The Social Chapter

Research Paper 95/92

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This Research Paper explains what the Social Chapter is and how our opt out works. It also looks at the impact of EC law on UK legislation in the following areas: working time; maternity leave and pay; young workers; European Works Councils; parental leave; part time and temporary workers; posted workers; transfer of undertakings; consultation with workers; and the onus of proof in sex discrimination cases. These - and other similar issues - are often loosely and collectively referred to as the "social chapter", though "EC employment legislation" might be a more accurate description.

Julia Lourie
Business and Transport Section

House of Commons Library

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I Summary

- The Social Chapter is the popular name for the **Social Policy Agreement** made between all the Member States of the European Union except the UK at Maastricht in December 1991 and incorporated in the **Social Protocol** to the Maastricht Treaty. The Maastricht Treaty, and hence the Social Protocol, finally came into force on 1 November 1993, after it had been ratified by all Member States. When Austria, Finland and Sweden joined the European Union on 1 January 1995, they too signed up to the Social Chapter.

- The Social Chapter does not, of itself, contain any legislation or impose any new laws on any of the signatories. What it does is to provide a new procedure for introducing social legislation which allows the EC to act in a wider range of "social" areas and to adopt more legislation by qualified majority voting. This makes it harder for any one Member State to veto proposals. It also involves the "social partners" - employers' and workers' representatives at European level - in drawing up proposals.

- In this context, "social" means "employment" more often than it means "welfare".

- Because the UK opted out of the Social Chapter, legislation passed under its procedures does not apply in the UK. However, it does apply to UK nationals (or subsidiaries of UK-registered groups) resident in the other Member States.

- So far, only one piece of legislation - on European Works Councils - has been adopted under the Social Chapter. Because many large UK companies have sizeable subsidiaries in the other Member States, they are introducing European Works Councils for their UK employees as well as their European workforce despite our opt out.

- Other proposals for legislation which have been referred to the Social Chapter include those on part-time and temporary workers and on parental leave.

- The European Commission is anxious to end the UK opt out which it considers a "dangerous precedent" for the cohesion of the Union. Both the Labour and Liberal Democrat parties are committed to signing the Social Chapter but the Conservative government is determined not to do so.

- Despite our opt out, EC law still has a profound influence on UK law in this field because of Directives already adopted under the Treaty of Rome (as amended by the Single European Act.) It is still possible for all Member States, including the UK, to adopt new social legislation under the provisions of the Treaty rather than the Protocol.

- Controversial developments arising from EC laws which pre-date the Social Chapter include those on working time, maternity leave, young workers, part timers, transfer of undertakings and consultation with workers.

II What is the Social Chapter?

A. The Social Chapter

The **Social Chapter** is the name commonly used to describe the **Social Policy Agreement** made between eleven Member States of the European Union at Maastricht in December 1991 and contained within the **Social Protocol** to the Treaty on European Union. It is referred to as the "Social Chapter" because the European Commission had originally hoped to replace the existing Social Chapter of the Treaty of Rome with a new version. The UK's opposition put paid to this and the original Social Chapter remains within the body of the Treaty of Rome, covering all Member States. In the Protocol itself, all twelve Member States agreed that the UK should be excluded from the Agreement. Now, of course, with the accession of Austria, Finland and Sweden, 14 Member States are covered. The Agreement does not, of itself, require the introduction of any new policies. It merely changes the procedure by which such policies can be introduced in future. In effect, it brings more "social" topics within the scope of Qualified Majority Voting in the Council of Ministers, the body which adopts legislation. An obvious example is that proposals on "the information and consultation of workers" require unanimous support under the Treaty of Rome's Social Chapter but only qualified majority support under the Treaty of Maastricht's Social Policy Agreement.

The Social Policy Agreement allows the eleven (now the fourteen) to take action on a **qualified majority** in the following areas:[1]

> " improvement in particular of the working environment to protect workers' health and safety;
>
> - working conditions;
>
> - the information and consultation of workers;
>
> - equality between men and women with regard to labour market opportunities and treatment at work;
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> - the integration of persons excluded from the labour market, without prejudice to Article 127[2] of the Treaty establishing the European Community"

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1 Article 2 (1)

2 This refers to vocational training

Acting **unanimously,** they may take action on the following:[3]

" social security and social protection of workers;

- protection of workers where their employment contract is terminated;

- representation and collective defence of the interests of workers and employers, including co-determination .....

- conditions of employment for third-country nationals legally residing in Community territory;

- financial contributions for promotion of employment and job-creation, without prejudice to the provisions relating to the Social Fund."

Certain areas are specifically **excluded** from the scope of the Agreement. These are:[4]

- pay
- the right of association
- the right to strike
- the right to impose lock-outs

Under the Treaty of Rome's Social Chapter the only area covered by qualified majority is that of health and safety, so Article 2 of the Social Policy Agreement represents a considerable extension of the use of the procedure and of the topics specifically listed as within the competence of the EC. A qualified majority under the Social Protocol is now 52 votes out of the 77 which the 14 Member States can wield. In all other Treaty areas in which qualified majority voting is used in the Council, the UK has 10 votes, so a qualified majority on main Treaty measures requires 62 votes out of 87.[5]

The Agreement also enhances the role of organised **management and labour** in implementing EC legislation. Article 2(4) of the Agreement states that at management and labour's joint request, a Member State may allow a Directive to be implemented by collective agreement on condition that this leaves the State in a position to guarantee the results required by the Directive. Furthermore, the Agreement, in Articles 3 and 4, introduces a new procedure under which the Commission must consult management and labour - the social partners - at Community level before submitting proposals for legislation in the social policy field. The leading "social partners" are the European Trade Union Congress (ETUC), the

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3 Article 2 (3)

4 Article 2 (6)

5 *European Report*, 17 December 1994, "EU Enlargement: Council agrees on final technical amendments of enlargement to 15"

Union of Industries of the European Community (UNICE) and the European Centre for Public Enterprises (CEEP). UK trade union and employer representatives participate in ETUC and UNICE. There are two stages to the consultation. The first concerns the possible direction of EU policy. The Commission considers that this stage should not exceed six weeks.[6] If, after this stage, the Commission decides action is still advisable, it proceeds to the second stage. This takes place on the basis of a letter giving details of the content of the proposal envisaged by the Commission. This stage will also last no more than six weeks. The social partners can either give their opinion to the Commission or decide to enter negotiations aimed at reaching agreement on the issue within nine months. This agreement could replace the proposed legislation. It could be implemented by the partners themselves - "in accordance with the procedures and practices specific to management and labour and the Member States" - or, at the joint request of the signatory parties, by a Council decision.[7]

One other item of note in the Agreement is that it permits an element of **positive discrimination** in favour of women which is not provided in the existing Social Chapter. Article 6 of the Agreement repeats Article 119 of the existing Social Chapter (that enunciating the principle of equal pay for equal work) but adds that the principle is not violated by measures "providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers."

B. The Social Charter

The Social Chapter is sometimes confused with the **Social Charter.** The Social Charter is the popular name for the **Community Charter of the Fundamental Social Rights of Workers** signed by eleven of the twelve Heads of Government of the Member States in Strasbourg in December 1989. The one dissentient was Mrs Thatcher. The Charter has no legal force and is declaratory in nature. It describes a series of "social" rights in rather general terms. These rights are grouped under twelve headings:-

- freedom of movement
- employment and remuneration
- improvement of living and working conditions
- social protection
- freedom of association and collective bargaining
- vocational training
- equal treatment for men and women
- information, consultation and participation for workers
- health protection and safety at the workplace

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6 *Communication from the Commission concerning implementation of the Protocol on Social Policy*, EC Doc 4075/94, COM (93) 600, 14 December 1993

7 Article 4

- protection of children and adolescents
- elderly persons
- disabled persons

The Charter was intended to act as a stimulus to further EC legislation and activity in the social field. At the end of 1989, the Commission published an *Action Programme* for the implementation of the Charter.[8] It contained 43 new initiatives, 17 of which were for legally binding Directives, to be brought forward in 1990, 1991 and 1992. The vast majority of these measures have been brought forward and many of them have been adopted. They include controversial measures such as the *Directives on Working Time, Pregnant Workers* and *Young Workers* (see Part V) as well as many less controversial proposals on, for example, *risks associated with working with asbestos, proof of employment relationship,* and *medical assistance on board ships*. Social Charter Action Programme proposals which have now been referred to the Social Policy Agreement procedures include those on *Part-time and Temporary Workers, European Works Councils, the Onus of Proof in Sex Discrimination Cases* and *Parental Leave* (see Part V).

