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Gavin Barrett

### Delivering a Community Employment Law: A Tale of Two Mechanisms

Paper for presentation at the Irish European Law Forum, January 2007

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**Gavin Barrett**

**DELIVERING A COMMUNITY EMPLOYMENT LAW:  
A TALE OF TWO MECHANISMS**

**Abstract:** Although much of the present-day focus on governance in the social policy field tends to focus on ‘new’ methods of governance such as the Open Method of Coordination, more well-established instruments of governance continue to merit our attention. This paper focuses on two instruments of classic Community governance in the social policy field – viz., the use of the social dialogue and classic Community legislation. The paper begins with some useful context-setting by discussing the elusive consensus that has surrounded Community social policy, a reality which has presented both difficulties and opportunities. The so-called process of ‘bargaining in the shadow of the law’ is then examined – in other words, the evolving role of social dialogue in Community social policy. The deployment of the classic ‘Community method’ is also looked at, with various reflections offered on the experience of one prominent example of legislation in the social policy field - the Acquired Rights Directive. Finally some reflections on national implementation of Directives are offered, based on study of the Irish Implementation of the Acquired Rights Directive – reflections which may be of value in considering the true worth not only of classic Community legislation but also that of the social dialogue process when this gives rise to Community directives.

Keywords: social policy, community governance, social dialogue, community legislation, Acquired Rights Directive

JEL classification: K31

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# **DELIVERING A COMMUNITY EMPLOYMENT LAW: A TALE OF TWO MECHANISMS**

Gavin Barrett\*

## **I. ELUSIVE CONSENSUS: COMMUNITY SOCIAL POLICY**

Consensus between member states of the European Union on the appropriate general direction of European social policy has always tended to be difficult to reach. Notwithstanding the relative broadening and deepening of Community social policy in recent years, this continues to be so. Freedland's observation (made in 1996) that there is no single clear or accepted policy agenda for employment law in the European Union still rings true—as does Shaw's acknowledgment of the difficulty involved in pointing to common themes in Community social policy.<sup>1</sup>

In some respects Community social policy needs to run (or, perhaps one should say, ought to have run) in order to stand still. The core project of the European Community has, from the time of its inception, been market integration. Community rules aimed at market integration have inevitable redistributive effects—for example, between more and less efficient

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<sup>1</sup> M. Freedland, "Employment Policy" in P. Davies et al, *European Labour Law: Principles and Perspectives*—Liber Amicorum Lord Wedderburn (1996, Clarendon Press, Oxford) and J. Shaw, "Twin-Track Social Europe—the Inside Track" in D. O'Keefe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty* (1994, Wiley, Chichester) both of which are quoted in P. Syrpis "The Integrationist Rationale for European Social Policy" in J. Shaw (ed.), *Social Law and Policy in an Evolving European Union* 17 at 17.

member states, regions, industries and enterprises—and inevitable consequences for those who work in affected enterprises or industries. The question of how (and indeed whether) the Community should respond to the redistributive effects of its own policies is one which poses itself.

In practice, even when the Community has decided to react by intervening in the employment law field, difficulties in bringing about any Community response have tended to abound. Market integration is a project which for long has been seen to be capable of being achieved—and indeed to a large extent has been achieved—by negative integration (i.e., the outlawing of national rules which prevent the creation of a single European market). Such negative integration is a process which is well capable of being destructive of national rules on social protection.<sup>2</sup> In theory such national rules can be replaced by equivalent European-level norms, protecting the same social interests as were formally protected at national level, but the reality is that negative integration (involving the judicial condemnation of national rules hampering the operation of a European single market, absent any justification deemed adequate for such rules) is far easier to achieve than the arduous work of positive integration (involving the creation of common standards and legal frameworks) in any policy field.

Indeed, particular considerations applying to social policy make the task of positive integration in this field even more difficult. Social policy is an area in which integrationist pressures must compete both (i) with arguments regarding the retention of sovereignty by member states in a whole range of areas touched upon by Community social policy, and (ii) with ideological objections relating to e.g., the appropriate role of regulation in governing the employer-employee relationship—objections which would be themes for debate even were social policy to be regulated entirely at national level.

Analyses have been offered suggesting arguments as to whether the Community should have a social policy at all, and offering justifications (whether economically-based or rooted in other justifications, such as

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<sup>2</sup> Note, for example, the influence of the famous Sunday Trading cases saga on United Kingdom laws concerning the opening of shops on Sunday, even if those laws were ultimately upheld by the European Court of Justice.

citizenship or human rights) for any such policy, or whether it should rely on regulatory competition between member states in order to establish social standards.<sup>3</sup> The reality, however, has been that the general path of Community social policy, confronted with difficulties such as those mentioned above, has not been decided on by reference to such arguments. Rather, it has trod along a path of least resistance in relation to issues which member states regard, for whatever reason, as sensitive or high-priority topics. The result has been the creation of an ad hoc and somewhat incoherent set of European social policy priorities. These priorities have been usefully characterised by Fitzpatrick as a pyramid, with issues given the highest priority placed at the top of the pyramid and vice versa.<sup>4</sup> In contrast, however, with what would be expected to be the top priorities in a genuine social constitution, (in which the highest priority might be given to the protection of such values as freedom of association and other aspects of collective labour law such as the right to strike, followed (perhaps) by such values as social security law and dismissal law) the EU social pyramid is represented—not inaccurately—as having its higher tiers (where law-making is easiest) dedicated to such issues as worker health and safety, employee information and consultation rights and gender equality law, its middle tiers (typically involving a requirement of unanimous voting for the adoption of norms) dedicated to issues such as social security rights and only its lower tiers (in which positive legislation has sometimes been precluded by Treaty rules<sup>5</sup>) concerned with protection for collective rights such as the right of association and the right

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<sup>3</sup> See for two very useful analyses in this regard, P. Syrpis, *loc. cit.*, and C. Barnard, “Regulating Competitive Federalism in the European Union? The Case of EC Social Policy” both of which are to be found in J. Shaw, *op. cit.*. See also e.g., S. Deakin and F. Wilkinson, “Rights vs. Efficiency? The Economic Case for Transnational Labour Standards” (1994) 23 *ILJ* 289, P. Davies, “The Emergence of European Labour Law” in McCarthy (ed.) *Legal Intervention in Industrial Relations: Gains and Losses* (Oxford, Basil Blackwell, 1992) 344 and such Community documents as the Commission White Paper on Growth, Competitiveness and Employment (COM (93)700).

<sup>4</sup> B. Fitzpatrick, “Converse Pyramids and the EU Social Constitution” in Shaw, *op. cit.*, at 303

<sup>5</sup> Hence Article 137(5) of the EC Treaty.



to strike. In each case the determining factor for the relative level of priority given to these issues is that

the higher up a national pyramid a set of laws reside, the more cherished they are within that system and the greater will be the resistance to their transplantation into equally elevated positions within other legal systems. In the context of European integration, it therefore requires powerful integrative forces to bring about Community competence over the harmonisation of (or even minimum guarantees within) particular areas of law. The ‘tougher’ the area of law and policy, the less likely it is that these integrative forces will be sufficiently powerful.<sup>6</sup>

The result of this at European level has been a pyramid of social values with an intrinsically converse nature, and “neither a recognisable hierarchy of fundamental social rights nor a consistent and coherent system of social law has emerged...”<sup>7</sup>

Poiaras Maduro has pointed out that the development of social rights in the EU “does not come about as a consequence of a political conception of the social and economic protection deserved by any European citizen” and has observed that “redistribution in the EU occurs as a result of ad hoc intergovernmental bargaining and not as a constitutive element of an emerging polity founded upon a social contract which includes a criterion of distributive justice”.<sup>8</sup> The same writer has pointed to the danger that without some agreement on a criterion of distributive justice, any decisions which the EU makes which have redistributive effects “will be

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<sup>6</sup> B. Fitzpatrick, loc. cit., at 311. The ‘toughness’ referred to relates to the concept of ‘tough law’ deployed by Kahn-Freund in his well-known article “On the Uses and Misuses of Comparative Law” (1974) 37 MLR 1 to refer to areas such as collective labour law.

<sup>7</sup> B. Fitzpatrick, loc. cit., at 316.

<sup>8</sup> M. Poiaras Maduro, “Europe’s Social Self: ‘The Sickness Unto Death’” in J. Shaw (ed.), op. cit., 325 at 337 and 342.

seen as a simple reflection of the balance of power in the EU and as lacking general social legitimacy”.<sup>9</sup>

The consequences of the inability to create the consensus necessary to formulate some kind of vision of the social vocation of the European Union may yet be profound. (Poiares Maduro himself has borrowed as a metaphor for what he sees as a refusal of the European Union to discuss its social self, the Danish philosopher Kierkegaard’s notion—developed in a quite different context—of a ‘sickness unto death’.<sup>10</sup>) On the political level, a perception that the contribution of the EU is a negative one in social policy terms seems to have been a significant element of the refusal of the French electorate to endorse the Constitutional Treaty in referendum—an event which serves to underscore, *inter alia*, the political importance which determining the direction of Community social policy has.

All is not doom and gloom for those in favour of an active European social policy, however. Partly in consequence of the tensions in this policy field, and the difficulty in making progress here, the field of European employment law has for long also constituted a testing ground for reconceptualisations both of the methods and of the instruments of governance at European level. Numerous examples can be given. Those interested in the influence of soft law instruments in the law can look to the operation and influence both of the Community Charter of Fundamental Social Rights and, more recently, of the Charter of Fundamental Rights of the European Union. Those interested in the operation (and allegedly centripetal force) of enhanced cooperation can look to the experience of the Community as regards the operation of the Social Policy Agreement and Social Policy Protocol, with the provisions of the Agreement now finding themselves substantively reproduced in the Social Chapter of the EC Treaty. An early and significant example of the

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<sup>9</sup> *Loc. cit.*, at p. 348.

<sup>10</sup> *The Sickness Unto Death: a Christian Psychological Exposition for Edification and Awakening* written pseudonymously by S. Kierkegaard sub. nom. Anti-Climacus, (English translation 1989, Penguin, Harmondsworth). In essence, the idea is one of a human being who refuses to accept the meaning of his of her life.

Open Method of Coordination in action was provided by the Employment Title (Part 3, Title VIII) of the EC Treaty, mandating a coordinated strategy between the employment. And of course, a radical innovation in the field of governance—although by now a well-established one—has been the role given to the process of social dialogue in the Maastricht Social Policy Agreement, with the relevant provisions now found in Articles 138 and 139 of the EC Treaty.

It is intended, in the remainder of this paper, to offer some reflections (of somewhat unequal duration, although perhaps justifiably so) on two of the most significant methods by which EU governance (for which we may read European Community governance) has traditionally been delivered in the social policy field, and to reflect on some of the possibilities and problems associated therewith. The role of the European social dialogue is first examined, followed by an examination of legislation as a policy tool.

Effectiveness—or ‘output legitimacy’, as it has sometimes been termed—is of course a central concern in this paper. However, so too is ‘input legitimacy’ and the question of. For, as Armstrong has observed, “the evolution of EU governance in the field of social policy raises crucial constitutional questions about the range of voices and identities heard in EU decision-making processes.”<sup>11</sup>

## **II. BARGAINING IN THE SHADOW OF THE LAW? SOCIAL DIALOGUE AND COMMUNITY SOCIAL POLICY**

Social dialogue generally may be defined as communication activity involving social partners which is intended to influence the arrangement and development of work-related issues. (In Marxist terminology, it would be referred to as ‘class cooperation’, or more pejoratively as ‘class collaboration’). At European level, it refers to the various discussions, consultations, negotiations and joint initiatives undertaken by the social

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<sup>11</sup> K. Armstrong, “Governance and the Single European Market” in G. de Búrca and P. Craig, *The Evolution of EU Law* (OUP, Oxford, 1999) 745 at p. 771.

partner organisations representing labour, on the one hand, and management on the other. It is a process which has been enshrined in Articles 138 and 139 of the EC Treaty since the coming into force of the Treaty of Amsterdam in 1999, although in reality it has been in existence for far longer than this, since these articles replicate provisions formerly found in the Social Policy Agreement annexed to the Social Policy Protocol annexed to the EC Treaty at Maastricht and in force since 1993.<sup>12</sup> Indeed social dialogue as a process predates even this, deriving its origins from the ‘Val Duchesse’ dialogue between the social partners, which began in 1985 in the chateau of the same name near Brussels, with the enthusiastic encouragement of the Delors Commission and its President.

Betten has referred to the social dialogue as a “quasi neo-corporatist form of social policy law making”<sup>13</sup> and Beirneart has described it as obviously paralleling the Belgian industrial relations system, which provides for similarly systematic consultation of the social partners, and, if wished, the appropriation by them of a dossier via the drawing up of a collective agreement.<sup>14</sup> Social dialogue ensures that management and labour, as the parties most affected by policy initiatives in the employment law field have an input into whether policy steps referred to them should be taken in the first place, and subsequently into the content of any such proposal.<sup>15</sup> Indeed, under the relevant Treaty provisions, should the social partners wish to do so they may actually negotiate the content of the proposal.<sup>16</sup> Considerable autonomy is thus envisaged for the social partners. (Indeed, the input of the social partners into the very design of this arrangement

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<sup>12</sup> Although not for the United Kingdom, at that time.

<sup>13</sup> See L. Betten, “The Democratic Deficit of Participatory Democracy in Community Social Policy” (1998) 23 *European Law Review* 20 at 28.

<sup>14</sup> See W. Beirneart in *Twenty Years of European Social Dialogue* (Directorate-General for Employment and Social Affairs, European Commission, 2006) 16 at 17.

<sup>15</sup> See Article 138 of the EC Treaty.

<sup>16</sup> Article 139 of the EC Treaty.

should not be neglected since the Treaty provisions represent in substance the 1991 agreement which the social partners themselves reached in the Val Duchesse talks on the appropriate role for them in the social policy field, an agreement which was written into the text of the Social Policy Agreement at Maastricht, from whence it found its way into the text of the European Community Treaty at Amsterdam).

Social dialogue exists both in bipartite form (the most familiar version, involving a dialogue only between the social partners, which is what is involved under Article 38 of the EC Treaty) and tripartite form (which involves dialogue not only between the social partners but with public authorities as well, and which is exemplified by the Tripartite Social Summit, which has existed since 2003).<sup>17</sup>

Insofar as legislative output of the social dialogue is concerned (or rather the output of the social dialogue process under Article 138 of the EC Treaty, frequently implemented by way of legislation under Article 139, Bercusson has aptly described this as ‘bargaining in the shadow of the law’, since the parties have to assess whether the result of their bargaining will be more advantageous to them than the unknown content of any alternative EC action.<sup>18</sup>

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<sup>17</sup> This consists of the Presidency of the Council plus the two subsequent Presidencies, the Commission and the social partners, represented at the highest level. (See Council Decision 2003/174/EC of 6 March 2003 establishing a Tripartite Social Summit for Growth and Employment (OJ L 070 31 (14.03.2003)). See in this regard European Commission, Recent Developments in the European Inter-Professional Social Dialogue 2002-3 (Directorate-General for Employment and Social Affairs, 2004) at 12-14).

<sup>18</sup> See generally Chapter 35 of B. Bercusson, *European Labour Law* (Butterworths, London, 1996).

## A. THE QUESTION OF OUTPUT LEGITIMACY

European social dialogue has been described by the Commission as “a unique and indispensable component of the European social model”.<sup>19</sup> It was a process born of the need to make progress in the social field, since serious difficulties were being encountered, at the time of its coming about, in using the traditional method of Community legislation in getting measures of a social nature through the Council of Ministers.<sup>20</sup> It has been referred to (not inaccurately) as “a tool for federalisation in all aspects of economic and social questions”.<sup>21</sup> Parallels can clearly be drawn with the origins of the Open Method of Coordination, which was also born of failure experienced in using certain other methods of cooperation at European level. In terms of its ‘output legitimacy’, there can be no doubt that the social dialogue has enjoyed successes. In terms of legislation, in the close to fourteen years of its existence, cross-industry directives such as the parental leave, part-time work and fixed-term contracts legislation have been adopted, as well as sectoral directives concerning working time both in sea transport and in civil aviation.<sup>22</sup> Thus ‘the shadow of the law’ has in the past (at least on these occasions) seemed to give the social

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<sup>19</sup> See the Commission website at [http://ec.europa.eu/employment\\_social/social\\_dialogue/index\\_en.htm](http://ec.europa.eu/employment_social/social_dialogue/index_en.htm) (18 January, 2007).

