The Social Chapter

Research Paper 97/102

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This Research Paper explains what the Social Chapter is, how our opt out has worked and how we will opt back in. 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; the onus of proof in sex discrimination cases; equal treatment (positive discrimination); sexual harassment; and equal treatment in occupational social security. 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. This paper replaces and updates Research Paper 96/76.

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* Areas in which measures have been brought forward under the Social Chapter

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, at present, apply in the UK. However, it does apply to UK nationals (or subsidiaries of UK-registered groups) resident in the other Member States.

- The Labour Government elected in the General Election on 1 May 1997 came to power committed to signing the Social Chapter. The Treaty of Amsterdam, agreed at the EU summit on 16 and 17 June 1997, incorporates the Social Policy Agreement into the Treaty of the European Communities, which covers all Member States, including the UK. The Treaty will probably be formally signed in October 1997 and come into force some two years later, once it has been ratified by all Member States. At that time, the Social Protocol will cease to have effect. In the meantime, the UK has been given a seat at the negotiating table so that it will be able to participate in all further discussions under the Social Chapter.

- So far, only two pieces of legislation - on European Works Councils and Parental Leave - have been adopted under the Social Chapter. Others - on sharing the burden of proof in sex discrimination cases and on equal rights for part-time workers - are likely to be adopted soon. Still others - on sexual harassment and worker involvement at a national level - have only recently started their progress through the Social Chapter procedures.

- The European Works Council Directive requires multinational companies with at least 1,000 employees in the EU (excluding the UK, at present) and at least 150 in each of two of those states, to set up Works Councils for the purpose of informing and consulting their employees on a Europe-wide basis. It came into force on 22 September 1996. 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.

- The Parental Leave Directive was agreed between the "social partners" (UNICE, the European employers' organisation; ETUC, the European trade union organisation; and CEEP, the European public service employers body). It gives all employees (men and

women) an individual non-transferable right to three months' unpaid parental leave to enable them to care for a child until a given age up to eight years old. It will come into force on 3 June 1998.

- The UK has undertaken to implement these two directives within two years of the signature of the Amsterdam Treaty or when it enters into force if that is later. So we will probably have legislation on European Works Councils and parental leave by October 1999.

- Despite our opt out, EC law still has a profound influence on UK law in the "social" 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. Part V of this Research Paper gives details of many of these provisions as well as those which have been brought forward under the Social Chapter.

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, with the accession of Austria, Finland and Sweden, 14 Member States are covered. Once the Treaty of Amsterdam, agreed in June 1997, has come into force, the Social Chapter will be re-incorporated within the main Treaty covering all Member States, but this may not be for another year or two.

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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1 Article 2 (1)

- the integration of persons excluded from the labour market, without prejudice to Article 127[2] of the Treaty establishing the European Community"

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]

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2 This refers to vocational training

3 Article 2 (3)

4 Article 2 (6)

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

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 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 (in which case the Commission itself is likely to propose legislation) 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]

So far, only two pieces of legislation have been adopted under these procedures: the *European Works Council Directive*, based on a Commission proposal, in September 1994, and the *Parental Leave Directive*, based on an agreement between the social partners, in June 1996. Two other proposals, on the *Burden of Proof in Sex Discrimination Cases* and on *Part-time Workers*, are very close to adoption. The first of these is based on a Commission proposal and the second on an agreement between the social partners. Two other measures - on *Sexual Harassment* and *National Level Information and Consultation of Workers* - have been referred to the Social Chapter procedures.

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

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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

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
- 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

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8 COM 89 (568) final

9 Social Protocol

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."

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 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)

Proposals have been brought forward on the extension of the working time directive, the right of workers to be consulted on internal company matters and the dignity of men and women at work. (See Part V).

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.

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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*

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.

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."

III What did 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 did not participate in discussion of Social Policy Agreement proposals at Council meetings and UK permanent representatives did 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*, dated December 1993, explains:[11]

> "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 raised many constitutional questions, which are discussed in some of the material listed in Part VI, but are of less importance now the opt out is to be ended.

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

B. Economic Implications

The Conservative government believed that our exclusion from future EC legislation imposing minimum labour standards would help us to create jobs and become more competitive. For 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, said:

> "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 will incur by signing up to the Social Policy Agreement. Eric Forth, when Minister of State at the Department for Education and Employment, 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 Conservative government did try 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;

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

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 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 sorts 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 Conservative government, the Labour party and the trade unions argued 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

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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

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."

> improved and common employees' rights for all Community countries in the single market?
>
> 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 maximising influence, full involvement and insistence on the best standards. That is how a Labour government will serve the British people."[18]

The current Labour Government has concentrated less on the positive economic advantages of signing the Social Chapter and more on the harmful effects of exclusion. For example, Robin Cook, when shadow Foreign Secretary, stressed the importance of a voice at the negotiating table:[19]

> "The Social Protocol of the Treaty on European Union established a framework for setting minimum employment standards. Despite the British opt-out from the Protocol, British companies that do business with the rest of Europe find themselves increasingly affected by its provisions. Britain needs to participate fully in the development of the European Union's social dimension in order to ensure that it meets the requirements of a modern competitive economy. We cannot do so from a position of isolation. We need a voice at the table in order to safeguard our interests:
>
> - European Union social policy should concentrate on establishing a level playing field of minimum standards. It should not be used to impose a large amount of centrally determined social regulation. Respecting the principle of subsidiarity, action at the European level should not seek to replace the policies of member states. Most social measures should continue to be determined nationally.
>
> - Consultation with employers and employees should be central to the development of social policy. As part of an opt-in to the Social Protocol a Labour government would wish to seek the agreement of the social partners on a realistic timetable for implementing its requirements. Future proposals put forward under the terms of the Protocol would be examined in close consultation with industry.
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> - Developments in the social field must take account of the need to maintain and improve competitiveness. Policy proposals should be assessed to determine their impact on competitiveness, as well as their ability to meet

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18 HC Deb, 11 December 1991, c 863

19 Labour Party, *A Business Agenda for Europe*, by Robin Cook, May 1996

> social objectives, before they are subject to consultation. The objective should be to ensure harmony between the development of social policy and the requirements of the labour market."

The Labour Manifesto for the 1997 General Election confined itself to the following promise:

> "Britain to sign the social chapter. An 'empty chair' at the negotiating table is disastrous for Britain. The social chapter is a framework under which legislative measures can be agreed. Only two measures have been agreed - consultation for employees of large Europe-wide companies and entitlement to unpaid parental leave. Successful companies already work closely with their workforces. The social chapter cannot be used to force the harmonisation of social security or tax legislation and it does not cost jobs. We will use our participation to promote employability and flexibility, not high social costs."