The Member States which have adopted the Social Chapter state that their aim in so doing is "to continue along the path laid down in the 1989 Social Charter."[9]

C. The Medium Term Social Action Programme

In a sense, the successor to the Social Charter Action Programme is the Medium Term Social Action Programme for 1995-1997, published by the European Commission in April 1995. This followed extensive consultation on the Commission's Green and White Papers on European Social Policy published in 1993 and 1994 (see Part VI). This programme is much less focused on legislation and labour standards than the 1989 programme. It is an attempt to reconcile some rather different views about the relative importance of the social and economic aims of the EC. The Introduction to the programme states:

> "The economic and social dimensions are in fact interdependent and must, therefore, advance hand in hand. There cannot be social progress without competitiveness and economic growth. Conversely, it is not possible to ensure sustainable economic growth without taking the social dimension into account. Social progress and social solidarity must form an integral part of the European approach to competitiveness. A new balance must be achieved between the economic and social dimensions, in which they are treated as mutually reinforcing, rather than conflicting, objectives."

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8 COM 89 (568) final

9 Social Protocol

Nevertheless, it is clear that achieving a universally acceptable balance will not be easy. The Introduction continues:

> " it remains clear that views on some aspects of social policy differ widely, and are in some cases contradictory. The White Paper pointed out that Member States and others were divided in their opinions about the need for further legislative action at European level, particularly as it concerns labour standards. While some want to see the focus almost exclusively on the application of existing legislation, with no new proposals, others remain in favour of a gradual extension of the floor of binding and enforceable minimum standards. Still others are calling on the Commission to present a wide range of new legislative proposals, some of which do not fall within the scope of the powers laid down by the Treaty on European Union and/or may be at odds with the principle of subsidiarity."

In view of this, the 1995-1997 programme concentrates on proposals for monitoring employment trends and systems; for research, collaboration and the exchange of information; for completing legislative initiatives which are already under way; and for enforcing legislation already adopted. There are, however, indications of initiatives in new areas which may, one day, develop into legislative proposals or agreements between the social partners. In the area of labour law, these include:

- individual dismissals
- extension of the working time directive to sectors currently excluded
- homeworking
- rights of workers to be consulted on internal company matters
- the reduction and reorganisation of working time
- illegal work
- teleworking
- protection of privacy of workers
- the right to payment of wages on public holidays and during sickness
- dignity of men and women at work (sexual harassment)

Michael Portillo, when Secretary of State for Employment, welcomed this change in emphasis but considered that the new programme still contained too many hints of further regulation[10]:

> "My aim is simple - a Europe which is competitive and can create jobs for Europe's 20 million unemployed people. When Europe's Employment Ministers meet, we should concentrate on how to help businesses to create jobs, not on measures which increase costs and red-tape and so destroy jobs.
>
> I have put my views on what the Community's priorities should be to the Commission and to other Employment Ministers. There are some welcome signs in this new Social Action Programme that the Commission has moved towards accepting that tackling structural unemployment and creating new jobs must top the agenda.
>
> But there are still too many signs in the new Programme that the old way of thinking - based on regulation and restriction - has not been laid to rest. It doesn't recognise that the more burdens we place on business, the harder we make it for employers to create new jobs and take on new employees. For example, an extension of legislation restricting the hours people can work is the last thing businesses in the sectors affected need as we come out of recession.
>
> Instead of proposing new areas of regulation, the Commission should be weeding out regulations which increase the cost of creating jobs. The so-called Acquired Rights Directive is a classic example. The proposals before the Council for revising this directive fall short of what is necessary to bring its requirements up to date. We need a radical review of this and other long-standing directives which reduce job opportunities and do nothing to help the unemployed.
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> The British Government will continue to take a consistent stance on Commission proposals; supporting those which help people to offer other people jobs and resisting all those which make it harder for them to do so."

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[10] Dept of Employment Press Release, 12 April 1995, *" 'The creation of jobs must remain top of the European agenda' - Michael Portillo"*

III What does the UK opt out involve?

A. Legal Implications

The terms of the Social Protocol preclude the UK from taking part in "the deliberations and the adoption by the Council of Commission proposals made on the basis of this Protocol and the [Social Policy] Agreement." In return, as it were, "Acts adopted by the Council and any financial consequences other than administrative costs entailed for the institutions shall not be applicable to the United Kingdom." So, UK Ministers do not participate in discussion of Social Policy Agreement proposals at Council meetings and UK permanent representatives do not participate in the COREPER discussions. However, UK employer and trade union representatives do participate in the social partner discussions and UK Members of the European Parliament are able to participate in relevant debates. Any proposals adopted under the Agreement do not apply in the territory of the UK but they do apply to UK nationals or companies resident in other Member States. A European Commission *Communication concerning the application of the Agreement on Social Policy*,[11] dated December 1993, explains:

> "The Agreement is soundly based in law given that the Protocol on Social Policy, which was adopted by the Twelve and thus ranks as a treaty, allows for measures to be taken by eleven Member States.
>
> Thus, the Community nature of measures taken under the Agreement is beyond doubt, which means that the Court of Justice will be empowered to rule on the legality of directives adopted by the Eleven and to interpret them. The scope of these directives will comply with the territoriality principle, in other words, such directives will not apply on the territory of the United Kingdom, but a UK national - or the subsidiary of a UK-registered group - resident on the territory of each of the other eleven Member States will be subject to the (harmonised) legislation of the Member State in question. Finally, the Protocol forms part of the *acquis communautaire* like any other provision of the EEC Treaty."

These arrangements raise many constitutional questions which are discussed briefly in Part IV below and more fully in some of the material listed in Part VI.

B. Economic Implications

The Conservative government believes that our exclusion from future EC legislation imposing minimum labour standards will help us to create jobs and become more competitive. For

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[11] EC Doc 4075/94, COM (93) 600

example, a briefing for UK Members of the European Parliament on the Social Chapter opt out, submitted by the Employment Department on 31 January 1992, says:

> "8. The UK Government made it clear throughout negotiations within the inter-governmental conference on political union that it saw no case for the extensions of Community competence and qualified majority voting proposed in amendments to the social chapter which have been incorporated in the Agreement signed by eleven Member States. The Government could not accept proposals for Treaty change which would have effectively transferred responsibility for many aspects of employment and social policy from national governments, and from individual employers and employees, to the Community. It could not, for example, agree to Community decisions in such broad areas as working conditions by qualified majority voting. In particular, The Government was concerned that this transfer of powers could have led to the imposition on employers and employees in the UK of unnecessary and damaging legislation which could have increased employers' costs, undermined the competitiveness of British firms and industry, and harmed employment and employment prospects."