<sup>20</sup> See contribution of J. Delors in European Commission, *Twenty Years of European Social Dialogue* (Directorate-General for Employment and Social Affairs, 2006) at 12.

<sup>21</sup> O. Quintin (Director-General for Employment and Social Affairs) in her foreword to *The Sectoral Social Dialogue in Europe* (Directorate-General for Employment and Social Affairs, European Commission, 2003)

<sup>22</sup> Viz., Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) (OJ L 167 33 (2.7.1999)) and Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA) (OJ L 302 57 (1.12.2000)).

partners sufficient incentive to negotiate. And yet a policy-making process such as the social dialogue, which is grounded on consensus between the social partners is clearly subject to major limits as a policy-making tool. Not all policies can be adopted by consensus, and all social policies adopted through this process are by definition subject to the veto of trade unions, and, more significantly in the employment field, employers. Moreover, there are definite limits to which the threat posed by the 'shadow of the law' can impel employers towards the negotiating table in the social dialogue process, since (as with the draft Temporary Workers Directive) it may be clear that insufficient consensus is unlikely to exist at Council level for the adoption of a legislative measure in the area outside the process of social dialogue. The social dialogue has known significant failures in legislative terms. Thus for example, the social partners, although consulted, declined to enter into negotiations on establishing either European Works Councils or a general framework for informing and consulting employees in the European Community, leaving the Community legislative organs to negotiate and adopt both Directive 94/45/EC and Directive 2002/14/EC without them.<sup>23</sup> Further, despite engaging in extended negotiations on the Temporary Workers Directive, they failed to reach any agreement. This failure has to date been more significant than those concerning the European Works Council Directive and the Framework Information and Consultation Directive, as the Temporary Workers Directive has as yet failed to be adopted by the Council using the normal legislative procedure).<sup>24</sup> It may be an exaggeration to describe the social dialogue as 'marking time' or as being

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<sup>23</sup> Directive 2002/14 /EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ L 80/29 (23.3.2002))and Council Directive 94/45/EC of 22 September 1994 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 (OJ L 254/64 (30.9.1994)).

<sup>24</sup> See now amended proposal for a directive of the European Parliament and the Council on working conditions for temporary workers (COM/2002/0701 final)(Brussels, 28 November, 2002).

‘bogged down’<sup>25</sup> but there certainly seems to have been a significant step away from the creation of hard law in its activities in recent years. Thus in the Work Programme of the European Social Partners 2006-2008, the social partners cite as notable achievements in the previous three years the negotiation of “two framework agreements on telework and work-related stress, two frameworks of actions on lifelong learning and gender equality and [the development of] a programme to assist social partners of the new Member States joining in the EU social dialogue. The perception of a necessity to develop the Open Method of Coordination in the social field could be regarded as an implicit admission that existing policy-making tools in the social field—including the social dialogue have been inadequate to achieve the Community’s goals. In recent years much focus has been put on the sectoral aspect of the social dialogue and it is to this topic it is now proposed to turn briefly.

## B. THE SECTORAL ASPECT OF THE SOCIAL DIALOGUE

Less obvious than the cross-industry or inter-professional side of the social dialogue (which has, after all, led to the most significant items of social-dialogue driven legislation, the parental leave, part-time work and fixed-term contracts directives) but by now responsible for much of any dynamism which the social dialogue process manifests is its sectoral aspect. The sectoral side of the social dialogue has seen very considerable development since the Commission established the sectoral social dialogue committees in 1998.<sup>26</sup> By 2005, no less than 31 sectoral dialogue committees were in place. A 2003 Commission document counted the sectoral dialogue as having already given rise to 230 commitments of different types and scale. Although this seems to be the last time such a count was carried out, the number of such commitments has certainly risen

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<sup>25</sup> Criticisms referred to in the contribution of W. Beirnaert in European Commission, *Twenty Years of European Social Dialogue* (Directorate-General for Employment and Social Affairs, 2006) 16 at 18.

<sup>26</sup> See in this regard Commission Communication COM (98) 322 final



very considerably since then.<sup>27</sup> A flavour of the varying natures of the agreements reached by the social partners is given in the text below.<sup>28</sup>

### C. THE INTERACTION OF SOCIAL DIALOGUE WITH OTHER POLICY-MAKING TOOLS (SUCH AS LEGISLATION AND THE OPEN METHOD OF COORDINATION) IN THE SOCIAL POLICY-MAKING FIELD

A feature of social dialogue as a policy-making process has been the level of interaction which its deployment has involved with other policy-making processes, such as legislation or the Open Method of Coordination. The most obvious example of its interaction with legislation is of course provided by the use by the Commission and Council of Article 139 of the EC Treaty to implement both cross-industry and sectoral agreements in the form of directives—viz., the (cross-industry) parental leave, part-time work and fixed-term contracts directives and the (sectoral) directives concerning working time both in sea transport and in civil aviation.<sup>29</sup>

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<sup>27</sup> See for evidence of this the European Commission report, *Recent Developments in the European Sectoral Social Dialogue* (Directorate-General for Employment, Social Affairs and Equal Opportunities, 2005). Note also that the number of sectoral committees has increased since 2003. The Commission web page (accessed in January 2006) asserted the adoption of over 300 joint texts, although if the earlier figure given was correct, this seems likely to be an underestimate.

<sup>28</sup> See the text below under the heading, *The Flexibility of Outcome Provided by the Social Dialogue*

<sup>29</sup> Viz., Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) (OJ L 167 33 (2.7.1999)) and Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA) (OJ L 302 57 (1.12.2000)).

However, cross-fertilisation with the legislative process also takes place in ways other than the social partners simply seeking to influence the Community legislature by having agreements reached by them implemented in the form of legislation. Calls for legislative or foreign policy action, support for existing legislative initiatives and consultation on the content of legislation or the overall direction of Community social policy can also play a role. Thus for example, the sectoral social dialogue process has produced, variously an agreed declaration calling for Community measures ensuring high standards in the private security sector,<sup>30</sup> a joint opinion in support of a Community legislative initiative in the road transport area,<sup>31</sup> the adoption of a clause for inclusion in the protocols to fisheries agreements between the European Union and third countries,<sup>32</sup> a number of joint declarations by the social partners in the construction industry for the Posted Workers Directive,<sup>33</sup> the offering of an (apparently influential) opinion on the draft Community ‘Everything but Arms’ regulation by the social partners in the sugar industry<sup>34</sup> and a common position by the social partners in the footwear industry on the European social agenda.<sup>35</sup> Social dialogue has also provided a means to facilitate the increase of the policy-determining weight of the social

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<sup>30</sup> Agreement of 13 December, 2001 between European Confederation of Security Services and UNI-Europa.

<sup>31</sup> Joint opinion of 2002 by the International Road Transport Union and the European Transport Workers’ Federation.

<sup>32</sup> Adopted in 2001 by the Association of National Organisations of Fishing Enterprises in the EU, the General Committee for Agricultural Cooperation in the EU (Europêche-Cogeca) and the European Transport Workers’ Federation.

<sup>33</sup> European Commission, *The Sectoral Social Dialogue in Europe* (Directorate-General for Employment and Social Affairs, 2003) at 25.

<sup>34</sup> Council Regulation (EC) No 2820/98 of 21 December 1998 applying a multiannual scheme of generalised tariff preferences for the period 1 July 1999 to 31 December 2001 (OJ L 134 1-109 (29.5.2003)). See European Commission, *The Sectoral Social Dialogue in Europe* (Directorate-General for Employment and Social Affairs, 2003) at 40.

<sup>35</sup> *Ibid.*, at 27.

partners and/or to mobilise politically. Hence, for example, in 2001, the relevant partners in the tourism, hotels, restaurants and cafés sector signed a joint declaration on the effects of VAT on activities and employment in this sector and presented joint declarations in favour of a reduced rate of VAT as well as a common position on the Commission communication on tourism.<sup>36</sup> In the railways sector, the social partners concluded a memorandum of understanding with the European Association for Railway Interoperability in order to ensure the involvement of the partners in the drawing up of technical specifications for interoperability.<sup>37</sup>

The social dialogue has also been used in conjunction with the Open Method of Coordination in order to achieve policy goals. The first apparent example of this seems to have been the framework of actions for the lifelong development of competencies and qualifications which was presented by the social partners to the Barcelona European Council in March 2002 (as a contribution to the achievement of the Lisbon strategy) and which identified a number of priorities in the field of lifelong learning. The signatory social parties agreed to implement the framework through an Open Method of Coordination—“in other words by establishing goals or guidelines at European level using the open method of coordination, which are followed up by regular national reports and systematic assessment of progress achieved in their implementation.” By 2005, no less three follow-up reports had been published by the social partners, although the degree of success constituted by this has to be judged in the light of the reality the results achieved by this process seem to have varied very considerably from one member state to another.<sup>38</sup>

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<sup>36</sup> COM (2001) 665 final (13 November, 2001).

<sup>37</sup> See European Commission, *The Sectoral Social Dialogue in Europe* (Directorate-General for Employment and Social Affairs, 2003) at 36.

<sup>38</sup> For the third of these reports, see <http://www.etuc.org/a/901>

#### D. THE FLEXIBILITY OF OUTCOME PROVIDED BY THE SOCIAL DIALOGUE

An extraordinary range of agreed outcomes, both legislative and otherwise, has been given rise to by the process of social dialogue. The flexibility of outcomes which may be given rise to by the social dialogue process constitutes a factor which this process has in common with the Open Method of Coordination. In some respects, the variety of outcomes reflects the variety of circumstances driving such agreements. Thus agreements reached by the social partners may be own-initiative undertakings, or they may stem from the process of consultation by the Commission under Article 138.<sup>39</sup>

In terms of legislation, as has already been noted, cross-industry directives such as the parental leave, part-time work and fixed-term contracts legislation have been the outcome of the inter-professional social dialogue, while the sectoral social dialogue has given rise to directives concerning working time both in sea transport and in civil aviation.<sup>40</sup>

In terms of agreements, the content tends to range from mere general recommendations to commitments to precise action, accompanied by monitoring systems. Included in the gamut of measures which have been agreed under the sectoral social dialogue are (by way of example)

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<sup>39</sup> According to the Commission, they may also stem from the application of Community decisions or directives. See European Commission, *The Sectoral Social Dialogue in Europe* (Directorate-General for Employment and Social Affairs, 2003) at 8.

<sup>40</sup> Viz., Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) (OJ L 167 33 (2.7.1999)) and Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA) (OJ L 302 57 (1.12.2000)).

recommended standards of conduct in the hairdressing industry,<sup>41</sup> as well as the circulation of a teaching CD-ROM aimed at tutors and pupils for the purposes of testing the skills of apprentice hairdressers,<sup>42</sup> an agreed declaration calling for Community measures ensuring high standards in the private security sector,<sup>43</sup> a joint opinion in support of a legislative initiative in the road transport area,<sup>44</sup> voluntary guidelines concerning age diversity and work in the commercial field,<sup>45</sup> agreed guidelines for teleworking,<sup>46</sup> a report on the concept of employability in the railways sector,<sup>47</sup> the publication of a health and safety good practice guide for small- and medium-sized undertakings in the construction sector,<sup>48</sup> common positions concerning the ratification of International Labour

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<sup>41</sup> Agreement reached in 2001 between the International Hairdressing Confederation and the International Hairdressing Union.

<sup>42</sup> The social partners in the sugar sector (viz., the European Committee of Sugar Manufacturers and the European Federation of Food, Agriculture and Tourism Trade Unions) similarly produced a training CD-ROM—the Leonardo kit—which was intended to help prevent industrial accidents. (See European Commission, *The Sectoral Social Dialogue in Europe* (Directorate-General for Employment and Social Affairs, 2003) at 40).

<sup>43</sup> Agreement of 13 December, 2001 between European Confederation of Security Services and UNI-Europa.

<sup>44</sup> Joint opinion of 2002 by the International Road Transport Union and the European Transport Workers' Federation.

<sup>45</sup> Agreement of 11 March 2002 between Eurocommerce and Uni-Europa.

<sup>46</sup> Agreement of February 2001 between UNI-Europa and the European Telecommunications Network Operators' Association.

<sup>47</sup> Report published in November 2001 by a working party from the sectoral social dialogue committee for the railways sector (on the basis of a survey carried out among a number of European railway companies).

<sup>48</sup> Drawn up in December 2002 by the FIEC and the EFBWW\_.

Organisation conventions in the sea transport field,<sup>49</sup> the adoption of a clause for inclusion in the protocols to fisheries agreements between the European Union and third countries,<sup>50</sup> and the offering of an opinion on the Community ‘Everything but Arms’ regulation.<sup>51</sup>

This is to offer but a very small sample—although an illustrative one—of the variety of agreed outcomes which have emerged from the social dialogue process.

There is also at least one sense in which the outcome capable of being produced by social dialogue is variable in a negative sense, however. The Commission’s own estimate is that the rate of coverage by agreements which are not translated into legislation is “approximately 80%” of workers and undertakings, a figure which is partly owed to the incorporation of agreements into business agreements and the use of extension procedures or mechanisms in a significant number of countries. Even accepting this figure, this is significantly smaller than the percentage of workers and undertakings capable (if at times only in a technical sense) of being reached by legislation. In addition, the proportion of workers and undertakings covered varies wildly from one member state to another—from 95% in Austria and Finland to a mere 30% in the United Kingdom.<sup>52</sup>

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<sup>49</sup> Agreed between the European Community Shipowners’ Association and the European Transport Workers’ Federation. See European Commission, *The Sectoral Social Dialogue in Europe* (Directorate-General for Employment and Social Affairs, 2003) at 39.

<sup>50</sup> Adopted in 2001 by the Association of National Organisations of Fishing Enterprises in the EU, the General Committee for Agricultural Cooperation in the EU (Europêche-Cogeca) and the European Transport Workers’ Federation.

<sup>51</sup> Council Regulation (EC) No 2820/98 of 21 December 1998 applying a multiannual scheme of generalised tariff preferences for the period 1 July 1999 to 31 December 2001 (OJ L 134 1-109 (29.5.2003)).

<sup>52</sup> Figures quoted from European Commission, *The Sectoral Social Dialogue in Europe* (Directorate-General for Employment and Social Affairs, 2003) at 6 (in which reliance was made on the report *Industrial Relations in Europe* 2002).

The effectiveness of the social dialogue as a policy-making tool in the absence of implementing legislation under Article 139 must clearly be judged in the light of such figures.

## E. THE SOCIAL DIALOGUE AS AN EVOLVING PROCESS

A feature of the social dialogue process has been its evolving nature. Again, this is something which this process has in common with the Open Method of Coordination. The Commission Communications of 1998 (entitled *Adapting and promoting the social dialogue at Community level*) and 2002 (entitled *The European social dialogue, a force for innovation and change*) were conscious attempts to push this process of development onwards. Thus the former document set out the basis of the establishment, composition and functioning of sectoral social dialogue committees. The latter document aimed at improving existing structures and promoting more effective dialogue, including by reinforcing the role of the ‘liaison forum’, which is a bipartite arena for informing and consulting both sectoral and cross-industry social partner organisations at European level, which meets several times a year at the invitation of the Commission.<sup>53</sup> Numerous significant recent steps in the process of evolution can be pointed out—the establishment, for example, of the ‘liaison forum’ and the establishment of multi-annual work programmes beginning in the period 2003-2005. Were one to look more broadly at the history of the social dialogue, then two, perhaps three distinct periods of evolution could be identified. The first would consist of the period from 1985 to 1993, which marked the beginning of cross-industry social dialogue. The second would be seen as having begun with the coming into force of the Maastricht Treaty and the associated Social Policy Agreement, at which time the possibility of legislative implementation of agreements between the social partners came about. According to the Commission, a third period of evolution, characterised by growth in independence and autonomy of the social partners can be seen to have begun at the Laeken

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<sup>53</sup> *Ibid.*, at 11. The role of the liaison forum was set out in the Commission’s 2002 Communication, *The Social Dialogue, a force for innovation and change* (COM(2002) 341 final).

