restraint would have been to court immediate failure. The implementation of a collective bargaining policy at European level capable of promoting the negotiation and conclusion of agreements is similarly delicate and requires the same pragmatic, prudent approach. The important thing is that the process should move forward.

This is the spirit in which we should approach the subject, first examining the collective bargaining system proposed in the Agreement on Social Policy appended to the Maastricht Treaty and then analysing the specific problems which this process raises because of its Community-wide scope.

## 1. The new collective bargaining provisions

### A. Origins

When the Heads of State or Government of the 12 Member States met in Rome as the European Council on 14 and 15 December 1990, they paved the way for two intergovernmental conferences, one on political union and the other on economic and monetary union, whose work culminated in the Maastricht Agreements. In particular, the intergovernmental conference on political union was requested to take account, when considering the extension and strengthening of Community action, of "the 'social dimension', including the need for social dialogue". The dominant political will at that time can be summarized in the following dual objective:

- to extend the application of the qualified majority principle to the social sphere so as to escape from the paralysing effect of the unanimity rule; [2] and
- to promote dialogue between management and labour in order to ensure a better balance between the legislative approach and the collective bargaining approach at Community level.

By emphasizing the need for social dialogue in this way, the European Council was indirectly acknowledging the work already carried out by the Commission and encouraging it to pursue that work.

The Commission rose to the challenge without delay: on the proposal of Ms. Vasso Papandreou, European Commissioner for Employment, Industrial Relations and Social Affairs, it was decided, at a meeting of the steering group on 25 January 1991, to set up an ad hoc group composed of representatives of the UNICE, the CEEP and the ETUC, which was mandated to examine the role of the social partners in the new institutional structures arising from the revised treaty. The objective was to intensify the social partners' participation in the Community decision-making process and to improve the effectiveness of the social dialogue and thereby open the road to genuine collective bargaining at European level. The ad hoc group set to work in February 1991.

[2] It will be recalled that article 118A, inserted in the Treaty of Rome by the Single European Act, made only a small dent in the unanimity rule since, in the social sphere, the Council of Ministers may take decisions by a qualified majority only as regards the health and safety of workers in the workplace.

It was tempting for the parties concerned to discuss the scope that should be given to qualified majority voting in the new treaty. But this would have led to endless debates and controversies, with no chance of producing any results, given the differences of opinion between the participants. The employers have always been very reluctant to accept any extension of Community powers on labour questions, in order to protect enterprises against what they see as overcentralized social policy-making. The trade union side has always maintained the opposite view, believing that the Community must assume its responsibilities and adopt basic legislation leading to a gradual upward harmonization of social standards in Europe, thus avoiding the establishment within the Single Market of unfair competition based on declining levels of social protection – what the ETUC has called the risk of "social dumping".[3]

Management and labour preferred instead to focus their discussions on finding a balance between the collective bargaining and legislative approaches that would eventually give them a decisive say in the planning and construction of "social Europe". For whether they liked it or not, they found themselves with their backs to the wall, with no choice but to assume their full share of responsibility in building Europe's social edifice if they were not to leave the "Brussels bureaucracy" to do the job alone.

The agreement they reached on 31 October 1991 is certainly a historic achievement marking an important stage in the social dialogue, since for the first time it defined the role the social partners plan to play in European social regulation. On the same day, the representatives of the ad hoc group handed over to both the President of the Council of Ministers and the President of the Commission the text they proposed for articles 118(4), 118A and 118B of the Treaty on European Union. With one or two exceptions (important ones, as will be seen below), this is the text which was incorporated in articles 2(4), 3 and 4 of the Agreement on Social Policy reached by 11 Member States at Maastricht a few weeks later.

## B. A new role for the social partners

Under the terms of article 3 of the Agreement on Social Policy, management and labour will be able to exercise their new responsibility for the elaboration of European social policy in several ways.

### (a) Compulsory consultation

The procedure for the elaboration of Community legislation involves compulsory consultation of the social partners in two stages. Before the Commission submits its formal proposals, the consultation will first concern

[3] In this connection see, for example, Hugh G. Mosley: "The social dimension of European integration", in *International Labour Review*, 1990/2, pp. 147-164.

the possible direction of the action envisaged and whether it is feasible (article 3(2)). Subsequently, under article 3(3), there will be consultation on the actual content of the proposal as finally determined by the Commission; at this point, the social partners may submit an opinion or, where appropriate, a recommendation to the Commission.