The 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 18 - 22 in Part VI). In any case, there is another argument which says that our continued exclusion from the Social Chapter would 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). Moreover, the European Court of Justice ruling on the *Working Time Directive* (see Part V,A, below) raised the possibility that the European Commission would have been able to bring forward many measures as "health and safety" measures, which the UK could not have vetoed, so effectively by-passing the Social Chapter opt-out. At another level, the "globalisation" of business creates economic pressures for convergence regardless of political moves. The convergence is not necessarily in the direction of further regulation. Some business leaders believe it is better for us to be involved in drawing up measures which will probably affect us in the long run whether we are in or out of the Social Chapter. For example, Robbie Gilbert, the CBI's principal adviser on employment policy, has argued in an article in the *Times*, that European attitudes are changing and that other Member States are now much more receptive to arguments about the unwisdom of imposing excessive social costs.[20] A survey published by the Industrial Society in 1995 found that 25% of the managers questioned wanted Britain to withdraw from the opt-out.[21] On the other hand, the Institute of Directors remains firmly in favour of the opt-out[22] and Ian Lang, when President of the Board of Trade, reported that the "overwhelming view" of his contacts with industry was "that acceptance of the social chapter would seriously damage competitiveness and employment because

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20 *Times*, 22 May 1996, "Time to rejoin social policy debate"

21 *Times*, 30 January 1995, "Industry divided on Euro opt-out"

22 *Times*, 25 April 1996, "Social Chapter is given short shrift"

it would allow the United Kingdom to be out-voted on measures imposing unnecessary burdens and costs on businesses."[23]

[23] HC Deb 14 February 1996, c 632W

IV What will opting in involve?

A. Intergovernmental Conference

The Intergovernmental Conference (IGC) to revise the Treaty of Rome began in March 1996 and culminated in the Amsterdam summit on 16 and 17 June 1997 with the agreement of a draft Treaty of Amsterdam.

The European Commission was anxious to end the UK's opt out to prevent the development of an *a la carte* Europe. In its Report for the Reflection Group, which prepared an agenda for the IGC, the Commission accepted that some countries required longer than others to adjust to certain policies, but argued 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."[24]

The report also referred 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." [25]

The Report of the Reflection Group, itself, concluded:

> "We believe that Europe also shares certain social values which are the foundation of our coexistence in peace and progress. Many of us take the view that the Social Agreement must become part of Union law. One of us believes that this would only serve to reduce competitiveness."[26]

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24 *Intergovernmental Conference 1996. Commission Report for the Reflection Group,* May 1995, p 8

25 Ibid, p 70. See Library Research Paper 95/76 for further information on the Reflection Group

26 *Reflection Group's Report*, 5 December 1995, SN 520/95 (REFLEX 21), p IV, First Part, *A Strategy for Europe*

There was, however, a general recognition that as long as the Conservative party remained in power, the UK would not give up its opt out. In its White Paper, "*A Partnership of Nations. The British Approach to the European Union Intergovernmental Conference 1996*", the Conservative Government had said:[27]

> "It is no secret that other Member States wish to see the UK's Social Chapter 'opt-out' removed at the IGC. The Government's position, however, is well known and equally constant. We are not prepared to accept the Social Chapter proposed at Maastricht. The British business community overwhelmingly supported that decision because they share our concern that the Social Chapter would damage competitiveness and destroy jobs. To accede to the Social Chapter could generate a one-way process in which European employment laws were increasingly imposed on the UK. Decisions in this area should be for companies themselves, which are best able to balance the competing objectives of employees, investors, customers and the wider community. They should not be imposed by the European Community. Within the Social Chapter the UK would risk being outvoted on a wide range of possible Directives on work conditions. The potential costs, in money and in jobs, are enormous. The UK will not give up its opt-out and cannot be forced to do so."

On the other hand, the Labour Party had made it clear for many years that it would sign the Social Chapter if returned to power. This was a manifesto commitment for the 1997 General Election (see Part III, B, above). One of Tony Blair's first actions as Prime Minister was to appoint Doug Henderson as Minister for Europe and send him to the Inter Governmental Conference to announce that the UK wished to end the opt out.[28]

B. Treaty of Amsterdam

The way in which our opt-in is being achieved is that the Social Chapter will, in effect, be incorporated within the main Treaty covering all Member States, including the UK. The Social Chapter now forms part of the *Treaty establishing the European Community* (TEC) and is, in fact, Protocol No 14 to that Treaty.[29] The Draft Treaty agreed at Amsterdam in June 1997 contains a new Social Policy Chapter (Chapter 4 - Articles 117-120) which effectively repeats the provisions of the Social Chapter and other TEC social provisions which are not superseded by

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27 Cm 3181, March 1996, para 60

28 *Western Europe Reuter Textline*, 5 May 1997, "EC lawyers study British Govt's Social chapter move"

29 Cm 3151, January 1996, *The Treaty on European Union. The Treaty establishing the European Community*

those in the Social Chapter. There are a few minor changes, described in reply to a PQ as follows:[30]

> "The changes that have been made to the Social Agreement text are intended to: incorporate elements of the existing Articles 117-120 TEC; replace co-operation with co-decision as the mechanism for consulting the European Parliament when legislation is adopted by QMV; allow the adoption by QMV of measures to encourage co-operation between Member States on combating social exclusion; slightly broaden the provisions on equality of men and women."

Treaties cannot be amended without the agreement of all the signatories, but the other Member States were more than happy to agree to the end of the UK opt out. The Amsterdam Treaty will not be formally signed until the autumn, probably in October, when the necessary translations have been made. It will then require Parliamentary approval just as the Treaty of Maastricht required Parliamentary approval as part of the ratification process in 1993. The form of Parliamentary approval will probably be that used in 1992/93 - a Bill amending the *European Communities Act 1972* to give legal effect in the UK to those parts of the Treaty which create legal obligations under the EC Treaties.

All the other Member States will have to ratify the Treaty changes too. This ratification process can be lengthy. Some countries will have to hold a referendum. The Maastricht Treaty was agreed in December 1991 but did not come into effect until November 1993 after it had been ratified by all Member States. Our opt out will not officially end until this ratification process is complete and the new Treaty in force. However, it was agreed at Amsterdam that we could participate in discussions on Social Chapter measures straight away. The Presidency Conclusions stated:

> "The Members of the European Council whose States are party to the Agreement on Social Policy annexed to Protocol 14 to the Treaty on European Union welcome wholeheartedly the decision of the United Kingdom to accede to the social provisions of the new Treaty. They note with great satisfaction the willingness of the United Kingdom to accept the Directives which have already been agreed under the Agreement and those which may be adopted before the entry into force of the new Treaty. The European Council notes that a means will have to be found, in advance of the signature of the Amsterdam Treaty, to give legal effect to these wishes.
>
> In that light, the Members of the European Council whose States are party to the Social Agreement declare that the United Kingdom will now be invited to express its views in discussions on acts to be adopted on the basis of the said Protocol and that the Presidency and the Member States while fully respecting

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30 HC Deb 9 July 1997, c 481W

> the provisions of the aforesaid Protocol as well as those of the Council's Rules of Procedure, will use their best endeavours to reach a solution which takes account of those views.
>
> They also confirm that, if the Treaty of Amsterdam were not to enter into force before 1 January 1998, the Council would be chaired by the Representative of the Government of the United Kingdom for matters falling under the said Protocol during its Presidency in the first half of 1998."

The Treaty of Amsterdam contains two other amendments relevant to the employment field. The first is the addition of an "Employment Chapter" to the Treaty; the second, the introduction of a "non-discrimination clause". Neither of these is covered in this Research Paper.

C. Implementation of Social Chapter Measures in the UK

Only two measures have actually been adopted under the Social Chapter so far - the Directives on European Works Councils and on Parental Leave. Once the Treaty of Amsterdam comes into force, we will have to implement them. The Labour Government has undertaken to implement these two Directives "within two years of the signature of the new Treaty or when it enters into force if that is later."[31] Unless ratification takes a very long time, the UK should have legislation on European Works Councils and parental leave by the autumn of 1999. Details are given in Part V, D and E, below.