European Council in 2001 (where the social partners presented a joint contribution) and characterised by multi-annual work programmes and less focus on implementation of agreements through legislation.<sup>54</sup>

## F. A MAJOR ROLE FOR THE COMMISSION

The major role of the Commission is very much reflected in the relevant Treaty provisions concerning the social dialogue. Thus under Article 138 of the EC Treaty, the Commission is given the task of promoting the consultation of management and labour at Community level and of taking any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.<sup>55</sup> It is the Commission which is to consult management and labour on the possible direction of Community action, before submitting proposals in the social policy field,<sup>56</sup> and the Commission which must consult management and labour on the content of the envisaged proposal, should it consider Community action advisable, after such initial consultation (and of course to the Commission that management and labour are required to forward the relevant opinion or, where appropriate, a recommendation).<sup>57</sup> Should the social partners wish to take control of the process, it is the Commission they inform of their wish to initiate the Article 139 procedure. The Commission then has a power of co-decision (with the social partners on whether to extend the usual nine month limit to the duration of Article 139 dialogue.<sup>58</sup>

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<sup>54</sup> See e.g., See European Commission, *Recent Developments in the European Inter-Professional Social Dialogue 2002-3* (Directorate-General for Employment and Social Affairs, 2004) at 6.

<sup>55</sup> Article 138(1) of the EC Treaty.

<sup>56</sup> Article 138(2) of the EC Treaty.

<sup>57</sup> Article 138(3) of the EC Treaty.

<sup>58</sup> Article 138(4) of the EC Treaty.



Agreements reached by the social partners under Article 139 can only be implemented via Council decision if this is “on a proposal from the Commission”.<sup>59</sup>

Of course, the use of social dialogue extends beyond its use to create agreements envisaged in Article 139. Whatever the use to which it is put, however, the Commission, has had in the past—and seems to retain — considerable importance in the development of the dialogue—a point which this policy-making tool has in common with the Open Method of Coordination.<sup>60</sup> Thus, for example, it has been acknowledged from the side of management that the Maastricht Social Policy Agreement—very much the birth certificate of the social dialogue process—“would never have seen the light of day” “if it had not been for the creativity and obstinacy of Jacques Delors”.<sup>61</sup> (Sight should not be lost of the fact that the Val Duchesse process which preceded it from 1985 onwards was also Commission-driven). On a more ongoing basis, the experience of ETUC has been that “the social dialogue has done better whenever the European Commission has maintained a high profile and a strong initiative in the social sphere.”<sup>62</sup> The evolutionary process which the social dialogue has undergone (and which has been referred to in the text above) has been very much supported and assisted by the Commission<sup>63</sup>—and the

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<sup>59</sup> Article 139(2) of the EC Treaty.

<sup>60</sup> Note the precedent for the role of the Commission provided by Monnet’s creation, the Commissariat du Plan, on which, interestingly, both Jacques Delors and Jacques Fournier (then President of CEEP) had worked in 1960s France. (See contribution of J. Fournier in European Commission, *Twenty Years of European Social Dialogue* (Directorate-General for Employment and Social Affairs, 2006) at 19).

<sup>61</sup> See contribution of W. Beirnaert in European Commission, *Twenty Years of European Social Dialogue* (Directorate-General for Employment and Social Affairs, 2006) at 16.

<sup>62</sup> See contribution of E. Gabaglio (former General Secretary of ETUC) in European Commission, *Twenty Years of European Social Dialogue* (Directorate-General for Employment and Social Affairs, 2006) at 15.

<sup>63</sup> As is testified to by the publication of the Commission of its 2002 and 2004 Communications, *The Social Dialogue, a force for innovation and change* (COM(2002)

Commission's role continues to be significant in new forms which social dialogue takes.<sup>64</sup> (Hence, for example, it is the Commission which takes the initiative concerning the meetings of the social partners' liaison forum). And not to be forgotten is the crucial financial support provided for the process of social dialogue by the Commission. Thus for example by 2003 the sectoral social dialogue was being provided with significant financial support by the Commission (totalling over 28 million euro) distributed under three separate budget lines.<sup>65</sup>

### G. THE QUESTION OF INPUT LEGITIMACY—WHO GETS TO NEGOTIATE AND HOW REPRESENTATIVE ARE THEY?

If a question mark is to be put over the social dialogue process, perhaps the obvious place in which to put it concerns its 'input legitimacy'. Thus, for example, under Article 139, nobody but 'management and labour' is given the right to negotiate agreements. Who the representatives of management and labour are is left—subject to not-over rigorous judicial control<sup>66</sup>—to the Commission. In fairness, the Commission appears to

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341 final) and Partnership for change in an enlarged Europe—Enhancing the role of European Social Dialogue (COM(2004) 557 final).

<sup>64</sup> Note for example the Commission role in the sectoral social dialogue committees in preparing meetings, agendas and in following up work previously validated at plenary meetings. (See European Commission, *The Sectoral Social Dialogue in Europe* (Directorate-General for Employment and Social Affairs, 2003) at 11).

<sup>65</sup> Budget line B3-4000 (established to promote development of social dialogue at cross-industry and sectoral levels), B3-4002 (which was intended to fund training and information measures for worker organisations) and B3-4003 (which was aimed in particular at funding measures to strengthen transnational cooperation by workers' and employer's representatives with regard to information and consultation in undertakings operating in a number of member states). See generally European Commission, *The Sectoral Social Dialogue in Europe* (Directorate-General for Employment and Social Affairs, 2003) at 12.

<sup>66</sup> See Case T-135/96 *Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME) v. Council of the European Union* [1998] ECR II-2335 in which

display very considerable sensitivity to the point that representativeness and input legitimacy more generally is key to (if not the Achilles' heel of) the social dialogue in terms of its legitimacy. Such sensitivity manifests itself in the acknowledgment by the Commission that "representativeness is obviously essential for the legitimacy of the social dialogue"<sup>67</sup> and in the fact that whenever an application to set up a committee is made, the Commission sends the social partner organisations involved a questionnaire enabling them to evaluate, inter alia, the level of their own representativeness.<sup>68</sup> It manifests itself in the fact that the Commission commissions continuing research in order to enable it to monitor the representativeness of European social partner organisations.<sup>69</sup> Further, it is to be seen in the fact that the Commission has also established objective criteria which must be met in order for social partner organisations to be considered eligible for consultation viz., that the organisations must (i) be cross-industry, or relate to specific sectors or categories and be organised at European level; (ii) consist of organisations which are themselves an integral and recognised part of Member States' social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible; and (iii) have adequate structures to ensure the effective participation in the consultation

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the Court of First Instance stipulated that it was essential that the signatories of an agreement, taken together, were sufficiently representative to justify the Council converting the agreement into a Directive. The ruling is analysed in E. Franssen and A. Jacobs, "The Question of Representativity in the European Social Dialogue" (1998) 35 CMLRev 1295.

<sup>67</sup> See e.g., the European Commission, *The Sectoral Social Dialogue in Europe* (Directorate-General for Employment and Social Affairs, 2003) at 11

<sup>68</sup> *Ibid.*

<sup>69</sup> See European Commission, *Recent Developments in the European Inter-Professional Social Dialogue 2002-3* (Directorate-General for Employment and Social Affairs, 2004) at 15 and European Commission, *Recent Developments in the European Sectoral Social Dialogue* (Directorate-General for Employment, Social Affairs and Equal Opportunities, 2005) at 5. The relevant research is carried out by the Institute of Labour Sciences at the Catholic University of Louvain and much of it is available at <http://www.uclouvain.be/en-11476.html>

process.<sup>70</sup> Overall, approximately fifty such organisations are said to meet these criteria,<sup>71</sup> but at cross-industry level, the number of players is much smaller: workers are represented at European by the European Trade Union Confederation (ETUC), which represents 77 member organisations in 35 European countries,<sup>72</sup> and has a total of 60 million members.<sup>73</sup> European employers are represented by the Union of Industrial and Employers' Confederations of Europe (UNICE), which represents the employers' organisations of 27 European countries,<sup>74</sup> and by the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP). In practice, the number of parties which have been involved in negotiating European-level agreements seems to have been kept smaller than the number who have been consulted about initiatives in the social policy field.<sup>75</sup>

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<sup>70</sup> The three criteria of representativeness were defined by the Commission in its communication of 1993 (COM (93) 600 final), and taken up again in further communications in 1996 (COM (96) 448 final) and 1998 (COM (98) 322 final). (See Commission social dialogue website at [http://ec.europa.eu/employment\\_social/social\\_dialogue/represent\\_en.htm](http://ec.europa.eu/employment_social/social_dialogue/represent_en.htm)).

<sup>71</sup> Ibid. See for a list of these the annex to the 2002 Commission Communication COM (2002) 341 final.

<sup>72</sup> In addition to eleven European associations of trade unions.

<sup>73</sup> Other trade union bodies operate under the auspices of ETUC, which additionally liaises with certain other European trade union bodies.

<sup>74</sup> The small- and medium-sized enterprises body UEAPME (Union européenne de l'artisanat et des petites et moyennes entreprises) participates in the European social dialogue as part of the UNICE delegation.

<sup>75</sup> According to Betten, in practice, the number of partners who are regarded as capable of concluding agreements is more limited than the number regarded as qualifying for consultation. (See L. Betten, "The Democratic Deficit of Participatory Democracy in Community Social Policy" (1998) 23 *European Law Review* 20 at 30-31. Interestingly, the Commission website describes the circa. fifty organisations having the legitimacy to be consulted in conformity with article 138 of the Treaty as only "possibly" having the legitimacy to enter negotiations (see

Concern about the representativeness of those of the social partners which have actually negotiated agreements has led to (unsuccessful) litigation in the past.<sup>76</sup> The Commission has stressed the embeddedness of both employer and employees representatives in industry in addition to their mandate from their affiliated organisations as providing them with the authority to speak on behalf of employers or the workforce as the case may be.<sup>77</sup> But concern has been expressed by some commentators that although UNICE, CEEP and ETUC are the most representative organisations of their kind, they still can not claim to represent a majority of employers and workers.<sup>78</sup> There is also the broader issue of the non-representation of parties, other than management and (employed) labour who are affected by social legislation. Thus, for example, legislation which creates higher employment for workers may be argued to have

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[http://ec.europa.eu/employment\\_social/social\\_dialogue/represent\\_en.htm](http://ec.europa.eu/employment_social/social_dialogue/represent_en.htm)) and has acknowledged that the requirement of representativeness will be stricter in the case of a negotiated agreement than for a simple consultation. (See European Commission, *The Sectoral Social Dialogue in Europe* (Directorate-General for Employment and Social Affairs, 2003) at 11).

<sup>76</sup> See Case T-135/96 *Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME) v. Council of the European Union* [1998] ECR II-2335. Compare the similarly unsuccessful earlier litigation (concerning appointments to the Consultative Committee of the ECSC) Case 66-76 *Confédération française démocratique du travail (CFDT) v Council of the European Communities* [1977] ECR 305.

<sup>77</sup> See European Commission, *Recent Developments in the European Sectoral Social Dialogue* (Directorate-General for Employment, Social Affairs and Equal Opportunities, 2005) at 6.

<sup>78</sup> See L. Betten, "The Democratic Deficit of Participatory Democracy in Community Social Policy" (1998) 23 *European Law Review* 20 at 32. On the question of representativeness, note also

E. Franssen and A. Jacobs, "The Question of Representativity in the European Social Dialogue" (1998) 35 *CMLRev* 1295.

economic implications for the unemployed. And issues of parental rights affect even ‘non-working’ parents.

It is only fair to note that (as already mentioned in the text above) social dialogue exists both in bipartite form (involving a dialogue only between the social partners, which is what is involved under Article 38 of the EC Treaty) and tripartite form (which involves dialogue not only between the social partners but with public authorities as well). In the latter case, problems of representativeness are less, since the interests of parties not represented by the social partners may be capable of being represented by the public authorities involved. In this regard, it is of interest that so-called tripartite concertation has been taking place since 2003 on both the political and the technical level in relation to macroeconomics, employment, social protection and education and training since the setting up of the Tripartite Social Summit, which, as noted above, consists of the Presidency of the Council (plus the two subsequent Presidencies, the Commission and the social partners, represented at the highest level).<sup>79</sup>

#### H. THE WEAK ROLE OF THE EUROPEAN PARLIAMENT IN THE SOCIAL DIALOGUE PROCESS

Arguably inextricably linked to the question of the legitimacy of the social dialogue process is the minor role accorded to the European Parliament in this process. It is not true to say that the European Parliament is entirely excluded from any role in practice, since it would appear that it is informed about proposals at least when they are at an early stage,<sup>80</sup> and

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<sup>79</sup> See Council Decision 2003/174/EC of 6 March 2003 establishing a Tripartite Social Summit for Growth and Employment (OJ L 070 31 (14.03.2003)). See in this regard European Commission, *Recent Developments in the European Inter-Professional Social Dialogue 2002-3* (Directorate-General for Employment and Social Affairs, 2004) at 12-14.

<sup>80</sup> L. Betten, *loc. cit.*, n. 79 above, at 32, citing the 1993 Commission Communication COM (93) 600. In addition, should the social dialogue process be entirely successful, then legislation adopted by the ‘normal’ route will involve Parliament having its usual role.

also that it is in practice asked its opinion on any social partners' agreement which it is proposed to implement by way of legislation.<sup>81</sup> But these are matters of practice rather than legal entitlement. Officially, "the only institution which represents and is chosen by all the peoples of the EU, is excluded from the legislative process of [Article 139(2)]".<sup>82</sup> The process largely bypasses the European Parliament.

Unsurprisingly, the European Parliament itself has long asked for a power of codecision so that, like the Council, it too could reject or approve any proposal in the social dialogue field.<sup>83</sup> Given that this corresponds to the usual conception of democracy at European level, it seems somewhat anomalous that it is an approach which has not yet been acceded to. Until it is, legitimacy in the parliamentary sense might perhaps be sought in the control by national parliaments of their executives in the Council of Ministers is not addressed in this article. But in reality, very considerable difficulties exist with the exercise of such control in most, if not all, member states.<sup>84</sup> Further, such control will be by definition absent in the case of an outvoted member state, wherever a qualified majority vote is taken to implement an agreement of the social partners by Community legislation (a possibility which exists under Article 139(2) of the EC Treaty). Interestingly, the process of social dialogue has been described from within the Commission as "the product of a long democratic tradition shared by all Member States of the European Union"<sup>85</sup> and the assertion

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<sup>81</sup> See E. Franssen and A. Jacobs, "The Question of Representativity in the European Social Dialogue" (1998) 35 CMLRev 1295 at 1305.

<sup>82</sup> *Ibid.*

<sup>83</sup> See resolution EP T4-0413/1997 of 18 July 1997 (OJ C286 325-338 (22.09.1997))

<sup>84</sup> See in relation to this topic G. Barrett (ed.), *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures* (Clarus Press, Dublin, 2007, forthcoming)

<sup>85</sup> See O. Quintin, Foreword to European Commission, *The Sectoral Social Dialogue in Europe* (Directorate-General for Employment and Social Affairs, 2003) at 3

made that “in an innovative way, the social dialogue forms part of the democratic governance of Europe”.<sup>86</sup> A rights-based vocabulary has also been used, whereby the social dialogue is described as “a component of fundamental social rights”.<sup>87</sup> In some ways, such claims are perhaps not implausible, given the impressively increased involvement of the social partners brought about by the process of social dialogue in determining the rules which are to govern their members. At the same time, it must be acknowledged that whatever democratic legitimacy the social dialogue process has apparently stems (at least to date) from a non-parliamentary concept of democracy.

## I. THE LACK OF TRANSPARENCY

Linked perhaps to the question of representativeness is the question of transparency. Supposedly, law should be made in public. Pressure has increased in recent years for the Council to be more open when it is exercising its law-making role. It may seem curious therefore to have set up—relatively recently—a system which can lead to the adoption of, *inter alia*, Community directives, and yet in which transparency is limited, except perhaps to those directly involved in policy-making in this way.

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<sup>86</sup> European Commission, *The Sectoral Social Dialogue in Europe* (Directorate-General for Employment and Social Affairs, 2003) at 7. Beirnaert asserts that “the Social Dialogue plays a major role in democracy by associating the kinetic forces of the economy with the definition of a socio-economic policy”. See W. Beirnaert, *European Commission, Twenty Years of European Social Dialogue* (Directorate-General for Employment and Social Affairs, 2006) at 18.