It is not really possible to put a figure on the costs which the UK would incur if we did sign up to the Social Policy Agreement. Eric Forth, Minister of State at the Department for Education and Employment, has explained:

> "It is not possible to put an exact figure on the costs of the draft social chapter proposed at Maastricht because it is a mechanism for legislating rather than a body of legislation. However, there can be no doubt that accepting the social chapter would lead to legislation being imposed in the UK which would adversely affect public finances. Most important, the costs of public sector employers would be increased and the flexibility and competitiveness of British business reduced so that jobs would be lost and tax revenue reduced."[12]

Nevertheless, the government has tried to estimate the costs in Compliance Cost Assessments (CCAs) attached to individual proposals which have, in different forms, been referred to the Social Policy Agreement procedures. For example, an Explanatory Memorandum on one version of the Draft European Works Council Directive, issued in November 1991,[13] said that the costs would be "considerable" and that "one large company [had] pointed to costs of £500,000; another up to £1,000,000." A CCA on a version of the Draft Directive on the burden of proof in sex discrimination and equal pay cases estimated that its compliance cost would be "in the range of £5.0 - £5.5 million per year."[14] A CCA on a version of the Draft Directive on part-time and temporary workers suggested that the costs to employers of

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12 Eric Forth, HC Deb 14 July 1995, c 831W

13 Dept of Employment Explanatory Memorandum on COM (91) 345, 18 November 1991

14 Dept of Employment Supplementary Explanatory Memorandum, 21 October 1993, on EC Doc 6703/88, COM (88) 269

complying with the proposals "could range from £1.25 billion to almost £1.5 billion."[15] A CCA on a version of the Draft Directive on parental leave suggested that the costs to employers "could range from £700 million to £2.3 billion per annum depending on whether or not an allowance is payable and the level of that allowance."[16] However, these sort of estimates are very speculative, depending entirely on the assumptions made. Other assumptions lead to quite different conclusions. For example, research for the Equal Opportunities Commission in the mid 1980s on the cost of parental leave suggested the real cost to industry would be "between £10 and £15 million at 1985 prices."[17]

In direct contrast to the government, the Labour party and the trade unions would argue that productivity is increased by a well-motivated and secure workforce; that competitiveness is therefore enhanced; and that our exclusion from raised levels of employment protection could make us the "sweatshop" of Europe. Neil Kinnock, responding to John Major's statement on the outcome of the Maastricht summit, said:

> "How can the Prime Minister claim to be seeking the best deal for Britain when he is determined to get the worst conditions for British workers? By refusing to agree to the social chapter, is not he wanting to exclude British people from the provisions for equal status for 6 million part time employees, many of whom are women; for fair and equal treatment for women at work; from proper protection for young people at work; for rights to minimum holiday leave; and for better information for employees? He claims that those decent basic provisions for individual employees, whether they are in or out of trade unions, would inhibit competitiveness. But how does he answer his fellow Conservatives like Herr Kohl and Mr Eyskens of Belgium, who says:
>
> > "It is a fact that the most competitive countries in Europe are also the ones with the best social and employment provision?"
>
> When will the government learn the lesson that civilised standards help efficiency and competitiveness, while exploitation and injustice harm them? When will he listen to the British people, the great majority of whom know that there should be improved and common employees' rights for all Community countries in the single market?
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> After the summit we must ask how the Prime Minister can claim to be at the heart of Europe when, because of his actions, our country is not even part of the key decisions that will shape the Europe of the future. Our country's interests cannot be served by isolation or opt out. They will be served by

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15 Dept of Employment Supplementary Explanatory Memorandum on the proposal for a directive on non-standard employment, 16 November 1993

16 Dept of Employment, Supplementary Explanatory Memorandum on the proposal for a directive on parental leave, 7 December 1993

17 *Personnel Management*, October 1994, "Cost of paternity leave could be nominal, employers told."

> maximising influence, full involvement and insistence on the best standards. That is how a Labour government will serve the British people."[18]

These arguments about the impact of deregulated labour markets on employment and competitiveness are difficult to resolve since evidence can be found to support either point of view (see, for example, items 16 - 19 in Part VI). In any case, there is another argument which says that our exclusion from the Social Chapter will have little practical effect because we are already covered by so much EC social legislation that we are having to adopt many minimum standards whether we like it or not (see Part V and the Annex). This line of argument also suggests that the EC will try to bring forward any new measures under procedures which do not exclude the UK: that a future Labour government may take us into the Social Chapter (and, hence, any legislation adopted without our input in the intervening years): and that the "globalisation" of business creates economic pressures for convergence regardless of political moves.

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[18] HC Deb, 11 December 1991, c 863

IV How long will the opt out last?

The European Commission is anxious to end the UK's opt out and will raise this during the 1996 Inter Governmental Conference (IGC) to revise the Treaty. In a document,[19] issued on 10 May 1995, which represents the Commission's first contribution to the Reflection Group[20] which has started to prepare for the IGC, the Commission accepts that some countries require longer than others to adjust to certain policies, but argues that this must be done:

> "within a single institutional framework and must centre on a common objective..... Permanent exemptions such as that now applying to social policy, which in the last analysis have had the effect of excluding the Social Charter from the Treaty, create problems, as they raise the prospect of an *à la carte* Europe, to which the Commission is utterly opposed. Allowing each country the freedom to pick and choose the policies it takes part in would inevitably lead to a negation of Europe."

The report also refers to the Social Policy Agreement as "a dangerous precedent for the operation and the cohesion of the Union insofar as all the Member States do not share the same objective."

Padraig Flynn, the Social Affairs Commissioner, has suggested that the Social Charter should be incorporated in the Treaty and that the range of issues it covers should be extended to include:

- the right to free association
- the right to an adequate level of physical and mental health
- the prohibition of discrimination between EU citizens and non-EU citizens legally resident in the Member States; and
- the right to non-discrimination on grounds of race, colour, sex, religion, age and disability.

He argues, as have others before him, that Europe's citizens should have "real and tangible guarantees that the process of integration and economic and monetary union will be pursued on behalf of, and not at the price of, a better quality of life for all." His view is that "there

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19 SEC (95) 731, *Report on the Operation of the Treaty on European Union*, as reported in *European Industrial Relations Review* 257, June 1995

20 See Library Research Paper 95/76 for further information on the Reflection Group

will be no economic union, no monetary union and certainly no political union, unless there is social union."[21]

The European Parliament has also advocated an end to the UK opt out in its official contribution to the Reflection Group.[22]

The Conservative government has no intention of supporting such proposals[23] and as changes to the Treaty require unanimity they cannot be forced upon us. The Labour[24] and Liberal Democrat[25] parties are both committed to signing up to the Social Chapter so a change of government before the conclusion of the IGC could result in the early end of our opt out. This would have to be agreed and ratified by all fifteen Member States as an amendment to the Treaty. It is also possible that a legal challenge could be mounted to the opt out on either non-discrimination or competition grounds. Michael Gold, in an article for the *National Institute Economic Review* raises the question:[26]

> "Could there be grounds for objecting that the UK stay-out is unconstitutional? This is undoubtedly an immensely complex legal question, but there do appear to be two sets of grounds *prima facie* for arguing it could be so.
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> First, there appears to be a contradiction between measures adopted by the eleven, which exclude the UK, and the principle of non-discrimination of workers. British employees will not enjoy the same rights at work as their counterparts in other EC member states and will not therefore benefit from equal protection before the European Court of Justice. Such a circumstance would also appear to conflict with the notion of citizenship of the European Union developed at Maastricht and written into the new Treaty.
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> Second, the stay-out arguably infringes EC competition policy. This question was raised by Vitor Martins, the Portuguese Secretary of State for European Integration and President of the Council, when he addressed the plenary session of the Economic and Social Committee at the end of January. The signing of the Social Protocol, he said, risked putting the eleven at a

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21 Speech to European Parliament, 22 May 1995, reported in *European Industrial Relations Review 257*, June 1995

22 Reported in *European Industrial Relations Review*, 258, July 1995

23 See, for example, Michael Portillo, HC Deb, 13 June 1995, c 581: "The social chapter of the Maastricht Treaty would have reduced firms' competitiveness and destroyed jobs. That is why we could not - and will not - accept it."

24 *Make Europe work for you*, Labour's Election Manifesto for the European elections, June 1994, says: "The next Labour government will immediately sign the Social Chapter."

25 *Unlocking Britain's Potential*, Liberal Democrat European Election Manifesto, June 1994, says: "Liberal democrats would.....reject Britain's Social Chapter 'opt out'. "

26 February 1992, "Social Policy: the UK and Maastricht"

competitive disadvantage in relation to the UK, an abnormal situation which would require a solution."