EC law can be implemented in the UK either by statute or by subordinate legislation. Section 2(2) of the *European Communities Act 1972* confers a right to implement EC Directives (and ECJ rulings) by Order in Council. Schedule 2 of the Act does impose certain limits on the use of subordinate legislation and makes it clear that any such Order must either be approved by resolution of both Houses of Parliament or subject to annulment by resolution of either House.

Since the Amsterdam summit in June 1997, we have been involved in discussions on the proposed directive on the burden of proof in sex discrimination cases. David Blunkett, Secretary of State for Education and Employment, reporting on the Social Affairs Council on 27 June 1997, said:[32]

> "Today's Council meeting has shown that we were right to commit ourselves to the social chapter and to end the UK's opt out. We are now able to exert a positive influence on social affairs in Europe, and are no longer standing on the outside watching our partners within. Measures that affect British businesses

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31 HC Deb 24 June 1997, c 452W

32 DfEE Press Release, 27 June 1997, *Britain now at the heart of European social affairs - David Blunkett*

> or British citizens in Europe can now be taken only after full and proper consideration by the UK government. We are using our seat at the table to the full.
>
> Today, for example, I have been able to offer UK support for the common position on the burden of proof directive. This directive demonstrates clearly the European Union's commitment to equal opportunities for men and women. By ending the UK's isolation, we have been able to ensure that the directive fully respects UK good practice in this field.
>
> There will be no need for us to change the fair approach which our courts have developed to the burden of proof. This itself proves that our positive approach to Europe pays. I am very pleased that, as a consequence, our proposed changes have been accepted to safeguard British interests."

Now that we are involved in the Social Chapter, we will no longer seek exemption from the financial costs associated with it. Gordon Brown, Chancellor of the Exchequer, announced this in reply to a PQ on 15 July 1997:[33]

> "Article 2 of the Social Protocol says that financial consequences, other than administrative costs, of the Social Chapter, shall not be applicable to the United Kingdom of Great Britain and Northern Ireland. This exemption could be achieved by means of a rebate on the UK's contribution to the EU budget. The Government has decided, however, that pursuing such a rebate in future would be inconsistent with the agreement reached at the Amsterdam Council enabling the UK to participate in Council discussions under the Social Chapter. It has also decided not to seek reimbursement of its contribution to past budget years. The total claim which will be written off as a result of this decision - initially estimated at £1 million for budget years 1995 and 1996 - will be reported in a note to the Consolidated Fund account."

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33 HC Deb 15 July 1997, c 111W

V Current Issues in European Social Policy

As our opt out from the Social Chapter has proved relatively short-lived, it has not had many 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. Measures adopted under the Maastricht Social Chapter and, in future, under the Amsterdam Social Policy Chapter will add to this. This section describes some of the more controversial areas where EC law is having, or could have, an impact in the UK. **Those areas in which measures have been brought forward (in whole or in part) under the Social Chapter are marked with an asterisk (*).**

A. Working Time

Proposals for a Directive on Working Time were originally published in September 1990.[34] These proposals were much amended and, on 23 November 1993, the Council of Ministers finally adopted the *Directive on the Organisation of Working Time*.[35] 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. On 15 July 1997, the European Commission adopted a White Paper which proposed that the Directive should be extended to all non-mobile workers in these sectors and that some of its provisions (e.g. those on paid annual leave) should be extended to mobile workers.[36]

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

35 Dir 93/104/EC

36 *White Paper on Sectors and Activities Excluded from the Working Time Directive*, European Commission, 15 July 1997

The Directive was due to be implemented in the UK by 23 November 1996, but the Conservative Government challenged its legal base in the European Court of Justice (ECJ). The Directive was adopted by qualified majority vote under Article 118A (health and safety) of the Treaty of Rome. The Conservative Government argued that as many of its provisions were concerned with working conditions, not health and safety, it should have been brought forward under a different Article requiring a unanimous vote in favour. On 12 November 1996, the ECJ rejected this argument, stating that:

> "There is nothing in the wording of Article 118a to indicate that the concepts of 'working environment', 'safety' and 'health' as used in that provision should, in the absence of other indications, be interpreted restrictively, and not as embracing all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment, including in particular certain aspects of the organisation of working time."

Further details of the Directive and the issues surrounding it are contained in Library *Research Paper 96/106*, dated 19 November 1996.

The DTI issued a *Consultation Document on Measures to Implement Provisions of the EC Directive on the Organisation of Working Time* on 6 December 1996. Responses were requested by 6 March 1997. The Conservative Government had hoped to get the ECJ ruling reversed at the Amsterdam summit in June 1997, but the Labour Government which replaced them in May 1997 is committed to introducing the Directive "without any further avoidable delay".[37] They are "currently finalising (their) implementation proposals which (they) aim to bring forward shortly".[38] Legislation is expected later this year. This will probably take the form of an Order under section 2(2) of the *European Communities Act 1972.*

B. Maternity Leave and Pay

Proposals for a Directive on Maternity Leave and Pay were first published in September 1990.[39] 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* was adopted by the Council of Ministers on 19 October 1992.[40] It was also brought forward under Article 118A. Amongst other things, the Directive requires that:

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37 Ian McCartney, HC Deb 30 June 1997, c 24W

38 Ian McCartney, HC Deb 23 July 1997, c 664W

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

40 Dir 92/85/EEC

- 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)

- *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)

Briefly, all women are now entitled to fourteen weeks **maternity leave**. In addition, women who have been continuously employed by their employer for at least two years are entitled to a period of **maternity absence** lasting from the end of their maternity leave till the end of the 28th week after the baby is born. Maternity leave cannot start earlier than the 11th week before the expected week of childbirth, so the maximum statutory leave period (i.e. "leave" plus "absence") is 40 weeks (11 weeks before, the week of childbirth and 28 weeks after). A woman who has worked for her employer for 26 weeks at the 15th week before the expected week of childbirth and who earns more than the lower earnings limit for national insurance contributions (currently £62 a week) would qualify for Statutory Maternity Pay of 90% of earnings for the first six weeks and a flat rate benefit (currently £55.70 a week) for the next 12 weeks' absence.

C. Young Workers

Proposals for a Directive on the Protection of Young People at Work were first published in March 1992.[41] After many amendments (some of which gave special treatment to the UK), the *Directive on the Protection of Young People at Work* was adopted by the Council of Ministers on 22 June 1994.[42] 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

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

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

42 Dir 94/33/EC

This Directive should have been implemented in all Member States by 22 June 1996, but the UK government secured what it called a "renewable option"[43] 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.[44]

On 30 October 1995, the Department of Health issued a *Consultation Document* on the *Employment of Children.* This proposed new model bye-laws and a minor change to the primary legislation to implement the changes necessary to bring UK law into line with the EC Directive by 22 June 1996. These are generally minor and non-controversial changes. The consultation document also took the opportunity to propose a *Deregulation Order* under the *Deregulation and Contracting Out Act 1994* to remove the limit of two hours on Sunday working by children without increasing the overall hours they may work in a week. It did not propose any changes to bring UK law on the areas covered by the "opt out" into line with the EC Directive.

The results of this consultation exercise were not published until 25 November 1996.[45] The Conservative Government intended going ahead with most of the proposals made in the Consultation Document. Model bye-laws containing a list of permitted occupations and a two week period free of work during the summer holidays would be drawn up, but they had not been issued before the election. The new Labour government is considering how it intends to proceed and an announcement is expected shortly.