<sup>87</sup> *Ibid.*, at 13.



## J. THE LACK OF OPENNESS TO OTHER VOICES ONCE AN AGREEMENT IS REACHED BY THE SOCIAL PARTNERS

The flexibility of the social dialogue process in terms of the outcomes which it is capable of producing has been adverted to in the text above. However, in at least one way the social dialogue process has produced an outcome which is remarkably inflexible—viz., there seems to be little room for input from any other party or institution once agreement has been reached by the social partners. Even the Commission and the Council who are given an express role by Article 139 seem unwilling or unable to use this role in order to amend in any way agreements reached by the social partners. As Franssen and Jacobs note, “it is the social partners who are responsible for the detailed contents of the Directive, as the Council seems to refrain from amending the text and to restrict itself to adopting or rejecting the agreement”<sup>88</sup> This has led to a situation in which “the social partners are absolute masters over the contents of an agreement [but] the Community institutions still decide whether they want to turn those contents into Community law”.<sup>89</sup> This may be seen as linked to the question of representativeness, discussed above, since it means that only the views of the social partners will ever be reflected in a European-level agreement that is converted into Community law under the procedure provided by Article 139.

## K. THE CHALLENGE OF EASTERN ENLARGEMENT

Starting with the EFTA enlargement in 1995, countries acceding to the European Community have had not only had to receive the legislative *acquis communautaire* into their systems, but have also had to incorporate what may be called the social dialogue *acquis* at both sectoral and inter-sectoral level. The May 2004 (and now January 2007) enlargements of the European Community have presented major challenges to the use of the

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<sup>88</sup> Loc. cit., n. 82 above, at 1306.

<sup>89</sup> Betten, loc. cit., n. 79 above, at 33.

social dialogue in the social policy area, *inter alia*, because of the lack of the necessary infrastructure (in the form of properly functioning independent trade union and employer organisations) in many of the former Eastern bloc countries to take part in the social dialogue process. Thus the Commission has referred to

the inherent weakness of structures for bilateral dialogue in most of the acceding countries, in addition to a number of other problems including low and frequently declining rates of unionisation, poor levels of recruitment amongst employers' organisations, fragmentation of the employers' and trade union organisations in some cases, and limited financial resources, all against the backdrop of an unfavourable economic climate.<sup>90</sup>

Problems such as these obviously seriously hinder participation in the European social dialogue process (whether at inter-professional or at sectoral level) by social partners from the newly-acceded member states.<sup>91</sup>

### **III. DEPLOYING THE CLASSIC 'COMMUNITY METHOD': REFLECTIONS ON ONE PROMINENT EXAMPLE OF LEGISLATION IN THE SOCIAL POLICY FIELD—THE ACQUIRED RIGHTS DIRECTIVE**

At the core of Community social policy for much of its existence has been (and in many areas remains) the Community method of legislation. Much of Community social policy is effected via the adoption of legislation,

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<sup>90</sup> European Commission, *Recent Developments in the European Inter-Professional Social Dialogue 2002-3* (Directorate-General for Employment and Social Affairs, 2004) at 24.

<sup>91</sup> Indeed, they cause difficulties even beyond this sphere, since a whole range of Community directives dealing with everything from health and safety to information and consultation now require the involvement of social partners.

normally in the form of a directive (defined as an instrument which “shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”) or, less usually a regulation, (which “shall have general application” and “shall be binding in its entirety and directly applicable in all Member States.”)<sup>92</sup>

A comprehensive comparative analysis of the usefulness of using Community legislation for the purposes of attaining objectives in the social field is a task beyond the aims of this brief paper. It is proposed nonetheless to offer some observations concerning one significant example of the Community method of legislation in the social policy field viz., regarding the Acquired Rights Directive, a measure which has given rise to a volume of European Court of Justice rulings second in the employment field only to that produced by Community equality law and to ask what (if any) lessons can be learned from the experience of having used this legislation as a policy-making instrument in the social field. This is done by examining the operation of the Acquired Rights Directive both from a general perspective and from the particular perspective of the implementation experience of one particular member state—in this case, Ireland—with comments which are founded on the experience of the operation of implementing legislation in this particular country forming the latter part of the text which follows.<sup>93</sup>

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<sup>92</sup> Article 249 of the EC Treaty. Note now in particular Paragraphs (a) to (i) of Article 137(1) of the EC Treaty which lists fields within the area of employment law in which directives may establish minimum requirements for gradual implementation. (See in this regard Article 137(2)(b) of the EC Treaty.

<sup>93</sup> The reason for this writer’s interest in this legislation in particular stems in part from my undertaking a recent study of the operation of the Directive generally, and later having been asked to examine the Irish implementation for a recent study for the European Commission, *The Implementation and Application of EU Labour Law Directives in the Enlarged European Union*. This study was submitted sub. nom. Report on Implementation by Ireland of Directive 2001/23/EC on the Approximation of Laws of the Member States Relating to the Safeguarding of Employees’ rights in the Event of Transfers of Undertakings, Businesses or Parts of Businesses.

## A. SOME GENERAL COMMENTS ON THE EXPERIENCE OF THE ACQUIRED RIGHTS DIRECTIVE

What lessons, if any, are to be drawn from the manner in which the Acquired Rights Directive originated or has evolved in the thirty years of its existence in one form or another? <sup>94</sup> Looking first (insofar as this is possible) at the general European level, a number of observations on how this legislation has been formed or operated seem apposite, although naturally care must be exercised regarding the extent to which such remarks may be generalised to legislation in the social policy field generally.

## B. ADOPTING AND AMENDING ACQUIRED RIGHTS LEGISLATION: THE WATERING DOWN OF AMBITIONS, THE REACHING OF UNSATISFACTORY COMPROMISES AND THE USE OF LEGISLATION AS A PUBLIC RELATIONS EXERCISE

A striking feature of the adoption of the original Acquired Rights Directive <sup>95</sup> and of its subsequent amendment in 1998 <sup>96</sup> has been the very

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<sup>94</sup> For an analysis of most recent case-law of the European Court of Justice in this area, see G. Barrett, "Light Acquired on Acquired Rights - A Survey of Recent Developments in the Law on Transfers of Undertakings" (2005) 42 CMLR 1053, and for some more recent reflections on some other recent case-law in this area, see by the same writer, "Celtec: Asking the Court of a Justice for a Date or The Limits of Consensual Behaviour in Privatisations" (2005) 30 ELR 600 and "'Shall I Compare Thee To...?' On Article 141 EC and Lawrence" (2006) 35 ILJ 93.

<sup>95</sup> Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ L 61, 5.3.1977, p. 26).

<sup>96</sup> By Council Directive 98/50/EC of 29 June 1998 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 (OJ L 201, 17.7.1998, p. 88). Directive 98/50/EC was subsequently repealed by Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of

considerable dilution of the original draft legislation as proposed by the European Commission when compared to the legislation in its final form. Such dilution has been well documented in the case of the original Directive by Hepple,<sup>97</sup> who noted the very considerable reduction in the scope of ambition of the proposal from its original Commission draft in 1974 to the legislation ultimately adopted in the form of Directive 77/187 by the Council. (An example was the elimination, by the time the Directive was adopted, of its application to certain share transfer situations, an alteration which robbed the Directive of a great deal of its significance and capacity to protect workers at national level, most particularly in the United Kingdom and Ireland, where large numbers of business transfers have always been carried out by this method. Similarly eliminated was the provision in Article 8 of the original Commission draft of Directive 77/187 that, if negotiations between employers and workers' representatives failed to secure agreement between the parties within a period of two months, each could refer the matter to an arbitration board which "shall give a binding decision as to what measures shall be taken for the benefit of the workers". Although the 1977 Directive was adopted under procedures requiring a unanimous vote in Council, and some of the blame for the watering-down of the original proposal may be attributed to the requirement of unanimity which applied in relation to the adoption of this proposal,<sup>98</sup> it is not clear that the entirety of the such responsibility can be straightforwardly ascribed to this cause. Thus, for example, the number of votes actually called in legislative matters at Council level has historically been so low as to make clear that legislation has tended to be adopted by consensus at Council level even where the legislative procedure under the EC Treaty involves qualified majority voting, and

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the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82, 22.3.2001, p. 16).

<sup>97</sup> B. Hepple, "Workers' Rights in Mergers and Takeovers: The EEC Proposals" (1976) 5 ILJ 197 and see also the note by the same writer on the Acquired Rights Directive in (1977) 6 ILJ 106.

<sup>98</sup> The ultimate shape of the Framework Equality Directive was also affected by this requirement, particularly insofar as concerned discrimination on grounds of religion.

even where such a qualified majority exists.<sup>99</sup> In addition, other factors seem to be at work: the normal give-and-take of negotiation between any parties with widely disparate interests would in any case be expected tend to lead in the direction of conclusions of more general nature. In particular, the very different collective labour law traditions of the member states would militate against very strong provisions in the collective employment law field. This last factor is one which probably accounts for the particular weakness of the information and consultation provisions of the Acquired Rights Directive.<sup>100</sup> Acute awareness on the part of the member states of the binding nature of the outcome of the bargaining process may also be a factor. In addition, sight should not be lost of the point that on occasion member states may be as interested in being seen to act as in actually acting: legislation may be adopted as an indication to the public that something is being done about a particular issue, even if in reality the content of the measure is severely lacking. This is, in effect, the phenomenon of adopting legislation in whole or in part as a public relations exercise. The occurrence of this at national level has been noted by O'Hegarty<sup>101</sup> and it is not merely cynicism to suggest that there is probably an element of this at European level too. As regards the Acquired Rights Directive in particular, it may be noted that in 1977, the EEC was still under lingering (if somewhat dissipating) pressure to demonstrate via the fulfilment of its social action programme that the

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<sup>99</sup> See in this regard the Commission White Paper on Governance.

<sup>100</sup> It is interesting to note that the individual employment law provisions of the Directive rather than the collective employment law ones have given rise to almost all of the litigation to have reached the European Court of Justice (with Case C-382/92 *Commission v. United Kingdom* [1994] ECR I-2435 being the exception which probes, rather than proves, this particular rule). In part this may be because rules of the latter kind are less likely to be litigated, but it may also be because collective labour law is a 'tough law' area in which transnational legal provisions are much less likely to be effective, which is certainly the Irish experience of the implementation of the collective law provisions of the Directive (as to which, see more below).

<sup>101</sup> See the chapter by L. O'Hegarty in G. Barrett (ed.), *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures* (Clarus Press, Dublin, 2007, forthcoming) in which this observation is made in the context of the European Union (Scrutiny) Act 2002.

Community attached as much significance to its social objectives as to its market objectives, and the adoption even of a proposal relating to acquired rights even in severely weakened form served this end.<sup>102</sup> Similarly, securing elusive agreement of all the member states in 1998 on the amending Directive 98/50<sup>103</sup> was a notable success for the then British Presidency of the Council of Ministers at that time in its final days, even it is clear that for some states, copperfastening in Community law the test formulated in *Süzen*<sup>104</sup> for the transfer of an undertaking, as Directive 98/50 did, must in terms of its substance have been an unsatisfactory compromise (given that it was for long a key issue preventing agreement on the amending directive). And yet it was agreed to, once it was clear no other compromise would be accepted, and once the Court of Justice had solved a key part of the political dilemma for the member states by interpreting Directive 77/187 in such a way as to transform the enterprise organisation concept of the undertaking into a politically convenient status quo of European law.

The weakening of Commission employment law proposals in the employment law field once they reach the Council of Ministers is now a less regularly-seen phenomenon than was formerly the case. At least part of the reason for this, however, has been the appearance of an alternative law-generating mechanism in the form of Article 139 agreements between the social partners under the social dialogue process. The adoption of the bulk of legislative measures in the employment law field now involves only the adoption of Directives with the (normally unamended) text of such an agreement attached—a method of policy-furtherance which thus escapes some of the disadvantages linked to adopting legislation following

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<sup>102</sup> See Council resolution of 21 January 1974 concerning a social action programme (OJ No C 13, 12.2.1974, p. 1).\_

<sup>103</sup> Council Directive 98/50/EC of 29 June 1998 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 (OJ L 201, 17.7.1998, p. 88)

<sup>104</sup> Case C-13/95 *Süzen* [1997] ECR I-1259.

the procedure used to adopt and amend the Acquired Rights Directive and which is examined further in the text below.

Although insofar as concerns the adoption of the Acquired Rights regime, the dilution process was a marked one, at least some of the consequences of such dilution may not be permanent. Even initially emasculated or otherwise unsatisfactory legislation may constitute a start in a more long-term sequence of events—a foot in the door which, once held ajar even to a narrow extent, can later be pushed further open when circumstances are more propitious—something which can be said to have already happened in the case of the Acquired Rights Directive, since its present (2001) form is the result not just of the original 1977 legislation, but of improving amendments made in 1998 (and consolidated in the 2001 measure), in addition to the strengthening input of the jurisprudence of the European Court of Justice. Further, a process of reform which is presently in its very early stages seems likely to lead to further amendments and improvements within some years—although as of yet, it is worthy of note there seems to be no intention to apply the Directive to share transfer situations or to attach to resolve disputes concerning the information and consultation provisions in the manner envisaged in the original 1974 Commission draft Directive.

### C. THE DIFFICULTY OF CHANGING DIRECTION IN THE EVENT OF BASIC CONCEPTUAL FAILURE IN LEGISLATION

One point which seems arguably to have been demonstrated by the experience of the Acquired Rights Directive is the potential relative inflexibility of legislation as a policy-making tool where basic conceptual failures occur in the design of a legislative instrument (perhaps because of the high political costs of securing agreement in the first place in such instruments) and the potential near-irreversibility of such errors. An example of this is arguably the enterprise organisation test adopted by the European Court of Justice in *Süzen*,<sup>105</sup> in which the Court asserted that

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<sup>105</sup> Case C-13/95 [1997] ECR I-1259.



“the term entity...refers to an organized grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective”<sup>106</sup> and turned its back decisively on an *entreprise-activité* approach, by expressly denying that the mere similarity of activities carried out before and after a transfer would suffice to establish that the transfer of an undertaking had occurred. The application of the *entreprise organisation* test has given rise to ongoing difficulties. One is the difficulty in distinguishing between asset-based undertakings and those based essentially on personnel,<sup>107</sup> a distinction which has to be made in order to apply the *Süzen* test (with no transfer of assets being necessary in the case of the latter type of undertaking). Another difficulty is that the *entreprise organisation* test also facilitates avoidance of the Directive in industries which do require the use of substantial assets (via the non-transfer of those assets). Further, the *Süzen*<sup>108</sup> test as interpreted in *Oy Liikenne*,<sup>109</sup> seems an utterly inadequate one to protect employees who work in industries which operate for the most part without assets: the application of the test has led one commentator to observe that

in contracting out of services the impact of the Directive has become, if not voluntary, at least highly contingent upon the structuring of the commercial deal by which the contracting out, contracting in or reassignment of the contract is effected. Where assets are an essential part of the business, the application of the Directive can be avoided by not transferring the assets; where the business is ‘based essentially on

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<sup>106</sup> Para. 13 of the judgment of the Court.

<sup>107</sup> See e.g., Case C-172/99 *Oy Liikenne* [2001] ECR I-745

<sup>108</sup> Case C-13/95 [1997] ECR I-1259.