V Current Issues in European Social Policy

As the Social Chapter only came into effect in November 1993, and as its procedures are lengthy, our opt out has so far had few practical implications. However, the large body of EC law already adopted under the social provisions of the main Treaty has had, and is still having, a significant effect on UK employment legislation. This section describes some of the more controversial areas where EC law is having, or could have, an impact in the UK.

A. Working Time

Proposals for a Directive on Working Time were originally published in September 1990.[27] These proposals were much amended and, on 23 November 1993, the Council of Ministers finally adopted the *Directive on the Organisation of Working Time*.[28] Amongst other things, the Directive imposes:

- a limit of 48 hours on the working week
- a limit of 13 hours on the working day
- a limit of 8 hours on night work
- an entitlement to 4 weeks' paid annual leave

However, there are many derogations and exemptions from these provisions (many of which were achieved by the UK in negotiations on the proposals). For example, the transport sector, work at sea and doctors in training are completely excluded from the Directive and other groups are excluded from some of the provisions or permitted to observe them in a flexible manner. The European Commission has indicated its intention of seeking to remove some of these exemptions. Its "Medium Term Social Action Programme, 1995-1997", published in April 1995, announced that:

> "during 1995, discussions with the social partners and/or studies will continue on how best to ensure that the activities and sectors excluded from the directive on the organisation of working time are appropriately covered (transport, sea fishing, inland waterways, civil aviation, sea transport, doctors in training and other work at sea). If necessary, the Commission will consider bringing forward proposals to complete the working time directive in 1996-97."

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27 EC Doc 8073/90, COM (90) 317

28 Dir 93/104/EC

The Directive is due to be implemented in the UK by 23 November 1996, but the UK Government has challenged its legal base in the European Court of Justice. The Directive was adopted by qualified majority vote under Article 118A (health and safety) of the Treaty of Rome. The Government argues that as many of its provisions are concerned with working conditions, not health and safety, it should have been brought forward under a different Article requiring a unanimous vote in favour.

Further details of the Directive and the issues surrounding it are contained in Library *Research Paper 94/52*, dated 1 April 1994.

B. Maternity Leave and Pay

Proposals for a Directive on Maternity Leave and Pay were first published in September 1990.[29] After many amendments (again often made to accommodate UK objections), the *Directive on the Protection at Work of Pregnant Women or Women who have recently given Birth*[30] was adopted by the Council of Ministers on 19 October 1992. It was also brought forward under Article 118A. Amongst other things, the Directive requires that:

- all women, regardless of length of service or hours of work, should be entitled to 14 weeks' maternity leave. Two weeks of this leave must be compulsory

- women must be paid an "adequate allowance", equal at least to sick pay, during their maternity leave; but it is possible to restrict payment of the allowance to women with at least one year's service

- employers must make an assessment of the risks to health and safety of pregnant and breastfeeding women and take appropriate action to remove any risks identified

The Directive had to be implemented in the UK by 19 October 1994 and it has been. The implementing legislation is contained in:

- *Trade Union Reform and Employment Rights Act 1993*, sections 23 - 25 (maternity leave)

- *Maternity Allowance and Statutory Maternity Pay Regulations 1994 SI No 1230* (maternity pay)

- *Social Security Maternity Benefits and Statutory Sick Pay (Amendment) Regulations 1994 SI No 1367* (maternity pay)

- *Maternity (Compulsory Leave) Regulations 1994 SI No 2479* (maternity leave)

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29 EC Doc 8792/90, COM (90) 406

30 Dir 92/85/EEC

- *Management of Health and Safety at Work (Amendment) Regulations 1994 SI No 2865* (health and safety)

- *Suspension from Work (on Maternity Grounds) Order 1994 SI No 2930* (health and safety)

C. Young Workers

Proposals for a Directive on the Protection of Young People at Work were first published in March 1992.[31] After many amendments (some of which gave special treatment to the UK), the *Directive on the Protection of Young People at Work*[32] was adopted by the Council of Ministers on 22 June 1994. The Directive defines **young people** as people under the age of 18; **children** as young people under the age of 15 or who are still subject to compulsory full-time schooling under national law; and **adolescents** as young people aged at least 15 but under 18 who are no longer subject to compulsory full-time schooling under national law. The Directive's main provisions are:

- there is a general prohibition on the employment of children, but there are exemptions for children engaged in cultural, artistic, sporting or advertising activities; children aged 14 or over engaged in work experience or training programmes; and children aged 13 or over engaged in light work

- where employment of young people is permitted, it must be subject to rigorous health and safety standards

- the working hours of children must be restricted to:

  - eight hours a day or 40 hours a week for those engaged in training or work experience schemes

  - two hours on a school day and 12 hours a week during term-time, outside school attendance times. In no circumstances may the daily working time exceed seven hours, except in the case of children who have reached the age of 15, in which case, the limit is eight hours

  - seven hours a day and 35 hours weekly in the school holidays (eight and 40 respectively for children over 15)

- the working hours of adolescents must be limited to eight hours a day and 40 hours a week

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31 EC Doc 5378/92, COM (91) 543

32 Dir 94/33/EC

- night work by children between the hours of 8pm and 6am, and by adolescents between the hours of 10 pm and 6 am (or 11pm and 7 am), is prohibited

- children must have a minimum rest period of 14 consecutive hours, and adolescents a rest period of 12 consecutive hours, in each 24 hour period

- young people must be given a break of 30 consecutive minutes where the working time exceeds four and a half hours

This Directive is due to be implemented in all Member States by 22 June 1996, but the UK government secured what it calls a "renewable option"[33] not to apply some of its provisions (including the term-time limits on the hours of work of children under school leaving age, the daily working time limits for adolescents, and the night time ban on work by adolescents) until 22 June 2000. The main reason why the UK was so keen to secure this "opt out" was that it wanted to preserve the possibility of children combining daily newspaper delivery rounds with a Saturday job. The present standard UK bye-laws effectively allow children under 15 to work 17 hours a week during term time - an hour before school and an hour after school on each weekday plus 5 hours on a Saturday and 2 hours on a Sunday. Those aged 15 and over can work 20 hours as they are permitted to work for 8 hours on a Saturday. The EC Directive reduces the maximum working week for children during term-time to 12 hours. This would allow a morning newspaper round of an hour to be combined with a Saturday job, but would not cover both morning and evening rounds plus a Saturday job.

Another reason for the "opt out" was that the UK only repealed legislation restricting the hours of work of adolescents as recently as 1989.[34]

D. European Works Councils

The European Commission has a long history of trying to introduce compulsory procedures for involving workers more in the running of their companies, which can be traced back at least to the Draft Fifth Directive on Company Structure and Administration proposed in 1972[35] and the Draft "Vredeling" Directive on Procedures for Informing and Consulting Employees in Large National and Multinational Firms proposed in 1980.[36] In December 1990, the Commission approved the text of a new Draft Directive on the establishment of European Works Councils.[37] The UK government was strongly opposed to any attempts to

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33 HC Deb, 24 June 1994, c358

34 *Employment Act 1989*

35 OJC 131, 13 Dec 1972, p. 49. EC Doc R/2128/72, COM (72) 887

36 OJC 297, 15 Nov 1980, p.3. EC Doc (4378) 1073/80, COM (80) 423

37 EC Doc 4466/91, COM (90) 581

introduce compulsory works councils and was able to veto this and subsequent proposals because it had been brought forward under Article 100 of the Treaty of Rome which requires unanimous support. At a Social Affairs Council on 12 October 1993, it was agreed that the proposals should be re-introduced under the Social Protocol provisions excluding the UK. These proposals were the first to be considered under these new procedures and, so far, the only ones to have been adopted. It was not possible to reach agreement among the social partners, so, in April 1994, a Draft Directive on European Committees for informing and consulting employees was issued.[38]

On 22 September 1994, the Social Affairs Council finally adopted the *Directive on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community- scale groups of undertakings for the purposes of informing and consulting employees*.[39] As the Directive was adopted under the Social Policy Agreement, it applies in all Member States except the UK.