The *Health and Safety (Young Persons) Regulations 1997* No 135, which came into force on 3 March 1997, implement articles 6 and 7 of the Directive. They amend the *Management of Health*

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43 HC Deb, 24 June 1994, c358

44 *Employment Act 1989*

45 Department of Health, letter to local authorities on *Employment of Children*, 25 November 1996

and Safety at Work Regulations 1992 to require risk assessments to cover specified risks (such as inexperience) associated with young people, to provide for parents of school age children to be given information about identified risks and preventive measures, and to prohibit young people from working in jobs with significant risks to their health.

On 7 February 1997, the DTI issued a *Consultation Document on Measures to Implement Provisions of the EC Directive on the Protection of Young People at Work.* This contained proposals to create entitlements for adolescent workers to:

- a minimum rest period of 12 hours for each 24 hour period
- a minimum rest period of at least 36 hours for each 7 day period
- a break from work of at least 30 minutes where daily working time is more than four and a half hours
- free assessment of health and capacities prior to assignment to night work and at regular intervals thereafter.

Responses were invited by 7 May 1997.

*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[46] and the Draft "Vredeling" Directive on Procedures for Informing and Consulting Employees in Large National and Multinational Firms proposed in 1980.[47] In December 1990, the Commission approved the text of a new Draft Directive on the establishment of European Works Councils.[48] The UK government was strongly opposed to any attempts to 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. 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.[49]

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

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

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

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

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.*[50] As the Directive was adopted under the Social Policy Agreement, it applies, for the present, in all Member States except the UK. It was extended to cover the rest of the European Economic Area (Norway, Iceland and Liechtenstein) in June 1995.[51]

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 the other 3 European Economic Area (EEA) states and at least one establishment employing a minimum of 150 workers each in two of these Member states. It applies within these 17 countries 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 EEA 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 EEA-17 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/EEA) 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]

- 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] This restricts the competence of the EWC to matters which affect establishments in at least two different Member States. The

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50 Dir 94/45/EC

51 DTI Press Notice, 26 January 1996, "*UK opt-out saves British Companies from European Works Council Directive*"

EWC's members are to be employees appointed or elected by employees' representatives, or, in the absence thereof, the entire body of employees. There should be between 3 and 30 members, with at least one from every Member State in which the company has an establishment. The operating costs of the EWC are to be met by central management. The EWC will have the right to meet with central management once a year to be informed and consulted on matters relating to " the structure, economic and financial situation, the probable development of the business and of production and sales, the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies." [Annex]

- Member States have two years from 22 September 1994 (i.e. until 22 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 (22 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, regardless of whether we are in or out of the Social Chapter, 113 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 EC/EEA Member States.[52] It is likely that most of these companies will choose not to exclude their UK workforce from any arrangements they make. Some 57 EWC agreements have already been reached in UK companies and all include UK employees. All but 6 are in companies covered by the Directive. *Bargaining Report* lists the agreements as:[53]

- Albert Fisher Group
- Allied Domecq
- APV
- Arjo Wiggins Appleton
- ASW Holdings
- Barclays Bank
- Bass
- BAT Industries
- BICC Cables
- Blue Circle Industries

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52 *Bargaining Report* 167, December 1996, "European Works Councils"

53 ibid

- BOC Group
- BP Chemicals
- BP Exploration
- BP Oil Europe
- BPB Group
- British Airways
- British Steel
- British Telecom
- Bunzi Fine Paper Europe
- Coats Viyella
- Commercial Union
- Compass
- Courtaulds
- Courtaulds Textiles
- David S Smith (Holdings)
- De La Rue
- General Accident
- GKN
- Guiness
- Hanson Brick
- Hanson Electrical
- HSBC (Midland Bank)
- Imperial Chemical Industries
- Imperial Tobacco
- IPT
- Laporte
- Lloyds Register
- Marks and Spencer
- Meyer International
- National Westminster Bank
- Norwich Union
- Pearson group
- Pilkington
- Reckitt and Coleman
- Redland
- Reuters
- RMC Group
- Scottish and Newcastle
- Securicor
- Sedgewick Group
- T&N
- Tate and Lyle
- Tomkins
- Transport Development Group
- Unilever
- United Biscuits
- Zeneca

Now that the Labour Government has agreed to sign the Social Chapter, we will have to introduce legislation applying the Directive to the UK. This is likely to be by October 1999. (See Part IV, C, above). The TUC has estimated that when the UK is covered, a further 127 UK-based parent companies will be brought within its scope, bringing the total for the UK to 240.[54]

It is estimated that some 1,200 companies worldwide are affected by the Directive because of the size and distribution of their European workforce. Of these, some 200 - 250 had set up voluntary EWC agreements by the 22 September 1996 deadline.[55] It is also thought that only six of the 17 affected countries had passed national implementing measures by 22 September 1996. These were Belgium, Denmark, Finland, Ireland, Norway and Sweden.[56] However, Austria, France, Germany, the Netherlands, Greece, Italy and Spain have since adopted the necessary implementing legislation.[57]

*E. Parental Leave

The European Commission originally brought forward proposals for a Directive on Parental Leave and Leave for Family Reasons in 1983.[58] The draft was shelved in 1986 but revived by the Belgian Presidency in July 1993.[59] 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 would be re-presented under the Social Policy Agreement which excludes the UK. In February 1995, the Commission initiated discussions with the European social partners on "the reconciliation of professional and family life". For the first time, the social partners decided to draw up an agreement themselves. The European Trade Union Congress (ETUC), the Union of Industries of the European Community (UNICE) and the European Centre for Public Enterprises (CEEP) signed the *Framework Agreement on Parental Leave* on 14 December 1995, and the *Directive on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC* was adopted at the Social Affairs Council on 3 June 1996.[60]

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54 *European Works Councils Bulletin*, issue 9, May/June 1997, "Opting into the EWCs Directive"

55 *European Industrial Relations Review* 273, October 1996, "EWCs Directive comes into force"

56 ibid

57 *European Works Council Bulletin*, issue 10, July/August 1997, "National implementation of the EWCs Directive"

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

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

60 Dir 96/34/EC

Article 1 of the Directive states that:

> "The purpose of this Directive is to put into effect the annexed framework agreement on parental leave concluded on 14 December 1995 between the general cross-industry organisations (UNICE, CEEP and the ETUC)"

Article 2 requires implementation by 3 June 1998, or, if there are special difficulties, 3 June 1999.

The main points of the framework agreement are:

- all employees (men and women) are entitled to an individual, non-transferable right to a minimum of three months parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, until a given age of up to eight years to be defined by the Member States and/or Social Partners [Clause 2 (1) and (2)]

- detailed qualifying conditions and terms are to be set by legislation or collective agreements in the Member States. For example, eligibility could be restricted to those with a minimum length of service of up to one year; arrangements could be made for part-time or other flexible forms of leave; employers could be permitted to postpone parental leave for operational reasons (e.g. where a replacement cannot be found at short notice or where several workers apply for leave at the same time). In addition, special arrangements may be made "to meet the operational and organisational requirements of small undertakings" [Clause 2 (3)]

- there is no requirement that the leave be paid and all matters relating to social security are left to Member States to decide [Clause 2 (8)]

- Member States and/or Social Partners are required to introduce measures "to entitle workers to time off.....on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable" [Clause 3]

Now that the Labour Government has agreed to sign the Social Chapter, we will have to introduce parental leave in line with this Directive. This is likely to be by October 1999. (See Part IV, C, above). At present, there is no right to parental leave in the UK. However, the Agreement between the Social Partners is very much less prescriptive than earlier versions of the Directive which the UK opposed.