### (b) The power to intervene

The social partners may state that they are ready to negotiate an agreement in place of a planned legislative instrument,[4] and this will result in the suspension of the Commission's work for a period of up to nine months, "unless the management and labour concerned and the Commission decide jointly to extend it" (article 3(4)).

The text originally proposed by management and labour excluded any intervention by the Commission in the extension procedure. However, the version finally adopted by those drafting the Agreement on Social Policy allows the Commission to veto a joint request by the social partners to extend their negotiations beyond the nine-month period. They considered that a time-limit was necessary to avoid thwarting or delaying the process of harmonizing or coordinating national legislation initiated by the Commission to meet the social policy aims of the Single Market. However, the Commission's veto is unlikely to be applied unless there is a patent breakdown in the negotiations, when a request for extension would seem to be a delaying tactic.

In addition to a few technical questions which remain unclear (the starting-point of the nine-month period, duration of the extension period), the procedure thus established makes no provision for the eventuality that the social partners do nothing during the period allowed them. In such a case would the Commission be free to resume its legislative activity, or would it be required to engage in further compulsory prior consultations, offering employers and workers another chance of saying that they planned to start negotiations? The first interpretation seems more consonant with the spirit of the text: after the necessary consultations, legislative work would be suspended until the allowed time elapsed and, if the negotiations broke down, it would then resume its normal course. The second, more questionable interpretation would inevitably run the risk of blocking the whole process.

[4] In such cases, the Commission retains the legislative initiative subject to respect of the principle of subsidiarity within the framework of its non-exclusive powers, the competence of the social partners being limited to the implementation of the text's provisions.

### (c) The power of direct initiative

The social partners may also freely decide to conclude European-wide agreements on any subject, including those falling outside the jurisdiction of the Community institutions.

In the long run such a power may therefore call into question the Commission's monopoly over legislative initiatives. Furthermore, it indirectly deprives the European Parliament of the new prerogatives conferred on it by the Single European Act through the so-called "cooperation procedure". This procedure – currently applicable to texts adopted by the Council of Ministers by qualified majority vote – allows Parliament to make its voice heard and in more than merely a consultative capacity. Any text which it proposes to amend requires unanimous adoption by the Council of Ministers if the latter does not endorse the amendments, and a unanimous vote is similarly required for the adoption of a text which has been purely and simply rejected by Parliament.

### (d) Implementation of Community directives

The Agreement on Social Policy also recognizes the right of a Member State to entrust its own social partners, at their joint request, with the implementation of Community directives, provided that the State in question takes the necessary measures to guarantee their effective application. The social partners considered representative in the State concerned must of course be authorized under national practice and law to assume responsibility for such implementation.

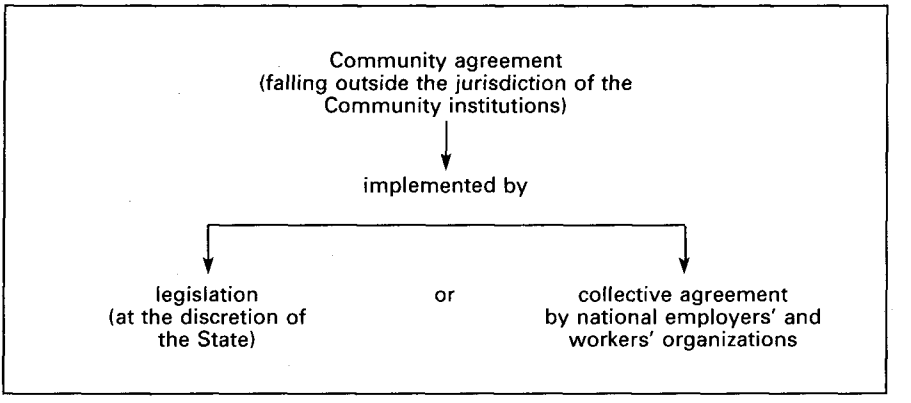
In addition to these prerogatives, article 3(1) of the Agreement on Social Policy stipulates that the Commission shall take any relevant measure to facilitate dialogue between the social partners "by ensuring balanced support for the parties". In practice this support mainly takes the form of financial assistance for meetings, such as conferences, seminars and congresses organized by the employers' or trade union organizations. But the Commission does not intend to go any further and the social partners themselves are left to organize themselves as they see fit to carry out their respective tasks in the best possible manner.