The main points of the Directive are summarised below:

- The Directive requires undertakings within its scope to establish a European Works Council or another procedure for informing and consulting employees. [Article 1]

- It covers undertakings or groups of undertakings with at least 1,000 employees located within the EU-14 states and at least one establishment employing a minimum of 150 workers each in two of these Member states. It applies within the EU-14 to multinationals with their headquarters located in the UK, or, indeed, anywhere else in the world. Employees in the UK or in any other country outside the EU do not count towards the 1,000 and 150 thresholds. [Articles 2 and 3]

- The responsibility for establishing European Works Councils or alternative procedures lies with the central management of the undertaking. Action may be taken either on its own initiative or at the written request of at least 100 employees (or their representatives) in at least two undertakings or establishments in two EU-14 states. [Articles 4 and 5]

- A Special Negotiating Body [SNB], composed of at least 3 but no more than 17 employee representatives, elected or appointed according to national law, must be formed to negotiate with central management. Representatives must come from every Member State (EU-14) in which the undertaking has an establishment. The SNB and central management should draw up a written agreement setting out the scope, composition, functions and terms of reference of the European Works Council or alternative procedures. The SNB can also decide by at least two-thirds of the votes not to open negotiations or to terminate those already started. [Article 5]

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38 EC Doc 6230/94, Com (94) 134

39 Dir 94/45/EC

- If it proves impossible to reach agreement within three years, and if the SNB has not taken a decision not to proceed, then the model European Works Council described in the Annex to the Directive will have to be established. [Article 7]

- Member States have two years from 22 September 1994 (i.e. until September 1996) in which to bring in legislation implementing the Directive, or to ensure that management and labour have taken the steps necessary to implement it by agreement. [Article 14]. Undertakings still have three years after implementation in which to negotiate their own arrangements, so there need be no compulsory European Works Councils until September 1999.

- Agreements on multinational consultation valid on the date the Directive comes into force (September 1996 or the date of implementation in a particular country, if earlier) are exempt from its provisions, as are any renewals of such agreements. [Article 13]

It is estimated that at least 140 UK-based companies will have to set up European Works Councils or other procedures under the Directive because of the number of their employees in other EU member States.[40] It is likely that most of these companies will choose not to exclude their UK workforce from any arrangements they make. United Biscuits and BP Oil Europe have already reached agreement on European-level information and consultation arrangements[41] and ICI and Courtaulds Textiles are negotiating EWC agreements covering their UK workforces.[42] UK-based multinationals will also have to consider the fact that it may be better to negotiate their own arrangements now and have them in place before September 1996, just in case the UK ever does decide to join the Social Policy Agreement.

The Medium Term Social Action Programme announced that the draft Vredeling and draft European Works Councils Directives would be withdrawn as a result of this progress under the Social Policy Agreement.

E. Parental Leave

The European Commission originally brought forward proposals for a Directive on Parental Leave and Leave for Family Reasons in 1983.[43] The draft was shelved in 1986 but revived by the Belgian Presidency in July 1993.[44] The proposals were further amended but were always opposed by the UK government. As the proposals had been brought forward under Article 100 of the Treaty of Rome and unanimity was required, the Council decided at its meeting of 22 September 1994 that no further progress could be made and that the proposals

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40 Mark Hall et al., *"European Works Councils: Planning for the Directive"*, Industrial Relations Research Unit, 1995

41 *Industrial Relations Service Employment Trends*, 574, Dec 1994, "First British European Works Councils Established"

42 *European Industrial Relations Review*, 258, July 1995

43 EC Doc 11118/83, COM (83) 686, as amended by EC Doc 10681/84, COM (84) 631

44 Draft attached to Dept of Employment's Explanatory Memorandum dated 7 October 1993, EC Doc 8093/93

would be re-presented under the Social Policy Agreement which excludes the UK. In essence, the proposals[45] would have given all employees (both men and women):

- a right to at least three months' parental leave to be exercised full or part time following a child's birth (i.e. at the end of maternity leave), with the possibility of a year's qualifying period and optional payment of an allowance

- a right to leave for family reasons for a period of at least six months on a part or full time basis, with the payment of an allowance to the employee on leave if temporarily replaced by someone from the unemployment register

- an allocation of 10 days per annum for pressing family reasons

On 22 February 1995, the Commission initiated procedures under the Social Policy Agreement with the publication of a document, *Consultation of management and labour on the reconciliation of professional and family life.*[46] This document seeks to widen the discussion to include such issues as childcare provision and flexible working arrangements as well as the question of parental and family leave.[47] The Medium Term Social Action Programme announced that the draft Directive on Parental Leave and Leave for Family Reasons would be withdrawn at an appropriate stage as a result of these developments. It is thought that the social partners will try to reach a Community-level Agreement on this issue. If they do, it will be the first time this possibility created by the Social Policy Agreement will have been used.[48]

F. Part Time and Temporary Workers

Three Draft Directives on "Atypical" workers were originally published in August 1990[49]. One of these - on the health and safety of temporary workers - was relatively uncontroversial, and was adopted on 25 June 1991.[50] The other two, however, were opposed by the UK government, and, on some points, by other Member States as well. Many revisions were proposed, including the amalgamation of the measures in one draft directive, but agreement could not be reached, and, at the Social Affairs Council on 6 December 1994, the European Commission indicated that it would bring forward new proposals in this area under the Social Policy Agreement which excludes the UK. Briefly, the proposals in their pre-December 1994 form,[51] would have required Member States to ensure that:

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45 As reported in *IDS European Report 398*, February 1995, "Parental leave - only a woman's work?"

46 SEC(95) 276

47 *European Report*, 2019, 25 February 1995, "Social Affairs: Commission Proposal for Broader Parental Leave"

48 *European Industrial Relations Review*, 258, July 1995

49 EC Doc 8072/90, COM (90) 228

50 Dir 91/383/EEC

51 Dept of Employment Explanatory Memorandum, 4 November 1994

- part-time and fixed term workers have no less favourable working conditions than, respectively, full-time workers and those employed on open-ended contracts in a comparable situation. This covered both statutory employment rights and contractual terms such as pay, holidays, occupational pensions and fringe benefits, but excluded statutory social security schemes

- employers provide information about appropriate vacant posts to employees who wish to change their hours or the length of their employment relationship

- part-time and fixed term contract workers are counted towards thresholds where Member States have legislation requiring employees' representative bodies to be established

The Medium Term Social Action Programme announced that these draft Directives would be withdrawn at an appropriate stage as the matter had now been referred to the Social Policy Agreement.

Despite the lack of progress on these proposals, EC law has led to significant changes to UK law on part-time workers. This is because of a House of Lords ruling that aspects of UK employment law were incompatible with Article 119 of the Treaty of Rome (equal pay) and with the Directives on Equal Pay[52] and Equal Treatment.[53] Until very recently, the *Employment Protection (Consolidation) Act 1978* gave certain employment protection rights (notably the right to a redundancy payment and the right to claim unfair dismissal) to people who worked 16 hours or more a week after two years' employment with the same employer. People who worked between 8 and 16 hours a week qualified for these rights after five years' continuous employment; and people who worked less than 8 hours a week did not qualify at all. On 3 March 1994, the House of Lords ruled that this law amounted to indirect discrimination against women as so many more women than men work under 16 hours a week. It was, therefore, incompatible with EC law.[54] The Government eventually laid a Statutory Instrument which amends the *EPCA* to take account of this judgment.[55] It removes all references to hours worked from the Act so that all employment rights now apply equally whatever hours are worked. This amendment to the statute came into effect on 6 February 1995, but the law effectively changed at least on 3 March 1994 and - as EC law takes precedence over UK law - one could say that it had been invalid for many years before that.