<sup>109</sup> Case C-172/99 [2001] ECR I-745.

manpower', it can be avoided, it seems, by the new employer not offering jobs to the former employer's workforce.<sup>110</sup>

Insofar as the *entreprise* organisation test has been the cause of ongoing difficulties, the Court of Justice may be criticised for the adoption of this test and the abandonment by it of the *entreprise-activité* conceptualisation of undertakings used by it in *Schmidt*.<sup>111</sup> In reality, however, most of the blame for ongoing difficulties is arguably more appropriately laid at the door of the Community legislature. In the first place, the inflexibility with which the *entreprise* organisation test is now applied stems from the fact that the *Süzen* ruling was almost immediately codified by the political institutions of the Community, which seized upon it almost immediately as the key to resurrecting negotiations on proposed amendments to the original Directive and securing agreement on them by the end of the 1998 British presidency of the Council. The *Süzen* ruling was thus quickly incorporated into the text of the Acquired Rights Directive by a Council which could now reassure itself that rather than broadening or narrowing the scope of the Directive, it was merely codifying extant case-law.<sup>112</sup> The possibility of the Court ever reversing its approach was thus taken out of its own hands. A second, more basic, argument can be made here, however, to the effect that all difficulties relating to the concept of the transfer of an undertaking are the result of an even more fundamental conceptual error made by the Community legislature in the first place in basing a directive aimed at the protection of employees on the notion of the transfer of an undertaking rather than on the transfer of a workplace. Arguably, it was this mistake as much as the adoption of the *Süzen* *entreprise* organisation test which has caused all of the subsequent problems in this regard. Ironically, exactly the same failure was made in

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<sup>110</sup> P. Davies, "The UK Will Have to Make Up Its Own Mind" (2001) 30 ILJ 231 at p. 234.

<sup>111</sup> Case C-392/92 [1994] ECR I-1311.

<sup>112</sup> See now Article 1(1)(b) of Council Directive 2001/23/EC, which repeats the wording of Article 1(1)(b) of the original 1977 Directive as inserted by Article 1(2) of Directive 98/50/EC.

United Kingdom and Irish law concerning the transfer of continuity for the purposes of the respective national redundancy payments schemes, in relation to which the Courts quickly ran into definitional difficulties regarding the question of when a business should be regarded as having transferred for the purposes of that legislation<sup>113</sup>—when arguably the question of what constituted a business should never have been an issue in the first place.

Another example of a design-flaw which has led to difficulties (in the form of a restriction on the scope of the Directive on grounds which seem difficult to defend in policy terms) is the large-scale exclusion of public sector workers from the benefit of the Directive, due to the failure to adopt a European-wide definition of employee in the manner of Community equality law<sup>114</sup> or Community law on the free movement of workers.<sup>115</sup> It may be that sufficient room for judicial manoeuvre has been left to the Court of Justice to undo some of the difficulty here however.<sup>116</sup>

#### D. LACUNAE IN THE ACQUIRED RIGHTS DIRECTIVE AND DELIBERATE FAILURES IN THE DIRECTIVE TO ADDRESS ISSUES DESPITE THE INEVITABILITY OF THESE ISSUES CAUSING DIFFICULTIES

One aspect of the Acquired Rights Directive which has been difficult to overlook has been the number of lacunae and deliberate failures to address

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<sup>113</sup> A good example of this is seen in the decision of the House of Lords in *Melon v. Hector Powe Ltd.* [1981] 1 All ER 313.

<sup>114</sup> Case C-256/01 *Allonby v. Accrington and Rossendale College* [2004] ECR I-873

<sup>115</sup> See in this regard Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, in particular para. 40 of the Court's judgment.

<sup>116</sup> Certainly Advocate General Poaires Maduro seemed to think so in the Opinion which he delivered in Case C-478/03 *Celtec Ltd v. John Astley and Others* [2005] ECR I-4389.

issues in the directive which it could clearly be foreseen would cause inevitable difficulties. Such omissions may well have occurred for the understandable reason that dealing with these issues would have been politically controversial enough with one or more member states to jeopardise the adoption of the legislation. Nonetheless, their existence is worthy of note, and the net effect of such omissions has been at times to make what is excluded from the Acquired Rights Directive as interesting as what is contained in it.

A good example of one such omission is that the Directive as originally adopted in 1977 failed to give any indication whatsoever as to whether or not a contracting-out, much less a change of contractors, could constitute the transfer of an undertaking. Davies has observed that it

cannot be argued ...that the issue of contracting out...arose solely because of changes in the economic climate which occurred after the adoption of the Directive. The Community legislator may perhaps be forgiven for not foreseeing the extent to which contracting out would develop in the 1980s, but that there was here a significant legal problem was manifestly apparent at the time the Directive was adopted.<sup>117</sup>

Similarly, the ongoing non-application of the Directive to share transfers has left a gaping hole through which the information and consultation requirements of the Directive have been capable of being safely avoided. Finally, given the importance of pensions to workers, it would be difficult to claim that the exclusion of the normal application of the Directive's rules by Article 3(4) of the Directive itself in relation to "employees' rights to old-age, invalidity or survivors' benefits under supplementary company or intercompany pension schemes outside the statutory social security

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<sup>117</sup> P. Davies, "Transfers of Undertakings" in S. Sciarra (ed.), *Labour Law in the Courts—National Judges and the European Court of Justice* (Hart Publishing, Oxford, 2001) 131 at p. 136.

schemes in Member States” is anything other than a gaping hole in the protection provided by the Directive.<sup>118</sup>

It may be noted in passing that this lack of willingness to see politically controversial issues dealt with at European level is not always confined to national executives represented in the Council of Ministers. A similar lack of inclination could be witnessed in the failure of the House of Lords in *Wilson v. St. Helens Borough Council* [1998] ICR 1141 to refer the question of the precise implications of the provision of Article 4(1) of the Directive that “the transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee”.

#### E. LACUNAE, AMBIGUITIES AND FAILURES TO DEFINE CRUCIAL CONCEPTS USED IN THE DIRECTIVE LEADING TO AN ENLARGED CONSTITUTIONAL ROLE FOR THE COURT OF JUSTICE

The existence of lacunae in the Acquired Rights Directive such as those just referred to leads on naturally to a further topic. For it is the existence in the past of certain of these lacunae is one factor which has led to an unusually strong law-making role being effectively delegated to the European Court of Justice in relation to the Directive. Thus the application of the Directive in situations of insolvency, although now a topic dealt with in the text of the Acquired Rights Directive itself,<sup>119</sup> follows in very large measure the course which had to be mapped by the Court of Justice

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<sup>118</sup> Even if qualified by the requirement under Article 3(4)(b) to adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer in respect of rights conferring on them immediate or prospective entitlement to old age benefits, including survivors' benefits, under supplementary schemes.

<sup>119</sup> See Article 5 of Council Directive 2001/23/EC of 12 March 2001 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 undertakings or businesses.

at a time when the original Directive made no provision at all for this important topic (a course which, once determined by the Court, was later in large measure codified into the text of the Directive by the Community legislature). Similarly the approach of the Directive to contracting-out situations and to administrative reorganisations of public authorities, important and foreseeable topics, only came to be dealt with in the text of the Directive after the Court of Justice had been effectively forced to create the law on these topics in the absence of any real guidance from the legislature in the original Directive.<sup>120</sup>

A further phenomenon which is to be seen in the Acquired Rights Directive consists of the pronounced and remarkable tendency to fail to define concepts which is to be seen in this instrument. The Directive for long lacked—and indeed, to some extent, still lacks—adequate definitions of important concepts used in the application of the Directive.<sup>121</sup> This tendency originally extended to a concept as fundamental to the Directive as the notion of the transfer of an undertaking, and still extends to the issue of the consequences of a violation of the prohibition on transfer-grounded dismissals, as well as the definition of “economic technical or organisational reasons entailing changes in the workforce”—reasons which can excuse a dismissal which would otherwise violate the Directive. Some such imprecision seems to have been due to a degree of

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<sup>120</sup> See now Article 1(1)(b) and 1(1)(c) of the Acquired Rights Directive, following the lead set by the Court of Justice in, respectively Case C-13/95 *Süzen* [1997] ECR I-1259 and Case C-298/94 *Henke* [1996] ECR I-4989.

<sup>121</sup> Some such lacunae were at least in part remedied by the 1998 amendments to the 1977 Directive. At that time, ideas which had earlier been developed by the Court of Justice of what, for example, constitutes a ‘transfer’ (see Case C-13/95 *Süzen* [1997] ECR I-1259) and (insofar as one may describe this as a separable issue) of what kind of body constitutes an ‘undertaking’ (see e.g. Case C-29/91 *Dr. Sophie Redmond Stichting* [1992] ECR I-3189, Case C-382/92 *Commission v. United Kingdom* [1994] ECR I-2435 and Case C-298/94 *Henke* [1996] ECR I-4989) were written into the text of the Directive by the Community legislature. These amendments are now to be found in Article 1(1)(b) and Article 1(1)(c) of the consolidating Directive 2001/23/EC. But gaps remain: it would, for example, be difficult to describe the new definition of the transfer of an undertaking as a comprehensive one.

inadvertence on the part of the Community legislature.<sup>122</sup> However, part of it has also been attributed to the Directive's targeting of only partial harmonisation of Member State rules governing employment rights in transfer situations.<sup>123</sup>

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<sup>122</sup> A good example of such inadvertence is that the Directive as originally adopted in 1977 failed to give any indication whatsoever as to whether or not a contracting-out, much less a change of contractors, could constitute the transfer of an undertaking. Davies has observed that it

“cannot be argued ...that the issue of contracting out...arose solely because of changes in the economic climate which occurred after the adoption of the Directive. The Community legislator may perhaps be forgiven for not foreseeing the extent to which contracting out would develop in the 1980s, but that there was here a significant legal problem was manifestly apparent at the time the Directive was adopted.”

(P. Davies, *loc.cit.*, n. 118 above). In fairness, however, in considering any charge of inadvertence against the Community legislature, the value of deliberate vagueness in drafting as a technique to assist the achievement of political compromise should not be overlooked.

<sup>123</sup> Certainly, in Case 105/84 *Danmols Inventar* [1985] ECR 2639, the Court of Justice declared it clear, on the basis of an examination of a number of provisions of the original 1977 Directive, that the Directive was intended to achieve only partial harmonisation and held that it followed that the Directive's protection should be available only to persons protected as employees under national law. (The original 1977 Directive said nothing on the topic of whether the concept of 'employee' should be given a Community definition or not.) A modified version of the Court's position was later enshrined in the text of the Directive by the Community legislature. (See now Article 2, Paragraph (2) and Sub-paragraph (1)(d) of Directive 2001/23/EC and see further concerning the definition of 'employee' text *infra*.) The Court has also found that where an employee declines to avail of his or her right under the Directive to continue the employment relationship with the transferee of the undertaking for which he or she works, it is for the Member State concerned, rather than for Community law, 'to determine what the fate of the contract of employment or employment relationship should be'. (Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas* [1992] ECR I-6577 at para. 35 of the Court's judgment). Since 1998, however, the discretion formerly accorded to national law as to how to deal with contraventions of the information and consultation requirements set out in the Directive has been limited by the general requirement that employees who consider themselves wronged by failure to comply with obligations arising from the Directive be enabled to pursue their claims by judicial process after possible recourse to other competent authorities. (See now Article 9 of the 2001 Directive).

Again, a corollary of this failure to provide necessary definitions has been the necessary development of a broad constitutional role for the Court of Justice in providing definitions needed in order to apply the Directive which would otherwise be lacking. Thus, for example, as has already been seen in the text above, the failure of the legislature to ascribe a meaning to the concept of undertaking for the purposes of the Directive forced the Court to do this instead (albeit that it initially vacillated over whether to use the *entreprise-activité* model or the *entreprise-organisation* one, before finally espousing the latter option).

The level of ambiguity in the text of the Directive has had similar constitutional implications to the lack of definitions provided in the instrument, in that an important role (which has little counterpart at national level, certainly in common law countries<sup>124</sup>) has in instances of legislative ambiguity fallen by default to the European Court of Justice. Sometimes however, so great has been the level of difficulty created by the Community legislature that the Court has not been unable to resolve satisfactorily difficulties created. Thus e.g., the reference (varying in its meaning depending on which language version of the Directive is referred to) to transfers ‘as a result of a legal transfer or merger’ has to an increasingly pointless extent continued to be seen by the Court to require a context of contractual relations in order for any transfer to come within the scope of the Directive.<sup>125</sup> The optimal solution to this difficulty—the unambiguous broadening by the Community legislature of the scope of the Directive to transfers effected ‘by contract or by some other disposition or operation of law, judicial decision or administrative measure’ was proposed by the Commission both in its 1994 draft Directive and in its revised 1997 proposal for a Directive amending the original Acquired Rights Directive. With somewhat depressing predictability, however, the

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<sup>124</sup> Although it may be more familiar in other legal systems such as the German, in which a relatively high political profile seems to be envisaged for the *Bundesverfassungsgericht*.

<sup>125</sup> See for example Case C-51/00 *Temco Service Industries* [2002] ECR I-969.



change did not however feature in the much-weakened version of the Directive ultimately adopted by the Council in 1998.<sup>126</sup>

Another example of ambiguity which the Court has arguably been unable to resolve completely satisfactorily relates to the consequences for workers of exercising their supposedly fundamental right under the Directive—recognised by the Court in *Katsikas*<sup>127</sup>—to object to their transfer under the Directive. In the event of any such objection, the Court held that it was for the Member States to determine what the fate of the contract of employment or employment relationship should be.<sup>128</sup> One test of the Directive's real value to employees, however, depends on whether it gives 'objectors' (who, it should be remembered may have very good grounds for their refusal to work for the transferee) the right to remain in the employ of the transferor, or, at the very least, to compensation for the loss of their right to employment with the transferor.

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<sup>126</sup> See Proposal for a Council Directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ C 274, 1.10.94, p. 10) at Article 1(1) thereof; 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 (OJ C 124, 21.4.97, p. 48) at Article 1(1) thereof; and Council Directive 98/50/EC of 29 June 1998 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 (OJ L 201, 17.7.1998, p. 88) at Article 1(1) thereof. The relevant provision is now Article 1(1) of Directive 2001/23/EC (OJ L 82, 22.3.2001, p. 16). Note that some Member States have voluntarily applied the Directive to a wider category of employees than required by the Directive. See in this regard F. Valdés Dal-Ré "Transfers of Undertakings: An Experience of Clashes and Harmonies Between Community Law and National Legal Systems in S. Sciarra, *Labour Law in the Courts: National Judges and the European Court of Justice* (Hart Publishing, Oxford, 2001) at 179.

<sup>127</sup> (Joined Cases C-132/91, C-138/91 and C-139/91) [1992] ECR I-6577.

<sup>128</sup> Para. 35 of the judgment of the Court. This position was refined somewhat in later case-law of the Court on this topic, but the basic position still holds true.

The Court in *Katsikas*,<sup>129</sup> however—implicitly rejecting in this respect the Opinion offered to it by Advocate General Van Gerven<sup>130</sup>— simply refused to involve itself in this area. Instead, the Court took refuge in the idea that this was an area in which the Directive espoused only partial harmonisation and left the matter largely in the hands of national legal systems.

The lack of certainty as to the precise implications of the provision of Article 4(1) of the Directive that “the transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee” is another zone of ambiguity not yet cleared up by the Court of Justice, although in this case, the responsibility is perhaps most appropriately laid at the door of national courts for their failure to refer the question to the Court of Justice under Article 234 of the EC Treaty.<sup>131</sup>

#### F. A REQUIREMENT OF SUB-OPTIMAL INTERPRETATION?

It is saying nothing particularly novel to observe that the European Court of Justice must pay careful attention to the question of whether national

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<sup>129</sup> Notwithstanding its reference to the fundamental right of the worker to choose his or her employer.

<sup>130</sup> Van Gerven AG advised finding that that Directive ‘does not prevent a Member State from conferring on employees the right to declare that the legal effects of a transfer of an undertaking are not to apply with regard to them, as a result of which their contracts of employment with the transferor will be maintained, provided that it is guaranteed - by means of an agreement between the employees and the employer or under a law, regulation or administrative provision within the meaning of Article 7 of the directive - that that right of objection is more favourable to employees, not only in principle but also in practice.’ (Emphasis added. See Cases C-132/91, C-138/91 and C-139/91 *Katsikas* [1992] ECR I-6577 at para. 22 of the Advocate General’s Opinion).

<sup>131</sup> See in this regard the ruling of the House of Lords in *Wilson v. St. Helens Borough Council* [1998] ICR 1141.

courts will follow its lead in any ruling. Autrement dit, the Court operates is subject to restraints in interpreting Community law. The Court's decisions on direct effect,<sup>132</sup> state liability,<sup>133</sup> the interpretive obligation,<sup>134</sup> and arguably horizontal direct effect<sup>135</sup> all appear to have demonstrated a strong degree of awareness on the part of the Court (were any such demonstration necessary) that the continued effectiveness of Community law depends on the cooperation of national courts. At times—as with the persistent refusal of the Court of Justice to view Directives as being capable of giving rise to horizontal direct effect—the Court can appear forced to adopt doctrinally sub-optimal interpretations of the law. It may well be that some of its jurisprudence in relation to the Acquired Rights Directive constitutes an example of this latter phenomenon.