*F. Part Time and Temporary Workers

Three Draft Directives on "Atypical" workers were originally published in August 1990.[61] One of these - on the health and safety of temporary workers - was relatively uncontroversial, and was adopted on 25 June 1991.[62] 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,[63] would have required Member States to ensure that:

- 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

First stage consultations with the Social Partners on a Commission background paper entitled "*Flexibility in working time and security for workers*" were held over six weeks starting on 27 September 1995 and gave rise to 22 replies. Apparently most representatives of employers and employees felt that the basic principle of not discriminating against workers involved in the newest kinds of flexible working hours and guaranteeing them the same working conditions as full-time workers with open-ended contracts should "serve as a guideline for determining specific rules to apply to each kind of employment concerned".[64] As a result, the Commission proceeded to second stage consultations and these were initiated on 17 April 1996. The social partners decided to negotiate an agreement (as they did on parental leave) rather than leaving it to the Commission to draw up legislative proposals.

Negotiations started on 21 October 1996. They were "aimed at defining standards for part-time work, work under fixed-term contract and temporary work".[65] The parties had nine months (ie

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

62 Dir 91/383/EEC

63 Dept of Employment Explanatory Memorandum, 4 November 1994

64 European Information Service, 20 April 1996, "*Internal Market: Social Affairs - second round of talks on working hours and safety at work*"

65 *European Report* No 2167, 19 October 1996, "Negotiations on part-time work to begin on October 21"

until July 1997) in which to reach an accord. Agreement was reached on 14 May 1997 on a measure which, at UNICE's insistence, applies only to part-time work and does not cover other forms of flexible work. The agreement was formally signed by UNICE, ETUC and CEEP on 6 June 1997 and will be submitted to the Council so that it can be made binding by Council Decision.[66] The agreement aims to remove discrimination against part-time employees, encourage the development of part-time working on a voluntary basis, and encourage more flexible working arrangements. It states that Member States may exclude from its provisions those workers employed on a casual basis, and may make access to certain terms and conditions subject to length of service, time worked or earnings qualification, thus providing considerable scope for interpretation by Member States.[67]

On 16 April 1997, the European Commission published a *Green Paper on Partnership for a New Organisation of Work.*[68] This addresses the key question: "how to reconcile security for workers with the flexibility that firms need?" It covers, briefly issues of "atypical" work (including temporary work, contract work and telework) which are becoming increasingly "typical". However, this is very much a consultation document and contains no proposals for legislation.

Regardless of the slow progress on these proposals and the UK's exclusion from the Social Policy Agreement under which they are now being considered, 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[69] and Equal Treatment.[70] Until 1995, the *Employment Protection (Consolidation) Act 1978* [EPCA] 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.[71] The Government eventually laid a Statutory Instrument which amended the EPCA to take account of this judgment.[72] It removed 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.

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66 *European Industrial Relations Review,* 283, August 1997, "Social policy state of play"

67 ibid

68 COM(97) 128 final, 7579/97

69 Dir 75/117/EEC

70 Dir 76/207/EEC

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

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

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.[73] 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 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 laid a Statutory Instrument, which came into effect on 31 May 1995, to make the necessary amendments to UK law.[74]

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.[75] Their purpose was 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. The proposals were the subject of much delay, disagreement and revision before their eventual adoption. The UK government opposed versions of the Directive on the grounds that it could prove costly to UK business. It also objected 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 believed the proposals were "anti-competitive and would impede the operation of the Single Market".[76] 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. Despite the continued opposition of the UK and Portugal, a *Directive on the posting of workers in the framework of the provision of services* was finally adopted at the Social Affairs Council on 24 September 1996.[77] The UK and Portugal voted against, but as it was taken under the qualified majority procedure, they were unable to veto it.[78] States have until 16 December 1999 at the latest to transpose the Directive into national legislation. It will apply in the UK as it was not adopted under Social Policy Agreement procedures.

The Directive will apply to three posting situations

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73 *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

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

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

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

77 *Council Directive 96/71/EC*

78 HL Deb 16 October 1996, c 217W

- when an undertaking seconds an employee from one of its establishments to another in a second member state;

- when one company subcontracts one of its employees to another undertaking in a second member state in order to carry out a contract for providing services;

- when a temporary employment or placement agency hires out a worker to a user undertaking established or operating in a second member state.

Undertakings must guarantee to apply to posted workers certain terms and conditions of employment laid down in the host country by law, regulation or administrative provision. In the building industry, terms laid down in certain collective agreements or arbitration awards must also be applied. The basic terms and conditions which must be applied to the posted worker are:

- minimum rates of pay

- minimum length of annual paid leave

- maximum working periods and minimum rest periods

- equality of treatment for men and women and other non-discrimination measures

- health and safety protection

- measures to protect pregnant women (and those who have recently given birth), children and young people

- conditions for hiring out workers, particularly be temporary employment agencies.

There are some exemptions on pay and holidays for very short or insignificant postings.

H. Transfer of Undertakings

The so-called *Acquired Rights Directive*[79] was adopted in 1977 and implemented in UK law by the *Transfer of Undertakings (Protection of Employment) Regulations 1981* [TUPE].[80] 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:

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79 Dir 77/187/EEC

- the contracts of employment of employees of the transferor (the seller) are automatically transferred to the transferee (the buyer). Thus, employees transferred 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*[81] 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]

- employee 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 (e.g. 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[82] cast doubt on this interpretation and it appeared that virtually all cases of contracting out were covered by TUPE. An article in the

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80 SI No 1794

81 HMSO, 1993

82 *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

Industrial Relations Law Bulletin ,[83] commenting on two Employment Appeal Tribunal cases,[84] 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."

The Government was, in any case, compelled by an imminent decision of the European Court[85] to amend TUPE[86] 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.

There have, though, been some recent ECJ decisions - particularly the *Rygaard* decision on 19 September 1995 and the *Ayse Suzen* case on 11 March 1997 - which suggest that the Court is beginning to adopt a more restrictive definition of a transfer and that the net of TUPE and the Directive is not as wide as many had supposed.

The UK's Conservative Government had for some time been trying to persuade the European Commission to amend the 1977 Directive so that transfers of contracts were no longer covered. (The *Suzen* ruling may have achieved this without the need for amendment of the Directive.) 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.[87] However, considerable doubt surrounded the question of whether the proposed amendments would actually 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

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83 *IRLB 515*, February 1995

84 *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]

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

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

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

> 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 was concerned was 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".[88] The Government had hoped that the revision would exclude contracting out by explicitly excluding transfers of "activities", but doubted the proposed wording would achieve this. The Consultative Document said:

> "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."

The proposed new Directive was referred by the Council to the Economic and Social Committee (ESC) in September 1994, and, on 29 March 1995, the ESC adopted an Opinion (by 95 votes to 80) which was highly critical of the draft. It considered that the new proposal did not clear up ambiguities and, by possibly weakening protection in contracting-out cases, might discriminate against women.[89] The proposal was also referred to the European Parliament which passed a

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88 proposed Article 1 (1)

89 See *European Industrial Relations Review*, 256, May 1995, "ESC: Transfer of undertakings revision attacked" - enclosed

Resolution on 18 January 1996 inviting the Commission to consider modifying, rather than replacing, the original 1977 Directive.[90] Specifically, the Parliament wanted Article 1(1) to remain unchanged. This would drop the exclusion of "activities" from its scope, so ensuring that contracting out cases were still covered. Eventually, the Commission agreed to this change so that the European Parliament gave its much delayed Opinion and the Commission was able to proceed to the next stage - the publication of an amended proposal which leaves out the key definitional change.[91]

The main changes proposed in this second revision are:

- The earlier proposal to make it clear that the transfer of only a function or activity did not fall within the Directive's scope unless an "economic entity which retains its identity" has been transferred, has been dropped.