In addition, two important cases heard in the European Court of Justice on 28 September 1994 improve the rights of part-timers (as defined by the company concerned) to join occupational pension schemes.[56] Certain Dutch pension schemes had not admitted workers if they worked less than a specified number of hours. The ECJ held that the exclusion of part-timers from

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52 Dir 75/117/EEC

53 Dir 76/207/EEC

54 *Regina v Secretary of State for Employment ex parte Equal Opportunities Commission and Another*

55 *The Employment Protection (Part-time Employees) Regulations* 1995, SI No 31

56 *Vroege v NCIV Instituut voor Volkshuisvesting BV & anor,* ECJ 28.9.94, Case C-57/93. *Fisscher v Voorhuis Hengelo BV & anor,* ECJ 28.9.94, Case C-128/93

an occupational pension scheme contravenes Article 119 of the Treaty of Rome (equal pay) if it can be shown that the exclusion affects a greater number of women than men and that the exclusion cannot be justified by objective factors unrelated to sex. The Government has laid a Statutory Instrument,[57] which came into effect on 31 May 1995, to make the necessary amendments to UK law.

G. Posted Workers

Proposals for a Directive "concerning the posting of workers in the framework of the provision of services" were first published in 1991.[58] They have been much amended since. The purpose of the proposal is to protect workers posted to another Member State by ensuring that certain employment laws in the "host" State (i.e. the one to which they are posted) apply to them. Three types of employment relationship would be covered:

(i) where a worker is temporarily posted to another Member State by a contractor or sub-contractor;

(ii) where an employment agency places a worker temporarily with an undertaking in another Member State; and

(iii) where an undertaking temporarily posts a worker to one of its own establishments or branches operating in a Member State.

In all these cases, the worker does not have a contract of employment with an undertaking established in the country to which he is posted.

The main requirement of the Draft Directive is that legislation (or certain collective agreements or arbitration awards) determining terms and conditions in the host country should apply to the posted worker. These "core" terms cover:

- working time and rest periods
- minimum paid holiday
- minimum rates of pay including overtime
- conditions of hiring out workers

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57 *The Occupational Pension Schemes (Equal Access to Membership) Amendment Regulations* 1995, SI No 1215

58 EC Doc 7322/91, COM (91) 230

- health and safety
- protection of pregnant women, children and young people
- equal opportunities

It was originally proposed that provisions on paid holidays and minimum rates of pay would not apply to postings of less than three months, but the French Presidency reduced this to allow host States to apply the provisions from day one[59].

The UK government is opposed to the Draft Directive on the grounds that it may prove costly to UK business. It also objects to the legal base - Articles 57 and 66 of the Treaty of Rome. These Articles are designed to eliminate obstacles to the provision of services in the Single European Market. The UK government believes the Draft Directive is "anti-competitive and would impede the operation of the Single Market".[60] This legal base only requires a Qualified Majority Vote. It also involves the new co-decision procedure, introduced by the Maastricht Treaty, which gives the European Parliament the power to reject a proposal by an absolute majority of its Members.

The Draft Directive was discussed at Social Affairs Council Meetings on 6 and 21 December 1994, 27 March 1995 and 29 June 1995 but no agreement was reached. Generally, the high wage, labour-importing countries such as Germany, the Benelux countries and France are keen to secure the Directive whilst the lower wage Mediterranean countries and the UK are opposed. Germany is particularly affected as many foreign building workers (including British ones) go to Germany on short term contracts at much lower rates of pay than German workers.

H. Transfer of Undertakings

The so-called *Acquired Rights Directive*[61] was adopted in 1977 and implemented in UK law by the *Transfer of Undertakings (Protection of Undertakings) Regulations 1981* [TUPE].[62] Its purpose was to "safeguard employees' rights in the event of transfers of undertakings, businesses or parts of businesses". Where the Directive or regulations apply:

- the contracts of employment of employees of the transferor (the seller) are automatically transferred to the transferee (the buyer). Thus, employees transferred

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59 Letter from Ann Widdecombe, Minister of State at the Department of Employment, to Jimmy Hood, Chairman of the Commons Select Committee on European Legislation, 23 March 1995

60 Letter from Ann Widdecombe to Jimmy Hood, MP, 29 November 1994

61 Dir 77/187/EEC

62 SI No 1794

from one employer to another continue to receive the same pay and conditions of service and their length of service is not interrupted by the transfer. [Reg 5]. Occupational pension schemes are not covered by the Regulations [Reg 7], although the Government's *Guide to Market Testing*[63] states that pension rights after a transfer should be "broadly comparable" to those enjoyed before

- any collective agreement made between the transferor and a recognised trade union is automatically transferred to the new employer [Reg 6]

- any employee dismissed because of the transfer is considered to have been unfairly dismissed unless the reason for his dismissal is "an economic, technical or organisational reason entailing changes in the workforce" [Reg 8]

- trade union representatives must be informed and consulted before the transfer occurs [Reg 10]

TUPE does not protect terms and conditions for all time. It is open to the new employer, as it would have been to the old, to try to renegotiate terms and conditions and to make employees redundant.

TUPE and the *Acquired Rights Directive* have become controversial as a result of a series of decisions in the European Court of Justice which have established that their application is wider than originally thought. For many years, it was thought that the legislation did not apply to cases of contracting out. Thus, private companies tendering for contracts to perform public services (eg school or hospital cleaning) under Compulsory Competitive Tendering (CCT) or, indeed, voluntary contracting out exercises, were able to submit low tenders based on lower rates of pay, longer hours of work or redundancies. One reason why contracting out was thought to be excluded was that TUPE (though not the Directive) excluded undertakings which were "not in the nature of a commercial venture". Another was that, as there was usually no transfer of stock, premises or equipment when a contract changed hands, it was thought that no "undertaking" was transferred. However, a series of European Court of Justice rulings[64] cast doubt on this interpretation and it has now become clear that virtually all cases of contracting out are covered by TUPE. A recent *Industrial Relations Law Bulletin* article,[65] commenting on two Employment Appeal Tribunal cases,[66] said:

> "The clarity of the reasoning and the extensive guidance given in these two cases is welcome. One consequence of their purposive analysis, however, is that it becomes increasingly difficult to conceive of circumstances in which contracting out or a change in service provider, will *not* be covered by TUPE."

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63 HMSO, 1993

64 *Watson Rask AO v ISSS* [1993] IRLR 133; *Dr Sophie Redmond Stichting v Bartol* [1992] IRLR 366; *Schmidt v Spar und Leihkasse* [1994] IRLR 302

65 *IRLB 515*, February 1995

66 *Council of the Isles of Scilly v (1) Brintel Helicopters Ltd and (2) Ellis and others* [1995] IRLR 6; *Kelman v (1) Care Contract Services Ltd and (2) Grampian Regional Council* [12 May 1994 EAT 992/93]

The Government was, in any case, compelled by an imminent decision of the European Court[67] to amend TUPE[68] so that non-commercial ventures are no longer excluded and to make it clear that transfers effected in two stages and which do not include the transfer of property are covered. This means that transfers of franchises or sub-contracts can be covered.

The UK Government has been trying to persuade the European Commission to amend the 1977 Directive so that transfers of contracts are no longer covered. There are other drawbacks to the Directive (including the obstacles it creates to the rescue of insolvent companies) and, in September 1994, the Commission published proposals for an amendment to the Directive[69]. However, there remain considerable doubts as to whether the proposed amendments would exclude transfers of contracts.

The Department of Employment issued a Consultative Document on the proposed revisions in October 1994. This summarised the "broad aims" of the proposals as intended to:

> "i) add a "transnational dimension" to the information and consultation provisions of the Directive, ie to cover cases where the decision leading to the transfer is taken by a decision-taking centre (eg head office or controlling undertaking) located in another Member State. This would parallel changes already agreed by the Council to the Collective Redundancies Directive;
>
> ii) exclude the transfer of only an activity of an undertaking from the scope of the Directive;
>
> iii) provide greater flexibility in the application of the Directive to transfers of insolvent companies with the aim of ensuring their survival;
>
> iv) incorporate elements of the case law of the ECJ;
>
> v) reflect amendments agreed to the Collective Redundancies Directive by the Council in June 1992."