It is difficult to determine a single dominant reason for the Court's change of approach in *Süzen*<sup>136</sup> from an *entreprise-activité* to an *entreprise-organisation* conceptualisation of an undertaking (perhaps not least

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<sup>132</sup> Note the alteration in the legal basis offered by the Court for this doctrine between its decision in Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337 and that in Case 148/78 *Pubblico Ministero v. Ratti* [1979] ECR 1629.

<sup>133</sup> Note the development in the basis offered by the Court for this doctrine from its decision in Case C-6/90 *Francovich and Bonifaci v. Italy* [1991] ECR I-5357 to that in C-46/93 *Brasserie du Pêcheur/ Factortame III* [1996] ECR I-1029

<sup>134</sup> See in this regard in particular the decisions of the Court of Justice concerning the scope of this doctrine in Case C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, Case C-334/92 *Wagner Miret v. Fondo de Garantia Salarial* [1993] ECR I-6911, Case C-91/92 *Faccini Dori v. Recreb* [1994] ECR I-3325 and Case C-192/94 *El Corte Inglés v. Blázquez Rivero* [1996] ECR I-1281.

<sup>135</sup> In which deference to the lack of likelihood of finding acceptance on the part of member state's courts is arguably as convincing an explanation as any for the refusal by the European Court of Justice to acknowledge that unimplemented Directives are capable of giving rise to horizontal direct effect (while accepting that they can give rise to so-called incidental horizontal direct effect).

<sup>136</sup> Case C-13/95 [1997] ECR I-1259.

because the Court has never acknowledged that any such change occurred<sup>137</sup>). Certainly, the Court gave no reasons grounded in employee protection for its change. However, the Court's re-evaluation of its approach in *Süzen* and resultant change did come in the face of hostility to the *entreprise-activité* approach from national governments, a lack of support for it either from the Commission or the Advocates General in either *Schmidt* or *Süzen*, academic criticism (far from all of which was justified), an absence of elucidation of powerful arguments in favour of the *entreprise-activité* approach, a lack of any strong Community interest in maintaining the *entreprise-activité* stance and finally, and perhaps most tellingly, a negative reaction from national courts, particularly in France, Germany and Italy.<sup>138</sup> In the light of all of these factors, it would probably have been more surprising if *Süzen* was decided in a way other than that in which it was. Had the case been decided otherwise, the Court would undoubtedly have found itself in an isolated position. Nevertheless, *Süzen* is undoubtedly a ruling which has reduced considerably the value of the Acquired Rights Directive as an employment protection measure of relevance to vulnerable workers in contracting-out situations.

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<sup>137</sup> O'Leary has noted - accurately - that the Court did not overrule its previous case-law on what constitutes a transfer (S. O'Leary, *Employment Law at the European Court of Justice* (Hart Publishing, Oxford, 2002) at 266). In real terms, however the Court's ruling in *Süzen* involved a marked shift in approach. See for some suggestions as to why the Court changed its mind, P. Davies, *loc. cit.* at n. 118, p. 142.

<sup>138</sup> This reaction took different forms. In France and Italy, it involved what has been referred to as 'passive dialogue'—the acceptance by national courts of unconvincing arguments that national law was in conformity with national law despite recent contrary case-law of the Court of Justice, and a consequent refusal to refer the matter to the European Court of Justice under what is now Article 234 of the EC Treaty. In Germany, it consisted of what has been termed 'active dialogue'—the reference of a second or further case to the European Court of Justice involving the same basic issue, but accompanied by additional arguments, and constituting in effect an invitation to the Court to change or modify its position. (See generally Davies, *loc. cit.* at n. 118, pp. 137 to 139).

#### **IV. IMPLEMENTING ‘COMMUNITY LEGISLATION IN THE SOCIAL POLICY FIELD: REFLECTIONS ON THE IRISH IMPLEMENTATION OF THE ACQUIRED RIGHTS DIRECTIVE**

The present examination of the traditional method of Community legislation and of the process of social dialogue as mechanisms used to deliver Community employment law seems likely to be well served by venturing beyond the point of adoption of such laws at European level and examining how such measures subsequently fare at the point of implementation. Much of Community employment legislation adopted by the normal legislative route as well as several Article 139 social policy agreements have taken the form of, or been annexed to Community Directives, with a concomitant transposition obligation being imposed on national legal systems. How have such measures fared in practice? Some benefit may be derived by taking—once again—the experience of the Acquired Rights Directive as an example, and by considering how its implementation has proceeded in one member state.

Ireland now implements the Acquired Rights Directive (in its latest embodiment<sup>139</sup>) by means of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations, 2003.<sup>140</sup> A study of the implementation of the Directive in Ireland was recently carried out by the writer as part of a recent international study for the European Commission, *The Implementation and Application of EU Labour Law*

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<sup>139</sup> The latest embodiment of which, as seen above, is Directive 2001/23/EC on the approximation of laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

<sup>140</sup> Regulation 15 of these Regulations revokes both the original implementing Regulations, the European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) Regulations 1980 (S.I. No. 306 of 1980) (which had implemented the original Acquired Rights Directive, Directive 77/187/EEC) and the later European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) (Amendment) Regulations 2000 (S.I. No. 487 of 2000) which had substantially amended the 1980 Regulations.

Directives in the Enlarged European Union. Arising from that study, the following observations are offered in relation to the experience of implementation of the Acquired Rights Directive in Ireland as an example of the achievement of a policy in the social field via the use of a directive. How transferable to other Member States or to other policy contexts any lessons learned are is of course an open question, although it seems probable that at least some of them are.<sup>141</sup>

#### A. THE IMPORTANCE OF THE MEANS OF IMPLEMENTATION OF THE DIRECTIVE CHOSEN BY THE MEMBER STATE

The effectiveness with which a European Community policy in the employment field which is sought to be implemented through the enactment of a directive is carried into effect seems likely—judging by Ireland’s experience with the Acquired Rights Directive—to be strongly affected by the means chosen by the member state to implement the directive. In Ireland, the choice of transposition means has traditionally come down to one between the adoption of an Act of the Oireachtas, and the simpler, more expedient and yet less transparent and more democratically troublesome recourse to the adoption of Ministerial Regulations. The legal obligation to transpose large numbers of directives and give effect to various items of Community legislation has the result that in practice large numbers of statutory instruments are adopted each year in fulfilment of Ireland’s obligations under Community law—a situation which has been prevented from giving rise to constitutional difficulties only by virtue of a liberal interpretation by the Irish Supreme Court of when such recourse to Ministerial regulations is to be viewed as permissible in the context of the implementation of the requirements of European Community law.<sup>142</sup> Historically, the less rigorous drafting

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<sup>141</sup> The publication of the study, which was carried out under the leadership of Middlesex University Business School, is likely to provide some information in this regard.

<sup>142</sup> See in this regard e.g., *Meagher v Minister for Agriculture and Food and others* [1994] I.R. 329 and *Maher, Brett and Ryan v. Minister for Agriculture* [2001] ILRM 481.

standards applied to the adoption of secondary legislation have resulted in various provisions of the Acquired Rights Directive being implemented through regulations which frequently repeat verbatim or almost verbatim the provisions of the Directive being implemented, however inappropriate this may have been.<sup>143</sup> The results of the less demanding requirements of proceeding in this way appear to have been:

- (a) a failure to integrate properly the legislation implementing the Directive into the body of Irish employment law. One example of this is the provision of Regulation 5 (3) of the 2003 Regulations that “if a contract of employment is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee concerned, the employer concerned shall be regarded as having been responsible for the termination of the contract of employment.” This is close to<sup>144</sup> a verbatim reproduction of provision of Article 4(2) of the 2001 Directive. What it fails to make, however, is any effort to explain the key issue of whether the test to be applied in relation to the substantial change is to be a contract-based one or not.
- (b) the importation of uncertainty directly from the Directive into Irish implementing legislation. Thus, Regulation 3(1) of the 2003 Regulations provides that the Regulations shall apply to any transfer of an undertaking, business, or part of an undertaking or business from one employer to another employer as a result of a legal transfer (including the assignment or forfeiture of a lease) or merger. Such a definition—largely identical to that found in Article 1 of the 2001 Directive—has had the advantage of helping to ensure that Irish legislation does not fall foul of the evolving standards required by the Directive. What it has not done is to provide sufficient guidance to employers or workers. Similarly, the stipulation in Article 4(1) of Directive 2001/23/EC that “the

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<sup>143</sup> The original implementing regulations (now happily repealed) were a particularly egregious example of this. See the European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) Regulations 1980 (S.I. No. 306 of 1980).

<sup>144</sup> The words ‘employment relationship’ found in the Directive are not repeated.

transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee” has been implemented in Irish law by the provision of Regulation 5(1) of the 2003 Regulations that “the transfer of an undertaking, business or part of an undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee and such a dismissal, the grounds for which are such a transfer, by a transferor or a transferee is prohibited.” This is probably the least well-drafted implementation of a provision of the 2001 Directive in Irish law. Thus the statement that a dismissal is prohibited seems to convey the impression that such a dismissal is void and yet in practice this does not seem to be how the measure is generally viewed as applying.<sup>145</sup>

- (c) the use of terminology (e.g., [the transfer of an undertaking] “as a result of a legal transfer”<sup>146</sup>, “dismissals for economic, technical or organisational reasons which entail changes in the workforce”<sup>147</sup>) unfamiliar to Irish lawyers and either poorly defined or not defined at all. In fairness, some improvement has taken place over time with the elimination of the formerly confusing reference in the Irish implementing Regulations to an ‘employment relationship’ (as distinct from a contract of employment) and with the clarifications in the meaning to be attributed to “representatives of employees” for the purposes of the Regulations.<sup>148</sup>

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<sup>145</sup> See the brief discussion in the text below of the High Court ruling in *Mythen v. Employment Appeals Tribunal, Butterkrust and Joseph Downes and Sons Ltd (in receivership)* [1990] IR 98.

<sup>146</sup> Found in Regulation 3(1) of the 2003 Regulations.

<sup>147</sup> Regulation 5(2) of the 2003 Regulations.

<sup>148</sup> See now Regulation 2(1) of the 2003 Regulations, and note also the provisions of Regulations 7(2) and 8(5) thereof.



How inevitable all or any of these problems are depends on the standards applied in relation to the drafting of secondary legislation but it is difficult to believe that the necessarily punctilious approach to the drafting of legislation promoted by the prospect of scrutiny (the rigorousness of which is incentivised by the prospect of political gains for those involved) in the passage of primary legislation through a bicameral legislature is likely to be easily replicable in any less rigorous process of drafting of secondary legislation.

#### B. THE POTENTIAL FOR DISRUPTION OF THE HARMONY OF A NATIONAL POLICY APPROACH IN RELATION TO A PARTICULAR ISSUE BY THE ENACTMENT AND IMPLEMENTATION OF A DIRECTIVE

A second phenomenon observable in the implementation of the Acquired Rights Directive is the potential for disruption of the harmony of a national policy approach in relation to a particular issue through the implementation of a directive.

Perhaps the best example of this relates to the meaning attributed to the concept of “representatives of employees” for the purposes of the Regulations.<sup>149</sup> Irish trade union law has for long focused on the policy goal of reducing the large number of unions in existence in this state. In pursuance of this policy, it has for long rendered illegal the conduct of collective bargaining with entities representing employees which do not constitute trade unions,<sup>150</sup> staff associations or excepted bodies.<sup>151</sup> Under

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<sup>149</sup> See now Regulation 2(1) of the 2003 Regulations, and note also the provisions of Regulations 7(2) and 8(5) thereof.

<sup>150</sup> Note that Regulation 2(1) defines “trade union” as meaning a trade union which holds a negotiating licence under the Trade Union Act 1941—a highly restrictive definition.

<sup>151</sup> See more generally in relation to this policy chapter 2 of T. Kerr and G. Whyte, *Irish Trade Union Law* (1985, Professional Books, Dublin). See the definitions of “trade union” and “excepted body” now provided in Regulation 2(1) of the 2003 Regulations.

the original Irish regulations which implemented the original form of the Acquired Rights Directive, the European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) Regulations, 1980<sup>152</sup>—no definition at all was provided of the concept of representatives of employees, even though this concept was used in those Regulations. This implicitly had the effect of confining the concept to trade unions, staff associations or excepted bodies. Subsequently, however, the decision of the European Court of Justice in *Commission v. United Kingdom*<sup>153</sup> made clear that such a restrictive approach to the meaning of employee representatives was not consonant with the requirements of the Directive. Subsequent to the receipt of a reasoned opinion from the Commission which pointed out the difficulties with the then definition, the concept was expanded, in Regulation 4 of the European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) (Amendment) Regulations, 2000, to include “in the absence of such a trade union, staff association or excepted body, a person or persons chosen (under an arrangement put in place by the employer) by such employees from among their number to represent them in negotiations with the employer”.<sup>154</sup> The 2003 Regulations maintained this arrangement with a marginal increase in specificity,<sup>155</sup> and through the stipulation in Regulation 8(5) that where there are no employees' representatives in the

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Note that Regulation 2(1) of the 2003 Regulations defines "excepted body" as having the meaning assigned to it by section 6(3) of the Trade Union Act 1941.

<sup>152</sup> Statutory Instrument No. 306 of 1980 (implementing Directive 77/187/EEC).

<sup>153</sup> Case C-382/92 [1994] ECR I-2435.

<sup>154</sup> It will be noted that this put the onus on the employer to put arrangements in place.

<sup>155</sup> Viz., by stating in Regulation 7(2) that where a transferred undertaking does not preserve its autonomy, it is the transferee who is bound by the obligation to make the referred-to arrangement, and by defining the group with the right to choose who should represent them as “employees transferred who were represented before the transfer”. The increased specificity seems to stem from the word-for-word implementation of the Directive, however, rather than any conscious decision to change legal policy: Regulation 7(2) simply mirrors the corresponding provision of Article 6(1) of Directive 2001/23/EC.

undertaking or business of the transferor/transferee, a procedure is to be put in place by the transferor or the transferee whereby the employees may choose from among their number a person or persons to represent them (including by means of an election) for the purposes of the Regulations.<sup>156</sup>

It should be noted that the effect of the expansion beyond its original meaning of the concept of employee's representatives has the effect that the 2003 Regulations effectively carve out an exception to a rule which is laid down by an Act of the Oireachtas (the parliament). The result of this is that—to an increasing extent, given the expansion of European legislation relating to employee consultation and information rights—that European law has become something of a cuckoo in the nest in relation to Irish trade union policy. Ireland, as a result of interventions including, but not confined to the Acquired Rights Directive, is simultaneously pursuing two inconsistent policies at the one time, one of them, domestic in origin, seeking to reduce the number of organisations or bodies engaging in discussions with employers on behalf of workers, the other actively promoting the setting up of such bodies.

This may of course be argued to be the inevitable price (and, depending on the context, a fair price, at that) of integration through law<sup>157</sup>—any law,

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<sup>156</sup> Regulation 8(6) makes a form of fall-back provision by stipulating that where, notwithstanding paragraph (5), there are still no representatives of the employees in an undertaking or business concerned (through no fault of the employees), each of the employees concerned must be given certain information in writing, where reasonably practicable, not later than 30 days before the transfer and, in any event, in good time before the transfer.

<sup>157</sup> There may be others. Such a centralised approach means that - together with any benefits associated a particular approach to any legal issue in addition to the benefits of centralisation itself - problems at the centre transmit themselves to the member states, a prime example in relation to the Acquired Rights Directive being the difficulties encountered by the European Court of Justice in determining the application or otherwise of the Directive in contracting-out situations, the law in relation to which was specifically pointed out to this writer by employer representatives interviewed as giving rise to considerable difficulties in practice. See for an article stressing such problems, T. Hartley, "The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws" (2005) 54 ICLQ 813.

not just a directive, in any policy area, where that integration does not involve the complete replacement of an entire body of domestic law in the relevant policy field. It is a phenomenon seen in other areas of law outside the social policy field (for instance, tort law, in which European law has intervened in the consumer protection area, or criminal procedure law in which the impact of the Third Pillar is now making itself increasingly felt). It is for all that a phenomenon which very visibly occurs in the context of the implementation of the Acquired Rights Directive and seems worthy of note here.