## C. Application of agreements concluded at Community level

For the present, an agreement signed at European level has no direct binding force whatsoever in the Member States, and this is why provision has been made for additional procedures.[5] The Agreement on Social Policy

[5] Naturally, the system of collective bargaining at Community level will be improved over time; the direct application of European agreements in the social domain should be considered a medium-term objective.

Box 1. First arrangement for the application of Community agreements



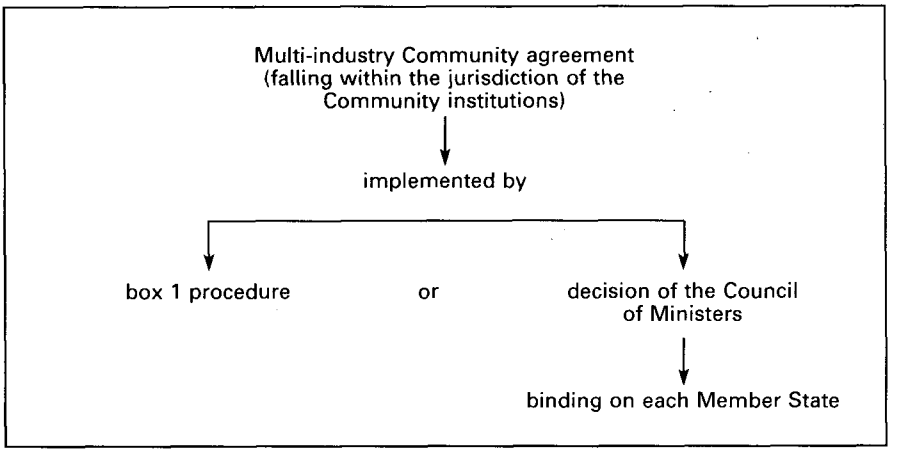

annexed to the Maastricht Treaty envisages two distinct arrangements to ensure implementation at national level of an agreement concluded at European level (article 4(2)).

Arrangement 1 (see box 1): Agreements are implemented in accordance with the procedures and practices specific to management and labour and the Member States. In the second Declaration at the end of the text of the Agreement on Social Policy, the 11 contracting parties declare that this first arrangement for the application of agreements consists in developing the content of the agreements by means of collective bargaining according to the rules of each Member State. Consequently, they go on, Member States are not obliged to apply the agreements directly or to work out rules for their transposition, nor to amend national legislation to facilitate their implementation. These agreements have no general legal force and are enforceable only in respect of the parties that have negotiated and signed them.

This first arrangement prompts three observations:

- The binding force of the European agreements will derive from the provisions established at national level for this purpose, since the signatory parties at European level have at most a moral obligation to insist on their implementation by the members they represent. Although such an obligation is not binding in itself, a failure to respect it would very likely have political consequences on relations between the signatories.
- The effect of the agreement will differ from one State to another because of the variety of national systems in force. In Germany a collective agreement has the force of a contract under private law, binding only the employers affiliated to the signatory employers' organization and those employees who are members of the signatory

Box 2. Second arrangement for the application of Community agreements




union. The benefits established by the agreement are thus incorporated into the contract of employment. In the United Kingdom collective agreements are more like "gentlemen's agreements". However, their provisions do become binding if they have been included in the worker's individual contract of employment. In France a collective agreement is closer to an "occupational Act" establishing a set of standards which apply to all enterprises in which a given occupation is exercised. Since the benefits under the agreement are not part of the employment contract, the legislator must intervene expressly to ensure that the agreement remains in force long enough to permit a substitute agreement to be negotiated or, failing that, individual acquired benefits to be maintained.

- The ease with which agreements are incorporated into each national system will depend largely on the goodwill of Member States. A State which is concerned to defend the interests of its workers will be more inclined to take all the necessary measures to ensure the proper application of the agreement.