- The requirement to inform and consult employees' representatives would no longer be limited to businesses employing 50 or more employees (as proposed in the first revision). Instead, it would apply to businesses satisfying any size threshold in national legislation for the election or nomination of employee representatives. (There is no size threshold in UK legislation).

- Employee representatives would have to have the "necessary independence" to carry out their functions under the Directive.

- The transferor and the transferee would be made jointly and severally liable for obligations arising from an employment contract which fall due before the date of transfer.

- The use of fraudulent insolvency proceedings as a means of depriving employees of rights provided for under the Directive would be banned.

- There would have to be "effective, proportionate and dissuasive" sanctions in the event of failure to comply with national legislation implementing the Directive.

- Legislation implementing the Directive would have to avoid introducing discrimination "on the basis of race, sex, age, disability, sexual orientation, colour, religion or nationality"

A DTI Explanatory Memorandum on the revised amendment proposals, dated 10 June 1997, sets out the Labour Government's general welcome for the proposed amendments and announces that a full public consultation will be carried out upon them:[92]

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90 Minutes of European Parliament, 18 January 1996, B4-0033/96

91 *Amended Proposal for a Council Directive amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses,* COM(97) 60 final, 24 February 1997

92 *Explanatory Memorandum on European Community Legislation, 5929/97, com(97) 60 final*

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20. The Commission's attempt to address some of the problem aspects of the Directive - which is widely recognised to be in some respects unclear and unsatisfactory - has been generally welcomed and could eventually lead to helpful amendments being agreed that would be of potential benefit to UK employers and employees, in so far as they reduce uncertainty about its application, and improve the effects of this legislation in providing necessary protection for employees and efficiency in the labour market. The Government therefore supports the initiative in principle and will ensure that the UK contributes positively and constructively to ongoing negotiations on the detailed provisions of the proposal. The Government intends shortly to carry out a full public consultation to obtain the views of interested parties before taking firm policy decisions in relation to the detail of these proposals."

I. Consultations with Workers

1. Redundancies and Transfers

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 (Part V, H), 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,[93] 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".

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 was, therefore, compelled to make further amendments on this point to comply with EC law. On 5 April 1995, the Employment Department issued a Consultation Document which described how the Government intended to do this. [94] Minor amendments to the proposals were made as a result of consultation and Regulations implementing the changes laid before Parliament on 5 October 1995.[95] They came into force on 26 October 1995 and apply to redundancies and business transfers occurring on or after 1 March 1996. They were debated in the House of Lords on 24 October 1995[96] and in the House of Commons on 6 February 1996.[97]

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

94 Library Location: Dep 3S 1464

95 *The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations* 1995 SI No 2587

96 HL Deb 24 October 1995, cc 1086 - 1101

97 HC Deb 6 February 1996, cc 197-238

The Regulations 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 relaxed the rules on redundancy consultation so that the "burden" imposed by extending the requirement to consult to non-unionised workplaces would be offset by a reduction in the number of cases to which it applied. Under the previous arrangements, consultation had to begin "at the earliest opportunity, and in any event -

> (a) where the employer was 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 was 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."[98]

Even if only one employee was to be made redundant, there had to be consultation with the recognised trade union, though no timescale was imposed.

The Regulations replace "at the earliest opportunity" with "in good time" and raise the threshold for 30 days' "notice" consultation 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. The Government estimated that by effectively excluding companies employing fewer than 20 people from the duty to consult, 96% of UK businesses would be exempt.[99] Three trade unions - GMB, NASUWT and UNISON - secured leave to apply for judicial review of the Regulations on the grounds, amongst others, that they were incompatible with the EC Directives. However, the High Court dismissed their claims in a judgment issued on 15 May 1996.[100] The unions intend to appeal to the Court of Appeal.[101]

The European Commission has now sent a formal complaint to British government warning that the new Regulations fail to meet all the requirements in the Directives and the ECJ judgment.[102]

*2. Worker Information and Consultation

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98 TULRCA, section 188 (2)

99 DTI Press Notice, 5 October 1995, *"New Regulations on Consultation about redundancies and business transfers"*

100 DTI Press Notice, 15 May 1996, "*Minister welcomes Court decision on Consultation Rights*"

101 *Bargaining Report,* 162, June 1996, "Consulting employee reps"

102 *Financial Times,* 18 October 1996, "Brussels challenges workplace legislation"

In November 1995, the European Commission published a *Communication on Worker Information and Consultation.*[103] Its purpose was to take stock of progress on Community legislation covering worker information and consultation in the light of the adoption of the *European Works Council Directive* by all bar one Member State in September 1994. A number of proposals which included provision for employee involvement (i.e. as members of supervisory boards or boards of administration) had made no progress. These were:

- the proposal for a Council Regulation on the statute for a *European Company*, with an accompanying proposal for a Council Directive on the *Involvement of Employees in the European Company*[104]

- the proposal for a Council Regulation on the statute for a *European Association*, with an accompanying proposal for a Council Directive on the *Involvement of Employees*[105]

- the proposal for a Council Regulation on the statute for a *European Cooperative Society*, with an accompanying proposal for a Council Directive on the *Involvement of Employees*[106]

- the proposal for a Council Regulation on the statute for a *European Mutual Society*, with an accompanying proposal for a Council Directive on the *Involvement of Employees*[107]

- the proposal for a *Fifth Council Directive on the Structure of Public Limited Companies and the Powers and Obligations of their Organs*[108]

Similarly, no progress had been made on the *Vredeling* proposal for a Council Directive on *Procedures for informing and consulting the employees of undertakings with complex structures, in particular in transnational undertakings.*[109] This, though, had been largely overtaken by the *European Works Council Directive*, which does introduce information and consultation (as opposed to involvement) procedures. The Commission felt there was an urgent need for progress on the European Company Statute in particular, and therefore suggested three options as possible ways forward:

Option 1: maintain the *status quo*

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103 EC Doc 11954/95, COM (95) 547

104 COM (89) 268/I and II, amended by COM (91) 174/I and II

105 COM (91) 273/I and II, amended by COM (93) 252

106 COM (91) 273/III and IV, amended by COM (93) 252

107 COM (91) 273/V and VI, amended by COM (93) 252

108 COM (72) 887, amended by COM (83) 185, COM (90) 629 and COM (91) 372

109 OJC 297, 15 November 1980, p 3; amended version, OJC 217, 12 December 1983, p 3

This would involve continuing the discussions on the six proposals mentioned above albeit with "little hope of progress".

Option 2: global approach

This would involve withdrawing the proposed directives on employee involvement annexed to the proposed European Company, Association, Cooperative Society and Mutual Society statutes and the Fifth Directive and Vredeling proposals and replacing them with a general framework on informing and consulting employees. In other words, "a Community instrument on information and consultation at national level would have to be adopted".