### C. THE IMPORTANCE OF THE CONTEXT PROVIDED BY THE SYSTEM OF INDUSTRIAL RELATIONS OF THE MEMBER STATE IN QUESTION

Reference has been made above to the potential for disruption through the implementation of a directive of the harmony of national policy approach in relation to a particular issue. In the early days of the Acquired Rights Directive it might have seemed more realistic to allude to the experience of this Directive (at least in the United Kingdom and Ireland) as providing much stronger evidence of the potential for disruption of a European-wide approach by virtue of national implementation strategies than it provided for the potential for disruption of national policy choices in relation to particular issues. This was due to the well-known difficulties created by the narrowness of the United Kingdom definition (and implicitly the Irish definition also) of 'employee representatives'. It took some time for the ruling of the European Court of Justice in *Commission v. United Kingdom*<sup>158</sup> to reveal that the definition of employee representative chosen by the United Kingdom was unacceptably narrow for the purposes of the Directive. However, with this ruling, at least one source of evidence of the

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<sup>158</sup> Case C-382/92 [1994] ECR I-2435

disruptive potential for a European approach risked in the choice of a Directive as an implementing method has disappeared.<sup>159</sup>

However, other evidence is provided by the experience of the Acquired Rights Directive of the susceptibility to national contexts of a European-wide approach to a social policy issue pursued through the means of the enactment and transposition of a directive. Thus the context provided by the system of industrial relations of a member state in question can vitally affect the impact of a directive.

The experience of the implementation of the Acquired Rights Directive regarding collective agreements reflects this. Regulation 4(2) of the 2003 Regulations (repeating verbatim what is stated in the first indent of Article 3(3) of the Directive) provides that “following a transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.” The 2003 Regulations thus preserve the pre-transfer situation as regards transfers of collective agreements.

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<sup>159</sup> Or at least has been reduced to the risk of illegal behaviour on the part of a member state.

Because of the voluntarist nature of Irish industrial relations,<sup>160</sup> however, in general, collective agreements are not legally binding. Thus the significance of Regulation 4(2) has been limited: the transferee's continuing to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement imposes no greater legal constraints on the transferee than it does on the transferor—which is to say, in the normal event, none at all. The binding power of the collective agreement will in general depend on the extent of the collective bargaining power possessed by the workforce. This remains the case after as before the transfer.<sup>161</sup>

The provision of the second indent of Article 3(3) of the Directive that Member States “may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year” has not been taken up by the Irish 2003 Regulations: given the lack of binding force of collective agreements, taking advantage of this derogation was unnecessary for Ireland. It would have been possible to give legally binding force to collective agreements in the event of a transfer of an undertaking, but this in most cases would have involved a considerable

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<sup>160</sup> See generally chapter 6 of T. Kerr and G. Whyte, *op. cit.*, at n. 52. For a more introductory view, see Chapter 7 of F. Meenan, *Working Within the Law* (second edition, 1999, Oak Tree Press, Dublin). Kerr and Whyte, *ibid.*, examine the exceptions to the general rule. It should additionally be noted that the general voluntarist nature of Irish industrial relations has been subject to some new statutory incursion in recent times. See now the Industrial Relations (Amendment) Act, 2001 and the powers of intervention which it gives to the Labour Court where, for example, it is not the practice of an employer to engage in collective bargaining negotiations and the internal dispute resolution procedures (if any) normally used by the parties concerned have failed to resolve the dispute; or, for example, the employer has failed to observe a provision of the Code of Practice on Voluntary Dispute Resolution. It should be noted that under s. 10 of the 2001 Act, the possibility exists of giving legally-binding force to determinations of the Tribunal by way of an order of the Circuit Court.

<sup>161</sup> It is possible, although not inevitable, that the underlying balance of power in the workplace may be disturbed by the fact of, for example, a transfer of part of an undertaking—and the balance of collective bargaining influence may tilt in favour of or against the workforce. This is not something which either the Directive or the Regulations attempt to address, however.

enhancement of the legal rights of workers far above what they enjoyed in the pre-transfer situation.

There appears to be little evidence that Regulation 4(2) of the 2003 Regulations is making any difference in practice. A representative of the Irish Congress of Trade Unions interviewed by this writer was adamant that if there is a trade union presence in the workplace in the first place, it is this presence and not the existence of Regulation 4(2) which will ensure the survival of collectively agreed arrangements. He was unable to recall one case in which a union had been de-recognised subsequent to a transfer. It is perhaps for this reason that the non-insertion of the one year time limit has occasioned no controversy: the lack of a time limit is scarcely felt because Regulation 4(2) itself has had no real impact. An Irish Business and Employers' Confederation interviewee agreed that unionisation of the transferor made a huge difference as regards awareness of rights under the Regulations and their ability to apply pressure to protect their members' interests.

Apart from the situation regarding collective agreements, further evidence of the importance of the context of industrial relations of a particular member state as regards the implementation of provisions of social policy-related directives is arguably given by the relatively poor results which have been attained by the information and consultation

The trade union view expressed in interview to this writer was that employers in Ireland frequently tend to adopt a casual approach to the information and consultation requirements under the Regulations. Interviews with employer representatives conducted by the writer tended to bear this out, with the feeling that this phenomenon is particularly the case where small employers are concerned, where the employer often knows his workforce personally, has a somewhat entrenched manner of dealing with it and may well feel a formalised information and consultation process to be superfluous and e.g., information conveyed by letter to suffice. A typical example of where this might happen might be when the original owner of the business is retiring or selling the business.

A trade union interviewee also pointed out that there is also a serious question as to whether worker will bother to enforce the Regulations in a given situation, given the relatively small awards of compensation

available to each individual, with this tendency being particularly pronounced in non-unionised employment.

The trade union view as expressed to this writer is that any information workers obtained under the Regulations may be useful but the information legally required by the Regulations is insufficient to render the assistance required to obtain what the trade unions see as sufficient participation rights in decision-making. The trade unions attitude seems to be that consultations should be required about whether the transfer should take place at all, whether it is right for the enterprise, the owners and the employees and whether the decision to transfer should be changed or reversed. Further, trade unions feel that information and consultation should be with a view to reaching an agreement. (Such an extensive participation rights are not required by the Directive, at present, however.)

Further, the trade union view was that employers do not take the consultation process, where this applies, as seriously as they ought to, with the general approach of employers being one of making their minds up as to what they intend to do before ever consulting with employees, with any consultation tending to be very focused on the basis of how the transfer can be facilitated. Thus the decision regarding the transfer is felt to be regarded by employers as essentially one to be taken on a unilateral basis with employees being informed and consulted only after the basic decision has been made. Interviewed trade unionists argued that participation rights should not act in this way as a mere regulatory burden to be borne on the way to the goal of effecting a transfer, but rather as a process which can put the transfer itself in question, a view which, however, is not reflected in the terms of the Directive.

Although of course the extent of consultation varies, the trade union view was that what normally happens is employers normally take a very minimalist approach, addressing only what they are prepared to address. Remedies are for breach of the obligations imposed by the Regulations are seen by trade unions as inadequate.<sup>162</sup> One trade union interviewee expressed the view that the attitude adopted by Irish employers was

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<sup>162</sup> A question discussed further in the text below.



different to that in countries such as Germany and France where there is a context of co-determination, and that with the voluntarist system industrial relations system which applies in this jurisdiction, that it was more a case of getting from employers only what they could be compelled to give. This was described to the writer as a cultural factor, born out of the industrial relations system.

#### D. THE IMPORTANCE OF THE CONTEXT PROVIDED BY THE DEGREE OF COLLECTIVE ORGANISATION OF THE INDUSTRY OR WORKPLACE IN QUESTION

If the Irish experience of the Acquired Rights Directive shows that the system of industrial relations of a member state in question can vitally affect the impact of a directive, it also shows that the degree of collective organisation of the industry or workplace in question can also be a major factor in the implementation of a directive in the employment law field. The context of the particular industry and in particular whether it is unionised or not seems to count for much—both in determining the extent to which rights supposedly granted by the Directive will be vindicated (for without unionisation, workers are unlikely to find out about the rights which they supposedly enjoy) and in determining the extent to which such rights will be enhanced.

An example of this is to be found in outsourcing (also referred to as ‘contracting out’ or ‘vertical disintegration’) situations. The trade union view as expressed to this writer in interview was that there was some evidence that in certain labour intensive industries, workers are not being retained in outsourcing situations, but rather are being let go by their employer any time a contract is not renewed. This was confirmed (at least in relation to the extent that such behaviour is not illegal) by the observation by an employer organisation interviewee that in contract-cleaning and other contract service industries, a lot of employers would be very aware of the case-law and would be aware that avoiding the transfer of staff would avoid the application of the Regulations and would act accordingly. On the other hand, the point was made by a trade union interviewee that a lot of the larger cleaning companies are unionised,

which improves the level of protection of workers' rights (awareness of rights etc) in such undertakings, although independently of the application of the Regulations. IBEC confirmed that where workers on a contract are unionised (as many are, particularly in the cleaning sector, where many workers are members of SIPTU, the largest union in the Republic), incoming contractors have on numerous occasions been compelled to take on the existing staff particularly by pressure being put on the party to whom the service is being provided (such as threats to picket etc.) particularly where this party is in the (highly unionised) public sector. Unions may also succeed in having the particular needs of employees met. Many in the cleaning industry would be on the minimum wage, and working only part-time and might not want to work on another contract in a location which would involve them incurring travelling expenses etc. A trade union interviewee argued that unionisation can actually help employers to retain contracts as the union can act as a channel of communication between the employer and employees if competitive pressures render matters difficult for the enterprise, and facilitate workplace adjustments necessary to keep the contract.

Ironically, among the legal rights conferred by the Directive which are most affected in practice by the context of unionisation or lack thereof is the right to the representatives of the employees affected by a transfer to the preservation of their status and function. Regulation 7 of the 2003 Regulations—following fairly closely the wording of the relevant provision of the Acquired Rights Directive itself<sup>163</sup>—provides that

where an undertaking, business or part of an undertaking or business the subject of a transfer, preserves its autonomy after the transfer, the status and function of the representatives or of the representation of the employees affected by the transfer

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<sup>163</sup> Article 6(1) of the Directive states that “if the undertaking, business or part of an undertaking or business preserves its autonomy, the status and function of the representatives or of the representation of the employees affected by the transfer shall be preserved on the same terms and subject to the same conditions as existed before the date of the transfer by virtue of law, regulation, administrative provision or agreement, provided that the conditions necessary for the constitution of the employee's representation are fulfilled.”

shall be preserved by the transferee concerned on the same terms and subject to the same conditions as existed before the date of the transfer as specified in any enactment, or in any agreement between the employer and the employees' representatives.

Irish trade unions see this provision of the Regulations as having made little if any difference in practice. An Irish Congress of Trade Unions interviewee could think of no case where collective bargaining arrangements had been set aside by the new employer. However, he felt that this had nothing to do with the regulations, but rather with industrial relations realities.<sup>164</sup> It may be that the Regulations have some independent or reinforcing effect, however: an IBEC interviewee reported that non-unionised employers were being advised by IBEC that they are legally obliged to accept collective bargaining rights if these existed in a transferred undertaking.

As regards the consultation and information requirements imposed under the Directive, the trade union view as expressed to this writer in interview was that the fact of union representation in a transfer situation makes a very considerable difference, with, in this situation, the requirements of the 2003 Regulations acting as a bottom line—the very minimum that unions will expect an employer to do. The view was expressed that where there is collective representation employers will do more than is required by the 2003 Regulations because they will want to effect the transfer with the least possible trouble for themselves.

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<sup>164</sup> The same interviewee pointed out (correctly) that the Regulations have no role in extending collective bargaining rights in the transferred unit where they have not previously existed. Interestingly, an IBEC interviewee confirmed that where workers on a contract are unionised (as many are, particularly in the cleaning sector, where many workers are members of SIPTU, the largest union in the Republic), the incoming contractor will frequently be compelled to comply with the Regulations and take on the existing staff particularly by pressure being put on the party to whom the service is being provided (such as threats to picket etc.) particularly where this party is in the (highly unionised) public sector.

### E. THE CRUCIAL NATURE OF SANCTIONS AND ENFORCEMENT MECHANISMS, WHERE A CHOICE IS MADE TO IMPLEMENT A PARTICULAR SOCIAL POLICY BY WAY OF COMMUNITY DIRECTIVE

The experience of the Acquired Rights Directive in Ireland testifies eloquently to the importance of the question of sanctions and enforcement mechanisms, where a choice is made to implement a particular social policy by way of the adoption and then transposition at national level of a Directive.

As regards sanctions, a good example of the difficulties which can be given rise to by inadequate provision concerning sanctions relates to the dismissal prohibition in the Regulations, which has already been adverted to in the text above. Under Regulation 5(1) of the 2003 Regulations “the transfer of an undertaking, business or part of an undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee and such a dismissal, the grounds for which are such a transfer, by a transferor or a transferee is prohibited.” As noted above, this provision is unfortunately worded in that it seems to convey the impression that such a dismissal is void. Indeed in the cases of *Brett and others v. Niall Collins Ltd.(in receivership)* and *Oyster Investments Ltd trading as Fotoking*<sup>165</sup> and again in *Harte v. Gendrum Enterprises Ltd.*<sup>166</sup>, the Irish Employment Appeals Tribunal took the view that a dismissal contrary to the provisions of the 1980 Regulations (the wording of which has not been altered in the equivalent provision of the 2003 Regulations) was prohibited by the Regulations and a nullity. Although these decisions do not reflect the general approach followed either by the EAT or by the Irish courts since, or (for some time) before (with the normal practice having subsequently been to regard such dismissals as effective dismissals, albeit contrary to the Unfair Dismissals Acts), they are illustrative of the difficulties which can be created by inadequate provision

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<sup>165</sup> [1995] ELR 69

<sup>166</sup> RP 351/2001

for sanctions in national legislation implementing Community employment law. Indeed, an even better illustration is the fact that for several years, under the original Irish implementing legislation<sup>167</sup>—which did not contain the provisions found in the 2003 Regulations regarding the role of rights commissioners—the dismissal provision, which is a crucial provision both in the structure of the Regulations and in the attainment of the goals of the Directive, was largely moribund in Irish law. Matters changed only when the Irish High Court expressed the view in *Mythen v. Employment Appeals Tribunal, Butterkrust and Joseph Downes and Sons Ltd (in receivership)*<sup>168</sup> that dismissal in breach of the Irish implementing Regulations was to be regarded as a violation of unfair dismissals legislation and that therefore the application of the relevant Regulations came within the jurisdiction of the Employment Appeals Tribunal.<sup>169</sup>

Another example of difficulties capable of being occasioned by the inadequate provision of sanctions concerns the information and consultation provisions of the Directive and implementing Regulations. The view was expressed by trade union representatives that in many the remedies for breach of the information and consultation provisions are viewed as insufficiently large to create a disincentive. Employers are frequently not greatly concerned about being caught and fined lightly. The existence of this attitude on the part of some employers (particularly small employers) was confirmed in other interviews conducted by the writer. Breaches of the information and consultation provisions do however attract a potential award of compensation of up to four weeks

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<sup>167</sup> The European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) Regulations 1980 (S.I. No. 306 of 1980).

<sup>168</sup> [1990] IR 98.

<sup>169</sup> Even now, some residual uncertainty remains as to the precise legal status of a dismissal contrary to the Regulations, although most of this uncertainty originates in European Community law, since there has been considerable ambiguity in the rulings of the Court of Justice on this point. See in this regard, e.g., the rulings of the Court in Case 101/87 P. *Bork International* [1988] ECR 3057 at para. 18 thereof, and more recently, Case C-51/00 *Temco Service Industries* [2002] ECR I-969 at para. 28 thereof.

remuneration,<sup>170</sup> and the view of the Department of Enterprise, Trade and Employment officials interviewed by this writer was that given that such an award could be made in favour of each affected employee, this was a substantial remedy and that going much beyond it could pose risks of putting transferor or transferee enterprises out of business. The level of remedies follows the precedent of earlier Irish employment legislation.