Arrangement 2 (see box 2): At the joint request of the signatory parties, agreements shall be implemented by a decision of the Council of Ministers on a proposal from the Commission. The Council's decision – adopted either unanimously or by qualified majority, depending on the field covered – gives general legal effect to the agreement.[6] This procedure can be applied only to agreements concerning one or more matters which fall within

[6] Under article 189 of the Treaty of Rome, "a decision shall be binding in its entirety upon those to whom it is addressed".

the jurisdiction of the Community institutions, as specified in article 2(1) of the Agreement on Social Policy.[7]

By their nature and effects, such decisions by the Council of Ministers may be compared with the administrative rulings provided for under the *erga omnes* extension procedure which is normal practice in the legal systems of several Member States; the political authority thereby confers institutional approval upon the concluded agreement.[8] The *erga omnes* procedure is not only the most logical one, given the objective of gradual harmonization of European social policy, but it also provides the greatest protection in that it extends coverage to those workers not represented by the parties signatory to the agreement.

An important question raised by this second procedure is whether the Commission or the Council of Ministers may amend the terms of the agreement. In this connection, the text of the Agreement on Social Policy differs from that proposed by the social partners.

The latter's agreement of 31 October 1991 stipulates that Council decisions must incorporate "agreements as they have been concluded"; however, the words "as they have been concluded" were not used in the text agreed at Maastricht. We believe that the question raised above should be answered in the negative, for both legal and practical reasons. If the terms of the agreement are amended, if additions or deletions are made, the new text is no longer the agreement as concluded by the social partners and it thus becomes impossible to speak of its "implementation" without distorting its meaning. Furthermore, such a manoeuvre would be clumsy, to say the least, since it would sour relations with the social partners by infringing their autonomy, something which would be contrary to the Commission's aim of promoting collective bargaining. There is no doubt that the fact of requiring a joint request by the signatories to an agreement before the Council of Ministers will implement it is added protection for the social partners. Even

[7] The Community's powers in social policy matters will be significantly broadened under the terms of this article, as will the application of voting by qualified majority, which up to now has been restricted to questions concerning the health and safety of workers, since the Community is required to "support and complement the activities of the Member States" in the following fields: improvement of the working environment to protect workers' health and safety; working conditions; the information and consultation of workers; equality between men and women with regard to labour market opportunities and treatment at work; and the integration of persons excluded from the labour market. On the other hand, unanimous decisions by the Council of Ministers are still required as regards: social security and the social protection of workers; protection of workers where their employment contract is terminated; representation and collective defence of the interests of workers and employers; conditions of employment for third-country nationals legally residing in Community territory; and financial contributions for the promotion of employment and job creation, without prejudice to the provisions relating to the Social Fund (article 2(3)). Pay, freedom of association, the right to strike and the right to declare lockouts are all matters falling outside the jurisdiction of the Council.

[8] Employers' organizations have made it clear that they will only negotiate agreements which are likely to be incorporated in a Council decision.

so, their fear of "Brussels imperialism" has already led them to suggest inserting a clause in every agreement stipulating that any substantial amendment by the Council would lead to its automatic annulment.

It should also be recalled that, provided the rules and procedures are respected, no one can prevent the Commission from intervening in the social policy sphere. While the bargaining procedure is autonomous so, too, is the legislative procedure, even if the social partners are consulted.

Finally, it should be observed that the second arrangement for implementing a European agreement does not foresee any role for the Economic and Social Committee of the European Community or for the European Parliament.

## 2. The implementation of collective bargaining policy at European level

The conclusion of agreements at Community level raises many problems and questions which must be resolved in the short or medium term if the success of collective bargaining's role in the construction of a social Europe is to be assured. As this is still unexplored territory, we reiterate the need for pragmatism and prudence on the part of all negotiating parties.

That having been said, six questions provide food for thought in the immediate future: the application of the principle of subsidiarity, the nature of the agreements, the representative status of the social partners, the mandate to negotiate, the scope of bargaining and the identification of disputes.

### A. The principle of subsidiarity

One of the foundations of the European edifice is the principle of subsidiarity, which requires that action be taken at a higher level only if the lower level is recognized as being less effective in the light of the interests to be served and the results to be achieved. This principle (on which much has been and continues to be written because its application is so politically sensitive) is set out in the second paragraph of article 3B of the Maastricht Treaty, which stipulates:

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

The principle of subsidiarity thus becomes a rule – subject to the control of the Court of Justice of the European Communities – which is legally applicable to Community policy in general and to social policy in particular.