Option 3: immediate action on the proposals concerning the statute for a European company, a European association, a European cooperative society and a European mutual society

This could be achieved in one of two ways:

(a) the proposed accompanying directives could be withdrawn, but no European company, association, cooperative society or mutual society would be allowed to be set up in a Member State which had not transposed the *European Works Council Directive* (i.e., at present, the UK); or

(b) unconditional withdrawal of the proposed accompanying directives. This would mean that European companies etc. with their registered offices in the UK would not be subject to the same obligations in the area of transnational information and consultation of employees as those with their registered offices in another Member State.

The UK's Conservative Government launched a consultation on these proposals in February 1996[110] and published its response at the beginning of June 1996.[111] The only option it would accept was Option 3 (b). This would remove one of the UK's major objections to the European Company Statute although "significant difficulties" with the proposal would remain. The response concluded:

> "15 The UK Government's view is that any extension of the existing Community requirements on worker information and consultation is unnecessary and undesirable. In particular it could not accept the establishment of a Community framework for information and consultation at national level. It is very clear from the results of the Government's consultation on the Communication that industry is very concerned about the considerable burdens this would place on UK

110 DTI Press Notice, 1 February 1996, "*DTI launches consultation on EC's Worker Information and Consultation proposals*"

111 HC Deb 5 June 1996, c 457W: Deposited Paper/3 3447

> organisations, severely disrupting the widespread and successful voluntary arrangements which currently exist in the UK.....
>
> 16 The Government remains fundamentally opposed to the separate directives on worker participation linked to the draft Statutes on the European Company, European Association, European Cooperative and European Mutual Society. It will continue to urge the Commission to drop these proposals, although it could not accept any link between their withdrawal and the introduction of a new general instrument on information and consultation. The Government would also strongly object to any attempt to discriminate against the UK by barring these new types of European-level undertaking from having their registered offices in this country....."

At the Social Affairs Council on 24 September 1996, the Commission announced that it would be establishing a high level group to study the issue of national level worker information and consultation, particularly in the light of the slow progress on the European Company Statute.[112] This group - the "Davignon group" - started work in November 1996 and issued its report on 13 May 1997.[113] The report makes it clear that it has only been concerned with forms of worker consultation in "European Companies" (SEs) so its recommendations would only apply to companies which chose this form. Such companies would have to negotiate an appropriate form of worker involvement within three months of approval of the creation of the SE by general meetings of the participating companies. There would be fallback information and consultation rules which would apply if no agreement was reached. Consultation with the social partners on the Communication could serve as the first stage consultation under the Social Chapter if it were eventually decided to refer the matter to these procedures.[114]

On 4 June 1997, the Commission decided to consult the social partners at EU level on the issue of information and consultation of employees at national level.[115] It issued a consultation document as the first stage of consultation under the Social Chapter. This consultation document proposes a general framework to cover worker consultation at national level and argues that the lack of such a framework has reduced the effectiveness of the existing directives on collective redundancies and transfer of undertakings. This consultation is separate from any consultations there might be about the form of consultation appropriate for European Companies, but the issues are clearly related.

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112 *European Industrial Relations Review,* 274, November 1996, "Progress at the September Council"

113 *European Commission Press Release,* 13 May 1997, "Commission welcomes worker involvement final report"

114 *European Industrial Relations Review,* 276, January 1997, "Social Policy State of Play"

115 European Information Service, 4 June 1997, "Worker Consultation: Commission plan for national framework regulation"

*J. Onus of Proof

Proposals for a Directive on the burden of proof in equal pay and sex discrimination cases were first published in May 1988.[116] The Commission originally sought to reverse the burden so that it should be up to employers to prove that they had not discriminated rather than up to employees to prove that they had. The UK always blocked these proposals, which had been presented under Article 100 of the Treaty of Rome and therefore required unanimous approval, on grounds of subsidiarity, disproportionate impact on the UK legal system and potential cost to employers. At the Social Affairs Council on 27 March 1995 they were referred to the Social Policy Agreement procedures which exclude the UK. First stage consultations with the social partners took place in July and August 1995. 20 responses were received. Apparently, "many supported the idea of a Directive, while others opined that a Recommendation would suffice and others were satisfied with national level provisions (despite large discrepancies between Member States)".[117] The Commission decided to modify its proposal so that the burden should be shared, rather than reversed. Second stage consultations began in February 1996 on the proposal that the plaintiff (usually the employee) should initially produce specific and substantial evidence of discrimination, after which the employer would have to prove that he or she did not treat their male and female employees unequally. The social partners decided not to negotiate a framework agreement on this issue, so the ball was back in the Commission's court.

In July 1996, the Commission issued a new proposal for a Directive under which plaintiff and defendant would share the burden of proof.[118] Employees who believe they have suffered from sex discrimination must produce facts from which discrimination may be presumed to exist. It will then be for the employer to prove that there has been no contravention of the principle of equal treatment. The plaintiff (i.e. the employee) will benefit from any doubt which may remain. This proposal is proceeding under the qualified majority procedure of the Social Policy Agreement.[119] The draft directive was discussed at the Social Affairs Council on 2 December 1996 where political agreement was reached. The European Parliament gave its Opinion at its plenary session held on 7-11 April 1997 and political agreement on a common position was reached at the Social Affairs Council on 27 June 1997.[120] Amendments were made at this meeting to ensure that the UK would not need to introduce legislation to formally shift the burden of proof. They ensure that the system developed by the UK Courts for dealing with sex discrimination cases through "inferring" discrimination where a complainant establishes a prima facie case of discrimination to which a

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

117 European Information Service, 10 February 1996, "*Internal Market: Equal Opportunities - Commissions wants burden of proof in sex discrimination shared*"

118 *Proposal for a Council Directive on the burden of proof in cases of discrimination based on sex*, COM(96) 340, 17 July 1996

119 *IDS Employment Europe*, 417, September 1996

120 *European Industrial Relations Review* 283, August 1997, p 2

respondent does not present a satisfactory explanation, does meet the main requirement of the Directive.[121] A DfEE press notice issued on 27 June 1997 states that:[122]

> "The Directive on the Burden of Proof in Sex Discrimination cases requires that, in civil cases where a complainant brings forward evidence which suggests that discrimination has taken place, it is for the respondent to demonstrate, on the balance of probabilities, that discrimination has not taken place. This reflects existing practice in UK Industrial Tribunals and other courts."

The Directive must now be forwarded to the European Parliament for a second reading under the co-operation procedure. Once formally adopted, it should come into force on 1 January 2001.[123]

K. Equal Treatment (Positive Discrimination)

The Commission has issued a draft Directive amending Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.[124]

This Commission proposal for an amendment to the Equal Treatment Directive follows the ruling of the European Court of Justice (ECJ) in the case of *Kalanke v the City of Bremen.*[125] The Land of Bremen had an automatic quota system under which, where candidates of different sexes short-listed for promotion were equally qualified, women were automatically given priority in sectors where they were under-represented (i.e. less than 50%). Kalanke, a man, challenged this system when he was turned down for promotion in favour of an equally qualified woman. Although the German Labour Court found that such a system was legal under German law, it referred the question of its conformity with EC law to the ECJ.