The remedies issue does not merely affect the attitude of employers. Trade union interviewees noted that that it is often in question as to whether a given worker will go to the trouble of attempting to enforce the Regulations insofar as these concern anything other than dismissal, given the relatively small awards of compensation available. In practice, it would seem that trade union representation makes a very great difference in terms of securing compliance with the legislation, but if employment is unionised, reliance on sanctions is less necessary to secure compliance with the Regulations.

As regards the enforcement mechanism provided by Irish law in order to assure compliance by transferors and transferees in relation to the Acquired Rights Directive, difficult and almost inevitably unsatisfactory choices have had to be made. To some extent the government appear caught between the proverbial rock and a hard place. Reliance on the Employment Appeals Tribunal has tended to meet condemnation from trade unionists on the basis of an allegedly over legalistic approach. The alternative—and what in the future will be the ascendant<sup>171</sup>—approach of reliance on rights commissioners, however, although more acceptable to trade unionists, seems deeply problematic in terms of securing adequate

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<sup>170</sup> Regulation 10(5) of the 2003 Regulations

<sup>171</sup> See in this regard now the most recent national social partnership agreement, Towards 2016 - Ten-Year Framework Social Partnership Agreement 2006-2015 (2006, Department of the Taoiseach, Dublin)

(available online at [http://www.taoiseach.gov.ie/attached\\_files/Pdf%20files/Towards2016PartnershipAgreement.pdf](http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Towards2016PartnershipAgreement.pdf)) at parag. 15.11 thereof).

enforcement of the aims of the Directive, something which has attracted the criticism of representatives of IBEC interviewed by this writer.

Under Article 9 of the Directive, Member States are required to introduce into their national legal systems such measures as are necessary to enable all employees and representatives of employees who consider themselves wronged by failure to comply with the obligations arising from the Directive to pursue their claims by judicial process after possible recourse to other competent authorities. Regulation 10(1) of the 2003 Regulations accordingly provides that a complaint that an employer has contravened any of the 2003 Regulations 172 in relation to an employee may be presented to a rights commissioner either by the employee, or by a trade union, staff association or excepted body on behalf and with the consent of the employee. A decision of a rights commissioner under paragraph (4) must do one or more of the following: declare that the complaint is well founded or not; require the employer to comply with the Regulations and, for that purpose, to take a specified course of action; or require the employee to pay such compensation as the Rights Commissioner thinks just and equitable in the circumstances.<sup>173</sup> A party concerned may appeal (normally only within a six week period 174) to the EAT (attendance before which can be compelled 175) from a decision of a rights commissioner under Regulation 10.<sup>176</sup>

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<sup>172</sup> With the exceptions of other than Regulations 4(4)(a) and 13.

<sup>173</sup> In the case of a contravention of Regulation 8, this may not exceed 4 weeks remuneration and, in the case of a contravention of any other Regulation, it may not exceed 2 years remuneration. See generally regarding all the foregoing Regulation 10(5) and (6).

<sup>174</sup> Regulation 11(2).

<sup>175</sup> Regulation 13(3). This is in contrast to the position regarding rights commissioners.

<sup>176</sup> Regulation 11(1) of the 2003 Regulations. The Tribunal may affirm, vary or set aside the decision of the rights commissioner. Under Regulation 12(1), a question of law may be referred to the High Court by the Minister for Enterprise, Trade and Employment from the EAT proceedings. Note that

The trade union view of rights commissioners is much more approving than their view of the Employment Appeals Tribunal, and the fact that unlike the EAT, Rights Commissioners will act as mediators, facilitating the settlement of cases (for instance by the payment of sums by way of compensation) appears to meet with their approval. An ICTU interviewee argued the need for institutions for the vindication of employment rights generally to be more “user-friendly, more concerned with people than with process”.<sup>177</sup>

The trade union view was that “the EAT is a very cold place for employees to vindicate their rights” by its very nature and because its rules of procedure, involving formal procedures such as the taking of evidence on oath, the possibility of cross-examination by a senior counsel of a worker (who may be a migrant worker with a poor grasp of English and who—in particular if he or she does not come from unionised employment—may be unrepresented) make it so. It was argued that Tribunal has evolved in effect into a court, something it was not meant to be from the outset (as one can see from its lack of power to award costs), and that the fact that its chairpersons were solicitors and barristers had helped to make this the case. This combined with what trade unions see as the relatively low amount of compensation available to each worker even if they succeed with a claim is viewed by the trade unions as a strong

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the Circuit Court can be involved at enforcement level, too.

<sup>177</sup> This corresponds with the Rights Commissioners own view of themselves. According to the Labour Relations Commission Annual Report 2004 (P.R.N. A5/0741, June, 2005) at p. 26 and 28 thereof

“the nature of referrals has gradually changed the role of the Rights Commissioner from a function solely within the industrial disputes arena to a combination of that role with that of a quasi-judicial role in respect of employment rights. Rights Commissioners now deal with pay, holidays, working conditions, contracts and pensions in an enhanced role beyond that as originally envisaged in the establishing legislation. As part of their role in deciding on claims and complaints, the Rights Commissioners also have, by statute, the authority to mediate in matters before them.”



disincentive to bringing a claim,<sup>178</sup> as is the fact that even if they succeed they will have to pay a large proportion of what they have been awarded to an advocate, if they have chosen to be represented. Unsurprisingly, a Report of the ICTU's Employment Rights Group has recommended compulsory first instance recourse to Rights Commissioners.

If there is a positive side to the use of Rights Commissioners, however, there is also a negative one. Hearings before Rights Commissioners are held in private, and there is a serious lack of transparency regarding the grounds on which Rights Commissioners reach their decisions. Adequate records of these grounds are not being kept or at least are not being made available in the public register of decisions, making it impossible to tell why remedies were awarded or refused or why the remedy awarded in one case is greater than the remedy awarded in the next.<sup>179</sup> A thorough perusal of such records as are contained in the Register did not make it clear that a proper understanding of the regulations is held by all Rights Commissioners. No case-law whatsoever of any sort, either Irish or European has ever been cited in any decision since records began with the coming into force of the 2000 Regulations and there is no evidence from these records that Rights Commissioners are even aware of such case-law. Furthermore, Rights Commissioners are appointed on the nomination of the social partners—with, somewhat remarkably, no legal knowledge or qualification being required of them in order for appointment as a Rights Commissioner, even though, according to the Labour Relations Commission Annual Report 2004 180 upwards of 75% of what they now have to do—including their application of the 2003 Regulations—involves the application of legal rights and obligations. As the quotation from the Annual Report of the Labour Relations Commission in the text above

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<sup>178</sup> It was pointed out that the legal maximum of two years earnings is rarely awarded.

<sup>179</sup> It should be noted that permission to photocopy any of the contents of the register of decisions which is required under the Regulations is invariably refused (and was refused even to this writer, although permission was granted to visually inspect the public register itself).

<sup>180</sup> Labour Relations Commission Annual Report 2004 (P.R.N. A5/0741, June, 2005) at p. 26 and 28 thereof.

makes clear, notwithstanding the fact that the role of Rights Commissioners is coming to be increasingly dominated by the need to apply legislation, their role originated as an industrial relations one and it appeared to this writer that these origins continue to colour their approach to the application of the law, and not always in a positive manner. Anecdotal evidence provided in interviews to this writer suggests that the goal of the successful mediation of a settlement between the parties is at least on occasion given primary importance, over and above the correct application of the terms of the Regulations. However, it should be emphasised that in the absence of anything approaching an adequate level of transparency, it is difficult to form any certain conclusions. Although it should be stressed that the Irish Congress of Trade Unions is happy with the service provided by Rights Commissioners, most particularly on the basis of the relative lack of formality of its procedures, the lack of transparency associated with the process makes it impossible to verify that the remedy provided by the Rights Commissioners service provides an effective vindication of the rights granted under the Directive.

IBEC's view as expressed to this writer in interview is that some kind of authoritative forum interpreting the legislation is needed. It is felt that the whole transfer of undertakings area is sufficiently complex that cases involving these issues should not be brought before Rights Commissioners, but rather that the first instance should be the Employment Appeals Tribunal and then appeals be brought to the Circuit Court where a solid body of guiding case-law could build up in contrast with what IBEC feels are the inconsistent decisions of the EAT.<sup>181</sup> Familiarity with European case-law (e.g., whether it was settled or not) on the part of the adjudicating body is felt to be necessary on the part of IBEC and this is one of the reasons they are generally dissatisfied with the extent of the jurisdiction which has been given to Rights Commissioners not just under the 2003 Regulations but under other employment legislation. IBEC's view is that if legislation is invoked then problems should be dealt with systematically in terms of what the legislation provides, and claims established by reference to the legislation. The

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<sup>181</sup> Although even here, the general lack of reporting of Circuit Court decisions at present is also felt to be problematic, making it difficult to find out what has happened in an individual case unless one has contact with one of the parties.

approach of rights commissioners by contrast is felt to be primarily an industrial relations problem-fixing approach rather than a more appropriate legal one which would be primarily concerned with the accurate determination of entitlements under the Regulations. Furthermore, there is felt to be a lack of consistency as between the approaches of different Rights Commissioners. Ideally, IBEC would feel that rights-based issues should be taken out of the hands of Rights Commissioners entirely and dealt with by the EAT, with interest-based issues dealt with by the Labour Court.

#### F. THE USE OF A FORM OF SOCIAL DIALOGUE IN THE IMPLEMENTATION OF EMPLOYMENT-RELATED DIRECTIVES IN IRELAND.

In the context of a paper discussing the use of the social dialogue in the social policy field, it is of interest to note that a domestic process of social dialogue has existed for some years in Ireland, and that, at least in the context of the implementation of the Acquired Rights Directive, this process has been intimately linked with the transposition of social policy directives. Thus it is of interest to note that it was in Sustaining Progress, the national social partnership agreement negotiated and entered into in 2003 between the government, and the social partners and covering the years 2003-2005,<sup>182</sup> that the Government committed itself to transposing the mandatory provisions of Directive 2001/23/EC by means of Regulations, by March 2003. In a further extension of the dialogue process, the Government explicitly undertook to consult the social partners on those provisions of the consolidated Directive which member states had an option either to implement or not (e.g. the pension interests of transferred employees) and undertook that it would then consider what required to be implemented by way of primary legislation.<sup>183</sup> According to

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<sup>182</sup> Sustaining Progress - Social Partnership Agreement 2003-2005 (2003, Government Publications Office, Dublin)

<sup>183</sup> Sustaining Progress - Social Partnership Agreement 2003-2005 (2003, Government Publications Office, Dublin), paragraph 10.8, p. 79. It is understood that according to legal advice provided by the Attorney General (based, it may be surmised, on the rulings

Department of Enterprise, Trade and Employment interviewees, it is in any case standard practice under national social partnership agreements, that the Irish Congress of Trade Unions (ICTU), the Irish Business and Employers Confederation (IBEC) and any government department which might have an interest<sup>184</sup> are consulted in relation to proposals, a process which is seen as carrying with it the advantage of avoiding political difficulties in the Oireachtas.

As regards the form of the consultation process in relation to employment legislation such as the 2003 Regulations, the first point which can be made is that the length of time given to it will vary according to the context or difficulties involved. There were meetings in the Department of Enterprise, Trade and Employment with IBEC and ICTU prior to the adoption of the 2003 Regulations. An IBEC interviewee noted that IBEC makes both written and oral submissions and of lobbying the Department of Enterprise, Trade and Employment in relation to important new legislation. As regards ICTU, draft regulations were sent for comment and ICTU were given a number of weeks to send their comments in, having shown it to its constituent members. Comments were duly sent to the Department. Individual trade unions were not consulted by the government, which channels its consultations via ICTU, but ICTU consulted them before sending in its own views.

According to information provided by the Department of Enterprise, Trade and Employment, subsequent consultations have been engaged in regarding the provisions of the Directive which it is optional for each member state to implement, although it would seem that this particular process—undertaken in fulfillment of the Government's explicit undertaking in the Sustaining Progress agreement to consult the social

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of the Supreme Court in *Meagher v Minister for Agriculture and Food and others* [1994] I.R. 329 and *Maher, Brett and Ryan v. Minister for Agriculture* [2001] ILRM 481) the optional provisions of the Directive must be implemented by primary legislation by virtue of the requirements of Article 15.2.1° of the Irish Constitution.

<sup>184</sup> Thus the Department of Social and Family Affairs and the Department of Finance were consulted in relation to the 2003 Regulations before they were adopted.

partners regarding the optional provisions of the Directive<sup>185</sup> —was of a fairly rudimentary nature. At the end of 2003, letters were sent by the Department of Enterprise, Trade and Employment to ICTU and IBEC who replied to these, although, according to Department of Enterprise, Trade and Employment interviewees, there were optional provisions of the Directive in respect of which no comments were received by the Department.<sup>186</sup> It would appear that no ongoing consultations concerning the Regulations have been engaged with either IBEC or ICTU apart from this.<sup>187</sup>

The results of this ‘social dialogue’ approach to implementation seem somewhat mixed. On the one hand, implementation of the Directive has been politically uncontroversial and has taken place in a context of consensus, and some of the credit for this must be attributed to the social dialogue processes which have led to its implementation, both in the the national social partnership agreement and subsequently . On the other hand, the fact that the Department appears to require consensus before it will propose or adopt implementing legislation may be seen as an Achilles’ heel to the process. Hence, for example, the government’s approach of transposing by primary legislation only such optional provisions of the Directive as can be agreed upon as desirable by the social partners has given an effective veto to the IBEC, the national employers’ organisation over the implementation of all optional provisions of the Directive, with no incentive to negotiate. The result is that to date,

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<sup>185</sup> Sustaining Progress - Social Partnership Agreement 2003-2005 (2003, Government Publications Office, Dublin), paragraph 10.8, p. 79.

<sup>186</sup> Among the issues which the social partners did comment upon were the issues of pensions, and the option under Article 3(1) of the Directive of providing for joint and several liability on the part of transferor and transferee, as well as the option under Article 3(2) of the Directive of compelling the transferor to notify the transferee of the rights and obligations to be transferred.

<sup>187</sup> ICTU organised a seminar for its own members on the Regulations on 27 May 2003 at the Gresham Hotel Dublin when the Regulations were published at which academic speakers and a speaker from the Department spoke. This allowed what was felt by the Department to be a useful exchange of views between the Department and ICTU.

only one of the several such optional provisions has been implemented.<sup>188</sup> Similarly, although explicit reference was made to the topic of pension interests of transferred employees in the Government's undertaking in the Sustaining Progress agreement to consult the social partners on the optional provisions of the 2001 Directive,<sup>189</sup> the ICTU's expressions to the Department of Enterprise, Trade and Employment of its deep dissatisfaction with the present legal position regarding pension rights in transfer situations have had little effect up to the time of writing.<sup>190</sup>

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<sup>188</sup> In accordance with Article 3(2) of the 2001 Directive, s. 21\_ of the Employees (Provision of Information and Consultation) Act, 2006, now imposes on the transferor of an obligation to notify the transferee of all rights and obligations which will be transferred to the transferee, so far as those rights and obligations are or ought to have been known to the transferor at the time of transfer. In contrast, no reliance has been put on the options provided e.g., by Article 4(1) of the Directive, Article 3(1), Article 3(4)(a), Article 5(1) and (3) or Article 7(5).

<sup>189</sup> Sustaining Progress -Social Partnership Agreement 2003-2005, op. cit., n. 186, paragraph 10.8, p. 79.

<sup>190</sup> On the other hand, it must be acknowledged there is a broader debate on pensions going on in Ireland at the moment, including over the issue of whether pension provision should be made compulsory and there seems to be a reluctance on the part of the Department to deal with the legal position on pensions in the particular context of transfer situations before the pensions issue generally is addressed, or to go further than is envisaged in the 2005 Proposal for a Directive of the European Parliament and of the Council on Improving the Portability of Supplementary Pension Rights. (COM(2005) 507 final, Brussels, 20.10.2005). Fears were also expressed that compelling transferees to assume responsibility for (expensive) defined benefit pension schemes and for possibly insolvent pension schemes would be likely to deter transfers altogether, and in this way work against the ultimate interests of employees in preserving their employment with the undertaking being transferred.