As long as the Commission remains the only architect of Europe, the principle of subsidiarity means that the question of the level at which action would be most effective can be answered only in terms of Community and national levels. But with the official recognition of the social partners as the second architect of a social Europe a second level of subsidiarity emerges: if the Community level is selected, will effectiveness necessitate the legislative or the collective bargaining approach? This question was clearly posed by Mr. Jean Degimbe, Director of the Directorate-General of Employment, Industrial Relations and Social Affairs: "The greatest problem concerning subsidiarity in the social sphere in coming years will lie not so much in the search for a balance between Community powers and the powers of the Member States but rather in the relationship which must be gradually defined at Community level between collective agreements and legislation."

When they envisage drawing up a Community agreement, the social partners will themselves have to judge whether a given question would not be better dealt with at other levels within the Member States, either by national organizations, or even at enterprise level, according to internal procedures directly agreed between management and workers.

## B. The nature of the agreements

A number of different interpretations have emerged concerning the word "agreement". Some consider the term does not necessarily imply a legal commitment. Others argue that an agreement can only be a legally binding instrument. And in an attempt to compromise, yet others have accepted the two meanings of the word, both the strong sense of an enforceable standard-setting instrument and the weaker sense of a looser agreement on overall direction and method.

That having been said, if there is to be any real harmonization of European social policy and if major distortions resulting from unfair competition are to be avoided, we consider that the term must be understood in its standard-setting sense. However, the social dialogue will continue to provide the opportunity for exchanges of views and ideas, for confrontation and consensus-building. Furthermore, the social partners would be wise not to commit themselves to reaching an agreement at any cost: nothing could be more dangerous than bargaining based on a poor handling of substantive matters.

On the other hand, given that there are national disparities of both an economic and a social nature, we believe the European standard-setting agreement should basically take the form of framework agreements, i.e. should be sufficiently flexible to allow adaptation to the special characteristics of individual national circumstances. In other words, some degree of diversity should be tolerated at the national level.

## C. Representative status of the social partners

The nature of social dialogue undergoes a radical change once the European social partners are granted their own standard-setting powers, alongside and even concurrently with the Community authorities. The recognition of their right to develop European labour standards through collective bargaining presupposes the prior identification of these very "social partners", to whom the European treaties repeatedly refer without defining who they actually are. If in theory any organization which is representative in its own country may participate in the Community dialogue should it so wish, some regrouping at European level is necessary for the sake of realism and efficacy.

At the multi-industry level, the Commission has to date, and within the framework of the social dialogue at Val Duchesse, recognized the ETUC as the representative of European employees, and the UNICE and the CEEP as the respective representatives of private and public employers in Europe.

But this practice has no legal basis and there is nothing to prevent other trade union organizations established at European level from asking to be accepted as partners in the new social dialogue. Thus the European Confederation of Executive Staff (CEC), which claims to have over a million members amongst its various affiliated organizations, has asked to be recognized as a partner, notably in discussions concerning its own sector. The recently constituted (1990) European Confederation of Independent Trade Unions has made the same request. On the employers' side, the UNICE coordinates the presence of employers' organizations within the Community bodies and consults with other employers' organizations, such as the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME).

Furthermore, it seems to us that trade union organizations that are representative within a Member State but not affiliated to a representative trade union organization at Community level (such as the French CGT or the Portuguese Inter-Trade Union Organization, which are not currently affiliated to the ETUC) should also be given an opportunity to make themselves heard in the Community social dialogue.

At the sectoral or industry level, the European negotiators must be mandated to act on behalf of trade unions active in the same sphere at national level. European trade union committees [9] and the corresponding industrial federations on the employers' side have been presented as the most representative sectoral organizations at European level.

The Commission has undertaken to conduct a study on representation criteria of trade union organizations at European level. Membership size, the

[9] The ETUC structure includes 16 accredited European trade union committees which group together at European level the trade union federations of one or more sectors.

importance of the interests or sectors represented by the affiliated organizations, and the unions' "seniority" or experience in European terms will probably be the major points taken into consideration.