Articles 1(1) and 2(1) of the Equal Treatment Directive provide that there shall be no discrimination whatever on the grounds of sex in relation to employment, including promotion. Article 2(4) allows a limited derogation by permitting "measures to promote equal opportunity for

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121 Letter from Andrew Smith to the Chairman of the Select Committee on European Legislation, 8 July 1997

122 DfEE Press Notice, 27 June 1997, *Britain now at the heart of European social affairs - David Blunkett*

123 *European Industrial Relations Review,* 283, August 1997, p 2

124 COM (96) 93, 7147/96. See also Commission Communication on the interpretation of the judgement of the Court of Justice on 17 October 1995 in Case C-450/93, *Kalanke v Freie Hansetadt Bremen*, COM (96) 88, 7061/96.

125 Case C450/93, 17 October 1995

men and women, in particular by removing existing inequalities which affect women's opportunities....". The ECJ ruled that "national rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive." There was some concern that the ruling might endanger the type of "positive action" measures (e.g. training courses specifically for women in areas such as engineering where they were significantly under-represented) which Article 2(4) was designed to allow. The EC Commission therefore proposed an "interpretative amendment" to make it clear that positive action measures short of rigid quotas are permitted by EC law.

The draft directive would add to Article 2(4) an explanation of permissible discrimination: "Possible measures shall include the giving of preference, as regards access to employment or promotion, to a member of the under-represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case."

The Conservative UK government was opposed to the draft directive. It believed that the ECJ stated the law correctly in *Kalanke* and that there was no need for any clarification. It was concerned that the proposed amendment might allow reverse discrimination (i.e. favouring a man or a woman solely on the grounds of their sex) and did "not believe that such discrimination would be widely acceptable in the UK".[126] It is also not clear whether the amendment is permissive (i.e. would allow Member states to use positive action) or mandatory (i.e. would require them to use positive action).

The draft has proved quite controversial and a majority of members at the Social Affairs Council held in Luxembourg on 17 April 1997 held that there was no need for amendments to the Directive.[127]

*L. Sexual Harassment

On 27 November 1991, the European Commission adopted a *Recommendation on the protection of the dignity of women and men at work* which was accompanied by a *Code of Practice on*

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126 DfEE Explanatory Memorandum on EC Communication on *Kalanke*, COM(96) 88, 12 June 1996

127 *European Industrial Relations Review* 280, May 1997, "Slow progress at April Council"

measures to combat sexual harassment[128]. These were endorsed by the Council of Ministers in a *Declaration* on 19 December 1991[129]. The Code defines sexual harassment as:

> "unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work."

The Code points out that sexual harassment may be contrary to Articles 3,4 and 5 of the *Equal Treatment Directive*[130] and to provisions of national law. However, it is mainly aimed at employers and recommends a series of policies and procedures designed to prevent sexual harassment from occurring and to deal with it if it does. The Council Declaration invites Member States to develop policies which would implement the Code of Practice in their own countries. The Department of Employment issued a leaflet, *"Sexual Harassment in the Workplace. A guide for employers"* in 1992 and other organisations, such as the Institute of Personnel Management and the Equal Opportunities Commission have done likewise[131]. The Department of Employment leaflet makes it clear that:

> "In certain circumstances sexual harassment may be unlawful, and under the Sex Discrimination Act 1975 employers may be vicariously liable for the actions of their employees unless they can prove they took such steps as were reasonably practicable to prevent the employees doing the act or acts complained of.
>
> In the worst cases, sexual harassment may be a criminal offence."

In July 1996, the Commission published an evaluation of legislation against sexual harassment in the Member States and of the action taken to give effect to the Recommendation and Code of Practice.[132] This found that while progress had been made, legislation was generally inadequate and a comprehensive approach was needed to establish and maintain workplaces free of sexual harassment. The Commission therefore sought the views of management and labour on the question of whether further action was appropriate, whether it should be at national or European level, whether it should be by means of legislation or collective agreement, and what its main elements should be. This proved to be the first stage of consultation with the social partners under the Social Chapter. On 20 March 1997 the Commission launched the second stage of the

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128 OJ C 27/4 - 27/11, 4 Feb 1992

129 *Council Declaration of 19 December 1991 on the implementation of the Commission recommendation on the protection of the dignity of women and men at work including the code of practice to combat sexual* harassment, 92/C 27/01

130 76/207/EEC

131 Institute of Personnel Management, *"Statement on Harassment at Work", 1992.* Equal Opportunities Commission, *"Consider the cost.....Sexual Harassment at work", "Sexual Harassment. What you can do about it", "Sexual Harassment - how to deal with it",* 1994

132 *Consultation of Management and Labour on the Prevention of Sexual Harassment at Work,* COM(96) 373, 24 July 1996

consultation. The social partners have yet to decide whether they wish to negotiate an EU-level framework agreement.[133]

M. Equal Treatment in Occupational Social Security

A Directive amending the Equal Treatment in Occupational Social Security Directive 86/378/EEC was adopted at the Social Affairs Council on 2 December 1996.[134] The amendments to the Directive were necessary to bring it into line with the *Barber* judgment in the ECJ that occupational pensions were deferred pay and should therefore be equal between men and women under Article 119 of the Treaty of Rome.[135] When the Directive was originally adopted in 1986, it was not thought that Article 119 covered pensions so the Directive specifically allowed certain aspects to include unequal treatment. In practice, the UK Government has already amended our law - by the *Pensions Act 1995* and associated Regulations - so that it conforms with the *Barber* judgment. We shall not, therefore, need to take any further action to implement the Directive.

133 *European Industrial Relations Review*, 283, August 1997, p 27

134 HC Deb 4 December 1996, c 681W

135 *Barber v Guardian Royal Exchange Assurance Group*, 17 May 1990

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. European Commission, *Social Policy: National Implementation Measures: Situation at 1st January 1996*, 1996

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

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

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

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

16. *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

17. *Comparative Labour Law and Industrial Relations*, Winter 1995, "EC Labour Law: The Softly, Softly Approach" by Jeff Kenner

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

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

20. Institute of Directors, *Social Europe: the economic implications of current European social policy*, 1996

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

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

23. DTI, *The Social Chapter: the British and Continental Approaches*, September 1996 (booklet)

24. *European Industrial Relations Review* 272, September 1996, "Social rights, social policy and the revision of the Treaty"

25. Employment Policy Institute Economic Report, *Europe's Social Chapter: to sign or not to sign?*, February 1997

26. *Labour Research*, June 1997, "Wind of change across Europe"

27 Library Research Paper 97/83, 25 June 1997, *The Amsterdam Treaty*

28. *European Industrial Relations Review,* 283, August 1997, "Social Policy under the Treaty of Amsterdam"

29. *European Industrial Relations Review,* 283, August 1997, "Social Policy state of play"

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. Three significant ones are:

- *Directive on the Organisation of Working Time, Dir 93/104/EC* - this should have been implemented by Member States by 23 November 1996. The UK Conservative Government mounted an unsuccessful challenge to its legal base in the ECJ. The Labour Government now intends to implement it "without any further avoidable delay".

- *Directive on the Protection of Young People at Work, Dir 94/33/EC* - this should have been implemented by 22 June 1996 but the UK has an option not to apply its more contentious provisions until 22 June 2000

- *Directive on the Posting of Workers in the framework of the provision of services, Dir 96/71/EC* - this does not have to be implemented until 16 December 1999.

Two Directives adopted under the Social Chapter procedures which exclude the UK, but which the Labour Government has undertaken to implement, probably by October 1999, are:

- *Directive on the establishment of a European Works Council or a procedure in Community-scale undertakings for the purposes of informing and consulting employees, Dir 94/45/EC*

- *Directive on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, Dir 96/34/EC*

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