The key issue as far as contracting out is concerned is the proposal to exclude from the scope of the Directive the transfer of "only an activity of an undertaking" where it is not "accompanied by the transfer of an economic entity which retains its identity".[70] The Government had hoped that the revision would exclude contracting out by explicitly excluding transfers of "activities", but it is not at all clear that the proposed wording will achieve the Government's desires. The Consultative Document says:

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67 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland, 8 June 1994*, Case C-382/92

68 by section 33 of the *Trade Union Reform and Employment Rights Act 1993*

69 EC Doc 9141/94, COM (94) 300 final

70 proposed Article 1 (1)

> "24 The Government welcomes, in particular, the recognition that a distinction needs to be drawn between the contracting out of an activity or service and the transfer of an undertaking to which the Directive applies. The uncertainty which has arisen in this area, giving rise to delay and expensive litigation, is not in the interests of employers or employees. The proposal to clarify the distinction between the transfer of an economic entity which retains its identity and the transfer of only an activity is therefore helpful as a signal of intent, though the present text does not appear to provide the certainty and clarity needed. The Government wishes to be certain that the intended effect of any agreed text on this important point will be clear and not open to a requirement for frequent interpretation which has been such a feature of the present Directive."

Commentators also doubt whether the proposed revisions would make any difference. The IRLB says:[71]

> "The Commission proposes that the transfer of an 'activity' of an undertaking 'which is accompanied by the transfer of an economic entity which retains its identity' would fall within the Directive. By contrast, the transfer only of an activity of an undertaking, business or part of a business, whether or not it was previously carried out directly, would not 'in itself' constitute a transfer as defined.
>
> It appears to us, however, that unless the ECJ were to resile significantly from its current robust approach to defining an 'economic entity', an amendment along these lines would have little or no effect on the potential application of the Directive (and therefore of TUPE) to contracting-out processes."

The fact that in the *Schmidt* case[72] the ECJ ruled that a single person could constitute an "economic entity" and could, therefore, be covered by the Directive supports *IRLB*'s view. It would appear, too, that organisations representing contractors, who have been lobbying hard for a change in the law, are beginning to accept that the proposed revisions will not help them and to advise their members to abide by TUPE.[73]

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71 op. cit.

72 op. cit.

73 *People Management*, 23 February 1995, "Contractors admit defeat in battle over TUPE rights."

I. Consultations with Workers

Two European Community Directives provide for consultation with workers' representatives in the event of redundancies or transfers of undertakings:

- the *Acquired Rights Directive* [77/187/EEC] transposed into UK law by the *Transfer of Undertakings (Protection of Employment) Regulations 1981* SI No. 1794 [TUPE]

- the *Directive on Collective Redundancies* [75/129/EEC] transposed into UK law by Part IV of the *Employment Protection Act 1975* and now consolidated into sections 188-198 of the *Trade Union and Labour Relations (Consolidation) Act 1992* [TULRCA]

The *Acquired Rights Directive*, as explained above, is designed to preserve the terms and conditions of employment of employees who are transferred from one employer to another, for example, when a business is sold as a going concern. It also requires employers to inform and consult with representatives of their employees about impending transfers. The *Directive on Collective Redundancies* requires employers to consult with workers' representatives when large-scale redundancies are contemplated.

In a ruling on 8 June 1994,[74] the European Court of Justice (ECJ) found that UK law did not properly implement these two directives because they:

- imposed a requirement to inform and consult workers' representatives only where the employer chose to recognise a trade union for collective bargaining purposes;

- did not require consultation with worker representatives on prospective transfers to be conducted "with a view to seeking agreement";

- did not provide an "effective, proportionate and dissuasive" penalty for employers who failed to inform and consult;

- in the case of consultation on redundancies, the definition of "redundancies" was too narrow;

- in the case of transfers of undertakings, the Regulations did not cover transfers which were not "in the nature of a commercial venture".

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[74] *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, Cases C-382/92 and 383/92

Some time before the ECJ ruling, the UK government, aware of the likely outcome of the case, had amended UK law to bring it into line with EC law in most respects. These amendments were made by sections 33 and 34 of the *Trade Union Reform and Employment Rights Act 1993* [TURER] and came into effect on 30 August 1993.

TURER failed to address the question of restricting consultation requirements to cases where there was a recognised trade union. The Government will now have to make further amendments on this point to comply with EC law. On 5 April 1995, the Employment Department issued a Consultation Document[75] which described how the Government intended to do this. It means to amend section 188 of TULRCA and Regulation 10 of TUPE so that an employer will be required, at his choice, to consult either a recognised trade union or elected representatives of the affected employees before making redundancies or transferring his business. At the same time, the Government intends relaxing the rules on redundancy consultation. At present, consultation must begin "at the earliest opportunity, and in any event -

> (a) where the employer is proposing to dismiss as redundant 100 or more employees at one establishment within a period of 90 days or less, at least 90 days before the first of those dismissals takes effect;
>
> (b) where the employer is proposing to dismiss as redundant at least 10 but less than 100 employees at one establishment within a period of 30 days or less, at least 30 days before the first of those dismissals takes place."

The Government propose replacing "at the earliest opportunity" with "in good time" and raising the threshold from 10 to 20 redundancies. The employer will be required to consult "at least 30 days before the first redundancy takes effect where, over a 90 day period, 20-99 redundancies are proposed, or at least 90 days before the date of the first dismissal where 100 or more dismissals are proposed."

J. Onus of Proof

Proposals for a Directive on the burden of proof in the area of equal pay and equal treatment for women and men were first published in May 1988.[76] The Draft Directive was discussed at the Social Affairs Council in December 1988 where it was opposed by the UK and others. It then lay dormant until it was revived, with some amendments which rather watered down its impact, by the Belgian Presidency in July 1993. The UK Government still opposes the proposals - on grounds of subsidiarity, disproportionate impact on the UK legal system and potential cost to employers - and has been able to block them as they have been presented under Article 100 of the Treaty of Rome and therefore require unanimous approval. At the

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75 Library Location: Dep 3S 1464

76 EC Doc 6703/88, COM (88) 269

Social Affairs Council on 27 March 1995, it was announced that the proposals would be referred to the Social Policy Agreement procedures which exclude the UK. The Medium Term Social Action Programme announce that the original draft Directive would be withdrawn at an appropriate stage as a result.

The main purpose of the proposals is "to ensure that measures taken by Member States pursuant to the principle of equality between men and women to enable all persons who consider themselves wronged by failure to apply to them the principle of equality to pursue their claims by judicial process after possible recourse to other competent authorities are made more effective" (Article 1). The principal means by which these measures would be made more effective would be by reversing the burden of proof in sex discrimination in employment and equal pay cases.

At present, the basic rule in civil cases in the UK is that the plaintiff, applicant or complainant (usually the employee) has the burden of proving his or her case, although there are cases where the burden of proof is reversed. For example, it is recognised that direct evidence of discrimination can be hard for an applicant to find and case law assists the applicant to a certain extent by allowing Courts to infer discrimination from the circumstances if employers are unable to offer a satisfactory explanation.[77] Moreover, the statutes themselves place the burden of proof on respondents in certain cases. Under section 1(3) of the *Equal Pay Act 1970*, an employer who pays an employee of one sex less than an employee of the other sex employed on like work or work of equal value has the burden of proving that the difference is due to a material factor which is not the difference of sex. Similarly, under section 1(1)(b) of the *Sex Discrimination Act 1975* (which covers indirect discrimination), a respondent who applies to a women a requirement or condition which has a disproportionate and adverse effect on women has the burden of proving that it is justifiable irrespective of sex. Finally, the European Court of Justice in the case of *Enderby v Frenchay Health Authority* [Case C-127/92] observed that, although the onus of proof lies on the complainant, the burden will shift at a certain stage to the employer to disprove discrimination where this is necessary in order to avoid depriving employees of effective means of enforcing the principle of equal pay.[78]

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77 Report from the House of Lords Select Committee on the European Communities on *"Burden of Proof in Sex Discrimination Cases"*, HL Paper 76, 1988/89, paras 5-8

78 *Financial Times*, 2 Nov 1993, "Employers must justify unequal pay"

VI Further Reading

1. Library Research Note 90/56, 26 July 1990, *"The Social Charter"*

2. Library Research Paper 93/78, 19 July 1993, *"The Maastricht Debate: Resolutions on the Social Protocol"*

3. Debate on a Resolution on government policy on the adoption of the Social Protocol, HC Deb 22 July 1993, cc 521-613.

   During the passage of the *European Communities (Amendment) Bill 1993*, which amended the *European Communities Act 1972* to take account of the Maastricht Treaty, the Government accepted an Opposition amendment requiring resolutions of both Houses of Parliament on the UK Social Protocol opt out before the legislation could come into force. The Opposition voted against the Resolution because it opposed the UK opt out, while some Conservative MPs also voted against because they opposed other aspects of the Maastricht Treaty. The Government was defeated by 8 votes. However, this decision was effectively overturned the following day when the Government linked a Resolution on the Social Protocol to a confidence motion.