## D. The mandate to negotiate

Before the trade union organizations recognized as representative can engage in collective bargaining at European level, they have to make the necessary internal adjustments and acquire the necessary legal authority to act on behalf of their members. Clearly the latter have great freedom to decide how they will confer such a mandate. For example, there might be a delegation of national negotiators duly authorized by their respective governing bodies to negotiate agreements on the basis of a previously approved range of demands, or negotiators might be given very specific (or ad hoc) mandates. The ETUC examined this subject some time ago and its VII Congress – held in Luxembourg from 13 to 17 May 1991 – was to a large extent devoted to a discussion of the transfer of powers and authority of national confederations to the ETUC to enable the latter to negotiate genuine agreements at European level. The employers' organizations will have the same issues to resolve.

However, the idea that the European organizations established at multi-industry or industry level – whether by the employers or the trade unions – will easily win a European mandate to negotiate from their members (in the legal sense of mandate, i.e. which is binding on the principal) is, in our view, somewhat unrealistic given the opposition voiced by various national bodies. It would therefore be more appropriate to establish a permanent form of interaction between the different bargaining levels, since it is difficult to conceive of a supranational dialogue not simultaneously fed by national discussions. In other words, the outline and shape of the future Community agreement will in fact be decided by the membership of the organizations represented by the European social partners: the "launching pad" of the agreement will be a broad, prior consensus among the members (i.e. a technical or a political mandate) rather than the granting of a real legal mandate. Indeed, it is probable that the signing of a European agreement will be possible only after the results of the negotiation have been endorsed by the bodies which conferred the mandate to negotiate.

## E. The scope of bargaining

The scope of bargaining is directly tied to the level at which the agreement is concluded, since a European-wide industrial relations system should operate on four distinct but complementary levels: the intersectoral (or multi-industry), the sectoral (or industry), the inter-regional and the group or enterprise level.

European framework agreements could be concluded between the representative organizations at the multi-industry level in areas also falling within the competence of the Commission. In other words, one can easily envisage the social partners seeking to assist the Commission in implementing the Social Charter. Furthermore, the joint opinions issued by the social partners since 1986 cover many issues which could be the subject of collective bargaining. For example, subjects such as the mobility of workers, the manpower and skills planning, the duration and organization of working time, workers' health and safety, equality between men and women in the workplace, or training could all be suitable topics for bargaining at the multi-industry level.

The sectoral level has rightly been considered the most appropriate for the development of collective bargaining in Europe since it is the most homogeneous and is most likely to achieve tangible results. A sectoral agreement could have a threefold objective: to adapt to the sector certain provisions established by multi-industry agreements; to resolve certain general questions (for example, managerial structures, classification, restructuring); and to deal with sector-specific problems (such as environmental protection in the chemical industry, the use of biotechnology in the food industry and rest periods in transport).

Inter-regional agreements could be reached in close coordination with national trade unions on specific matters arising in border regions.

Cross-border collective bargaining has already been established by a number of European groups and enterprises, such as Bull, BSN, Elf Aquitaine, Volkswagen, Thomson Consumer Electronics. One notable result is that agreements have been reached on providing information to workers.[10]

## F. Disputes

Disputes may occur because of problems arising either from the application of European agreements or the conflict between collectively bargained European standards and national standards.

[10] See in this connection previous ILR articles: Herbert R. Northrup and Richard L. Rowan: "Multinational union-management consultation: The European experience", in *International Labour Review*, 1977, Vol. 116, No. 2, pp. 153-170; and Herbert R. Northrup, Duncan C. Campbell and Betty J. Slowinski: "Multinational union-management consultation in Europe: Resurgence in the 1980s?", ibid., 1988/5, pp. 525-543. It should be noted that article 11 of the amended proposal for a "Directive complementing the Statute for a European company with regard to the involvement of employees in the European company" provides a basis for collective bargaining between the labour and management representatives of these groups: "The management board or the administrative board and the employees' representatives may negotiate and conclude collective agreements on matters of concern to the SE's employees, including mechanisms for participation in the capital and profits of the SE."

### (a) The application of European agreements

First, the dispute may be over the interpretation of an agreement. Efficiency would seem to be best served by the establishment of a joint committee on the interpretation of each agreement, composed exclusively of representatives of the signatory parties. Since differences of interpretation could also arise within the committee, provision would need to be made for appeal to a single, higher European authority. The ETUC's idea of establishing a specialized chamber within the Court of Justice of the European Communities merits further study. This procedure should apply only to agreements implemented by collective bargaining within each Member State. If the agreement was implemented by a decision of the Council of Ministers, and therefore had legal force, disputes over interpretation would follow the procedural rules applicable to Community regulations and directives, i.e. the matter would go before the national courts, which are themselves competent to request a preliminary ruling from the Court of Justice.