4. Debate on a Resolution on government policy on the adoption of the Social Protocol, HL Deb 22 July 1993, cc 797-894

5. European Commission, *"Green Paper: European Social Policy: Options for the Union"*, EC Doc 10401/93, COM (93) 551, 17 November 1993

6. European Commission, *"Communication concerning the application of the Agreement on social policy"*, EC Doc 4075/94, COM (93) 600, 14 December 1993

7. Dept of Employment, *"European Commission's Green Paper on European Social Policy. The United Kingdom Response*", April 1994, PL 951

8. Labour Party, "*Jobs and Social Justice: Labour's response to the Green Paper on European Social Policy"*, 1994

9. European Commission, *"European Social Policy. A way forward for the Union. A White Paper"*, EC Doc 9069/94, COM (94) 333, 27 July 1994

10. European Commission, *"Medium Term Social Action Programme, 1995-1997"*, 11 April 1995, EC Doc 6827/95

11. *Industrial Relations Journal*, Summer 1992, "Two speed ahead: social Europe and the UK after Maastricht" by Brian Towers

12. *Industrial Relations Journal*, Autumn 1992, "Maastricht: a fundamental change in European labour law" by Brian Bercusson

13. *Common Market Law Review 30: 481-513, 1993*, "Social Policy after Maastricht" by Philippa Watson

14. Michael Gold (ed), *"The Social Dimension: Employment Policy in the European Community"*, 1993

15. *Comparative Labour Law and Industrial Relations*, Spring 1995, "The Implementation of the Protocol and Agreement on Social Policy of the Treaty on European Union" by Brian Bercusson and Jan Jacob van Dijk

16. Low Pay Unit, *"Deregulation: Britain pays the price"*, January 1994

17. Institute of Directors, *"Employment Policy in the European Community: Lessons from the USA.. A Research Paper for the IOD by Charles Hanson*", 1995

18. *Employment Gazette*, February 1995, "Progress towards a flexible labour market"

19. *Times*, 13 February 1995, "Flexibility faces jobs test"

20. Library Research Paper 94/51, 31 March 1994, "*Qualified Majority Voting: the Argument and the Agreement*"

21. Library Research Paper 95/76, 20 June 1995, "*Towards the IGC: Enter the Reflection group*"

Annex Employment rights derived from EC law

EC law has had a profound influence on UK employment law over the last 15 years. The list of rights which owe something, if not everything, to EC law which follows is not comprehensive, but it illustrates the point:

- protection of terms and conditions of employment when a business changes hands - *Transfer of Undertakings (Protection of Employment) Regulations 1981* which implemented the *Acquired Rights Directive 77/187/EEC*

- reinforcement of the principle of equal pay for work of equal value - *Equal Pay (Amendment) Regulations 1983* which amended UK law to take account of the European Court of Justice (ECJ) ruling in *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (1982)*

- requirement that employers set equal retirement ages for men and women - *Sex Discrimination Act 1986* which amended UK law to take account of the ECJ ruling in *Helen Marshall v Southampton and South West Hampshire Area Health Authority (1986)* [Case C-152/84]

- extension of scope of *Sex Discrimination Act 1975* to cover enterprises employing fewer than six people and employment in private households - *Sex Discrimination Act 1986* which amended UK law to take account of the ECJ ruling in *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (1983)*

- equalisation of upper age limit for redundancy payments for men and women at 65 or normal retiring age for the job, whichever is lower - *Employment Act 1989* which amended UK law to take account of an Employment Appeal Tribunal Ruling in *Hammersmith and Queen Charlotte's Special Authority v Cato (1989)* that discriminatory upper age limits breached the *Equal Treatment Directive 76/207/EEC*

- right to 14 weeks' maternity leave regardless of length of service or hours of work - *Trade Union Reform and Employment Rights Act 1993* which implemented the *Directive on the Protection at Work of Pregnant Women or Women who have recently given Birth 92/85/EEC*

- extension of right to written particulars of employment to all employees who work at least 8 hours a week and reduction in the time period in which the statement must be given from 13 weeks to 2 months - *Trade Union Reform and Employment Rights Act 1993* which implemented the *Directive on an Employer's Obligation to Inform Employees of the Conditions Applicable to the Contract of Employment Relationship 91/533/EEC*

- protection against dismissal for "whistleblowing" on health and safety issues extended to all regardless of length of service and hours of work - *Trade Union Reform and Employment Rights Act 1993* which implemented a provision of the *Health and Safety Framework Directive 89/39/EEC*

- extension of *Transfer of Undertakings (Protection of Employment) Regulations 1981* to cover non-commercial ventures and transfers of franchises or sub-contracts - *Trade Union Reform and Employment Rights Act 1993* which implemented (in advance) changes to UK law needed to comply with the ECJ ruling in *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (8 June 1994)* [Case C-382/92]

- improvement in the procedures for consulting workers in the event of collective redundancies or business transfers - *Trade Union Reform and Employment Rights Act 1993* which implemented (in advance) changes to UK law needed to comply with the ECJ ruling in *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (8 June 1994)* [Case C-383/92]

- removal of the upper limit (previously £11,000) on compensation in sex discrimination cases - *Sex Discrimination and Equal Pay (Remedies) Regulations 1993* which amended UK law to take account of the ECJ ruling in *Helen Marshall v Southampton and South West Hampshire Area Health Authority (No 2) (2 August 1993)* [Case C-271/91]

- removal of upper limits on compensation for race discrimination in Great Britain and for religious discrimination in Northern Ireland - *Race Relations (Remedies) Act 1994* and the *Fair Employment (Amendment) (Northern Ireland) Order 1995*. These were not strictly necessary to comply with EC law but the government wanted to keep the rules on compensation for discrimination on grounds of race or religion in step with the rules on discrimination on grounds of sex

- extension of employment protection rights such as the rights to claim unfair dismissal and redundancy payments to all workers, regardless of hours worked, after two years service. Previously, people who worked between 8 and 16 hours a week had to serve for five years before qualifying while people who worked less than 8 hours never qualified at all. - *Employment Protection (Part-time Employees) Regulations 1995* which amended UK law to take account of the House of Lords decision in *Regina v Secretary of State for Employment ex parte Equal Opportunities Commission and Another* (3 March 1994) that the previous rules were incompatible with EC law, including the *Equal Treatment* and *Equal Pay Directives*

There are some outstanding Directives which have been adopted by the EC, but which we have not yet implemented in the UK. The two significant ones are:

- *Directive on the Organisation of Working Time Dir 93/104/EC* - this does not have to be implemented by Member States until 23 November 1996. The UK Government has challenged its legal base in the ECJ and does not intend to do anything to implement it until the outcome of the case is known

- *Directive on the Protection of Young People at Work Dir 94/33/EC* - this does not have to be implemented until 22 June 1996 and the UK has an option not to apply some of its provisions until 22 June 2000

Recent papers on related subjects have been:

95/76	Towards the IGC: Enter the Reflection Group
95/36	Progress in the Implementation of Subsidiarity
95/27	Towards the IGC: The Emerging Agenda
95/7	A Minimum Wage
94/115	The 1996 Intergovernmental Conference: Background and Preparations
94/111	Employment and Trade Union Legislation since 1979
94/81	Part Time Workers: House of Lords Judgment
94/80	The Competitive Economy