Another possible cause of dispute could be the non-conformity of a European agreement with European legislation. A dispute concerning the annulment of all or part of a European agreement implemented through national agreements could be examined by a joint committee of interpretation empowered by the collective agreement to propose, where applicable, a revision of the disputed text, without prejudice to an appeal to a higher legal authority. If the agreement was rendered binding by virtue of being a decision of the Council of Ministers, the correct procedure would then be to apply for annulment before the Court of Justice, as in the case of other Community acts.

A third kind of dispute could concern the violation or the non-application of a European agreement by a Member State. Since the provisions established by European collective bargaining become binding national standards once incorporated into a State's internal regulations, the matter should be left in the hands of the national jurisdictions.

### (b) Integration of national and European collective bargaining standards

In its ruling on a problem of harmonization between Community provisions and national texts, handed down on 15 July 1969 (Costa *v.* Enel, *Reports of Cases before the Courts of Justice and the Court of First Instance*, 1969), the Court of Justice affirmed the primacy of Community law when it stated that, by reason of its specific and original nature, the right arising from a treaty (and hence regulations and directives) may not be abrogated by any form of national text.

This primacy of Community law is logical: how could the European Community function if a Member State were empowered to deviate from

Community law whenever it wished, and to apply its own national provisions?

For the moment Community law is based solely on legislation and that is the only basis on which the Court of Justice has been called upon to rule. However, it seems difficult not to accord the same primacy to collective bargaining, which would mean that any nationally negotiated provisions to the contrary would be considered null and void. Thus at some, admittedly distant, future point we may read in a legal gazette that a Spanish employee has decided to petition the Spanish court handling labour questions, or a French employee an industrial tribunal, for the application of a European sectoral agreement on the grounds that it is more favourable than the provisions of the national branch agreement that applies in his or her enterprise.

## Conclusion

The approach we have adopted, namely to take the Agreement on Social Policy appended to the Maastricht Treaty as the basis for our examination of the collective bargaining procedures that the European Community apparently wishes to see established, may give rise to criticism since ratification of the treaty is proving more arduous and uncertain than anticipated.

But is the future of collective bargaining at Community level really linked to what happens to the Maastricht Treaty? We do not think so. We believe, on the contrary, that the extension of collective bargaining is an inevitable part of a logical progression towards the construction of Europe. In each Member State contractual policy and collective bargaining law are integral parts of labour law and consequently it is difficult to see how the latter could be developed at Community level without this essential instrument of social regulation. Furthermore, a strengthened role for the social partners implies a weakening of Community institutions, a not unpleasing prospect to the many critics of the "Brussels technocratic bureaucracy". Finally, it is worth recalling that collective bargaining at European level has already been implicitly recognized by the Single European Act with the addition of article 118B to the Treaty of Rome, as follows: "The Commission shall endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement". Does not the expression "relations based on agreement" imply the possibility of concluding European agreements with legally binding force?

In our view it is beyond question: there now undoubtedly exists the will to give collective bargaining a leading role in the development of European social policy. Success will depend on two conditions being met: firstly, the determination of the social partners to conduct an active collective

bargaining policy at European level – which will be judged by results; and secondly, a recognition of the full autonomy of the social partners, with the freedom to choose the subject of negotiation and to conduct talks and conclude agreements without arbitration or intervention by the Community authorities. On this second point, it was already clear from the agreement of 31 October 1991 that the social partners intended to engage in a bilateral dialogue, forgoing the need for direct, active participation by the European Commission. Their intention was reaffirmed at the Social Summit – known as Egmont III – held in Brussels on 3 July 1992, when management and labour expressed the wish to implement new Community procedures of consultation and negotiation under the terms laid down by the agreement of 31 October and in accordance with the new treaty; to this end, they set up a social dialogue committee to replace both the steering group established in January 1989 and the ad hoc working group established in January 1991. The movement towards collective bargaining is gathering momentum and taking shape. Whether we like it or not, it seems that the process will be difficult to reverse.